

THE MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. Yor-26-12, SRP-26-11

STATE OF MAINE
Appellee

v.

PHILIP A. FRYMAN
Appellant

ON APPEAL from the York County Unified Criminal Docket

APPELLANT'S REPLY BRIEF

Jamesa J. Drake #5194
Attorney for Appellant
Drake Law, LLC
P.O. Box 56
Auburn, Maine 04212
(207) 330-5105

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First Assignment of Error

Count 32 is jurisdictionally defective.

Argument

Count 32 of the indictment alleges that:

On or between May 29, 2010 and May ■■■, 2011, ... PHILIP A. FRYMAN ... did intentionally subject T.S., dob ■■■/1999, who was in fact less than 12 years of age, to sexual contact.

(A: 45-46; emphasis added). This charge fails to state an offense because it simultaneously alleges unlawful sexual contact when T.S. was “less than 12” and *not* “less than 12,” which cannot be sustained because 12 years-old is what differentiates 17-A M.R.S. § 255-A(1)(E) (victim less than 14) from 17-A M.R.S. § 255-A(1)(E-1) (victim less than 12).

The State’s “between” argument ignores the plain language of the indictment, which alleges unlawful sexual contact “on” the end date. (Red Br. 24). Nor does it matter what the petit jury found or could have found. (Red Br. 24 n. 16). A *petit* jury cannot convict on a charge unless a *grand* jury has returned an indictment for that offense.¹ The proper remedy is to vacate Philip’s conviction on Count 32.

¹ Me. Const. Art. I., § 7; *State v. Vashon*, 123 Me. 412, 413-15, 123 A. 511 (1924) (a felony is an infamous crime under Article I, section 7 of the state constitution).

Second Assignment of Error

The State failed to prove Count 3.

Argument

Count 3 alleged gross sexual assault involving T.N. before she was 14 years of age. (A: 38). T.N. testified that she was “probably, like, 13, 14, maybe” when the offense conduct occurred. (3Tr. 45). T.N.’s equivocal testimony as to her age, and the absence of other record evidence, means that the State has failed to prove every material element of the offense beyond a reasonable doubt, offending the Due Process Clause. *Jackson v. Virginia*, 443 U.S. 307, 320-21 (1979); Red Br. 25 (age of the alleged victim is a material offense element).

The State rejoins that the record evidence contains more information. It does not. *First*, the State’s attributes the prosecutor’s own testimony to T.N. (Red Br. 26). This is the testimony:

Q: [T.N.], I want to – I want to talk about a time in Sanford where the defendant is taking you into the bathroom.

[Defense counsel]: I’m going to object. It’s leading. There’s no testimony with regard to that, whatsoever.

THE COURT: Overruled.

By [the prosecutor]:

Q: Do you remember that?

A: Yes.

Q: Okay. Tell us what happened in the bathroom.

* * * * *

A: He took me into the bathroom. And then he sat on the toilet and pulled out his penis and asked me to suck on his penis.

(3Tr. 44). *The prosecutor* testified that the incident happened in Sanford. T.N. never endorsed that. T.N. testified that the conduct happened in a “bathroom.” T.N. never confirmed that “the bathroom” was in Sanford.²

Even assuming *arguendo* that T.N. did somehow testify that the conduct occurred in Sanford, what matters is when T.N. thought she lived in Sanford. T.N. said that she lived in Sanford from “2010 to about 2012,” (3Tr. 64), but that proves nothing because T.N. turned 14 years old in 2011, (3Tr. 19).³

² The State’s argument on appeal demonstrates one reason why leading the witness on direct examination is prohibited. M.R. Evid. 611(c). The record it creates is useless.

³ T.N. was not a child witness. She was 27 years when she testified; she can be expected to know when she lived in Sanford. (Red Br. 26).

The State also relies on Tiffani's (the mother's) testimony about when the family lived in Sanford. (Red Br. 26). But Tiffani has no personal knowledge about when or where any of the alleged abuse occurred. All Tiffani could say is that it in July 2010, the family moved from Sanford to North Berwick. (1Tr. 83-84, 86). Tiffani's testimony cannot prove that T.N. was forced to engage in oral sex when she was under 14 years old *in Sanford*.⁴

The State failed to present evidence from which the jurors could conclude beyond a reasonable doubt that T.N. was under 14 years old at the time of the alleged gross sexual assault. *See Jackson*, 443 U.S. at 320 (a "mere modicum" of evidence cannot "rationally support a conviction beyond a reasonable doubt."). T.N.'s own testimony forecloses that conclusion. The proper remedy is to vacate the conviction on Count 3.

⁴ Ironically, the State stresses that "place is not an essential element of the crime and serves only to fix the venue of the prosecution and provide evidence upon which jurors may evaluate credibility." (Red Br. 25, citing *State v. Miller*, 2018 ME 112, ¶ 14, 191 A.3d 356). But the State then bootstraps the prosecutor's testimony that the incident occurred in Sanford with Tiffani's about when T.N. lived in Sanford. The prosecutor's impermissible leading question is not grounds for upholding a gross sexual assault conviction and its attendant lengthy prison sentence. Especially not here, where the Tiffani's testimony is contradicted by T.N.'s testimony, and only T.N. has personal knowledge of what was alleged.

Third Assignment of Error

Count 31 merges with Count 20.

Argument

The State says that the factual basis for Counts 31 and Count 20 concern “two separate acts” “as set forth in the bill of particulars.” (Red Br. 27).

The indictment reads:

Count 20: On or between July 01, 2010 and July 31, 2011, in North Berwick, YORK County, Maine, PHILIP A. FRYMAN, did engage in a sexual act with T.S., dob [REDACTED]/1999, not his spouse, who had not in fact attained the age of 14 years.

Count 31: On or between July 01, 2010 and July 31, 2011, in North Berwick, YORK County, Maine, PHILIP A. FRYMAN, being the parent-step-parent, foster parent, guardian or other similar person responsible for the long-term care and welfare of T.S., dob [REDACTED]/1999, did engage in a sexual act with T.S., dob [REDACTED]/1999, who had not in fact attained the age of 18 years.

(A: 42, 45). There is no allegation of “two separate acts.” There are no distinguishing factual characteristics between Counts 20 and 31. The bill of particulars provides:

Count 20: The state specifically alleges the defendant subjected T.S. DOB: [REDACTED]-99 to direct physical genital to genital contact.

Count 31: The state specifically alleges the defendant subjected T.S. DOB [REDACTED]-99 to direct physical genital to genital contact.

(A: 171). There are no distinguishing factual characteristics between Counts 20 and 31 in the bill of particulars, either.

There is no way, on this record, for this Court to know whether the *grand jury* intended a distinct factual basis for each charge. Did the grand jurors intend for each charge to pertain to different criminal acts? Or did the grand jurors intend for each charge to represent alternative means of proving the same crime? (Red Br. 28 n. 22, citing M.R. Crim. P. Rule 7(c) which permits the State to bring alternative charges for the same criminal act). This Court will not guess what the grand jurors intended:

To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guarantee of the intervention of a grand jury was designed to secure.

Russell v. United States, 369 U.S. 749, 770 (1962).

Likewise, this Court has no idea what the petit jurors found, and it will not guess about that, either. *State v. Paquin*, 2020 ME 53, ¶ 27, 230 A.3d 17 (“Although the jury might have found that separate incidents formed the basis of its verdicts on Counts 5 and 30, we cannot know that, and will not assume it.”). The State suggests that because it presented evidence of two distinct events, the jury necessarily must have accepted that evidence and apportioned it between Counts 20 and 30. (Red Br. 28). So, is the State’s “sock” evidence the basis for Count 20 or 30? (Red Br. 28 (citing 2Tr. 160)). Is it the basis for both Count 20 and 30? Or did the jury use the “leg” evidence as a basis for one or both of those counts instead? (Red Br. 28 (citing 2Tr. 156)). The record is opaque.

The error “must be seen as obvious error” and corrected. *State v. Armstrong*, 2019 ME 117, ¶ 25, 212 A.3d 856. The remedy is to remand the case with instructions for merger.⁵

⁵ Merger is not reserved exclusively for *Blockburger*-type double jeopardy violations. (Red Br. 27; *Blockburger v. United States*, 284 U.S. 299 (1932)). See *State v. Murphy*, 2015 ME 62, ¶ 28, 124 A.3d 647 (“When, as here, the State presents its alternative charging theories as multiple counts based on one criminal act, court action to consolidate the duplicative counts is appropriate to assure that a person cannot be convicted or punished more than once for the same criminal act.”) (cleaned up).

Fourth Assignment of Error

Counts 2, 3, 20, and 21 violate the Due Process Clause's fair notice guarantee.⁶

Argument

A bill of particulars cannot save a defective indictment. (Blue Br. 38-39). Discovery is not part of a fair-notice analysis, either. (Red Br. 39).⁷ A jury unanimity instruction does not cure a fair-notice defect. *See* Blue Br. 37 n. 11 ("The point of a fair-notice requirement is to enable a defendant to meet the charges *before* the jury retires to deliberate.").

The fair-notice analysis examines the indictment to determine whether the indictment provides fair notice of the charges. Here, the Counts 2 and 3, and 20 and 21, tracked the statutory language but did no more to distinguish one count from the next. Therefore, those charges failed to provide fair notice. *See* Blue Br. 33-38 (discussing when and how

⁶ Philip erroneously said, on page 26 of his Brief, that Counts 2, 19, 20, and 31 violated the fair notice guarantee. (Blue Br. 26). He sincerely apologizes for the confusion. The correct argument appears on page 40 of his Brief: Counts 2, 3, 20, and 21 violate the fair notice guarantee. Philip's error played no role in the State's briefing; the State argues that none of the counts in the indictment violate the fair notice guarantee.

⁷ The double-jeopardy analysis permits consideration of the bill of particulars, discovery, and the evidence adduced at trial.

an indictment must “descend to the particulars”). Philip complained about this *repeatedly*. See e.g. A: 81-82; see also Blue Br. 27-32 (explaining why the trial court ordered the State to produce two bills of particulars).

The indictment provides two identically worded allegations of gross sexual assault involving T.N.:

Count 2: On or between January 01, 2010 and July 01, 2010, in Sanford, YORK County, Maine, PHILIP A. FRYMAN, did engage in a sexual act with T.S., dob [REDACTED]/1997, not his spouse, who had not in fact attained the age of 14 years.

Count 3: On or between January 01, 2010 and July 01, 2010, in Sanford, YORK County, Maine, PHILIP A. FRYMAN, did engage in a sexual act with T.S., dob [REDACTED]/1997, not his spouse, who had not in fact attained the age of 14 years.

(A: 38). The indictment also provides two identically worded allegations of gross sexual assault involving T.S.:

Count 20: On or between July 01, 2010 and July 31, 2011, in North Berwick, YORK County, Maine, PHILIP A. FRYMAN, did engage in a sexual act with T.S., dob [REDACTED]/1999, not his spouse, who had not in fact attained the age of 14 years.

Count 21: On or between July 01, 2010 and July 31, 2011, in North Berwick, YORK County, Maine, PHILIP A. FRYMAN, did engage in a sexual act with T.S., dob [REDACTED]/1999, not his spouse, who had not in fact attained the age of 14 years.

(A: 42-43).

How does Philip know from reading the indictment what he must defend against in Count 2 as opposed to Count 3? How does Philip know from reading the indictment what he must defend against in Count 20 as opposed to Count 21?

Philip doesn't know anything from the indictment about the factual basis for any of these charges because the charges track the statutory language and nothing more. *See Valentine v. Konteh*, 395 F.3d 626, 638 (6th Cir. 2005) ("After an extensive search, we cannot find one court that has actually considered the issue and upheld the use of multiple identically-worded and factually-indistinguishable counts....").

Valentine is not binding on this Court, but the State never proves *Valentine* wrong. (Red Br. 40). The State cites to no case where a court has tolerated a multi-count indictment with "identically-worded and factually-indistinguishable counts" – and this is because, at since *Russell*, prosecutors have been on notice not to do what happened in this case. (Blue Br. 34-39). The proper remedy is to vacate the convictions on Counts 2, 3, 20, and 21.

Fifth Assignment of Error

Counts 2, 19, 20, 31, and 32 offend the Due Process and Double Jeopardy Clauses.

Argument

The State says that “[d]ouble jeopardy is not an issue here” because “the factual basis for each specific act is distinct in the trial record.” (Red Br. 43). So, what is it? What is the factual basis for each individual count of conviction? The State never says, and this is fatal to its argument.

The bill of particulars does not identify the factual basis for any charge. The State in summation did not elect a factual basis for the charge. The judge never connected a charge with any trial evidence.⁸

Compare what happened in Philip’s case with what happened in *State v. Chase*, 2025 ME 90, 345 A.3d 183:

In its opening instructions, the court explicitly correlated each count with the date alleged as to that count. Although the victim alluded to being violated more times than she could count, her testimony focused on three incidents taking place on the three dates charged in the indictment and referenced in the instructions. When instructing the jury at the end of the trial, the court again expressly linked each count to one alleged incident occurring on the specific date charged. The prosecutor’s closing argument went over the evidence,

⁸ The verdict sheet is not contained in the official casefile.

carefully linking it to these three specific dates. After the closing arguments, the court further instructed the jury that when the jury reported its verdicts, the court would go through each count separately again repeating the specific state for each count. Accordingly, after the jury reached its verdicts, the court asked the jury for its verdict on each count separately, against referencing the date identified in each count.

Id. at ¶ 20. Philip had none of these safeguards.⁹

Nor does the State provide answers on appeal. The State never says, for example, the factual basis for Count 2 was the incident T.N. described at 3Tr. 27-30, and not the incident she described at 3Tr. 31-34, 43. The State never says, for example, the factual basis for Count 19 was the incident discussed at 3Tr. 47-51 and not 2Tr. 162-63. *See also* Blue Br. 45-46 (discussing Counts 20, 31, and 32).

Jury unanimity is only *one* of the many constitutional requirements for a fair and just verdict, and there is no case-law which holds that as long as a jury unanimity instruction is given, every other constitutional

⁹ In *Chase*, the victim evidently could distinguish between counts by date, and that's something that neither T.N. nor T.S. was able to do. But importantly, T.N. and T.S. were able to identify plenty of other distinguishing attributes. *See e.g.* Red Br. 28 (the “leg” incident was different than the “sock” incident). Any one of these attributes could have been used by the State and the trial court here; perhaps they were used by the grand jury or the petit jury, but the record is silent in that regard.

mandate is satisfied. Importantly here, a jury unanimity instruction does not excuse double-jeopardy violations.

This Court has held that, “[i]n cases involving allegations of multiple acts of sexual abuse committed against child” who “have no practical way” of “distinguishing or identifying by specific incidents” – in “these types of cases” – “the State is not required to present specific evidence of separate and discrete incidents of sexual abuse for the jury to convict a defendant of every charged offense, so long as the jury is properly instructed on specific unanimity[.]”. *State v. Reynolds*, 2018 ME 124, ¶¶ 21-23, 193 A.3d 168; *see also State v. Schooley*, 2025 ME 84, ¶ 24, 345 A.3d 78 (same).¹⁰

Unlike the scenario that *Reynolds* or *Schooley* contemplate, here, however, T.N. and T.S. *could* provide “distinguishing or identifying” facts

¹⁰ *Reynolds* and *Schooley* do not discuss the double jeopardy ramifications of the notion that “the State is not required to present specific evidence of separate and discrete incidents of abuse for the jury to convict a defendant of every charged offense, so long as the jury is properly instructed on specific unanimity.” *Schooley*, 2025 ME 84, ¶ 24. Respectfully, unless this Court cabins these cases to the particular situation they describe, *i.e.* a child victim who has “no practical way” of distinguishing between abuse, *Reynolds* and *Schooley* will altogether undue – and impermissibly stand in contrast with – the Supreme Court’s robust double-jeopardy jurisprudence.

differentiating specific incidents. The problem has nothing to do with unanimity; this Court may presume that the jurors were unanimous in their findings about everything. The problem is: *what were those findings?* The reason a jury unanimity instruction is no panacea is because here, it is impossible to tell from the record which “separate and discrete incidents of abuse,” any of which could have been the basis for a conviction, *were* unanimously found as the factual basis for a conviction.¹¹

Jury unanimity does not license the State to use charging language that fails to descend to the particulars, *and then* introduce evidence that could support multiple counts of criminal activity without ever specifying a factual basis for the charge, *and then* instruct the jury that they can return a general verdict if they all agree. When that happens, the defendant has no ability to defend against future charges. Philip has no ability to say, for example, I was convicted of the conduct described at 3Tr. 27-30. He cannot prove that. He has no way of knowing that the conduct described at 3Tr. 27-30 and not 3Tr. 31-34 formed the basis for his conviction. Neither does the State or this Court. Vacatur is required.

¹¹ All arguments are made in the alternative. (Blue Br. 19).

Sixth Assignment of Error

The trial court erred by admitting other-act evidence.

Argument

Nothing Philip argues would “upend this Court’s established precedent and severely compromise the States ability to prosecute child sexual abuse cases.” (Red Br. 29). The Rules of Evidence apply to the State, and they apply even in child sexual abuse cases, and they apply even if abiding by them may make the State’s task of securing a conviction more difficult. *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) (due process requires that the rules of evidence apply equally to the prosecution and the defense).

It is true that in child sexual assault cases, this Court “routinely upholds the admission of ‘other acts’ conduct.” (Red Br. 29). Doing so here is a bridge too far.

The trial court’s reason for admitting other-acts evidence – despite the mistrials, despite its previous ruling excluding such evidence, and despite Philip’s repeated warnings about double jeopardy problems – was that such evidence provided important background:

[T]he jury is entitled to know about the quality and character of what has happened over the course of the years so they can evaluate the behavior and the acts of the victims.

(3Tr. 40; Red Br. 30). Rule 106, not Rule 404(b), is the complete-the-story rule, and Rule 106 plainly does not apply here.”¹² M. R. Evid. 106.

Philip never opened the door to other-acts evidence, either. (Red Br. 30-31).¹³ The trial court never identified how or when trial counsel opened the door, and neither does the State on appeal. Respectfully, the concept of “opening the door” does not mean what either the trial court or the State seem to think it means.¹⁴

¹² Rule 106 provides: “If a party utilizes in court all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part – or any other writing or recorded statement – that in fairness out to be considered at the time.” M. R. Evid. 106.

¹³ The trial court also believed that *Reynolds et al.*, permitted the introduction of other-acts evidence because “we have an ongoing, long-standing pattern of abuse going on.” (3Tr. 40). *Reynolds* says no such thing. There is no Rule 404(b) exception for child sexual abuse cases. Nor is there an exception for criminal activity “taking place over a protected period of time.” (3Tr. 40; Red Br. 32).

¹⁴ See e.g. *United States v. Rosa*, 11 F.3d 315, 355 (2d Cir. 1993) (The rule of “opening the door” “gives the trial court discretion to permit a party to introduce otherwise inadmissible evidence on an issue (a) *when the opposing party has introduced inadmissible* evidence on the same issue, *and* (b) when it is needed to rebut a false impression that may have resulted from the opposing party’s evidence.”) (emphasis added).

Rule 404(b) does allow the admission of other-act evidence for non-propensity purposes, but none of those purposes applies here – as the trial court correctly found in the first instance. (Blue Br. 28, 50; *see also* A: 62-63). Rule 404(b) is not a catch-all for *every* other act.

For starters, the evidence must be probative of a fact in controversy. The “relationship and dynamics between the caregiver and the two victims” was not at issue. (Red Br. 32). Everyone agreed that Philip was the stepfather, and he lived with his stepdaughters. The frequency of the sexual contact is likewise irrelevant because motive, opportunity, and lack of mistake were not at issue, either. (Red Br. 32).

“Grooming” is irrelevant. (Red Br. 32). “Grooming” is not an offense element. And whatever “grooming” means,¹⁵ it does not allow the unrestrained admission of *completed* sexual acts that themselves support criminal charges.

¹⁵ Justice Alexander has described grooming-type behavior. *See State v. Conroy*, 2020 ME 22, ¶¶ 41-42, 225 A.3d 1011 (Alexander, J., dissenting) (For two days, the defendant “engaged the victim in a continual pattern of online and in-person communications, including the exchange of sexual messages and nude photographs, culminating in his sexually assaulting the victim.”). There is no “grooming” exception to Rule 404(b), whatever “grooming” means.

At a minimum, the State must be willing to elect the conduct that constitutes the basis for the offense, *and* the State must distinguish it from conduct proffered as “other act evidence,” *and* the trial court must be prepared to give adequate limiting instructions that direct the jurors away from a non-propensity purpose. *See generally State v. Williams*, 2024 ME 37, ¶ 31, 315 A.3d 714 (limiting instructions may alleviate prejudice). But if none of that happens – and none of that happened here – than the admission of so-called other-act evidence gives rise to, among other things,¹⁶ Due Process and Double Jeopardy problems.

The State’s argument that the other-acts evidence was “quite limited in nature” is not the answer. (Red Br. 33). Here, the other-acts evidence was of completed sexual acts, each of which could have formed the basis for their own discrete count of criminal activity. Not only is such evidence prejudicial in the sense that it is likely to trigger an emotional response in the jurors, obviously. But also, the admission of

¹⁶ Rule 403 problems will present as well. M. R. Evid. 403. Whatever probative value the evidence might have will be overcome by the prejudicial nature of the evidence which was never properly channeled for the jury’s use and consideration.

even one such other act, without safeguards, spawns Double Jeopardy issues. The law does not tolerate “limited” double jeopardy violations.

The State’s suggestion that defense counsel was not unfairly surprised, (Red Br. 33), is not supported by the record. Defense counsel was *shocked*. (Blue Br. 32-33, Defense counsel: “I’m really knocked on my rear end here, frankly.”). It does not matter what the State disclosed in discovery. (Red Br. 34 n. 30). This misses the point entirely; the State reproduced discovery, called it a bill of particulars, and was correctly told by the trial court that this was non-compliant and unhelpful. (Blue Br. 29-30). The defense pleaded with the State to elect a factual basis for the charge; it believed, rightfully-so, that the trial court understood why this was necessary; and it was caught completely unawares when the floodgates opened and T.S. and T.N. were permitted to testify about *all* the sexual acts detailed in the Statement of the Case, Blue Br. at 13-14 (T.S. discussed six events), and 14-15 (T.N. discussed five events).

The State has read *Reynolds*, and Rule 404(b), and this Court’s conceptualization of jury unanimity in very specific types of sexual assault cases far beyond their mooring. A course correction is needed to prevent the situation here from arising again. Vacatur is required.

Seventh Assignment of Error

The trial court relied on an impermissible aggravating factor when calculating Philip's sentence.

Argument

The State never explains why respectful disagreement with the jury verdict supports the factual inference of a lack of remorse. It does not.¹⁷ Even if it did, the State never explains why aggravating punishment based on respectful disagreement with the jury verdict comports with the First and Eighth Amendments. It does not.

“It is a ‘settled appellate rule that issues averted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are waived.’” *Tolbert v. Queens College*, 242 F.3d 58, 75 (2d Cir. 2001) (quoting *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990)). This Court should apply that rule to the State and, for all the reasons outlined in the Blue Brief, it should remand the case for resentencing.

¹⁷ The act of filing a notice of appeal indicates disagreement with the jury verdict. Is every defendant who dares to appeal lacking in remorse? If so, then why do judges advise defendants *at sentencing* about the right to appeal? Can the act of appealing be used on remand as evidence of a lack of remorse to aggravate punishment? Lack-of-remorse has a role at sentencing – *if at all* – only in the most extreme and unique cases. Respectfully, this Court should say so clearly.

Conclusion

For the reasons stated here and in the Blue Brief, Philip respectfully requests the relief identified in each assignment of error.

Respectfully submitted,

/s/ Jamesa J. Drake

Jamesa J. Drake # 5194

Drake Law LLC

P.O. Box 56

Auburn, ME 04212

(207) 330-5105

jdrake@drakelawllc.com

Certificate of Service

This brief was served on opposing counsel as required by Rule 1E of the Maine Rules of Appellate Procedure.

/s/ Jamesa J. Drake

Jamesa J. Drake

Bar No. 5194

Drake Law LLC

P.O. Box 56

Auburn, Maine 04212

(207) 330-5105

jdrake@drakelawllc.com

STATE OF MAINE

SUPREME JUDICIAL COURT

Sitting as the Law Court

Docket No. Yor-26-12, SRP-26-11

State of Maine

v.

Philip Fryman

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Dated: July 15, 2026

/s/ Jamesa J. Drake

Jamesa J. Drake

Bar No. 5194

Drake Law LLC

P.O. Box 56

Auburn, ME 04212

(207) 330-5105

jdrake@drakelawllc.com