

State of Maine v. Chuck D. Schooley

Appeal from Unified Criminal Docket in
Lincoln County

Supreme Judicial Court sitting as the Law Court
Law Court Docket number LIN-24-234

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Introduction

Mr. Schooley's jury should have received a specific unanimity instruction. Mr. Schooley was charged with one count of gross sexual assault, but the testimony of the alleged victim at trial alluded to numerous instances that could have been used by the jury to support its conviction. Without a specific unanimity instruction there is no certainty that each juror's finding of guilt rested on the same alleged incident of conduct. As such, Mr. Schooley has not received a fair trial and his convictions should be vacated.

Comments made by the State in its closing remarks constitute prosecutorial error. A number of the State's comments overreached and played to the emotions of the jury, encouraging the jury to base their verdict on emotion and sympathize with Ms. B [REDACTED], the alleged victim. The State's comments also bolstered her testimony and vouched for her credibility. In the cumulative, all the outlined comments prevented Mr. Schooley from receiving a fair trial.

Procedural History

Mr. Schooley, the appellant, was charged by criminal complain on July 20, 2022 with one count of Gross Sexual Assault (Class A) under Title 17-A M.R.S. § 253(1)(C)¹ and one count of Violation of Condition of Release (Class E) under Title 17-A M.R.S. § 1092(1)(A).² (App. at 3). An indictment on the charges was filed with the lower court on September 23, 2022.³ (App. at 4). Mr. Schooley was arraigned on October 13, 2022 and entered not guilty pleas to both counts of the indictment. (App. at 5).

¹ Title 17-A M.R.S. § 253(1)(C) states that “[a] person is guilty of gross sexual assault if that person engages in a sexual act with another person and. . . [t]he other person, not the actor's spouse, has not in fact attained 12 years of age. . .”

² Title 15 M.R.S. § 1092(1)(A) provides that “[a] defendant who has been granted preconviction or postconviction bail and who, in fact, violates a condition of release is guilty of. . . [a] class E crime. . .”

³ The indictment alleged that: “On or about January 1, 2020 and July 16, 2022, in Wiscasset, Lincoln County, Maine, **CHUCK D. SCHOOLEY**, did engage in a sexual act(s) with minor child, DOB [REDACTED], not his spouse, who had not in fact attained the age of 12 years.” The term “act(s)” in the indictment suggests duplicity. But, since this issue was not raised with the trial court in a motion to dismiss before the verdict was rendered Mr. Schooley appears to be forestalled from raising it here on appeal. See State v. Campbell, 314 A.2d 398, 402 (Me. 1974) (“A duplicitous indictment is subject to dismissal provided a motion is seasonably filed in accordance with Rule 12(b)(2), M.R.Crim.P. State v. Dalphonse, 276 A.2d 605, 607 (Me. 1971); Glassman, Maine Practice, Commentary 12.1.”); State v. Derry, 118 Me. 431, 108 A. 568, 570 (Me. 1920) (“If the objection (duplicity) was ever tenable it comes too late after verdict.” State v. Dolan, 69 Me. 573.). At trial, the indicted charge read to the jury at the start of trial only referenced a single act: “Members of the jury, harken to a complaint brought against Chuck D. Schooley in which the State has alleged that on or about January 1, 2020 and July 16, 2022, in Wiscasset, Lincoln County, Maine, Chuck D. Schooley did engage in a sexual act with a minor child, date of birth [REDACTED], not his spouse, who had in fact not attained the age of 12.” In instructing the jury at the close of the evidence the Court provided instruction as to a single act as well: “Mr. Schooley, is charged with one court, gross sexual assault of a minor, which is a Class A crime in Maine” and the court continued to define the law in term of a single count. (Tr. T. at 200-202).

A jury trial was held before the Lincoln County Unified Court on February 20th and 21st of 2024. (App. at 7). Mr. Schooley waived his right to a jury trial on the Violation of Condition of Release charge and the trial court tried that matter. (Tr. T. at 1-2). The jury returned a guilty verdict on the charge of Gross Sexual Assault. (App. at 8); (Tr. T. at 248). As a result of the jury's verdict, the lower court found Mr. Schooley guilty of the Violation of Condition of Release charge. (App. at 8); (Tr. T. at 1-2); (Sent. T. at 3).

On May 3, 2024 Mr. Schooley was sentenced by the lower court. (App. at 8). On Count 1, the charge of Gross Sexual Assault, the court imposed an eighteen year sentence to the Department of Corrections and a fifteen year period of supervised release. (App. at 8-9); (Sent. T. at 15-16). On Count 2, the charge of Violation of Condition of Release, a concurrent sentence of six months was imposed. (App. at 9); (Sent. T. at 16).

A timely notice of appeal was filed on May 20, 2024. (App. at 10).

Statement of Facts

M■■■■ B■■■■ lived with her mother, stepfather, and various sibling in Wiscasset, Maine from roughly the ages of eight to eleven. (Tr. T. at 39, 87-89, 111-112, 155, 175-177). Mr. Schooley is Ms. B■■■■' stepfather. (Tr. T. at 88-89). Ms. B■■■■ testified at trial that she would be home alone with Mr. Schooley and her younger brothers while her mom was at work or at a friend's house.⁴ (Tr. T. at 91, 95, 154). During this time Ms. B■■■■ testified that Mr. Schooley would touch her inappropriately. (Tr. T. at 93-94, 116-117, 154, 164). According to Ms. B■■■■' testimony at trial, this happened once in a vehicle and on other occasions in Mr. Schooley's bedroom. (Tr. T. at 94, 96-111). At trial, Ms. B■■■■ specifically described an incident in Mr. Schooley's vehicle on July 16, 2022. (Tr. T. at 38, 47, 103-107, 146-154). Additionally, Ms. B■■■■ described two specific incidents at their Wiscasset home.⁵ (Tr. T. at 97-102, 107-110, 137). The other incidents were alluded to generally. (Tr. T. at 93-102, 110-111, 116-117, 154, 164).

In July of 2022 the allegations of sexual abuse were reported to authorities.⁶ (Tr. T. at 38, 47). In August of 2022, Ms. B■■■■ left the Wiscasset home and moved to North Carolina to live with her biological father and paternal

⁴ Ms. B■■■■ testified that her mom was at work about twice a week. (Tr. T. at 95).

⁵ One incident was described by her as occurring in the house where she was told to go to the bedroom upstairs and when she did she, unsuccessfully, tried to keep the door to the room shut. (Tr. T. at 136-141). The other incident in the house was described as occurring when extended family member had come to the home for a bonfire. (Tr. T. at 141-146).

⁶ Ms. B■■■■ stated that the incidents started when she was around eight. (Tr. T. at 111-112).

grandmother. (Tr. T. at 40, 85-87, 112, 121-122, 163). When she moved to North Carolina, Ms. B[REDACTED] was eleven years old.⁷ (Tr. T. at 40, 112, 121-122). Ms. B[REDACTED] did not see Mr. Schooley again until the start of Mr. Schooley's trial on February 20, 2024. (Tr. T. at 1, 89).

Ms. B[REDACTED] testified at trial that she told her mom about the sexual abuse on two prior occasion.⁸ (Tr. T. at 113-114, 135-136). The first time she testified that she told her mother was when they lived in a trailer and not the Wiscasset house. (Tr. T. at 113). On that occasion Ms. B[REDACTED] stated that she and her mom were at the house of her mother's friend, and that the friend was present as well. (Tr. T. at 113). The other time was a couple of days after the described July 16, 2022 incident in Mr. Schooley's vehicle. (Tr. T. at 114, 135). About half an hour after she said that she told her mom she testified that she also told her best friend Christine.⁹ (Tr. T. at 51, 57-58, 114-116, 134-136).

On July 18, 2022, due to the comments to Christine, Ms. B[REDACTED], her mother, and Mr. Schooley was interviewed by representatives of the Lincoln

⁷ Ms. B[REDACTED]' birthday is [REDACTED]. (Tr. T. at 112). She moved to North Carolina in August of 2022. (Tr. T. at 112). As such, in August of 2022 Ms. B[REDACTED] was eleven years old. (Tr. T. at 112).

⁸ She originally had stated that her mother never knew about the sexual abuse. (Tr. T. at 66).

⁹ Ms. B[REDACTED] was friends with Christine via the SnapChat app and while she considered her to be her best friend, and like a sister, they had never met in person. (Tr. T. at 75, 78, 80, 118, 158-160). Ms. B[REDACTED]' closest friends were people on SnapChat. (Tr. T. at 160).

County Sheriff's Office and the Department of Health and Human Services.¹⁰ (Tr. T. at 35, 37-39, 41, 136). Mr. Schooley denied Ms. B [REDACTED]'s allegations. (Tr. T. at 42). Mr. Schooley's surprise in learning of the allegations was seen in his interview with law enforcement when he responded that "if she came home and said something like this happened at school, something serious like [law enforcement] was talking to him about, he said he would believe it." (Tr. T. at 47). The clothing that Ms. B [REDACTED] had been wearing during the incident in the vehicle were taken by law enforcement and tested for DNA.¹¹ (Tr. T. at 47-48). The results came back negative. (Tr. T. at 48). At trial, Ms. B [REDACTED] stated that she did not like Mr. Schooley. (Tr. T. at 120).

During her interviews following the allegations, Ms. B [REDACTED] was asked to describe what sex meant and she stated that she really did not know. (Tr. T. at 52). She also could not describe anything about seeing Mr. Schooley's penis. (Tr. T. at 52). When asked where his penis went, Ms. B [REDACTED] responded "by my private parts," not accurately describing sexual intercourse. (Tr. T. at 52-53).

In its initial closing remarks to the jury, the State made the following comments:

"So what we talk about now is -- since the State's evidence is really based on direct evidence and the testimony of M [REDACTED], it really turns

¹⁰ The testimony at trial established that Christine contacted authorities to report the abuse. (Tr. T. at 38-39, 114-116).

¹¹ The clothing had been washed prior to testing. (Tr. T. at 48).

on credibility. So briefly we'll talk about things that might lend itself to credibility.” (Tr. T. at 212).

“She thought she finally had the courage to testify and this wasn't because -- as she testified yesterday, she told her mom what happened. This wasn't because somebody in the household protected her. As far as M [REDACTED] was concerned - and I think you can deduce this or you heard this yesterday - nobody was helping her in the house. She confided in her mom. Her mom didn't help her. **Certainly Mr. Schooley wasn't helping her.** So she had to rely on other people. She had to -- actually, by testifying she was stepping out into the unknown by finally revealing this secret.”
(Tr. T. at 214-215)(emphasis added).

“It was her friend's brother, she testified, who had to call the police and have them come.”¹²
(Tr. T. at 216).

“So she really was all on her own up here, and **it took great courage for her to finally step forward and tell you, 12 strangers, the Judge, and to again face Mr. Schooley.**”
(Tr. T. at 216-217)(emphasis added).

“And I'll point out that when she first started to testify, she came out here and sat down, Judge swore her in, and before I even asked a question she needed a recess. That was the first time that she had been in front of people. That was the first time she had seen Mr. Schooley in years, and **it was very probably traumatic for her to begin to experience this.** However, we took a recess, and she came back out, got herself together and was able to face Mr. Schooley, the jury, the Judge and -- and a cross from a defense attorney.”
(Tr. T. at 217)(emphasis added).

“And I'll just point out you saw how skilled Mr. Ashe is. He had a detective of 26 years squirming a little bit in the chair during his cross of him -- of the detective up there. **She stood up to his cross, stuck to her story, was consistent with her story and even corrected Mr.**

¹² Ms. B [REDACTED]' testimony only stated that “she [Christine] called social services, and then they came out to my house.” (Tr. T. at 116).

Ashe when he tried to get her off her story or correct her by saying, no, that's not what I said, this is what I said.”
(Tr. T. at 217)(emphasis added).

“She really worked to get her truth out. . . And I think if you notice - I did notice - she almost grew up right in that stand. She took ownership back of her life, got stronger and by telling her truth and her story, and I think those all lead to the credibility here. And this case really does turn on the credibility of the eye witness in this matter.”
(Tr. T. at 218)(emphasis added).

And, in its rebuttal remarks to the jury the State made the following comment:

“And, again, the State has a high burden here. The State welcomes that burden. And the State believes that the testimony of M [REDACTED] yesterday was credible, and if you believe that testimony, then the State has met its burden and should find Mr. Schooley guilty of gross sexual assault.”
(Tr. T. at 233)(emphasis added).

After the State rested, Mr. Schooley moved for a judgment of acquittal, which the trial court denied. (Tr. T. at 185, 192-193). The jury received instruction from the court and was sent to deliberate. (Tr. T. at 197-208, 233-240). The jury sent multiple notes to the trial court, the last stating that they did not have a unanimous verdict. (Tr. T. at 241-247). After re-instruction by the trial court, the jury reached a guilty verdict on the charge of gross sexual assault. (Tr. T. at 244-248). The charge of violation of condition of release was not tried by the jury, but the trial court. (Tr. T. at 1-2, 194-195); (Sent. T. at 4-5). The trial court stated that its verdict would follow the jury’s finding. (Tr. T. at 194-195). As such, a

guilty verdict was entered by the trial court on the charge of violation of condition of release. (Sent. T. at 4-5).

The sentencing court was presented with a joint sentencing recommendation, which was accepted by the court, and Mr. Schooley received a straight eighteen year sentence with a fifteen year term of supervised release. (Sent. T. at 16).

After Mr. Schooley was sentenced on May 3, 2024, he timely filed a notice of appeal. (App. at 10).

Issues Presented for Review

- I. Whether it was obvious error for the trial court to not give a specific unanimity instruction to the jury.
- II. Whether the State committed prosecutorial error by playing to the sympathies of the jury and vouching for the alleged victim's testimony.

Statement of Issues Presented for Review

Mr. Schooley's jury was not instructed on specific unanimity. The State indicted Mr. Schooley on a single count of gross sexual assault. At trial, his stepdaughter, Ms. B [REDACTED], testified to an indeterminate number of sexual encounters, giving specific details about three such encounters. The trial court's failure to provide the jury with a specific unanimity instruction was obvious error because without the instruction it leaves open the possibility that Mr. Schooley's gross sexual assault conviction is not based on one specific act, allowing the individual members of the jury to vary on the individual act that they used to support Mr. Schooley's conviction. Such an error affects Mr. Schooley's constitutional right to unanimity in conviction and the ability to have confidence that a just and constitutional verdict was issued by the jury. As such, Mr. Schooley has not received a fair trial and his conviction should be vacated.

The State also made a number of comments in its closing statements to the jury that should be considered error. The State's closing remarks to the jury overreached and played to the emotions of the jury, encouraging the jury to base their verdict on emotion and sympathize with Ms. B [REDACTED]. Additionally, the State's characterization of Ms. B [REDACTED] in its comments to the jury resulted in the State bolstering her testimony and vouching for her credibility, while at the same time implying that Mr. Schooley should not be believed. Lastly, the cumulative effect

of the comments prevented Mr. Schooley from receiving a fair trial, which deprived him of due process.

Wherefore, for the reasons enumerated above, Mr. Schooley requests that this Court vacate his convictions and remand his case to the Lincoln County Courts for further proceedings.

Argument

I. It was obvious error for the trial court to not give a specific unanimity instruction to the jury.

When no objection is raised to jury instructions, this Court reviews “the instructions only for obvious error, that is, ‘highly prejudicial error tending to produce manifest injustice.’ State v. Baker, 2015 ME 39, ¶ 11, 114 A.3d 214 (quotation marks omitted); see M.R.U. Crim. P. 52(b).” State v. Villacci, 2018 ME 80, ¶ 9, 187 A.3d 576, 580 (Me. 2018). See State v. Chase, 2023 ME 32, ¶ 13, 294 A.3d 154, 159 (Me. 2023)(where “[t]he record contain[ed] neither a request for a specific unanimity instruction nor an objection to the court's jury instructions. . . [when] the issue is unpreserved, our review is for obvious error. See State v. Asante, 2020 ME 90, ¶ 10, 236 A.3d 464. Obvious error occurs ‘when jury instructions, viewed as a whole, are affected by ‘highly prejudicial error tending to produce manifest injustice.’ ’ State v. Baker, 2015 ME 39, ¶ 11, 114 A.3d 214 (quoting State v. Ashley, 666 A.2d 103, 106-07 (Me. 1995).”); State v. Rosario, 2022 ME 46, ¶ 34, 280 A.3d 199, 208 (Me. 2022)(where “[a]t trial, [the defendant]. . . failed to request a specific unanimity instruction, and we therefore review for obvious error.”).

“For obvious error to exist there must be (1) an error¹³, (2) that is plain, (3) that affects substantial rights, and . . . (4) that . . . seriously affects the integrity, fairness, or public reputation of judicial proceedings.” State v. Rosario, 2022 ME 46, ¶ 29, 280 A.3d 199, 208 (Me. 2022)(citing State v. Lajoie, 2017 ME 8, ¶ 13, 154 A.3d 132.). Additionally, “jury instructions [are reviewed] in their entirety to determine if the instructions ‘fail[ed] to inform the jury correctly and fairly in all necessary respects of the governing law.’ State v. Fox, 2014 ME 136, ¶ 22, 105 A.3d 1029 (quotation marks omitted).” State v. Villacci, 2018 ME 80, ¶ 9, 187 A.3d 576, 580 (Me. 2018). See also State v. Chase, 2023 ME 32, ¶ 13, 294 A.3d 154, 159 (Me. 2023); State v. Fortune, 2011 ME 125, ¶ 25, 34 A.3d 1115, 1121 (Me. 2011)(“[w]e review jury instructions ‘as a whole, taking into consideration the total effect created by all the instructions and the potential for juror misunderstanding.’ State v. Saucier, 2001 ME 107, ¶ 23, 776 A.2d 621; accord State v. Gauthier, 2007 ME 156, ¶ 14, 939 A.2d 77.”).

“Any errors ‘in criminal cases that affect constitutional rights are reviewed to determine that we are satisfied, beyond a reasonable doubt, that the error did not affect substantial rights or contribute to the verdict.’ Gauthier, 2007 ME 156, P 14,

¹³ “To determine whether there is an error, ‘we evaluate the instructions in their entirety’ and consider their total effect, ‘the potential for juror misunderstanding, and whether the instructions informed the jury correctly and fairly in all necessary respects of the governing law.’ Id. ¶ 14 (quotation marks omitted).” State v. Rosario, 2022 ME 46, ¶ 29, 280 A.3d 199, 208 (Me. 2022).

939 A.2d 77.” State v. Fortune, 2011 ME 125, ¶ 25, 34 A.3d 1115, 1121 (Me. 2011).

Mr. Schooley’s jury was not instructed on specific unanimity. The State indicted Mr. Schooley on a single count of gross sexual assault. (App. at 1, 13). At trial, his stepdaughter, Ms. B [REDACTED], testified to a indeterminate number of sexual encounters, giving specific details about three such encounters. (Tr. T. at 38, 47, 93-111, 116–117, 137, 146-154, 154, 164). As such, without a specific unanimity instruction, there is no clarity as to whether Mr. Schooley’s jury unanimously based its verdict on the same, singular act of gross sexual assault. Such error has affected Mr. Schooley’s substantial rights and ability to receive a fair trial and, as such, his convictions should be vacated.¹⁴

“The Maine Constitution provides that ‘unanimity, in indictments and convictions, shall be held indispensable.’ Me. Const. art. I, § 7.” State v. Reynolds, 2018 ME 124, ¶ 15, 193 A.3d 168, 173 (Me. 2018); see also State v. Russell, 2023 ME 64, ¶ 25, 303 A.3d 640, 647 (Me. 2023); State v. Hanscom, 2016 ME 184, ¶ 16, 152 A.3d 632, 637 (Me. 2016).

¹⁴ Mr. Schooley’s second charge of violation of condition of release was not tried by the jury, but by the trial court. (Tr. T. at 1-2, 194-195); (Sent. T. at 4-5). The trial court stated that its verdict would follow the jury’s finding. (Tr. T. at 194-195). After the jury reached its verdict, the trial court entered a guilty verdict on the charge of violation of condition of release. (Sent. T. at 4-5). As Mr. Schooley’s conviction for violation of conviction of release is entirely based on the the jury’s finding of guilty, this conviction should also be vacated, as without the jury’s underlying conviction for gross sexual assault, there is no longer a basis to support the conviction.

It has been “previously explained” by this Court that “[c]ourts regularly encounter indictments that may aggregate, in one count of the indictment, several identical crimes committed against one or more victims.’ State v. Fortune, 2011 ME 125, ¶ 26, 34 A.3d 1115.” State v. Reynolds, 2018 ME 124, ¶ 15, 193 A.3d 168, 173 (Me. 2018). Such instances are “especially common in cases where, as here, there are allegations of ‘multiple sex acts committed against a minor child.’” State v. Reynolds, 2018 ME 124, ¶ 15, 193 A.3d 168, 173-174 (Me. 2018). In these cases, “when separate but similar incidents ‘are the evidence supporting a single charge, the jury must unanimously find that one specific incident occurred.’” State v. Reynolds, 2018 ME 124, ¶ 15, 193 A.3d 168, 174 (Me. 2018)(citations omitted).

To this point, it has been noted that

[w]hen separate, similarly situated victims or similar incidents such as thefts or drug transactions are the evidence supporting a single charge, the jury must unanimously find that one specific incident occurred or that the elements of the crime are proven as to at least one victim in order to convict. See Commonwealth v. Conefrey, 420 Mass. 508, 650 N.E.2d 1268, 1270-72, 1273 n.11 (Mass. 1995)(reversing a conviction when the court denied the defense's request for a specific instruction on unanimity, and alternate incidents could have supported the conviction). On request, the jury should be instructed on this point, if the evidence offered in support of one charge includes more than one incident of the charged offense. See *Maine Jury Instruction Manual* § 6-65 at 6-103 (4th ed. 2011). State v. Fortune, 2011 ME 125, ¶ 27, 34 A.3d 1115, 1121-1122 (Me. 2011).

“[A] specific unanimity instruction would ‘explain[] to jurors that they are required to unanimously agree that a single incident of the alleged crime occurred that supports a finding of guilt on a given count.’” State v. Chase, 2023 ME 32, ¶ 16, 294 A.3d 154, 160 (Me. 2023); see also State v. Russell, 2023 ME 64, ¶ 25, 303 A.3d 640, 647 (Me. 2023)(“‘[a] specific unanimity instruction explains to jurors that they are required to unanimously agree that a single incident of the alleged crime occurred that supports a finding of guilt on a given count. Thus, if the State alleges multiple instances of the charged offense, any one of which is independently sufficient for a guilty verdict as to that charge, specific unanimity instructions are proper.’ State v. Osborn, 2023 ME 19, ¶ 34, 290 A.3d 558 (citation and quotation marks omitted)”).

In State v. Russell, 2023 ME 64, ¶ 3, 303 A.3d 640, 643 (Me. 2023), on appeal to this Court, “[t]he State concede[d]” and this Court “agree[d] that a specific unanimity instruction was necessary. . . [and a]ccordingly, [this Court] vacate[d] the judgment of conviction [for the affected counts]. . . .” In doing so, this Court stated that “[a]n instruction was necessary to inform jurors that they were ‘required to unanimously agree that a single incident of the alleged crime occurred that support[ed] a finding of guilt on [each] count.’ Its absence is error that requires us to vacate the judgment[s]” State v. Russell, 2023 ME 64, ¶ 32, 303 A.3d 640, 649 (Me. 2023)(citation omitted).

Additionally, this Court has repeatedly noted the need for a specific unanimity instruction when multiple incidents could be used to support a finding of guilt for a single criminal charge, such as the one here:

- In State v. Villacci, 2018 ME 80, fn. 1, 187 A.3d 576 (Me. 2018) this Court noted that “[a]lthough not raised by Villacci, we note that the court also erred by failing to give the jury a specific unanimity instruction. See State v. Hanscom, 2016 ME 184, ¶ 16, 152 A.3d 632. It does not appear that either Villacci or the prosecutor requested such an instruction, despite the obvious need for one.”
- In Hodgdon v. State, 2021 ME 22, fn. 5, 249 A.3d 132 (Me. 2021) this Court stated that “[a] specific unanimity instruction explains to jurors the requirement of ‘unanimous agreement among the[m] that a single incident of [the alleged crime] occurred’ to support a finding of guilt on a given count. Hanscom, 2016 ME 184, ¶ 11, 152 A.3d 632; see Reynolds, 2018 ME 124, ¶ 15, 193 A.3d 168 (‘[W]hen separate but similar incidents are the evidence supporting a single charge, the jury must unanimously find that one specific incident occurred.’ (quotation marks omitted)). ‘On request, the jury should be instructed on this point, if the evidence offered in support of one charge includes more than one incident of the charged offense.’ Fortune, 2011 ME 125, ¶ 31, 34 A.3d 1115. . . . Hodgdon was, therefore, entitled to a specific unanimity jury instruction concerning

Count 5. See Fortune, 2011 ME 125, ¶ 31, 34 A.3d 1115”).

- In State v. Chase, 2023 ME 32, ¶ 16, 294 A.3d 154, 160 (Me. 2023) this Court noted that “[I]f the State alleges multiple instances of the charged offense, any one of which is independently sufficient for a guilty verdict as to that charge, specific unanimity instructions are proper.” State v. Osborn, 2023 ME 19, ¶ 34, 290 A.3d 558; see also Fortune, 2011 ME 125, ¶ 31, 34 A.3d 1115 (‘When separate, similarly situated victims or similar incidents such as thefts or drug transactions are the evidence supporting a single charge, the jury must unanimously find that one specific incident occurred . . . in order to convict.’); Alexander, *Maine Jury Instruction Manual* § 6-65 at 6-145 (2023 ed.).”

- In State v. Hanscom, 2016 ME 184, ¶ 14, 152 A.3d 632, 636 Me. 2016) this Court found that “[b]ased on the State's evidence, the jury was entitled to reasonably conclude that [the defendant] committed the crime of unlawful sexual contact more than once against each girl. The jury was not instructed, however, about the requirement of unanimity as it applies to a single incident, and the instructions therefore left open the prospect that the jury would find [the defendant] guilty based on verdicts that were less than unanimous.”

The trial court’s failure to provide the jury with a specific unanimity instruction was obvious error because without the instruction it leaves open the

possibility that Mr. Schooley's gross sexual assault conviction is not based on one specific act, allowing the individual members of the jury to vary on the individual act that they used to support Mr. Schooley's conviction. Such an error affects Mr. Schooley's constitutional right to unanimity in conviction and the ability to have confidence that a just and constitutional verdict was issued by the jury. As such, Mr. Schooley has not received a fair trial and his convictions should be vacated.

Ms. B [REDACTED] testified that Mr. Schooley would touch her inappropriately. (Tr. T. at 93-94, 116-117, 154, 164). According to Ms. B [REDACTED]' testimony at trial, this happened once in a vehicle and on other occasions in Mr. Schooley's bedroom. (Tr. T. at 94, 96-111). At trial, a specific incident was describe in Mr. Schooley's vehicle on July 16, 2022. (Tr. T. at 38, 47, 103-107, 146-154). Two additional, specific incidents were described at the Wiscasset house.¹⁵ (Tr. T. at 97-102, 107-110, 137). The other incidents at the Wiscasset home were alluded to generally. (Tr. T. at 93-102, 110-111, 116-117, 154, 164).

Given Ms. B [REDACTED]' trial testimony, where there were multiple instances presented to the jury upon which they could base a verdict, an unanimity instruction was clearly needed. Without the specific unanimity instruction, there is no clarity as to whether the jury unanimously based its verdict on the same,

¹⁵ One incident was described by her as occurring in the house where she was told to go to the bedroom upstairs and when she did she, unsuccessfully, tried to keep the door to the room shut. (Tr. T. at 136-141). The other incident in the house was described as occurring when extended family member had come to the home for a bonfire. (Tr. T. at 141-146).

singular act of gross sexual assault. In State v. Russell, 2023 ME 64, ¶ 32, 303 A.3d 640, 649 (Me. 2023)(citation omitted), this Court found that obvious error existed when the jury in that case was not provided with an unanimity instruction by the trial court. Moreover, as highlighted above, this Court has repeatedly noted the need for a specific unanimity instruction in cases like Mr. Schooley's, where the jury is presented with multiple instances of conduct at trial that could be used to support a singular charge. See State v. Chase, 2023 ME 32, ¶ 16, 294 A.3d 154, 160 (Me. 2023); Hodgdon v. State, 2021 ME 22, fn. 5, 249 A.3d 132 (Me. 2021); State v. Reynolds, 2018 ME 124, ¶ 15, 193 A.3d 168, 174 (Me. 2018); State v. Villacci, 2018 ME 80, fn. 1, 187 A.3d 576 (Me. 2018); State v. Hanscom, 2016 ME 184, ¶ 14, 152 A.3d 632, 636 (Me. 2016).

Furthermore, the jury's deliberations resulted in numerous notes to the trial court. (Tr. T. at 241-241, 244). The trial court stated that one of those notes suggested that the jury did: "not have unanimous verdict." (Tr. T. at 244). After the note was sent by the jury, the court readdressed the jury, instructing them, substantively, that:

Members of the jury, your note indicates the difficulties you are having in agreeing upon a verdict. Let me take some -- let me make some observations that may be helpful for your consideration when you return to the jury room.

First of all, the amount of time you have spent in deliberations so far is not unusual for this type of case. Responsible deliberations require a thorough discussion of all the issues and points of view. The fact that

you've taken this amount of time suggests that you are doing your job responsibly.

As I indicated in my closing instructions, the verdict you reach must represent the considered judgment of each juror. In order to return a verdict, your verdict must be unanimous. Whether the verdict is not guilty or guilty, all 12 of you must agree.

It is your duty as jurors to talk with one another and to deliberate with a view to reaching an agreement if you can do so without sacrificing individual judgment. Each of you must decide the case for yourself, but do so only after impartial consideration of the evidence in the case with your fellow jurors.

In the course of your deliberations keep an open mind. Do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous, but do not surrender your honest belief as to the weight or effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

Remember, at all times you are not partisans. You are judges of the facts. Your sole interest is to determine the facts, determine whether the State has proven the charge beyond a reasonable doubt based upon the evidence that you heard in this case.

Keep these observations in mind as you return to the jury room for further deliberations. At this point I'm going to have you go back to the jury room to consider the instructions I've just given. If after further consideration you wish to break for the evening, that's fine. If after further consideration you're able to reach a verdict, you should report that to the court in accordance with my prior instructions. If after further deliberations you still believe that you cannot reach a verdict, you should advise me of that in writing.

So with that, I'll have you return to the jury room to consider the instructions.

(Tr. T. at 245-247).

The jury thereafter informed the trial court that it had reached a verdict. (Tr. T. at 147-148). No where in these re-instructions was the jury, who was struggling with the issue of unanimity, informed that their verdict must have specific unanimity as to a singular event. Given the difficulties the jury was having in reaching a verdict the need for a specific unanimity instruction seems highly relevant and necessary in Mr. Schooley's case.

In sum, without the specific unanimity instruction, there is no clarity as to whether the jury unanimously based its verdict on the same, singular act of gross sexual assault. Such error has affected Mr. Schooley's substantial rights and ability to receive a fair trial and, as a result, his convictions should be vacated.

II. The State committed prosecutorial error by playing to the sympathies of the jury and vouching for the alleged victim's testimony.

When no objection is made to a prosecutor's statements at trial an obvious error standard of review is applicable. State v. Lockhart, 2003 ME 108, ¶ 47, 830 A.2d 433, 449 (Me. 2003); M.R.U. Crim. P. 52(b); see also State v. Fahnley, 2015 ME 82, ¶ 35, 119 A.3d 727, 737 (Me. 2015). The test for establishing obvious error has been concisely stated to include a showing, by the defendant, of "(1) an error, (2) that is plain, and (3) that affects substantial rights. . . [e]ven if these three conditions are met. . . a jury's verdict [is] only [set aside] if. . . (4) the error seriously affects the fairness and integrity or public reputation of judicial

proceedings.” State v. Dolloff, 2012 ME 130, ¶ 35, 58 A.3d 1032, 1043 (Me. 2012) (internal citations and quotations omitted).

The State made a number of comments in its closing statements to the jury that should be considered error.¹⁶ See State v. White, 2022 ME 54, fn.11, 285 A.3d 262 (Me. 2022)(using the term error in place of misconduct).

“It is a ‘well-established rule that the prosecutor has a responsibility to help ensure a fair trial, and although permitted to strike hard blows, may not strike foul ones. . . .” State v. Lockhart, 2003 ME 108, ¶ 48, 830 A.2d 433, 449 (Me. 2003) (internal citations omitted). The Rules of Professional Conduct requires that attorneys, including prosecutors, adhere to Rule 3.4(e), which states that a lawyer shall not,

in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.

Additionally, the prosecutor for the State, in its statements to the jury, “is limited to the domain of facts in evidence” and has “an overriding obligation to see

¹⁶ As noted supra, Mr. Schooley’s second charge of violation of condition of release was not tried by the jury, but by the trial court. (Tr. T. at 1-2, 194-195); (Sent. T. at 4-5). The trial court stated that its verdict would follow the jury’s finding. (Tr. T. at 194-195). After the jury reached its verdict, the trial court entered a guilty verdict on the charge of violation of condition of release. (Sent. T. at 4-5). As Mr. Schooley’s conviction for violation of conviction of release is entirely based on the the jury’s finding of guilty, this conviction should also be vacated, as without the jury’s underlying conviction for gross sexual assault, there is no longer a basis to support the conviction.

that an accused receives a fair trial.” State v. Pineau, 463 A.2d 779, 781 (Me. 1983)(internal citation omitted); see also State v. Dolloff, 2012 ME 130, ¶ 42, 58 A.3d 1032, 1046 (Me. 2012). The State should not make “statements pandering to jurors' sympathy, bias, or prejudice.” State v. Dolloff, 2012 ME 130, ¶ 42, 58 A.3d 1032, 1046 (Me. 2012)(citation omitted).

“Prosecutors are expected to observe ‘a level of ethical precision that avoids overreaching and prevents the fact-finder from convicting a person on the basis of something other than evidence presented during trial.’ Dolloff, 2012 ME 130, ¶ 40, 58 A.3d 1032; see also State v. Robinson, 2016 ME 24, ¶ 23, 134 A.3d 828.” State v. Pratt, 2020 ME 141, ¶ 15, 243 A.3d 469, 474 (Me. 2020).

In making its argument to the jury the State “‘may employ wit, satire, invective and imaginative illustration in [its] arguments before the jury ... but in this the license is strictly confined to the facts in evidence.’” State v. Terrio, 442 A.2d 537, 543 (Me. 1982). Moreover, “when allegations based on prosecutorial misconduct are raised, trial and appellate courts must assess whether wit, invective, and zeal have crossed the line into the realm of ‘foul blows.’” State v. Dolloff, 2012 ME 130, ¶ 41, 58 A.3d 1032, 1045 (Me. 2012).

Additionally, it is misconduct for the State to “[i]nject[] personal opinion regarding the guilt or credibility of the accused or other witnesses, see State v. Schmidt, 2008 ME 151, ¶¶ 16-17, 957 A.2d 80.” State v. Dolloff, 2012 ME 130, ¶ 42, 58 A.3d 1032, 1046 (Me. 2012).

Also, the State cannot bolster the credibility of its witnesses. “Using the authority or prestige of the prosecutor's office to shore up the credibility of a witness, [is] sometimes called ‘vouching,’ see State v. Williams, 2012 ME 63, ¶ 46, 52 A.3d 911.” State v. Dolloff, 2012 ME 130, ¶ 42, 58 A.3d 1032, 1046 (Me. 2012).

If error is found, “‘the comments of the prosecutor [are reviewed] as a whole,’ looking ‘at the incidents of misconduct both in isolation and in the aggregate.’” State v. Clark, 2008 ME 136, ¶ 7, 954 A.2d 1066, 1069 (Me. 2008) (internal citations omitted); see also State v. Dolloff, 2012 ME 130, ¶ 41, 58 A.3d 1032, 1045 (Me. 2012).

The State’s closing remarks to the jury overreached and played to the emotions of the jury, encouraging the jury to base their verdict on emotion and to sympathize with Ms. B[REDACTED]. Additionally, the State’s characterization of Ms. B[REDACTED] in its comments resulted in the State vouching for her testimony and implying that Mr. Schooley should not be believed.

In its initial closing remarks to the jury, the State made the following comments:

“So what we talk about now is -- since the State's evidence is really based on direct evidence and the testimony of M[REDACTED], it really turns on credibility. So briefly we'll talk about things that might lend itself to credibility.” (Tr. T. at 212).

“She thought she finally had the courage to testify and this wasn't because -- as she testified yesterday, she told her mom what happened.

This wasn't because somebody in the household protected her. As far as M [REDACTED] was concerned - and I think you can deduce this or you heard this yesterday - nobody was helping her in the house. She confided in her mom. Her mom didn't help her. **Certainly Mr. Schooley wasn't helping her.** So she had to rely on other people. She had to -- actually, by testifying she was stepping out into the unknown by finally revealing this secret.”
(Tr. T. at 214-215)(emphasis added).

“So she really was all on her own up here, and **it took great courage for her to finally step forward and tell you, 12 strangers, the Judge, and to again face Mr. Schooley.**”
(Tr. T. at 216-217)(emphasis added).

“And I'll point out that when she first started to testify, she came out here and sat down, Judge swore her in, and before I even asked a question she needed a recess. That was the first time that she had been in front of people. That was the first time she had seen Mr. Schooley in years, and **it was very probably traumatic for her to begin to experience this.** However, we took a recess, and she came back out, got herself together and was able to face Mr. Schooley, the jury, the Judge and -- and a cross from a defense attorney.”
(Tr. T. at 217)(emphasis added).

“And I'll just point out you saw how skilled Mr. Ashe is. He had a detective of 26 years squirming a little bit in the chair during his cross of him -- of the detective up there. **She stood up to his cross, stuck to her story, was consistent with her story and even corrected Mr. Ashe when he tried to get her off her story or correct her by saying, no, that's not what I said, this is what I said.**”
(Tr. T. at 217)(emphasis added).

“She really worked to get her truth out. . . And I think if you notice - I did notice - she almost grew up right in that stand. She took ownership back of her life, got stronger and by telling her truth and her story, and I think those all lead to the credibility here. And this case really does turn on the credibility of the eye witness in this

matter.”¹⁷

(Tr. T. at 218)(emphasis added).

And, in its rebuttal remarks to the jury the State made the following comment:

“And, again, the State has a high burden here. The State welcomes that burden. **And the State believes that the testimony of M [REDACTED] yesterday was credible**, and if you believe that testimony, then the State has met its burden and should find Mr. Schooley guilty of gross sexual assault.”

(Tr. T. at 233)(emphasis added).

The State’s comments enumerated above demonstrate a clear effort by the State to bolster Ms. B [REDACTED]’ testimony and to vouch for her. (Tr. T. at 216-218, 233). In making its statements, the State has also attempted to elicit sympathy for Ms. B [REDACTED], by suggesting how traumatic the trial process was on her and how difficult it was for her to testify, calling her “courageous.” (Tr. T. at 216-217). A “prosecutor’s. . . emotionally charged remarks are improper.” State v. Hunt, 2023 ME 26, ¶ 27, 293 A.3d 423, 433 (Me. 2023)(citation omitted). The State’s overreaching comments interfered with the jury’s fact-finding duty and attempted to convince the jury that Mr. Schooley was guilty on the basis of something other than the evidence at trial.

The State also clearly states that it believed Ms. B [REDACTED]’ testimony to be credible. (Tr. T. at 218, 233). “At trial, an attorney is prohibited from commenting

¹⁷ In its closing remarks the State stated that “[i]t was her friend's brother, she testified, who had to call the police and have them come.” (Tr. T. at 216). Ms. B [REDACTED]’ testimony only stated that “she [her friend Christine] called social services, and then they came out to my house.” (Tr. T. at 116). While not an overly important misstatement, it still was a statement of facts not in the evidence.

on his or her personal opinion as to the credibility of a witness.” State v. Williams, 2012 ME 63, ¶ 46, 52 A.3d 911, 922 (Me. 2012)(citations omitted). In asserting that Ms. B [REDACTED] is credible, the State has also suggested the Mr. Schooley should not be deemed credible, stating at one point that he “[c]ertainly. . . wasn’t helping her.” (Tr. T. at 214-215). In a case where the key evidence was Ms. B [REDACTED]’ testimony, her credibility was highly relevant and central to the State’s case. The State noted this fact itself in its closing remarks, acknowledging that its case turned on the credibility of Ms. B [REDACTED].¹⁸ (Tr. T. at 212, 218). As such, the State’s comments severely affected Mr. Schooley’s ability to receive a fair trial.

This Court has found in a similar case, where young victims under the age of twelve testified at trial to acts of unlawful sexual contact, that the prosecutor had crossed the line in its closing remarks and vouched for the credibility of the victims. See State v. Hanscom, 2016 ME 184, ¶ 2, 20, 152 A.3d 632, 634, 638 (Me. 2016). In Hanscom this Court stated

the prosecutor vouched for the credibility of the two child witnesses during closing arguments, stating: ‘I would submit the most important testimony that you heard yesterday came from [A.B. and C.D.]. . . They were specific, they were detailed, and I would submit to you they were genuine in their testimony.’ A lawyer should not ‘state a personal opinion as to . . . the credibility of a witness.’ State v. Hassan, 2013 ME 98, ¶ 33, 82 A.3d 86 (citing M.R. Prof. Conduct 3.4(e)). A prosecutor may properly suggest to the jury ways to analyze the credibility of witnesses when those arguments are ‘fairly based on facts in evidence.’ See Hassan,

¹⁸ The State said: the “State’s evidence is really based on direct evidence and the testimony of M [REDACTED], it really turns on credibility” and “this case really does turn on the credibility of the eye witness in this matter.” (Tr. T. at 212, 218).

2013 ME 98, ¶ 33, 82 A.3d 86 (quotation marks omitted). It is improper, however, for a prosecutor to vouch for a witness by ‘impart[ing] her personal belief in a witness's veracity or impl[ying] that the jury should credit the prosecution's evidence simply because the government can be trusted.’ State v. Williams, 2012 ME 63, ¶ 46, 52 A.3d 911 (quotation marks omitted). Here, the prosecutor crossed that line. State v. Hanscom, 2016 ME 184, ¶ 20, 152 A.3d 632, 638 (Me. 2016).

The State’s comments here that the “State believes that the testimony of M [REDACTED] yesterday was credible” and that “she took ownership back of her life, got stronger and by telling her truth and her story, and I think those all lead to the credibility here” are statements akin the State’s comment in Hansom where the State said it believed the alleged victims were genuine in their testimony. (Tr. T. at 218, 233).

Lastly, the “alleged instances of misconduct “cumulatively” prevented Mr. Schooley from receiving a fair trial, which “deprived [him] of due process.” Id. ¶ 74; see U.S. Const. amend. XIV, § 1; Me. Const. art. I, § 6-A.” State v. Sholes, 2020 ME 35, ¶ 23, 227 A.3d 1129, 1135 (Me. 2020). The harmful impact of the State’s comments, viewed in the totality of the circumstances, effected Mr. Schooley’s substantial right to receive a fair trial. Under this approach, the effect of misconduct is determined by looking at factors that include “the severity of the misconduct, the prosecutor's purpose in making the statement (i.e., whether the statement was willful or inadvertent), the weight of the evidence supporting the verdict, jury instructions, and curative instructions.”” State v. Dolloff, 2012 ME 130, ¶ 32, 58 A.3d 1032, 1042 (Me. 2012)(citation omitted). Given that the purpose of the highlighted statements was to influence the jury’s verdict by

vouching for Ms. Barnes' credibility, and the number of comments made to that effect, there was a clearly harmful impact from the comments on Mr. Schooley's trial. Additionally, the only evidence that supports Mr. Schooley's convictions are statements made by Ms. Barnes. As such, the evidence given by her was central to the case and the actual veracity of those statements should not have been polluted by the State's closing remarks that attempted to vouch for and bolster her credibility. Whether the statements were believable, and the credibility of Ms. Barnes, was something solely for the jury to decide.

Conclusion

For the above-reasons, the Appellant asks this Court vacate his convictions and remand his case to the Lincoln County Courts for further proceedings.

Dated: January 10, 2025

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Certificate of Service

I, Jeremy Pratt, Esquire, hereby certify that on this date I sent by electronic mail one copy of the foregoing Brief of Appellant, later to be followed by two printed copies, via the U. S. Postal service, to Kent Murdock, DDA, Lincoln County District Attorney's Office, P. O. Box 249 Wiscasset, ME 04578.

Dated: January 10, 2025

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