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

LAW COURT DOCKET NO. Pis-25-160

STATE OF MAINE
Appellee

v.

WILLIAM BRADBUY
Appellant

ON APPEAL from the Piscataquis County
Unified Criminal Docket

BRIEF OF APPELLANT

Rory A. McNamara # 5609
DRAKE LAW LLC
P.O. Box 143
York, ME 03909
(207) 475-7810

ATTORNEY FOR WILLIAM BRADBURY

TABLE OF CONTENTS

TABLE OF AUTHORITIES

U.S. Supreme Court Cases

Other Cases

Statutes

Rules

Other Authorities

INTRODUCTION

Two teenage sisters accused defendant of touching their breasts and displaying his genitals to them. There are two errors, one requiring vacatur and entry of judgment of acquittal of the touching-count (*i.e.*, Count II), and the other necessitating vacatur of those pertaining to the display of his genitals:

I. The State offered zero evidence of two elements of the offense regarding the alleged touching of the younger sister. First, it offered no proof that she did "not expressly or impliedly acquiesce[]" to the touching. She said nothing. She put up no resistance. When she said she was leaving, defendant backed away and offered to give her a ride home. Likewise, the State offered no proof that defendant acted with criminal negligence regarding whether she acquiesced. There is therefore insufficient evidence that the sister communicated a lack of acquiescence, let alone that defendant was criminally negligent in not observing such a hypothetical communication.

II. On the morning of the second day of trial, just as defendant was about to testify, the State suddenly produced a handful of still-images purportedly from a video law enforcement had recovered from his phone. The court overruled defendant's motion to exclude the video, thereby failing to impose any sanction for the State's discovery violation and effectively driving defendant from the stand.

STATEMENT OF THE CASE

After a two-day jury trial, defendant was convicted of unlawful sexual touching, 17-A M.R.S. § 260(1)(A) (Count II) (Class D) (2021);[1] and four counts of indecent conduct, 17-A M.R.S. § 854(1)(C) (Counts III & IV) (Class E), and 17-A M.R.S. § 854(1)(B) (Counts V & VI) (Class E). Because the jury could not reach a consensus on Count I, unlawful sexual touching, *supra*, the State dismissed that charge. Immediately after trial, the Piscataquis County Unified Criminal Docket (Haddow, J.) imposed six months' jail on Count II, concurrent to 60-day sentences on the remaining counts. This timely appeal,

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[1] Section 260 has been amended since the time of the conduct at issue in this case. *See* P.L. 2023, ch. 280, § 5 (effective Oct. 25, 2023). The applicable statute, that in effect at the time of the charged conduct (June through August 2023, according to the complaint), reads:

> 1. A person is guilty of unlawful sexual touching if the actor intentionally subjects another person to any sexual touching and:
>
> A. The other person has not expressly or impliedly acquiesced in the sexual touching and the actor is criminally negligent with regard to whether the other person has acquiesced. Violation of this paragraph is a Class D crime[.]

17-A M.R.S. § 260(1)(A) (2021). The new version provides,

> 1. Unlawful sexual touching. A person is guilty of unlawful sexual touching if the actor intentionally subjects another person to any sexual touching and:
>
> A. The other person has not consented to the sexual touching and the actor is criminally negligent with regard to whether the other person has consented. Violation of this paragraph is a Class D crime[.]

17-A M.R.S. § 260(1)(A) (2023).

slowed by a sixteen-week delay in obtaining appointed appellate counsel, follows.

I. The State's case

In late summer 2023, defendant lived just down the road from Sister 1 and Sister 2, aged 16 and 14, respectively, and their family. 1Tr. 31-32, 36. Also close by was the home of the girls' maternal grandmother and her husband – the girls' step-grandfather. 1Tr. 33.

In October of that year, the girls' mother escorted them to the Penquis Children's Advocacy Center (CAC) in Bangor. 1Tr. 54, 61. One interviewer met with Sister 1, and another with Sister 2. 1Tr. 61, 74. As the prosecutor told the jury, the resulting CAC videos "are the crux of this case." 1Tr. 23.

A. Sister 1

The State introduced some portion of Sister 1's CAC interview through the interviewer. SX 1 (Sister 1);[2] 1Tr. 62, 65. On direct, the State merely had Sister 1

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[2] The numeration of the exhibits at trial was confusing. The separate videos of Sister 1's and Sister 2's interviews seem both to be marked as State's Exhibit 1. *See* 1Tr. 62, 65, 154. In his briefing, defendant differentiates them as either "Sister 1" or "Sister 2.".

It is also less than clear from the record which portions of the videos were introduced as evidence. The "Sister 1" video was apparently played from 0:1:30 to 09:55 and from 37:33 to 41:03. 1Tr. 62, 65, 119, 122. A transcript of only the latter portion was provided to the jury. SX 3; 1Tr. 117. However, the jury was instructed that the transcript was not evidence, only the "video itself is the evidence." 1Tr. 119-22. "[I]f you saw anything in the transcript that was not in the video, you are to disregard it," the court instructed.

At one point, the State represented that it would display the "Sister 2" video from 1:19:24 to 1:44:15. 1Tr. 71. Elsewhere, it represented that the video was begun at what the transcriptionist recorded as "0:1:10," perhaps ending at 05:27. 1Tr. 75-76, 80. And it apparently displayed the Sister 2

identify where she lived, who she lived with, where she went to school while she lived in Maine, and where she went swimming while here. 1Tr. 141-43.

The defense was not permitted to introduce those portions of the interview in which Sister 1 told her interviewer that her step-grandfather had sexually assaulted her. 1Tr. 6-8, 12, 42-44, 49. The step-grandfather had, in fact, been convicted based on Sister 1's allegations, serving time in prison as a result. 1Tr. 146-47; *see also* 1Tr. 131-34 (on voir dire, describing those sexual allegations). In the middle of trial, though, Sister 1 recanted those allegations; she admitted that she had lied to the interviewer. 1Tr. 146-47. Whereas the court permitted defense counsel to elicit testimony from Sister 1 that she had lied about her step-grandfather, it denied the defense request for leave to develop the details of those allegations. 1Tr. 139-40.

From the short clip of the interview that was played for them, the jury heard that defendant once touched her, sucking on her "boobs." SX 1 (Sister 1) ca. 38:00. Sister 2 was there at the time. *Id.*

On redirect – without defense counsel having inquired into the substance of the allegations – the State elicited that defendant would sometimes "jerk himself off" in front of the girls. 1Tr. 149. Sister 1 added that defendant touched her chest; he put his mouth on her breast, and Sister 2 saw this. 1Tr. 149-50. "[A]fter he stopped," she and Sister 2 went home. 1Tr. 150.

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video from 1:19:22 to 1:49:04. 1Tr. 79-80. The jury received a transcript-copy of this latter portion, marked as State's Exhibit 2. *See* 1Tr. 80, 117.

It was the sucking-on-boobs incident that the State alleged was the basis for Count I. 2Tr. 35-36. However, when the jury could not reach a consensus on Count I, the State dismissed it. 2Tr. 65-67.

B. Sister 2

After the State introduced portions of the video-recording of Sister 2's CAC interview, 1Tr. 75-76, 79-80, it briefly called her to testify on direct examination. 1Tr. 95-97. It elicited where she lived, what grade she was in in school, where her biological father lived, and on what street she lived at the time of the alleged offenses. *Id.* Finally, it asked whether she told the truth when she gave her interview. 1Tr. 97. Then, it passed the witness. 1Tr. 97.

From the portion of the video apparently displayed to the jury, Sister 2 claimed that defendant showed them videos on his phone of his "private cumming." SX 1 (Sister 2) ca. 1:20:00. In other words, the videos were of defendant "jerking himself off." *Id.* ca. 1:20:30. On two occasions, defendant watched while the girls were swimming, and he was "jerking himself off." *Id.* ca. 1:24:00 to 1:27:00. These were the allegations that the State contended were proof of the indecent-conduct counts or proof of defendant's "intent." 2Tr. 39-40.

One time, Sister 2 fell asleep on the couch at defendant's home. SX 1 (Sister 2) ca. 1:29:30. When she woke up, defendant was touching her, testifying at trial, "he kept touching me and when I woke up he had um clothes on, but he kept staring at me and watching me sleep." *Id.* ca. 1:30:00. Defendant was touching his penis at the time. *Id.* ca. 1:31:15. The

interviewer asked Sister 2 what she did, and Sister 2 responded, "I just said 'I'm leaving;' I got up like nothing ever happened and when I got home I told my mom." *Id*. ca. 1:35:00. Defendant "backed up and just stared at [Sister 2]." *Id*. ca. 1:35:15. Defendant then gave Sister 2 a ride home. *Id*. ca. 1:35:40.

Sister 2 later added this about that incident:

> He kept touching my boob and I swear I'm not sure if it was just me or if it was just my imagination thinking of what could happen, you know? I swear I felt him move down my shirt and start kissing my boob. I swear. I'm not sure if it was just me or but.

Id. ca. 1:40:00. "[H]alf asleep," she felt "wetness" on her boob. *Id*. ca. 1:40:45. It was this incident that the State contended sufficed for a conviction on Count II. 2Tr. 36. In fact, Sister 2 denied that there was any other time that defendant touched her. SX 1 (Sister 2) ca. 1:41:10.[3]

II. The court's discovery ruling

At the beginning of trial, defense counsel represented that it was likely that defendant would testify. 1Tr. 11. And, after the State's case, counsel reiterated, "My client … will likely testify." 1Tr. 118.

A development on the second day of trial, March 20, changed those plans. That morning, the prosecutor handed defense counsel copies of a few photographs obtained from the State's search of defendant's phone,

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[3] In her tesimony, Sister 2 did not mention any touching. Rather, she testified that, when she awoke, defendant was near her "uncoveredly" – perhaps meaning exposing his genitals. 1Tr. 108.

including some of defendant "in his room naked with an erection." A20; 2Tr. 3.[4] Apparently, these were still-images of a video. A20; 2Tr. 3.[5] Defense counsel moved to exclude evidence about the video "because I'm just hearing about it this morning." A21; 2Tr. 4.

The district attorney informed the court that "as the case [wa]s getting closer to trial," a staff member began to wonder what became of the results of the search of defendant's phone. A22; 2Tr. 5. The State's staff-person began "pestering the sheriff's office to provide [the D.A.] with whatever they had uploaded from the defendant's phone." A22; 2Tr. 5. It was uploaded to "ShareFile or Citrix," according to the State, on March 7. A22; 2Tr. 5.[6] Given the late disclosure, however, the prosecution felt that "using it in the State's case-in-chief would be problematic." A22; 2Tr. 5. That's why the prosecutor did not ensure that counsel actually received the video. A22; 2Tr. 5.

The prosecutor argued that it was nonetheless "reasonable" for the State to be permitted to use the video "to confront" defendant, should he testify. A22-A23; 2Tr. 5-6. Such was relevant, according to the State,

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[4] Defense counsel's offer of proof on this topic is somewhat ambiguous. It is possible that, according to him, the State made 3,200 pages of discovery, in which these images were dumped, available to counsel on the weekend prior to trial – *i.e.*, four or five days before trial.

[5] It is unclear whether this evidence was a singular video, several snippets of a video, separate videos, or something else. Defendant refers to whatever it or they are as "video."

[6] Defense counsel appears to have refuted this timing. He seems to have indicated that the discovery was not uploaded as of at least March 11. 2Tr. 7.

because Sister 2 had told the CAC interviewer that defendant had shown her and Sister 1 videos of his genitals. A23; 2Tr. 6.

Regardless the role of the prosecutor, defense counsel noted the need to "punish[] the cops for slacking off, period." A25; 2Tr. 8.

The court denied defendant's motion to exclude, mentioning two "factors" that motivated that ruling: (1) the video was "particularly relevant for cross-examination, given that it sounds as though the defendant is electing to testify," and (2) the video was "in existence on the defendant's phone" rather than "some other source." A25; 2Tr. 8. Apparently referencing M.R. Evid. 403, the court therefore concluded "that there's not undue or unfair prejudice in allowing the State to rely on images taken from these videos that were found on the phone." A25; 2Tr. 8.

Before the court's ruling, defense counsel represented, defendant was prepared to testify. A21; 2Tr. 4. After counsel informed defendant of the ruling and advised him about "the detriment … from those pictures that we didn't know about," defendant changed his mind, opting not to testify. 2Tr. 11.

III. Motion for judgment of acquittal

In particular, defense counsel pressed an argument that there was insufficient evidence as to Count II, arguing that, at one point, Sister 2 had denied being touched. A18; 1Tr. 155. Nonetheless, the court concluded that there was sufficient evidence that defendant had touched Sister 2. A19; 1Tr. 156. It therefore overruled the motion. A19; 1Tr. 156.

ISSUES PRESENTED FOR REVIEW

I. Is there insufficient evidence to sustain the conviction on Count II, because the State offered no evidence that Sister 2 had not expressly or impliedly acquiesced to the touching, or that defendant had been criminally negligent with regard to whether Sister 2 acquiesced?

II. Did the court abuse its discretion by declining to exclude the video from defendant's phone, because its last-minute production was both the result of law enforcement's slipshod discovery practices and caused defendant to change his defense strategy in the middle of trial?

ARGUMENT

First Assignment of Error

I. There is insufficient evidence to sustain the conviction on Count II, because the State offered no evidence that Sister 2 had not expressly or impliedly acquiesced to the touching, or that defendant had been criminally negligent with regard to whether Sister 2 acquiesced.

A. Preservation and standard of review

Defense counsel moved for judgment of acquittal, specifically on Count II. Though counsel did not advance the exact argument presented herein, his omission to do so is immaterial for this Court's purposes.

"[E]ven where an accused fails to move for entry of judgment of acquittal based on insufficiency of the evidence, the trial court has an independent duty pursuant to M.R. U. Crim. P. 29(a) to assess the sufficiency of the evidence at the close of both the State's case-in-chief and the accused's case." *State v. Kendall*, 2016 ME 147, ¶ 12, 148 A.3d 1230. The issue of sufficiency is before a trial court "irrespective of whether the defendant articulates it." *Ibid.*; *see* M.R. U. Crim. P. 29(a) ("The court on motion of a defendant or **on its own motion shall** order the entry of judgment of acquittal of one or more crimes charged in the indictment, information, or complaint after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such crime or crimes.") (emphasis added). This Court will therefore take up his appellate challenge to the sufficiency of the evidence "under the standard of review applicable to preserved error." *Kendall*, 2016 ME 147, ¶ 12. It will take the evidence in the light most favorable to the prosecution, evaluating whether a jury could

rationally find each required element to be proven beyond a reasonable doubt. *State v. Gatto*, 2020 ME 61, ¶ 16, 232 A.3d 228.

There is an additional federal constitutional consideration, which defendant expressly invokes in the event federal court review becomes necessary. Specifically, the Fourteenth Amendment prohibits what occurred here: a conviction absent proof beyond a reasonable doubt of every element of the offense. *See Jackson v. Virginia*, 443 U.S. 307, 321 (1979) ("[I]t is clear that a state prisoner who alleges that the evidence in support of his state conviction cannot be fairly characterized as sufficient to have led a rational trier of fact to find guilt beyond a reasonable doubt has stated a federal constitutional claim.").

B. Analysis

Among other requirements, a conviction for 17-A M.R.S. § 260(1)(A) (2021) requires proof that the person touched "has not expressly or impliedly acquiesced in the sexual touching...." That "means that the lack of acquiescence must be communicated in some fashion, verbally or otherwise." *State v. Asaad*, 2020 ME 11, ¶ 14, 244 A.3d 596, *quoted with approval by State v. Idris*, 2025 ME 17, ¶ 9, 331 A.3d 419. "After all, expression and implication both involve a 'target' — another person who heard, saw, or felt the expression or implication." *Asaad*, 2020 ME 11, ¶ 14.

The Court's analysis need go no further. There is nothing at all in the record to establish that Sister 2 "communicated in some fashion" that she did not want the touching to occur. Rather, the record supports only the fact that she said and did nothing while defendant "kept" touching her – a word she

used three times in her brief description of the event. *See* SX 3; SX 1 (Sister 2) ca. 1:30:15 & 1:40:00. What, other than acquiescence, is someone supposed to take from a lack of objection or resistance of any sort?[7]

When Sister 2 finally communicated something – "I just said, 'I'm leaving,'" she told the CAC interviewer – defendant immediately "backed up" and ceased the touching. SX 1 (Sister 2) ca. 1:35:15. Thus, there is no evidence that Sister 2 ever communicated a lack of acquiescence that defendant did not heed.

Above and beyond the element of acquiescence, there is another missing element of proof: that of criminal negligence. Let's assume, for the sake of argument and counter to the factual record, that Sister 2 actually did communicate her lack of acquiescence. Whatever she might possibly have done to somehow communicate her non-acquiescence could have been nothing more than imperceptible.[8] *Cf. United States v. Tollinchi*, 54 M.J 80, 83 (C.A.A.F. 2000) (no rational juror could find beyond a reasonable doubt that alleged victim manifested lack of consent when record establishes she was able to do so but did not).

Recall, too, that the State bore the obligation of disproving the possibility that any "[i]gnorance or mistake" by defendant as to whether

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[7] In comparison, this Court has previously found *affirmative* "waiver" when defense attorneys have "acquiesced to the process employed." *State v. Foster*, 2016 ME 154, ¶ 10, 149 A.3d 542.

[8] For the sake of clarity, again, defendant vehemently disagrees that there is *any* communication of a lack of acquiescence. Here, he is hypothesizing *arguendo*.

Sister 2 impliedly acquiesced undermined the criminal-negligence element. *See* 17-A M.R.S. § 36(1). Criminal negligence, moreover, is itself a high burden. It requires proof beyond a reasonable doubt that defendant's failure to notice Sister 2's lack of acquiescence constituted "a gross deviation" from what a reasonable person would have understood from her conduct. 17-A M.R.S. § 35(4)(C).

"'Gross deviation' is a considerable narrowing of the reasonableness standard...." *State v. Wilder*, 2000 ME 32, ¶ 34, 748 A.2d 444. "[T]o constitute criminal negligence the risk involved must be greater in degree than will suffice for civil negligence." *State v. Crocker*, 435 A.2d 58, 65 (Me. 1981). Otherwise, as this Court has noted, statutes requiring proof of criminal negligence or recklessness would provide insufficient notice to the public, making those statutes susceptible to "a due process challenge." *Wilder*, 2000 ME 32, ¶ 34.

This Court, in other words, has a role to play in upholding the integrity of the gross-deviation standard. There are several notable examples of the Court doing so, providing examples of what is necessary in our case.

In *Wilder*, a father grabbed and squeezed his nine-year-old son on three separate occasions, causing pain and bruises each time. After his convictions for assault, the defendant appealed, contending that the State had failed to prove that his attempts to control the son's behavior constituted a gross deviation from what a reasonable and prudent parent would have done in the circumstances. *Id.* ¶¶ 2-12. Noting the gross-deviation standard, this Court could not "say, as a matter of law" that "grabbing [the] son hard to

get his attention and stop him from talking too much was … beyond a reasonable doubt, an action grossly deviant from what a reasonable and prudent parent would believe necessary in the same situation." *Id.* ¶ 47.

Years earlier, in *State v. Tempesta*, 617 A.2d 566 (Me. 1992), a defendant was convicted of driving to endanger after splashing snow and slush onto the windshields of oncoming vehicles, causing the drivers of those vehicles to momentarily lose control. *Id.* at 566-67. Reasoning thusly, this Court found insufficient evidence of a gross deviation:

> Even if no car were actually to his right, [the defendant's] concern that a vehicle was in his blind spot could justify his choosing to splash the oncoming vehicles rather than chance hitting another vehicle. To the extent that [the defendant's] failure in the circumstances to keep his mirrors clear contributed to his difficulty in determining whether the right-hand lane was occupied, this failure does not reach the level of criminal negligence.

Id. at 567-68. The lesson of *Tempesta* relevant to our case is that, even when a defendant's actions are not perfect – certainly, the defendant "fail[ed]" to keep his mirrors clean, causing the other drivers' loss of control – the State has not necessarily established a *gross* deviation from those of a reasonable and prudent person. Many cases hold similarly: Defendants who merely *could have* employed a greater standard of care and thereby avoided causing injury have not necessarily grossly deviated from what a reasonable person would have done. *E.g.*, *State v. Ela*, 136 Me. 303, 308 (1939) (though the defendant might have exercised more care, evidence insufficient to prove manslaughter because lack of proof of gross deviation).

Our case is a step further even from *Wilder*, *Tempesta* and *Ela*. They stand for the principle that, even when a defendant is imperfect in observing a risk, such imperfection does not necessarily constitute a gross deviation. In our case, though, there is simply no evidence that defendant was even imperfect. That is, there is no evidence whatsoever that Sister 2 communicated a lack of consent. It follows, then, defendant could not have been grossly negligent for failing to observe such hypothetical but non-existent non-acquiescence.

Second Assignment of Error

II. The court abused its discretion by declining to exclude the video from defendant's phone, because its last-minute production was both the result of law enforcement's slipshod discovery practices and caused defendant to change his defense strategy in the middle of trial.

A. Preservation and standard of review

This argument is preserved by defendant's motion to exclude the video, documented at pages 11 through 13 of the brief, *supra*, and A20 through A26 of the Appendix.

Thus, the Court will review for abuse of discretion. *State v. Reed-Hansen*, 2019 ME 58, ¶ 17, 207 A.3d 191. An abuse of discretion is "an error in the application of the law to the facts." *State v. Hussein*, 2019 ME 74, ¶ 17, 208 A.3d 752. "[I]f the trial judge misconceives the applicable law or misapplies it to the factual complex, in total effect the exercise of legal discretion lacks a foundation and becomes an arbitrary act." *Id*. (quotation marks omitted).

In the context of a discovery violation and sanction, a trial court's choice of sanction must make a defendant "whole," or else it will have abused its discretion. *Cf. State v. Poulin*, 2016 ME 110, ¶ 27, 144 A.3d 574 ("The trial court cannot … permit a discovery violation to deprive a defendant of a fair trial."). In other words, this Court will review to determine whether the prejudice wreaked as a result of the violation was "'mitigated – or not – by the trial court's ruling.'" *State v. Page*, 2023 ME 73, ¶ 14, 306 A.3d 142, quoting *Poulin*, 2016 ME 110, ¶ 28. A key component of the court's sanction

is "its duty to administer an orderly and efficient process for ensuring that a case timely proceeds to trial." *State v. Burbank*, 2019 ME 37, ¶ 17, 204 A.3d 851.

A. Analysis

Below, the State did not contest the fact that the late disclosure of the video was a discovery violation. Rather, it implicitly recognized as much, conceding that it would have been "problematic" for it to introduce the video in its case-in-chief. A22; 2Tr. 5. Nonetheless, it is important to understand the nature of the violation, as that ought to inform the proper sanction. *See Reed-Hansen*, 2019 ME 58, ¶ 18 ("slipshod" discovery practices and "[c]arelessness" deserve significant sanction). A sanction may be "used to educate the State that its casual approach to fulfilling its discovery obligation was unacceptable." *Id.* ¶ 19. It should be used here to warn prosecutors, law enforcement, and the government branches that underfund them that the rules of procedure cannot be continually violated with little or no consequence.

There are two factors deserving of particular attention. First, an individual prosecutor has a rule-derived "obligation" to make discovery of evidence "within the possession or control of any member of the attorney for the State's staff and of any official or employee of this State or any political subdivision thereof who regularly reports or who, with reference to a particular case, has reported to the office of the attorney for the State." M.R. U. Crim. P. 16(a)(1). Certainly, that "obligation" includes the discovery of materials in the possession of the law enforcement officials who seized and

searched defendant's phone pursuant to *this prosecution*. After all, after the prosecutor's staff-person finally followed up with law enforcement, they responded with the video.

And there should be no question: The video was subject to automatic discovery. M.R. U. Crim. P. 16(a)(2)(i) obligates the prosecutor to produce to defendant "any" evidence "intended to be used against the defendant at trial," when such has been obtained "as a result of a search and seizure." Clearly, from the State's representations at trial, this was all true.

When was the prosecutor obligated to make this material available? The prosecutor was required to do so within seven days of defendant's not-guilty plea. M.R. U. Crim. P. 16(b)(2). That was on May 31, 2024. 5/31/24 Tr. at 3-4. The State's eventual disclosure, in contrast, happened some nine-plus months later – nearly 300 days after it was due.

This informs the second point defendant wishes to make. This Court must not continue to condone the State's failure to conduct meaningful trial preparation until the last minute, when trial is just days away. *Cf. State v. Hassan*, 2018 ME 22, 179 A.3d 898 (evidence obtained from State's belated "pretrial interview" some three and a half years post-indictment and four days before trial, is not discovery violation); *State v. Dennis*, 2024 ME 54, 320 A.3d 396 (State's belated testing of evidence, some 11 and a half months after arrest and six days before trial, is not discovery violation). "[A]ll too often, new information is obtained on the eve of trial." *Id.* ¶ 35 (Stanfill, C.J., concurring), citing *Page*, 2023 ME 73 (a year and a week after complaint and "only a few weeks" before trial, the State still had not turned over information

in its possession for more than a year) and *State v. Pelletier*, 2023 ME 74, 306 A.3d 614 (13 months after complaint and three days before trial, State still had not turned over evidence long in its possession); *see also State v. Donte Johnson*, Ken-24-563 (pending) (six months after a *court-order* requiring production of evidence, State has not complied).

Ask any trial judge or defense attorney: The trend of late discovery and deferral of vital investigation of cases until the last-minute is on the uptick. Prosecutors and law enforcement are, no doubt, overburdened. However, they have not made serious attempts to either exercise their discretion to cut case-loads so that they may comply with the law, or to beseech the other branches of government to appropriate the funding apparently necessary to abide by the rules of discovery. *See* Marie Weidmayer, *Bangor Daily News*, *Felony Cases in Penobscot, Piscataquis counties are skyrocketing* (Aug. 26, 2025), available at https://observer-me.com/2025/08/26/news/felony-cases-in-penobscot-piscataquis-counties-are-skyrocketing/ (reporting that the number of pending felonies in Penobscot County "has more than doubled compared with five years ago").

Why should they? It's no skin off their backs to see cases delayed. They aren't the ones in jail or subject to liberty-restricting conditions or the awful limbo that is a pending criminal charge. The effects, rather, are seen directly on defendants who must endure these tribulations, defense lawyers who must scramble to render effective assistance despite last-minute changes, and, indirectly, on Maine's overburdened and woefully under-resourced courts, and the public coffers that strain under continuance after

continuance and motion for discovery after motion for discovery. How much time in recent years has this Court alone spent dealing with discovery-related appeals?

The system is failing, and, until those who can do something to save it know that they must act, it will continue to worsen. This Court can draw the line, making clear that violations of its rules will not be tolerated. Respectfully, others appear to believe those rules are merely optional.

In this case, the State waited until "the case [was] getting closer trial" before reaching out to its law enforcement team-members to check in on the results of the search warrant it had been required to produce several months earlier. 2Tr. 5. When the courts are burdened, when defendants' liberty is curtailed, when the rules contemplate much earlier discovery, this Court should not countenance the State's neglect to pay earlier attention to such things. This case is another opportunity for the Court to deliver a needed message.

Respectfully, the trial court's analysis is deficient in two important regards. First, defendant surmises that most people are not in fact aware of each and every file on their cellphones or comparable devices. Sexting is commonplace amongst many, perhaps most, Americans. So is ownership of multiple devices. That is not a reasonable assumption by the court.

Second, the point of the burden of proof is that it is irrelevant what *the defendant* knows, but it is vital what the defendant knows that *the State* knows and can prove with evidence. Inverting this order – supposing that defendant knows of every possibly incriminating thing he's ever done or

possessed – would obviate the discovery rules. For example, if defendant did it, shouldn't he know that his DNA is on the victim, or that the eyewitness saw him at the scene, or that the blood-spatter analysis would not support his version of events? Such an exception would swallow the discovery rule. A defendant could be charged with foreknowledge of everything and anything inculpatory.

Finally, the State chose not to offer the video in its case-in-chief. That was its tactical prerogative, not a court-sanction. Perhaps it was an attempt to avoid making the existence of the video known to defendant until his attorney had finished questioning the witnesses – *e.g.*, is this what you saw, does the metadata support that fact, etc.? There is no "fair balance between the parties' competing interests," *Page*, 2023 ME 73, ¶¶ 1, 14, to be struck when one party, the State, has strategically opted not to use the evidence it should have made available nine months earlier. In contrast, how did the court's ruling mitigate the prejudice to defendant? He couldn't investigate the video. He was driven from the stand at the specter of the jurors moments away from deciding his fate viewing a video of him masturbating. That is not a fair trial. It is trial by surprise and against the rules of procedure.

CONCLUSION

For the foregoing reasons, this Court should vacate defendant's convictions and remand for entry of judgment of acquittal on Count II and a further proceedings on the remaining counts.

Respectfully submitted,

September 5, 2025

/s/ Rory A. McNamara

Rory A. McNamara, #5609
DRAKE LAW LLC
P.O. Box 143
York, ME 03909
207-475-7810

ATTORNEY FOR WILLIAM BRADBURY

CERTIFICATE OF SERVICE & FILING

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

/s/ Rory A. McNamara