

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

LAW COURT DOCKET NO. Ken-25-572

STATE OF MAINE
Appellee

v.

CHRISTOPHER A. CONNORS
Appellant

ON APPEAL from the Kennebec County
Unified Criminal Docket

REPLY BRIEF OF APPELLANT

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ARGUMENT

First Assignment of Error

I. The court erred by admitting two portions of the CAC video.

The State's primary contention is that the complainant's "answers were not elicited by suggestive or leading questions but were responsive to open-ended or clarifying prompts..." (Red Br. 18-19). Defendant of course disagrees, as to the two portions of the interview identified in the Blue Brief.

A. Repeated questioning is often suggestive, and it was here.

As the State acknowledges, questioning prohibited by 16 M.R.S. § 358(3)(B) is such that "suggests the answer sought to the person being questioned." (Red Br. 21; citation omitted). Contrary to the State's brief, however, repeated questioning is suggestive. "When a child is asked a question and gives an answer, and the question is immediately asked again, the child's normal reaction is to assume that the first answer was wrong or displeasing to the adult questioner." *State v. Michaels*, 642 A.2d 1372, 1377 (N.J. 1994), citing Debra A. Poole and Lawrence T. White, *Effects of Question Repetition on Eyewitness Testimony of Children and Adults*, 27 *Developmental Psychology*, November (1991) at 975. Children are particularly susceptible to this phenomenon:

[W]hen you start directing variations of the same question to a child and asking those question variations time and time again, you send a message to the child that says 'I'm less than enthusiastic with how you are answering this question.' That's

how children will interpret it. And the child's interpretation is 'I've got to get this right, and to get this right I have to change my answer.' And under those circumstances, without intending to, with no premeditated malice whatsoever, an interviewer can lead a child into confirming the interviewer's a priori expectations that the interviewer took into the interview.

Jenkins v. Commonwealth, 308 S.W.3d 704, 710 n. 8 (Ky. 2010) (quotation; inverted commas added for clarity). “Relative to adults, children are more suggestible because they find themselves in more situations in which they are unfamiliar.” Mary Ann King and John C. Yuille, *Suggestibility and the Child Witness*, in *Children’s Eyewitness Memory* 29 (Stephen J. Ceci et al. eds., 1987).

In our case, the first instance of suggestiveness is so intuitive that a simple rhetorical question illuminates its impermissibility: What, exactly, is ambiguous about the answer “Two days ago”?¹ Why did that need any follow-up, unless to “correct” a wrong answer? Why did the interviewer have to “clarify” that? Observe a second, very important consideration here: This exchange, about when the assault allegedly happened, preceded in time the more impactful exchange regarding whether the assault occurred over or under the complainant’s clothing. It thus primed the complainant to be aware that the interviewer would intervene were he to disfavor the

¹ The State has argued that such “looping” is an innocuous “technique in which the interviewer repeats the child’s prior answer to invite clarification.” (Red Br. 18).

complainant's answers. The interviewer would not tolerate unanticipated answers, and the complainant needed to be attuned to the need to fix them.

Turning now to that second exchange, notice the repeated questioning and other suggestiveness:

Q. And when he put his hand on your penis, was it over your clothes, under your clothes, or something else?

A. Over my clothes.

Q. Over your clothes. Okay. Alright.

SX 3 ca. 19:45. Whatever this looks like on paper, the video better reveals the circumstances of the underlined portion. The interviewer averts his eyes from the complainant, blinks several times, and his voice indicates that he is thinking out loud, as if wondering how he might redirect the response he's just elicited. It is a pregnant pause.

The interview continues:

Q. And you said he put his mouth on your penis, too. Can you tell me about your clothes when he put his mouth on your penis?

A. Above.

Q. I just want to make sure I understand. So you had pants on and underwear?

A. [Nods]

Here, the complainant *twice* states that the mouth-on-penis incident occurred over his clothing. He stated defendant's mouth was "above" his clothes. Then, when asked whether his clothes were on "when [defendant]

put his mouth on your penis,” the complainant nods in the affirmative. Unless the interviewer had a preconceived notion that the complaint would say something different during the interview, there seems little reason to press on.

The interview continues:

Q. Okay, where were your pants and underwear, when he put his mouth on your penis?

A. [Gestures to upper thighs] So here and kind of there. There [moving hand upwards].

Q. So, they were pulled down?

A. [Nods]

Notice what happens here: The interviewer had just elicited that the complainant “had pants **on** and underwear,” but he is now assuming – despite the prior answers to the contrary – that those articles of clothing are somewhere other than “on.” It is a contradiction in terms to say one has his underwear “on” when that garment is not covering the genitals. Notice also how the interviewer puts the words “pulled down” into defendant’s “mouth” (actually, the complainant merely nods), interpreting the boy’s hand position at or near the boy’s genitals to mean something farther “down.”

Then the interview proceeds:

Q. Okay. And did [defendant] pull them down?

A. [Nods]

Q. And what about your shirt? Was your shirt pulled up or was it off, or do you remember?

A. It was up.

Q. It was up. Okay. Alright. And did [defendant] pull them down – pull your pants down?

A. [Nods]

Q. Yeah.

The interviewer has just testified that defendant pulled down the complainant's pants. This came out of nowhere, other than the interviewer's expectation from his "pre-interview" intelligence gathering.

Section 358 is a paradigm-changer, altering the age-old belief that the crucible of direct- and cross-examination is the best way to elicit the truth. That new assumption presupposes, however, that the CAC-process is itself rigorous and adhered to scrupulously. Were this Court to take a hands-off approach, allowing interviewers leeway to push boundaries and affording lower courts boundless "discretion" to apply the Legislature's laws, justice will be hard to deliver. Witness-said/defendant-said cases are already particularly susceptible to unsound verdicts. Slackening further the standards for admissibility will yield more of them.

B. This court's role is plenary.

To quickly dispense with the State's contention that the issue is unpreserved, the court's *in limine* ruling was final: "I will grant the State's [m]otion in [l]imine to permit use of the CAC interview provided that there aren't any other issues that arise, which I don't expect to happen." (A20; 1Tr. 8.). Sure, the court left open the possibility that defendant might raise *different* "other issues," but nothing new could possibly "arise" about the

CAC video, recorded as it was over a year before trial. This “context” clearly evinces a final ruling. *See* M.R. Evid. 103(e). The State’s position, calling for an additional mid-trial objection, would place form over function and welcome collateral litigation.²

The State’s observations that the record is less than clear about what, exactly, defense counsel objected to at trial should not sway the Court. The parties had just discussed the objections in chambers, before briefly summarizing them on the record. (A20; 1Tr. 5). The court reviewed the entire video “carefully.” Despite agreeing that defense counsel made “some fair points” about there being “some instances of some looping,” the court felt that “on the whole [the interview] is not unnecessarily suggestive or unnecessarily or unfairly leading.” (*Id.*). The only two such “instances” defendant continues to press on appeal are the two discussed in the briefing.

Anyway, this Court’s review is properly absolute. What did the trial court do that this Court cannot by reviewing the exact same video that the lower court viewed? There is nothing inherently desirable about “discretion” when it comes to evidentiary rulings. From the standpoints of predictability, consistency and public trust, in fact, “discretion” is *not* at all desirable. There is no principled reason to accord it here.

The hearsay exception created by 16 M.R.S. § 358, to state the obvious, is not a court rule. It is a statute. While rules are sometimes applied in gray

² Is it in anyone’s interest to conclude that the issue is not preserved because counsel didn’t intone a repeat, futile objection, putting the merits off until post-conviction review?

areas, with some degree of subjectivity, see M.R. Evid. 102, statutes are commands which judges must follow, under sworn oath and adherent to principles of separation of powers. It is decidedly the duty of this Court to say what the Legislature’s laws mean, not merely whether actions fall within a zone of “discretion” approximating what the law *might* be. Juxtapose the notion of “discretion” to interpret statutes, which the State would accord Maine judges, with what the Supreme Court is doing. See *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024) (“In the business of statutory interpretation, if it is not the best, it is not permissible.”).

It is true, any error of law – and, certainly, misconstruing a statute is an error of law – is automatically an abuse of discretion. *Koon v. United States*, 518 U.S. 81, 100 (1996) (“A district court by definition abuses its discretion when it makes an error of law.”). It makes no sense to speak of “discretion” to overstep what the Legislature means by “suggestive or leading” in § 358.³ Rather, case-law that simply states what is correct and what is incorrect as a matter of law is of much more assistance to all, trial judges included.

³ Doing so is confusing for all. A case in point is well known to this Court. Compare *State v. Penley*, 2023 ME 7, ¶ 18, 288 A.3d 1183 (court abused its discretion in admitting evidence of victim’s pre-murder fear of the defendant) with *State v. Coleman*, 2024 ME 35, ¶¶ 14-18, 315 A.3d 698 (notwithstanding State’s concession, in light of *Penley*, that court abused its discretion in admitting evidence of victim’s pre-murder fear of the defendant, this Court discerns no abuse of discretion).

C. The error is not harmless.

The State sees what it views as a “critical fact” impeding defendant’s argument that the court’s error was prejudicial: Why didn’t defense counsel cross-examine the complainant about the objectionable CAC statements? (Red Br. 19). However, “if a child witness sincerely believes that the suggested sexual abuse actually occurred, cross-examination of that child witness may not effectively test the reliability of the child's recollection.” *State v. Sargent*, 738 A.2d 351, 353 (N.H. 1999); *see also Jenkins*, 308 S.W.3d at 710 n. 9 (“Because the child truly believes the suggested version, cross-examination of a child whose memory has been affected by suggestive interviewing is ineffective.”) (collecting cases for this proposition). While it has consistently been the State’s theory that either party must be lying, *see Second Assignment of Error*, that has never explicitly been defendant’s theory. (See, e.g., 31-36: defense counsel argues that interview techniques, law enforcement and other “adult” influences have shaped allegations).

Yes, as the State observes, elsewhere (other than the challenged exchange), the complainant reported that defendant “put his mouth on [the complainant’s] penis.” (Red Br. 19). This is telling, though: If such so obviously means under the clothes, as it must to establish the offense of conviction, *see* 17-A M.R.S. § 251(1)(C), (D), why did the interviewer bother to ask repeat questions of the complainant until he got the answer he anticipated? Regardless, the point is that, had the court ruled correctly, the State would have been stuck with this:

Q. And you said he put his mouth on your penis, too. Can you tell me about your clothes when he put his mouth on your penis?

A. Above.

Q. I just want to make sure I understand. So you had pants on and underwear?

A. [Nods]

When a complaining witness admits that the assault occurred above his clothes, a jury cannot rationally find that it instead occurred under them.

Second Assignment of Error

II. The prosecutor's error is reversible.

The State's argument boils down to a protestation that the prosecutor expressed "no personal opinion as to the credibility of either witness, no vouching...." (Red Br. 26). Not only is that implausible, it is also not the only line the prosecutor traversed. Defendant first retraces those several traversals. Considered in tandem – in context of each other – these errors unmistakably conveyed the prosecutor's opinion about credibility.

First, Maine law prohibits questioning one witness about whether other witnesses are lying. *State v. Bourgeois*, 639 A.2d 634 (Me. 1994) ("Contrary to the State's contention that the State's questions were proper, cross-examination that tries to push a defendant into saying other witnesses lied is impermissible.") (cleaned up); *State v. Gilman*, 637 A.2d 1180 (Me. 1994) ("Questions that solicit an opinion on whether another witness lied are impermissible, however, as an invasion of the jury's exclusive province to assess credibility."); *State v. Commeau*, 409 A.2d 247, 249 n. 1 (Me. 1979) ("Cross-examination that tries to push a defendant into saying other witnesses lied is impermissible."); *State v. Tripp*, 634 A.2d 1318, 1320 (Me. 1994) (cleaned up) ("Improperly questioning a defendant about whether other witnesses lied requires reversal except when there is 'overwhelming' evidence of guilt."); cf. *State v. Corrieri*, 654 A.2d 419, 422 (Me. 1995) ("Unlike *State v. Tripp*, 634 A.2d 1318, 1319-21 (Me. 1994), where we found obvious error and set aside the conviction, the State did not ask the defendant to comment on the credibility of the other witnesses."). Here, the

State did that: “Why on earth would [the complainant] make all this up?” (2Tr. 131). The prosecutor’s question was as much a rhetorical one as one actually seeking a substantive answer.

Second, an attorney may not argue that a jury can believe a defendant only if it finds that the complaining witness has lied. *State v. Goodwin*, 1997 ME 69, ¶ 5, 691 A.2d 1246 (“Whether conveyed in cross-examination or in final argument,” it is error for a prosecutor to “create the impression that the jury could believe the defendant only if the jury found another witness lied.”). Here, the prosecutor did that: “This is not a case where you can believe both the complainant and the defendant, it is just not. Only one of them can be telling the truth.” 3Tr. 8 (cleaned up). The job of the jury, the prosecutor argued, was to determine which one was “telling the truth.” (3Tr. 8-10; *see also* 3Tr. 18). Rather than representing some “objective logical reality,” as the State posits on appeal, *see* Red Br. 26, it is possible that the complainant has merely confabulated, given the suggestive prodding of the investigative “team.”

Third, and ultimately, it is impermissible for a prosecutor to *imply* that she disbelieves the defendant and believes the complainant. *State v. Comer*, 644 A.2d 7, 10 (Me. 1994) (error if prosecutor has “clearly implied its opinion that the victim told the truth and the defendant lied”). The State’s arguments, in its brief, pleading that implied no such thing, do not withstand reason. In context, the prosecutor’s numerous, repeated refrains in closing arguing clearly implied that the prosecutor believes defendant lied on the

stand whereas the complainant told the truth. (See Blue Br. 31-33) (documenting such argument).

As for the State's hope that the attorneys'-arguments-are-not-evidence instruction staved off prejudice, that is no help. First, it is in evidence that the prosecutor tried to get the defendant to say that the victim was lying. And, the State, in its brief, contends it is an "objective logical reality" that one of them must be lying, "*was a direct reference to the evidence the [j]ury had heard.*" (Red Br. 26; emphasis added). The court's instruction doesn't even claim to address these errors based in evidence rather than argument.

And, as it relates to the prosecutor's implied credibility assessments, recall that, also, the court instructed that the attorneys' arguments "simply represent their views on the evidence and what they see as the proper conclusions you should draw from it." (3Tr. 61). "They have every right, indeed they are expected," the court instructed, "to argue about the facts of the case and credibility of witnesses." (3Tr. 61). In other words, while it was up to the jurors to "make [their] own decisions" on credibility, the arguments were "expected" to convey the attorneys' "views on the evidence" and "credibility of witnesses." Literally nothing forbade jurors from considering the prosecutor's quite obvious personal opinion about who was lying and who was not. Just the opposite.

Yes, defendant's DNA was found on the complainant's penis. But there are reasonable doubts that such came about as the complainant alleged. A trillionth of a sugar packet worth of feces in a dirty bathroom isn't much. It's

why we wash our hands before leaving a bathroom: We reasonably fear that, were we not to do so, we'd be contaminated.

Third Assignment of Error

III. The sentencing court erred.

Defendant briefly addresses the State’s sentencing arguments.

A. Lack of remorse

The State advocates for what is effectively a bright-line rule: If a defendant allocutes yet does not confess and repent – and do so convincingly – his sentence may be aggravated for “lack of remorse,” regardless what else he says. In other words, a court may find a “lack of remorse” in what a defendant does *not* say.

The constitutional problem with that view is that a defendant may reinvoke his right against self-incrimination, even mid-allocation. *See State v. McLain*, 2025 ME 87, ¶¶ 27, 34 n. 7, 345 A.3d 141 (after valid waiver, if there is even ambiguous reinvocation, police must honor it). He retains a constitutional right to *not* “express remorse” – a euphemism for confess⁴ – even should he speak about other topics. Should he do so – should he opt not to self-incriminate (even ambiguously, per *McLain*) – he shall “suffer no penalty” for reliance upon his right. *Malloy v. Hogan*, 378 U.S. 1, 8 (1964).

There is a bottom line here: If a court is to penalize a defendant, it may constitutionally rely only on a defendant’s affirmative statements. It cannot look to the other way, to what a defendant has *not* said. A defendant has a constitutional right not to confess and “suffer no penalty” from doing so.

⁴ *E.g.*, A confession would undermine one’s appellate and post-conviction-review rights. A confession might not be appropriate, because, occasionally, juries have been known to convict the innocent.

That the court below did not comport with these constitutional lines is clear from his own finding:

I have yet to hear him express any concern about the victim in this matter. I have yet to hear him express any remorse about what he did with respect to the victim in this matter.

(A27; STr. 40). Defendant cannot lawfully be penalized for what he did not say, but the court's language makes it clear that he was.

Alternatively, defendant assumes, *arguendo*, that he may be penalized for what he did say. On this record, nothing in the content of his allocution demonstrates that he lacks remorse. It simply indicates that he sought to address other things, at worst ambiguously invoking his right not to incriminate himself. *See McLain*, 2025 ME 87, ¶ 62.

B. Notice

The State cites zero decisions interpreting constitutional due process. It discusses none of the cases, noted in the Blue Brief (at 40-42), that declare the constitutional requirements. Rather, it makes the confounding argument: "The Appellant cannot create a due process violation from the timing of a filing that no rule or statute requires in the first place." (Red Br. 35). In the State's view, due process is apparently a matter of legislative grace; the Legislature can entirely dispense with it by omission. Obviously, that flouts 1L concepts of constitutional supremacy.

Neither §§ 6 and 6-A nor the Fourteenth Amendment permit sentencing by ambush. And, yes, the State (and court) risks a lack-of-notice objection when it has not "preview[ed]," *but see* Red Br. 36, the grounds it

alleges are aggravating. *See Oyler v. Boles*, 368 U.S. 448, 452 (1962) (due process requires “reasonable notice and an opportunity to be heard relative to” recidivist-aggravator before sentencing, though not before underlying trial); *Collins v. State*, 816 P.2d 1383, 1385 (Alaska App. 1991) (“Both the defendant and the government are entitled to notice that the judge is considering previously unmentioned aggravating or mitigating factors before the parties present their sentencing arguments.”); *People v. Mancebo*, 41 P.3d 556, 563-64 (Calif. 2002) (“[A] defendant has a cognizable due process right to fair notice of the specific sentence enhancement allegations that will be invoked to increase punishment for his crimes.”). Why is this important? Should a defendant subpoena the four or five accusers mentioned in the police reports? The officers? Thoroughly investigate them? What a waste that would be, if, ultimately, the State and court do not intend to rely on them. A defendant must know what he is expected to meet.

C. Reliability

Defendant’s reliability argument is underscored by his lack-of-notice objection. Without notice that he’d need to do so, defendant was not prepared to meet the State’s police-report-upon-hearsay evidentiary presentation. Obviously, lack of testing lets unreliable evidence run free.

The hearsay within hearsay statements evidence are “unreasonably abundant.” *Cf. State v. James*, 2002 ME 86, ¶¶ 9, 13, 797 A.2d 732 (“unreasonably abundant” hearsay diminishes reliability). The sources of the base layer of hearsay have motives to fabricate – *e.g.*, they don’t like defendant, don’t like that he’s gay, and are jealous ex-partners. *Cf. id.* ¶ 15

(motive to fabricate undermines reliability). The sources of the second layer of hearsay, the officers, have a bias – *i.e.*, they’re instructed to believe victims and prosecute criminals, and their jobs are dependent upon sufficient levels of criminality to justify budgets. Finally, notice the dates of the investigations – 2014, 2017, etc. What has happened in between? Why haven’t there been prosecutions? Have there been recantations? Reliability is undermined, relatedly, because the individuals making the reports can no longer be subjected to criminal prosecution for making false statements. *See* 17-A M.R.S. § 509 (false report is Class-D offense); 17-A M.R.S. § 8(2) (establishing three-year statute of limitations to prosecute Class-D offenses).

D. Mitigation

Yes, a court has reasonable discretion to decide just *how* mitigating a mitigator is. But certain things are mitigating as a matter of law⁵ (actually, on this M.R. App. 20 appeal, we are talking about principle).

This Court has a legislatively commanded obligation to implement objective “criteria for sentencing which are both rational and just.” 15 M.R.S. § 2154(4). That is undermined – and so are proportionate sentencing and faith in evenhanded justice – by judges coming down 180 degrees from one another on the same issue. Even more so when a defendant’s background is just the sort of thing upon which Maine sentencing is premised: obtaining “an individualistic picture of the person to be sentenced

⁵ This is simply the converse of how we treat aggravating factors and life-sentence “gateway” factors. Extreme cruelty, pecuniary gain, premeditation, etc. – those are all *Shortsleeves* factors. As a matter of law, they permit the ultimate aggravation under Maine law.

with emphasis on circumstances about the person or in his personal background as may have an impact on his behavior.” *State v. Samson*, 388 A.2d 60, 67 (Me. 1978).

A background such as defendant’s – raped at 15, physically abused by parental figures, ran away from home, suicide attempts, etc. – is mitigating. Countless jurisdictions have turned to sentencing guidelines so that the same factor is not counted in opposite directions by different judges. While Maine may not yet be at the point of adopting guidelines, nor should it tolerate such disparate treatment that hollows the meaning of “mitigating” and “aggravating.”

CONCLUSION

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

Respectfully submitted,

July 13, 2026

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CERTIFICATE OF FILING & SERVICE

I have filed this brief, and served opposing counsel, as listed on the service list, in compliance with M.R. App. P. 1D(c), 1E and 7(c).

/s/ Rory A. McNamara

CERTIFICATE OF WORD-COUNT COMPLIANCE

Other than those portions of the brief exempted by M.R. App. P. 7A(f)(3), this brief contains 3,928 words.

/s/ Rory A. McNamara