STATE OF MAINE
KENNEBEC, ss.

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
DOCKET NO. KEN-25-278

STATE OF MAINE,
Appellee

v.

DUSTIN FOSTER
Appellant

ON APPEAL FROM THE UNIFIED CRIMIAL DOCKET

BRIEF OF APPELLEE

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PROCEDURAL HISTORY

On April 24, 2025, the Kennebec County Grand Jury returned an indictment charging Dustin Foster (Foster) with Unlawful Trafficking in Scheduled Drugs, Class B (17-A M.R.S. § 1103(1-A)(A) (2025), and Unlawful Possession of Scheduled Drugs, Class C (17-A M.R.S. § 1107-A(1)(B)(8) (2025). (Appendix, page 29 [A. __]).

On May 20, 2025, a testimonial hearing was held on Foster's Motion to Determine Immunity under 17-A M.R.S. § 1111-B (2023). (A. 4, 30-32). After hearing, the trial court issued an oral order denying the motion. (Transcript at 73 [Tr. at __]). Foster later filed a Motion for Reconsideration and Findings of Fact. (A. 33). The court denied both motions. (A. 7, 26).

Foster timely appealed.[1] (A. 5).

[1] Interlocutory appeals of orders denying immunity under 17-A M.R.S. § 1111-B are permissible under the death knell exception. *State v. Beaulieu*, 2025 ME 4, ¶ 13, 331 A.3d 280.

STATEMENT OF THE FACTS

On the evening of February 7, 2025, Analyn Green (Green) called 911. (Tr. at 11). Earlier that evening, one of Green's roommates had located a needle in the bathroom. (*Id.* at 13). Green observed that her boyfriend, Foster, was sweating, pacing the room, and mumbling to himself, then alternatively just standing and blankly staring. (*Id.* at 15). Green assumed that Foster had taken something, but she did not know what he might have taken. (*Id.* at 16).

While on the phone with the 911 operator, Green reported that she thought Foster had relapsed and that he was "freaking out" and "screaming" in their bedroom. *Hearing Def. Ex. 1* entitled "*02-07-25 19.22.17 Emergency (NG911-1) – 2(1).wav"* (hereinafter "911 call") at 00:15-00:22. When asked if she was still with Foster, Green said she had to go outside because Foster wouldn't stop yelling. (*Id.* at 01:02-01:07).

Green confirmed for the 911 operator that Foster was not changing color at all and was completely alert and breathing normally. (*Id.* at 01:23-01:27, 01:54-01:57, 02:16-02:22; Tr. at 31). Green repeated that she had to go outside because Foster was screaming at her. (*Id.* at 02:22-02:25).

Later in the 911 call, Green said that she needed to go back inside the residence because Foster had said that he was going to burn the house down

and she wanted to make sure that he was not going to hurt himself. (*Id.* at 04:19-04:35). She told the 911 operator that she did not want to go into the house while on the phone, so she was going to put the phone in her pocket when she went inside. (*Id.* at 04:40-04:43). When she went back into the house, Green was heard saying to someone, "you're being erratic…yeah, so you're going to stab yourself? Like seriously?" (*Id.* at 06:19-06:24). A male voice was heard yelling at her, "you are giving me my money." (*Id.* at 08:05-08:08). Shortly afterwards, Green told Foster to stop breaking stuff. (*Id.* at 08:26-08:34). After some more conversation with Foster, Green informed the 911 operator that "they're here" and the call was terminated. (*Id.* at 10:06-10:10).

At the hearing, Green said—for the first time—that she was worried that Foster was experiencing a drug-related overdose. (Tr. at 25). Green acknowledged that she did not think she had used the word "overdose" during the 911 call. (*Id*. at 36).

Green testified that she is a nurse with 13 years of experience who is trained in providing CPR and has performed CPR on numerous occasions in her professional life. (*Id.* at 26-27). At no point on February 7, 2025, did Green administer any kind of life-saving aid to Foster, including CPR. (*Id.* at 28, 35).

She believed that she might have had Narcan in her vehicle that day, but she never asked Foster if she could administer it to him. (*Id.*at 28). She also testified that she left Foster alone in the house when she went outside to call 911. (*Id.* at 30). She admitted that she felt confident enough in his health at that time to leave the house and to leave him unattended in the bedroom. (*Id*).

Green testified that at no point during the interaction did Foster lose consciousness. (*Id.* at 31). Instead, he was yelling and threatening to burn the house down. (*Id.* at 31-32). Green was afraid of making him angrier. (*Id.* at 29-30). When she went back inside the house, she put the phone back into her pocket, so he couldn't hang up the phone. (*Id.*at 32). When she went back into the house, Foster was breaking his phone. (*Id.*at 34). Green agreed that right before the 911 call was terminated, Foster was still fully alert and conscious. (*Id.* at 34-35). She also testified that no medical vehicles were at the scene and that she did not observe anyone administer any kind of life-saving aid to Foster. (*Id.* at 35).

Tabitha Knowles, a dispatch supervisor for Delta Ambulance and an EMT, testified that an ambulance was staged near the residence. (*Id.* at 40, 46). EMT Knowles testified that staging means the ambulance is out of sight, but close by and ready to respond if necessary. (*Id*. at 46). In this case, EMT

Knowles said that the ambulance was asked to stage by Waterville Communications, who "advised us [of a] possibly agitated patient and to stage in the area until PD cleared." (*Id*.). At 7:45 p.m., the police department cancelled the ambulance, saying it was no longer needed. (*Id.* at 47; A. 41). EMT Knowles confirmed that the ambulance was cancelled before medical personnel ever made contact with Foster. (Tr. at 54).

Kennebec County Sheriff's Deputy Zachary Reynolds did not testify at the hearing, but a copy of his report was attached to Foster's Motion to Determine Immunity.[2] (A. 39). Deputy Reynolds indicated in his report that when he arrived on scene, he observed that Foster was "visibly sweating" and "appeared to be high on narcotics." (*Id*.). Foster denied using drugs and refused medical assistance. (*Id*.). Deputy Reynolds was aware that Foster had an active warrant for his arrest and Foster was arrested on the warrant. (*Id*.). Foster's backpack was searched incident to arrest, resulting in the recovery of drug paraphernalia and 15 grams of suspected fentanyl. (*Id*.).

[2] This Court has not yet decided whether hearsay is admissible in a hearing on a motion to determine immunity. *Beaulieu*, 2025 ME at ¶ 4 n. 3. In *Beaulieu*, the State waived any hearsay objection and allowed Beaulieu to admit the police report and the witness's handwritten statement. *Id.* at ¶ 4. In this case, Foster attached Deputy Reynolds' report to his Motion to Determine Immunity and the State did not object. Foster also cites to the report in his brief. (Blue Brief, 6 [Bl. Br. __]). As a result, the parties have waived any potential hearsay objections as to Deputy Reynolds' report.

ISSUE PRESENTED FOR REVIEW

Is Foster immune from prosecution under 17-A M.R.S. § 1111-B?

ARGUMENT

I. The motion court correctly found that Foster was not immune from prosecution under 17-A M.R.S. § 1111-B.

A. Foster did not present evidence establishing immunity.

The immunity statute is triggered when there is a "call for assistance for a suspected drug-related overdose." 17-A M.R.S. §1111-B (2023). The caller must subjectively "suspect that a drug-related overdose has occurred." *State v. Beaulieu*, 2025 ME 4, ¶ 19, 331 A.3d 280. Furthermore, "it is the content of the call that must reflect the caller's suspicion." *Id*.

Once a call is made requesting assistance for a suspected drug-related overdose and law enforcement officers or medical professionals arrive on scene, the person who is experiencing the suspected drug-related overdose is protected from prosecution for certain offenses. 17-A M.R.S. § 1111-B(1)(B) (2023). The protection lasts "for the duration of the response to the medical emergency." 17-A M.R.S. § 1111-B (2023).

On review after a hearing, the evidence is considered "in the light most favorable to the trial court's judgment to determine if the evidence rationally

supports the trial court's decision." *State v. Connor*, 2009 ME 91, ¶ 9, 977 A.2d 1003. This Court is deferential to the trial court's findings and "will not substitute [its] judgment as to the weight or credibility of the evidence for that of the fact-finder if there is evidence in the record to rationally support the trial court's result." *Id*.

A defendant who claims he is immune from prosecution under 17-A M.R.S. § 1111-B has the initial burden. A defendant asserting immunity must file a motion and present "evidence to establish immunity." 17-A M.R.S. § 1111-B(4) (2023). If the defendant successfully presents evidence establishing immunity, then the burden shifts to the prosecution to prove by clear and convincing evidence that immunity does not apply to the defendant. *Id*.

The defendant's burden is not specified in the statute, but it appears to require a defendant to introduce prima facie evidence of immunity. Prima facie evidence is "[e]vidence that will establish a fact or sustain a judgment unless contradictory evidence is produced." *State v. Beeler*, 2022 ME 47, ¶ 17, 281 A.3d 637, citing *Prima Facie Evidence*, Black's Law Dictionary (11th ed. 2019). Prima facie evidence "requires only some evidence on every element of proof necessary to obtain the desired remedy." *Cookson v. State (Cookson II)*, 2011

ME 53, ¶ 8, 17 A.3d 1208. It is a "low standard" and "does not depend on the reliability or credibility of the evidence, all of which may be considered at some later time in the process." *Id*. This Court will not disturb a lower court's determination that a defendant failed to present prima facie evidence unless "the evidence compelled the court to find to the contrary." *Cookson v. State*, 2014 ME 24, ¶ 16, 86 A.3d 1186.

In this case, Foster failed to produce evidence establishing immunity. First, he failed to produce evidence that the 911 call was "for a suspected drug-related overdose." 17-A M.R.S. § 1111-B (2023). The 911 call does not contain any reference to a drug-related overdose. Green, the caller, never said she believed that Foster was overdoing; instead, she only said that she believed that Foster had relapsed. (Tr. at 36). While there is no specific wording that is required for the call to trigger application of the statute (*Beaulieu*, 2025 ME at ¶ 19), not only did Green not use the word *overdose*, but she also told the 911 operator throughout the course of the call that Foster was awake, alert and breathing normally, and not changing color (911 call at 01:23-01:27, 01:54-01:57, 02:16-02:22). She also said that Foster was screaming and threatening to burn the house down (*Id*. at 00:15-00:22, 02:22-02:25, 04:19-04:29). Accordingly, not only did Green not use the word

overdose during the call itself, but the detailed observations she provided to the operator suggested that Foster was not experiencing an overdose.

Although Foster offered Green's testimony at the hearing, "it is the content of the call that must reflect the caller's suspicion [that an overdose is occurring]." *Beaulieu*, 2025 ME at ¶ 19. In determining that Foster had not met his burden, the motion court correctly looked to the content of the call itself. (Tr. at 69 ("the circumstances surrounding the call and—and the call itself, which the Court was able to listen to—which was very helpful—I think present a different picture than—than that this was an overdose"); *Id.* at 71 ("I'm taking into account the fact that, you know, she made comments that are—that were overheard on the call, such as, you know, telling him, stop breaking stuff.")). After considering the content of the call itself, the motion court correctly found that the call was not made "for the purpose of reporting an overdose." (*Id.* at 72).

Second, Foster failed to establish that there was a medical emergency. *Beaulieu*, 2025 ME at ¶ 21. To the contrary, the testimony at the hearing was that Green—a nurse with 13 years of experience—never provided any medical care to Foster herself. (Tr. at 26, 28, 35). She did not administer CPR and did not attempt to administer Narcan. (*Id.* at 27-28). She also never observed

anyone administer any kind of life-saving care to Foster. (*Id.* at 35). Indeed, Foster denied any drug use, declined medical assistance, and medical personnel in the ambulance never had contact with him. (A. 39; Tr. at 54). Thus, there was no medical emergency. *See Beaulieu*, 2025 ME at ¶ 21 ("The statute requires that the response to a call for assistance…be to the location of a 'medical emergency'… The trial court made no finding that there was a medical emergency at Beaulieu's location nor does the record give any indication that medical assistance was requested, required, or rendered.").

Foster contends that the motion court erred by considering Green's medical background because it was "well beyond the content of the call itself." (Bl. Br. 16). However, Foster himself invited the court to look beyond the content of the 911 call by calling Green to testify. Indeed, the purpose of having her testify was *precisely* to go beyond the content of the call because the call itself was insufficient to establish immunity.

Contrary to Foster's argument, the motion court was not required to disregard the portions of Green's testimony that were disadvantageous to him. *See State v. Harding,* 2024 ME 67, ¶ 13, 322 A.3d 1175 ("The fact-finder is free to selectively accept or reject testimony presented."). Having called Green to testify, Foster made her medical training relevant to the motion court's

assessment of her subjective belief that Foster was experiencing a life-threatening overdose and whether a medical emergency was in fact occurring. Certainly, a licensed nurse would be expected to have a better understanding than the average lay person of what it might look like when someone is experiencing a medical crisis. They would also be in a better position to begin providing some level of medical care while they waited for emergency medical personnel to arrive. The fact that Green determined that she did not need to administer CPR, Narcan, or other life-saving aid, and felt comfortable leaving Foster alone in the house demonstrates that she neither subjectively believed that Foster was experiencing a drug-related overdose or that a medical emergency was in fact occurring. (Tr. at 28, 30, 35).[3] This evidence amply supports the motion court's conclusion that Green's 911 call was not for a drug-related overdose but rather to deal with the threatening and aggressive behavior of her significant other who had *possibly* relapsed. (Tr. at 70).

Accordingly, because Foster did not provide evidence that the call was for a suspected drug-related overdose or that there was a medical emergency,

[3] Foster alleges that it was error for the court not to consider that he could have been overdosing on methamphetamine, for which Narcan would have not been effective. (Bl. Br. at 19). Deputy Reynolds believed that the substance he located in Foster's backpack was fentanyl powder. (A. 39). EMT Knowles testified that she has only seen "less than a handful" of stimulant overdoses in her career because most overdoses involve opiates. (Tr. at 52).

the motion court did not err by concluding that Foster failed to meet his burden to present evidence to establish immunity.

B. In the alternative, any perceived error in the motion court not shifting the burden to the State was harmless.

Because Foster did not object below when the motion court did not shift the burden to the State, the review is limited to obvious error. *State v. Watson,* 2024 ME 24, ¶ 18, 319 A.3d 430; (Tr. at 73-75). "Error is obvious when there is (1) an error, (2) that is plain, and (3) that affects substantial rights. If these conditions are met, we must also conclude that (4) the error seriously affects the fairness and integrity or public reputation of judicial proceedings before we vacate a judgment on the basis of the error." *Id*.

Foster alleges the court erred when it did not shift the burden to the State. (Bl. Br. 11-12). Even if the motion court should have shifted the burden to the State at some point during the proceeding, the error was harmless because clear and convincing evidence was introduced showing that Foster was not entitled to immunity. *Maine Eye Care Associates P.A. v. Gorman*, 2006 ME 15, ¶ 19, 890 A.2d 707 ("Evidence is clear and convincing if 'the factfinder could reasonably have been persuaded that the required findings were proved to be highly probable.'" (internal citations omitted)).

Even when the burden shifts to the State, the State is not obligated to introduce the testimony of witnesses to meet its burden. 17-A M.R.S. § 1111-B(4) (2023) ("The court *may* hear testimony…) [emphasis added]. In *Beaulieu*, the Law Court found no error and affirmed the motion court's denial of Beaulieu's motion to determine immunity when no witnesses testified at the hearing and Beaulieu offered only the police report and witness statement into evidence. 2025 ME at ¶ 4.

Here, Foster offered Deputy Reynolds' report, the 911 call, and the testimony of Green and EMT Knowles. As argued above, the content of the 911 call does not reflect a subjective suspicion of a drug-related overdose, Foster denied drug use, declined medical assistance, and medical assistance was, in fact, never provided to Foster by anyone. (Tr. 28, 35, 54). It is immaterial that this evidence was offered by Foster rather than the State. Accordingly, the evidence before the motion court was sufficient to determine by clear and convincing evidence that the grounds for immunity did not apply to Foster. 17-A M.R.S. §1111-B(4) (2023).

CONCLUSION

For the foregoing reasons, the motion court's denial of Foster's motion to determine immunity should be affirmed.

Respectfully submitted
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Dated: October 31, 2025

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CERTIFICATE OF SERVICE

I, Darcy Mitchell, Assistant Attorney General, certify that I have emailed a copy of the foregoing "BRIEF OF APPELLEE" to Foster's attorney of record, Matt Fortin, Esq.

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