

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

LAW COURT DOCKET NO. And-25-463

STATE OF MAINE
Appellee

v.

JAMES R. FOOTMAN Jr.
Appellant

ON APPEAL from the Androscoggin County
Unified Criminal Docket

BRIEF OF APPELLANT

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INTRODUCTION

(I) The issue at trial was whether defendant is this robber:



SX 2 (still image from video; cropped and zoomed). As proof, the court permitted the State to introduce evidence that, days later, someone – the person pictured here – robbed a different, nearby convenience store:



SX 39 (cropped and zoomed). Defendant was *not* on trial for robbery #2.

The State had no better proof that defendant is robber #2 than it had that defendant is robber #1. He had not been apprehended or positively

identified at either scene. He had not been convicted of robbery #2, much less admitted to it. Rather, the State's evidence that defendant is the person who committed both robberies was identical: He is a white male of slender build, known to wear sneakers like those in the photos, and he possessed a red utility-knife like that wielded in both robberies.

In other words, evidence of the second robbery added nothing that the State did not already have. Nothing, that is, other than prejudice. Evidence of the second robbery added only the possibility that jurors decided the case based on the propensity inference, emotion, or even, pursuant to the court's jury instructions, based on uncharged conduct.

(II) The court committed multiple sentencing errors. It unconstitutionally penalized defendant for not demonstrating "remorse" or accepting responsibility, despite the fact that he neither testified nor allocuted. It seemingly increased defendant's sentence because he is addicted to drugs. And its basic sentence – founded in its unsound conclusion that defendant's crime was something more than a low-tier Class-A robbery – embodies a misapplication of principle.

STATEMENT OF THE CASE

After a two-day jury-trial, defendant was convicted of robbery, 17-A M.R.S. 651(1)(E) (2017)¹ (Class A) (Count I). The court (Archer, J.) entered a conviction for the bifurcated charge of violation of a condition of release, 15 M.R.S. § 1092(1)(A) (Class E) (Count II). Thereafter, Justice Archer imposed an aggregate twelve-year carceral sentence – none suspended. This direct appeal, consolidated with an M.R. App. P. 20 appeal, follows.

I. Someone robbed the Big Apple at 248 Main Street in Lewiston.

This was the robbery – the only robbery – for which defendant was on trial. A40 (indictment).

Around 11 p.m. on November 11, a masked man approached the convenience store’s cashier and demanded money. 1Tr. 49. The cashier testified:

He came into the store. He came up to my register. He demanded money. I kind of laughed at him. And then I saw that he had the box cutter. So I opened the register, and I gave him some money. I gave him \$20. He said, give me more. I gave him the remaining 10s I had in the drawer.² And then he left.

¹ Since the date of the robbery, the statute has been amended. *See* P.L. 2025, c. 327, § 1 (effective Sept. 24, 2025).

² Surveillance footage shows that the cashier did not empty the drawer, retaining certain bills of unknown denominations. *See* SX 1 ca. 12:08:10 (time-stamp). Defendant points this out only as it bears on the seriousness of the robbery, an issue discussed in the second assignment of error.

1Tr. 49. The robber made away with \$50. 1Tr. 49. The robbery took about 20 seconds, total. *See* SX 1; 1Tr. 59-60 (“approximately 16 seconds”).

The cashier described the knife as “a regular retractable foldable box cutter. It had a black and red handle.” 1Tr. 50. The robber did not point the box-cutter at the cashier; “It was kind of pointed off to the side.” 1Tr. 50-51. “It wasn’t pointed anywhere. It was just kind of in his hand like [demonstrating].” 1Tr. 50. Surveillance footage shows that the cashier and robber were separated by a check-out counter, a large rack of tobacco-products, a cash register and computer-screen, and a plexiglass shield. *See* SX 1; 1Tr. 58-59.

This is a still-shot of the robber, admitted as State’s Exhibit 5:



A police officer who later responded to the scene estimated – based on what, it is not clear – that the robber was 5’1” and 150 lbs. 1Tr. 85. The police “put

a BOLO” out for their suspect. 1Tr. 85. They distributed the photo, introduced as State’s Exhibit 5, attached above. 1Tr. 91.

II. Five days later, a police officer noticed a person resembling the suspect in State’s Exhibit 5.

“[O]n the tail end of a 16-hour shift,” an officer returning to the police station took note of an individual standing near the intersection of Sabattus and College Streets in Lewiston. 1Tr. 92. The man “appeared to be wearing shoes that matched the shoes that were taken in the photograph ... given to other officers.” 3Tr. 92. This was about half a mile from the Big Apple. 1Tr. 93.

The officer parked his cruiser and approached the individual, whom he recognized “from prior police contacts.” 1Tr. 94. The individual is defendant. 1Tr. 94.

The officer documented defendant’s appearance, from waist down:



SX 9; 1Tr. 95-97. The officer testified that he patted down defendant “for weapons,” yielding “a red box cutter from his person”:



SX 10; 1Tr. 97.

The officer documented his findings, did not arrest defendant, and had no further involvement in the case, other than testifying at trial. 1Tr. 99, 101.

III. Police obtained better photos of the Big Apple robber.

The lead detective “began canvassing the area” for surveillance-camera footage depicting the robber. 1Tr. 140-43. At trial, several resulting images were introduced, perhaps the clearest of which are:



SX 20; 1Tr. 153.



SX 22; 1Tr. 153.



SX 25; 1Tr. 153.

IV. Over defendant’s objection, the court admitted evidence that someone robbed the 7-Eleven at 345 Main Street in Lewiston.

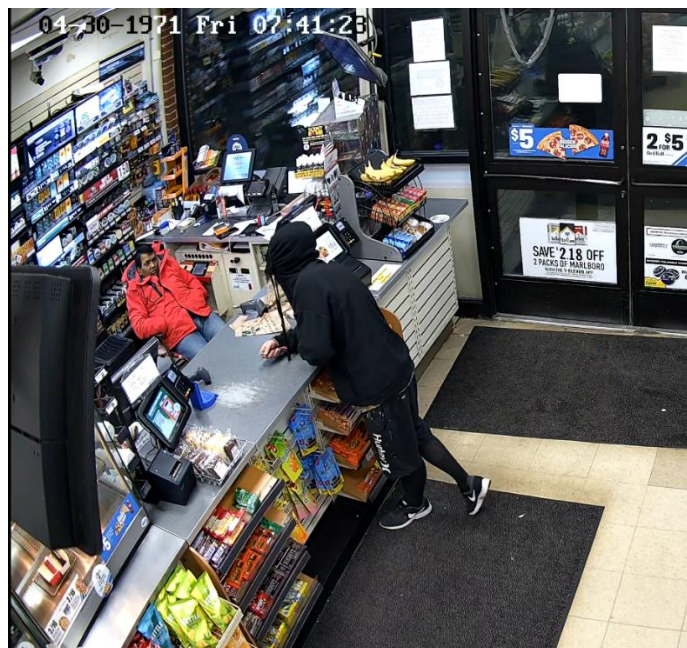
Defendant moved *in limine* to preclude the State from introducing evidence of a separate case, then pending, in which he was alleged to have committed a different robbery. A41. At a pretrial hearing, the State contended that evidence of the second robbery – alleged to have occurred on November 14 – was relevant to “modus operandi and identity.”³ A19-A21;

³ In this case, where there is no dispute that whoever the robber is acted with sufficient mens rea, modus operandi is relevant only to the extent it tends to establish identity. 1 Imwinkelried *et al.*, *Courtroom Criminal Evidence*, § 907, quoted in *State v. Hartman*, 161 N.E.3d 651 (Ohio 2020) (“Evidence that the defendant had committed uncharged crimes with the same peculiar modus tends to identify the defendant as the perpetrator of the charged crime.”).

MILTr. 17-19. After the parties disputed whether the two robberies were sufficiently similar to conclude that the robber was the same in each, the court determined that the second robbery was “highly relevant to identity.” A23-A26; MILTr. 21-24. After that 404(b) analysis, the court also ruled that Rule 403 was not violated because identity “is the number one issue in this case.” A26; MILTr. 24.

Before the State aired evidence of the second robbery, the court assured defense counsel that the objection was “obviously preserved.” A45; 2Tr. 5. For good measure, defendant nonetheless objected when the State formally offered that evidence. A46, A 47; 2Tr. 15, 17.

The 7-Eleven evidence consists primarily of video exhibits and a number of still-image exhibits. This is an example:



SX 39. The videos depict robber #2 enter the store, approach and place his hand and forearm atop the counter. SXs 35, 36. Something appears to be in

his hand, perhaps a knife, though it is not possible to be certain.⁴ *Id.* The cashier appears to attempt to retrieve something for the robber, and, after a few short seconds, the robber leaves the store. *Id.*

After the videos were played for the jury, the lead detective took the stand and acknowledged that, in addition to the Big-Apple robbery, he had “become aware” that “another incident,” “[a]nother robbery” had, in fact, occurred at the 7-Eleven. 2Tr. 19. The State introduced four still-photos, such as State’s Exhibit 39, which is displayed above, through the detective. 2Tr. 20-21; SXs 37-40.

In its closing argument, the State argued that the 7-Eleven evidence was evidence that defendant committed the Big-Apple robbery:

Now, you also saw, jury members, evidence of a robbery that occurred at the 7-Eleven three days after the Big Apple robbery. The 7-Eleven robbery occurred on 11/14 – November 14th. The Big Apple robbery occurred on November 11th. You can see it. That has been submitted. And it – you saw evidence that a man, also wearing black and white Nike shoes, also armed with a box cutter that is very clearly visible and – in the video and in the still shots – that this individual also committed a theft – or an attempted theft. Excuse me. (Indiscernible) also robbed the 7-Eleven.

⁴ Nobody testified that robber #2 wielded a box cutter/utility knife.

2Tr. 75. And the State's final word to the jury, offered in its rebuttal closing was:

And Mr. Footman either has the incredibly unlucky circumstances to be wearing the same shoes and carrying the same box cutter as the suspect who had just robbed both the Big Apple and then 7-Eleven. Or the reasonable inference is that the – because he is the one who committed those robberies. And jury members, if you find that – if you find that this is the same man, which the State suggests that (indiscernible), then this defendant is guilty of these facts and that you should find him so. Thank you.

2Tr. 90.

No limiting instruction was given. Nor was there a specific-unanimity instruction. In other words, jurors were permitted to convict defendant for the Big-Apple robbery or the uncharged 7-Eleven robbery, or jurors might have patched together a verdict based on some concluding that he committed the former and others concluding the latter. Indeed, the court's jury instructions made no mention of the need for the jury to make findings related to one date or the other.

V. When police later apprehended defendant, he was wearing black-and-white sneakers.

Days later – November 18 – the detective detained defendant to question him about the robberies. 1Tr. 155-59. Asked whether anything “stood out” to him about defendant that day, the detective answered, “[H]is

shoes were very, very, very, very similar to the shoes of the suspect...” 1Tr. 156. The State then introduced several photographs the detective had taken of defendant and his shoes, including:



SX 32; 157-58.

VI. For the sake of concision, defendant reserves discussion of sentencing until the argument portion of this brief.

The court found that defendant’s conduct – a sixteen-second robbery, undertaken with a ubiquitous household tool, resulting in no injury – warranted a “moderate” basic sentence of between 10 and 15 years’ prison. A32; STr. 18. After determining that the aggravating factors “far outweighed” mitigators, the court selected a maximum sentence of twelve years. A37, A39; STr. 23, 25. It suspended no time. A38-A39; STr. 24-25.

ISSUES PRESENTED FOR REVIEW

(I) Did the trial court erroneously admit evidence of a second, uncharged robbery, which the State contended was committed by defendant, when the State's evidence of the identity of both robbers was identical in each case?

(II) Did the sentencing court multiple legal errors and misapplications of principle, including aggravating defendant's sentence for a lack of remorse or acceptance of responsibility, even though he neither testified nor allocuted?

ARGUMENT

First Assignment of Error

- I. **The trial court erroneously admitted evidence of a second, uncharged robbery, which the State contended was committed by defendant, when the State’s evidence of the identity of both robbers was identical in each case.**

- A. **Summary of the argument**

The two robberies were neither sufficiently distinctive nor similar enough to one another to justify admission. There was no “signature” characteristic, in other words, that suggested that only the same person would have committed both. Nor was there clear evidence that robber #2 was even defendant. M.R. Evid. 404(b) does not permit admission.

Anyway, Rule 403 was violated: Evidence of the second robbery added nothing to the case other than the risk of unfair prejudice.

- B. **Preservation and standard of review**

Defendant’s motion *in limine* and at-trial objections preserved both M.R. Evidence 403 and 404(b) arguments. A41; see M.R. U. Crim. P. 51. The trial court had “the opportunity to consider the issue[s] and correct any perceived error.” *Off. of the Pub. Advoc. v. PUC* , 2024 ME 11, ¶ 23, 314 A.3d 115, quoting *Brown v. Town of Starks*, 2015 ME 47, ¶ 6, 114 A.3d 1003. It explicitly evaluated both rules. A23; MILTr. 21 (“So I did analyze this under 404.”) & A26; MILTr. 24 (“The next step in my analysis, of course, is a 403 analysis.”). Review is therefore abuse-of-discretion, certainly as to the Rule-403 argument. *State v. Hussein*, 2019 ME 74, ¶ 10, 208 A.3d 752. While it perhaps does not matter for this appeal – because abuse-of-

discretion anyway applies to 403-rulings – defendant requests that this Court also review his 404(b) argument for abuse of discretion. While this Court has previously stated that it evaluates such contentions only for clear error, *State v. Williams*, 2024 ME 37, ¶ 28, 315 A.3d 714, such circumscribed review, respectfully, is out of step with other appellate courts⁵ and is bound to cause uneven application of Rule 404(b) as well as jurisprudential confusion.

A trial court “by definition abuses its discretion when it makes an error of law.” *Koon v. United States*, 518 U.S. 81, 100 (1996). Thus, below, it is important that part of the court’s error is in its interpretation and application of this Court’s case-law, especially *State v. Connors*, 679 A.2d 1072 (Me. 1996) – a question for this Court de novo. *See Martin v. Martin*, 520 P.3d 813, 817 (Nev. 2022) (“We review questions of law, including interpretation of caselaw, de novo.”); *Collins v. Minn. Sch. of Bus.*, 655 N.W.2d 320, 329 (Minn. 2003) (“The appropriate standard of review for this issue involving

⁵ All twelve federal courts of appeal review final 404(b) rulings for abuse of discretion. *See United States v. García-Sierra*, 994 F.3d 17, 30 (1st Cir. 2021); *United States v. Nam Vu Bui*, 859 Fed. Appx. 610, 611 (2d Cir. 2021); *United States v. Curry*, 158 F.4th 153, 161 (3d Cir. 2025); *United States v. Beeman*, 135 F.4th 139, 145 (4th Cir. 2025); *United States v. Uhlenbrock*, 125 F.4th 217, 224 (5th Cir. 2024); *United States v. Sanford*, 2026 U.S. App. LEXIS 504 * 15 n. 6 (6th Cir. Jan. 7, 2026); *United States v. Brewer*, 915 F.3d 408, 415 (7th Cir. 2019); *United States v. Holt*, 160 F.4th 945, 948 (8th Cir. 2025); *United States v. Berckmann*, 971 F.3d 999, 1001-02 (9th Cir. 2020); *United States v. Summers*, 147 F.4th 1135, 1141 (10th Cir. 2025); *United States v. Pertillo*, 2026 U.S. App. LEXIS 388 * 5 (11th Cir. Jan. 8, 2026); *United States v. Brown*, 597 F.3d 399, 406 (D.C. Cir. 2010).

the application of existing case law is de novo.”). De-novo review of “legal concepts,” *MSAD 6 Bd. of Dirs. v. Town of Frye Island*, 2020 ME 45, ¶ 16, 229 A.3d 514, is appropriate lest this Court’s decisional law be distorted and disunified. Clearly, here, the court explicitly “relied upon” *Connors*, which it (erroneously, with all due respect) found “[i]s directly on point.” A24; MILTr. 22.

C. Analysis

Defendant contends that the robbery-#2 evidence survives neither M.R. Evid. 404(b) nor 403. He takes them in that order, finally addressing prejudice.

1. The evidence flunks Rule 404(b).

This Court’s decisional law often groups together for identical treatment several non-propensity uses. While it is unquestionably correct that, for example, “evidence of prior bad acts is admissible for limited purposes other than to prove propensity, including, *inter alia*, identity and the relationship of the parties,” there are nonetheless important nuances to consider in how and when those non-propensity purposes become availing in a given case. *Williams*, 2024 ME 37, ¶ 29 (quotation marks omitted).

A few such considerations are relevant to our case. The State must prove that the robberies, together, evince significant idiosyncrasy, and yet are similar enough to one another, to support an inference that the same person – and only the same person – would have committed both. Further, the State must offer clear evidence that, in fact, it was defendant who

committed the second robbery, the bad/other act. The court’s ruling fails at each step.

- i. The robberies are not highly idiosyncratic in comparison to others, or significantly similar to one another.**

The first step in evaluating whether proof of an “other” act is probative of modus operandi to establish identity is whether that act is “sufficiently idiosyncratic” to support a finding that it is not simply the acts of others. *State v. Joubert*, 603 A.2d 861, 866 (Me. 1992) (quotation marks omitted). That is, they must be committed in such a distinctive manner as to separate them from the world of other bad/other acts.

Mueller and Kirkpatrick, in their treatise *Federal Evidence*, posit an example that does *not* “satisfy the criterion of being unique or highly distinctive”:

[T]he defendant committed three robberies,..., and in each case he wore a red baseball hat and told the teller he had a gun that he did not display, and chose a branch bank in a suburban neighborhood, entering between 10 and 11AM....

§ 4.36 *Evidential uses of prior acts – Modus operandi or signature identity* (4th ed., July 2024 update). Such is insufficiently distinctive because “many bank robbers behave in that fashion.” *Id.* In contrast, another hypothetical might clear the hurdle:

[I]n addition, we learn that defendant wore a Denver Broncos sweatshirt each time, and handed the teller a worn blue canvas

gym bag with a computer-made note that said ‘I have a gun; put the money in the bag[.]’

Id. The take-away: “[A] mere overlap in features or the existence of common ground on a few elements is not enough.” *Id.* Black-and-white shoes and a household utility knife are more akin to a red hat than to a Broncos sweatshirt, worn blue canvas bag, and an identically-worded computer-written note.

Fifteen minutes of Google-searching (“Maine robbery photos”) reveals that there is nothing particularly unique or distinctive about our robber/s appearance, right down to the black-and-white shoes, if you look closely enough. Again, think red hat:





6.

In addition to ubiquitous shoes, we have a red utility knife or “box-cutter.” Those of us possessing one or several such a common household tool would not be surprised that robbers routinely utilize such cheap, easy-to-obtain weapons. *See, e.g., People v. Westefer*, 522 N.E.2d 1381, 1383 (Ill. 2d Dist. App. 1988); *State v. Holmes*, 24 P.3d 1118, 1122 (Wash. 2d Ct. App. 2001); *State v. Johnson*, 2008 Minn. App. Unpub. LEXIS 303 * 11, 2008 WL 853081 * 4 (Minn. Ct. App. 2008); *Fisher v. State*, 2003 Tex. App. LEXIS 8567 ** 7-10, 2003 WL 22283333 ** 3-4 (Tex. 8th Dist. Ct. App. 2003); *Noe*

⁶ Clockwise from top left: Jessica Lowell, Kennebec Journal/Morning Sentinel, *Gardiner police release security images of suspect in convenience store robbery* (April 25, 2019) <https://www.centralmaine.com/2019/04/25/gardiner-police-release-security-images-of-suspect-in-convenience-store-robbery-early-wednesday/>; Lydia Libby, News Center Maine, *FBI releases new footage of Greater Portland armed robberies* (Mar. 31, 2018) <https://www.newscentermaine.com/article/news/local/fbi-releases-new-footage-of-greater-portland-armed-robberies/97-533815858>; Penobscot Bay Pilot, *Maine state police seek help identifying robbery suspect* (Nov. 19, 2017) <https://www.penbaypilot.com/article/maine-state-police-seek-help-identifying-robbery-suspect/94754>; Elle Ousfar, News Center Maine, *Police searching for armed man who robbed Circle K in Saco, police say* (Sept. 19, 2021) <https://www.newscentermaine.com/article/news/crime/police-searching-for-armed-man-who-robbed-circle-k-in-saco-maine/97-7221785c-6b36-454c-83e0-52dc01a4a620>; News Center Maine, *Police searching for suspect in Oakland bank robbery* (Dec. 20, 2022) <https://www.newscentermaine.com/article/news/crime/police-searching-for-suspect-in-camden-national-bank-oakland-maine-bank-robbery-crime/97-fea0daa0-0dc4-43f2-8f96-c4f013a0aa0a>; News Center Maine, *Police investigate robbery at Lisbon Falls market* (Jan. 3, 2024) <https://www.newscentermaine.com/article/news/crime/police-investigate-robbery-at-lisbon-falls-market-maine-rusty-lantern/97-32aaad7b-4c01-4572-b86e-9153ff3a8414> (all images accessed Jan. 23, 2026).

v. Commonwealth, 2018 Ky. Unpub. LEXIS 63 ** 9-12, 2018 WL 5732312 ** 2-4 (Ky. 2018); *State v. Ortiz*, 789 N.W.2d 761, 767-68 (Iowa 2010); *State v. Bingham*, 2018 Tenn. Crim. App. LEXIS 760 ** 16-17, 2018 WL 4859046 * 5 (Tenn. Ct. Crim. App. 2018); *State v. Torain*, 340 S.E.2d 465, 471 (N.C. 1986); *State v. Carter*, 2018 N.J. Super. Unpub. LEXIS 1394 ** 3-5, 2018 WL 2979135 ** 1-2 (N.J. Super. App. Div. 2018); *State v. Ray*, 560 S.E.2d 211, 218 (N.C. Ct. App. 2002); *Billups v. State*, 527 S.E.2d 905, 902 (Ga. Ct. App. 2000); *State v. Prunier*, 613 A.2d 311, 312 (Conn. App. 1992); *State v. Bull*, 634 A.2d 101, 103 (N.J. Super. App. Div. 1993); *State v. Sandifer*, 17 P.3d 921, 923-24 (Kan. 2001); *State v. Wuneburger*, 860 So. 2d 78, 81 (La. Ct. App. 2003); *State v. Musse*, 2019 Minn. App. Unpub. LEXIS 299 ** 2-3, 2019 WL 1510685 * 1 (Minn. Ct. App. 2019); *State v. Portee*, 2010 S.C. App. Unpub. LEXIS 499 * 11, 2010 WL 10080247 * 4 (S.C. Ct. App. 2010) (per curiam); *United States v. Maddix*, 96 F.3d 311, 313 (8th Cir. 1996); *State v. Gott*, 784 S.W.2d 344, 345 (Mo. Ct. App. 1990); *Commonwealth v. Stevenson*, 707 N.E.2d 385, 387 (Mass. Ct. App. 1999); *State v. Sanders*, 104 So. 3d 619, 632 (La. Ct. App. 2012); *People v. Taylor*, 818 N.E.2d 728, 734 (Ill. 1st Dist. App. 2004); *People v. McGregor*, 757 P.2d 1082, 1083 (Colo. Ct. App. 1987); *State v. Blassingame*, 525 S.E.2d 535, 537 (S.C. Ct. App. 1999); *Pargo v. State*, 198 S.W.3d 685, 687 (Mo. Ct. App. 2006); *State v. McBride*, 2002 Iowa App. LEXIS 326 * 4, 2002 WL 570931 * 2 (Iowa Ct. App. 2002); *State v. Anaya*, 2003 Wash. App. LEXIS 2345 * 11 (Wash. 2d Ct. App. 2003); *People v. Scheer*, Mich. App. 2012 LEXIS 243 * 1, 2012 WL 470194 * 1 (Mich. Ct. App. 2014); *Green v. Herbert*, 2002 U.S. Dist. LEXIS

13108 ** 17-18 n. 6, 2002 WL 1587133 * 6 n. 6 (S.D. N.Y. 2002). There is nothing “signature” about them.

Connors is the State’s best case, but it is both distinguishable and has been criticized in the years since its publication. *Connors* was on trial for one burglary, but the State was allowed to introduce evidence of second. This Court affirmed that ruling, noting that the uncharged-offense evidence showed a plan or signature common to the [charged] burglary, and demonstrated that *Connors* was in Maine⁷ committing burglaries at businesses located on major highways. At both crime scenes, wires were cut and alarms disengaged, safes man-handled, and bootprints left.

679 A.2d at 1075. Justice Glassman dissented, doubting such constituted “signature-like” similarity. *Id.* at 1075-77. Commentators have called *Connors* a “very close case,” tepidly endorsing, “Some elements of the two burglaries were similar.” Field & Murray, *Maine Evidence* § 404.6 at 149 (6th ed. 2007) (emphasis added). In contrast, the dissent was “persuasive.” *Id.*

Putting the above facts aside, however, *Connors* has something else that tends to establish that the two burglaries were committed by the same person: Mr. *Connors* told his cellmate that he did them both! *Id.* at 1073-74. The jurors heard about these confessions “in detail.” *Id.* at 1074. This

⁷ *Connors* was from Massachusetts. 679 A.2d at 1073.

additional characteristic – the defendant made “signature” confessions to both burglaries – pushes *Connors* into distinguished territory.

Distinctiveness is not the only requirement here. In addition, an other act must share commonality with the charged act such as to persuade that the two offenses are related. Mueller & Kirkpatrick, *Federal Evidence, supra*, § 4.36 (“[T]he prior acts must bear a very close resemblance to the charged offense.”). The commonality must be such as to mark the “handiwork of the defendant.” *Id.* Again, there is nothing but ubiquitous features to tie robbery #1 to robbery #2.

A final point: There is only one “other” act. “When the [S]tate has evidence of only one prior incident, the similarities and distinctiveness must be even stronger.” *State v. Arnold*, 324 P.3d 538, 542 (Or. Ct. App. 2014). It’s just as likely that whatever similarity the two robberies share is the product of coincidence as of calling-card attributes.

ii. There was no clear evidence that defendant committed robbery #2.

Assuming arguendo that robberies are sufficiently similar, what does evidence of robbery #2 really prove? That the same person – *whomever it was* – robbed both establishments? How does that help the State to prove that it was defendant who committed this robbery? Without convincing evidence that defendant committed robbery #2, evidence of that robbery can hardly be probative of the identity of robber #1. *Cf. People v. Williams*, 212 Cal.Rptr.3d 728, 756 (Calif. Ct. App. 2017) (“The evidence would tend to

prove only that the same person or persons had committed all the crimes. The evidence would not tend to prove that person was Jarrod.”).

That’s why other jurisdictions require clear proof that the person who committed the bad/other-act offense is the person against whom such evidence is marshalled. In New York, for example, a trial judge “who admits evidence of an uncharged crime on the issue of identity on less than clear and convincing proof of both a unique *modus operandi* and of defendant’s identity as the perpetrator of the crime abuses his discretion as a matter of law.” *People v. Robinson*, 503 N.E.2d 485, 550 (N.Y. 1986). And, in Iowa, the proponent must offer “clear proof the individual against whom the evidence is offered committed the bad act or crime.” *State v. Putman*, 848 N.W.2d 1, 9 (Iowa 2014) (quotation marks omitted). So, too, in New Hampshire: There must be “clear proof the defendant committed the other acts.” *State v. Kirsch*, 662 A.2d 937, 942 (N.H. 1996).

Defendant is aware that, in federal courts, “preliminary questions” need be evaluated by courts probing for evidence sufficient for a jury to find the fact in question. *Huddleston v. United States*, 485 U.S. 681, 689 (1988). Maine has never adopted *Huddleston*, and, anyway, *Huddleston* did not deal with identity; it dealt with whether the defendant knew that certain appliances were, in fact, stolen. 485 U.S. at 683. In an advisory note to M.R. Evid. 104, the advisers discussed Maine’s more solicitous (than the federal rules’) approach to evaluating “other questions, such as identification, where the rights of a criminal defendant may be seriously jeopardized” whenever preliminary questions of admissibility are summarily decided by the court

without the opportunity for pre-admission cross-examination. Advisers' Note to former M.R. Evid. 104 (Feb. 2. 1976). When it comes to identity of the "bad actor," in Maine, something clearer is called for.

Connors is again illustrative. There, again, the defendant had *admitted* his involvement in the other-act burglary. 679 A.2d at 1073-74 ("Connors admitted to him having committed both [burglaries]."). Confessions are not speculative or conjectural. This Court can clearly distinguish *Connors* on this point alone: Here, there was no clear proof that defendant was robber #2; in comparison, Connors had confessed to bad-act #2. This misapplication of *Connors* is an abuse of discretion, by itself. *Connors* does not encompass other acts the perpetrator of which has not been established by clear evidence. *See also State v. Webber*, 613 A.2d 375, 377 (Me. 1992) (the defendant admitted committing the other act).

There are other ways to think about this. For example, this Court strongly disfavors defense evidence that someone else, other than the defendant, has committed similar crimes. *State v. Seger*, 532 A.2d 1013 (Me. 1987) (evidence of another abduction a week later, that defendant could not have committed, is inadmissible); *State v. Adams*, 2015 ME 30, ¶¶ 14-15, 113 A.3d 583 (evidence that neighborhood is "high crime area," origin of many other drug-prosecutions, is inadmissible). If defendants' evidence is incapable of sustaining a reasonable doubt, surely the State's evidence here is even less probative in overcoming any reasonable doubts. Consistency dictates as much.

In sum, Rule 404(b) is not satisfied. The robberies are not so distinctive as to warrant a belief that only the same person would have committed them. They are not so similar, either, to support a finding that whoever committed one robbery must have also committed the other. And, there is much less than clear evidence – far less than in *Connors* – that defendant committed robbery #2, the other act. These standards cannot be toothless; when it comes to bad-acts evidence, there is too much at stake to tolerate lenient gatekeeping.

2. Admission violated Rule 403.

What – other than prejudice to defendant – did the State gain from evidence of robbery #2? In the best-case scenario, based on that evidence, the jury believed that the black-and-white-sneaker-wearing, box-cutter-toting white male robbed *both* stores. But that nonetheless still necessitated the State to prove that defendant was the black-and-white-sneaker-wearing, box-cutter-toting white male. In other words, admission of the second robbery added nothing legitimate to the State’s case.

In contrast, the risk of prejudice to defendant was significant. “Evidence that defendant had been involved in an incident similar to the offense for which he is on trial is extremely prejudicial.” *State v. Works*, 537 A.2d 221, 223 (Me. 1988). That is, there is perhaps less margin for error when the other-act evidence bears some resemblance to the crime at bar. In such cases, “[t]he jury is improperly led to believe that if defendant acted in a certain manner once, he probably committed the similar crime charged.” *Id.* In this vein, the State’s ask was indistinguishable to the propensity

implication: *If defendant was robber #2, he must have also committed robbery #1.* 2Tr. 90 (State: “[I]f you find that this is the same man, which the State suggests that (indiscernible), then this defendant is guilty of these facts and that you should find him so.”).

Allegations of additional crimes tend to stick with jurors, spurring verdicts on other than the evidence and allegations before them. *Michelson v. United States*, 335 U.S. 469, 476 (1948). Jurors concerned with criminal activity in their communities can be primed to see to it that a defendant is “punished” lest he get away with a different offense, “even if they had a reasonable doubt as to his guilt in the case before them.” *State v. Goodrich*, 432 A.2d 413, 418 (Me. 1981) (quotation marks omitted). While it may be possible, in closes cases, to give the tie to the runner and let *one* man go free, the average juror likely would struggle to permit a *second* man go free, identity be damned.

The court’s ruling also threatened a trial within a trial. *Cf. Robinson*, 503 N.E.2d at 842. It sowed – and defendant will discuss this further, below – a possibility of juror confusion. *See id.* And it wholly embraced “needlessly presenting cumulative evidence” – *i.e.*, more about the black-and-white sneakers and utility knife that was cumulative of the State’s case about robbery #1. M.R. Evid. 403. Its probative value hovering near nil, proof of robbery #2 portended substantial prejudice and other ills. The court erred in ruling to the contrary.

3. The error is not harmless.

It is not highly probable that the error played no part in the verdict. *Cf. Hussein*, 2019 ME 74, ¶ 19.

For one, there was no limiting instruction to the effect that jurors were to consider robbery #2 only in their evaluation of identity. While defendant does not separately assign error to that omission, it is nonetheless indicative of the harm to defendant. He was between a rock and a hard place, given the court's erroneous ruling: Either accept a limiting instruction that, in reality, could not "unring the bell," *cf. State v. Johnson*, 2014 ME 68, ¶ 7, 92 A.3d 351, and might highlight the robbery-#2 evidence, or hope the jury forgot it. Such are the no-win consequences of a court's erroneous evidentiary rulings.

Second, consider the risk of jury confusion. There were two discrete robberies, committed (by someone or someones) a few days apart. Either allegation could, under this Court's case-law affording prosecutors capacious leeway in establishing the date of the offense, *e.g., State v. Hodgdon*, 2017 ME 122, ¶¶ 19-20, 164 A.3d 959 (collecting cases), suffice as a basis for defendant's conviction. And there was no specific-unanimity instruction. Jurors were unrestrained. They may have convicted defendant of the uncharged offense. Some may have voted to convict him of robbery #1, and others may have voted instead for robbery #2. This creates double-jeopardy problems, too. What can defendant be lawfully convicted of?

Second Assignment of Error

II. The sentencing court committed multiple legal errors and misapplications of principle, including aggravating defendant's sentence for a lack of remorse or acceptance of responsibility, even though he neither testified nor allocuted.

A. Summary of the argument

The court committed patent constitutional error, increasing defendant's sentence because he neither expressed remorse nor accepted responsibility. It seemingly increased defendant's sentence, too, because of his drug-addiction. And it unreasonably determined that the offense of conviction was deserving of a "moderate" basic sentence, despite its objectively low-level nature.

B. Preservation and standard of review

This Court "review[s] questions of law, including the legality of a sentence, de novo." *State v. Ellis*, 2025 ME 56, ¶ 22, 339 A.3d 794. Defendant's argument about the court's penalization of his privilege against self-incrimination is such an issue of law. *Id.*; *State v. Chase*, 2023 ME 32, ¶¶ 27-28, 294 A.3d 154. So is his contention that the court increased his sentence because of his addiction. *See State v. Lopez*, 2018 ME 59, ¶ 13, 184 A.3d 880 (constitutionality of sentence reviewed de novo).

Issues of principle – *i.e.*, the court's selection of a basic sentence – should be reviewed de novo for misapplication of principle. *State v. Plummer*, 2020 ME 143, ¶ 10, 243 A.3d 1184. That is anyway the standard this Court has enunciated for review of basic sentences, *id.*, and defendant is aware of no principled reason why maximum and final sentences are

reviewed only by a more deferential standard. *See id.* (abuse of discretion). Given the Legislature’s expansive remit to this Court, *see* 15 M.R.S. §§ 2154 & 2155, defendant requests de novo review, so as to better unify objective sentencing criteria.

C. Analysis

Defendant separates the court’s errors:

1. It unlawfully penalized defendant’s exercise of his privilege against self-incrimination.

After defendant neither testified nor allocuted, the court docked him: Finally, nothing that the Court heard today or read in preparation for today, reflects that the defendant feels any remorse for his actions or has accepted any sort of responsibility. This is the final aggravating factor.

STr. 23.

It is black-letter law: “A defendant’s sentence may not be increased ... because he chose to forgo expressing remorse or taking responsibility at trial or sentencing.” *Ellis*, 2025 ME 56, ¶ 26. The court’s is a violation of defendant’s state and federal privilege against self-incrimination. *See Mitchell v. United States*, 526 U.S. 314 (1999). This is an open-and-shut case, and remand so the court can deduct its unlawful aggravation from defendant’s sentence is the required remedy. *See Chase*, 2023 ME 32, ¶ 32; *Ellis*, 2025 ME 56, ¶¶ 28-30.

2. To some extent, the court appears to have penalized defendant because of his addiction.

A court may not, consistent with the Eighth and Fourteenth Amendments, penalize a person because of his status as an addict. *Robinson v. California*, 370 U.S. 660, 667 (1962) (plurality opinion) (state law imprisoning person because of his status as a drug-addict violates the Eighth and Fourteenth Amendments). Rather, a court might only penalize a person for “some act” he commits *because of* his addiction. *Powell v. Texas*, 392 U.S. 514, 532-33 (1968). Respectfully, it appears that, at times, the court may have traversed this subtle line:

[T]o the extent that the defendant's memorandum suggests that the Court factor his substance use into my analysis at this juncture, I do not consider that to be a mitigating factor, given the defendant's history that has been relayed to me. Instead, as discussed in a moment, the Court views that as an aggravating factor, **particularly** because it led to the commission of the crime.

STr. 20 (emphasis added). “Particularly” does not mean exclusively or only. It connotes multiple considerations, something akin to “especially” or “exceptionally,” with other factors implicit in the comparison. See Dictionary.com, “particularly” <https://www.dictionary.com/browse/particularly> . What could those lawfully be?

The court added:

Given that the substance use was a direct contributor to the commission of the crime at hand. Additionally, despite opportunities over the years, the defendant's substance use has willfully gone untreated.

STr. 22. While the first sentence plausibly confines itself to the nexus between the addiction and the crime, the second sentence seemingly bears punishment for defendant's addiction "over the years."

At the very least, these passages create doubt that whether the court's consideration of defendant's addiction was lawful. Therefore, remand for resentencing is appropriate. *Ellis*, 2025 ME 56, ¶ 29 ("We need not conclude that the sentencing court in fact relied upon an improper consideration, and any doubt as to whether the defendant was punished for exercising his right to trial must be resolved in favor of the defendant.") (brackets and quotation marks omitted). This outcome is especially warranted, given that remand is anyway necessary and because the distinction between lawful and unlawful consideration of addiction has not yet been – but should be – drawn by this Court.

3. The court's basic-sentence calculus constitutes a misapplication of principle.

Courts must tailor basic sentences to "the gravity of offenses." 17-A M.R.S. § 1501(8). Doing so is necessary to eliminate unjustifiable sentencing disparities and disproportionality. *See* 15 M.R.S. § 2154(3); ME. CONST., Art. I, § 9. Respectfully, the court markedly overstated the seriousness of this offense.

This was a lower-tier Class-A robbery. It was brief (less than 20 seconds) and motivated by addiction. It involved about as least a dangerous “dangerous weapon” that would qualify as such. *See* 17-A M.R.S. § 651(1)(E). Nobody was hurt. A de minimis quantum of money was stolen.⁸ Even the State disagreed with the court’s analysis, arguing that the basic sentence was no more than ten years – 50% less than the fifteen-year apex selected by the court. *See State’s Sentencing Memorandum* at 2 (proposing a ten-year basic sentence, “a third of the maximum sentence”). Objectively, the court overstated the seriousness of the offense.

This was an offense on the minimal – not “moderate,” as the court determined – end of the spectrum of seriousness. Given courts’ frequent reference to “comparable” basic sentences, it is important to correct even deviations of “just” five to ten years’ prison. Obviously, that time matters to defendant, too.

CONCLUSION

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

Respectfully submitted,

February 13, 2026

⁸ The Legislature, by incorporating into § 651 the requirement of commission of a “theft,” has signaled its intent to peg punishment to the value of property stolen. *See* 17-A M.R.S. § 651(1) (requiring proof of “theft”); 17-A M.R.S. § 353(1)(B) (Class of crime differentiated by value). The court’s basic-sentence analysis does not uphold that scheme.

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CERTIFICATES OF FILING & SERVICE

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

/s/ Rory A. McNamara