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

LAW COURT DOCKET NO. Cum-24-530

STATE OF MAINE
Appellee

v.

DANIEL CARDONA
Appellant

ON APPEAL from the Cumberland County
Unified Criminal Docket

BRIEF OF APPELLANT

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INTRODUCTION

(I) Maine courts routinely deem a party to have "opened the door" to an opposing party's counterproof. Yet, respectfully, this Court has given precious little guidance about that concept, leaving trial courts to variously interpret this nuanced and often difficult doctrine. This case presents an example and an opportunity for the Court to clarify what it means to open the door, providing necessary predictability and fairness.

The lower court determined that defendant opened the door to evidence that, before the sexual contact for which he was on trial, defendant gave the twelve-year-old complaining witness and her friend a sex-toy, urging them to use it on one another. Needless to say, evidence of such a "prior bad act" carried with it considerable a considerable risk that jurors would draw the forbidden propensity inference. Yet, the court's conclusion that the door had been opened was based on evidence that defendant had a foster child in his home – evidence to which the State had acceded when it was offered. The State's sex-toy rejoinder, clearly, was incongruent and disproportionate to the supposed door-opening evidence and was antithetical to fair trial.

(II) The court erroneously excluded evidence that the complaining witness and her family had a motive to frame defendant: Defendant not only falsely accused the complaining witness and her cousin of sexual contact, he *threatened to kill* the cousin if he ever touched the complainant again. The court excluded this evidence, concluding that it was irrelevant hearsay.

Neither conclusion is correct, and, as above, the remedy is reversal for a new trial.

STATEMENT OF THE CASE

After a jury trial, defendant was convicted of unlawful sexual contact, 17-A M.R.S. § 255-A(1)(F) (2019)[1] (Class B). Thereafter, the Cumberland County Unified Criminal Docket (Cashman, J.) imposed an eight-year carceral sentence, suspending all but five years of that term for the duration of four years' probation. This direct appeal follows.

I. The allegation against defendant

As he does not press an argument that the State's evidence was legally insufficient, defendant discusses the State's case in a "balanced" and "objective" manner. *See United States v. Rodriguez*, 115 F.4th 24, 33 n. 1 (1st Cir. 2024) (internal quotation marks omitted) (such is appropriate when no sufficiency-of-the-evidence argument is raised). In doing so, he omits details that are extraneous to the appeal.

The complaining witness, "E,"[2] is [redacted]. 1Tr. 56. At the time of the sexual contact, E was 12.[3] 1Tr. 74. Back in 2020, E spent a good deal of time at defendant's and his wife's [redacted] home in

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[1] Section 255-A has been amended three times since the criminal conduct in this case, which is alleged to have occurred in October 2020. None of those amendments, however, have altered subsection 1, paragraph F. *See* 1Tr. 74.

[2] As defendant cares about [redacted], he has instructed counsel to shield their identities as much as possible. The undersigned has endeavored to do so [redacted], and no disrespect is intended by the pseudonyms or other descriptors used in the briefing.

Unless otherwise noted, defendant omits brackets and uses those pseudonyms and descriptors rather than the witnesses' names.

[3] She was 15 at the time of trial. 1Tr. 54.

Portland, visiting almost every weekend, where she would connect with [redacted]. 1Tr. 56-57.

In retrospect, E testified, defendant gave her preferential treatment, cooking for her but not [redacted] and giving her small gifts. 1Tr. 84-85; 3Tr. 153. For example, he once gifted her a pair of purple Crocs. 1Tr. 85-86. Sometimes, defendant made E feel "kinda" uncomfortable by telling her that he loved her. 1Tr. 82. He also had a habit of comparing E's body to "petite" females he saw around town. 1Tr. 82-83. Another witness testified that defendant compared E to "women with big breasts and butts." 3Tr. 154-55.

One weekend morning in October 2020, E was in the basement at [redacted] 1Tr. 74-75. In a video-exhibit, E told a questioner that, when she was alone in bed, she was awoken by defendant touching her. SX1 ca. 15:45. She could tell it was defendant because of his distinct, heavy breathing. 1Tr. 75-76. Defendant touched her genitals, inserting his finger inside her. 1Tr. 78; SX1 ca. 17:45, 18:45. Despite E's resistance, defendant kept touching her for approximately five to ten minutes. 1Tr. 79; SX1 ca. 16:15.

E did not immediately disclose this incident because she was nervous. 1Tr. 80. Rather, E told her mom what happened about a year later, on October 19, 2021. 1Tr. 57-58. To contextualize the delay, the State called a social worker who gave the neatly circular testimony that children disclose sexual abuse "when they're ready." 1Tr. 185-87, 189.

E explained what led to the disclosure: Defendant had alleged that E's male cousin ("the cousin") participated in some nature of sexual contact with E. SX1 ca. 33:45. Though E denied that ever happened, she reported that defendant "believes that he saw" E and the cousin do so. SX1 ca. 34:15. In either case, the allegations caused sufficient concern for [redacted], including E's [redacted], to inquire whether anyone had ever done something inappropriate to E, causing her to disclose. SX1 ca. 23:45, 33:30. E, her mother, [redacted] and [redacted] promptly went to the police station to make a complaint. 1Tr. 60-61.

Getting wind of this, E's mother spoke with defendant by phone. 2Tr. 162; 3Tr. 48. A recording of their discussion was introduced by the defense. DX19; 3Tr. 31. From the rambling conversation, the jury learned:

- Defendant's wife calls him "the worst creature on goddamn earth," and the wife thinks defendant is a "fucking predator," and she has accused him of the "most rottenest things," DX19 ca. 4:15;
- Defendant's wife sometimes thinks that he stares through the window at E, DX19 ca. 4:45;
- E has spoken with defendant about her romantic interests. DX19 ca. 20:00.

Rounding out the elements of the charged-offense, E testified that she believes defendant was in his fifties at the time of the sexual contact. 1Tr. 74-75. They were not married to one another. 1Tr. 74.

II. The defense

The defense was premised on the notion that E falsely accused defendant. In particular, as counsel argued in closing, [redacted] were attempting to "turn the tables" and blame defendant for various ulterior reasons. *E.g.*, 4Tr. 42. As the State aptly recapitulated the defense,

> The defendant essentially argues to you that this didn't happen, that E is lying, it wasn't [defendant]; that E's mom, [redacted], and E herself, in a sense, in defendant's words, turned the tables. It's a conspiracy fueled by some type of grudge related to [redacted]'s history with the defendant, a history which is eerily similar to E's, and the rumor that the defendant spread about E's and the cousin's relationship.

4Tr. 70. These two prongs – [redacted]'s ax to grind and the rumor about E and her cousin – were centerpieces of the defense.

Thus, defense counsel elicited testimony from [redacted], that on multiple occasions back in 2003 or 2004,[4] she had been awakened by defendant touching her vagina and buttocks. 3Tr. 95-96. Indeed, E repeated [redacted]'s allegation to a forensic questioner. SX1 ca. 22:15. [redacted] also testified that,

[4] [redacted] was in her 20s at the time. 3Tr. 95. Defense counsel stated on the record that his decision to introduce evidence about these incidents was strategic. 3Tr. 123-24

decades ago, defendant had audio-recorded her [redacted], catching her in an act of infidelity. 3Tr. 110, 120. She contended that defendant "blackmail[ed]" her with the recording. 3Tr. 110-11. Though she denied it, defense counsel suggested that this history caused [redacted] to hold a grudge against defendant. 3Tr. 120. In closing, the prosecutor noted that [redacted]'s allegation was "eerily similar" to E's. 4Tr. 70.

Defense counsel also sought to shed more light on the proximate cause of E's disclosure and the motives that series of events may have engendered. For instance, E's mom's angry phone call with defendant the night before E disclosed the abuse: What precipitated that, exactly? Counsel sought to trace its impetus back to three conversations defendant had had with E's male cousin back in the summer of 2020, shortly after the cousin had graduated from high school. 2Tr. 131, 149-50. But, when the cousin began to testify about what he had told defendant during those exchanges, the State objected on relevance and hearsay grounds. 2Tr. 131-32, 150. At sidebar, counsel explained that he was trying to develop [redacted]'s motive to fabricate an allegation: "[T]his man, this young man, has a bias against [defendant] and … he – his mother [redacted]] particularly, and E's mother, and – and hence E all worked this together and have come up with this case." 2Tr. 136.

The court permitted counsel to voir dire the cousin. 2Tr. 139. He acknowledged that, during their conversation, defendant had warned him, "[Y]ou put your hands on E, I will put my hands on you." 2Tr. 141-42. After counsel refreshed the cousin's memory with a protection-from-abuse complaint he had sought to prevent defendant from contacting him, the

cousin acknowledged that, in response, he promised, "I would leave E alone." 2Tr. 142. Sometime after that, the cousin understood, defendant had said something to E's brother about watching "the life drain out of [the cousin's] body" – a threat that caused the cousin to seek a protection order. 2Tr. 144-48. This was the series of events that prompted E to report that defendant had touched her. 2Tr. 145-48. The court excluded the cousin's testimony as irrelevant hearsay. 2Tr. 152.

III. The sex-toy

On the morning of the first day of trial, and over defendant's objection, the State suddenly added to its witness list a friend[5] of E. 1Tr. 5-11. The State sought to elicit from the friend that, on one occasion, defendant gave E and the friend a sex-toy, arguing that such was relevant to his intent – his "sexual attraction to E." 1Tr. 12-13. The court, in its discretion, granted defendant's motion to exclude testimony about the sex-toy incident on M.R. Evid. 403 grounds – "unfair surprise." 1Tr. 14-20. The court, however, noted that it could revisit that ruling if defendant's interest in E's "chastity" was "generated in a very discrete way" and "by nonhearsay evidence." 1Tr. 19.

The issue resurfaced on the morning of the third day of trial. The State argued:

5 [redacted]

> The door was opened when defense counsel improperly elicited testimony about a Department of Health and Human Services Child Protective Services case that was ongoing in his house. That testimony suggested that the Department had given this home an imprimatur of safety and is, ergo, vouching for that home improperly.
>
> So none of that testimony should have come in. The fact that it did come in now opens the door, I think, for the State to come in and say, hey, this wasn't as safe a home as you're misleading the jury to believe that it was and that there is, in fact, evidence that this was a dangerous place, because he has now cloaked the home in this vouching from the Department of Human Services [sic]. And we now have a right to come in and rebut that.

3Tr. 4. The State also contended that defendant had opened the door by producing evidence about "how safe [defendant's] home was and how everybody enjoyed being there;" eliciting "improper evidence of defendant's lack of criminal record;" and "frankly, some of the other improper statements that were raised in the opening." 3Tr. 5.

The court bit, agreeing that "much of what was described by the State – I agree that that all happened and that it – it has suggested that a circumstance which the State now has to be given the opportunity to rebut." A49; 3Tr. 8.

Thus, the State was permitted to elicit:

- Once, "a while after" the sexual contact, when defendant gave E and her friend a car-ride, "he put a vibrator on one of the back seats and

offered [E and the friend] to use it." 3Tr. 68. This made E feel "[v]ery uncomfortable." 3Tr. 69.

- The friend corroborated this account, testifying that one night they were in a van when defendant handed them a vibrator and told the friend she "would have been better off" with E than with her boyfriend. 3Tr. 153-54.

And, in closing, the State marshaled this evidence to argue that defendant had "sexual fantasies" about E and to corroborate E's testimony, generally (*i.e.*, "She'd never spoken to [the friend] about it since it occurred."). 4Tr. 27.

ISSUES PRESENTED FOR REVIEW

I. Did the court commit reversible error by concluding that defendant "opened the door" to evidence that defendant gave the complaining witness and her friend a vibrator and urged them to use it?

II. Did the court commit reversible error by excluding evidence that, just before the complainant accused defendant of abuse, defendant had threatened to physically assault and kill her cousin if he touched the complainant?

ARGUMENT

First Assignment of Error

I. The court committed reversible error by concluding that defendant "opened the door" to evidence that defendant gave the complaining witness and her friend a vibrator and urged them to use it.

A. Summary of the argument

The notion that defendant opened the door to evidence is not a reasonable one. As defendant will demonstrate, the supposed door-opening evidence is no more than evidence, to which the State acceded, that defendant had a foster child living in his residence at the time the complaining witness leveled her allegation against him. On this basis, the court permitted the State to develop evidence that defendant once gave the complaining witness and her friend a vibrator and suggested they use it. The two are not proportionate, not even close. The State did not need to introduce the sex-toy evidence to forestall any prejudice to it. And because, in this battle of two witnesses' credibility, it is not highly probable that the court's ruling played no role in the outcome, vacatur is necessary.

B. Preservation and standard of review

This issue is preserved by the parties' colloquy, discussed above and excerpted at pages A24 through A52 of the Appendix. *See* M.R. U. Crim. P. 51. Previously, this Court has reviewed a court's ruling that a party has "opened the door" for an abuse of discretion. *State v. Corrieri*, 654 A.2d 419, 421 (Me. 1995). Defendant, however, contends that there are significant legal principles at play – outlined below. *See*, *e.g.*, *State v. Robertson*, 205

A.3d 995, 1000 (Md. 2019) (reviewing de novo because application of open-the-door doctrine is a question of law). Therefore, this Court should review the court's identification and interpretation of the applicable legal principles de novo, and it should then accord reasonable discretion to the court's application of the facts to those principles. *Cf. United States Bank Trust, N.A. v. Jones*, 925 F.3d 534, 536-37 (1st Cir. 2019).

C. Analysis

There are several factors in determining whether a party has opened the door to another party's evidence. Defendant begins his analysis by (1) discerning the testimony that allegedly permitted the State's rejoinder about the sex-toy. Only once that initial, "door opening" evidence has been identified can the other factors of the open-the-door doctrine be evaluated. They include, (2) whether that new evidence is necessary to remove prejudice and preserve fairness; and, if the other conditions are satisfied, (3) whether the counterproof "fits" the door-opening proof. Here, the State's sex-toy evidence fails at each step.

1. If the door was opened at all, at most, it was barely cracked open and because the State asked for it to be opened.

According to the State, the defense opened the door by offering evidence of "how safe [defendant's] home was and how everybody enjoyed being there." 3Tr. 5. Ironically, it was *the State* that first broached this subject, relating in its opening statement:

> The evidence will show that E loved spending time with [redacted], especially at [defendant's] house. She and [redacted]

> [redacted] would congregate at the residence of the defendant and his wife, [redacted]. Even though it was nearby, she loved to stay there with her family and it was a very common thing for her and [redacted] to do.

1Tr. 42. True to its promise, right off the bat, the State elicited how E liked to spend time at defendant's home with [redacted]. 1Tr. 56-57. Even following the incident, the State elicited, E enjoyed spending time with [redacted] at the house. 1Tr. 81. Thus, this justification is a nonstarter, as "one cannot open the door for one's own evidence." Wright & Miller, 21 Fed. Prac. & Proc. Evid. § 5039.1 (2d ed., April 2025 update).

The next proffered basis for opening the door – the State's contention that defendant offered "improper evidence of defendant's lack of criminal record," 3Tr. 5 – fares no better. While, it is true, defense counsel did float the *possibility* of eliciting such evidence, when the State quickly objected, warning counsel that doing so would open the door to the sex-toy testimony, counsel promptly withdrew the question. 2Tr. 81-84 (Counsel: "I'll – I'll – I'll withdraw the question."). Counsel thought about opening the door, saw what was waiting on the other side, and thought better of it.

Next, the State asserted that defendant opened the door by virtue of, "frankly, some of the other improper statements that were raised in the opening." 3Tr. 5. Defendant is not sure to what the State was referring. Regardless, because counsel's arguments are not evidence, opening statements do not "open the door." *State v. Donovan*, 1997 ME 181, ¶ 8, 698 A.2d 1045; *see also* 1Tr. 37 (Trial court: "Now what the attorneys say in their

openings or at any other time during the trial is not evidence for you to consider."); 4Tr 21 (Trial court: "I would remind you, however, that arguments are not evidence."); 4Tr. 78 (Trial court: "The attorneys' opening statement and the closing arguments are not evidence.... The statements and arguments are not evidence from which you can find facts."); 4Tr. 69 (Prosecutor: "[T]he arguments of the parties is not evidence."). Again, the State takes nothing from this thread.

The centerpiece of the State's argument that defendant opened the door was its claim that defendant did so by offering evidence that DHHS had placed a foster child in his home – vouching, according to the State. 3Tr. 4. Presumably, the State is here referring to testimony, elicited by defense counsel without objection, that DHHS had placed a foster child in the home. 2Tr. 160.[6] This is the slim reed upon which the State's door-opening contention rests.

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[6] The door-opening testimony, according to the State and court, is this, which came from E's mom:

Q E may have stayed over there as often as once a week for every week of the year?

A I wouldn't say every week of the year, but there was a good span where she'd spend the weekend, like Friday night and Saturday night.

Q The – how may children would typically stay there that you would witness when you were picking up E or dropping E off?

A On a regular basis, between six or seven, if not a few other friends of the children that go over.

Q **I think on the video you brought up a – there was a foster child in the home at some point in time?**

Yet, there is a wrinkle. When counsel elicited the testimony about the foster child, he referenced how E's mom had already "brought up" the fact of the DHHS placement in the law enforcement's initial interview with E and her mom. 2Tr. 26-27. By this point, in other words, the jury had already heard about the foster child from the video published without objection from the State. DX18 ca. 23:45. Indeed, the State itself *requested* that video be shown in full, for the sake of "completeness." 2Tr. 27. Presumably, the State was keen for jurors to hear E's mom and the police officer mulling their concerns that the foster child was in defendant's care and planning to inform DHHS of their allegations against him. DX18 ca. *ibid* to 27:45 (E's mom: "My concern is that this is a two-year old who doesn't have a voice.").

The takeaway is, at best for the State, the supposed door-opening evidence is quite slim and, on balance, not helpful to the defense. But, rather than treating this modicum of mostly unhelpful evidence as something that somehow opened the door, defendant asks this Court to stop its analysis here

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A **Yes**.

Q **And that was a DHHS plament – placement, if you know?**

A **Yes**.

Q The – did you think that the Cardona home was a safe place for your children to be at?

A At that time, most certainly, I did.

Q The – I think I remember you using – saying that you thought it was very, very safe there?

A Yeah, at that time, I did.

2Tr. 160 (emphasis added).

and determine that, if anything, the State strategically invited this "error." The State should not now be permitted to hold up evidence it requested be played for "completeness" as a basis to admit otherwise inadmissible evidence. *Cf.* 1 McCormick On Evid. § 57 (9th ed., Feb. 2025 update) ("The majority of courts appear to subscribe to the general proposition that 'one who induces a trial court to let down the bars to a field of inquiry that is not competent or relevant to the issues cannot complain if his adversary is also allowed to avail himself of the opening.'").

2. The sex-toy evidence was not necessary to avoid prejudice to the State caused by evidence that DHHS had placed a foster child in defendant's home.

The foregoing catalogues the minimal prejudice, if any, the State could have suffered from admission of the fact. The State's lack of objections on this score are also indicative. It could have objected to E's mom's video-taped concerns about defendant having a foster child. It did not – for good reason, as such could have plausibly prejudiced only *defendant*. It could have objected when defendant elicited redundant testimony. It did not, likely knowing that such was not wreaking meaningful prejudice. Rather, the State laid in wait.

"The fact that the door has been opened does not, by itself, permit all evidence to pass through. The doctrine is to *prevent* prejudice and is not to be subverted into a rule for *injection* of prejudice." *State v. Trempe*, 663 A.2d 620 (N.H. 1995) (emphasis in *Trempe*; quotation marks and citation omitted). Thus, counterproof may be offered via the doctrine only when one

party has broached a subject in a manner "that creates a misleading advantage" such that the opponent, in fairness, must be permitted "to counter the misleading advantage." *State v. Gaudet*, 97 A.3d 640, 646 (N.H. 2014). In other words, to truly "open the door," "the initial evidence must have reasonably misled the fact finder in some way." *Ibid.*

At the risk of belaboring the point: What risk of misleading the jury did the State face from evidence that E's mom was worried about the safety of the foster child in defendant's home? Again, the court's ruling does not survive this step of the analysis, even in isolation of the others.

3. Even assuming the door had been opened and the State needed to respond to avoid unfair prejudice, the sex-toy evidence was in no way proportionate to the evidence that a foster child resided in defendant's home.

Assuming a door has, in fact, been opened, there are nonetheless limitations. For example, the doctrine applies only the extent that there exists "a flat contradiction between the testimony previously introduced by the opponent and the rebuttal evidence proffered by the party…." Gilligan & Imwinkelried, *Bringing the 'Opening the Door' Theory to a Close: The Tendency to Overlook the Specific Contradiction Doctrine in Evidence Law*, 41 SANTA CLARA L. REV. 807, 830 (2001). Thus, contrary evidence that merely "touches on the same subject or issue" does not suffice to open the door; rather, it must present an "outright contradiction" of the would-be door-opening evidence. *Ibid.* Put differently, "a prosecutor may not exceed the scope of an open door." *Kincaid v. State*, 501 P.3d 1257, 1266 (Wyo. 2022). Admissibility, rather, depends on the "degree of 'fit' between initial

proof and counterproof." Mueller & Kilpatrick, 1 *Federal Evidence* § 1:12 (4th ed., Aug. 2023 update).

Kincaid is an apt example. There, prosecutors argued that the defendant, on trial for threatening to shoot his wife, had opened the door to a prior disagreeable incident between him and his wife. *Kincaid*, 501 P.3d at 1266. The prosecution argued the defense had done so by eliciting testimony that the wife was taking psychiatric medications, reasoning that it therefore was entitled to elicit that she was prescribed those medications to cope with anxiety caused, in part, by the prior incident with her defendant-husband. *Ibid.* The court concluded that there was insufficient "fit" between the proof and the counterproof. *Id.* at 1266-67. It reversed, finding the error to be harmful. *Id.* at 1267-68.

In our case, the proof and the counterproof are much farther apart than in *Kincaid*. The sex-toy evidence bears no relationship to evidence about the foster child. There is no "outright contradiction," nor even a close "fit." This gaping chasm further implicates Rule 403 problems. Such principles do not dissolve, even once a door has been legitimately opened. Gilligan & Imwinkelried, *supra*, at 834 ("A party's right to specifically contradict is qualified by a trial judge's discretionary power to exclude under Federal Rule of Evidence 403."). Preventing jurors from making "inferential errors," such as those posed by bad-act evidence, is perhaps the most important basis for invoking Rule 403. *Id.* at 834-35. This dovetails with the Court's next and final consideration: prejudice to defendant.

4. Admission of the sex-toy evidence was not harmless.

Once again, this was a he-said-she-said case – at least, except for the sex-toy incident, which was corroborated by E's friend. Cases that boil down to which witness a jury finds more credible are uniquely susceptible to prejudice. *Cf. Watson v. State*, 2020 ME 51, ¶¶ 32-36, 230 A.3d 6. Moreover, the sex-toy evidence was propensity evidence, the sort that "is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge." *Michelson v. United States*, 335 U.S. 469, 475-76 (1948). Evidence of a similar event – particularly of sexual deviancy – is "extremely prejudicial." *State v. Works*, 537 A.2d 221, 223 (Me. 1988) (in trial for masturbating in grocery store, admission of evidence that defendant had subsequently masturbated in department store is prejudicial error). There is a substantial probability that the outcome was affected by the court's erroneous admission of the sex-toy evidence.

Second Assignment of Error

II. The court committed reversible error by excluding evidence that, just before the complainant accused defendant of abuse, defendant had threatened to physically assault and kill her cousin if he touched the complainant.

A. Summary of the argument

Perhaps especially so in cases of alleged sexual abuse of minors, juries want to know why an alleged victim would fabricate such a claim. Maine courts instruct juries to actively scrutinize witnesses for any motive to fabricate. Defendant had evidence that his accuser and her family had such a motive: He had threatened physical harm to E's cousin if he ever touched E again. That is a powerful motive that might cause witnesses to fabricate allegations, and the court's reasons for excluding it do not withstand scrutiny.

B. Preservation and standard of review

This issue is preserved. Defense counsel sought to elicit testimony that defendant threatened the male cousin with physical harm, and he made a record of some of that testimony via voir dire. This Court can review that exchange at pages A53 through A92 of the Appendix. Therefore, this argument is preserved, and this Court will review for abuse of discretion. *State v. Ali*, 2025 ME 30, ¶ 13, ____ A.3d ____.

C. Analysis

Frankly, this is an open and shut issue. Defendant moves quickly to address the court's two bases for exclusion: relevance and hearsay.

First, the evidence was relevant, and it is not a close question. "The partiality of a witness is subject to exploration at trial and is 'always relevant

as discrediting the witness and affecting the weight of his testimony.'" *Davis v. Alaska*, 415 U.S. 308, 316 (1974), quoting 3A Wigmore, Evidence § 940, p. 775 (Chadbourn rev. 1970); *State v. Tiernan*, 941 A.2d 129, 134 (R.I. 2008) ("[T]he **potential** bias of a witness is always subject to exploration by cross-examination…") (emphasis added). Indeed, "revealing **possible** biases, prejudices, or ulterior motives of the witness" "is a proper and important function of the constitutionally protected right of cross-examination." *Davis*, 415 U.S. at 316-17 (emphasis added). Constitutionally, defendants must be able to ask questions "designed to show a prototypical form of bias on the part of the witness, and thereby to expose to the jury the facts from which jurors **could** appropriately draw inferences relating to the reliability of the witness." *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986) (cleaned up; emphasis added)). "[T]he jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which **might** bear on the accuracy and truth of a witness' testimony." *United States v. Abel*, 469 U.S. 45, 52 (1984) (emphasis added).

The "standard for relevance is a low one." *In re M.S.*, 2014 ME 54, ¶ 10, 90 A.3d 443. In Maine "[g]reat latitude" is to be accorded to defendants seeking to explore witnesses' "special interests." *State v. Brown*, 321 A.2d 478, 482 (Me. 1974). "Evidence of bias, hostility and personal interest of a witness may be shown by the introduction of independent evidence to that effect," and such "is not limited to cross-examination of the witness, and no preliminary foundation need be laid for its admissibility." *State v. Doughty*,

399 A.2d 1319, 1324 (Me. 1979). "Any party, including the party that called the witness, may attack the witness's credibility." M.R. Evid. 607.

Evidence that E's disclosure was precipitated by defendant's threats of physical harm should her cousin "touch her" again more than satisfies this low bar. Whether such threats actually motivated her and her family to come forward was not for the court to decide. "The weight to be given to the evidence and the determination of witness credibility are the exclusive province of the jury." *State v. Basu*, 2005 ME 74, ¶ 20, 875 A.2d 686 (quotation marks and citation omitted).

As for hearsay, the court's ruling, with all due respect, is on similarly tenuous ground. To recap, counsel sought to elicit two statements, which defendant takes in succession:

- "[Y]ou put your hands on E, I will put my hands on you," to which the cousin responded, ""I would leave E alone."

Simply, none of this was offered for the truth of the matter asserted, and, thus, none of it is hearsay. *See* M.R. Evid. 801. In other words, defendant was not offering this to show either: that defendant would actually "put his hands on" the cousin should the cousin touch E; or that, in light of this threat, the cousin would, in fact, "leave E alone." Rather, as defense counsel argued, the point was to explain why the cousin "had a bias against [defendant]" that caused him to work in concert with E and their respective mothers to "come up with this case." 2Tr. 136.

The remaining statement, defendant acknowledges, at first seems more like hearsay:

- Defendant told someone, who then relayed the statement through family members, "I will watch the life drain out of [the cousin's] body." 2Tr. 144-48.

Clearly, there are multiple statements here. One is indistinguishable from that which defendant has just discussed. Defendant's statement was not offered to show that he would *actually* "watch the life drain out of [the cousin's] body." Rather, as above, it was offered to show the effect on the cousin and his family.

The second (or multiple) statement/s – *i.e.*, that the cousin's family members actually recounted defendant's threat to each other and eventually to the cousin himself – is also not offered for the truth. Again, these statements are offered to show the effect on the listener: the cousin (and, for that matter, the other family members) took them to be true. The point, again, is not whether their reports are accurate; rather, they were offered to show the family's justification for (a) obtaining a protection order against defendant, (b) furthering the narrative that defendant is interested in E's sexuality, and (c) in the eyes of the defense, fomenting a conspiracy to blame defendant for his odd[7] and threatening behavior. Such "context," as this Court has repeatedly held, is not hearsay. *E.g.*, *State v. Pratt*, 2015 ME 167, ¶ 12, 130 A.3d 381.

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[7] As defense counsel argued before trial, such was "offered to show the effect on the listener. Whether it's true or not that the cousin had sex with E is irrelevant for my purposes. It shows why E would have been upset. It shows why … [redacted] would have been upset … E's mom would have been upset." A55; 1Tr. 23

Nobody likes being threatened, especially in connection with touching one's younger female cousin. It should have been for the jury to evaluate whether defendant's threats caused everyone to conspire against defendant, "the worst creature on goddamn earth." Immediately following the life-drain-out threat, [redacted] the cousin's mother [redacted], who then came forward with her own allegation against defendant – in eerily similar to E's), rallied and accompanied E to the police station to formalize her complaint. Defendant should have been permitted to develop the circumstances in which he went from [redacted] to black sheep.

"Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury can't fairly appraise them." *Alford v. United States*, 282 U.S. 687, 692 (1931). Indeed, because it is jurors, not judges, who are to evaluate the all-important question of credibility, courts should err on the side of prejudicial error. Like the Supreme Court of Oregon, this Court should hold that "a decision to exclude evidence relevant to bias or interest which is error is reversible if it denies the jury an adequate opportunity to assess the credibility of a witness whose credibility is important to the outcome of the trial." *State v. Hubbard*, 688 P.2d 1311, 1319 (Or. 1984). That standard is satisfied here. Without knowing that defendant threatened to kill the cousin should he again touch E, the jury could not have adequately assessed E's and the cousin's family members' motive to fabricate the allegation against defendant.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE AND FILING

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