THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE
SITTING AS THE LAW COURT

DOCKET No. SAG-24-362

STATE OF MAINE
Appellee
v.
KENNETH M. CHASE Jr.
Appellant

BRIEF FOR APPELLEE, State of Maine

Natasha Irving, Esq.
ME Bar 5490

Valerie A. Adams, Esq.
ME Bar no. 5479
Attorney for the State
Sagadahoc District Attorney's Office
752 High Street
Bath, ME 04530
Adams@CumberlandCounty.org

Table of Contents

Table of Authorities

Cases

Statutes

Other

Introduction

(I) The defendant waived his assertion on appeal that a specific unanimity instruction was required. This Court is not in a position to second guess trial strategy, and the defendant "openly acquiesced" to the trial court's proposed jury instructions, which did not include a specific unanimity instruction.

(II) On the merits, the defendant's argument that a specific unanimity instruction was required fails under the obvious error standard. With regard to Counts 1 and 2, there was specific evidence of only one assault having occurred that would form the basis of a finding of guilt on (or about) the dates alleged. Although there was evidence about other assaults having occurred around the time of the date alleged in Count 3, there was specific testimony about one assault, which was corroborated by text messages on the precise date in the indictment, therefore the jury could have identified the event alleged in Count 3.

(III) The sentencing court properly considered the seriousness of the crime in determining to impose consecutive sentences on each count, and the court then properly considered other factors relevant to sentencing, such as the existence of the defendant's criminal history and the impact on the victim, in conducting the second step of its analysis.

STATEMENT OF FACTS

Procedural history

The defendant was indicted on three counts of Gross Sexual Assault, Class B, each under 17-A M.R.S. sec. 253(2)(H), three counts of Domestic Violence Assault, Class D, each under 17-A M.R.S. sec. 207-A(1)(A), and three counts of Endangering the Welfare of a Child, Class D, each under 17-A M.R.S. sec 554(1)(C). The date alleged in Count 1, Gross Sexual Assault, is December 31, 2021; that date of offense is the same in Count 4 and Count 7. The date alleged in Count 2, Gross Sexual Assault, is January 29, 2022; that date of offense is the same in Count 5 and Count 8. The date alleged of Count 3, Gross Sexual Assault, is May 24, 2022. After a jury trial, he was convicted of all counts. The net effect of the defendant's sentence on all counts was 27 years, all but 17 years suspended, with 3 years of probation. This appeal follows.

Trial

In June of 2022, the Sagadahoc County Sheriff's Office opened an investigation into the defendant after the mother of the victim, who is the defendant's daughter, reported to law enforcement that she believed her daughter had been sexually assaulted. (1Tr. 151). During the course of the investigation, the victim took part in a Child Advocacy Center (CAC) interview, during which she

disclosed a history of sexual assault. (1TR. 155). Further, significant evidence was uncovered during the course of the investigation, namely a recording that the victim had made of an assault (1TR. 156) and text messages between the victim and the defendant (1TR. 171). Though the victim's initial report did not reference specific dates on which the assaults occurred, the detective used the evidence to place the dates of offense on December 31, 2021 (1Tr. 159-160), January 29, 2022, and May 24, 2022 (1Tr. 171-173).

At trial, the victim, who was 18 at the time of trial, testified briefly about historic assaults, some specific – in the Hannaford parking lot when she was in second grade – and some generic – it happened more times than she could count. (1Tr. 68- 1Tr. 70). The victim then testified specifically that the last assault had occurred in the month of May, around the time of her father's birthday, which is May 29. (1Tr. 70).[1] She stated that it was at night and that everyone was asleep, and that her father had both texted and called her and she went down and they "had sex." (1Tr. 70). The victim was then shown text messages from May 24, 2022, May 28, 2022, and May 30, 2022, as well as a call log from her phone from May 2022, all of which were introduced into evidence. (1Tr. 71-80). She testified that on all three occasions, the purpose of his texts was to make her come downstairs to have

[1] Though the year was not explicitly stated, the victim had already established that she went to live with her mother on June 1 of 2022 (1Tr. 53). Text messages that were introduced as State's Exhibits 8, 9, 10, and 11 also showed the year 2022.

sex with him. (1Tr. 71-80). She testified that on each instance, it was "pretty much the same each time." (1Tr. 81). With regard to May 24 specifically, she also testified about where her sister was at the time, where her stepmother was, and where that assault occurred ("[o]n the couch, closest to the mudroom). (1Tr. 82; 1Tr. 86).

The victim also testified that an incident occurred around December or January. (1Tr. 88). On that instance, she testified, her father told her to take off her clothes, and then he "put his penis in [her] vagina." (1Tr. 90). The victim recorded this incident on her phone and that recording was admitted at trial as State's Exhibit 5 and 15 (a "cleaned up" or enhanced version). (1Tr. 104 and 240). Testimony by the detective established that a fire call for a fire that occurred on December 31, 2021, at 3:47 PM could be heard on the recording. (1Tr. 158-159) An audio expert who analyzed the recording's authenticity testified that the metadata of the original recording reflected a creation date of December 31, 2021. (1Tr. 203-204).

The victim testified to one additional specific assault that occurred following the December incident, an assault in his work truck while he was plowing. (1Tr. 94). She testified that he had tried putting a water bottle in her vagina and then they "had sex." (1Tr. 95-96). Though the victim did not testify about a specific date, there was corroborating evidence in the form of text messages, admitted as State's

Exhibit 7, which established that the victim had been asked to go plowing with the defendant on January 29, 2022, and she expressed that she would. (1Tr. 174-175).

Jury Instructions

The court proposed written jury instructions (see A63-A67), which were ultimately provided to the jurors, and neither party requested a specific unanimity instruction, though the defendant requested specific instruction as to defendant's 5th amendment rights. (3Tr. 74-75). The court then inquired of the defendant whether there were any issues on the instructions that were proposed, to which the defendant replied in the negative. (3Tr. 76). After providing oral instructions, the court inquired of the parties whether there was anything to address at sidebar, to which both parties replied in the negative. (3Tr. 104).

After sending out two notes, the first regarding the availability of a transcript (3Tr. 159-160) and the second regarding to hear the recording admitted as State's 5 and State's 15 (3Tr. 166), the jury reported a partial deadlock (3Tr. 169). There were no other notes, and ultimately the jury returned guilty verdicts on all counts. (3Tr. 179-181).

Sentencing

Because Counts 1, 4, and 7 arose from a single criminal episode, and likewise Counts 2, 5, and 8, and 3, 6, and 9, respectively, arose from two distinct criminal episodes, the sentencing court (Hjelm, A.R.J.) grouped the charges such that the sentences for each count in each episode would run concurrently to one another while the sentences for each group would run consecutively to every other group. (A26). Reasoning that "the imposition of concurrent sentences across the three gross sexual assault charges would not achieve the goals of sentencing [] because these offenses were so serious, so heinous," the court determined consecutive sentences pursuant to 17-A M.R.S. 1608(1)(D) to be appropriate. (A.27). The court then moved on to the statutory sentencing procedure, noting – relevant to this appeal – that in the second step of the process, the court would look at "factors that go beyond the circumstances of the crime itself to look at and take into account a subjective victim impact, for example, a criminal history." (A.29).

With regard to the first set of offenses, occurring December 31, 2021, the court looked, in its second step of analysis, at subjective victim impact and at the defendant's minimal criminal history ("[s]o there's some modest impact that that sentence has mostly because Mr. Chase is not in a position to say that he does not have a criminal history at all[]"). A34. Ultimately, the court determined that the maximum period of incarceration was eight years. (A36.)

Moving to the second set of offenses, occurring January 29, 2022, the court noted that the analysis of the maximum period of incarceration was quite similar to Count 1, but noted in the second step that there was one difference: the defendant had previously committed one offense against this victim, as found by the jury. (A38-A39). Likewise, in analyzing the third set of offenses, occurring May 24, 2022, the court noted that the one difference with respect to the maximum period of incarceration was that at this point, the defendant had committed two sexual assaults against the same victim, warranting an increase to ten years. (A40).

The overall sentence resulted in a period of 27 years to the Department of Corrections, all but 17 years suspended, with 3 years of probation. (A44).

STATEMENT OF THE ISSUES

I. Has the defendant waived any assertion regarding a specific unanimity jury instruction on appeal by declining to make a request for the instruction at trial?

II. Is a specific unanimity instruction required where it was not requested, specific dates of offense were alleged, and specific evidence was presented to support a finding of guilt on those specific dates?

III. Is it improper for a court to order that sentences run consecutive due to the seriousness of the multiple offenses at issue and then to also consider the existence of multiple offenses in determining the maximum sentence?

ARGUMENT

I. The defendant waived his assertion on appeal that a specific unanimity jury instruction was required.

The Defendant's failure to request a specific unanimity instruction precludes this Court from reaching this issue on the merits, given that he has waived his assertion on appeal that the instruction was required.

"If a defendant explicitly waives the delivery of an instruction or makes a strategic or tactical decision not to request it, we will decline to engage in appellate review, even for obvious error." *State v. Nobles*, 2018 ME 26, ¶ 34, 179 A.3d 910; see also *State v Lester*, 2025 ME 21, ¶ 14 n. 5. Where a defendant has "elected not to request a specific jury instruction regarding the requirement of unanimity for each convicted count," this Court "will not review an issue – even for obvious error – when a party has, as a trial strategy, openly acquiesced to the process employed." *State v. Foster*, 2016 ME 154, ¶¶ 9-10, 149 A.3d 542. Per Alexander's *Maine Jury Instruction Manual*, a specific unanimity instruction is to be given upon request "if the evidence offered in support of one charge includes more than one incident of the charged offense. Alexander, *Maine Jury Instruction Manual* § 6-65 cmt. at 6-145.

It is within the purview of the defense to waive jury instructions as a matter of trial strategy. *See e.g.*, *State v. Cleaves*, 2005 ME 67, ¶ 13, 874 A.2d 872; *State v.*

Ford, 2013 ME 96, ¶ 16-17, 82 A.3d 75. "Although the attorneys' specific reasoning is not part of the record, it is reasonable to assume that they may have eschewed defense theories that might strain credibility or otherwise conflict with defenses they deemed more likely to succeed." *State v. Ford*, 2013 ME 96, n. 3, 82 A.3d 75. "Obvious error review provides no invitation to change trial and instruction request strategy when the results of the original strategy turn out less favorably than hoped for." *State v. Cleaves*, 2005 ME at ¶13, 872 A.2d at 874.

In the instant case, the defendant did not request a specific unanimity instruction. Notably, however, the defendant *did* request another instruction and even proposed specific wording of the instruction. Likewise, when the defendant's objection to certain trial testimony was sustained, the defendant requested a limiting instruction and proposed the language, which was accepted by the Court, further demonstrating the defendant's awareness of the importance of instructions, both jury instructions and otherwise, and the defendant's awareness of the ability to request not on the instructions but the specific language of them. The jury instruction requested by the defendant was included, and the defendant assented to the remaining proposed jury instructions, not once, but twice.

Furthermore, defense strategy was not focused on whether the State could prove that the crime occurred on the dates in question but whether the victim was truthful. The bulk of the defense was focused on the audio recording and attacking

its authenticity. If the jury were to conclude that the audio recording had been fabricated, the natural next step would be to conclude that the victim had fabricated everything. Though some defense strategy encompassed specific dates, the purpose was to demonstrate that the victim was not being truthful. Declining to request a specific unanimity instruction is not inconsistent with this defense tactic. In fact, requesting such an instruction might, from defense perspective, have lent credibility to the victim by tacitly acknowledging that the allegations had occurred, but that the State could not meet its burden on other grounds.

This Court is not in a position to second-guess the strategy of the defense, particularly where the defendant was clearly attuned to the time and opportunity to make a request for jury instructions. Here, the Court need not reach this argument on the merits as the defendant has waived this assertion on appeal.

II. The court's jury instructions, as a whole, correctly and fairly informed the jury of the applicable law and the defendant was not prejudiced by any omission of a specific unanimity instruction.

Should the Court reach the issue of jury instructions on the merits, the appropriate standard of review is obvious error. *State v. Rosario*, 2022 ME 46, ¶ 29, 280 A.3d 199. An obvious error is an error that is plain, that affects substantial rights, and if such an error is found, then the court must assess whether "the error seriously affects the fairness and integrity or public reputation of judicial

proceedings." *State v. Pabon*, 2011 ME 100, ¶ 29, 28 A.3d 1147. The standard "calls for an evaluation of the error in the context of the entire trial record to determine whether the error was so seriously prejudicial that it is likely that an injustice has occurred." *Id*. at ¶ 19. "The burden is on the defendant to demonstrate obvious error to this Court." *State v. Lester*, 2025 ME 21, ¶ 15, citing *State v. Dolloff*, 2012 ME 130, ¶ 13, 58 A.3d 1032.

"[C]ases involving allegations of a continuing course of sexual assaults including multiple counts of sexual abuse will *sometimes* generate issues involving the defendant's right to a unanimous verdict on each specific finding of guilt—what we have termed "specific unanimity." *State v. Miller*, 2018 ME 112, ¶ 14, 191 A.3d 356, 359, fn 6 (emphasis added) (internal citations omitted).

The omission of a specific unanimity instruction was not error, let alone plain. Defense strategy in the instant case was highly focused on the veracity of the victim. The victim was subject to vigorous cross examination as to her audio editing capabilities, as to the layout of the home and whether there would have been sufficient privacy for an assault to have occurred, to her bedtime schedule (as it was suggested by the defense that the text messages sent by the defendant referred not to sexual activity but to her not abiding by her bedtime rules), and to the defendant's own schedule, which by defense theory would have left him too depleted to have assaulted her.

The defense did present an alibi as to the December and January dates; claiming on the December instance that he was not in the house, and on the January instance that he was actually with his fiancée and not the victim. However, the indictment alleged specific dates for those instances, and evidence at trial, as well as argument, only focused on those specific dates. There was no other evidence of other assaults having occurred around the dates alleged except for the brief statement of the victim at the start of her testimony that the defendant assaulted her "more times than [she] can count." As to the May dates, the victim did testify about multiple instances, but she also testified about an assault occurring on the specific date alleged in the indictment, and that testimony was supported by other evidence that corroborated that date of offense.

"Resolving the issue involves examining the totality of the trial evidence—not just the evidence on which the State or the defendant seemed most focused—in the context of the elements of the charge at issue." *Hodgdon v. State*, 2021 ME 22, 249 A.3d 132, 138, citing *State v. Reynolds*, 2018 ME 124, ¶ 15, 193 A.3d 168; *State v. Hanscom*, 2016 ME 184, ¶ 11, 152 A.3d 632; *State v. Fortune*, 2011 ME 125, ¶ 31, 34 A.3d 1115. Examining the totality of the evidence presented in the instant case, in the context of the charges, it becomes clear that omission of the specific unanimity instruction was not error at all, let alone an error affecting substantial rights.

A close reading of *State v. Russell* elucidates precisely why the specific unanimity instruction was not necessary in this case. Russell involved five counts, the first of which charged "on or between October 1, 2018 and October 31, 2018 … ALEXANDER RUSSELL [] did engage in a sexual act with a minor … who submitted as a result of compulsion." Because the victim testified about only one incident during that time period that involved compulsion, the court reasoned that no specific unanimity instruction was necessary as "the jury *could identify the discrete event alleged in Count 1*[]" (emphasis added). Likewise, as to Count 5, which charged a sexual assault occurring on a specific date, and where the testimony was as to a specific incident, the court reasoned that the instruction was unnecessary as "there was only one alleged instance of conduct for the jury to consider … the evidence did not generate the need for a specific unanimity instruction." *State v. Russell*, 2023 ME 64, ¶ 33, 303 A.3d 640, 650 (internal quotations omitted)

Here, as in *Russell*, there was testimony about numerous assaults, but there was evidence – both testimony and otherwise – supporting allegations on each specific date alleged. If the State had charged a date range rather than a specific date, specific unanimity may have been required. But as in *Russell*, Chase was alleged to have committed the offenses on specific dates, and the evidence allowed the jury to "identify a discrete event" giving rise to each conviction.

The defendant suggests that this Court should essentially reverse this case on principle to "send a message" that specific unanimity instructions should be given as a matter of course, citing to a case that addresses prosecutorial misconduct.[2] That is inconsistent with this Court's guidance. The Court has reviewed a number of cases involving specific unanimity, many of which involved generic testimony. See e.g., *State v Hanscom*, 2016 ME 184, 152 A.3d 632, *State v. Reynolds*, 2018 ME 124, 193 A.3d 168, *State v Villacci*, 2018 ME 80, ¶ 1 n. 1, 187 A.3d 640. In those cases, the need for a specific unanimity instruction *was* obvious, but in each case, this Court analyzed the totality of the trial evidence in the context of the charges, which is what this Court has stated is required and what this Court should do in this case. Here, a specific unanimity instruction was not required. Though the victim in the instant case gave generic testimony as to assaults that had occurred when she was younger, that testimony was brief, and the evidence supporting the charges that were presented by the State, the defense case, and the charging instrument, all focused on specific dates and not on assaults that may have occurred when the victim was younger, nor on regularly occurring "generic" assaults.

[2] The full quote that the defendant cited to is "*Hence, when a trial has been infected by prosecutorial error*, we are free to require a new trial based on our supervisory power regardless of the strength of the evidence against the defendant when necessary to preserve the integrity of the judicial system and to send a message that such conduct will not be tolerated." *State v. White*, 2022 ME 54, ¶35, 285 A.3d 262 (emphasis added).

III. The sentencing court properly considered the seriousness of the crime in determining to impose consecutive sentences on each count, and the court then properly considered other factors relevant to sentencing.

This Court "review[s] a sentencing court's imposition of consecutive sentences for an abuse of discretion … [.]" *State v. Treadway*, 2020 ME 127, ¶ 13, 240 A.3d 66, 70 (internal quotations and citations omitted). The determination of a maximum sentence is reviewed for abuse of discretion. *State v. Plummer*, 2020 ME 143, ¶ 11, 243 A.3d 1184.[3]

"Generally, a court must impose multiple sentences concurrently unless it finds a statutory basis for imposing the sentences consecutively." *Treadway*, 2020 ME 127 at ¶ 14. In this case, the sentencing court determined that consecutive sentences were warranted due to the seriousness of the conduct involved in the criminal episodes underlying the guilty verdicts. That analysis is proper and is squarely in line with the rationale set forth by statute. *See* 17-A M.R.S. 1608(1)(D). The State could have, at its discretion, charged three separate offenses on three separate charging instruments, given how removed in time they were from one another. And the court notably adhered to the statute in imposing concurrent

[3] The defendant suggests that the standard of review in this case should be *de novo*, which is the standard of review for double counting of the so-called *Hewey* factors codified at 17-A M.R.S. § 1602. The instant case does not involve double counting of those factors but raises the question of the propriety of imposing consecutive sentences and then subsequently considering a similar factor in determining the maximum sentence per 17-A M.R.S. § 1602.

sentences for each set of counts arising from the same date of offense. There was no abuse of discretion on the part of the trial court in reasoning that "the imposition of concurrent sentences across the three gross sexual assault charges would not achieve the goals of sentencing [] because these offenses were so serious, so heinous[.]" (A.27).

Further, the Court's determination of a maximum sentence in its *Hewey* analysis, codified at 17-A M.R.S. 1602(1), was proper. Though this Court has not yet reviewed the specific issue set forth by the defendant, similar issues have come before this Court, and from those cases, parallels illustrating the propriety of the trial court's analysis can be drawn.

It is proper for a court to consider a prior conviction as an aggravating factor in sentencing an individual on an offense that has already been statutorily enhanced on the basis of that prior conviction. *Treadway*, 2020 ME 127 at ¶ 22. A court may consider the same fact both in determining the basic sentence and in determining the maximum sentence. *Plummer*, 2020 ME 143 at ¶ 14.

In the instant case, the court properly considered the criminal history of the defendant in determining the maximum sentence on Counts 2 and 3. The court was not "double counting" the seriousness of the crimes, but was applying the framework laid out by statute, which specifically calls for the court to take into

account criminal history. Though the court had already considered the seriousness of the same multiple criminal episodes in identifying the statutory basis for imposing consecutive sentences, it was not improper for the court to also identify the existence of the prior episodes in increasing the maximum sentence for subsequent episodes. "[T]he same fact can generate multiple factors." *State v. Plummer*, 2020 ME 143 at ¶ 14. Furthermore, the wording of the court does not lead one to conclude that "seriousness" was as impactful as the existence of defendant's criminal history, or the Defendant's conduct's effect upon the victim, both of which are specifically listed as factors to be considered in the second step of the court's *Hewey* analysis.

CONCLUSION

For the foregoing reasons, this Court should deny the appeal and affirm the judgment.

Respectfully,

/s/ Valerie A. Adams
Valerie A. Adams, Bar no. 5479
Cumberland County DA's Office
On behalf of the Sagadahoc County DA's Office
752 High Street
Bath, ME 04530
207-443-8204
Adams@CumberlandCounty.org
Attorney for the Appellee-State

Certificate of Service

I have filed this brief, and served opposing counsel, as listed on the briefing schedule and the Board of Bar Overseer's (email) directory, in compliance with M.R. App. P. 1D(c), 1E and 7(c).

Respectfully,

/s/ Valerie A. Adams