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

LAW COURT DOCKET NO. And-25-364

**STATE OF MAINE**
**Appellee**

v.

**DUANE D. HANSON**
**Appellant**

ON APPEAL from the Androscoggin County
Unified Criminal Docket

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# REPLY BRIEF OF APPELLANT

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## ARGUMENT

### *First Assignment of Error*

### I. The court erred by excluding the witnesses' testimony that Victim told them someone other than defendant assaulted her.

This evidence was admissible both substantively and for impeachment. Defendant begins with the substantive purpose, as that obviates the need for the Court to consider the impeachment-admissibility (though defendant nonetheless analyzes it).

#### A. The statements were admissible as substantive evidence.

##### 1. The statements are excepted from the hearsay-bar and are neither "speculative" nor "conjectural."

Defendant argued, *see* Blue Br. 25-27, that Victim statements that someone else assaulted her are not hearsay, excepted as they are by M.R. Evid. 801(d)(1)(C). The State has responded simply that 801(d)(1)(C) does not apply because "[o]n voir dire, Victim denied" making those statements. Red Br. 32. Respectfully, that is not how 801(d)(1)(C) works.

As Judge Weinstein confirms:

> If at trial the eyewitness fails to remember or **denies** that he made the identification, the previous statements of the eyewitness can be proved by the testimony of a person to whom the statement was made, and the statement can be given substantive effect.

*Weinstein's Federal Evidence*, ¶ 801(d)(1)(C)[01], at 801–222, quoted in *United States v. Brink*, 39 F.3d 419, 424-26 (3d Cir. 1994). In other words, Victim out-of-court statements are not hearsay even if they are inconsistent

with her trial testimony. *United States v. Calhoun*, 2023 U.S. Dist. LEXIS 32070, ** 2-3, 2023 WL 2244674, * 1 (E.D. Mich. 2023). The State is simply mistaken.[1]

The State's remaining contention – there is no "reasonable connection" to alternative suspects – fares no better. Victim admitted to the three witnesses that someone else assaulted her! Of course that is neither speculative nor conjectural. A contrary ruling would bar the State, in its future prosecutions, from introducing alleged-victims' since-recanted allegations. *See* Blue Br. 24-25, discussing *State v. Kimball*, 2015 ME 67, ¶¶ 11-12, 117 A.3d 585. Anyway, there was plenty of other corroborating evidence – from Victim own daughter (Victim reported her injuries were caused by others) and forensic evidence (Victim injuries not consistent with punches, consistent with infliction by an object). *See* Blue Br. 21, 30 (discussing corroboration).

This Court need not analyze anything more: At this point, the court erred in excluding Victim out-of-court statements. Defendant presses on only arguendo.

### 2. Defendant had a constitutional right to introduce the statements as substantive evidence.

Put aside the rules of evidence for a moment, as that is what the constitutional analysis requires. Would it comport with anyone's expectation

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[1] As defendant argued in the Blue Brief (at 27 n. 6), at the very least, even were 801(d)(1)(C) not availing as a matter of law, remand would be necessary for the trial court to consider other hearsay-considerations it did not consider before, à la *State v. Gleason*, 2025 ME 52, ¶ 24, 339 A.3d 774.

for fair fact-finding were three witnesses barred from telling the jury that the victim told them that someone other than the defendant committed the crime? At the gut-level, that is an absurdity. It is difficult to imagine even a prisoner of conscience in some hastily convened tribunal in Siberia being denied leave to offer evidence that someone else admitted committing the offense for which he stands accused.

In contrast, what was the State's legitimate interest in excluding the statements? There can be no serious argument about "waste of time." In aggregate, it would have taken perhaps 90 seconds – amidst a nine-day trial – for the anyway-testifying witnesses to swear to Victim statements. That would have been far shorter than the voir dire of Victim that the court ordered in lieu of admission of thosee statements. It would have been far shorter than necessitating lengthy appellate litigation about admissibility.

This Court's "alternative-suspect" test, respectfully, is entirely unnecessary. Here, it led to arbitrary results. Defendant went to trial to present the evidence of an alternative suspect, and it was patently admissible.

**B. In addition, the statements were admissible for purposes of impeachment.**

Defendant need not spill much ink here, given the foregoing analysis. Nonetheless, the statements – about the identity of the perpetrator – are neither "extrinsic" nor "collateral."

The doctrine of "collateral" and "extrinsic" impeachment evidence, as implied by those very terms themselves, encompasses considerations

secondary to the issue of guilt or innocence. *See* 1 McCormick on Evidence § 45 (Feb. 2025 update) (neither collateral nor extrinsic if "relevant to a fact of consequence on the historical merits of the case"); *id.* (not collateral "when it relates to a so-called 'linchpin' fact"); ("A matter is deemed 'collateral' if the matter itself is irrelevant to establish any fact of consequence in the litigation…."); *id.* ("[F]or purposes of impeachment a part of the witness's story may be attacked when as a matter of human experience, she could not be mistaken about that fact if the thrust of her testimony on the historical merits was true."). It would be stunning indeed were a victim's statements about who assaulted her deemed "collateral" or "extrinsic."

*McCormick* also explains how notions of what is "collateral" bend in relation to whether the opposing party has "opened the door." *Id.* Is there any doubt that, by accusing defendant of being the perpetrator, the State "opened the door" to evidence that, actually, Victim told three other people that he wasn't the perpetrator?

**C. Exclusion was not harmless.**

Defendant was acquitted of multiple charges. That forecloses any notion that the evidence against defendant was overwhelming. They simply did not believe everything that Victim said and the State sold.

The State makes too much of the milquetoast and confusing closing argument the defense was allowed to make:

> If you're trying to mend those bridges, is it easier to say that in the depths of your addiction, you were led to do things that your nor [sic] proud of to get drugs. Angering other people involved

> with drugs and similarly dangerous people was easier to say that Duane Hanson did all of it.

(8Tr. 91-92). Even the transcriptionist couldn't make sense of it. And, after a nine-day trial, it is telling that this fleeting passage is what the State holds up to disprove prejudice. The defense informed the trial court, "[W]e want [defense counsel] to be able to do more" than just that. 7Tr. 82. Counsel represented, "[I]f I were given the full ballpark and Your Honor agreed with alternative suspect evidence, I would have expanded this [closing argument]." 7Tr. 83. Even before closing, the court told counsel, "I'm not going to let defense counsel go any further." 7r. 86.

Three witnesses would have testified that Victim said someone else did it.[2] The issue of harmlessness therefore comes down to credibility – whom would jurors have believed, Victim or the three witnesses? Jurors, not appellate courts, are the arbiters of credibility. So, even when the jury *could* have disbelieved the witnesses and believed Victim a reviewing court can have no confidence beyond a reasonable doubt that "it *would* have done so." *Smith v. Cain*, 565 U.S. 73, 76 (2012) (per curiam) (emphasis in original). All the convictions must be vacated.

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[2] The fact that one witness blurted out, in a non-responsive manner, something along the lines that a drug-dealer injured Victim *see* Red Br. 33-34, doesn't move the needle. First, these are not Victim statements. Second, they refer to some time "in June." Third, defense counsel's evident reluctance to press the witness on his testimony (because counsel knew he was forbidden to do so), if anything, indicated defense *doubts* about the veracity of the witness' assertions. Fourth, the court's rulings prevented defense counsel from referring to this evidence in closing.

*Second Assignment of Error*

## II. The court erred by permitting the State to introduce duplicitous evidence that materially varied from that alleged in the indictment.

### A. The objection was preserved; review is de novo.

The State contends that de-novo review is inappropriate because "trial counsel never made nor developed such an argument" about duplicity or material variance. Red Br. 38. It believes that defendant preserved only a Rule-403-and-404(b) argument.[3] *Id.* However, M.R. U. Crim. P. 51 does not require intonation of magic words. Indeed, this Court has startlingly little decisional law containing the terms "duplicity" and "material variance" in our context, so it's no surprise that trial counsel did not use them.

Rule 51 simply requires a party seeking to preserve an objection to ask the court to do something and explain why. Counsel did that. *See* A106-A107 (seeking to exclude because it's "outside of what I would consider the on-or-about date"); 1Tr. 117 (seeking to exclude because defendant "prepare[d] for trial" based on "two indictments"); *id.* (seeking to exclude because of last-minute notice "two hours before" trial). The court clearly understood that defendant was arguing that the June/July/"whole summer" evidence was uncharged, overruling that objection because, in its view, "the

[3] Just as the State plied two alternative theories of admissibility – substantive ("on-or-about") *and* 404(b) (other purposes) – so did defendant have two constituent objections: 1) exclude it because it was not sufficiently "on or about"; and 2) exclude it because it's not proper 404(b) or is too prejudicial.

indictment charges" dates "within that – that reasonable time limit, on or about gets us there." A107.

### B. On the merits, the variance was material.

Our case, respectfully, epitomizes a significant problem with Maine criminal practice: The prosecution routinely gets to throw everything against the wall and see what, if anything, will stick. Other jurisdictions do not permit months-apart incidents to stand in for the offenses that were actually charged and indicted. There are numerous reasons why.

#### 1. Defendant has zero ability to identify what he's been acquitted and convicted of.

Forget the present assignment of error, for a moment. Imagine that defendant prevails on the first issue (*i.e.*, exclusion of Victim statements), necessitating vacatur and remand. What, then, consistent with the Double Jeopardy Clauses, can he be tried for a second time?

Recall: He was acquitted of some assault-charges. *Which* incidents? Nobody can say for sure, because the jury was not asked to restrict its verdicts to the charged incidents. *Any* portion of the State's case – its *entire* evidentiary presentation – may be what the jury acquitted defendant of. We can only guess. Obviously, this is a huge problem, as, by law, he shall not be subjected to a subsequent prosecution for anything he's been acquitted of. *United States v. Ball*, 163 U.S. 662, 671 (1896).

With all respect, the State seriously misreads the Blue Brief, writing, "[T]he court's jury instructions on 'specific unanimity' and 'date of the offense' remedy any double jeopardy concern, which Hanson appears to

acknowledge." Red Br. 42. Defendant vehemently disagrees. All specific unanimity did here was ensure jurors agreed on one identifiable incident per every charge. Nothing was done to limit *which* incidents the jury based its verdicts upon. That is the crux of the double jeopardy problem: We simply don't know of what defendant's been acquitted or convicted.

### 2. The grand jury right was nullified.

Defendants have a constitutional right to prosecution only after an indictment. *See* ME. CONST. Art. I § 7. Here, the grand jury returned an indictment relating to August 21, October 12 and October 29. Did the grand jurors even *hear* evidence about the June/July/"whole summer", let alone *indict* based on them? Unless the answer is 'yes' – and we'll never be able to say for sure[4] – defendant's constitutional right has been nullified by the court's decision to permit the trial jurors to convict based on incidents outside the scope of the indictment.

### 3. Defendant has no ability to confine the sentencing court to consideration of only "the offense."

The most impactful part of selection of an appropriate sentence is identification of the basic sentence. Courts are lawfully authorized to consider only "the nature and seriousness of *the offense*." 17-A M.R.S. § 1602(1)(A) (emphasis added). How can that possibly be done when nobody knows what "the offense" is? The court below guessed, identifying what it

[4] M.R. U. Crim. P. 6 and decisions like *State v. Moore*, 2023 ME 18, ¶¶ 14-21, 290 A.3d 533 make it virtually impossible for Maine defendants to obtain information about grand jury proceedings – again, unlike most other jurisdictions.

felt was “the offense.” Given the duplicitous evidence – not to mention the acquittals – sentencing by guesswork is not harmless.

### 4. The ruling undermined defendant’s notice and preparation.

Experienced counsel told the court that its ruling rendered them less than prepared. 1Tr. 117. Without doubting the State’s assertions that the June/July/“whole summer” allegations were detailed in discovery, that is simply no salve.

It was admittedly conceivable before trial that the court would entertain admission of the June/July/“whole summer” evidence for *404(b) other-acts purposes*. Yet, the court permitted the June/July/“whole summer” evidence as *substantive evidence* of guilt. Counsel should not have foreseen *that*.

The difference matters for purposes of notice and preparation. How much “collateral” and “extrinsic” evidence would a defendant prepare to counter mere other-acts evidence not admitted as a charged incident? Why would a defense lawyer create a trial within a trial and draw attention to uncharged allegations admitted merely to prove “relationship of the parties”?

On the other hand, if, suddenly, that same evidence will be admitted as if it were charged conduct, defense counsel would need a different strategy. They would need to investigate and adduce evidence to attack the evidence head on. The variance sprung at trial created this very conundrum.

### *Third Assignment of Error*

## III. The court erred or misapplied principle at each step of its sentencing analysis.

### A. The court considered other than "the offense" – if that can even be discerned.

Regarding sentencing, the State – like the court – confidently believes the worst: "'All these injuries were caused by the defendant's vicious multi-day beating.'" Red Br. 44, quoting STr. 52-53. It describes what it believes are "factually correct" statements by the court. Red Br. 44. It credits the court's certification that it "'considered only the defendant's conduct in actually committing the crime at hand.'" Red Br. 45, quoting STr. 51.

Of course, given the duplicity discussed above, we simply have no idea what defendant was convicted and acquitted of. The "crime at hand", what might be "factually correct", and even the existence of a "multi-day beating" – these are all in the eye of the beholder. They do not necessarily reflect "the offense" of which defendant was convicted by a jury of his peers. *See* 17-A M.R.S. § 1602(1)(A) (sentence must be based on "the offense"). Given the duplicity, the jury may not have even considered the "multi-day beating"; it may have evaluated a totally different "crime at hand"; it may have acquitted defendant of things the court and State feel are "factually correct."

Even assuming that the court somehow chose "the offense" of which the jury actually convicted defendant, it necessarily aggregated other incidents into its consideration. Defendant discussed this at pages 45 through 47 of the Blue Brief, and he does not read the Red Brief to contest any of the specific points he made there.

### B. The court failed to address the death of defendant's child.

*All* of defendant's criminal history follows the tragic death of his young son. Defense counsel sought mitigation for this and defendant's childhood abuse. The court did not even address the argument, and, on appeal, the State suggests that the impact of the boy's death on defendant is not "'significant'" and "'relevant'" enough to warrant a judge's mention. Red Br. 46, quoting *State v. Reese*, 2010 ME 30, ¶ 34, 991 A.2d 806.

To the contrary, it very much matters *why* someone has turned to crime. A defendant's background is not something too insignificant or irrelevant to matter when imposing a sentence. A court's failure to even address such things as these suggests to observers that sentencing is arbitrary and predetermined.[5]

## CONCLUSION

For the foregoing reasons, this Court should vacate defendant's convictions, or, in the alternative, vacate defendant's sentences, then remand for proceedings not inconsistent with its mandate.

Respectfully submitted,

March 27, 2026

/s/ Rory A. McNamara

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[5] Defendant has no occasion to argue more about the court's step-three errors, given the State's argument. *See* Red Br. 48; M.R. App. P. 7A(c).

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## CERTIFICATES OF FILING & SERVICE

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

/s/ Rory A. McNamara