State of Maine v. Ethan Gervais

Appeal from Unified Criminal Docket in
Aroostook County

Supreme Judicial Court sitting as the Law Court
Law Court Docket number ARO-24-127

Brief for Appellant

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Introduction

Facebook messages entered into evidence at trial by the State lacked sufficient foundation to establish that Mr. Gervais sent the messages. Closing remarks and questioning by the State during Mr. Gervais' trial resulted in prosecutorial error. Additionally, the trial court abused its discretion in allowing testimony about drug use by Mr. Gervais at trial. The trial court also abused its discretion when it allowed the State to refer to Ms. M[redacted] as a victim in its closing statements.

Procedural History

Ethan Gervais, the appellant, was charged by criminal complaint on February 27, 2023 with one count of Domestic Violence Assault (Class D) under Title 17-A M.R.S. § 207-A(1)(A)[1], one count of Assault (Class D) under Title 17-A M.R.S. § 207(1)(A)[2], and one count of Criminal Mischief (Class D) under Title 17-

[1] Title 17-A M.R.S. § 207-A(1)(A) provides that "[a] person is guilty of domestic violence assault if. . . [t]he person violates section 207 and the victim is a family or household member as defined in Title 19-A, section 4102, subsection 6 or a dating partner as defined in Title 19-A, section 4102, subsection 4. Violation of this paragraph is a Class D crime."

[2] Title 17-A M.R.S. § 207(1)(A) stated that "[a] person is guilty of assault if. . . [t]he person intentionally, knowingly or recklessly causes bodily injury or offensive physical contact to another person."

A M.R.S. § 806(1)(A).[3] (App. at 1). Mr. Gervais was arraigned on the aforementioned charges on March 8, 2023. (App. at 1).

Mr. Gervais faced additional charges by criminal complaint on June 5, 2023, one count of Burglary (Class B) under Title 17-A M.R.S. § 401(1)(B)(4)[4], one count of Tampering with a Witness, Informant, Juror or Victim (Class B) under Title 17-A M.R.S. § 454(1-B)(A)(2)[5], one count of Aggravated Criminal Trespass (Class C) under Title 17-A M.R.S. § 402-A(1)(A)[6]; one count of Domestic Violence Assault (Class D) under Title 17-A M.R.S. § 207-A(1)(A)[7]; one count of Domestic Violence Criminal Threatening (Class D) under Title 17-A M.R.S. § 209-

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[3] Title 17-A M.R.S. § 806(1)(A) provides that "[a] person is guilty of criminal mischief if that person intentionally, knowingly or recklessly. . . [d]amages or destroys the property of another, having no reasonable grounds to believe that the person has a right to do so; damages or destroys property to enable any person to collect insurance proceeds for the loss caused; or tampers with the property of another, having no reasonable grounds to believe that the person has the right to do so, and thereby impairs the use of that property."

[4] Title 17-A M.R.S. § 401(1)(B)(4) says that "[a] person is guilty of burglary if. . . [t]he person violates paragraph A and . . . [t]he violation is against a structure that is a dwelling place."

[5] Title 17-A M.R.S. § 454(1-B)(A)(2) states that "[a] person is guilty of tampering with a victim if, believing that an official proceeding, as defined in section 451, subsection 5, paragraph A, or an official criminal investigation is pending or will be instituted, the actor. . . [i]nduces or otherwise causes, or attempts to induce or cause, a victim. . . [t]o withhold testimony, information or evidence."

[6] Title 17-A M.R.S. § 402-A(1)(A) provides: "A person is guilty of aggravated criminal trespass if, knowing that that person is not licensed or privileged to do so, that person enters a dwelling place and. . . [w]hile in the dwelling place violates any provision of chapter 9 or 11." Chapter 9 contains offenses against a person and Chapter 11 involves sexual assaults.

[7] Title 17-A M.R.S. § 207-A(1)(A) states "[a] person is guilty of domestic violence assault if. . . [t]he person violates section 207 and the victim is a family or household member as defined in Title 19-A, section 4102, subsection 6 or a dating partner as defined in 4."

A(1)(A)[8]; one count of Obstructing Report of Crime or Injury (Class D) under Title 17-A M.R.S. § 758(1)(A)[9]; and one count of Violating Condition of Release (Class E) under Title 15 M.R.S. § 1092(1)(A)[10]. Mr. Gervais was indicted on July 13, 2023.[11] (App. at 12). An arraignment was held on October 31, 2023. (App. at 14).

The State filed a motion for joinder on July 21, 2023. (App. at 4, 12). The motion was granted on September 29, 2023 and all the aforementioned charges were joined together. (App. at 13).

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[8] Title 17-A M.R.S. § 209-A(1)(A) says: "[a] person is guilty of domestic violence criminal threatening if. . . [t]he person violates section 209 and the victim is a family or household member as defined in Title 19-A, section 4102, subsection 6 or a dating partner as defined in 4." Title 17-A M.R.S. § 209 states "A person is guilty of criminal threatening if he intentionally or knowingly places another person in fear of imminent bodily injury." Title 19-A M.R.S. § 4102(6) says: "'[f]amily or household members' means. . . [p]resent or former spouses or domestic partners; [i]ndividuals presently or formerly living together as spouses; [p]arents of the same child; [a]dult household members related by consanguinity or affinity; [m]inor children of a parent or guardian when the defendant is an adult household member of that parent or guardian; [i]ndividuals presently or formerly living together; and [i]ndividuals who are or were sexual partners. Holding oneself out to be a spouse is not necessary to constitute "living together as spouses." For purposes of this subsection, "domestic partners" means 2 unmarried adults who are domiciled together under long-term arrangements that evidence a commitment to remain responsible indefinitely for each other's welfare."

[9] Title 17-A M.R.S. § 758(1)(A) provides "[a] person is guilty of obstructing the report of a crime or injury if that person intentionally, knowingly or recklessly disconnects, damages, disables, removes or uses physical force or intimidation to block access to a telephone, radio or other electronic communication device with the intent to obstruct, prevent or interfere with another person's. . . [r]eport to a law enforcement agency."

[10] Title 15 M.R.S. § 1092(1)(A) states that a person is guilty of a violation of condition of release if "[a] defendant who has been granted preconviction or postconviction bail and who, in fact, violates a condition of release is guilty of. . . [a] Class E crime."

[11] The State moved to amend the indictment at the start of the second day of trial to strike the "and parent's of D[redacted] M[redacted]" language in Court 1 (Burglary) and Court 3 (Aggrieved Criminal Trespass) in AROCD-CR-23-20206. (Tr. T. (vol. 2) at 9-13). The trial court granted the motion to amend, finding that it was not a substantive change. (Tr. T. (vol. 2) at 13).

A motion in limine regarding privileged or protected documentary evidence was filed by Mr. Gervais on October 2, 2023 and granted on October 31, 2023. (App. at 13, 14). A motion in limine was filed by Mr. Gervais on February 5, 2024 to prevent the State from calling Ms. M[redacted] "victim." (App. at 5, 7, 14). The trial court granted the motion, only permitting the State to refer to the alleged victim as a victim in closing statements. (App. at 7, 14, 17). An additional motion in limine was filed to prohibit reference to drug use by Mr. Gervais. (App. at 14); (Tr. T. (vol. 1) at 34-38).

A motion was made, and granted, during the trial to amend the indictment pertaining to the burglary charge and to strike the language of "and the parents of D[redacted] M[redacted]" from the indictment. (App. at 14).

On February 5, 2024 a misdemeanor plea was entered into for the charges of Class D Assault (Count 2) and Class D Criminal Mischief (Count 3).[12] (App. at 5-6). On February 28, 2024 the court sentenced Mr. Gervais to six months in jail on the charge of Class D Assault. (App. at 7-8). A sentence of sixty days was also imposed on the charge of Class D Criminal Mischief. (App. at 8). Both sentences were ordered to run concurrent to the other sentences imposed by the court at the February 28, 2024 sentencing. (App. at 8).

Jury selection was held on July 5, 2024. (App. at 15). A jury trial was held on July 6, 2024 and July 7, 2024. (App. at 6, 15). A not guilty verdict was

[12] Pertaining to the charges in docket number AROCD-CR-23-20088.

returned on the charges of Burglary (Count 1), Aggravated Criminal Trespass (Count 3), and Obstructing Report of Crime or Injury (Count 6). (App. at 1, 15).[13] Mr. Gervais was found guilty of Tampering with a Victim (Count 2), Domestic Violence Criminal Threatening (Count 5), and Violation of Condition of Release (Count 7).[14] (App. at 15). The State dismissed the charge of Domestic Violence Assault on September 28, 2023 (Count 4).[15] (App. at 1, 15). The jury also found Mr. Gervais guilty of Class D Domestic Violence Assault (Count 1). (App. at 7).

A sentencing was held on February 28, 2024. (App. at 15). Mr. Gervais was sentenced on the Class B Tampering charge to a seven year term of imprisonment with the Department of Corrections, with all but two years suspended, and three years of probation. (App. at 16). A concurrent sentence of 364 days was imposed on the charge of Class D Domestic Violence Criminal Threatening. (App. at 16). On the charge of Class E Violating Condition of Release a sentence of six months was imposed. (App. at 17). And, on the charge of Class D Domestic Violence Assault the court imposed a sentence of six months, to run concurrent to all others sentences imposed. (App. at 7).

Mr. Gervais filed a timely notice of appeal on March 12, 2024. (App. at 9, 18). A motion to extend the time to file an appeal of sentence, along with the

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[13] Counts pertaining to charges in docket number AROCD-CR-23-20206.

[14] Counts pertaining to charges in docket number AROCD-CR-23-20206.

[15] Counts pertaining to charges in docket number AROCD-CR-23-20206.

application, was filed on March 28, 2024 and granted on the same date. (App. at 10, 18).

Statement of Facts

Mr. Gervais and D[redacted] M[redacted] grew up together, attending the same schools. (Tr. T. (vol. 1) at 67). They began a romantic relationship after they had left school in 2021. (Tr. T. (vol. 1) at 66, 67-68). Their relationship resulted in a quick pregnancy and a child born on November 22, 2021. (Tr. T. (vol. 1) at 68). Immediately after Ms. M[redacted] had the baby their relationship began to unravel and they could not get along. (Tr. T. (vol. 1) at 69, 82-83, 256). They broke up multiple times within the two and a half to three years that they were together.[16] (Tr. T. (vol. 1) at 69).

On February 25, 2023 they were no longer living together. (Tr. T. (vol. 1) at 70). However, they went out to eat and have drinks together on that evening. (Tr. T. (vol. 1) at 71, 74-75, 221). They stayed out until some time around twelve or twelve thirty, after which they went back to Mr. Gervais' apartment. (Tr. T. (vol. 1) at 71). Mr. Gervais and Ms. M[redacted] began to argue and Ms. M[redacted] testified that Mr. Gervais broke a glass table and then flipped the rocking chair she was sitting in

[16] They had briefly lived together around November and December of 2022. (Tr. T. (vol. 1) at 70, 128).

backwards, which caused a glass entertainment center to shatter.[17] (Tr. T. (vol. 1) at 74-76, 221-223); (Tr. T. (vol. 2) at 79, 82). Mr. Gervais' brother, who lived in the apartment below, came upstairs at that point. (Tr. T. (vol. 1) at 72, 77); (Tr. T. (vol. 2) at 50, 52). Ms. M[redacted] testified that Mr. Gervais had her phone and keys and that his brother was trying to convince him to give them back, at which point Mr. Gervias threw the phone on the ground and hit his brother. (Tr. T. (vol. 1) at 77-80). Ms. M[redacted] then took her phone and keys and left. (Tr. T. (vol. 1) at 80). She testified that Mr. Gervais followed her out to her car and got in it.[18] (Tr. T. (vol. 1) at 80-82). As she was trying to leave a police officer arrived. (Tr. T. (vol. 1) at 80).

Mr. Gervais was arrested and under his conditions of release he was not allowed to have contact with Ms. M[redacted].[19] (Tr. T. (vol. 1) at 88, 224); (Tr. T. (vol. 2) at 69); (Tr. T. (vol. 2) at73). Ms. M[redacted] testified that Mr. Gervais contacted her

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[17] Photographs of the apartment showing the scene when law enforcement arrived were entered into evidence as Exhibits 29, 30, and 31. (Tr. T. (vol. 2) at 63-65). Law enforcement viewed Ms. M[redacted]'s forearms to check for injury. (Tr. T. (vol. 2) at 74-75). No physical injuries were seen on Ms. M[redacted] by law enforcement, nor did she complain of pain. (Tr. T. (vol. 2) at 102). Law enforcement also stated that Mr. Gervais told them that he grabbed the chair and flipped it. (Tr. T. (vol. 2) at 82, 97-99). However, he told law enforcement the glass table was broken from him throwing a Zippo lighter at it and not because Ms. M[redacted] was flipped and landed on the table. (Tr. T. (vol. 2) at 100-101).

[18] The responding officer stated that he could smell intoxicants on Mr. Gervais and Ms. M[redacted]. (Tr. T. (vol. 2) at 48-49, 101-102, 122).

[19] They were allowed to have contact pertaining to their shared child. (Tr. T. (vol. 1) at 88); (Tr. T. (vol. 2) at 73). A certified copy of Mr. Gervais' bail conditions was entered into evidence at trial. (Tr. T. (vol. 1) at 8-9, 46-47).

about getting rid of the pending charges and fixing their relationship. (Tr. T. (vol. 1) at 89, 90-91). Ms. M[redacted] claimed that Mr. Gervais wanted her to change her statement to law enforcement.[20] (Tr. T. (vol. 1) at 92-93, 94, 225-226, 230). She testified that conversations about her statement took place both in person and via Facebook messenger.[21] (Tr. T. (vol. 1) at 94-95, 100-101, 103, 109, 227-228, 231). A three minute call was also made between the two allegedly using Facebook Messenger prior to Ms. M[redacted] changing of her statement.[22] (Tr. T. (vol. 1) at 102, 229, 231). A revised statement was sent to the State on May 2, 2023. (Tr. T. (vol. 1) at 226-227). Ms. M[redacted] went to the police on June 2, 2023 to report the contact with Mr. Gervais, which violated his bail conditions. (Tr. T. (vol. 1) at 226-227); (Tr. T. (vol. 2) at 70, 102). Law enforcement took pictures of some messages between Mr. M[redacted] and Mr. Gervais that were located on her phone.[23] (Tr. T. (vol. 1) at 103-104, 236); (Tr. T. (vol. 2) at 70, 103). A number of the messages were

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[20] She stated that "I sent him the statement I wrote out; and then he sent back what I needed to change so he wouldn't look so guilty." (Tr. T. (vol. 1) at 103).

[21] A revised statement was provided to the State on May 2, 2023. (Tr. T. (vol. 1) at 94, 226-227).

[22] Ms. M[redacted] also stated that Mr. Gervais would tell her if she did not do what he said that "he would always win" their son. (Tr. T. (vol. 1) at 103, 229).

[23] The messages were obtained when Ms. M[redacted] went into the police station at the end of May or beginning of June. (Tr. T. (vol. 1) at 103-104). Law enforcement took picture of the messages. (Tr. T. (vol. 2) at 70-71).

entered into evidence at trial.[24] (Tr. T. (vol. 1) at 105, 110, 113-114, 131-135, 177-183).

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[24] Mr. Gervais objected to the messages and the following exchange took place:

> THE COURT: Okay. Are these in order?
> THE STATE: I believe they are, yes.
> MS. DEVEAU: We don't know if they're in order because there's not proper--
> THE COURT: Well, actually, she would be able to tell us that.
> THE STATE: So--
> MS. DEVEAU: Um, I would argue based on State v. Marquis that none of those photos of text messages can come in. There's also more that the State has, um--
> THE STATE: I plan to deal with the other text messages throughout the direct examination of the same individual.
> MS. DEVEAU: And I'm not objecting based on relevance. I understand the relevance of it. What I would be objecting on is the foundation. Um, in Marquis, it's discussed how there has to be ample evidence, um, to support a threshold finding that, um, the messages have to be essentially verified. Um, there has to be proof of evidence sufficient to support the finding that Ethan was the one who sent those messages. Um, I am arguing that there's not proof necessary for that because the officer did not go in and actually, like, look at the profile. All we have is just those photos of the messages. We do not have times. We do not have dates. We do not have a cohesive picture of how those messages were sent. The photos were instead just taken, and they chose as they scrolled through. Um, we don't have anyone to back that up. In fact, when the officer went into Ethan's phone, he said he found no direct messages between the two of them; and that would definitely go against the fact that these are authenticated.
> . . .
> THE COURT: . . . No, no, not at all. And so she-- there has to be sufficient foundation before you're permitted to publish; and so you'd have to request that. And if there's an objection at that point, I'll rule on it. If there's no objection, then it will be granted and you can publish. I will say, as a threshold showing, it's not-- you know, the standard is that it is what the proponent claims.
> . . .
> THE COURT: So, there's been sufficient foundation at this point that they used the app regularly, that they messaged back and forth, although that was a little thin in terms of how do you know that it's him and so on and so forth. So, you need to establish further foundation for that. If there's an objection, I'll rule on it. If there isn't, then at that point, you'll likely be able to admit and then publish. . .
> (Tr. T. (vol. 1) at 106-109).

On April 22, 2023, Ms. M went out to celebrate her birthday with friends. (Tr. T. (vol. 1) at 95-96, 232, 272). While out celebrating, Ms. M testified that Mr. Gervais showed up and tried to get her attention. (Tr. T. (vol. 1) at 97-99, 233, 272). Outside the establishment where they were celebrating, Ms. M and Ms. M 's male friend said that Mr. Gervais threatened to kill him during a confrontation in the parking lot.[25] (Tr. T. (vol. 1) at 98-100, 233-234, 274-277).

Around May 13, 2023 a joint mother's day and birthday celebration was held for Ms. M 's mother. (Tr. T. (vol. 1) at 125, 235-236, 283); (Tr. T. (vol. 2) at 114). The celebration was at her sister's residence on Long Lake, which was a duplex where Ms. M also resided at the time. (Tr. T. (vol. 1) at 125-126). Among the guests at the get together was Ms. M 's ex, Seth M , who showed up to drop off the son that they shared. (Tr. T. (vol. 1) at 129). Ms. M testified that during the party she received messages from Mr. Gervais at around 10:30 or 11 p.m..[26] (Tr. T. (vol. 1) at 129-130, 185, 284). And then she heard Mr.

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[25] Ms. M also testified that Mr. Gervais pushed two of her friends before leaving. (Tr. T. (vol. 1) at 99-100, 233-234). Ms. M 's male friend testified that he was not pushed by Mr. Gervais. (Tr. T. (vol. 1) at 276-277).

[26] Ms. M testified that the messages continued until "probably 3:30 in the morning." (Tr. T. (vol. 1) at 185). Ms. M 's mother testified that she saw her daughter communicating through Facebook messenger with Mr. Gervais' profile and that her daughter showed her some of the messages. (Tr. T. (vol. 2) at 148-149, 154).

Gervais' truck going by the house.[27] (Tr. T. (vol. 1) at 130, 184-185). She testified that she saw Mr. Gervais in the truck.[28] (Tr. T. (vol. 1) at 185); (Tr. T. (vol. 2) at 137). Ms. M[redacted] further testified that Mr. Gervais parked his truck across the road from the house, but took off when members of the party went to cross the road, and then continued to go back and forth the rest of the night. (Tr. T. (vol. 1) at 130-131, 185-186, 280, 283-285, 292); (Tr. T. (vol. 2) at 150, 156). The party ended some time between 12 and 2 a.m. (Tr. T. (vol. 1) at 193).

When the party ended Ms. M[redacted] went inside her apartment at the lake house. (Tr. T. (vol. 1) at 193). Her ex went into the apartment with her but left quickly thereafter, approximately around 1:30 or 2 a.m.. (Tr. T. (vol. 1) at 194). Ms. M[redacted] testified that Mr. Gervais was still sending her messages at that point. (Tr. T. (vol. 1) at 194). Ms. M[redacted] testified that she locked her doors and was in bed when she heard the doors rattling and Mr. Gervais came into the apartment. (Tr. T. (vol. 1) at 195-196, 201-202). She stated that Mr. Gervais pinned her to the

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[27] Mr. Gervais' truck had a distinctive fan. (Tr. T. (vol. 1) at 130); (Tr. T. (vol. 2) at 151, 157-158, 161).

[28] Law enforcement testified that Mr. Gervais denied being at Ms. M[redacted]'s house on the night of May 13, 2023. (Tr. T. (vol. 2) at 73). Law enforcement also testified that Ms. M[redacted] was the only person in his investigation that stated they saw Mr. Gervais driving the truck. (Tr. T. (vol. 2) at 137, 149).

bed and threatened to kill her. (Tr. T. (vol. 1) at 202-203, 211). Ms. M stated that she calmed Mr. Gervais down and he left.[29] (Tr. T. (vol. 1) at 204, 206-207).

Ms. M testified that the following day, on Mother's Day, she met up with Mr. Gervais to exchange their child and he said if she did not get in his truck he would hit her, so she got in and was taken to his apartment for approximately twelve hours. (Tr. T. (vol. 1) at 93, 208, 254, 260-261). She testified that after that he was showing up and following her, she stated that "[h]e kept violating [the] protection order." (Tr. T. (vol. 1) at 209, 212). At that point Ms. M stated she decided to go to the police station to report Mr. Gervias' conduct spanning April 22nd up until the weekend of May 12th, 2023. (Tr. T. (vol. 1) at 212, 227, 232).

Mr. Gervais filed a motion in limine to prevent reference to Ms. M as a "victim" during the course of the trial. (App. at 5, 7, 14). The court granted the motion and ruled that "[t]he Court will only refer to the victim preceded by the word alleged. The State and all witnesses during the trial shall only refer to the alleged victim by name. However, in closing, the State is free to use the word victim because that's argument and certainly, um, fair game." (Tr. T. (vol. 1) at 11-12).

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[29] Ms. M stated that Mr. Gervais had parked his truck at a neighbor's house. (Tr. T. (vol. 1) at 207). Ms. M 's sister testified that she saw Mr. Gervais' truck "was in the road by the driveway." (Tr. T. (vol. 1) at 287). She stated that it left for a brief period of time and then was in parked in the driveway a few minutes later. (Tr. T. (vol. 1) at 288, 295); (Tr. T. (vol. 2) at 136, 142).

An additional motion in limine was raised prior to trial to limit the State's ability question witnesses about alleged drug use by Mr. Gervais. (Tr. T. (vol. 1) at 34-38). The trial court ruled that it would

> be watching that in terms of 403 and how far- - the State seeks to go down that road. At some point, then the prejudicial effect outweighs the probative value; but it's certainly relevant as it relates to these charges. Um, so there would be- - there would be some latitude, but I will be keeping an eye on that. And if it gets- - if it starts to get into that side track then and outweigh the probative value of it, then I'll sustain the objection if there's one made. (Tr. T. (vol. 1) at 37-38).

At trial, Ms. M[redacted] testified that Mr. Gervais had her "son in the truck and" she was upset that he was meeting up with "his former drug dealer." (Tr. T. (vol. 1) at 259, 270). She testified that he "would rather not have" her son around Mr. Gervais' "cocaine drug dealer." (Tr. T. (vol. 1) at 259). She also stated that the "drug dealer. . . was always a concern" and it was a concern when she saw his son around him on "that day." (Tr. T. (vol. 1) at 268). Ms. M[redacted] admitted to drug use around her child. (Tr. T. (vol. 1) at 261).

During trial, Ms. M[redacted] testified that she communicated with Mr. Gervais through Facebook Messenger messages. (Tr. T. (vol. 1) at 100-101, 109). She stated that she did not "really text that much" and used Messenger. (Tr. T. (vol. 1) at 100). When talking about messaging with Mr. Gervais on April 22, 2023, Ms. M[redacted] stated that the account that Mr. Gervais was texting her from was the same account that he had used before February 25, 2023. (Tr. T. (vol. 1) at 101). She

testified that she had received texts from Mr. Gervais from the account before and that a Facebook profile picture was visible.[30] (Tr. T. (vol. 1) at 102). She also stated that she would make calls to Mr. Gervais through Facebook Messenger and that was how they usually called each other. (Tr. T. (vol. 1) at 102, 109-110). She stated that she heard Mr. Gervais' voice when they spoke on the phone through the Messenger app. (Tr. T. (vol. 1) at 110).

When discussing the messages contained in Exhibit 18, Ms. M[redacted] stated that she was "pretty sure" that the messages were from the night before the Mother's Day party. (Tr. T. (vol. 1) at 237). In discussing Exhibit 20, Ms. M[redacted] stated that she thought and that she was "pretty sure" that the messages were from the same night that Mr. Gervais came in her house. (Tr. T. (vol. 1) at 237-238). Ms. M[redacted] stated that all the messages were from within the Mother's Day weekend. [31] (Tr. T. (vol. 1) at 238). Ms. M[redacted] also testified that Mr. Gervais had threatened to kill her in a written message over this time period, but that message was never

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[30] Law enforcement testified that when viewing the messages on Ms. M[redacted]'s phone he was able to see Mr.Gervais' name and profile picture. (Tr. T. (vol. 2) at 71). The profile photograph showed a dirt bike and a young child. (Tr. T. (vol. 2) at 71). Law enforcement stated that Mr. Gervais stated that he had received texts from Ms. M[redacted], but never said that he had contacted her. (Tr. T. (vol. 2) at 72, 126-127). Law enforcement testified that it never clicked on Mr. Gervais' Facebook profile to view it. (Tr. T. (vol. 2) at 103). Ms. M[redacted]'s mother testified that she was Facebook friends with Mr. Gervais and that his profile photograph had a motorcycle in it and a picture of her grandson. (Tr. T. (vol. 2) at 146-147).

[31] Ms. M[redacted] stated that when showing the messages to Officer Querze "we kind of just went through my messages. I don't really exactly know. I showed him the best I could the dates and times off of Facebook Messenger. It's not really the easiest." (Tr. T. (vol. 1) at 238-239). She did insist that the messages were sent over the Mother's Day weekend. (Tr. T. (vol. 1) at 239).

found.[32] (Tr. T. (vol. 1) at 243); (Tr. T. (vol. 2) at 108, 133). The Facebook Messenger messages were entered into evidence as Exhibits 2-7 and 9-28.[33] (Tr. T.

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[32] Ms. M[redacted] testified that Mr. Gervais might have said this in a call, that she "just remember it happening." (Tr. T. (vol. 1) at 243, 250). She also stated that they frequently would block each other on Facebook and that after Mr. Gervais was arrested, she was blocked and all their Facebook messages disappeared. (Tr. T. (vol. 1) at 244, 250, 266). Ms. M[redacted] sent Mr. Gervais an email on May 29, 2023 discussing being blocked. (Tr. T. (vol. 1) at 249). She went to the police station on June 2, 2023 and was able to access the messages to show law enforcement then. (Tr. T. (vol. 1) at 249-250); (Tr. T. (vol. 2) at 70).

[33] When the first page of messages was shown to Ms. M[redacted] as Exhibit 2, Mr. Gervais objected and the following exchange took place:

> THE COURT: Any objection to 2?
> MS. DEVEAU: Yes, objection.
> THE COURT: Side bar.
> . . .
> MS. DEVEAU: Um, within those messages is hearsay that's coming in. Um, the hearsay parts of it cannot come in. I understand my client's parts are not hearsay; but the parts which D[redacted] said, those messages, that is hearsay without an exception.
> . . .
> MS. DEVEAU: I would still wonder-- I don't-- I still don't see the purpose. It's not being used for impeachment purposes. It's not being-- the State is only offering this for the truth of the matter asserted.
> THE COURT: Um, well, as I understand it is the proffer is to show communication. So, what she says is somewhat immaterial. It's that he responded back. And so the objection is overruled. And by way of foundation in particular as to Exhibit 2, the Court's satisfied that she's identified it both by the manner of communication before, the immediate preceding message identifying his voice, which she'd be well familiar with, as well as the testimony about Querze photographing it when she showed it to him. So, objection is overruled and Exhibit 2 is admitted. Any further questions before we proceed?
> . . .
> THE COURT: All right. And so just by way of time savings, if the State intends to and does develop similar foundation, the Court's ruling is likely to be consistent with the ruling on Exhibit 2. . .
> . . .
> THE COURT: All right. So, Exhibit 2 is admitted over objection. You may proceed.
> (Tr. T. (vol. 1) at 111-114).

No objections were made for the remainder of the Facebook messages Exhibits 3-7 and 9. (Tr. T. (vol. 1) at 114-117, 131-132, 134-135,). Exhibit 8 consisted of the revised statement Ms. M[redacted] provided to the State. (Tr. T. (vol. 1) at 118-124).

(vol. 1) at 110, 113-114, 131-135, 177-183). The Facebook Messenger messages in Exhibits 22-28 were published to the jury. (Tr. T. (vol. 1) at 189-193). Mr. Gervais raised foundational objections to admission of the Facebook messages.[34]

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[34] In additional to the objection raised prior to admission of the first group of Facebook messages, see supra fn. 33, Mr. Gervais raised another objection prior to admission of Exhibit 10. (Tr. T. (vol. 1) at 148-154). The following exchange took place:

> THE COURT: So, is it Facebook messages consistent with the other ones that were--
> THE STATE: Yes.
> THE COURT: Is that the proffer?
> THE STATE: That is. I'm just confirming. Um. I believe they all are, yes.
> . . .
> MS. DEVEAU: Um, like I said, your Honor, we are willing to, um, agree that some of these should come in; but other ones, um, we could argue their relevance and their prejudicial value. But I don't know how you'd like that to happen, if you'd like it to happen one at a time as they get introduced or if we do it all as once.
> . . .
> THE COURT: I'm not trying to interrupt, but you folks will have plenty of time to talk amongst yourselves. This was in the discovery and stuff. From the Court's standpoint, all of the correspondence with the State can establish ostensibly between Mr. Gervais and Miss M[redacted] on this event is going to be fair game.
> . . .
> THE COURT: Okay. All right. Any further anticipated objection form the Defense side of things?
> MS. DEVEAU: No, besides the fact that these don't include the whole picture. Um, the top is cut off.
> . . .
> MS. DEVEAU: It doesn't have my client's name anywhere in that.
> THE STATE: Well, if you look at 28, his name's right at the top.
> . . .
> MS. DEVEAU: Okay.
> THE COURT: Let's go on the record. We're talking about the exhibits that are the text messages- - we keep saying text messages, but the Facebook message exchange that are Exhibits 10 through. . . 28, I'm sorry. And the Defense had contended that there needs to be foundation for all of them and seeking for time savings to admit them as a group if they are going to be admitted. . .my concern is that if there's something either out of sequence, continuation doesn't necessarily mean sequential, it might be further down; and so that a creates some confusion issues. . .
> (Tr. T. (vol. 1) at 151-154, 173-174).

(Tr. T. (vol. 1) at 111-114, 148-154). Law enforcement testified that only one messages from May 14th showed a date and time, and that is the exhibit with the date and timestamp on it, and it was "assuming" the ones before the date stamped message were from the 13th, but did not see that date. (Tr. T. (vol. 2) at 103). No other dates were recorded by law enforcement. (Tr. T. (vol. 2) at 103-104). There were also possibly messages from May 13th that were not photographed by law enforcement. (Tr. T. (vol. 2) at 104-105).

After his arrest, Mr. Gervais' cell phone was seized and a search warrant was sought and issued. (Tr. T. (vol. 2) at 75). Law enforcement searched the contents of the phone and found no messages between Mr. Gervais and Ms. M[redacted] on the phone.[35] (Tr. T. (vol. 2) at 75-77, 107, 115).

During closing statements the State made the following remarks:

> "After speaking with Colby, Officer Querze had the presence of mind to speak with D[redacted] once again, privately this time in his cruiser without the defendant present. *And then she told him what really happened*." (Tr. T. (vol. 2) at 205)(emphasis added);
>
> "If you're sitting in a-- a reasonable person sitting in a chair, having that chair flipped and landing on glass, a reasonable person *would find* that that is offensive physical contact. (Tr. T. (vol. 2) at 204)(emphasis added);
>
> "*I think* he misspoke on the gucking, but I'm not gonna-- I'm not gonna fault him for that." (Tr. T. (vol. 2) at 210)(emphasis added);

[35] Law enforcement stated that there "was around 75 thousand contents from the phone." (Tr. T. (vol. 2) at 77, 107, 127, 140-141). Law enforcement reviewed "approximately five hundred to a thousand text messages." (Tr. T. (vol. 2) at 77, 141).

> "Now, *I think* there's a few things that my friend has said that I feel the need to correct. . ." (Tr. T. (vol. 2) at 224)(emphasis added).
>
> "Now, I guess the last thing is, um, we have a name for the kind if a person who tells the story the exact same way every time they are asked about it. And the name for that person is an actor. I put to you that what-- the stories that you heard-- stories is the wrong word. The testimony that you heard was an expression of the same truth. . . I ask that you find the defendant guilty of all counts." (Tr. T. (vol. 2) at 215).
>
> "Lying implies a certain intention that I find-- I think that you'll find was not present. What Mr. Querze did was he incorrectly indicated on a probable cause report that he had received back witness statements. . . I don't think that based on that you can say that he lied. It was a misstatement. We all make misstatements. We… say things that we wish we hadn't, and we all regret things that we did do. But to call it lying is, I think, a bridge too far." (Tr. T. (vol. 2) at 227).

At the close of the State's rebuttal argument the trial court addressed the jury on its own initiative and instructed the jury that

> I just want to make clear, you've not heard any evidence since you came back up here. The words of counsel are not evidence. You've heard some phrases about perhaps what counsel may think. That's not material. It's what you develop for thoughts and impressions on the evidence during deliberations that count. You folks determine the credibility of the witnesses and you folks weigh the evidence and find the facts, and so that is up to you and it's your task.
> (Tr. T. (vol. 2) at 228).

Once the jury was sent to deliberations, the Court further clarified its actions in instructing the jury, stating:

> All right. Just so the record is clear, um, Mr. Inglis during part of the closing argument was expressing personal opinion as to the evidence, which is impermissible. The Court, without objection, sue sponte, provided instruction as to what the counsel things about the evidence is no the focus, it's what their belief is. And so I just make it clear in

the record why the Court did that to address that issue.
(Tr. T. (vol. 2) at 236).

The jury returned guilty verdicts on the charges of Domestic Violence Assault, Tampering with a Victim, Domestic Violence Criminal Threatening, and Violation of Condition of Release. (Tr. T. (vol. 2) at 247-248). Not guilty verdicts were returned on the charges of Burglary, Aggravated Criminal Trespass, and Obstructing Report of a Crime or Injury. (Tr. T. (vol. 2) at 247-248).

On February 28, 2024 the sentencing court imposed a seven year sentence, with all but two years suspended, and three years of probation on the Tampering with a Witness Charge. (Sent. T. at 35-36). A concurrent 364 day sentence and three concurrent six month sentence were also imposed. (Sent. T at 36).

After Mr. Gervais was sentenced on February 28, 2024, he timely filed a notice of appeal. (App. at 9, 18).

Issues Presented for Review

I. Whether sufficient foundation was laid for admission of Facebook Messenger messages into evidence at trial.

II. Whether prosecutorial error exists in comments the State made during its closing remarks and in its questioning of law enforcement at trial.

III. Whether the trial court erred in ruling on Mr. Gervais' motion in limine allowing testimony regarding Mr. Gervais' drug use.

IV. Whether the trial court erred in ruling on Mr. Gervais' motion in limine that allowed the use of the term victim in the State's closing remarks to the jury.

Statement of Issues Presented for Review

Maine Rule of Evidence 901(a) requires production of evidence that is sufficient to support a finding that Mr. Gervais was the person that sent the Facebook messages in question to Ms. M[redacted]. The State needed to establish that the evidence was a true and accurate representation of the Facebook messages. There was not sufficient evidence to establish that Mr. Gervais sent the Facebook Messenger messages entered into evidence at trial. Additionally, the messages were not provided in their entirety, selected portions of the message were submitted into evidence. As such, the trial court erred in admitting the Facebook Messenger messages because the State did not establish an adequate foundation for entry of the messages into evidence.

The State made a number of comments in its closing statement to the jury that should be considered error and prevented Mr. Gervais from receiving a fair trial. In its comments to the jury the State expressed opinions on the evidence, vouched for witnesses, and painted the evidence to its advantage, instead of letting the jury come to its own conclusions based on the evidence presented. Additionally, in questioning the witnesses at trial the State's questioning involved improper incorporation of what prior witnesses had testified to and commentary about how it would formulate questions. In the aggregate, the alleged instances of misconduct cumulatively prevented Mr. Gervais from receiving a fair trial, which deprived him of due process.

Mr. Gervais asserts that it was an abuse of the trial court's discretion and error for it to deny his motion in limine and allow testimony about his drug use to be presented to the jury. The testimony about drug use by Mr. Gervais should have been excluded under Maine Rules of Evidence 401, 403, and 404(b). As such, the trial court abused its discretion and it was error for the trial court to allow the State to present the evidence to the jury.

The State's reference to Ms. M[redacted] as a victim in its closing statements was prejudicial to Mr. Gervais and allowed the State to express an opinion on the evidence that bolstered the credibility of its central witness, and painted her as a "victim" in the eyes of the jury. It was error and an abuse of the trial court's discretion to allow the State to refer to Ms. M[redacted] as a victim in its closing remarks.

Argument

I. An insufficient foundation was laid for admission of Facebook Messenger messages into evidence at trial.

This Court has noted that it will review a lower "'court's foundational findings or implicit findings to support admissibility of evidence for clear error, and. . . will uphold those findings unless no competent evidence supports the

findings.' State v. Taylor, 2011 ME 111, ¶ 20, 32 A.3d 440."[36] State v. Cruthirds, 2014 ME 86, ¶ 16, 96 A.3d 80, 87 (Me. 2014); see also State v. Tieman, 2019 ME 60, ¶ 12, 207 A.3d 618, 622 (Me. 2019)(review of "a trial court's ruling on the admissibility of evidence [is] for clear error or abuse of discretion. See State v. Berke, 2010 ME 34, ¶ 10, 992 A.2d 1290.").

"Maine Rule of Evidence 901(a) require[s] the State, as the party offering the text messages, to 'produce evidence sufficient to support a finding' that [the defendant] was the person who sent them." State v. Marquis, 2017 ME 104, ¶ 15, 162 A.3d 818, 822-823 (Me. 2017). Moreover,

> Maine's standard for authenticating evidence pursuant to Rule 901 is 'identical to that set forth in the Federal Rules of Evidence' and 'embodies a flexible approach to authentication reflecting a low burden of proof.' Berke, 2010 ME 34, ¶ 11, 992 A.2d 1290 (quotation marks omitted). Testimony from a witness with knowledge that electronically stored information is what it is claimed to be is an adequate method of authentication. See M.R. Evid. 901(b)(1); State v. Webster, 2008 ME 119, ¶ 20, 955 A.2d 240; State v. Churchill, 2011 ME 121, ¶ 8, 32 A.3d 1026. 'Electronic evidence is held to the same standard of authentication as other evidence.' Churchill, 2011 ME 121, ¶ 6, 32 A.3d 1026.

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[36] Mr. Gervais objected prior to the State's request for admission of the first page of Facebook messages that were shown to Ms. M[redacted] at trial. (Tr. T. (vol. 1) at 106-109, 111-114). The trial court stated that: "*And so just by way of time savings, if the State intends to and does develop similar foundation, the Court's ruling is likely to be consistent with the ruling on Exhibit 2.*" (Tr. T. (vol. 1) at 113)(emphasis added). After further objection the Court also stated that "And the Defense had contended that there needs to be foundation for all of them and seeking for time savings to admit them as a group if they are going to be admitted. . .my concern is that if there's something either out of sequence, continuation doesn't necessarily mean sequential, it might be further down; and so that a creates some confusion issues. . ." (Tr. T. (vol. 1) at 173-174). As such, Mr. Gervais asserts that the court's ruling on the messages was firm and clearly visible on the record and therefore review should be for clear error and not obvious error.

State v. Tieman, 2019 ME 60, ¶ 13, 207 A.3d 618, 622 (Me. 2019).

This Court has noted that "[t]he hallmark of authentication pursuant to M.R. Evid. 901(b)(1) is assurance from the witness that the chat log offered in evidence is a true and accurate representation of the chat as it occurred. It is then up to the jury to decide whether to believe the witness."[37] State v. Tieman, 2019 ME 60, ¶ 13, 207 A.3d 618, 622 (Me. 2019)(citation omitted).

The trial court erred in admitting the Facebook Messenger messages because the State did not establish an adequate foundation for entry of the messages into evidence at trial. There was an insufficient foundation to establish that Mr. Gervais sent the Facebook Messenger messages entered into evidence at trial. Additionally, the messages were not provided in their entirety, selected portions of the message were submitted into evidence.[38]

During trial, Ms. M[redacted] testified that she communicated with Mr. Gervais through Facebook Messenger messages. (Tr. T. (vol. 1) at 100-101, 109). Ms. M[redacted] testified that she had previously received calls and messages from Mr. Gervais on the Facebook account she communicated with at the time of the alleged crimes. (Tr. T. (vol. 1) at 100-102, 109-110). She also stated that she was "pretty

[37] Main Rule of Evidence 901(b)(1) states that "[t]he following are examples only—not a complete list—of evidence that satisfies the requirement. . . *Testimony of a witness with knowledge.* Testimony that an item is what it is claimed to be." (emphasis added).

[38] Maine Rule of Evidence 106 provides that "[i]f 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 ought to be considered at the time."

sure" about the dates when the messages were sent, but that all were from the weekend in question.[39] (Tr. T. (vol. 1) at 237-238). Law enforcement testified that only one messages had a date and time associated with it, showing the date of May 14th, and it was "assuming" the ones before that date stamped message were from the 13th, but no other dates were visible. (Tr. T. (vol. 2) at 103). No other dates were recorded by law enforcement and law enforcement only took pictures of some of the messages between Ms. M[redacted] and Mr. Gervais. (Tr. T. (vol. 1) at 103-104, 236); (Tr. T. (vol. 2) at 70-71, 103-104).

There was no direct evidence that the Facebook messages were sent by Mr. Gervais.[40] Ms. M[redacted] could only testify that she received the messages. (Tr. T. (vol. 1) at 100-102, 109-110). There were no messages located on Mr. Gervais' phone. (Tr. T. (vol. 2) at 75-77, 107, 115). Law enforcement testified that it never clicked on Mr. Gervais' Facebook profile to view it. (Tr. T. (vol. 2) at 103). As such, the evidence provided by Ms. M[redacted] did not provide reliable information to

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[39] Ms. M[redacted] testified that she showed law enforcement the dates and times of the Facebook messages the best that she could, noting that it was not the easiest. (Tr. T. (vol. 1) at 238-239). She also insisted that the messages were sent over the Mother's Day weekend. (Tr. T. (vol. 1) at 239).

[40] As Mr. Gervais argued to the trial court: "Um, there has to be proof of evidence sufficient to support the finding that Ethan was the one who sent those messages. Um, I am arguing that there's not proof necessary for that because the officer did not go in and actually, like, look at the profile. All we have is just those photos of the messages. We do not have times. We do not have dates. We do not have a cohesive picture of how those messages were sent. The photos were instead just taken, and they chose as they scrolled through. Um, we don't have anyone to back that up. In fact, when the officer went into Ethan's phone, he said he found no direct messages between the two of them; and that would definitely go against the fact that these are authenticated." (Tr. T. (vol. 1) at 106-107).

admit the messages. The link to Mr. Gervais is too tenuous. It was error for the trial court to admit the messages.

II. The State committed prosecutorial error in its closing remarks to the jury and in its questioning of law enforcement at trial.

This Court reviews "preserved claims of prosecutorial misconduct for harmless error. See M.R. Crim. P. 52(a) (providing that any error 'which does not affect substantial rights shall be disregarded')." State v. Fahnley, 2015 ME 82, ¶ 33, 119 A.3d 727, 737 (Me. 2015). "Pursuant to this standard of review, '[w]hen an objection has been made to a prosecutor's statements at trial, we review to determine whether there was actual misconduct, and, if so, whether the trial court's response remedied any prejudice resulting from the misconduct.' State v. Dolloff, 2012 ME 130, ¶ 32, 58 A.3d 1032 (citations omitted)." State v. Fahnley, 2015 ME 82, ¶ 33, 119 A.3d 727, 737 (Me. 2015). This Court "determine[s] the effect of error by looking to 'the totality of the circumstances, including the severity of the misconduct, the prosecutor's purpose in making the statement (i.e., whether the statement was willful or inadvertent), the weight of the evidence supporting the verdict, jury instructions, and curative instructions.'" State v. Dolloff, 2012 ME 130, ¶ 33, 58 A.3d 1032, 1043 (Me. 2012). The State carries the burden under a harmless error standard of review to "persuade us that 'it is highly probable that the jury's determination of guilt was unaffected by the prosecutor's comments.'." State v. Dolloff, 2012 ME 130, ¶ 34, 58 A.3d 1032, 1043 (Me. 2012).

When no objection is made to a prosecutor's statements at trial an obvious error standard of review is applicable. State v. Lockhart, 2003 ME 108, ¶ 47, 830 A.2d 433, 449 (Me. 2003); M.R.U. Crim. P. 52(b); see also State v. Fahnley, 2015 ME 82, ¶ 35, 119 A.3d 727, 737 (Me. 2015). The test for establishing obvious error has been concisely stated to include a showing, by the defendant, of "(1) an error, (2) that is plain, and (3) that affects substantial rights. . . [e]ven if these three conditions are met. . .a jury's verdict [is] only [set aside] if. . . (4) the error seriously affects the fairness and integrity or public reputation of judicial proceedings." State v. Dolloff, 2012 ME 130, ¶ 35, 58 A.3d 1032, 1043 (Me. 2012) (internal citations and quotations omitted).

Mr. Gervais asserts that the proper standard of review is harmless error, as the trial court raised issue with the prosecution's closing statement and provided a curative instruction sua sponte, which should allow for review as if Mr. Gervais had raised the issue himself.[41] See Chatmon v. United States, 801 A.2d 92, 100

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[41] At the close of the State's rebuttal argument the trial court addressed the jury on its own initiation and instructed the jury that "I just want to make clear, you've not heard any evidence since you came back up here. The words of counsel are not evidence. You've heard some phrases about perhaps what counsel may think. That's not material. It's what you develop for thoughts and impressions on the evidence during deliberations that count. You folks determine the credibility of the witnesses and you folks weigh the evidence and find the facts, and so that is up to you and it's your task." (Tr. T. (vol. 2) at 228).
Once the jury was sent to deliberations, the trial court further clarified its actions in instructing the jury, stating: "All right. Just so the record is clear, um, Mr. Inglis during part of the closing argument was expressing personal opinion as to the evidence, which is impermissible. The Court, without objection, sue sponte, provided instruction as to what the counsel things about the evidence is no the focus, it's what their belief is. And so I just make it clear in the record why the Court did that to address that issue." (Tr. T. (vol. 2) at 236).

(D.C. 2002)(finding that "[h]ere, the trial judge did intervene by considering the propriety of the prosecutor's comments and actions and giving a curative instruction. . . [t]hus, the appropriate standard of review is harmless error and not plain error.").[42]

The State made a number of comments in its closing statement to the jury that should be considered error. See State v. White, 2022 ME 54, fn.11, 285 A.3d 262 (Me. 2022)(using the term error in place of misconduct). Additionally, in questioning the witnesses at trial the State's questioning involved improper incorporation of what prior witnesses had testified to and commentary about how it would formulate questions.

"It is a 'well-established rule that the prosecutor has a responsibility to help ensure a fair trial, and although permitted to strike hard blows, may not strike foul ones. . ." State v. Lockhart, 2003 ME 108, ¶ 48, 830 A.2d 433, 449 (Me. 2003) (internal citations omitted). The Rules of Professional Conduct place this burden on the shoulders of a prosecutor. Rule 3.4(e) states that a lawyer shall not,

> in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible

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[42] This Court has noted that "When a defendant objects to statements made by a prosecutor during closing argument and the court issues a curative instruction, the defendant must make a further objection or move for a mistrial to preserve the issue for appeal. See State v. Jones, 580 A.2d 161, 163 (Me. 1990)." State v. Quirion, 2000 ME 103, ¶ 25, 752 A.2d 170, 175 (Me. 2000). However, Mr. Gervais asserts that he should be entitled to a harmless error standard of review as the lower court raised the the error on its own accord and provided instruction on its own accord and chose not to take additional action, which it could have done on its own accord.

> evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.

Additionally, the prosecutor for the State, in its statements to the jury, "is limited to the domain of facts in evidence" and has "an overriding obligation to see that an accused receives a fair trial." State v. Pineau, 463 A.2d 779, 781 (Me. 1983)(internal citation omitted); see also State v. Dolloff, 2012 ME 130, ¶ 42, 58 A.3d 1032, 1046 (Me. 2012). The State should not make "statements pandering to jurors' sympathy, bias, or prejudice." State v. Dolloff, 2012 ME 130, ¶ 42, 58 A.3d 1032, 1046 (Me. 2012)(citation omitted).

In making its argument to the jury the State "'may employ wit, satire, invective and imaginative illustration in [its] arguments before the jury ... but in this the license is strictly confined to the facts in evidence.'" State v. Terrio, 442 A.2d 537, 543 (Me. 1982). Moreover, "when allegations based on prosecutorial misconduct are raised, trial and appellate courts must assess whether wit, invective, and zeal have crossed he line into the realm of 'foul blows.'" State v. Dolloff, 2012 ME 130, ¶ 41, 58 A.3d 1032, 1045 (Me. 2012).

If error is found, "'the comments of the prosecutor [are reviewed] as a whole,' looking 'at the incidents of misconduct both in isolation and in the aggregate.'" State v. Clark, 954 A.2d 1066, 1069 (Me. 2008)(internal citations

omitted); see also State v. Dolloff, 2012 ME 130, ¶ 41, 58 A.3d 1032, 1045 (Me. 2012).

The State made a number of assertions in its closing remarks to the jury that were not fair and disadvantaged Mr. Gervais, preventing him from receiving a fair trial. In its comments to the jury the State expressed opinions on the evidence, vouched for witnesses, and painted the evidence to its advantage, instead of letting the jury come to its own conclusions based on the evidence presented.

"Prosecutors are expected to observe 'a level of ethical precision that avoids overreaching and prevents the fact-finder from convicting a person on the basis of something other than evidence presented during trial.' Dolloff, 2012 ME 130, ¶ 40, 58 A.3d 1032; see also State v. Robinson, 2016 ME 24, ¶ 23, 134 A.3d 828." State v. Pratt, 2020 ME 141, ¶ 15, 243 A.3d 469, 474 (Me. 2020).

It is misconduct for the State to "[i]nject[] personal opinion regarding the guilt or credibility of the accused or other witnesses, see State v. Schmidt, 2008 ME 151, ¶¶ 16-17, 957 A.2d 80." State v. Dolloff, 2012 ME 130, ¶ 42, 58 A.3d 1032, 1046 (Me. 2012). During closing statements the State asserted opinions on the facts by stating:

> "After speaking with Colby, Officer Querze had the presence of mind to speak with D[redacted] once again, privately this time in his cruiser without the defendant present. *And then she told him what really happened*." (Tr. T. (vol. 2) at 205)(emphasis added);

> "If you're sitting in a-- a reasonable person sitting in a chair, having that chair flipped and landing on glass, a reasonable person *would find* that that is offensive physical contact. (Tr. T. (vol. 2) at 204)(emphasis added);
>
> "*I think* he misspoke on the gucking, but I'm not gonna-- I'm not gonna fault him for that." (Tr. T. (vol. 2) at 210)(emphasis added);
>
> "Now, *I think* there's a few things that my friend has said that *I feel* the need to correct. . ." (Tr. T. (vol. 2) at 224)(emphasis added).

Akin to these statements are statements made by the State that attempted to bolster the credibility of its witnesses. "Using the authority or prestige of the prosecutor's office to shore up the credibility of a witness, sometimes called 'vouching,' see State v. Williams, 2012 ME 63, ¶ 46, 52 A.3d 911." State v. Dolloff, 2012 ME 130, ¶ 42, 58 A.3d 1032, 1046 (Me. 2012). The State ran afoul of this rule by bolstering Ms. M[redacted]'s testimony, and in doing so vouched for her, by stating:

> "Now, I guess the last thing is, um, we have a name for the kind of a person who tells the story the exact same way every time they are asked about it. And the name for that person is an actor. I put to you that what-- the stories that you heard-- stories is the wrong word. The testimony that you heard was an expression of the same truth. . . I ask that you find the defendant guilty of all counts." (Tr. T. (vol. 2) at 215).

The State also vouched for the testimony of its lead investigator when it stated:

> "Lying implies a certain intention that I find-- I think that you'll find was not present. What Mr. Querze did was he incorrectly indicated on a probable cause report that he had received back witness statements. . . I don't think that based on that you can say that he lied. It was a misstatement. We all make misstatements. We… say things that we wish we hadn't, and we all

regret things that we did do. But to call it lying is, I think, a bridge too far." (Tr. T. (vol. 2) at 227).

Additionally, despite the trial court's ruling to allow the State to reference Ms. M[redacted] as a victim in its closing statements, the use of the term, in the way that the State used it, resulted in additional vouching for Ms. M[redacted]'s testimony and the assertion that Mr. Gervais was guilty of the alleged crimes. A "prosecutor's inflammatory or emotionally charged remarks are improper." State v. Hunt, 2023 ME 26, ¶ 27, 293 A.3d 423, 433 (Me. 2023)(citation omitted). In closing statements, the State made reference to Ms. M[redacted] as Mr. Gervais' victim, stating: "his victim D[redacted] M[redacted] went out on a date." (Tr. T. (vol. 2) at 203); "he tried to get the victim to change her statement." (Tr. T. (vol. 2) at 205); and "his victim D[redacted]." (Tr. T. (vol. 2) at 208). The State, in these comments, is asserting personal opinion, when the jury has not yet made a determination as to whether Mr. Gervais was guilty of the alleged charges. Cf. State v. Robbins, 2019 ME 138, ¶ 9, 215 A.3d 788, 792 (Me. 2019)(this Court concluded that error occurred when the "only evidence from which the jury could find that Robbins committed the crimes charged came from the testimony of the victim—her credibility was the heart of the State's case. The prosecutor's questions to Robbins—presented in the form of assertions—explicitly conveyed his personal opinion to the jury that the victim had told the truth, and that the jury did not need to decide that question for itself: '[Y]ou were sexually assaulting this girl [in] December 2008. . . . [T]here is

no . . . allegedly here. . . . There is testimony on the record to that effect . . . .' See State v. Williams, 2012 ME 63, ¶ 46, 52 A.3d 911 ('At trial, an attorney is prohibited from commenting on his or her personal opinion as to the credibility of a witness.'))".

In these remarks, the State is not making argument, it is making conclusionary statements about the evidence and witnesses, which should be left up to the jury to do. It is the jury's job analyze and choose how to view the evidence.

Compounding the harm done by the statements made by the State in its closing remarks were also errors in the form of its questioning of witnesses during the trial testimony.[43] "As part of its obligation to ensure a fair trial for the defendant, the prosecution must avoid eliciting inadmissible testimony. State v. Gaudette, 431 A.2d 31, 34 (Me. 1981). The failure of the prosecutor to observe this duty is improper prosecutorial conduct. See id. at 34-35; State v. Thornton, 414 A.2d 229, 235 & n.5 (Me. 1980)." State v. Hinds, 485 A.2d 231, 235 (Me. 1984).

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[43] After Mr. Gervais raised issue with the form of the State's questioning of witnesses near the end of trial, the trial court noted that counsel during trial had questioned witnesses about what other people testified." (Tr. T. (vol. 2) at 139). The trial court further noted that improper question formation occurred during the trial when addressing witnesses. (Tr. T. (vol. 2) at 159-160). The lower court stated that: "So, cuz the Court sua sponte jumped in when you were making comments just clearly thinking out loud, and I told the jury to disregard that. And so I think counsel at the podium needs to simply ask questions and, you know, elicit responses. You know, telling the jury that you're trying to formulate this or what-- or what you think about the evidence I think is improper." (Tr. T. (vol. 2) at 160).

Statements during questioning of witness improperly elicited inadmissible testimony. See fn. 43.

Lastly, the "alleged instances of misconduct "cumulatively" prevented Mr. Gervais from receiving a fair, which "deprived [him] of due process." Id. ¶ 74; see U.S. Const. amend. XIV, § 1; Me. Const. art. I, § 6-A." State v. Sholes, 2020 ME 35, ¶ 23, 227 A.3d 1129, 1135 (Me. 2020).

The harmful impact of the State's comments, viewed in the totality of the circumstances, effected Mr. Gervais' substantial right to receive a fair trial. As noted previously, under this approach, the effect of misconduct is determined by looking at factors that include "the severity of the misconduct, the prosecutor's purpose in making the statement (i.e., whether the statement was willful or inadvertent), the weight of the evidence supporting the verdict, jury instructions, and curative instructions.'" State v. Dolloff, 2012 ME 130, ¶ 32, 58 A.3d 1032, 1042 (Me. 2012)(citation omitted). The statements here run amuck of the majority of these factors, it was essential to the State's case that the jury viewed the alleged victim and the lead detective as truthful and trustworthy. Their testimony was the key evidence necessary for the State to prove its case. The State's purpose in making the comment was to bolster its case by backing up the legitimacy of its key and essential witnesses. The weight of the evidence against Mr. Gervais was highly dependent on their testimony. And, the court's instruction given to the jury failed to appropriately or adequately address the issue with the jury. As such, the

State's misconduct was not harmless error. The State cannot meet its burden of persuasion on appeal that "'it is highly probable that the jury's determination of guilt was unaffected by the prosecutor's comments.'"[44] Id. at at ¶ 34, 1042.

III. The trial court erred in ruling on Mr. Gervais' motion in limine allowing testimony regarding Mr. Gervais' drug use.

A preserved objection to a motion in limine ruling is reviewed for both clear error and abuse of discretion.[45] State v. Patterson, 651 A.2d 362, 366 (Me. 1994). Questions as to the relevancy of proffered evidence is reviewed for clear error and a trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion "because the question of admissibility frequently involves the weighing of probative value against considerations militating against its admissibility." State v. Patterson, 651 A.2d 362, 366 (Me. 1994); see also State v. Joy, 452 A.2d 408, 412 (Me. 1982); State v. Smith, 472 A.2d 948, 949-50 (Me. 1984); State v.

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[44] Likewise, the statements and questioning by the State satisfy the obvious error standard as well. This error affects substantial right in receiving a fair, level playing field. The statements deprived Mr. Gervais of receiving the fairness and integrity or public reputation of judicial proceedings.

[45] A motion in limine ruling, does not become final until the questionable evidence is offered at trial. See State v. Pinkham, 586 A.2d 730, 731 (Me. 1991). This Court has held that when an objection at trial has not been made "objection on appeal comes too late. . . [and] challenge to the court's in limine ruling is not preserved," making "review for obvious error affecting his substantial rights." State v. Thomes, 1997 ME 146, ¶ 7, 697 A.2d 1262, 1264 (Me. 1997) (citations omitted). However, the Court has further stated that "'Maine Rule 103(e) puts the burden on counsel to renew an objection or offer made in limine or otherwise before the evidence would be offered at trial, unless the trial judge or the circumstances make it clear that the previous ruling was indeed final.'" State v. Green, 2024 ME 44, ¶ 18, 315 A.3d 755 (Me. 2024). The trial court here did not expressly defer its pretrial ruling and its ruling was clear on the record and should not be subject to an obvious error standard of review. Cf. State v. Pineo, 2002 ME 93, 798 A.2d 1093, fn. 4 (Me. 2002).

Condon, 468 A.2d 1348, 1351 (Me. 1983); State v. Ernst, 114 A.2d 369, 373 (Me. 1955). More specifically, this Court

> review[s] determinations based on relevancy for clear error, but regularly review decisions on admissibility for abuse of discretion. Howe, 2001 ME 181, ¶ 8, 788 A.2d at 163. A trial court commits 'clear error' on evidence questions when its findings regarding the foundation for admitting or excluding evidence are not supported by facts in the record. . . Discretion in rulings on evidentiary issues 'is considered abused . . . if the ruling arises from a failure to apply principles of law applicable to a situation resulting in prejudice.' State v. Mills, 2006 ME 134, 910 A.2d 1053 (Me. 2006) (citations omitted).

Mr. Gervais asserts that it was an abuse of the trial court's discretion and error for it to deny Mr. Gervais' motion in limine and allow testimony about Mr. Gervais' drug use. The motion in limine alleges that information about drug use by Mr. Gervais should have been excluded under Maine Rules of Evidence 401, 403 and 404(b). (App. at 59).

Maine Rule 401(a) provides that evidence is relevant if "[i]t has any tendency to make a fact more or less probable than it would be without the evidence." Under Maine Rule of Evidence 404(b) "'[e]vidence of [prior bad acts] 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.' M.R. Evid. 404(b). Evidence of prior bad acts is admissible, however, 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, 627 (Me. 2016).

"Our inquiry must not end with a determination that the evidence was not excludable pursuant to M.R. Evid. 404(b). Evidence of prior bad acts must still be excluded, even when probative and relevant, if its probative value is substantially outweighed by the danger of unfair prejudice." State v. Thomes, 1997 ME 146, ¶ 11, 697 A.2d 1262, 1255 (Me. 1997)(citing State v. Connors, 679 A.2d 1072, 1074 (Me. 1996); State v. Nadeau, 653 A.2d 408, 411 (Me. 1995); M.R. Evid. 403).

As noted, a motion in limine was raised prior to trial to limit the State's ability to question witnesses about alleged drug use by Mr. Gervais. (Tr. T. (vol. 1) at 34-38). The trial court addressed this motion prior to the commencement of Mr. Gervais' trial, stating that it would

> be watching that in terms of 403 and how far- - the State seeks to go down that road. At some point, then the prejudicial effect outweighs the probative value; but it's certainly relevant as it relates to these charges. Um, so there would be- - there would be some latitude, but I will be keeping an eye on that. And if it gets- - if it starts to get into that side track then and outweigh the probative value of it, then I'll sustain the objection if there's one made. (Tr. T. (vol. 1) at 37-38).

During the trial, Ms. M[redacted] testified that Mr. Gervais had her "son in the truck and" was upset that Mr. Gervais was meeting up with "his former drug dealer." (Tr. T. (vol. 1) at 259, 270). She tested that he "would rather not have" her son around Mr. Gervais' "cocaine drug dealer." (Tr. T. (vol. 1) at 259). She also stated that the "drug dealer. . . was always a concern" and it was a concern when she saw his son around him on "that day." (Tr. T. (vol. 1) at 268). Ms.

M[redacted] further testified that Mr. Gervais would act different because of drugs and alcohol. (Tr. T. (vol. 1) at 69). It was also stated by Ms M[redacted] that Mr. Gervais did cocaine behind her back a lot. (Tr. T. (vol. 1) at 75).

All of this testimony should have been excluded by the trial court during Mr. Gervais' trial. Information about Mr. Gervais' drug use was not related to the charges against him. The information did nothing but inflame the jury against Mr. Gervais by providing this information that was not related to the charges against him. The information should also have been excluded as evidence of prior bad acts, as it was being used to support the State's case based on evidence that was not related to the charges against Mr. Gervais. The information was also extremely prejudicial and that prejudice outweighed any probative value that can be attributed to drug use by Mr. Gervais. As such, by using this evidence Mr. Gervais's trial was severely tainted. The allegations of drug use infiltrated his trial and incited sentiment against him. The trial court abused its discretion and it was error for the trial court to allow the State to present the evidence to the jury.

IV. The trial court erred in ruling on Mr. Gervais' motion in limine that allowed the use of the term victim in the State's closing remarks to the jury.

A preserved objection to a motion in limine ruling is reviewed for both clear error and abuse of discretion.[46] State v. Patterson, 651 A.2d 362, 366 (Me. 1994).

[46] See footnote 45 supra asserting that an abuse of discretion standard of review is appropriate for use by this Court.

Mr. Gervais filed a motion in limine to prevent reference to Ms. M as a "victim" during the course of the trial. (App. at 5, 7, 14). The court granted the motion and ruled that "[t]he Court will only refer to the victim preceded by the word alleged. The State and all witnesses during the trial shall only refer to the alleged victim by name. However, in closing, the State is free to use the word victim because that's argument and certainly, um, fair game." (Tr. T. (vol. 1) at 11-12).

Despite the trial court's ruling, it was error and and abuse of the trial court's discretion to allow the State to refer to Ms. M as a victim in its closing statements. The painting of Ms. M as a victim was prejudicial to Mr. Gervais and allowed the State to express an opinion on the evidence and bolster the credibility of its central witness, pushing the jury to accept its view of her as a victim.[47] In State v. Philbrick, 669 A.2d 152, 156 (Me. 1995). As such, the State, in these comments, asserted personal opinion, when the jury has not yet made a determination as to whether Mr. Gervais was guilty of the alleged charges. It was error and an abuse of the trial court's discretion to allow the State to refer to Ms. M as a victim in its closing remarks.

[47] In its closing remarks the State argued: "his victim D M went out on a date" (Tr. T. (vol. 2) at 203); he tried to get the victim to change her statement" (Tr. T. (vol. 2) at 205); and "his victim D ." (Tr. T. (vol. 2) at 208).

Conclusion

For the above-reasons, the Appellant asks this Court vacate his convictions and remand his case to the Arrostook County Courts for further proceedings.

Dated: July 23, 2024

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Certificate of Service

I, Jeremy Pratt, Esquire, hereby certify that on this date I mailed via the U.S. postal service, first class mail, two copies of the foregoing Brief of Appellant to John Inglis, Esq., Aroostook County District Attorney's Office, 144 Sweden Street, Caribou, ME 04936-2353.

Dated: July 23, 2024

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