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

LAW COURT DOCKET NO. Sag-24-362

STATE OF MAINE
Appellee

v.

KENNETH M. CHASE Jr.
Appellant

ON APPEAL from the Sagadahoc County
Unified Criminal Docket

REPLY BRIEF OF APPELLANT

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First Assignment of Error

I. Omission of a specific-unanimity instruction constitutes obvious error.

Defendant responds to the State's arguments, countering that (A) his attorney did not waive such an instruction, and (B) the omission was erroneous because it both impaired defendant's right to a unanimous verdict and permitted jurors to overlook weaknesses in the State's case.

A. There was no waiver, because counsel did not *knowingly* forgo an instruction.

The State has followed this Court's, respectfully, misguided case-law from recent years, contending that defense counsel opted not to request a specific-unanimity instruction because of "strategy" or as a trial "tactic." *E.g.*, Red Br. 4, 12-13. How could this Court or the State know that? How do we know that counsel wasn't simply "'derelict'" in missing the missing instruction – the long-held metric for determining whether an error is plain? *See State v. Dolloff*, 2012 ME 130, ¶ 36, 58 A.3d 1032, quoting *United States v. Frady*, 456 U.S. 152, 163 (1982).

The plain language of M.R. U. Crim. P. 52(b) – providing for obvious-error review of errors that "were not brought to the court's **attention**" – implies that waiver in Maine criminal cases can occur only *knowingly – i.e.*, with awareness or "attention."[1] Admittedly, in *some circumstances*, it might

[1] Defense counsel's two statements – "No" and "No, Your Honor," 3Tr. 76, 104 – when the court solicited further instructional requests suggest nothing more than dereliction. To hold otherwise would be to invite defense attorneys to couch their representations to trial courts, *e.g.*, "Your Honor, if

be patent that an attorney has eschewed an instruction or motion of which she was aware.[2] In others, like ours here, however, there is no such basis for suggesting that counsel acted knowingly.

Anyway, there could be no reasonable trial strategy for declining a specific-unanimity instruction. Without one, after all, no "factfinder, judge, or jury has found that the defendant committed that specific individual" crime. *Richardson v. United States*, 526 U.S. 813, 822 (1999). No defense lawyer could "strategically" allow that to happen to his client. Such an instruction requires jurors to scrutinize a complainant's testimony, serving as a bulwark against knee-jerk, emotional verdicts of the kind that juries are uniquely apt to return against accused child rapists. So, when the State contends that no instruction was needed because the defense strategy centered on "whether the victim was truthful," Red Br. 13, it is only half-correct. Yes, the defense was that G[redacted] was untruthful; however, a specific-unanimity instruction could only bolster such a defense, requiring the jury to probe for "sufficiently definite" allegations – a hallmark of credible

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there are any errors or omissions, I've simply missed them." This Court should not incentivize "trapping" lawyers into waiver.

[2] For example, the cases the State cites, *see* Red Br. 12, involve some form of a *knowing*, affirmative action on behalf of a defense lawyer. *State v. Nobles*, 2018 ME 26, ¶ 35, 179 A.3d 910 (whereas counsel requested competing-harms instruction for some counts, he "explicitly" declined to seek such an instruction for the count subject to appeal); *State v. Foster*, 2016 ME 154, ¶¶ 3, 8-10, 149 A.3d 542 (counsel voluntarily withdrew motion for bill of particulars, demonstrating "awareness of procedural mechanism" subject to appeal); *cf. State v. Woodard*, 2025 ME 32, ¶¶ 10-11, ___ A.3d ___ (counsel explicitly states it's his "strategy call" to forgo one varietal of defense-of-third-party instruction, which, this Court holds, simultaneously waives instruction as to another varietal).

testimony. *Cf. State v. Reynolds*, 2018 ME 124, ¶ 24, 193 A.3d 168. Without it, the jury was permitted to reach a patchwork verdict, cobbling incredible allegations with more credible ones.

Finally, the State's conception of waiver excuses the prosecutor and the court from their independent obligations to ensure proper instruction of the jury. *See Dolloff*, 2012 ME 130, ¶ 35, quoting *Frady*, *supra* (error is plain where "'the trial judge and the prosecutor'" missed it). "'It is the duty of the trial judge to charge the jury on all essential questions of law, whether requested or not.'" *Kelly v. South Carolina*, 534 U.S. 246, 256 (2002), quoting C. Wright, Federal Practice and Procedure § 485, p. 375 (3d ed. 2000)). It cannot be said that, in Maine, a criminal defendant's constitutional right to specific unanimity is other than an "essential question of law." If a defense lawyer is "derelict" in asking for such an instruction, everyone has a duty to bring that to the court's attention.

B. Omission was error affecting substantial rights or, in the alternative, warrants reversal pursuant to this Court's supervisory powers.

There are several factors indicating that a specific-unanimity instruction was necessary and its omission prejudicial.

First, G[redacted]'s testimony about the abuse defendant allegedly inflicted upon her when she was in grade school was both evocative and more detailed than the State's evidence about two of the gross-sexual-assault counts (Counts II & III). An allegation of sex with one's kindergartener daughter in the parking lot of the local Hannaford, possibly leaving blood in the young girl's underpants, is deplorable. Jurors could not easily poke such

an image from their mind's eyes, especially compared to the relatively nondescript, glancing allegation of "sex" on "the couch" more than a decade later.

Second, there was no limiting instruction at all about the too-many-to-count generic allegations of sex or the discrete allegations outside of Hannaford and at that house in Brunswick back in second grade. The jury was left free to utilize this evidence in any manner they saw fit.[3]

Third, though the State makes much of the fact that there was no defense based on "the dates in question," *see* Red Br. 13, 16, that is for an important reason that hurts, rather than helps, the State. Specifically, the court instructed the jury that, essentially, dates do not matter. (A58-A59). Again, this left the jury free to use any of the allegations as a basis for its verdicts.

Fourth, we know that the evidence against defendant was not overwhelming. The jury's initial deadlock suggests otherwise. Thus, the jury – at least initially – did not unanimously agree that defendant did everything G[redacted] claimed he did. *Compare Reynolds*, 2018 ME 124, ¶ 24 (multiplicity is less of a concern if the jury accepts everything a complainant

[3] The State contends that *State v. Russell*, 2023 ME 64, ¶¶ 28-33, 303 A.3d 640 supports is contention that no specific-unanimity instruction was generated. Red Br. 17. Defendant disagrees. In *Russell*, there was only one incident that satisfied the elements of the lead count (GSA-by-compulsion). 2023 ME 64, ¶ 28. In our case, any of the too-many-to-count allegations could have satisfied the elements of 17-A M.R.S. § 253(2)(H) (parent-child sex with an under-18).

alleges). This raises the risk of patchwork, and therefore unconstitutional, verdicts.

Fifth, this Court's case-law recognizes that the need for a specific-unanimity instruction hinges on "not just the evidence on which the State or the defendant seemed most focused," but, rather, on "the totality of the trial evidence." *Hodgdon v. State*, 2021 ME 22, ¶ 14 n. 5, 249 A.3d 132. Anyway, the kindergarten, second-grade, and too-many-to-count allegations were sufficiently concerning for defense counsel to address them in closing argument. (3Tr. 132-33).

Finally, this Court has supervisory authority to reverse a conviction separate and apart from any legal standard. *State v. White*, 2022 ME 54, ¶¶ 29-30, 34-37, 285 A.3d 262. What else will it take for trial courts to give – and attorneys to seek – a three-sentence, constitutionally necessary, instruction as a matter of course?

Second Assignment of Error

II. The court improperly double-counted the fact that defendant committed multiple offenses.

Defendant continues to contend that the appropriate standard of review for a claim of double-counting is de novo. *State v. Plummer*, 2020 ME 143, ¶ 11, 243 A.3d 1184. This is so, regardless of at which particular steps the double-counting occurred. *See Ibid.* ("By its nature, a double-counting claim relates to multiple steps of the sentencing analysis. More pertinently, the claim poses the question of whether the sentencing court misapplied a legal principle. We therefore review a double-counting claim de

novo."). The point is probably moot, however, as misapplication of a "legal principle" surely constitutes an abuse of discretion – the State's preferred standard of review. *See* Red Br. 19 n. 3; *State v. Hussein*, 2019 ME 74, ¶ 17, 208 A.3d 752 (court abuses discretion when it "misapplies" the law).

As for the merits, the court clearly counted multiple times the fact that defendant committed three offenses – once in deciding to impose consecutive sentences and twice more, once each at Step Two of the analysis for Counts II and III. The State does not appear to argue to the contrary.

Rather, it argues that doing so was permissible. The repeat-counting, the State's argument goes, was simply aggravation for "prior conviction[s]" or "criminal history." Red Br. 20-21. Criminal history, the State's argument continues, is "specifically listed" as a cognizable Step Two factor. Red Br. 21; *see* 17-A M.R.S. § 1602(1)(B) ("Relevant sentencing factors include ... the individual's criminal history...."). Respectfully, there are two problems with this reasoning.

First, the court separately – already, that is – counted defendant's criminal history:

> I also take into account Mr. Chase's criminal history. It is limited. It is remote, but it is a felony conviction from back in 2007. I did review the docket entries that were submitted here today. There were two probation violations. The basis for the violation is made clear from the docket records, but I'm happy to accept [defense counsel's] representation that the bases for the two violations were not criminal in nature. I don't – I steer away from referring to a violation as technical because that really minimizes it. But they are not – at least the violations are not – not criminal, and I am going forward on that premise.
>
> The second violation did result in 30 days of incarceration. First there was no further sanction, so there was some

> consequence for the violation. But again, there was a felony violation – felony conviction from 2007. That's a different kind of case. It was a property crime not a crime of violence. And again, it is – it is remote. So there's – 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.

(A33-A34; 2STr. 78-79). This passage demonstrates that the State's suggestion that all the court did was count defendant's "criminal history" is not borne out by the record. Rather, the court, in its own words, was aggravating defendant's sentence because "there's not a single, isolated incident." (A38; 2STr. 82). There's simply no way around that fact, which renders the State's argument unavailing.

Second and counterfactually, even assuming that the court wanted to count the fact that defendant committed multiple offenses as evidence of his "criminal history" or "prior convictions," to do so it would have to stretch the meaning of those terms beyond recognition. Defendant is not aware of any case in any jurisdiction – and the State has not identified one, either – that recognizes convictions obtained at the same trial and penalized at the same sentencing hearing to be "prior convictions." Rather "criminal history" refers, "'not to the chronology of conduct, but to the chronology of the sentencing.'" *United States v. De Jesus Mesa Lopez*, 349 F.3d 39, 41 (2d Cir. 2003), quoting *United States v. Espinal*, 981 F.2d 664, 668 (2d Cir. 1992). This mirrors similar Maine laws. *See* 17-A M.R.S. § 9-A(3) (for enhancement purposes, a prior conviction is determined by "the date the sentence is imposed").

In either case – factually or legally – the State's argument falls short. Not only is there no authority for such double-counting, 17-A M.R.S. § 1602(1)(B) ("all *other*") (emphasis added), seems to proscribe it. Regardless, it is a misapplication of principle to count the same thing multiple times, thereby inflating a defendant's sentence.

CONCLUSION

For the foregoing reasons, this Court should vacate defendant's conviction and remand for further proceedings not inconsistent with its mandate, or, in the alternative, remand for resentencing.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

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

/s/ Rory A. McNamara