

MAINE SUPREME JUDICIAL COURT

Reporter of Decisions

Decision: 2026 ME 97

Docket: And-25-463

Argued: June 2, 2026

Decided: September 15, 2026

Panel: STANFILL, C.J., and MEAD, CONNORS, LAWRENCE, DOUGLAS, LIPEZ, and TAUB, JJ.

STATE OF MAINE

v.

JAMES R. FOOTMAN JR.

TAUB, J.

[¶1] James R. Footman Jr. appeals from a judgment of conviction of robbery (Class A), 17-A M.R.S. § 651 (1)(E) (2026), and of violation of condition of release (Class E), 15 M.R.S. § 1092(1)(A) (2026), entered by the trial court (Androscoggin County, *Archer, J.*) after a jury trial. Footman also appeals from his sentence.

[¶2] The convictions pertain to a robbery on November 11, 2024. Footman contends that the court clearly erred or abused its discretion by admitting evidence relating to a similar robbery on November 14, for which Footman was not on trial. Because evidence of the November 14 robbery was not probative of the identity of the person who committed the robbery on November 11, the court erred in admitting it. Because we determine that the

error was not harmless, we vacate the judgment of conviction and do not reach the sentence appeal.

I. BACKGROUND

A. Factual Background

[¶3] “Viewing the evidence in the light most favorable to the State, the jury rationally could have found the following facts beyond a reasonable doubt.” *State v. Ellis*, 2025 ME 56, ¶ 3, 339 A.3d 794.

[¶4] On November 11, 2024, an individual wearing a medical mask and black Nike shoes with white trim walked into a Big Apple store on Main Street in Lewiston. The man approached two clerks at the register and demanded that they give him money. The man held a box cutter with a black and red handle. One of the clerks initially gave him twenty dollars. The man demanded more money and the clerk handed him another thirty dollars. The man then left the store.

[¶5] On November 16, a law enforcement officer interacted with Footman and observed that he was wearing black and white Nike shoes similar to those worn by the person who had robbed the Big Apple. The officer took photographs of Footman’s shoes. The officer retrieved from Footman’s pocket a box cutter with a black and red handle and took a photograph of it. On

November 18, another law enforcement officer interacted with Footman, observed that he was wearing shoes that looked like those worn in the Big Apple robbery, and took photographs of them.

B. Procedural History

[¶6] On January 8, 2025, the State charged Footman with the November 11 robbery (Class A), 17-A M.R.S. § 651(1)(E), and violation of condition of release (Class E), 15 M.R.S. § 1092(1)(A). Footman pleaded not guilty.

[¶7] Before trial, the State indicated that, to prove Footman's identity as the perpetrator of the Big Apple robbery on November 11, 2024, it intended to introduce evidence that on November 14, an individual attempted to rob a 7-Eleven store on Main Street in Lewiston, near the Big Apple. The evidence consisted of a surveillance video recording showing that a man with his face covered by a hood and wearing black Nike shoes with white trim entered the 7-Eleven, held a box cutter with a black and red handle, and demanded money from a clerk before fleeing.

[¶8] Footman moved in limine to exclude the evidence relating to the November 14 robbery of the 7-Eleven, arguing that the evidence was inadmissible under Maine Rules of Evidence 404(b) and 403. The court ruled that the State could introduce the evidence to prove the identity of the

perpetrator of the Big Apple robbery, determining that the evidence was probative and not unfairly prejudicial to Footman.

[¶9] The court held a jury trial on the robbery charge in July 2025. In addition to video evidence of the Big Apple robbery, the jury saw two surveillance-camera videos depicting the 7-Eleven robbery, along with still photographs taken from those videos. In its closing argument, the State asserted that Footman wore the “same black and white Nike shoes” on “four separate occasions”: the Big Apple robbery, the 7-Eleven robbery, and his two encounters with law enforcement officers. The State further asserted that Footman carried the “same black and red box cutter” on “three separate occasions”: the Big Apple robbery, the 7-Eleven robbery, and his first encounter with a law enforcement officer.

[¶10] The jury returned a guilty verdict on the robbery charge. Footman waived his right to a jury trial on the charge of violation of condition of release, and the court found him guilty.

[¶11] At the sentencing hearing, although Footman had neither testified at trial nor allocuted, the court considered his alleged lack of remorse to be an aggravating factor, stating, “[N]othing 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.” The court sentenced Footman to twelve years in prison for robbery and six months in prison for violation of condition of release, to be served concurrently, and it entered a judgment of conviction.

[¶12] Footman timely appealed from the judgment. *See* M.R. App. P. 2B(b)(1). He also timely filed an application for leave to appeal his sentence, which the Sentence Review Panel granted. *See* M.R. App. P. 20(a), (b). One of the grounds for Footman’s sentence appeal is that the trial court improperly considered his alleged lack of remorse as an aggravating factor.

II. DISCUSSION

[¶13] Footman contends that the court erred by admitting the evidence of the uncharged 7-Eleven robbery that the State offered as evidence that it was Footman who committed the Big Apple robbery. He argues that Rules 404(b) and 403 of the Maine Rules of Evidence required the exclusion of the evidence. “[W]e review the trial court’s decision to admit the evidence pursuant to Rule 404(b) for clear error and its determination pursuant to Rule 403 for an abuse of discretion.” *State v. DeMass*, 2000 ME 4, ¶ 11, 743 A.2d 233.

[¶14] Under Rule 404(b), “[e]vidence of a crime, wrong, or other act is not admissible to prove a person’s character in order to show that on a

particular occasion the person acted in accordance with the character.” Such evidence is admissible, though, “if offered to prove identity, intent, knowledge, motive, opportunity, plan, preparation, or absence of mistake.” *State v. Anderson*, 2016 ME 183, ¶ 13, 152 A.3d 623. In other words, the evidence must be “probative of a material issue other than character.” *Huddleston v. United States*, 485 U.S. 681, 686 (1988); *see State v. Joubert*, 603 A.2d 861, 866 (Me. 1992); *State v. DeLong*, 505 A.2d 803, 805-06 (Me. 1986) (explaining that evidence of a prior bad act is admissible for a purpose other than establishing character if it is “probative of some element of the crime for which the defendant is being tried” (quotation marks omitted)).

[¶15] Here, the State offered the evidence of the 7-Eleven robbery to prove that it was Footman who committed the Big Apple robbery. When evidence of an uncharged crime is offered to prove the identity of the perpetrator of the charged crime, the two crimes must have sufficiently distinctive factual similarities to support the reasonable inference that they were committed by the same person, *see State v. Connors*, 679 A.2d 1072, 1074 (Me. 1996) (explaining that the uncharged crime must have a “signature-like similarity” to the charged crime); *Joubert*, 603 A.2d at 866 (explaining that the charged and uncharged crimes must be “sufficiently idiosyncratic” (quotation

marks omitted)). There must also be evidence that the uncharged crime did in fact occur and that the defendant committed it. *Cf. Huddleston*, 485 U.S. at 689 (explaining that, under Federal Rule of Evidence 404(b), similar-act evidence is probative only if there is sufficient evidence “that the act occurred and that the defendant was the actor”). Otherwise, the evidence merely proves that the same person committed both crimes rather than that *the defendant* committed either crime.

[¶16] Both prongs of the test were present in *Joubert*, where the defendant was charged with murdering an eleven-year-old boy. 603 A.2d at 862-63. The defendant had pleaded guilty to murdering two boys in Nebraska, and there were various similarities between one of those murders and the charged murder, including that both victims were found with human bite marks on their legs along with crisscross slash wounds made in an effort to disguise the bite marks. *Id.* at 865-66. We held that that the trial court properly admitted evidence of the Nebraska murder, which was offered to show that the defendant committed the charged murder: “The unusual bite marks with concomitant slashes, together with the similar physical characteristics and manner of death of both victims, ‘are sufficiently idiosyncratic’ to support the reasonableness of the trial court’s inference that they were killed by the same

person.” *Id.* at 866 (quoting *United States v. Pisari*, 636 F.2d 855, 859 (1st Cir. 1981)). That the defendant had pleaded guilty to the murder in Nebraska sufficed as proof that he was the perpetrator of that murder. *See id.* at 865-66.

[¶17] Here, the parties dispute whether the Big Apple and 7-Eleven robberies had sufficiently distinctive similarities to support an inference that they were committed by the same person. But even if we were to assume that the two crimes had “signature-like similarities” or were “sufficiently idiosyncratic,” the evidence of the 7-Eleven robbery offered by the State was not probative of Footman’s identity as the perpetrator of the Big Apple robbery. Unlike the defendant in *Joubert*, who had pleaded guilty to the uncharged crime, *id.* at 865, Footman had not, at the time of trial, pleaded guilty to the 7-Eleven robbery. The only evidence that the State offered to show that Footman was the person who committed the 7-Eleven robbery came from the police officers’ encounters with Footman on November 16 and 18, where they observed him with shoes and a box cutter similar to those of the suspect of both robberies. But this is the exact same evidence that the State offered as proof that Footman was the individual who committed the Big Apple robbery.

[¶18] For evidence of a second, uncharged crime to be probative of the defendant’s identity as the perpetrator of the charged crime, the State must

offer separate or additional evidence to demonstrate that the person who committed the uncharged crime was the defendant. Otherwise, evidence of the uncharged crime does not tend to make it more or less probable that the defendant committed the charged crime. See M.R. Evid. 401 (evidence is relevant only if it has a tendency to make a fact of consequence more or less probable than it would be without the evidence). In other words, if the evidence proving the perpetrator's identity is the same for both crimes, evidence of the uncharged crime does nothing to assist the fact finder in determining whether the defendant committed the charged crime. Any such evidence is therefore inadmissible because "[e]vidence revealing other crimes" must "have a relevant or a material bearing on some essential aspect of the offense being tried." *State v. Heald*, 393 A.2d 537, 542 (Me. 1978) (quotation marks omitted); M.R. Evid. 401. Because the State did not offer separate or additional evidence of Footman's identity as the person who committed the 7-Eleven robbery, evidence of the 7-Eleven robbery had no probative value with respect to identity of the person who committed the Big Apple robbery. The trial court thus erred by admitting this evidence. See *State v. Jordan*, 1997 ME 101, ¶ 7, 694 A.2d 929 (holding that the court erred in admitting evidence of the defendant's prior bad acts directed against his wife because the evidence had

no probative value with respect to an alleged later crime against a police officer).

[¶19] This error was not harmless. A preserved nonconstitutional error is treated as harmless only “if it is highly probable that the error did not affect the judgment.” *State v. Mangos*, 2008 ME 150, ¶ 15, 957 A.2d 89; *see* M.R.U. Crim. P. 52(a). We recognize that there was evidence other than that of the 7-Eleven robbery upon which the jury could have relied to determine that Footman committed the Big Apple robbery. But evidence of an uncharged crime creates a risk that “a jury will convict for crimes other than those charged—or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment.” *Old Chief v. United States*, 519 U.S. 172, 181 (1997) (quotation marks omitted). Further, the State argued to the jury that evidence that the perpetrator of the 7-Eleven robbery had white and black shoes and a black and red box cutter suggested that it was Footman who robbed the Big Apple. We cannot say that it is highly probable that admission of evidence of the 7-Eleven robbery did not affect the judgment. We therefore hold that the court’s error in admitting the evidence was not harmless, and we vacate the judgment of conviction.¹

¹ Because we vacate the judgment of conviction, we do not reach Footman’s challenge to his sentence. Given the nature of Footman’s challenge, however, we feel compelled to repeat that

The entry is:

Judgment vacated. Remanded for further proceedings in accordance with this opinion.

Rory A. McNamara, Esq. (orally), Drake Law LLC, York, for appellant James R. Footman, Jr.

Neil E. McLean Jr., District Attorney, and Alexandra W. Winter, Asst. Dist. Atty. (orally), Prosecutorial District III, Lewiston, for appellee State of Maine

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defendants have the constitutional right to remain silent and to decline to testify at trial or allocute at sentencing. *Ellis*, 2025 ME 56, ¶ 25, 339 A.3d 794. Because a defendant cannot be punished for exercising that right, a sentence “may not be increased . . . because [the defendant] chose to forgo expressing remorse or taking responsibility at trial or sentencing.” *Ellis*, 2025 ME 56, ¶ 26, 339 A.3d 794. Rather, “any consideration of a defendant’s failure to [show remorse or] take responsibility as an aggravating factor must be based on affirmative evidence in the record to support that finding.” *Id.* ¶¶ 24, 26.