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

LAW COURT DOCKET NO. Han-23-466

STATE OF MAINE
Appellee

v.

CRAIG A. WOODARD
Appellant

ON APPEAL from the Hancock County
Unified Criminal Docket

BRIEF OF APPELLEE

Toff Toffolon #3349
Office of the District Attorney
70 State Street
Ellsworth, Maine 04605
(207) 667-4621

TABLE OF CONTENTS

Statement of Facts………………………………………………………………………… 1

Statement of Issues……………………………………………………………………….. 1

Summary of Argument…………………………………………………………….. 2

Argument………………………………………………………………………………… 2

Conclusion……………………………………………………………………………… 12

Certificate of Service…………………………………………………………………. 12

TABLE OF CASES AND AUTHORITIES

State v. Garcia, 106 A.3d 1137 (2014)

State v. Nightingale, 2023 ME 71………………………………………………… 7

State v. Hamel, 2013 ME 16………………………………………………………… 8

State v. Smith, 600 A.2d 1103 (1991)…………………………………………… 8

17-A MRS Sec. 108(2) ……………………………………………………………… 5

MRUCP 65 *et seq*…………………………………………………………………….. 10

MRUCP 66……………………………………………………………………………….. 10

STATEMENT OF THE FACTS

The appellant's statement of the facts is more of an argument than a recitation of the history of the case. The State has included transcript references to those facts which it considers to be key to this Court's analysis throughout its Argument section.

STATEMENT OF THE ISSUES

I. THERE WAS NO THIRD PARTY DEFENSE INSTRUCTION AND THE LACK OF SAID INSTRUCTION, TOGETHER WITH THE CONVICTION, PRODUCES A MANIFEST INJUSTICE.
II. THE SENTENCING COURT UNLAWFULLY APPLIED THE MANDATORY MINIMUM SENTENCING PROVISION.
III. THE SENTENCING COURT UNLAWFULLY AND IMPROPERLY INCREASED THE DEFENDANT'S MAXIMUM SENTENCE BASED ON HIS AGE.
IV. THE SENTENCING COURT IMPROPERLY INCREASED DEFENDANT'S MAXIMUM SENTENCE BECAUSE DEFENSE COUNSEL'S SENTENCING MEMORANDUM CHARACTERIZED CERTAIN PORTIONS AS DEFENDANT'S STATEMENTS.

SUMMARY OF ARGUMENT

I. The Facts of the Case, as Described by the Victim, the Defendant (As Introduced through the Interviewing Officer), and Other Witnesses, Did not Give Rise to the Need for a Third Party Defense Instruction.

II. Because the Defendant Was Convicted of a Crime Involving the Use of a Firearm, Application of the Mandatory Minimum Sentence was Required.

III. The Sentencing Court Lawfully Considered the Defendant's Age When Conducting the *Hewey* Analysis.

IV. There is No Record Evidence that the Court Considered Portions of the Sentencing Memorandum as Reflecting Defendant's Statements To a Degree which Materially Impacted the Sentence.

ARGUMENT

I. THIRD PARTY DEFENSE INSTRUCTION

The defense did not ask for such an instruction: It is obvious that trial counsel thought very carefully about which self defense instructions to ask for, and that as a matter of strategy, he did not ask for a third party instruction. As is argued with respect to issue (IV) below, the State asserts that such strategy calls are reviewed by way of post-conviction petition, and not by direct appeal.

There was no record evidence that the victim intended to harm third parties: The evidence adduced at trial shows that the victim went to the vicinity of the defendant's property because he and Mr. Woodard had agreed to fist fight <u>each other</u> via exchanges over social media. (*Transcript, hereinafter "T", at 35)* Mutual unarmed brawling is neither deadly force, nor necessarily, unlawful. Upon arrival, Mr. Dale exited a vehicle and showed his hands so that there would be verification that he held no weapon. (*T at 39)* The victim said that Mr. Woodard said "I'll come and fight you." *(T at 40)* The only people that Mr. Dale could see were Mr. Woodard and his father, and he had no knowledge that Mr. Woodard lived in an RV on the property. *(T at 41)* Mr. Dale told the jury that he was never on the defendant's property, much less near the RV, and he said that immediately before Mr. Woodard retrieved his gun, he told Mr. Woodard that he was leaving. (*T at 45)*

In addition to the victim's testimony, the State offered the testimony of the officer who interviewed Mr. Woodard. That conversation is reflected at *T 56-60.* At no time during the interview did Mr. Woodard tell the officer that there was anyone in the RV, or that he or anyone else felt threatened by Mr. Dale.

However, Mr. Woodard did tell the officer that he felt that it was his fourth shot that hit Mr. Dale, that the fourth shot was fired while Mr. Dale was in retreat, and that he intended to kill Mr. Dale.

The defense called Craig Woodard's father who stated that Mr. Dale never got closer to the RV than eighty to ninety feet, and that he never saw a firearm other than the one possessed by his son, and the shotgun that he had.

There is no record evidence that there were third parties in the dwelling: There is no credible evidence that there was anybody in the RV at the time of the incident. Tim Woodard testified that he had his granddaughter and her mother in the RV, (*T-82),* but he could not have known this for sure, because he testified that he had arrived home immediately before the incident, and had gone into his own house, not the RV, to call the police and to retrieve a gun. (*T-71).* The State must be candid in conceding that it cannot remember whether there was any evidence adduced from the video which was introduced, because it cannot remember what excerpt it played, but the video is part of the Court's file.

The instruction was not generated, because the defendant could not reasonably have believed that deadly force was necessary, could not reasonably have believed that the victim was about to use deadly force against a third person, and the defendant provoked the potential for the use of unlawful, deadly force.

The above statement attempts to summarize aspects of 17-A MRS Sec. 108(2) which might have come into play here. Factual argument with respect to these elements appears elsewhere, but in brief, the record evidence shows that Mr. Dale, with nothing in his hands, being at best eighty feet from the defendant's property, in retreat when he was struck with a bullet, and invited to Mr. Woodard's property by Mr. Woodard for the purpose of engaging in a fist fight, was shot at repeatedly by the defendant and grievously injured.

In conclusion as regards claim of error (I), the evidence did not generate the need for the instruction and the defense strategically did not seek it.

II. THE MINIMUM MANDATORY SENTENCE

There are three components to the appellant's argument:

The State did not plead use of a firearm: This argument fails on its face. The indictment, count one, clearly identifies the use of a handgun. (*Appendix at A34)*

The term “firearm” is defined at 17-A MRS Sec. 12-A, and said definition clearly encompasses a handgun. The clerk, in reading the charges to the jury, referenced a handgun. (*Transcript at 16)*

The State did not prove the use of a firearm: The State points out that Mr. Woodard’s *own father,* called as a witness on behalf of his son, told the jury that he personally witnessed the defendant shoot at Mr. Dale (*Transcript at 80)* This is but one example of a record replete with testimonial references to the defendant’s firing of multiple shots, one of which buried itself into the victim. (*Transcript at 48)*

The Court’s instructions as regards the firearm element were materially erroneous:

First, it is a matter of record that the jury instructions referred to a firearm when the court defined the elements of elevated aggravated assault. At T-111, the court instructed as follows:

> *“ The term use of a dangerous weapon has a specific definition that we need to discuss. Use of a dangerous weapon is defined in our law as the use of a* ***firearm*** *or other weapon….” (*emphasis added)

Second, any error in the instruction was harmless. Defense counsel did not object to the instructions. Defense counsel conceded in his closing argument that the victim had been shot with a bullet. (*Transcript at 127 et seq.).* From the start to the finish of this trial, the jury was constantly reminded that the case at bar involved the defendant firing a gun. Given the totality of the record, the court met its burden of avoiding prejudicial error and ensuring that the instructions were correct and complete. *State v. Nightingale,* 2023 ME 71 But even if the Court finds an error in the instruction, it is highly probable that any error did not affect the verdict. *State v. Garcia,* 106 A.3d 1137 (2014)

III. THE DEFENDANT'S AGE

The appellant characterizes the sentencing court's consideration of the defendant's age as an "aggravating" factor, or as "categorical". In doing so, the appellant attempts to ascribe a nature and weight to age which simply does not exist in this case. It is routine and necessary practice across this State to consider age when following the mandate that sentences be tailored to the individual offender. The defense suggests that courts should turn a blind eye to age, thus depriving the courts of a valuable assessment of the history for law abiding conduct, or lack thereof. In attempting to advance the interests of this particular defendant, appellant counsel suggests a new rule which would deprive many

Maine citizens of being able to argue in mitigation of potential sentences by offering the sentencing court a long track record, based on age, of compliance with the law. This is a curious stance, because the appellant concedes that a judge may consider youth as a mitigating factor. *(Appellant's Brief, hereinafter, "AB" at 25)* The sentencing court considered this defendant's age as a yardstick for an appropriate level of maturity which should have caused him to refrain from shooting a retreating victim. Such consideration is a totally appropriate exercise of sentencing individualization and it should be praised by this Court as alluded to in the appellant's cite to *State v. Hamel,* 2013 Me. 16, and as required by the legislature by virtue of 17-A MRS Sec. 1501(6). In fact, the court seemed to be aware of *Hamel,* because it distinguished that case in terms of whether or not the conduct was the product of "youthful indiscretion" (*ST at 29)*

In *State v. Smith,* 600 A.2d 1103 (1991), this Court noted explicitly and with at least tacit approval that the sentencing court was aware of the defendant's age at the time of the offense, and at the time of sentencing. The information was relevant to the lawful sentencing objective of determining the defendant's prospects for rehabilitation. While the *Smith* sentencing occurred under a statutory scheme since repealed, the goal of assessing rehabilitative potential is still imbedded in our approach today.

It is also important to note that defense counsel alluded to his client's age in mitigation when he stated that "*…generally speaking, he hasn't done a significant criminal pattern of conduct." (Sentencing Transcript, hereinafter "ST", at 21).* The use of the word "pattern" absolutely implicates a consideration of the age of the offender.

Further, in exercising his right of elocution, the defendant himself implicitly asked the court to consider his age by the use of such statements as "*I've been struggling long before these charges, long before the prosecution. I've been torn down by society long before anybody ever took a shot at me in a courtroom. Every bit of growth I have is legitimate. Every bit of positivity that I've tried to put into the world is to make up for something." (ST at 22)* The State asks, how would it be possible for the court to evaluate the affect of Mr. Woodard's life circumstances, both good and bad, without considering his age at the time of the offense?

Finally, consideration of Mr. Woodard's age was but one aspect of the court's analysis. The court noted that the most significant aggravating factor in step two was the impact on the victim. (*ST at 28)* The Court went to great lengths to describe that impact in reviewing the facts of the shooting from the time that the victim was struck by a bullet, to the time that he received treatment. *(ST at 24-28)* The court made only a one sentence reference to age. *(ST at 29)*

IV. THE DEFENSE SENTENCING MEMORANDUM

This argument fails as a matter of law and as a matter of fact.

Legal Deficiency: Appellant counsel argues that the memorandum reflected the poor performance of trial counsel. He notes his opinion that such performance "*simply sets the case up for a petition for post-conviction review". (AB at 27)* The State takes no position in this brief as to the adequacy of trial counsel's performance, but it does agree with the appellant that if he wishes to challenge the quality of Mr. Juskewitch's work, he should do so using the framework established by MRUCP Rule 65 *et. seq.* An appeal does not provide the reviewing court with the opportunity to decide whether trial counsel failed to provide representation of the kind required of a reasonably fallible attorney. Simply put, the appellant has chosen the wrong forum in which to address this complaint. That fact is recognized in MRUCP Rule 66, discussing the prerequisites for filing a PCR petition. Those prerequisites do not include the prosecution of an appeal.

Factual Deficiency: The State finds no support for the assertion that the court's sentence was influenced by defense counsel ascribing certain statements in his sentencing memorandum to the defendant. As the sentencing transcript reveals, Mr. Juskewitch explicitly told Justice Larson the following:

> *"I have no complaints, except when my work is used to judge my client. My sentencing memorandum is my work. It's not my client. It's my best work at attempting to assist the Court. If it's offensive, I should be held accountable for that and not my client." (ST at 18)*

Further, the court focused on the statements of the defendant, made in open court at his sentencing, when determining the maximum sentence. The court quoted the defendant's words: *"Mr. Woodard also makes another statement that the Court finds troubling is that it takes two to tango. That might be true in the event of there was a fisticuffs, but there weren't fisticuffs here." (ST at 30)*

CONCLUSION

Based on the foregoing, the Court is respectfully asked to sustain both the convictions and the sentence imposed.

Date: ______________________________

Toff Toffolon #3349

CERTIFICATE OF SERVICE

On the date shown below, I emailed one copy of this brief, and sent two copies of said brief by regular mail to Rory McNamara, Esq., P.O. Box 143, York, Maine 03909.

Date: ___________________________

Toff Toffolon