IN THE
MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket No. SOM-23-326

STATE OF MAINE,

Appellee

v.

STEVE EDWARDS,

Appellant

ON APPEAL FROM THE UNIFED CRIMINAL DOCKET OF THE
COUNTY OF SOMERSET AND STATE OF MAINE

BRIEF FOR APPELLANT

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STATEMENT OF THE CASE

A July 16, 2020 eighteen count indictment alleged that on August 9, 2019 Appellant (hereinafter referred to as "Mr. Edwards") possessed and or accessed with intent to view sexually explicit material of a minor. A. 62, 67. Each count alleged represents a single image acquired by investigators in the unallocated space on Mr. Edwards' computer. A. 62, 67.

The State's indictment was the product of cybertips created by the National Center for Missing and Exploited Children (NCMEC). A. 171-176. In January 2019, Maine State Police received referrals from NCMEC that a particular internet protocol address potentially uploaded or accessed child exploitative material on the internet. A. 171-176. The cybertips alleged that a certain internet protocol address which, through further investigation by police was tied to the personal address of Mr. Edwards, engaged with sexually explicit material on three occasions: January 28, 2019; January 30, 2019; and February 26, 2019. A. 171-176. Five and a half months after Maine State Police received the cyber tips alleging access, a search warrant is executed at Mr. Edwards' residence, 1911 Mercer Road, Mercer, Maine. A. 154. Forensic analysis of two of his personal computers revealed allegedly child sexually exploitative material in the devices' unallocated space. Hearing Tr. 91-96 (Mar. 14, 2023). Based on images seized within unallocated space, Mr. Edwards was initially charged on July 17, 2020 by a twelve-count indictment for violating 17-A M.R.S. Sec 284(1)(C) and later by a superseding indictment on May 13, 2022, alleging an additional six images, for a total of eighteen images in violation of Sec. 284(1)(C). A. 62, 67. Mr. Edwards' was arraigned on January 6, 2021 in Skowhegan District Court where he entered a plea of not guilty. A. 4.

Mr. Edwards moved to suppress any evidence seized from the search of his residence on the grounds that the August 8, 2019 warrant lacked probable cause.

A. 75-80. On August 23, 2022 Skowhegan District Court held a hearing on Mr. Edwards' motion. A. 8. Mr. Edwards argued that the cyber tips, five and a half months old at the time of the warrant's execution, were stale, therefore the warrant lacked probable cause. A. 75-80. The State argued that the time period between receipt of the cybertips and execution of the warrant was within a period acceptable by precedent. A. 80-83. On August 26, 2023, the Court issued a written order upholding the evidence seized from the search warrant. A. 38. The Court concluded that the five and half months between the tips and warrant was not long enough to render the tips stale. A. 41.

Mr. Edwards subsequently moved to preclude from admission at trial, the State's use of the cybertip reports generated by NCMEC (A. 83); certain prior bad acts by Mr. Edwards (A. 87); and certain prior convictions. A. 92. Mr. Edwards argued by motion and at the March 3, 2022 motion in limine hearing that the cybertip reports relied upon by Maine State Police to begin their investigation could not be introduced as evidence at trial because they were hearsay. A. 42. At the hearing, the Court stated that it would offer a limiting instruction at the trial for the use of the reports such that they could not be offered for the truth of the matter asserted. A. 42. Regarding prior bad acts and convictions, the State acknowledged that none of the acts listed in Mr. Edwards' motion were acts intending to be raised

by the State during its case in chief. A. 42-44. A three-day jury trial commenced on March 14, 2023.

The State opened with testimony from Detective Abbe Chabot (hereinafter referred to as "Detective Chabot"), the primary investigative officer who received the cybertips from NCMEC and whose affidavit grounded the search warrant of Mr. Edwards' property. Hearing Tr. 72 (Mar. 14, 2023). The State first focused Detective Chabot's testimony on how the investigation started with referrals from NCMEC. Hearing Tr. 79-81 (Mar. 14, 2023). Detective Chabot testified that a cybertip was received on January 28, 2019 but that she was assigned as primary investigator in late July 2019. Hearing Tr. 81 (Mar. 14, 2023). Here, the Court issued its limiting instruction that the cybertips referenced by Detective Chabot were not to be admitted for the truth of the matter asserted. Hearing Tr. 81 (Mar 14, 2023). The State then focused Detective Chabot's testimony on the execution of the warrant at the Defendant's home. Hearing Tr. 82 (Mar. 14, 2023).

Detective Chabot testified that she was assigned as an interviewer along with Special Agent Gregory Kelly (hereinafter referred to as "Special Agent Kelly") during the warrant execution. Hearing Tr. 83 (Mar. 14, 2023). At the residence to be searched, Detective Chabot was initially met by Mr. Edwards' wife and later by Mr. Edwards who held an approximately two-hour recorded conversation with Detective Chabot and Special Agent Kelly. Hearing Tr. 88 (Mar. 14, 2023).

Testimony about the conversation with Mr. Edwards revealed that Mr. Edwards told Detective Chabot and Special Agent Kelly that while using a search engine, his computer took him to "weird sites" that contained images of "really bad things." Hearing Tr. 102-03 (Mar 14, 2023). Mr. Edwards confirmed that it was his Toshiba laptop that was used when sites were accessed. Hearing Tr. 106 (Mar. 14, 2023). Detective Chabot further testified that she inquired of Mr. Edwards what the images were and that he eventually indicated that one image was a little girl. Hearing Tr. 105 (Mar. 14, 2023). Mr. Edwards explained to Detective Chabot that he had been using a internet search engine which took him to sites where the images came from, but that he could not remember the names of any site. Hearing Tr. 107 (Mar 14, 2023). Detective Chabot testified that she asked Mr. Edwards whether he was looking at child pornography and he replied that he "does not look for child pornography." Hearing Tr. 107 (Mar. 14, 2023). Mr. Edwards could also not identify the origin of the imagery but mentioned that it could be from a foreign site. Hearing Tr. 108 (Mar. 14, 2023).

During cross-examination counsel for Mr. Edwards confirmed with Detective Chabot that only six items were seized from Mr. Edwards' residence none of which were external hard drives, CD-ROMs or DVDs. Hearing Tr. 130-131 (Mar. 14, 2023). Detective Chabot additionally confirmed that during the search, no evidence was found of dissemination of child sexually exploitative

material. Hearing Tr. 132-133 (Mar. 14, 2023). Counsel for Mr. Edwards reviewed the conversation Mr. Edwards had with Detective Chabot and Special Agent Kelly, and Detective Chabot confirmed Mr. Edwards willingness to talk to her and Special Agent Kelly. Hearing Tr. 137 (Mar. 14, 2023). Detective Chabot further testified that Mr. Edwards explained to her and Special Agent Kelly that while searching for legal pornography you "click on something and it takes you to a site and you see things you don't expect to see." Hearing Tr. 159-160 (Mar. 14, 2023). The testimony went on to clarify that Mr. Edwards informed Detective Chabot that the pop-up imagery incident occurred within the last month. Hearing Tr. 162 (Mar. 14, 2023). Mr. Edwards additionally clarified details regarding his personal computers for Detective Chabot, namely that he used his Toshiba laptop to access pornography but also owned an HP Envy laptop and ran a commercially available antivirus software on both computers. Hearing Tr. 166-168 (Mar. 14, 2023). Both personal computers Mr. Edwards confirmed to Detective Chabot, were purchased refurbished. Hearing Tr. 178 (Mar. 14, 2023).

Mr. Edwards' counsel confirmed through Detective Chabot's testimony that Mr. Edwards explained to her that he does not like looking at child pornography but recognizes there is a "gray area" where "a young woman can look like a little girl and a little girl can look like a young woman." Hearing Tr. 172 (Mar. 14, 2023). Detective Chabot also testified that in her conversation with Mr. Edwards

about his pornography habits, Mr. Edwards replied that, concerning child sexual exploitative material, he "does[n't] look at that stuff" and "do[esn't] like even hearing about it." Hearing Tr. 173 (Mar. 14, 2023). Mr. Edwards confirmed again once prompted with an image of child sexual exploitation provided by Detective Chabot that he does not like looking at child pornography. Hearing Tr. 179 (Mar. 14, 2023).

On re-direct, Detective Chabot confirmed that Mr. Edwards responded in the affirmative to the proposition by Special Agent Kelly that the allegedly child exploitative material retrieved from internet searches was an accident. Hearing Tr. 183 (Mar. 14, 2023). Detective Chabot then confirmed that Mr. Edwards could not remember what he searched to produce those accidental results or the frequency with which the accidents occurred. On final re-cross, Mr. Edward's counsel confirmed that Mr. Edwards informed the Detective that he did not "really examine the pictures." Hearing Tr. 185 (Mar. 14, 2023).

The State's next witness was Special Agent Gregory Kelly of The Department of Homeland Security, who assisted Maine State Police with the investigation. Hearing Tr. 13-14 (Mar. 15, 2023). The State focused Special Agent Kelly's testimony on his role of forensically investigating the contents of the two laptops seized during the August 9, 2019 search. Hearing Tr. 20-24 (Mar. 15, 2023**)**. Special Agent Kelly testified as to the forensic procedure of creating a copy

of the internal contents of Mr. Edwards' personal computers for further analysis. Hearing Tr. 25 (Mar. 15, 2023). Special Agent Kelly's testimony outlined that the forensic procedure reviews any and all data on a computer, regardless of whether that data exists in allocated or unallocated space. Hearing Tr. 31 (Mar. 15, 2023). Special Agent Kelly clarified that unallocated space is when "the file system – something's deleted, the user deletes it, the operating system deletes it . . . it's been marked for deletion but it's not yet overwritten." Hearing Tr. 32 (Mar. 15, 2023). Special Agent Kelly then testified as to his findings of search terms used on Mr. Edwards' Toshiba laptop. Hearing Tr. 42 (Mar. 15, 2023). Special Agent Kelly's testimony confirmed that the search terms revealed through analysis of the computer were, in his training and experience indicative of someone searching for child sexually exploitive material. Hearing Tr. 49-52 (Mar. 15, 2023). Special Agent Kelly confirmed however that after his investigation of the searches and images found on Mr. Edwards' computer, he could not say that the images were produced as a result of a search queried. Hearing Tr. 50 (Mar. 15, 2023). Special Agent Kelly further testified that he recovered from unallocated space on the Toshiba, images contained in the State's indictment. Hearing Tr. 62-64 (Mar. 15, 2023). These images were introduced into evidence and confirmed via testimony that each image represented a distinct count on the State's indictment. Hearing Tr. 65 (Mar. 15, 2023).

The State directed Special Agent Kelly's testimony to clarify the nature of the images retrieved from unallocated space. Hearing Tr. 66 (Mar. 15, 2023). Agent Kelly testified that some of the images retrieved were partially overwritten by the computer. Hearing Tr. 69 (Mar. 15, 2023). Special Agent Kelly went on to confirm the images introduced by the State as evidence as the ones he recovered from unallocated space on both the Toshiba and HP Envy laptops. Hearing Tr. 85-88 (Mar. 15, 2023). Direct concluded with Special Agent Kelly identifying Mr. Edwards as the individual he met at the residence during the execution of the search warrant. Hearing Tr. 89 (Mar. 15, 2023).

Cross-examination by Mr. Edwards' counsel focused on the fact that the images recovered by forensic analysis came from unallocated space. Hearing Tr. 93 (Mar. 15, 2023). Special Agent Kelly testified as to what types of records he would be searching for on the computer which would indicate the existence of possession or access to child sexually exploitative material. Hearing Tr. 114-116 (Mar. 15, 2023). Special Agent Kelly confirmed that he did not locate "any large collage of images" on either of Mr. Edwards computers, nor was there evidence of email or other electronic communication by Mr. Edwards that indicated transmission of child sexually exploitative material. Hearing Tr. 119-121 (Mar. 15, 2023).

Further testimony regarding the nature of unallocated space confirmed that the eighteen images retrieved resided in unallocated space and therefore "not accessible to the normal user without software." Hearing Tr. 128 (Mar. 15, 2023). Special Agent Kelly confirmed Mr. Edwards' computers did not contain software capable of accessing data residing in the computer's unallocated space. Hearing Tr. 128 (Mar. 15, 2023). Special Agent Kelly additionally confirmed that the images found on Mr. Edwards' Toshiba computer in unallocated space were not accessible to Mr. Edwards the day of the August 9, 2019 search warrant, nor were they encrypted by Mr. Edwards. Hearing Tr. 129, 133 (Mar. 15, 2023).

Cross-examination then focused on the eighteen images recovered by Special Agent Kelly from unallocated space on Defendant's personal computers. Hearing Tr. 172-173 (Mar. 15, 2023). Special Agent Kelly testified that the images recovered appeared to be "thumbnails" and agreed with counsel's characterization that it is reasonably possible for images to be saved to a browser cache and then sent to unallocated space without being viewed by Mr. Edwards. Hearing Tr. 177 (Mar. 15, 2023). Special Agent Kelly further agreed with counsel's inquiry that, with respect to the images retrieved from unallocated space on the Toshiba laptop, it was "a reasonable possibility that the images were saved to the temporary browser cache and then transferred to unallocated space without Steve seeing it." Hearing Tr. 179 (Mar. 15, 2023). Special Agent Kelly then testified that because of

the images existence in unallocated space he would have "no idea when they were put there." Hearing Tr. 178 (Mar. 15, 2023). Counsel for Mr. Edwards' posited that because they are all in unallocated space "[t]hey could have been put there at the same time. They could have been put there separate times. We don't know" to which Special Agent Kelly testified "[c]orrect." Hearing Tr. 178.

On re-direct by the State, Special Agent Kelly agreed it was possible that Mr. Edwards did see images in the unallocated space prior to their placement there. Hearing Tr. 182 (Mar. 15, 2023). On re-cross by Mr. Edwards' Counsel, Special Agent Kelly re-confirmed that it was "reasonably possible" that Mr. Edwards did not see certain child sexually exploitive images. Hearing Tr. 182 (Mar. 15, 2023).

At the close of the State's case in chief, Mr. Edwards' counsel orally moved for a judgment of acquittal. A. 47. Counsel argued that the State failed to prove beyond a reasonable doubt, Mr. Edwards' possession of child sexually exploitive material on or about August 9, 2019. A. 47-50. The Court denied counsel's motion, ruling that the question of whether Mr. Edwards "possessed" child sexually exploitative material within the meaning of the statute was a question best left up to the jury. A. 50; Hearing Tr. 196 (Mar. 15, 2023).

Mr. Edwards' case in chief focused on direct testimony by expert witness Scott Lavoie (hereinafter referred to as "Mr. Lavoie"), who has experience in network engineering and computer systems. Hearing Tr. 199 (Mar. 15, 2023). Mr.

Lavoie's testimony confirmed that during his analysis of the Toshiba laptop, he was able to locate the images retrieved by Special Agent Kelly in unallocated space. Hearing Tr. 230-233 (Mar. 15, 2023). Testimony further detailed that the images retrieved by the expert were "very low quality, low resolution." Hearing Tr. 229 (Mar. 15, 2023). Mr. Lavoie then testified that he was able to locate three images on the HP laptop indicative of child sexually exploitive material. Hearing Tr. 239 (Mar. 15, 2023). Mr. Lavoie testified that Mr. Edwards' explanation to Detective Chabot that images on his personal computer were accidentally downloaded was "absolutely" possible. Hearing Tr. 236 (Mar. 15, 2023). Mr. Lavoie concluded direct examination with testimony that "if there was a website that had a bunch of thumbnails on it that went to child pornography . . . and then they clicked on them; I would expect to see the big full-size images [on un unallocated space]." Hearing Tr. 237 (Mar. 15, 2023).

On cross-examination, Mr. Lavoie testified that in his report, he concluded that Mr. Edwards did not access child pornography on his computer. Hearing Tr. 241 (Mar. 15, 2023). The State confirmed with Mr. Lavoie that, though he characterized the eighteen images entered into evidence by the State as "suspected child pornography" in his report prepared for Mr. Edwards' case, he was able to confirm the existence of each image in unallocated space. Hearing Tr. 243 (Mar. 15, 2023).

On re-direct, Mr. Lavoie testified in response to counsel's inquiry as to whether he would expect to see more evidence of sexually explicit material on the unallocated space if someone was actually intending to view or access it, that he would expect to see it in both the allocated an unallocated space. Hearing Tr. 248 (Mar. 15, 2023).

At the close of Mr. Edwards' expert witness testimony, Mr. Edwards confirmed with the Judge that he knew and understood of his right to testify but by his own volition, would not. Hearing Tr. 252 (Mar. 15, 2023). After confirming no testimony from Mr. Edwards, both parties rested. After both parties rested, Mr. Edwards' counsel renewed a motion for judgment of acquittal which was denied. A. 51.

Prior to the court's final jury instructions, each party offered closing arguments. During the State's rebuttal closing argument, the prosecutor made direct reference to uncharged conduct not entered into evidence, drawing immediate objection by defense counsel, who moved for a mistrial. A. 52-57. Specifically, the prosecutor, while arguing that the age of the persons in the thumbnail photos retrieved from unallocated space was clear, asserted:

> If you think that [sic] pixilated when I made it that big – and if you look up here, you can see, at 672 times percent, is that not still child exploitative material? Can you not tell her age? Can you not tell the difference between an adult and a child? That is what this case is about. It's not the however many he possessed that we didn't charge him with.

Hearing Tr. 55-56 (Mar. 16, 2023). The court offered a curative instruction to disregard the comment and remind the jury that they should only focus on what Mr. Edwards had been charged with. A. 55. After deliberation, the jury found Mr. Edwards guilty as charged on all eighteen counts. A. 151.

After the jury verdict was reached, Mr. Edwards' counsel filed two written post-judgment motions. The first was a combined renewed motion for mistrial and motion for new trial, renewing the objection made on the record to the State's reference to uncharged conduct during its rebuttal closing argument. A. 102. The second post-judgment motion was a third motion for judgment of acquittal. A. 108. The State filed motions objecting to both. A. 114, 127. At Mr. Edwards' sentencing hearing, the court denied both motions. A. 57. On August 22, 2023 Defendant timely filed his notice of appeal of the conviction and sentence. A. 35. This appeal follows.

SUMMARY OF THE ARGUMENT

The Trial Court erred in denying Mr. Edwards' Motion to Suppress when it found the information contained in the CyperTips was not stale despite there being 160 days from the date of the last CyperTip to the warrant request. Significant time transpired from when the Computer Crimes Unit first learned of the possibility that sexually explicit material was being accessed from Mr. Edwards' residence. Moreover, there were three total CyperTips. One in January and two

in February of 2019. The Computer Crimes Unit received no further tips. The warrant request was in August that same year. This would suggest that no sexually explicit material was not being accessed for a significant period of time leading up to the warrant request. Thus cutting against the Trial Court's foundation for probable cause. The argument is simple, the longer the time period between CyperTip and warrant request the greater the erosion of probable cause.

The Trial Court erred when it denied Mr. Edwards' Motion for Judgment of Acquittal. Because the images contained in each of the 18 counts were found on unallocated space, and that no software was present that would allow Mr. Edwards to carve out or access the images found on unallocated space, Mr. Edwards did not possess any of the 18 images. The evidence could only relate to the "access with intent to view" portion of the relevant statute. Moreover, because the images were found on unallocated space, there was no way to determine when or how the images made it to the unallocated space. The State's own expert testified that that images could have made it to unallocated space without the computer user even seeing or viewing the images. There was insufficient evidence presented during trial to prove that Mr. Edwards accessed sexually explicit material on 18 separate occasions. Thus his Motion for Judgment of Acquittal should have been granted.

The Trial Court erred in denying Mr. Edwards' Motion for Mistrial and Motion for New Trial when it found that the prosecutor's reference to uncharged

images during their rebuttal in closing statements did not prejudice Mr. Edwards' substantive trial rights. The Trial Court along with the Parties went through great strides to ensure that Mr. Edwards received a fair trial. Prior bad acts were excluded, the information regarding the cybertips was given a special instruction. It was clear to all Parties that no reference would be made to any uncharged conduct or additional potential sexually explicit images that were found by investigators. Despite these efforts, the prosecutor referenced uncharged images during his rebuttal in closing statements. The bell was rung. Despite the Trial Court's curative instruction, the seed was planted. The State has failed to show that the prosecutor's reference to the uncharged images did not taint the Jury to the prejudice of Mr. Edwards' substantive trial rights.

The Trial Court erred in its instructions to the Jury when it failed to instruct the Jury that they must find Mr. Edwards accessed with intent to view on 18 separate occasions. "Access with intent to view" is a newly added element to 17-A M.R.S.A § 284(1)(C). Access with intent to view suggests an affirmative act. The Court should have instructed the jury that they must find Mr. Edwards accessed with intent to view on 18 separate and distinct occasions. This would have been the fair and appropriate way to present this matter to the Jury. For this reason and the reasons set forth above and below, Mr. Edwards asks this Court to vacate his conviction and remand this matter for a new trial.

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING MR. EDWARDS' MOTION TO SUPPRESS WHEN IT FOUND THE INFORMATION CONTAINED IN THE CYBERTIPS WAS NOT STALE DESPITE THERE BEING 160 DAYS FROM THE DATE OF THE LAST CYBERTIP TO THE WARRANT REQUEST.

The court erred in denying Mr. Edwards' motion to suppress evidence seized as a result of the search warrant because by the time the search warrant was executed, the information that formed the basis for probable cause to search Mr. Edwards' residence was stale.

This court reviews the evidence in the light most favorable to the trial court's order denying Mr. Edwards' motion to suppress. *See State v. Wright,* 2006 ME 13, 890 A.2d 703. When reviewing a denial of a motion to suppress on grounds that the information relied upon for issuing the warrant, this court "reviews directly the finding of probable cause by the issuing judge." *Id*. ¶ 8.

The Law Court "must give the [challenged] affidavit a positive reading . . . with all reasonable inferences that may be drawn to support the magistrate's determination." *Id.* at 8. Probable cause "exists when, based on the totality of the circumstances, there is a fair probability that . . . evidence of a crime will be found in a particular place" and that "the affidavit supporting the warrant must set forth some 'nexus' between the information

upon which the warrant relies and the location of the property to be seized." *Id*. ¶ 12 (quoting *State v. Samson*, 2007 ME 33 ¶ 12, 916 A.2d 977).

According to *Wright*, there is no "*per se* rule fixing a specific period as a mandatory maximum time which, to be valid, a search warrant must be sought after . . . the approach is *ad hoc* in terms of the circumstances of each case." *Id*. ¶ 9; see also *State v. Roy*, 2019 ME 16, ¶ 12, 201 A.3d 609 ("whether probable cause still exists at the time a warrant is requested is determined not by the mere passage of time . . . but by the consideration of the unique facts and circumstances of the case at hand."). In *Wright*, the Law Court declined to suppress evidence obtained from a search warrant where eighty days elapsed between the probable-cause establishing occurrence and issuance of the warrant. *Wright*, 2006 ME 13, ¶ 7, 890 A.2d 703.

The case at bar is distinguishable from *Wright* and *Roy* in the respective lapse of time between the finding of probable cause and issuance of the warrant. In *Wright*, eighty days elapsed between the probable-cause establishing occurrence and the issuance of the warrant. *Wright,* 2006 ME 13, ¶ 3, 890 A.2d 703. In *Roy*, only 13 days between. *Roy*, 2019 ME 16, ¶ 5, 201 A.3d 609. Here, *more than 160 days passed from the time of the incident date to the issuance of the warrant*. A. 81. Acknowledging this court's observation that probable cause in child pornography investigation may exist

long after initial observation of a crime, the Law Court has not applied this approach to a lapse of more than eighty days. *See Roy*, 2019 ME ¶ 13-14, 201 A.3d 609; *Wright*, 2006 ME 13 ¶ 10-11, 890 A.2d 703.

It is not reasonable to conclude that evidence of child exploitative material would be found on any electronic device more than 160 days after the occurrence that forms the basis of probable cause. While there is no magic number for time, during the period between the cybertips and warrant, there was no further evidence of any activity or any cybertips. A. 173. None of Mr. Edwards' online activity generated probable cause after the initial three cybertips. *Id*. The lack of activity over the 160-day gap undercuts the idea that there might still be material there five and a half months later.

Therefore, the trial court erred in denying Mr. Edwards' motion to suppress because the information grounding the existence of probable cause was stale at the time of warrant request and execution.

II. THE TRIAL COURT ERRED WHEN IT DENIED MR. EDWARDS' MOTION FOR JUDGMENT OF ACQUITTAL.

The State failed to present sufficient evidence that Mr. Edwards accessed with intent to view child sexual exploitative material on eighteen separate occasions. A conviction that rests on legally insufficient proof violates the Due Process Clause and cannot stand. *Jackson v. Virginia*, 443 U.S. 307, 309, 318 (1979); *In re Winship*, 397 U.S. 358, 363-64 (1970).

The Law Court, in reviewing the sufficiency of the evidence, must analyze "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Van Sickle*, 434 A.2d 31 (Me. 1981) *citing Jackson v. Virginia*, 443 U.S. 307 (1979). The Law Court has consistently followed such a standard. *See, State v. Doughty*, 399 A.2d 1319, 1326 (Me. 1979); *State v. Rowe*, 238 A.2d 217, 223-224 (Me. 1968); *State v. Wright,* 128 Me. 404, 406 (1929). Appellate oversight of sufficiency challenges "[are] not an empty ritual." *United States v. Burgos*, 703 F.3d 1, 9 (1st Cir. 1995). The Law Court must not give credence to "evidentiary interpretations and illations that are unreasonable, insupportable, or overly speculative." *Burgos* at 10. Furthermore, although a verdict may be supported by circumstantial evidence alone, this must be "loath to stack inference upon inference in order to uphold the jury's verdict." *Burgos* at 10 (quoting *United States v. Valerio*, 48 F.3d 58, 64 (1st Cir. 1995)).

Notably, a conviction under 17-A M.R.S.A § 284(1)(C) requires proof beyond a reasonable doubt that a person "[i]ntentionally or knowingly . . . possesses . . . or accesses with intent to view . . . material that the person knows or should know depicts another person engaging in sexually explicit conduct, and: (1) The other person has not in fact attained 12 years of age; or (2) the person knows or has reason to know that the other person has not attained 12 years of age." 17-A

M.R.S.A. § 284(1)(C). The term "possession" in the statute is self-defined, according to its plain meaning. *See State v. Wilson*, 2015 ME 148, ¶16-17, 127 A.3d 1234.

Addressing possession first, each count Mr. Edwards was charged with corresponds with a child exploitative image recovered from unallocated space on Mr. Edwards' personal computers. At trial, it was determined via testimony by the State, that the exploitative images were found deep in the recesses of unallocated space of his computers. Hearing Tr. 93 (Mar. 15, 2023). The State testified that material in unallocated space on a personal computer is inaccessible to the user of that personal computer without specific software to "carve" it out. Hearing Tr. 127-129 (Mar. 15, 2023). Given the inaccessibility of the images in unallocated space, the State failed to prove beyond a reasonable doubt that Mr. Edwards possessed any of the eighteen images charged in the indictment.

Lacking evidence sufficient to prove beyond a reasonable doubt that Appellant actually possessed eighteen separate pieces of exploitative material, the State was left to prove that he accessed with intent to view the images. This required the State to prove, beyond a reasonable doubt, that it was Mr. Edwards' conscious purpose to access child sexually exploitative material and view it. More specifically, the State needed to, and failed to, prove beyond a reasonable doubt that each image, eighteen in total, was accessed in such a manner. The evidence

presented by the State, eighteen images in unallocated space, does not correspond to the notion that Mr. Edwards accessed with intent to view sexually exploitive images on eighteen separate occasions.

Rather, the images contained in unallocated space, inaccessible except through computer forensics, evidenced merely that they were in the unallocated space of the computer. Further still, the search terms relied upon by the State to substantiate its argument that Mr. Edwards accessed the illegal images with intent to view were also recovered from unallocated space. As such, even acknowledging Mr. Edwards' ownership of the two personal computers, there can be no definitive answer as to *who* entered those search terms which prompted the cybertip, *when* those terms were entered into a search engine, or when and if results were received from those search terms.

During cross-examination, Mr. Edwards' counsel elicited testimony from the State witness Special Agent Kelly that indeed it was reasonably possible that the thumbnail images identified by the State in unallocated space could have found their way there via spam, pop-ups or other means not made aware to the individual using the internet search engine. Hearing Tr. 177 (Mar. 15, 2023). Given the existence of reasonable alternative methods by which the eighteen images on unallocated space could have arrived there, the State failed in meeting its burden to prove beyond a reasonable doubt that access with intent to view did occur on

eighteen separate occasions by Mr. Edwards. In sum, the State did not present evidence that Mr. Edwards did something differently on eighteen different occasions or that Appellant accessed with intent to view on eighteen different occasions.

As such, "if evidence viewed in the light most favorable to the verdict gives equal or nearly equal circumstantial support to . . . a theory of innocence of the crime charged [an appellate court] must reverse the conviction. *Valerio* at 64. This is so because "where an equal or nearly equal theory of guilt and a theory of innocence is supported by evidence viewed in the light most favorable to the prosecution, a reasonable [fact finder] *must necessarily entertain* a reasonable doubt. *Burgos* at 10 (emphasis in original). In the present case, the State failed to prove beyond a reasonable doubt that Mr. Edwards accessed with intent to view on eighteen separate occasions, the illegal imagery found deep in the recesses of unallocated space.

III. THE TRIAL COURT ERRED IN DENYING MR. EWARDS' MOTIONS FOR MISTRIAL AND NEW TRIAL WHEN IT FOUND THAT THE PROSECUTOR'S REFERENCE TO UNCHARGED IMAGES DURING THEIR REBUTTAL IN CLOSING STATEMENTS DID NOT PREJUDICE MR. EDWARDS' SUBSTANTIVE TRIAL RIGHTS.

Mr. Edwards' counsel preserved this issue for appeal through oral and written motions for mistrial and new trial. A. 50, 99. Under Maine law, "if the defendant objected at trial, [the Law Court] review[s] the [State's]

comments for harmless error and affirm[s] the conviction if it is highly probable that the jury's determination of guilt was unaffected by the prosecutor's comments." *State v. Cheney*, 2012 ME 119, ¶ 34, 55 A.3d 473. Further, this court reviews objections made to prosecutor statements made at trial for "actual misconduct" and if so, whether the trial court's response "remedied any prejudice resulting from the misconduct. *State v. Dolloff*, 2012 ME 13 ¶ 132; *See also State v. Clark*, 2008 ME 136 ¶ 7, 954 A.2d 1066. *Id.* An error committed and preserved on appeal by the Appellant warrants relief if it was harmful such that it "affected substantial rights [of the Defendant]." *State v. White*, 2022 ME 54 ¶ 30, 285 A.3d 262. Harmful error in other words, means that "the error was sufficiently prejudicial to have affected the outcome of the proceeding." *State v. Pabon*, 2011 ME 100 ¶ 34, 28 A.3d 1147.

The existence of prosecutorial error affecting substantial rights can render a trial fundamentally unfair, "however strong the evidence." In *White*, the Law Court further acknowledged that "[w]hen a trial has been infected by prosecutorial error, we are free to require a new trial based on our supervisory power regardless of the strength of the evidence against the defendant when necessary to preserve the integrity of the judicial system." *White*, 2022 ME 54 ¶ 34, 285 A.3d 262. Prosecutors are thusly held to a

higher standard regarding their conduct, as "improper argument may be so prejudicial as to deny the defendant a fair trial." *See State v. Bahre*, 456 A.2d 860, 865 (Me. 1983). In *White*, where this Court used the term "error" not "misconduct" this Court underscored the purpose of their review as "focus[ing] not on the prosecutor's subjective intent but on the due process rights of the defendant." *White*, 2022 ME 54, ¶19, 285 A.3d 262.

White also underscores the limitations of permissible arguments made by the prosecution. "The prosecutor should make only those arguments that are consistent with the trier's duty to decide the case on the evidence and should not divert the trier from that duty." *Id*. ¶ 26. This Court instructs prosecutors to prosecute with "unflinching and assertive efforts" which "must be tempered by a level of ethical precision that … prevents the fact-finder from convicting a person on the basis of something other than evidence presented during trial." *State v. Dolloff*, 2012 ME 130 ¶ 40, 58 A.3d 1032. The core of this Court's instruction is that the prosecution must focus the jury's attention on the offenses charged, not those charges which were not brought. *See White*, 2022 ME 54, ¶ 26, 285 A.3d 262; *see also* ABA Criminal Justice Standards for the Prosecution Function Sec. 3-6(c) (4th ed. 2017) ("The prosecutor should make only those arguments that are consistent with the trier's duty to decide the case on the evidence . . . .").

Finally, the State "carries the burden of persuasion when [the] review is for harmless error." *Dolloff*, 2012 ME 130, ¶ 39, 58 A.3d 1032. "When the Court conducts a harmless error analysis, the State must persuade us that it is highly probable that the jury's determination of guilt was unaffected by the prosecutor's comments." *Id*. ¶ 34.

In the present matter, Mr. Edwards' substantial rights were dramatically impacted right before the jury was to deliberate. The prosecutor, during the State's rebuttal closing argument, directly referred to uncharged conduct. The comment was in regard to uncharged conduct that was identical to the charged conduct in the eighteen-count indictment and directly infected the jury's ability to deliberate on only the charges brought to trial. A. 54. The fact that the jury was infected with his comment regarding *uncharged conduct* such that their impression of Mr. Edwards was not solely the product of evidence provided at trial is not harmless error and certainly not "wholly within" the range of permissible comments for prosecutor to make. *See e.g., State v. Nobles*, 2018 ME 26, 179 A.3d 910. There are several factors that exacerbate the damage to Mr. Edwards' substantial rights. First, motions in limine previously highlighted this issue as one to avoid, therefore the State was on notice at the start of the trial. Second, the nature of uncharged conduct and matter at hand: child sexual

exploitation, adds to risk of prejudice. Finally, the timing of the statement.

Regarding the first exacerbating factor, Mr. Edwards filed a motion in limine to clarify the extent of information discussed at trial. A. 42, 88. One motion specifically addressed the issue of whether the State could refer to or mention alleged sexually explicit images that were not charged as part of the State's eighteen count indictment. A. 42, 88. The State was on notice and agreed regarding the scope of information to be discussed at trial. Therefore, the prosecutor's clear statement regarding uncharged conduct at the end of their rebuttal closing argument directly contravenes what was agreed to pre-trial, which was that mentioning this uncharged conduct would violate the Maine Rules of Evidence 403, 404(a), and 404(b).

Turning to the second exacerbating factor, the prosecutor's error in this case was particularly serious because of the nature of allegations, possession of sexually explicit materials. The Court and the parties, during pre-trial, took substantial effort to ensure that the jury did not have any bias or prejudice coming into the trial given the sensitive nature of this charge. However, as soon as the reference to uncharged child sexual exploitative conduct was made by the prosecutor, the bell had been rung and the damage was done, which no curative instruction could remedy. Though the Court instructed the jury to disregard the statement and focus only on the charged

material, the implication that there was more uncharged conduct that the State *could* have charged Mr. Edwards' with was highly prejudicial. Thus, the prosecutor's ringing of the bell in the jury's minds by reference to uncharged conduct in a child sexual exploitation case dramatically increased the likelihood of prejudice to Mr. Edwards. Child sexual exploitation matters are sensitive in particular because of the emotionally charged nature of the conduct. Ensuring fairness to the defendant is essential in such matters. In this case, the comment relating to uncharged material is highly prejudicial and could not be cured by a curative instruction.

Third, the timing of the prosecution's clear statement regarding uncharged conduct exacerbates the prejudicial impact to Mr. Edwards' substantial rights. In the present case, the prosecutor made the erroneous comment to uncharged conduct identical to that which was charged in the indictment during his rebuttal closing argument. A. 54. This means the jury heard the prejudicial comment after they had time to hear and consider the evidence against Mr. Edwards and right before they went to deliberate. Hearing reference to uncharged conduct identical to the conduct charged in the indictment right before deliberation, cannot be cured by a curative instruction which merely requests that the prejudicial prosecutorial statement be disregarded. Again, the bell cannot be un-rung in the jury's mind when

they are on the verge of deliberation.

In *White*, the Law Court ruled that comments made during the State's opening statement and closing argument were improper. *White*, 2022 ME 54, 285 A.3d 262. This Court's finding of prosecutorial error warranting a mistrial is comparative to the current one at issue for two reasons. First, in *White* the prosecutor's opening statement asked the jury to "hold the defendant accountable for his criminal actions." *White*, 2022 ME 54, ¶ 23, 285 A.3d 262. This Court found that comment improper because the phrase "criminal actions" could be "understood by the jury to refer to the [defendant's] drug dealing activities" which he was not charged with. *White,* 2022 ME 54, ¶ 23, 285 A.3d 262*)*. Here, although Mr. Edwards was charged with different criminal conduct, there was still a prejudicial reference to uncharged conduct just as the comment made in the opening statement in *White*. In this matter, the State commented on the record that "[i]t is not the however many he possessed that we didn't charge him with." A. 51. Both the comment in *White* and in this matter strongly suggest to the jury that the Mr. Edwards' committed a much more serious crime or crimes than what the State alleged. Furthermore, referencing uncharged conduct strongly suggests to the jury that Mr. Edwards routinely commits crimes and it is likely that he committed the offenses as charged in the indictment.

Second, the prosecution's error in *White* was not limited to the opening statement. Rather, the State made a reference to the defendant's silence during the closing argument. *White,* 2022 ME 54, ¶ 27, 285 A.3d 262. Here too in the present matter did the State commit an error during closing. Both the comment in *White* and in the present matter stand on their own as highly prejudicial comments communicated to the jury immediately before their deliberations

The infection of the jury at the trial's conclusion works a greater prejudice to Mr. Edwards because the entirety of his case is now recontextualized with this new information regarding uncharged conduct identical to that which was charged in the indictment and presented to the jury, information which the jury will now use to substantiate its findings. Therefore, the trial court erred in denying MR. Edwards motions for mistrial and new trial due to prosecutorial error affecting his substantial rights to a fair trial.

IV. THE TRIAL COURT ERRED IN ITS INSTRUCTIONS TO THE JURY WHEN IT FAILED TO INSTRUCT THE JURY THAT THEY MUST FIND MR. EDWARDS ACCESSED WITH INTENT TO VIEW ON EIGHTEEN SEPARATE OCCASSIONS.

Under Maine Law, jury instructions are reviewed in their entirety to determine "whether they presented the relevant issues to the jury fairly, accurately, and adequately." *State v. Hansley*, 2019 ME 35, ¶ 8, 203 A.3d 827. The trial

court's judgment will be vacated only if "the erroneous instruction resulted in prejudice." *Caruso v. Jackson Lab*., 2014 ME 101, ¶ 12, 988 A.3d 221. Furthermore, "to preserve objections to instructions, a party must object before jury deliberations begin." *Clewley v. Whitney*, 2002 ME 61, ¶ 9, 794 A.2d 87. If Defendant did not object to jury instructions given at trial, this Court will review the instructions for obvious error. *State v. Plummer*, 2020 ME 106, ¶15, 238 A.3d 241. A conviction must be vacated if "the erroneous instruction[s] resulted in prejudice." *State v. Anderson*, 2016 ME 183 ¶ 18, 152 A.3d 623.

At trial, Mr. Edwards' objected on two occasions to the jury instructions. A. 139. With objections preserved for appeal, at issue is whether the issued instructions resulted in prejudice to Mr. Edwards, which they did. Crucially, the jury instructions failed to clearly explain to the jury the following. First, that each count represents a separate image in violation of the statute. Second, that, to be found guilty, the State must prove beyond a reasonable doubt that Mr. Edwards possessed or accessed with intent to view each image on a separate occasion. Testimony at trial by both Mr. Edwards' and the States' experts confirmed that the images found were found on unallocated space, inaccessible to the user. If a user cannot access the images, they are not within his control and therefore he is not in possession of them. Crucial then is whether the Appellant accessed with intent to view eighteen times. Here, the images were found in unallocated space. Mr.

Edwards had no software to access the images residing in unallocated space. As such, Mr. Edwards did not possess the images within the meaning of the statute. Thus, the State needed to prove eighteen different acts of access by Mr. Edwards with the intent to view the images residing in unallocated space. At trial, the State could not and did not prove access with intent to view.

Turning to the jury instructions, they do articulate that "each charge must be considered independently." A. 132-133. However, they do not clarify the crucial distinction that each charge must be considered independently such that regarding access with intent to view, the jury, must determine whether Mr. Edwards independently accessed and independently viewed on each occasion, child sexually exploitative materials. Failing to do so, the Court permitted the jury to reach a verdict without analysis as to each individual count and whether, on each count, the State, beyond a reasonable doubt, proved Mr. Edwards access with intent.

Failing to adequately and accurately instruct the jury regarding access with intent to view, the jury instructions worked to prejudice the Appellant, resulting in a conviction despite, as argued, the State's failure to prove beyond a reasonable doubt, eighteen separate acts of access by Mr. Edwards.

CONCLUSION

For the reasons set forth above, the Appellant prays that this Honorable Court vacate the trial court's judgment of conviction and remand for a new trial.

Respectfully submitted,

/s/ Peter J. Cyr, Esq.

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CERTIFICATE OF SERVICE

I, Peter J. Cyr, attorney for Appellant Steven Edwards, hereby certify that on this date, January 12, 2024, I have caused ten (10) copies of this Brief to be served via in hand delivery to the Office of the Clerk of the Supreme Judicial Court of Maine. I further certify that I caused two copies of this Brief to be served on opposing counsel at the address listed on the Briefing Schedule.

DATED at Portland, Maine, this 12th day of January, 2024.

Respectfully submitted,

/s/ Peter J. Cyr, Esq.

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