SUPREME JUDICIAL COURT
Sitting as the Law Court
Law Court Docket Number: SOM-24-325

STATE OF MAINE

v.

RAYMOND ELLIS

On Appeal from a criminal conviction entered by the Unified Criminal Court sitting in Somerset County.

Brief for Appellee – The State of Maine

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PROCEDURAL HISTORY

On January 2, 2024, the Appellant, Raymond Ellis (hereinafter "Appellant"), had an initial appearance on a criminal complaint with the following counts: Robbery (Class A) (17-A M.R.S. § 651(1)(E)); Criminal Threatening with a Dangerous Weapon (Class C) (17-A M.R.S. § 209(1), 1604(5)(A)); Possession of a Firearm by a Prohibited Person (Class C) (15 M.R.S. § 393(1)(A-1)(1)); and Theft by Unauthorized Taking (Class E) (17-A M.R.S. § 353(1)(A). Bail was set at his in custody initial appearance at $25,000 cash bail with numerous special conditions. (A. 4.)

On April 19, 2024, the Somerset County Grand Jury returned a True Bill formally charging Appellant. (A. 38.) Those charges were identical to those found in the Complaint. (A. 38) The Appellant entered pleas of Not Guilty on the True Bill on May 8, 2024. (A. 5.)

A jury trial related to Counts 1, 2, and 4 began on June 12, 2024. (A. 7.) Count 3 was presented to the Court at that same time. (A. 7.) The jury returned a verdict on June 13, 2024, and found the Appellant guilty of Counts 1, 2, and 4. (A. 8.) The Court also found Appellant guilty of Count 3. (A. 8.)

A contested sentencing hearing was held on July 8, 2024. (A. 9.) The Court rendered a sentence of twenty-five (25) years all but twenty (20) years suspended with four (4) years of probation on Count One. (A. 9-10.) Counts Two and Four were

merged with Count One for purposes of sentencing. (A. 10.) The Court rendered a sentence of three (3) years for Count 3, which was made to run concurrent with Count One. (A. 10.) Appellant timely filed a Notice of Appeal on February 21, 2023 challenging the Trial Court's verdict on three grounds to be discussed below. (A. 13.)

STATEMENT OF FACTS

A. Trial Facts

On August 5, 2023, Seth Johnson drove the Appellant and 17-year-old Jameson Laney to the Big Apple in Madison intending to rob the store. (1Tr. 95.) The Appellant and Laney went inside the store as Johnson stayed outside to act as a lookout. (1Tr. 97.) The Appellant carried a handgun. (1Tr. 97.) Laney carried a shotgun. (1Tr. 96-97.) Both the Appellant and Laney were wearing black ski masks and black clothing. (1Tr. 96.)

Once inside, Laney pointed the gun at the clerk and told him to hand over the money from the register and get on the ground. (1Tr. 174-175.) Laney then took the money, the clerk's wallet, and some Marlboro cigarettes while the Appellant took a couple Mountain dews. (1Tr. 175.; 2Tr. 69.) The two then left the store and fled in Johnson's car. (1Tr. 176-177.) Surveillance cameras from the Big Apple captured the robbery and immediate flight. (1Tr 66.)

Julie Cantara is the Appellant's wife. (2Tr. 59.) On the morning of August 5, 2023, Cantara saw a Facebook post about the Big Apple robbery. (2Tr. 60.) Cantara then spoke with the Appellant, who admitted that he was the one that robbed the store. (2Tr. 61.)

Brylie Murray was a friend of Cantara. (2Tr. 36.) A few weeks after the robbery, Murray was with the Appellant, Cantara, and Seth Johnson at their

apartment complex. (2Tr. 37.) At that time, the Appellant bragged that he and Jameson Laney robbed the Big Apple in Madison. (2Tr. 37.) Reminiscing, the Appellant acknowledged that he didn't get much from the robbery but mentioned getting some cigarettes. (2Tr. 38.)

Detective David Cole investigated the August 5, 2023, robbery. (2Tr. 79). On November 8, 2023, Cole contacted the Appellant and searched his vehicle. (2Tr. 88). During his search, Cole found a black ski mask, a black long sleeve shirt, and a sawed-off shotgun (2Tr. 88-90.) All three items matched what was seen in the surveillance footage associated to the robbery. (2Tr. 90.)

B. Sentencing Facts

In following the statutory three-step analysis, the sentencing court set the Appellant's basic sentence at 20 years. (STr. 13-14.) During step two, the court identified the following aggravating factors: that "firearms were brandished, although thankfully not used"; the Appellant's failure to take responsibility; that two teenagers were involved with the Appellant; the Appellant's seven prior felony convictions; and that four of the Appellant's prior felonies involved firearms. (STr. 16-17.) The Court also identified the following mitigating factors: no firearm was discharged; nobody was hurt; and the Appellant did not take the witness stand and state anything fictitious. (STr. 16.) In balancing the aggravating and mitigating factors, the court determined the maximum sentence to be 25 years. (STr. 17.) In

applying the third step, the court determined that five years of the Appellant's sentence would be suspended to help facilitate his lawful reintroduction into society. (STr. 19.)

ISSUES PRESENTED

I. Whether this Court should uphold *State v. Brewer*, 505 A.2d 774 (Me. 1985) because the "no inference" jury instruction is settled law and constitutionally valid?

II. If this Court overturned *State v. Brewer*, 505 A.2d 774 (Me. 1985), should the judgment be upheld because there was no highly prejudicial error?

III. Whether the trial court properly acknowledged that firearms being brandished was an aggravating factor?

SUMMARY OF ARGUMENT

I. This Court should deny the appeal because the "no inference" jury instruction is settled law and constitutionally valid. Instructing jurors to draw inferences from "a missing witness" is incompatible with the Maine Rules of Evidence. Specifically, under Rule 607, a party can call a witness, elicit testimony, and attack the called upon witness's testimony if it is adverse. Therefore, it cannot be treated as an evidentiary fact that a witness creates any inference.

II. Even if current precedent was overturned, this Court should not vacate the judgment because there was no highly prejudicial error that resulted in manifest injustice. There was no manifest injustice because (1) the content of the missing witness's testimony was covered by other witnesses and video surveillance; (2) the missing witness was not peculiarly available to the prosecution; and (3) either party could have called the missing witness.

III. This Court should find that the sentencing court committed no error when it found that brandishing a firearm was an aggravating factor for the Appellant's robbery conviction. 17-A M.R.S. § 651(1)(E) establishes that Robbery becomes a Class A offense when the robber is "armed with a dangerous weapon." Here, the court noted that the Appellant was not only "armed with a dangerous weapon," but that the weapon was also

brandished. If this Court does find error, it should be determined it was not obvious and did not affect substantial rights or affect "the fairness and integrity or public reputation" of the proceedings.

ARGUMENT

I. This Court should uphold State v. Brewer, 505 A.2d 774 (Me. 1985) because the "no inference" jury instruction is settled law and constitutionally valid.

This Court should deny the appeal because the "no inference" jury instruction is settled law and constitutionally valid. Instructing jurors to draw inferences from "a missing witness" is incompatible with the Maine Rules of Evidence. Specifically, under Rule 607, a party can call a witness, elicit testimony, and attack the called upon witness's testimony if it is adverse. Therefore, it cannot be treated as an evidentiary fact that a witness creates any inference.

This Court reviews a requested jury instruction to determine whether it "'(1) stated the law correctly; (2) was generated by the evidence; (3) was not misleading or confusing; and (4) was not sufficiently covered in the instructions the court gave.'" *State v. Russell*, 2023 ME 64, ¶ 18, 303 A.3d 640, quoting *State v. Hanscom*, 2016 ME 184, ¶ 10, 152 A.3d 632. Prior to vacating a judgment, this Court must find that the trial court's "refusal to give the requested instruction" was "prejudicial to the requesting party." *Russell*, 2023 ME at ¶ 18.

Generally, the Law Court reviews "jury instructions as a whole for prejudicial error, and to ensure that they informed the jury correctly and fairly in all necessary respects of the governing law." *Id*. at ¶ 15. "A defendant is entitled to relief only

when jury instructions, viewed as a whole, are affected by highly prejudicial error tending to produce manifest injustice." *Id.* (internal quotations omitted).

"Any party, including the party that called the witness, may attack the witness's credibility." M.R. Evid. 607. "[I]n a criminal case the failure of a party to call a witness does not permit the opposing party to argue, or the factfinder to draw, any inference as to whether the witness's testimony would be favorable or unfavorable to either party." *State v. Brewer*, 505 A.2d 774, 777 (Me. 1985). "The promulgation of the Maine Rules of Evidence removed any logical basis for the missing-witness inference by abolishing the practice of vouching." *Brewer*, 505 A.2d at 776. "Under Rule 607 a party may call a witness, elicit the witness's testimony, and then freely attack the witness's credibility if the testimony proves to be adverse." *Id.* "Since neither party vouches for any witness's credibility, the failure of a party to call a witness cannot be treated as an evidentiary fact that permits any inference as to the content of the testimony of that witness." *Id.* at 776-777.

In *State v. Russell*, 2023 ME 64, ¶ 16, 303 A.3d 640, 644-645, the Law Court upheld the trial court's determination to not give a defense requested instruction that would have stated in part that "the defendant "may rely on relevant omissions in the police investigation to raise reasonable doubt." Like the "missing witness" instruction, the Law Court determined the instruction was improper. The Court

opined that a "fundamental problem with [the defendant's] proposed instruction on the quality of the police investigation is that it invites the jury to focus on something other than the sufficiency of the State's evidence in determining guilt." *Russell*, 2023 ME 64 at ¶ 20.

The Court, instead, re-affirmed that the "standard jury instructions quite properly call upon the jury to not speculate on what other evidence might have been presented and what other witnesses might have been called." *Id.* (referencing Alexander, Maine Jury Instruction Manual § 6-12 at 6-23 (2023 ed.). In further support of its decision, the Court noted that the entirety of the instructions established that it was the State's burden to prove the defendant's guilt beyond a reasonable doubt. *Id*. at ¶ 22. Further, the Court noted that the defendant was not prohibited from arguing that the law enforcement investigation was deficient and that the "court's instructions confirmed and emphasized what [the defendant] told the jury concerning the State's burden." *Id*.

This Court should not overturn *State v. Brewer*, 505 A.2d 774 (Me. 1985) and should find that the Appellant's constitutional rights were protected. Here, the Appellant's right to be presumed innocent was protected when viewing the entire instructions. The jury was repeatedly informed about the State's burden of proof. Not including the "missing witness" instruction did not undermine that notion.

Further, the trial court did not prohibit the defense attorney's ability to argue about the nature of the evidence. Thus, the Appellant's rights were protected.

This Court should also uphold *State v. Brewer*, 505 A.2d 774 (Me. 1985) because the "no inference" instruction is proper when considering the entire landscape of Maine's Rules of Evidence. Under Rule 607 "[a]ny party, including the party that called the witness, may attack the witness's credibility." Considering this, it is proper to give a "no inference" instruction because "neither party vouches for any witness's credibility," and "the failure of a party to call a witness cannot be treated as an evidentiary fact that permits any inference as to the content of the testimony of that witness." *Brewer*, 505 A.2d at 776-777. For these reasons, this Court should deny the appeal.

II. If this Court overturned State v. Brewer, 505 A.2d 774 (Me. 1985), the judgment should not be vacated because there was no highly prejudicial error or manifest justice

Even if *State v. Brewer*, 505 A.2d 774 (Me. 1985) was overturned, this Court should not vacate the judgment because there was no highly prejudicial error that resulted in manifest injustice. There was no manifest injustice because (1) the content of the missing witness's testimony was covered by other witnesses and video surveillance; (2) the missing witness was not peculiarly available to the prosecution; and (3) either party could have called the missing witness.

In his appeal, the Appellant referenced other courts use of the "missing witness" instruction. The Appellant specifically noted that the First Circuit Court of Appeals implements the following pattern instruction:

> If it is peculiarly within the power of the government to produce a witness who could give material testimony, of if a witness, because of [his/her] relationship to the government, would normally be expected to support the government's version of events, the failure to call that witness may justify an inference that [his/her] testimony would in this instance be unfavorable to the government. You are not required to draw that inference, but you may do so….

Brief of Appellant, page 17. The Appellant, however, failed to include that the First Circuit has established the following requirements for a "missing witness" instruction. "As a preliminary requirement to the consideration of a missing witness instruction, a criminal defendant must demonstrate that the uncalled witness is either 'favorably disposed' to testify on behalf of the government by virtue of status or relationship or 'peculiarly available' to the government." *U.S. v. Anderson,* 452 F.3d 66, 81 (1st Cir. 2006) (internal citation omitted). "Once past that point, the court must consider the explanation (if any) for the witness's absence and whether the witness, if called, would be likely to provide relevant, non-cumulative testimony." *Anderson*, 452 F.3d at 81 (internal citation omitted). In its analysis, it is also important to the court of appeals whether the missing witness was "in the government's employ" or a "private citizen." *Id*. Finally, in determining whether the

missing witness instruction is required, the court of appeals considered whether the defendant had the ability to subpoena the witness. *Id*. at 82.

Other courts have similar prerequisite requirements. *See, e.g., United States v. Grant*, 683 F.3d 639, 650-51 (5th Cir. 2012) (determining a missing witness instruction was not warranted because the informant witness was not peculiarly within the government's control); *United States v. Cole*, 380 F.3d 422, 427 (8th Cir. 2004) (determining a missing witness instruction was not warranted because the witness was not peculiarly or solely within the government's control and because the defense had the opportunity to call the witness); *United States v. Ramirez*, 714 F.3d 1134, 1137 (9th Cir. 2013) (determining that a missing witness instruction was not required because even if the witness was within the government's control there was no showing that the witness would have provided "unfavorable testimony" against the government).

While some courts do utilize a "missing witness" instruction, it is important to note the context in which such instructions are provided. In this case, there is no evidence that the missing witness was peculiarly available to the prosecution. Further, it is likely the missing witness's testimony would have been largely covered by other witnesses and video surveillance evidence. Finally, it is important to consider that both the State and the Defense could have subpoenaed the missing witness and called him to testify. In the event this Court overturns established

precedent, each of these factors are informative and important to consider, for they establish there was no manifest injustice.

III. The sentencing court did not err when finding that "firearms were brandished" was an aggravating factor in relation to robbery

This Court should find that the sentencing court committed no error when it found that brandishing a firearm was an aggravating factor for the Appellant's robbery conviction. Further, even if this Court found error, it should be determined it was not obvious and did not affect substantial rights or affect "the fairness and integrity or public reputation" of the proceedings.

When a sentencing issue is not raised to the sentencing court, the Supreme Judicial Court of Maine reviews for obvious error. *State v. Watson*, 2024 ME 24, ¶ 18, 319 A.3d 430, 436. "Error is obvious when there is (1) an error, (2) that is plain, and (3) that affects substantial rights." *Id*. (internal quotations omitted). If the these conditions are met, this Court "must also conclude that (4) the error seriously affects the fairness and integrity or public reputation of judicial proceedings before we vacate a judgment on the basis of the error." *Id*.

First, there was no error in mentioning that the Appellant brandishing a dangerous weapon was an aggravating factor. 17-A M.R.S. § 651(1)(E) establishes that Robbery becomes a Class A offense when the robber is "armed with a dangerous weapon." Here, the court noted that the Appellant was not only "armed

with a dangerous weapon," but that the weapon was also brandished. There is a distinction between being armed and having brandished a weapon. Thus, if a weapon is brandished or used, such an occurrence can serve as a legitimate aggravating factor.

Second, even if mentioning that brandishing a dangerous weapon was error, it was not obvious because it did not affect substantial rights or affect "the fairness and integrity or public reputation" of the proceedings. The court protected the Appellant's rights by statutory sentencing guidelines. Further, the sentencing court highlighted numerous aggravating factors that support the Appellant's sentence.

CONCLUSION

For the reasons detailed above, it is requested that this Court find that the "no inference" jury instruction is settled law and constitutionally valid and that the sentencing court did not err when it noted that the brandishing of firearms was an aggravating factor.

Date: 12/13/2024

Respectfully Submitted,

/s/ Tim Snyder

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CERTIFICATE OF SERVICE

I, Timothy Snyder, First Assistant District Attorney, hereby certify that one (1) copies of the within Brief for Appellant were mailed to Appellant's Attorney addressed as follows:

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The State has sent a native .pdf file for submission to the court (at lawcourt.clerk@courts.maine.gov).

/s/ Tim Snyder

Dated: 12/13/2024

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