Supreme Judicial Court sitting as the Law Court
Law Court Docket number KEN-25-281

State of Maine v. Kenneth D. Marin

Appeal from Unified Criminal Docket in
Kennebec County

Reply Brief for Appellant

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Argument

I. Expansion on Factual Statement made by the State in its Statement of the Facts.

Mr. Marin provides further factual development on a statement made by the State in its Statement of the Facts. The State has asserted that "L.M. recalls seeing the blankets move frequently when the Appellant and T.D. shared a bed, hearing a buzzing noise at times, and seeing T.D. have a strange reaction. (*Id.*)." (Red Brief at 12). During the trial Mr. Marin's grandson, L.M., testified that: "[o]ne night he got out of bed and she got out of bed and she was moving very uncomfortably. And I thought I heard a buzzing noise. But I just remember her moving uncomfortably, like she had to pee or something, something was like bothering her, that she had her head on the bed." (Tr. T. (Feb. 24, 2025) at 199). Mr. Marin points out that from the trial testimony of L.M., buzzing noises were heard one time.

II. It was error and an abuse of the trial court's discretion to admit State's Exhibit 9.

The State has asserted that Exhibit 9 should be admitted because "it portray[s] similar sex acts," and because "it is an image about the parties' relationship, grandfather and granddaughter." (Red Brief at 18). Exhibit 9 has no direct relationship to the acts T.D. testified about. Mr. Marin and T.D. were not granddaughter and grandfather. T.D. asked to call

Mr. Marin Opa and noted that everyone asked to call him that. (Tr. T. (Feb. 24, 2025) at 180-181).

The State has also asserted that it goes against this Court's prior precedent to rule as Mr. Marin has requested and to find that when a charge of gross sexual assault requires no intent element that evidence of mental state is irrelevant at trial.[1] (Red Brief at 23). Such a determination would only affect those crimes which require no intent, crimes defined in the gross sexual assault statute that require an element of intent would not be affected. See Title 17-A M.R.S. § 253. And, as Mr. Marin pointed out in his primary brief, this Court has stated that

> **In criminal trials involving an intent element**, we have repeatedly held that evidence of the prior relationship between the accused and the victim is relevant and admissible to establish the accused's motive, intent, or opportunity to commit the crime, or to demonstrate the absence of any mistake or accident. See State v. Roman, 622 A.2d 96, 98-99 (Me. 1993); State v. Young, 560 A.2d 1095, 1096 (Me. 1989); State v. Lewisohn, 379 A.2d 1192, 1201 (Me. 1977).
> State v. Dilley, 2008 ME 5, ¶ 30, 938 A.2d 804, 811 (Me. 2008) (emphasis added).
> See (Blue Brief at 29).

Such evidence should not be admissible in cases where intent is not an element of the crime. Use of such evidence in Mr. Marin's case significantly impacted his character and ability to receive an unbiased verdict. Applied to the

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[1] The State articulated that "A ruling as requested by the Appellant would deem evidence of the *relationship* between the parties irrelevant to any fact finder. *Id.* That means any evidence of grooming, attraction, or sex acts that happened in other jurisdictions is automatic error. Such a finding goes against years of precedence and should not be considered by this Court." (Red Brief at 23).

facts of Mr. Marin's case, it was error to admit the sexually explicit photograph into evidence to establish factors pertaining to his mental state.

Additionally, an Ohio court has noted that intent is not an issue when a defendant has argued that an act never occurred, stating:

> "Intent is an element of most crimes, but it typically is not a material issue for other-acts purposes unless it is genuinely disputed—in most cases, 'the act speaks for itself.' Thus, intent evidence is not admissible when 'the requisite intent is presumed or inferred from proof of the criminal act itself,' *or when intent is not in issue at all, such as when the defense theory is that the act never occurred.* (Citations omitted.)(Emphasis added.) State v. Hartman, 161 Ohio St. 3d 214, 2020-Ohio-4440, 161 N.E.3d 651, ¶ 52-53, 55.
> State v. Ludwick, 2022-Ohio-2609, 34 (Ohio Ct. App. 2022).

The State also argued that the probative value of Exhibit 9 was heightened by Mr. Marin's testimony at trial.[2] Mr. Marin would point out that the evidence was offered and accepted prior to his testimony and not for impeachment purposes after he had testified. As such, the evidence was admitted prior to the point that the State asserts established grounds for the admission of the photograph.

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[2] The State asserted that: "Moving to Rule 403, the probative value of State's Exhibit 9 outweighed any potential prejudicial concerns. As noted throughout the record, specifically in State's Exhibit 3, the Appellant stated numerous times the sexual abuse could not have happened because he had no sexual desire. *See* (Trial Tr. 50, 153-154 (Feb. 25, 2025).) At trial, the Appellant even identified himself as asexual. (*Id.* at 153.) This image, which was found on the Appellant's private computer in his secluded bedroom, contradicts the Appellant's continuous claims that he is not capable of sexual desire. (Trial Tr. 141, 206 (Feb. 25, 2025).)." (Red Brief at 18).

III. The obvious error standard of review allows for review of the admission into evidence of uncharged conduct occurring outside of Kennebec County and the State of Maine.

The State has asserted that Mr. Marin has waived his ability to pursue his uncharged conduct argument on appeal. (Red Brief at 20-21). The State cites State v. Harding, 2024 ME 67, ¶ 21, 322 A.3d 1175, 1182 (Me. 2024) and State v. Rega, 2005 ME 5, ¶ 17, 863 A.2d 917, 922 (Me. 2005) to support its argument.[3] These cases involved instances of a conscious decisions= on the record by trial counsel to not seek action by the trial court. In Harding, 2024 ME 67, ¶ 21, 322 A.3d 1175, 1182, trial counsel made a decision not to request a mistrial and withdrew a request for a curative instruction. In Rega, 2005 ME 5, ¶ 17, 863 A.2d

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[3] State v. Harding, 2024 ME 67, ¶ 21 322 A.3d 1175, 1781-1782 (Me. 2024) states that "[h]ere, however, the lack of a request for a mistrial was coupled with an affirmative withdrawal of a request for a curative instruction, which was the remedy defense counsel initially sought and then decided should be omitted. These choices were conscious, amounting to waiver. See State v. Scott, 2019 ME 105, ¶ 20, 211 A.3d 205 ('By expressly declining a curative instruction for strategic reasons and not otherwise moving for a mistrial, Scott failed to preserve for appellate review the admissibility of the homeowner's statement or any potential prejudice flowing therefrom.'); State v. Rega, 2005 ME 5, ¶ 17, 863 A.2d 917 (withdrawing an objection precludes review; '[w]hen a party affirmatively agrees to a court action, that party has failed to preserve the action for appellate review'); State v. Cardilli, 2021 ME 31, ¶ 33, 254 A.3d 415 ('If a defendant explicitly waives the delivery of an instruction or makes a strategic or tactical decision not to request it, we will decline to engage in appellate review, even for obvious error.' (quoting State v. Nobles, 2018 ME 26, ¶ 34, 179 A.3d 910))." .
State v. Rega, 2005 ME 5, ¶ 17, 863 A.2d 917, 922 (Me. 2005) states that "Rega's withdrawal of his objection and his affirmative request that the recording be played for the jury is akin to a stipulation that it was admissible. When a party affirmatively agrees to a court action, that party has failed to preserve the action for appellate review. Med. Care Dev. v. Bryler Corp., 634 A.2d 1296, 1299 (Me. 1993). The same is true when a party affirmatively requests that evidence be presented to the jury. We do not review alleged errors that resulted from a party's trial strategy. Aucella v. Town of Winslow, 628 A.2d 120, 123 (Me. 1993). Rega has failed to preserve for appeal the admissibility of the recording of the police interview with the wife."

917, 922, trial counsel withdraw an objection and made an "affirmative" request that the recording be played for the jury, which this Court found "akin to a stipulation that it was admissible." No such affirmative, conscious action by trial counsel is present on the record in Mr. Marin's case. His trial counsel never affirmatively addressed the issue on the record. The evidence just came into the record without objection. As such, Mr. Marin believes his argument should be reviewed under an obvious error standard. Additionally, the record provides ample ability to review Mr. Marin's argument as to the use of uncharged conduct at trial by the State. This Court has found that

> An issue is preserved for appellate review if there is a sufficient basis in the record to alert the trial court and the opposing party to the existence of the issue. See Warren Constr. Group, LLC v. Reis, 2016 ME 11, ¶ 9, 130 A.3d 969; Verizon New Eng. v. PUC, 2005 ME 16, ¶ 15, 866 A.2d 844. If an issue is unpreserved, we will review it only for obvious error. See State v. Clarke, 1999 ME 141, ¶ 29, 738 A.2d 1233.
> State v. Reeves, 2022 ME 10, ¶ 35 268 A.3d 281, 291 (Me. 2022).

Mr. Marin is requesting that this Court address the issue on appeal.

Conclusion

For the above-reasons, the Appellant again requests that this Court vacate Mr. Marin's conviction.

Dated: December 3, 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 one printed copy, via the U. S. Postal service, to Shannon Flaherty, Esq., Office of the District General, 95 State Street, Augusta, ME 04330.

Dated: December 3, 2025

_____/s/ Jeremy Pratt_____
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