STATE OF MAINE
AROOSTOOK, ss.

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
DOCKET NO. ARO-24-127

STATE OF MAINE,

APPELLEE

V.

ETHAN GERVAIS

APPELLANT

ON APPEAL FROM THE UNIFIED CRIMINAL DOCKET

BRIEF OF APPELLEE

TODD COLLINS
District Attorney

JOHN INGLIS
Assistant District Attorney
144 Sweden St.
Caribou, Maine 04736
(207) 498-2557

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INTRODUCTION

Ethan Gervais was found guilty following a two-day jury trial, of Tampering with a Victim, Domestic Violence Assault held February 6-7, 2024. The trial covered the events of February 25th of 2023 when Mr. Gervais assaulted Ms. M[redacted], the mother of his child Xander. It also covered the 3 months following that assault when Mr. Gervais violated his conditions of release, engaged in domestic violence criminal threatening all with the purpose of tampering with his victim.

In the lead up to the trial the Appellant filed several motions in limine dealing with his drug use and whether the State could refer to Ms. M[redacted] as his victim, the latter being granted in part.

Following the trial Mr. Gervais was found guilty of domestic violence assault, domestic violence criminal threatening, violating his conditions of release and tampering with a victim (Class B).

Mr. Gervais' conviction should remain.

STATEMENT OF FACTS

D[redacted] M[redacted] and Ethan Gervais began a domestic relationship in 2021, Ms. Muoz became pregnant and by November 22nd of the same year they had a child together named Xander. (Tr. T. (vol. 1) at 68). The relationship between Ms. M[redacted] and Mr. Gervais began to deteriorate thereafter, the relationship enduring multiple breakups occasioned by Mr. Gervais' drug and alcohol use. (*Id*.) The precipitating event for this case were the events of February 25, 2023. Ms. M[redacted] and Mr. Gervais went out that night together and returned to his apartment. (Tr. T. (vol. 1) at 71) Mr. Gervais became upset, he threw a bong onto the glass entertainment set, breaking it. (Tr. T. (vol. 1) at 75, 222) Mr. Gervais began to swinging the rocking chair she was sitting into the glass entertainment center next to her. (Tr. T. (vol. 1) at 75-76, 223-224) Upon hearing all the noise coming from above, Mr. Gervais' brother, Colby occupied the apartment beneath his own. Colby Gervais rushed up the stairs. He found that Mr. Gervais was attempting to prevent Mr. M[redacted] from leaving. (Tr. T. (vol. 1) at 72, 77) Not satisfied with the mediation Colby attempted to provide, Mr. Gervais then severely assaulted Colby in a count that was mostly dealt with by way of a misdemeanor plea prior to trial. (Tr. T. (vol. 1) at 79) Breaking Ms. M[redacted]'s phone during the course of these events was also dealt with by way of misdemeanor plea. Ms. M[redacted] tried unsuccessfully to intervene but thereafter

ran out to her vehicle, without putting her shoes on, in February, trying to get away. (Tr. T. (vol. 1) at 81) It was Colby who was the first to call for medical intervention, police eventually arrived, finding Mr. Gervais in the passenger seat of Ms. M[redacted]'s vehicle, her in the driver's seat and the vehicle half way out of the driveway. (Tr. T. (vol. 1) at 82) Once in Officer Querze's cruiser, Ms. M[redacted] told him what had happened earlier, the first chance she had to speak away from Mr. Gervais. (Tr. T. (vol. 1) at 85) Within a day or two, Mr. Gervais was contacting Ms. M[redacted] in violation of his conditions of release, he was specifically doing it because he was interested in getting rid of the charges. (Tr. T. (vol. 1) at 88-89) They would meet behind Acadia Family Health and the K-Mart parking lot, weekly. (Tr. T. (vol. 1) at 90, 92) At these meetings where Mr. Gervais was attempting to get Ms. M[redacted] to change her statement and early on was making vague threats. (Tr. T. (vol. 1) at 92-93) Threats that included withholding their child from her. (Tr. T. (vol. 1) at 102) In the last meeting he threatened to hit Ms. M[redacted] if she did not get into his truck, after getting in his truck, she was driven to his home and kept there for half a day. (Tr. T. (vol. 1) at 93) Later in the development of the case he was making threats to hit or to kill her every day. (Tr. T. (vol. 1) at 125) During this time, Mr. Gervais became more deliberate about Ms. M[redacted] writing a statement to diminish the impact of her report of February 25, 2023. (Tr. T. (vol. 1) at 94-95) Much of this discussion

happened using Facebook Messenger. The messages she received by Messenger were from the same account as she had previously received messages from Mr. Gervais prior to the events of February 25, 2023, displaying his profile picture associated with his Facebook account. (Tr. T. (vol. 1) at 100-101) Exhibit 13, 14 and 28, Messenger messages, specifically had Ms. Gervais' name upon them. (Tr. T. (vol. 1) at 154) Ms. M[redacted] received calls from Mr. Gervais through that same application, including the night that Ms. M[redacted] would send her recantation statement to the District Attorney's Office and that it was Mr. Gervais' voice she spoke with that night. (Tr. T. (vol. 1) at 102 and 110) The messages that were eventually put into evidence were from Ms. M[redacted]'s phone, that she handed to Officer Querze to capture. (Tr. T. (vol. 1) at 104, 236) A conversation between the two of them took place prior to the messages being sent where Mr. Gervais was tampering with Ms. M[redacted]. (Tr. T. (vol. 1) at 227, 230) Among the Exhibits entered into evidence were numbers 2-8 which included showed a three minute phone call, followed by a Messenger discussion of the recantation, with input from Mr. Gervais who sought to have the recantation worded to fit his demands. (Tr. T. (vol. 1) at 118) The recantation was sent both to the District Attorney's Office and to the Appellant's private investigator, Paul Gamble. (Tr. T. (vol. 1) at 118)

Mr. Gervais continued to violate the no contact conditions in other ways during this time. On April 22, 2023 he appeared at Ms. M[redacted]'s place of employment, the Legion, where she was celebrating her birthday. (Tr. T. (vol. 1) at 95) Mr. Gervais had been messaging her all evening, upset that another man was sitting next to her, apparently watching her through the window from the K-Mart Parking lot. (Tr. T. (vol. 1) at 97) He chose to enter the Legion, to sit two seats away from her and to threaten to kill Jeff Cyr, seated next to her. (Tr. T. (vol. 1) at 98) She eventually agreed to talk with Mr. Gervais, on the way out of the Legion Mr. Gervais grabbed her, threatened to kill Jeff Cyr who attempted to intervene and pushed her friend D[redacted] before ripping away in his truck. (Tr. T. (vol. 1) at 99-100) Later, further contact, at her residence he threatened to kill her. (Tr. T. (vol. 1) at 203, 211) The trial was rife with ongoing violations of conditions of release.

Ultimately the jury convicted the Appellant of Tampering with a Victim, Domestic Violence Assault and Domestic Violence Criminal Threatening. The Appellant had previously pled to Assault against his brother, Colby Gervais, and Criminal Mischief for destroying Ms. M[redacted]'s phone.

ISSUES

Issue 1: Sufficient foundation was laid for the admission of the Facebook Messenger messages into evidence

Issue 2: There was no prosecutorial error, moreover, the judge issued curative instructions that the Appellant did not object to as inadequate

Issue 3: The trial court did not err in permitting exploration of Mr. Gervais' drug use, moreover, the hardest blows related to drug use were struck during Ms. M[redacted]'s cross-examination by the Appellant

Issue 4: The trial court did not err in permitting the State to refer to Ms. M[redacted] as the Appellant's victim in closing

ARGUMENT

Issue 1: Sufficient foundation was laid for the admission of the Facebook Messenger messages into evidence

Ms. M[redacted] testified that the messages she received, some of which were received into evidence, came from the same Facebook account that she had previously messaged Mr. Gervais, had his name upon them and when they called through the same application she recognized his voice on the phone calls immediately preceding and proceeding the messages entered into evidence as Exhibits 2-7. Further, she testified that the topic of the conversation preceding the messages being sent was directed at having Ms. M[redacted] change her statement, occurring on May 2, at 8:02 PM, as indicated on Exhibit #2, with another date appearing on Exhibit 7, less than 2 hours later. That topic of conversation, in substance, was the same as is reflected in those exhibits. Ultimately, that correspondence culminated in the email from Ms. M[redacted] to the District Attorney's Office and to the Appellant's private investigator. Entered as Exhibit 8, that email was a word-for-word transcription of the information contained in those messages.. These are the same messages that relate to the Tampering with a Victim charge, and they included dates, contrary to the position taken in the Appellant's brief. The other messages referred to by the Appellant in his brief, where he questions

their authenticity for containing fewer dates, are unrelated to the charges for which the Appellant was convicted but instead relate to the Burglary and the Aggravated Criminal Trespass charges for which he was found not guilty. More, those messages which Appellant claims did not have sufficient foundation to be introduced into evidence can be authenticated by the witness to whom they were sent, as was done here. State v. Tieman, 207 A.3d 618 (2019) at para. 14.

Issue 2: There was no prosecutorial error, moreover, the judge issued curative instructions that the Appellant neither requested nor objected to as inadequate

When the Appellant does not object to a prosecutor's statements at trial the obvious error standard of review applies. State v. Lockhart, 2003 ME 108 para. 47, 830 A.2d 433, 449 (Me. 2003).

"To show obvious error, there must be (1) an error, (2) that is plain, and (3) that affects substantial rights." *Sousa*, 2019 ME 171, ¶15, 222 A.3d 171 (quotation marks omitted). "[I]f these three conditions are met, we will set aside a jury's verdict only if we conclude that (4) the error seriously affects the fairness and integrity or public reputation of judicial proceedings."

"The defendant's burden ... is significant," and we have explained that "[w]hen a prosecutor's statement is not sufficient to draw an objection, particularly when viewed in the overall context of the trial, that statement will rarely be found to have created a reasonable probability that it affected the outcome of the proceeding." *State v. Dolloff*, 2012 ME 130, ¶ 38, 58 A.3d 1032.

The Appellant did not object to any of the comments now alleged to be made in error, therefore the Court should review those same comments by

that same obvious error standard. The Appellant now resists the phrase, "And then she told him what really happened." (Tr. T. (vol. 2) at 205) But this same comment is reflected in the evidence contained in the trial transcript:

When Officer Querze first approached Ms. M[redacted] crying in her vehicle, Ms. Gervais sat beside her in the passenger seat. Ms. M[redacted] told Officer Querze, "that everything was fine; but I was in absolute tears…" She "got out of the car and I kind of just told him (Querze) everything." (Tr. T. (vol. 1) at 83)

The Appellant now finds issue with another comment made in closing that it refers to as vouching, the comment is reproduced with fewer ellipses below:

"… the last thing I think I want to address with you is this question of whether or not Officer Querze lied under oath. Lying implies a certain intention that I find- I think 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. And that was a sworn document he had- and he had an obligation to be sure that that was the case, that he had in fact received those witness statements. And in his full report, he corrected and said he did not receive written statements; and he also corrected that when given the opportunity when questioned on it before another proceeding. 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 do. But to call it lying is, I think, a bridge too far." (Tr. T. (vol 2) at 227)

What the Appellant fails to note is that these comments were made in response to those of the Appellant in closing.

"We have held that when the prosecutor's comment was "invited" by the defendant, the comment will not "warrant reversing a conviction" if the prosecutor "did no more than respond substantially in order to right the scale." *Dolloff*, 2012 ME 130, ¶ 64, 58 A.3d 1032 (quotation marks omitted); *see id.* ¶ 44 (citing *United States v. Mejia-Lozano*, 829 F.2d 268, 274 (1st Cir. 1987) ("[T]he prosecutor is given somewhat greater leeway in rebuttal to rehabilitate his witnesses in response to defense counsel's inflammatory statements." (quotation marks omitted))). *State v. Sholes*, 2020 ME 35, ¶ 21, 227 A.3d 1129, 1134

The Appellant in his brief cites the Rules of Professional Conduct, specifically Rule 3.4(e) which equally applies to the conduct of the Appellant in closing,

"A *lawyer*[1] shall not:

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

The Appellant's relevant remarks in closing:

"The officer in this case did his best, *but his best is also lying under oath*." (Tr. T. (vol 2) at 220) (emphasis added)

Here, the State's remarks, referred to as vouching by the Appellant, were invited, and were merely made to balance the scales.

The Appellant also argues that the cumulative effect of any alleged misconduct prevented Mr. Gervais receiving due process. The Court recently found that plain error did not have the effect of depriving a Appellant of due process:

[1] It does not read "A *prosecutor* shall not…"

"Nevertheless, we conclude that this plain error did not affect Tripp's substantial rights because the jury acquitted Tripp on the charge of aggravated trafficking of a scheduled drug that in fact caused the death of a person. Thus, the jury apparently did not give any weight to the State's comments, and the prosecutorial error could not have been sufficiently prejudicial to have affected the outcome of the proceeding." *State v. Tripp*, 2024 ME 12, ¶ 26, 314 A.3d 101, 114

Here, it is clear from the jury's verdict that the comments made by the State did not have the effect the Appellant alleges, the Appellant was acquitted of several counts including two felony count, Burglary (Class B) and Aggravated Criminal Trespass (Class C), after the State asked for Mr. Gervais to be convicted of those counts. Apparently, the State's words did not weigh heavily upon the ears of the jurors.

The court did choose to *sua sponte* issue a corrective instruction to the jury. (Tr. T. (vol 2) at 228 and 236)

"We will generally defer to the determination of a presiding Justice, who has the immediate feel of what is transpiring, that a curative instruction will adequately protect against the jury giving consideration to matters which have been heard but have been stricken as evidence." *Dolloff*, 2012 ME 130, ¶ 32, 58 A.3d 1032 (quotation marks omitted). "Any concern created by improper statements made by a prosecutor is likely to be cured by a prompt and appropriate curative instruction, especially when such an instruction is specifically addressed to the prosecutor's [error]." *Id.* (as cited in *State v. Tripp*, 2024 ME 12, ¶ 27, 314 A.3d 101, 114)

"Only where there are exceptionally prejudicial circumstances or prosecutorial bad faith will a curative instruction be deemed inadequate to eliminate prejudice." *State v. Bethea, 2019 ME 169, ¶ 26, 221 A.3d 563*

Here, as in *Tripp* and *Clark*, the court issued a curative instruction, no argument has been made that there were exceptionally prejudicial circumstances or prosecutorial bad faith.

"Moreover, the trial court repeatedly informed the jurors that comments made in closing argument are not evidence. *See State v. Langill,* 567 A.2d 440, 442 (Me.1989) (stating that the trial court "cured any impropriety caused by the prosecutor's statements" when it instructed the jury that "any statements or comments made by the lawyers in the case" are not evidence and that the jury is the judge of the facts); *see also Young,* 2000 ME 144, ¶ 7, 755 A.2d at 548–49 (noting "the crucial role of the trial court as a check to prosecutorial excesses, it being in the best position to assess the 'feel' of the trial and to take the necessary corrective action when misconduct occurs to undo the prejudice") (citing Robert W. Clifford, *Identifying and Preventing Improper Prosecutorial Comment in Closing,* 51 Me. L.Rev. 241, 244, 257–67 (1999)); *Borucki,* 505 A.2d at 94 (stating that an appellate court "must be reluctant to reverse a judgment on the basis of an error not brought to the attention of the trial court")." *State v. Clark*, 2008 ME 136, ¶ 14, 954 A.2d 1066, 1071

Clark, involved a case where the prosecutor told the jury four times that the Appellant had lied and no prosecutorial misconduct was found, nothing contained in the allegations of the Appellant rises to that level here. The curative instruction provided by the lower court here should be deemed adequate to eliminate any alleged prejudice, it is after all, the basis of our legal system that the jury is provided the law from the court and argument from counsel. The court providing curative instructions such as these diminish the words of counsel, not the authority of the court. The Court should not credit the Appellant's argument.

<u>Issue 3</u>: The trial court did not err in permitting exploration of Mr. Gervais' drug use, moreover, the hardest blows related to drug use were struck during Ms. M[redacted]'s cross-examination by the Appellant

A trial court's denial of a motion in limine is reviewed for an abuse of discretion. *State v. Dube*, 2014 ME 43, ¶ 8, 87 A.3d 1219, 1222

The lower court, in ruling on the Appellant's Motion in Limine specifically heard from counsel that the evidence of prior drug use was relevant to Mr. Gervais' more aggressive behavior and in relation to the delayed report. An in chambers discussion was held prior to the commencement of the trial where some of the details of the discovery materials were addressed. The State specifically informed the Court that on the night of the first incident, Ms. M[redacted] told Officer Querze, on video, that Mr. Gervais had taken cocaine that evening. ((Tr. T. (vol 1) at 35) The discussion continued, and dealt with the reason for the delayed report, that Mr. Gervais had taken their son where he went to purchase drugs. (Tr. T. (vol 1) at 36)

With that information, the Court decided:

"And so I'll be watching that in terms of 403 and how far- 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 them charges. Um, so 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)

Ms. M[redacted] eventually testified that he acted differently when under the influence of drugs and alcohol, specifically cocaine, and that it would make him mean and he would lose patience. (Tr. T. (vol 1) at 69) Ultimately, she testified that she did not know if he used cocaine that night because he would do it behind her back. (Tr. T. (vol 1) at 75) These two comments concluded the State's oral examination on the issue of Ms. Gervais' drug use and did not meet with objection.

The most damaging comments in fact happened in response to the Appellant's cross examination of Ms. M[redacted] when she testified that she "would rather not have" her son around Mr. Gervais' drug dealer and that she was upset that Mr. Gervais was meeting with his former drug dealer. (Tr. T. (vol 1) at 258-259, 270)

The court was within its discretion to allow testimony on this issue, it indicated that if the State went too far afield that it would wait for an objection and sustain it, but one was never made. The Appellant did his worst, to himself.

Issue 4: The trial court did not err in permitting the State to refer to Ms. M[redacted] as the Appellant's victim in closing

Abuse of discretion standard applies to this issue as well. The State notes that it is customary for the State to refer to the victim as the victim in

closing. The Appellant makes only one citation to legal authority in making this argument, outside noting a case, but apparently does not rely upon that authority to make its argument for that authority appears unrelated both to the preceding argument and the proceeding. The State not only normally refers to victims as victims, but does so emphatically where the statute itself refers to the object of the crime as a victim:

§207-A. Domestic violence assault

1. A person is guilty of domestic violence assault if:

A. The 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. (emphasis added)

§454. Tampering with a witness, informant, juror or *victim*

1-B. 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:

A. Induces or otherwise causes, or attempts to induce or cause, a *victim*:

(2) To withhold testimony, information or evidence. (emphasis added)

The State in every criminal trial asks the Appellant to be convicted of charge against him in closing arguments. Crimes such as these have victims and to refer to the victim as anything other than a victim would be to divorce language from substance.

The State asks the Court to find that the lower court did not abuse its discretion.

CONCLUSION

For the above reasons the Appellee asks the Court to affirm its judgement.

CERTIFICATE OF SERVICE

I, John Inglis, Assistant District Attorney, certify that I have mailed two copies of the foregoing "BRIEF OF THE APPELLEE" to the Appellant's attorneys of record, Jeremy Pratt, Esq. and Ellen Simmons, Esq.

DATED: September 30, 2024

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JOHN INGLIS
Assistant District Attorney
Maine Bar No. 6420