STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Docket No. CUM-24-530

STATE OF MAINE,
Appellee,

V.

DANIEL CARDONA,
Appellant,

Appeal from the Unified Criminal Docket for the
County of Cumberland and State of Maine

Brief of the Appellee

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Statement of Facts

Sometime in October of 2020, Daniel Cardona had unsolicited sexual contact with a 12-year-old [redacted]. She awoke to Daniel Cardona penetrating her vagina with his finger for approximately five to ten minutes. 1Tr. 78 – 79. Mr. Cardona, seemingly obsessed with the prospect of his [redacted]'s sexuality, was alleging that she had a sexual relationship with one of her cousins. 2Tr. 161 – 165; SX1 ca. 33:45. It is unclear if Mr. Cardona was describing a fantasy or a pure fabrication involving his grand-niece and her cousin but either way his grand-niece denied that occurred. SX1 ca. 34:15.

The victim's mother testified that she called Mr. Cardona and spoke to him on the phone on October 18, 2020. She recorded their discussion that recording was ultimately introduced into evidence by the defense as defense exhibit 19. 3Tr. 31. During that discussion Mr. Cardona suggested that his grand niece was attracted to another young woman. On October 19, 2020 the victim disclosed that she was sexually assaulted by [redacted] Daniel Cardona. 2Tr. 163. There is no evidence that she ever accused her cousin or [redacted] or any other person of the sexual assault.

On February 23, 2024 Mr. Cardona, through his counsel, filed a witness list. That witness list included the name [redacted]. Ultimately the case was set

for a three-day trial beginning on July 15, 2024. On July 12, 2024, an investigator for the State and the State's trial counsels called Ms. [redacted] as part of their due diligence in preparing for trial. It was unclear to the State what the nature of her testimony would be as part of the defense's case. Ms. [redacted] disclosed the information that she later testified to at 3Tr. 151-157. Specifically, she disclosed that after the time of the offense but prior to the victim's disclosure, Ms. [redacted] was alone in a van with Mr. Cardona and his victim when Mr. Cardona handed them a sex toy and suggested that they should be together romantically. 3Tr. 154. The victim's testimony corroborated this event.

On July 15, 2025, during an *in limine* argument prior to beginning the trial, the trial court precluded the State from introducing the newly learned information as part of their case in chief. Specifically, the trial court ruled that "the State can't use it unless they seek based on something that was opened." 1Tr. 16. The trial court also presciently noted "I think there are a lot of issues that could get generated during this trial, so I'm reserving the right to reconsider." 1Tr. 16. The trial court agreed with the State's clarification that "any evidence that's introduced about Mr. Cardona's alleged concern for this victim's chastity would open that door wide to this evidence coming in." 1Tr. 19. This was not a situation where the evidence was irrelevant or otherwise inadmissible due to suppression or the rule against hearsay, etc. Even trial counsel for the Appellant agreed that the evidence

was “somewhat relevant.” 1Tr. 12. The basis for the trial court’s ruling was “unfair surprise” ostensibly pursuant to M. R. Evid. 403. 1Tr. 15.

On July 15, 2025, during his opening statement, trial counsel for Appellant told the jury that “There’s no suggestion that Dan has done this to any other child. He has a criminal history of a disorderly conduct in 1978 when he was 18 years of age having been born in 1960, and he received a $25 fine. That’s his – that’s his criminal history.” 1Tr. 47. Trial counsel further stated that “Dan Cardona seated before you here, he suffers a serious mental illness. He's bipolar. He's -- [redacted], they refer to him as having mental illness. They don't -- I wouldn't say they make fun of him about it, but it's a frequent discussion [redacted]. He's at McGeachey Hall. He's on medications for it. They say sometimes he goes off his medications and he acts weirdly. He rambles a lot. He makes -- I guess he perseverates. He just goes off on a tangent and just won't let go, won't let go, won't let go. At times, he can be a difficult person to live with due to his mental illness.” 1Tr. 49.

On the second day of trial, July 16, 2025, trial counsel for the Appellant called a police officer from the Portland Police Department and introduced a video interview of the victim’s initial interview with him at the Portland Police Department occurring on October 19, 2023. DX18; 2Tr. 23-16. Trial counsel had previously announced his intent to play “a few snippets of it here and there.” 1Tr.

52. The State was forced to move for the recording be played in its entirety pursuant to the rule of completeness. 2Tr. 27. The trial court prefaced the video with a limiting instruction regarding the hearsay portions of the video. [1] That limiting instruction clearly applied to the brief and vague mention of a foster child placed in Appellant's residence. DX18 ca. 27:45; 2Tr. 30.

Also, on July 16, 2025, trial counsel called the victim's mother and elicited testimony that she was aware Appellant was making accusations that something "inappropriate for children" was happening between the victim and her cousin. 2Tr.161. Trial counsel suggested that Appellant was making "allegations" against the victim regarding her relationship with her cousin and connected them to the disclosure she made implicating Appellant the following day. 2Tr.164. The defense highlighted the fact that the cousin-in-question's parents were on the phone call with the victim and her mother wherein the disclosure was made and that they implored the victim "to tell the truth about anything like that, that it was very important to be truthful and to -- also to come forward and say who that might be, no matter who it was." 2Tr.165. Trial counsel also deliberately elicited the fact that

[1] "Those statements are hearsay and cannot be considered by you as evidence of any of the factual assertions made either by the officer or of [the victim]'s mother. The statements in the video as a whole may be considered by you as part of your overall analysis of the interview of [the victim] or they may be considered, to the extent that you find them relevant, that they allow you to evaluate [the victim]'s disclosure and as well in your overall determination of credibility, which I will give you -- that's a responsibility with every witness, and I will give you further instructions about that at the end of the trial." 2Tr. 30.

there was a foster child in Appellant's home during the time of the crime and that the foster child "was a DHHS placement" in the home. 2Tr. 160.

After establishing those themes Appellant introduced the aforementioned October 18, 2020 recorded phone call between himself and the victim's mother. DX19; 3Tr. 31. That recording included multiple comments by Mr. Cardona expressing concern about (and some might say obsession with) [redacted]'s sexuality, her potential sexual partners (from his perspective), his speculation regarding her sexual orientation, and his supposed observations on those subjects. DX19.

On the third day of trial, July 17, 2025, prior to beginning its cross-examination of the victim's mother, the State moved for an evidentiary ruling that the door had been opened by defense counsel. The State specifically cited his inappropriate comments during his opening statement and his introduction of evidence that Child Protective Services had placed a child in Appellant's residence. 3Tr.5. The trial court ruled that "I believe, though, 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." 3Tr. 8.

Issues Presented for Review

1. **Did the trial court abuse its discretion in ruling that Appellant had opened the door to testimony about a separate incident wherein Appellant invited the victim to utilize a sex toy with her brother's girlfriend?**

2. **Did the trial court commit reversible error by excluding evidence that Appellant threatened the victim's cousin at some unknown time prior to her disclosure on a record devoid of evidence that the victim was aware of the threat?**

Argument

1. Did the trial court abuse its discretion in ruling that Appellant had opened the door to testimony about a separate incident wherein Appellant invited the victim to utilize a sex toy with [redacted]?

A. Standard of Review

This Court reviews a trial court's evidentiary ruling that a party has "opened the door" to the admission of otherwise objectionable evidence using the abuse of discretion standard of review. *State v. Corrieri*, 654 A.2d 419, 421 (Me. 1995). This is because "the question of admissibility frequently involves the weighing of probative value against considerations militating against its admissibility." *State v. Robinson*, 628 A.2d 664, 666 (Me. 1993); *see also* M.R. Evid. 403. As a practical matter, the trial jurist is the "person who sees and hears first hand the impact of the testimonial evidence" so the law vests them "with substantial discretion to make the balancing determination." *State v. O'Neal*, 432 A.2d 1278, 1282 (Me. 1981).

B. The First Open Door: Character Evidence

In the instant case the trial court Justice grounded her decision to initially exclude Ms. [redacted]'s testimony on the theory that it constituted "unfair surprise" to the defense. 1Tr. 15. The trial court also expressed a desire to balance the State's right to present motive and lack of mistake evidence against the potential that it be

perceived by the jury as propensity evidence. 1Tr. 19.[2] The trial court made it clear that "the ruling is based on 403." 1Tr. 18. [3] Her ruling was *in-limine* and therefore the probative strength of the evidence was not yet entirely clear. The trial court clearly stated, "I think there are a lot of issues that could get generated during this trial, so I'm reserving the right to reconsider." 1Tr. 16. The trial court agreed that evidence of Appellant's fixation with the victim's chastity would be one such basis for opening that door. 1Tr. 19.

On the second day of trial, Appellant introduced evidence that could only be properly admitted pursuant to M. R. Evid. 404(a)(2) to show evidence of a pertinent character trait of Appellant's; namely, that he was a safe person for children to be around as vouched for by DHHS. 2Tr.160.[4] The rule is clear that if a defendant admits such evidence "the prosecutor may offer evidence to rebut it." M.R. Evid. 404(a)(2).[5] By "eliciting evidence of good character, even indirectly, a

[2] The State argues, and the trial court ultimately implicitly accepted, that this evidence was relevant towards motive and lack of mistake *and* to rebut the pertinent character trait evidence elicited by Appellant pursuant to M.R. Evid. 404(a)(2).

[3] The State maintains that "unfair surprise" was not a viable reason to exclude this evidence under M.R. Evid. 403 and that there was no discovery violation implicated by the late discovery of this information. However, the court's order can reasonably be construed as a*lso* implicating the potential for unfair prejudice or confusion of the issues which are other grounds upon which a M.R. Evid. 403 exclusion maybe properly based if the evidence could be interpreted as propensity evidence. The trial court Justice's concerns about that are part of the record. 1Tr. 19. On appeal the State notes that "unfair surprise is not included in Rule 403 as a separate ground for exclusion. A continuance is the appropriate remedy unless surprise and the ***other grounds*** listed in Rule 403 are present." *Pettitt v. Lizotte*, 454 A.2d 329, 332 (Me. 1982) (emphasis added) (citing R. Field & P. Murray, Maine Evidence § 403.1 at 59 (1976)). *See also State v. Gorman*, 2004 ME 90, ¶ 41, 854 A.2d 1164 (observing that a trial court action, proper under the law, may be affirmed, even for a different reason than that given by the trial court).

[4] Appellant elicited testimony from his own witness on direct examination that there was a foster child in his home and that the foster child "was a DHHS placement" in the home. 2Tr. 160.

[5] While reference to M.R. Evid. 404 was not explicitly made, the State argued the following in support of the open door: "So we've seen lots of character bolstering here, and frankly, the improper suggestion that the Department of

criminal defendant can 'open the door' to otherwise unadmissable controverting evidence of bad character." Field & Murray, *Maine Evidence* § 103.8 at 30 (6th ed. 2007). When the prosecution seeks to rebut that evidence "the court must first determine what the specific character trait is claimed to be. Second, the court must determine whether the evidence tendered by the State actually rebuts the claimed character trait." *State v. Robbins*, 2019 ME 138, ¶ 31, 215 A.3d 788.

As to the first *Robbins* requirement, the trial court appears to have accepted the argument of the State that the DHHS evidence was "character bolstering" because it suggested that the Appellant and his home were safe for children to be around. 3Tr. 5. As to the second Robbins requirement, the State suggests that the pertinent character trait injected into the litigation by Appellant represents a broader target than specific fact contradiction rebuttal traditionally does. In other words, when rebutting evidence offered under 404(a)(2), the State will generally have a wider array of evidence that might be responsive to rebutting a character trait as opposed to when rebutting something about a discrete and specific event or condition. However, in this case Defendant's suggestive sexual comments towards children could not be more responsive to the character trait Appellant introduced.

Health and Human Services has come in and said that this is a safe home. Therefore, no sexual assaults on children could have happened here." 3Tr.5. That argument appears to have been accepted by the trial court.

Appellant relies upon *State v. Donovan* for the proposition that opening statements do "not 'open the door' for rebuttal evidence concerning matters never placed in issue by the evidence" because opening statements are not themselves evidence. *State v. Donovan*, 1997 ME 181, ¶ 8, 698 A.2d 1045. The State concedes that opening statements are not evidence. However, in *Donovan* the State sought to elicit testimony regarding the victim's pertinent character trait, namely that she was "a chronic victim." *Id.* ¶ 6. In *Donovan* the trial court found that the victim's "prior marital history was not otherwise relevant." *Id.* ¶ 9. In Appellant's case, Ms. [redacted]'s testimony was clearly relevant to show motive or lack of mistake. Even Appellant admitted that Ms. [redacted]'s testimony was "somewhat relevant." 1Tr. 12. Because the information in *Donovan* was not relevant, it was never "placed in issue by the evidence." *Donovan*, 1997 ME 181, ¶ 8, 698 A.2d 1045.[6]

Reflecting on *Donovan* 20 years later, the Law Court emphasized that Donovan's opening "did not 'open the door' for the State to present evidence of the victim's prior marital history and abusive relationships because those

[6] *See State v. Lockhart*, 2003 ME 108, ¶ 49, 830 A.2d 433 (observing that a reference in the prosecutor's opening statement addressing the defendant's theory of the case was proper because the defendant's theory of the case was "before the jury"); *see also State v. Pillsbury*, 2017 ME 92, ¶ 23 n.6, 161 A.3d 690 (observing that Defendant's opening statement focused squarely on how the evidence would show that he acted in self-defense and had not murdered the victim, thus placing the issue of self-defense "before the jury" and opening the door for the State to introduce evidence rebutting that claim); *see also State v. Niemszyk*, 551 A.2d 842, 843 (Me. 1988) (observing that a defendant's opening statement addressing the allegedly narrow scope of the police investigation opened the door to the State introducing evidence tending to show a more accurate picture of the scope of the investigation).

relationships were never placed in issue[,]" rather than reasoning that openings can *never* open the door because they are not themselves evidence. *Pillsbury*, 2017 ME 92, ¶ 23 n.6, 161 A.3d 690 (citing *Donovan*, 1997 ME 181, ¶¶ 6-9, 698 A.2d 1045). The *Pillsbury* Court dispelled the strict reading of *Donovan* being suggested by Appellant because when "Pillsbury's opening statement focused squarely on how the evidence would show that he acted in self-defense and had not murdered the victim" he placed "the issue of self-defense before the jury" and thus "admission of the witness's testimony regarding Pillsbury's prior attack on the victim stemming from jealousy was proper" because Pillsbury opened the door to that evidence with his opening statement. *Pillsbury*, 2017 ME 92, ¶ 23 n.6,161 A.3d 690.

In the present case, Appellant's opening statement put his character before the jury and then Appellant elicited bolstering character evidence on direct examination from a witness he called. 1Tr. 47; 2Tr. 160. Either one of those acts was enough for a court to find that the door had been opened without abusing its discretion.[7]

[7] Appellant's decision to frame the case in his opening by saying that there "is no suggestion Dan has done this to any other child" was meant to invite the inference that because he had not done so in the past, he must not have done so in this case. 1Tr. 47. That invitation to rely on character evidence was only cemented by the description of Appellant's minimal criminal record and pity inducing mental illness. Furthermore, Appellant elicited testimony that the Maine Department of Health and Human Services had given Appellant's residence the imprimatur of safety for children; effectively arguing that the branch of the State entrusted with the safety of children was vouching for him. Under those circumstances it's inaccurate to say that Appellant's character and the safety of his home were "matters never placed in issue by the evidence." *Donovan*, 1997 ME 181, ¶ 8, 698 A.2d 1045.

C. The Second Open Door: Motive, Intent and Opportunity

This Court has long recognized that evidence of "subsequent acts similar to the charged offense is admissible for any permissible purpose other than to prove the character of the defendant to show that he acted in conformity therewith." *State v. DeLong*, 505 A.2d 803, 805 (Me. 1986). Furthermore, the Law Court has stated,

> [If] a defendant elicits testimony related to previously excluded evidence during cross-examination or through presentation of the defense case, and the testimony, as delivered, is inconsistent with the excluded evidence or affects the credibility of the State's case, a court does not abuse its discretion in finding that the defendant has 'opened the door' to the excluded evidence and permitting the State to conduct limited questioning for the purpose of responding to the defendant's challenge.

State v. Hall, 2017 ME 210, ¶ 19, 172 A.3d 467.

As in *Delong*, over the course of the three-day trial in this case it became evident that certain evidence "was relevant and admissible to show the relationship between the parties that in turn sheds light on defendant's motive (i.e., attraction toward the victim), intent (i.e., absence of mistake), and opportunity (i.e., domination of the victim) to commit the crimes with which he was charged." *DeLong*, 505 A.2d at 805–06. In *Delong*, <u>much</u> more potentially incendiary

information (multiple prior incestuous acts) was outweighed under the 403 analysis by the probative value those acts demonstrated towards motive, intent and opportunity; as compared to this case, which included a single off-hand remark about a sex-toy. It would be discordant for this Court to find that the information in the present case outweighed what amounts to similar probative power to that found in *Delong* as an abuse of discretion by the trial court.

Another example is *State v. Ruest*, wherein the Law Court found no error when, after Ruest opened the door on direct examination, the State elicited testimony from Ruest's mother on cross-examination that there were "allegations made by the [same] victim in 1977 that the defendant had sexually abused her, that [the mother] had not believed the victim, and that [the mother] was aware that the defendant had admitted the allegations." *State v. Ruest*, 506 A.2d 576, 577 (Me. 1986). In *Ruest*, the door was opened by his mother testifying on direct that the victim was a "compulsive liar." *Id.* That testimony enhanced the relevance of Ruest's prior sexual abuse and admission because it "impeach[ed] the mother's credibility and … tended to support the victim's credibility" after the mother attacked it. *Id.* "This enhanced probative value made appropriate the court's reevaluation of the evidence to determine whether its probative value continued to be outweighed by other competing factors under M.R. Evid. 403." *Id*. The fact that Ruest sexually abused the same victim in the past and had admitted to it constitutes

a ***far*** ***more*** potentially unfairly prejudicial fact than the incident described in Ms. [redacted]'s testimony. Again, it would be discordant for this Court to find that the information in the present case outweighed what amounts to similar probative power to that found in *Ruest* as an abuse of discretion by the trial court.

In the instant case, Appellant introduced evidence to support a defense that argued the victim fabricated her account to retaliate against Appellant's attempts to expose her alleged relationship with her cousin. 2Tr.161; 2Tr.164.[8] He elicited testimony through the victim's mother regarding Appellants concerns that the victim was doing "something inappropriate for children" with her cousin. 2Tr. 161. Appellant also introduced evidence of Appellant's concerns regarding the victim's potential past sexual partners and her sexual orientation. DX19; 3Tr. 31. The trial court agreed that if evidence was introduced "about Mr. Cardona's alleged concern for this victim's chastity" it "would open that door wide to this evidence coming in" when articulated that way by the State. 1Tr. 19. Even with that warning, Appellant subsequently introduced evidence regarding the victim's sexual history and her sexual orientation. DX19; 3Tr. 31.

[8] Appellant called the victim's mother as a witness and elicited testimony that she was aware Appellant was making accusations that something "inappropriate for children" was happening between the victim and her cousin. 2Tr.161. Trial counsel suggested that Appellant was making "allegations" against the victim regarding her relationship with her cousin and connected them to the disclosure the victim made implicating Appellant the following day. 2Tr.164.

That evidence constitutes a second basis for which the door was opened. That is, to rebut the misleading defense theory that the victim only accused [redacted] of unlawful sexual contact in order to cover up her supposed ongoing sexual relationship with another person, either her male cousin or a female friend.[9] By introducing this evidence, the State was able to show that the victim's disclosure was ***not*** intended to "turn the tables" to blame Appellant in retaliation for Appellant supposedly exposing an incestuous relationship with her cousin. Appellant's Br. 11. That alleged incestuous relationship was one of the "centerpieces of the defense." *Id.* The trial court implicitly recognized that Ms. [redacted]'s testimony suggests that the imagined relationship between the victim and her cousin was just a jealous fantasy Appellant indulged in with no basis in reality. Her testimony illustrated the point that Appellant was himself sexually attracted to [redacted] and his obsession with her chastity was simple *jealousy* unmoored from reality due to mental illness. Absent the *real* stakes of having a *real* incestuous relationship with her cousin potentially exposed, there was

[9] This was an evolution of the defense theory that the victim's cousin or female friend constituted an *alternate suspect*. That theory was specifically litigated at a motion *in-limine* hearing held on 6/14/2024. The *in-limine* court precluded Appellant from eliciting alternative suspect evidence because during the extensive *voir dire* conducted on 6/14/25 there was no connection established via admissible evidence between any of the alternative suspects and the crime itself, as required per *State v. Bridges*, 2003 ME 103, ¶ 39, 829 A.2d 247. The evolution of that defense theory presented at trial properly skirted the *in-limine* court's ruling by theorizing that the sexual contact was itself invented completely in order to cover up another relationship or to retaliate for the supposed exposure of that other relationship to the children's parents, instead of as an alternative suspect to the specific criminal act.

significantly less reason for the victim in this case to falsely accuse the Appellant and to falsely testify in this case.

Appellant claims the State "strategically invited" Appellant's error in introducing evidence which opened the door to testimony and suggests that the State ought not be rewarded for that tactic. Appellant's Br. 22. Appellant observes that Defense Exhibit 18, which was the initial recorded interview with the victim and her mother at the Portland Police Station on October 19, 2021, contains a passing reference to a foster child being in Appellant's home where the crime occurred. DX18 ca. 23:45 – 27:45. Appellant urges that because the State insisted on a defense exhibit, DX18, being played in full as a matter of completeness, and that as a result that brief reference was heard by the jury, the State cannot later claim the defense "opened the door" when Appellant elicited testimony about it on direct examination of a defense witness.

This argument is misguided. The State was forced to ask that Defense Exhibit 18 be played in full to counteract the misleading impression the "snippets" Appellant intended to play for the jury would have left. 1Tr. 52. Had the recording not been played for completeness, the State would have been at a serious and unfair disadvantage. To suggest that the State's request was a strategic trap as opposed to a good faith effort to ensure the jury was not deceived and to assist trial counsel who was struggling with the technology is unfair. Further, the State

offered to discuss editing out portions of the video that were objectionable to trial counsel.[10] Additionally, the trial court gave a limiting instruction regarding the evidence admitted per the rule of completeness.[11] That poses a significantly different circumstance from when Appellant's trial counsel elicited testimony regarding the DHHS placement during a direct examination without the benefit of any limiting instruction. That testimony was introduced for the truth of the matter whereas the statements in Defense Exhibit 18 were only introduced to help the finder of fact evaluate the victim's credibility and for context to the non-hearsay in the video.

2. Did the trial court commit reversible error by excluding evidence that Appellant threatened the victim's cousin at some unknown time prior to her disclosure on a record devoid of evidence that the victim was aware of the threat?

A. The Limits of Relevance

Trial courts should exclude evidence offered by a defendant if the evidence is irrelevant. *State v. Dechaine*, 572 A.2d 130, 134 (Me. 1990). Trial courts have broad "discretion to exclude such evidence if it is too speculative or conjectural or too disconnected from the facts of the case against the defendant." *State v. LeClair*,

[10] "I mean, I'm willing to talk about it if there's really specific, irrelevant information." 2Tr. 8.
[11] "Those statements are hearsay and cannot be considered by you as evidence of any of the factual assertions made either by the officer or of [the victim]'s mother. The statements in the video as a whole may be considered by you as part of your overall analysis of the interview of [the victim] or they may be considered, to the extent that you find them relevant, that they allow you to evaluate [the victim]'s disclosure and as well in your overall determination of credibility, which I will give you -- that's a responsibility with every witness, and I will give you further instructions about that at the end of the trial." 2Tr. 30.

425 A.2d 182, 187 (Me. 1981) (citing M.R. Evid. 402 and 403).[12] Furthermore, trial courts have broad discretion to exclude evidence if its introduction would result in undue delay, waste of time or jury confusion. *State v. Houston*, 534 A.2d 1293, 1294 n.1 (Me. 1987) (discussing M.R. Evid. 403).

During the trial, Appellant tried in vain to establish a connection between Appellant's threats towards the victim's cousin and the victim herself. 2Tr. 129-153. However, Appellant's claim that the trial court precluded him from introducing the defense that the victim retaliated against the Appellant because he threatened her cousin is untrue. The trial court made it clear that the methods trial counsel attempted to introduce that defense offended the rules of evidence.[13] Appellant repeatedly claimed that the evidence was not being introduced for its truth but instead for its effect on the victim of Appellant's sexual assault. However, she was not present when Appellant threatened her cousin and there is no evidence to suggest that she was aware of it.

Assuming for the benefit of Appellant that the threat made by Appellant to the victim's cousin was *somehow* known to the victim when she disclosed,

[12] While *Leclair* specifically addresses an alternative suspect defense, its grounding of those evidentiary principles in M.R. Evid. 402 and 403 shows that this is a legal principle of general application beyond the context of that specific defense. "Alternative suspect evidence offered by the defendant, ***as with any evidence***, must be sufficiently probative to be relevant and thus admissible." *State v. Jaime*, 2015 ME 22, ¶ 33, 111 A.3d 1050 (emphasis added) (citing M.R. Evid. 401 and 402).

[13] The trial court observed that "This is all hearsay. And you're starting with the wrong witnesses to get this in. You're starting at the end of the story not the beginning." 2Tr. 135-136

Appellant failed to elicit information to support that defense from her because he began at the "end of the story not the beginning." 2Tr 135-136. Rather than questioning the victim, [redacted], her mother or [redacted] when he had them on the stand, Appellant opted to only direct his questions towards the cousin who would be at the far end of the evidentiary chain which begins with the victim's awareness of the threats. Absent some reasonable connection between the threat and the victim, the trial court did not abuse its discretion by excluding the cousin's testimony as irrelevant. Appellant may argue for *reasonable* inferences and finders of fact may base their verdicts on such. However, it is improper for Appellant to ask that the finder of fact speculate about evidence that has not been generated and doing so is not calling for a *reasonable* inference.

This Court's precedent provides at least one illustrative example of why this evidence was properly excluded. In *State v. Berube* the defendant appealed complaining that he was not permitted to elicit testimony from "the female minor to whom the offense charged relates, and who testified for the State, as to trouble between her mother and the respondent" because "a defendant may introduce any competent evidence, either direct or circumstantial, to show that a particular charge against him was concocted by a prosecutrix or others…." *State v. Berube*, 139 Me. 11, ___, 26 A.2d 654, 656 (1942). In *Berube*, the Court found no prejudicial error with the exclusion of the evidence, explaining as follows:

> [T]he testimony is specific that the child did not report the alleged occurrence to her but rather to a third party. There is nothing in the case which would so connect the mother with it as to justify the admission of testimony referring either to trouble between her and the respondent or to her threats against him.

Id., 26 A.2d at 656. In *Berube*, as in the instant case, the defense sought to elicit testimony that could only lead the jury to speculate because no relevant connection between that testimony was established by the evidence. In *Berube*, as in the instant case, the defense that the victim's family had an axe to grind needed to be substantiated by some evidence connecting it to the actual crime. As this Court observed in the context of an alternative suspect defense, "a defendant cannot be allowed to use his trial to conduct an investigation that he hopes will convert what amounts to speculation into a connection between the other person and the crime." *Dechaine*, 572 A.2d at 134. [14]

[14] A helpful analogy illustrating this concept can be drawn to the caselaw regarding alternative suspect defenses. In Maine a "defendant is permitted to present evidence tending to establish that another is responsible for the crime for which he is charged, and the trial court must admit that evidence 'if it is of sufficient probative value to raise a reasonable doubt as to the defendant's culpability.'" *State v. Reese*, 2005 ME 87, ¶ 10, 877 A.2d 1090 (quoting *State v. Bridges*, 2003 ME 103, ¶ 39, 829 A.2d 247). As with any failure of proof defense, this Court ruled that in the alternative suspect context there must be a "connection between the alternative perpetrator and the crime through *admissible evidence*." *Bridges*, 2003 ME 103, ¶ 39, 829 A.2d 247. Here there was no competent and admissible evidence of a connection established between Appellant's threat to the victim's cousin and the Appellant's sexual assault of the victim.

Furthermore, there are real M.R. Evid. 403 issues with the cousin's testimony. There was a danger that the jury would confuse the issues if evidence of Appellant's threat to the cousin was admitted without any context provided regarding whether that threat was communicated through a chain [redacted] to the victim, none of whom testified to such. In that sense this case is most akin to *State v. Houston*, wherein the Law Court affirmed a trial court's exclusion of evidence about a collateral business dispute between the defendant and the victim "that was likely to confuse or mislead the jury." *Houston*, 534 A.2d at 1294 n.1. The danger is even greater in the instant case where the defense being peddled requires the jurors to stack inference, upon inference, upon inference without ever being grounded in evidence.[15]

B. The Harmless Error Analysis

Finally, assuming arguendo that it was error for the trial court to exclude the cousin's testimony, the error was harmless. Trial counsel objected to the exclusion of the cousin's testimony and properly preserved the issue. Ergo a harmless error analysis is appropriate. The State acknowledges that it "has the burden of persuasion on appeal in a harmless error analysis." *State v. Dolloff*, 2012 ME 130,

[15] In support of the relevance the Appellant suggested "[[redacted]] tells [the victim's cousin] about the threat of -- of Dan is maybe going to kill him. In turn, [the cousin] is confronted by [redacted] and [redacted] tells the victims mother who tells the victim." 2Tr. 135. Appellant further urged that "it's plain to me that this man, this young man, has a bias against Dan Cardona and that he -- [redacted], and [the victim's] mother, and -- and hence [the victim] all worked this together and have come up with this case." 2Tr 136. Those successive inferences, unsupported by any testimony, call for speculation, not reasoned connection.

¶ 39, 58 A.3d 1032. If a trial court improperly restricts a defendant's right to elicit testimony demonstrating the bias of a witness, it is considered a violation of the Sixth Amendment's Confrontation Clause. See *Delaware v. Van Arsdall*, 475 U.S. 673 (1986); *Arizona v. Fulminante*, 499 U.S. 279, 308 (1991). When an error occurs during a trial and it is "of constitutional magnitude, the appropriate harmless error inquiry is whether, after a review of the whole record, we are satisfied beyond a reasonable doubt that the error did not contribute to the verdict obtained." *State v. Warren*, 1998 ME 136, ¶ 17, 711 A.2d 851.

Therefore, the "harmless error inquiry focuses on the importance to the defense of the evidence excluded and the prejudicial effect of the exclusion." *State v. Begin*, 652 A.2d 102, 105 (Me. 1995) (citing *United States v. Yefsky*, 994 F.2d 885, 897 (1st Cir. 1993)). According to the *Warren* Court, whether "such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts." *Warren*, 1998 ME 136, ¶ 18, 711 A.2d 851. Those factors include "whether the testimony was cumulative, [and] the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points." *Id.*

In this case, Appellant elicited testimony that he had previously sexually assaulted [redacted] and argued that [redacted] was therefore trying to "turn the tables" on Appellant by persuading the victim to falsely accuse Appellant of a

similar sexual assault. 4Tr. 42. He also elicited the testimony that Appellant had been accusing the victim of having an incestuous secret relationship with her cousin and/or another female; evidence Appellant made clear was central to their case.[16] Even on appeal Appellant recognizes that the State's summary of that defense was "aptly recapitulated" by the State when in its closing the State observed that those were the two planks of Appellant's defense. Appellant's Br. 9.

Given that evidentiary landscape, the alleged fact that Appellant threatened the victim's cousin (without evidence establishing her knowledge of such) could never be more than blue-on-black. That is, it would be almost indistinguishable against a back drop of those much more serious allegations. It is not reasonable to accept that upon learning of the victim's knowledge that [redacted] was sexually assaulted by Appellant, and that she was being accused of having a sexual relationship with her cousin by Appellant, a finder of fact would ***not*** accept that defense theory but upon learning of a much less serious incident without evidence of a connection to the victim the finder of fact ***would*** accept the defense theory.

In that sense, the testimony was cumulative in the same way a grain of sand added to a heap of dirt is cumulative. As such, it is evident beyond a reasonable doubt that the error, if it occurred, "did not contribute to the verdict obtained."

[16] "Your Honor, the theory of our case is that [redacted] and the [redacted] family and the [redacted] family have now put this story together, and they did so in retaliation for Dan making statements about the cousins having sex with one another. And they were quite upset about that and the -- and this is retaliatory." 1Tr. 22-23.

Warren, 1998 ME 136, ¶ 17, 711 A.2d 851. Once "a jury has been given a case and has done its work in deliberating and deciding on guilt or innocence, serious and manifest injustice must be present before we will set such a verdict aside." *Dolloff*, 2012 ME 130, ¶ 39, 58 A.3d 1032. On these facts the Court would be remiss to find that the error, harmless as it was, created a serious manifest injustice.

Conclusion

Appellee respectfully requests that this Court not vacate Appellant's conviction. Neither assignment of error complained of by Appellant is merited. Appellant opened the door to testimony about his reputation because he introduced a certain defense. That testimony was also relevant to show Appellant's motive, intent and opportunity to have unlawful sexual contact with his grand-niece. Furthermore, the trial court properly excluded the testimony of the victim's cousin after *voir dire* revealed that it was irrelevant and could only invite the jury to speculate or confuse the issues.

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CERTIFICATE OF SERVICE

I, Christopher Coleman, hereby certify that a true copy of the above Appellee's Brief was sent to Appellant's attorney Rory McNamara, Esq. by virtue of email this June 20, 2025.

6/20/2025
Date

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