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

REPLY BRIEF OF APPELLANT

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First Assignment of Error

I. The court committed reversible error by admitting the sex-toy evidence.

A. The sex-toy evidence was not admissible "character" evidence.

Defendant has three responses to the State's argument that the sex-toy evidence was admissible to rebut supposed evidence of good character "placed before the jury" by the defense: (1) Rule 405 simply does not permit it; (2) the State, having been the first to broach the foster-child evidence, faced no risk of prejudice sufficient to offer counter-proof; and (3) three sentences in the defense opening statement – to which the State lodged no objection – did not justify admission of the sex-toy evidence as a rejoinder.

1. Rule 405 precludes the sex-toy evidence as supposed "character" evidence.

"Rule 404 governs *what* character evidence may be admissible. The *method* of proving such character, however, is governed by M.R. Evid. 405. In *all instances* in which character evidence is admissible for any reason, Rule 405 unambiguously sets out the only permissible ways in which such character may be shown." *State v. Kirk*, 2005 ME 60, ¶ 11, 873 A.2d 350 (emphasis in *Kirk*). Rule 405 provides only two such "methods" even possibly[1] availing to the State's argument and court's ruling: "When evidence

[1] Rule 405(b) – "When a person's character or character trait is an essential element of a charge, claim, or defense, the character or trait may also be proved by relevant specific instances of the person's conduct" – is clearly inapplicable because defendant's "character" was not "an essential element" of the charge or defense.

of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation. On cross-examination of the character witness, the court may allow an inquiry into relevant specific instances of the person's conduct." M.R. Evid. 405(a).

Starting at the end, the second sentence of Rule 405(a) is inapt because, as to the friend,[2] the sex-toy evidence was not elicited on cross-examination, and as to E, she – the complainant – is certainly not a "character witness." That leaves only reputation evidence. Clearly, evidence about the sex-toy is not reputation evidence; defendant did not have a reputation for providing young females with sex-toys. As a matter of law, one or two people cannot be the basis for "reputation" evidence. *Cf. State v. Kalex*, 2002 ME 26, ¶ 19, 789 A.2d 1286 (two to six people is too small a sample for reputation evidence). Thus, the sex-toy evidence was not properly admitted. Defendant continues on, nevertheless, to demonstrate further, alternative bases for reaching the same conclusion.

2. The State faced no threat of prejudice from the foster-child evidence.

According to the State, the defense opened the door to the sex-toy evidence by eliciting this brief testimony from E's mother:

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

[2] As he did in the Blue Brief (see 8 n. 2), defendant utilizes pseudonyms for his family members.

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?

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.

2Tr. 160; Red Br. 12 (identifying this evidence). This is the sum of the evidence that, according to the State at trial, left the prosecutors "really struggling to know if we can get a fair trial here." A46; 3Tr. 5. Such, the State's attorneys represented to the court, left "a heavy burden that weighs against the State now." *Id.* The grievous harm resulting from this exchange left the State with no choice but to seek to offer the sex-toy evidence in rebuttal. *Id.*

On appeal, though, the State is a far bit more sanguine about the evidence which *it* insisted[3] be aired *before* the supposed-door-opening

[3] The State twice writes that it "was forced" to seek admission of this evidence pursuant to the rule of completeness. Red Br. 8, 20. It adds that it would be "unfair" to hold its request to admit this evidence against the State. Red Br. 20. Respectfully, if, on one hand, the State believes it nearly lost its chance at a "fair trial" by the defense's subsequent, brief evidence on the topic, why didn't the State seek to exclude the much more detailed exchange it instead requested be admitted?

exchange cited above. It describes the prior evidence admitted at its behest as "brief and vague" and containing but a "passing reference" to the foster child. Red Br. 8, 20. Here it is:

Mom: I just want – like I mentioned to you outside – I just to reiterate that there is a two-year-old that's staying in the house. That is – she is a ward of the State. [redacted]'s fostering her right now. So –

Officer: Umm.

Mom: I mean, I don't know how, how –

Officer: Yeah, it's –

Mom: – it plays out, so.

Officer: Yeah, I know. Umm. I mean, my first thing would be to tell you is letting the caseworker or DHHS know. She's a ward of the state then – however, they're gonna want to know why, and if you tell them that you filed a police report for that then they're potentially, they're gonna have to talk to [defendant's] wife and possibly him which would let him know that this is pending and – how do you think that would go over, know what I'm saying?

Mom: Right, yeah, no. I really think – just because of the allegations thing my family's been sort of up and [redacted]'s very defensive and umm – but [redacted] can validate his umm –

Officer: Right.

DX 18 ca. 23:45 to 25:10.

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Officer: I would – considering the fact that she's a ward of the state – I would, I would still report it to DHHS if I were you and let them handle it, say, hey, we filed a report we're going to the police department about an incident involving him and we understand that it will they will be investigating that and wanna let you know because there is – the child is in foster care in that house, you know, so they can be aware of it and its, obviously, it'll probably be upsetting to [redacted] [redacted] umm and obviously it would let [defendant] know, but, you know what, that's his problem to deal with.

Mom: Exactly. And that's the way –

Officer: And this wouldn't be an issue if he, you know ---

Mom: Right.

Officer: I would, that's what I would do.

Mom: My concern is my daughter and the fact that this is a two-year-old that doesn't have a voice, you know.

Officer: Exactly. So, yeah, I would let 'em know. Umm and how – and so – we'll give you the case number

before you leave if they want to say what's the umm

– so I think they'll be able to find out anyway, so.

DX 18 ca. 26:20 to 27:40. Combined, the evidence introduced at the State's request went on for about three minutes.[4]

Clearly, the State had nothing to fret about. The evidence it succeeded in bringing forth was far more detailed and – if its arguments are to be credited – prejudicial to it than that which, a day later, the defense elicited about the same thing.

Again, the analysis need not continue. Defendant presses on only to develop a final reason why the sex-toy evidence was erroneously admitted.

3. Defendant's opening statement did not open the door to the sex-toy evidence.

The State contends that it was entitled to introduce the previously excluded[5] evidence about the sex-toy because of this line, from defense counsel's opening: "There's no suggestion that [defendant] has done this to any other child. He has a criminal history of a disorderly conduct in 1978

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[4] Whatever else the court's limiting instruction might have meant, it explicitly permitted jurors to consider the video "to evaluate E's disclosure and as well in [their] overall determination of credibility." 2Tr. 30. It is the State's very thesis that the foster-child evidence was relevant to defendant's argument that he, not E, was credible and that E's disclosure was untruthful. Jurors might have felt that such evidence was relevant to "E's disclosure" and "credibility" – *e.g.*, E's mom's genuine concern about the foster-child evinces that the disclosure was not fabricated.

[5] In a cursory footnote, the State contends that the sex-toy evidence should not have been initially excluded. Red Br. 12 n. 3. In addition to being waived for lack of development, the argument is counter to the plain language of Rule 403, which permits exclusion for "wasting time" – certainly encompassing last-minute continuances occasioned by unfair surprises.

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.

That's the thread that the State must now cling to, and on which the court's ruling hangs. This, in the State's view, *see* Red Br. 15 (citing this), is how defendant "put his character before the jury" in a manner that allowed the State to introduce its sex-toy evidence. It cannot argue that there is any *evidence* of defendant's clean criminal record, as none was offered. *See* Blue Br. 19. Just this argument.

At trial, the State didn't object to these three sentences in defense counsel's opening. Yet, now it must contend that they were so very prejudicial to it that it had to be allowed to offer evidence about the sex-toy in order to preserve its right to a fair trial. What about the principle, often repeated by this Court, that because arguments of counsel are not evidence, a court's admonition not to credit them salves any prejudice? *E.g.*, *State v. Osborn*, 2023 ME 19, ¶ 25, 290 A.3d 558. In fact, the court gave several such instructions, at least one before the State claims it had to succumb to the need to offer the sex-toy evidence. *See* Blue Br. 19-20 (documenting them). Shouldn't those instructions also forestall prejudice to the State?

B. The State's new theory: Its non-character evidence.

Finally, and 180 degrees from its argument that the sex-toy evidence was necessary character evidence – the State now posits a potpourri of other theories of relevance, under the banner of non-character evidence. For example, the sex-toy evidence, it argues, was relevant for purposes of establishing that defendant had "motive, intent and opportunity," Red Br.

16-17; and "to rebut the misleading defense theory that the victim" had motive to fabricate the allegation. Red Br. 18-19. Defendant observes that the muddled nature of the State's theory of admissibility – is it character evidence or non-character evidence? – again underscores its lack of necessity to offer rebuttal evidence, as well as the lack of "fit" or "proportionality" to the supposed door-opening evidence.

A more fundamental problem lurks in the State's varied theories. An overly expansive conception of what it means to open the door permits an enterprising prosecutor to argue that just about any defense whatsoever opens the door. Following the State's argument to its conclusion, a defense lawyer, just by reminding jurors to scrutinize the State's witnesses for motives to fabricate, would open the door to any and all otherwise inadmissible evidence that, no, in fact defendant *did* do it. That seems like the State's theory here: Simply because the defense resisted the State's case, the State was entitled to offer previously excluded evidence to prove that defendant was "obsessed" with E's "chastity" and that its witnesses were honest and forthright.

Implicit in every defense is that the defendant didn't do it. Implicit in virtually every defense is that the State's witnesses are wrong, most often because they're fabricating. The State asks this Court to endorse the admission of otherwise excluded evidence to "rebut" these standard, practically uniform, truisms. Were this Court do so, the door would be propped permanently open for any otherwise admissible evidence.

Maine courts expect parties to avail themselves of possible remedies before complaining of prejudice. *State v. Foster*, 2016 ME 154, ¶ 10, 149 A.3d 542. In offering guidance to trial courts about the scope of the opening-the-door doctrine, this Court should bear that principle in mind. In our case, the fact that the State eschewed any lesser remedy indicates two things. From a procedural viewpoint, the State should not thereafter be permitted to benefit – obtaining the admission of evidence that was otherwise inadmissible – from its strategic choices. Second, on a factual level, the State's omission to object, seek a curative or limiting instruction, ask for a mistrial, or anything of the sort speaks loudly: There clearly was no threat of prejudice to it from evidence that defendant had a foster child in his home. That's why there was no objection.

It is exceedingly difficult for attorneys to know what a judge, after the fact, will determine to be sufficient to "open the door." Unpredictability and uneven application are one thing. It is something much worse, though, for unpredictability to be coupled with a conception of 'fit' or 'proportionality' as gaping as that demonstrated in this case. Recall, the court's warning concerned the possibility that defense counsel might open the door so by offering evidence about E's "chastity." A39; 1Tr. 19; Red Br. 18. If evidence about a foster child and three lines of argument about a spotless criminal record constitutes inquiry into E's chastity, justifying counterevidence about a sex-toy, there's probably not much that can't be squeezed through the doctrine's capacious doors.

In closing, defendant notes that the State has not argued that admission of the sex-toy evidence was harmless. Given its presentation of a harmlessness argument as to the second assignment of error, the State is clearly aware of the importance of doing so, were it to determine that such an argument is viable. Its knowing – therefore, affirmative – choice not to do so here is waiver. *Cf. United States v. Murguia-Rodriguez*, 815 F.3d 566, 572-73 (9th Cir. 2016) (prosecution waives harmlessness by not briefing it or mentioning it without elaboration).

Second Assignment of Error

II. The court committed reversible error by excluding evidence about defendant's threat to kill E's cousin.

It is apparent that neither the State nor the court has understood why defendant sought to introduce that defendant threatened to kill the cousin. He did not offer it for the truth, counter to the court's hearsay-ruling. The State tacitly acknowledges the unsoundness of the court's reasoning, making no effort in its brief to defend the ruling on hearsay grounds. Nor was defendant's threat offered, as the State mischaracterizes it on appeal, to prove that E alone took the initiative, as a result, to fabricate the allegation against defendant. Rather, the threat-evidence was offered to prove that the *family, collectively* fomented the threat – that is, *they* "turned the tables" against defendant to get back at him.

Anyway, it would have been more than reasonable for jurors to conclude that the whole family, *including E*, knew of the threat. In the five-minute voir dire of the cousin that the court reluctantly accorded defense counsel, the cousin explained that the threat was initially conveyed to E's brother. A83-85; 2Tr. 144-46. The brother then told his mother and father – that is, E's mother and father – about the threat. A84; 2Tr. 145. Jurors heard the mother's angry call to defendant that night, the mother telling defendant, "my own child, someone that you have spoken words to" had made her "upset" enough to call defendant and confront him. DX 19 ca. 3:35. The mother complained that her son, "is telling me all these things that you say to him." DX 19 ca. 5:05. The son was "so bothered" by what defendant

had told him that the mother would no longer permit him to visit defendant's wife. DX 19 ca. 7:00. [redacted], the one who soon thereafter came out of the blue to level an allegation against defendant that was "eerily similar" to E's – then related the threat to the cousin. A84-85; 2Tr. 145-46. Collectively, they then went to the police station to file an official complaint. 1Tr. 60-61.

This is a rather extensive trail; certainly, it is not an "unreasonable" basis, as the State claims, for jurors to reason that E and her whole immediate family – her parents, her brother, [redacted] and the cousin, etc. – collectively had motive to turn the tables against defendant.

Respectfully, prosecutors and courts cannot have it both ways – drawing jurors' attention to the importance of proof that witnesses are motivated to lie while, on the other hand, barring defendants from offering reasonable proof of such motive. As a matter of course, Maine courts instruct jurors to search high and low for witnesses' "motive to fabricate." *See* Alexander, *Maine Jury Instruction Manual*, *General Witness Evaluation. Instruction* § 6-24 (2024). They do so even though some view such an instruction as impliedly saddling a defendant with a burden to prove that a witness against him was motivated to fabricate. *Cf. State v. Lipscombe*, 2023 ME 70, ¶¶ 15-16, 304 A.3d 275. The court below gave just such an instruction. 4Tr. 81 (instructing jurors to consider "whether there has been any evidence introduced of any motive or lack of motive for a witness to exaggerate or lie."). And the State leaned heavily into the theme, arguing in

opening that the evidence "will show that E had no motive to make this up." 1Tr. 43. In closing, it added,

> Most importantly, ladies and gentlemen, there's no evidence that E had a credible motive to lie. Is it really reasonable to believe that the mother, [redacted] and E conspired to set up [redacted] Dan? Why would they do that?

4Tr. 71.

The problem is, they *did* all have a motive to lie: Defendant had threatened to kill [redacted]. The court prevented jurors from hearing it, at the State's request. When courts and prosecutors heartily and repeatedly focus jurors' attention on evidence or a lack thereof of witnesses' motivation to lie, it is difficult to credit the notion that the exclusion of evidence that the whole lot of State's witnesses had a motive to lie is harmless beyond a reasonable doubt.[6] Reversal is required.

CONCLUSION

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

Respectfully submitted,

July 14, 2025

/s/ Rory A. McNamara

[6] The State has appropriately conceded that, as the error is of constitutional magnitude, the State must prove harmlessness beyond a reasonable doubt. Red Br. 26.

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CERTIFICATE OF SERVICE & 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