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

LAW COURT DOCKET NO. Som-24-325

STATE OF MAINE
Appellee

v.

RAYMOND ELLIS JR.
Appellant

ON APPEAL from the Somerset County
Unified Criminal Docket

REPLY BRIEF OF APPELLANT

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INTRODUCTION

(I) Defendant's arguments are of first impression to this Court. *Brewer* did not mention them, let alone decide them,[1] just as the State, in its brief, has not addressed the constitutional infirmities defendant identified in his opening brief. Moreover, the State's conclusion that, regardless, there is no resulting prejudice is, with all due respect, a product of its misidentification of the proper standard for evaluating prejudice.

(II) The State asserts that is lawful for a sentencing court, at Step Two of its analysis, to count the fact that a defendant "brandished" weapons when the statute of conviction already requires proof that the defendant was "armed with" such a weapon. Defendant counters that it is a statutory violation to consider "brandishing" *at all* at Step Two, and that there is no material difference between "brandishing" and "armed with" a weapon.

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[1] *State v. Brewer*, 502 A.2d 774 (Me. 1985) involved a challenge to a missing-witness inference drawn *against* a criminal defendant. As a result, the *Brewer* Court neither had the benefit of, nor considered, briefing about criminal defendants' rights to such an inference (and instruction) *in their favor*.

ARGUMENT

First Assignment of Error

I. This Court should overturn *State v. Brewer*, 505 A.2d 774 (Me. 1985), permit defendants in criminal trials to obtain a missing-witness jury instruction, and disapprove of the "no-inference" instruction given in this case.

Defendant responds to the State's contentions (A) that *Brewer* should be upheld because it is "settled law and constitutionally valid," Red Br. 10, 12, 20; (B) that M.R. Evid. 607 somehow eliminates the need for a missing-witness instruction and argument; and (C) that, in the circumstances, the omission of the missing-witness instruction, and the provision instead of a no-inference instruction, caused no prejudice to defendant.

A. This Court has never addressed the constitutional challenges defendant advances. Nor has the State's brief.

Brewer did not address the constitutional arguments defendant has raised. In fact, even now, the State's brief does not wrestle with them.[2] As a

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[2] As the State's brief contains no response to defendant's constitutional arguments, and because *Brewer* itself does not address them, this Court, adhering to the party-presentation principle, should deem the State to have waived for lack of development any contrary argument. That is what the Court would do when the shoe is on the other foot. *E.g.*, *State v. Sheppard*, 2024 ME 84, ¶ 19 n. 6, ___ A.3d ____.

Given the State's silence, the Court should presume that *Brewer* is unconstitutional as applied to defendant, saving the merits for another, fully-briefed, day. *See United States v. Castillo-Marin*, 684 F.3d 914, 919 (9th Cir. 2012) (when appellee-government's brief omits to address first two prongs of plain-error test, court treats those points as conceded; court rules for defendant-appellant); *State v. Noble*, 2024 WI App 32, ¶¶ 7-8, 2024 Wisc. App. LEXIS 335, * 4, 2024 WL 1756057, * 2 (Wisc. Ct. App. 2024) (court rules for appellant-defendant because appellee-State failed to file a brief; court "will not act as both advocate and judge by independently developing a litigant's argument."); *State v. Valadez*, 2024 WI App 37, ¶ 28, 2024 Wisc. App. LEXIS 353, **18-19, 2024 WL 1903631 (Wisc. Ct. App. 2024) (where

result, neither are defendant's arguments "settled law" nor has anyone ever explained why *Brewer* is "constitutionally valid" in light of these contentions.

1. *Brewer* denies defendants' constitutional right to a trial by the "law of the land."

The State's brief does not mention defendant's constitutional right to a trial according to "the law of the land." ME. CONST. Art. I, § 6. Nor does *Brewer*. Nobody has rebutted defendant's contention that his entitlement to a missing-witness instruction (and to make such an argument) stems from § 6. Defendant refers this Court to pages 11 and 17-18 of the Blue Brief. However, absent any argument on this point by the State, defendant is not permitted to discuss it further here. *See* M.R. App. P. 7A(c) ("Any reply brief filed by the appellant must be strictly confined to replying to new facts asserted or arguments raised in the brief of the appellee."). That – a strategic advantage for the State by not developing an argument to which an appellant may respond in his reply brief – is reason all the more to hold the State to its waiver-for-lack-of-development.

2. *Brewer* distorts the constitutional presumption of innocence.

It is true, *Brewer* recognized – rightly – that a missing-witness instruction deployed against a criminal defendant "distorts the allocation of the burden of proving the defendant's guilt." 505 A.2d at 777. However, the *Brewer* Court did not consider how prohibiting a missing-witness argument

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appellee-State does not rebut appellant's claim that she was denied counsel, court treats contention as conceded, rules for appellant; court "will not abandon our neutrality to develop arguments for a party") (cleaned up, quotation marks omitted).

in a defendant's favor has a similar unconstitutional effect. The State, in its brief, merely reminds us that the trial court here instructed the jury that the State had the burden of proof. Red Br. 14.

Again, by operation of Rule 7A(c), defendant has no ability to make any further argument here, as there is nothing to respond to. He simply reminds the Court of his argument, at pages 10-11, 13-17 and 19-21 of the Blue Brief.

B. M.R. Evid. 607 does not somehow save *Brewer*.

To underscore what is perhaps obvious: Neither may the (asserted) lack of "any logical basis for the missing-witness inference," *Brewer*, 505 A.2d at 776, nor an evidentiary rule (*i.e.*, M.R. Evid. 607), trump a *constitutional* right. In other words, even were it true that Rule 607 somehow undermines the "logic" of a missing-witness instruction – and defendant strongly disagrees with any such notion in the context of instructions inuring to the benefit of criminal defendants – so what? Defendant was constitutionally entitled to such an instruction and argument, regardless of any committee-derived rule of evidence.

Echoing *Brewer*, the State contends that Rule 607 solves everything because any "'party may call a witness.'" Red Br. 13, quoting *Brewer*, 505 A.2d at 776. How is that not unconstitutional burden-shifting? *Cf. Melendez-Diaz v. Massachusett*s, 557 U.S. 305, 324 (2009) ("Converting the prosecution's duty ... into the defendant's privilege under state law or the Compulsory Process Clause shifts the consequences of adverse-witness no-shows from the State to the accused."). A defendant, with his comparatively

limited resources, is supposed to track-down, serve, and call the sole human victim residing out of state?

Anyway, it is the State's omission itself that is probative. When the State does not call the sole disinterested eyewitness – indeed, the sole human victim – shouldn't defendant be able to argue that this is a red flag – a reasonable doubt? Isn't that common sense? Isn't it a reasonable inference?

C. The error isn't harmless beyond a reasonable doubt.

Respectfully, the State's prejudice analysis misfires, identifying an inapplicable standard for the inquiry. It asserts that "there was no highly prejudicial error that results in manifest injustice." Red Br. 10, 15. That, however, is the standard applicable to *un*preserved assignments of error reviewed only for obvious error. *State v. Russell*, 2023 ME 64, ¶ 15, 303 A.3d 640 (whereas unpreserved claims are reviewed for "highly prejudicial error tending to produce manifest injustice," preserved ones are reviewed for "prejudicial error"). Rather, because defendant's objection was preserved, review is for "prejudicial error." *Ibid.*

As for the meaning of "prejudicial error," defendant acknowledges that *typically* such means instructional omissions or errors making it "highly probable" that the error or omission had no effect on the outcome. *State v. Judkins*, 2024 ME 45, ¶ 21, 319 A.3d 443. However, as defendant claimed in the Blue Brief at 23, the error here is of constitutional magnitude – deprivation of a trial by "the law of the land" and distortion of the presumption of innocence. Therefore, reversal is appropriate unless the State can establish that the error or omission was harmless beyond a

reasonable doubt. *Id.* ¶ 20; *Chapman v. California*, 368 U.S. 18, 24 (1967) (such is required by federal law). That State has not satisfied that standard.

The State's substantive contentions about prejudice do not move the needle in its favor. For one, it is not quite accurate that "the content of the missing witness's testimony was covered by other witnesses and video surveillance." Red Br. 15. While, it is true, the jury did hear that Mr. Bonito reported that the perpetrators were White and had no facial tattoos, *see* Blue Br. 6-7, that isn't quite the point of the inference defense counsel sought to draw upon. Rather, defense counsel should have been permitted to argue that, because the State did not call Bonito to testify, jurors should assume that had it done so, Bonito would have *affirmatively* stated that defendant was *not* a robber – and that's why the State didn't call him. There is a material difference between a general exclusionary statement (*e.g.*, the perpetrator was White and had no tattoos) and a specific, affirmative statement that, according to the victim, defendant was absolutely *not* the perpetrator. For all the reasons stated above, defendant should have been able to argue that the State's omission to call Mr. Bonito should cause them to harbor doubts because he would have sworn that defendant was not the one who robbed him.

Also, the State doubts that Mr. Bonito was "peculiarly" available to the State. Red Br. 15, 17. But, as defendant argued at pages 21-22 of the Blue Brief, the Maine standard (and, thus, the standard guaranteed by "the law of the land") is whether the missing witness "would be" or "might be expected to corroborate" the State's case. Indeed, *State v. McAllister*, 24 Me. 139, 144

(1844) says nothing about "peculiarly:" "Everyone is presumed to wish to offer evidence which can operate in his favor, if it is attainable; and it is a settled principle, that unnecessary omission to do this, is a circumstance, which the jury may consider with other evidence in the case." The State has not argued – nor could it – that Bonito was not "attainable" or that his omission from trial was somehow "necessary." Notice that the State does not contend that the sole disinterested eyewitness and sole victim is *not* someone jurors would expect to corroborate its case. *Cf. United States v. Ramirez*, 714 F.3d 1134, 1138 (9th Cir, 2013) ("When the government can call a key percipient witness, but relies instead on out-of-court statements, it's permissible for the jury to infer that the witness's testimony would have been unfavorable to the prosecution.") (cleaned up; quotation marks omitted).

Finally, the State argues that everything is copacetic because "either party could have called the missing witness." Red Br. 15, 17. As defendant discussed above, such a contention is an invitation to upturn the constitutionally derived burdens of proof and persuasion.

Defendant reiterates the argument he noted in the Blue Brief, page 23, about prejudice. Importantly, the witnesses who identified defendant as a participant in the robbery had credibility deficits. *See* Blue Br. 7-8 (discussing those deficits). Even the prosecutor, in the State's closing, seemed to acknowledge as much. 2Tr. 140 ("Nobody is asking you to like these witnesses….").

Second Assignment of Error

II. The sentencing court erred by counting the fact that "firearms were brandished" when the statute of conviction already requires proof that at least one of the robbers is "armed with a dangerous weapon."

The State contends:

> 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.

Red Br. 19. Defendant wishes to make two points in response.

First, defendant notes that it is error for a sentencing court to be considering "brandishing" *at all* at Step Two. Such is part of "the particular nature and seriousness of the offense as committed by the individual," and, therefore, is already accounted for at Step One. 17-A M.R.S. § 1602(1)(A). By counting the "nature and seriousness of the offense" again at Step Two, the court is necessarily double-counting, in violation of § 1602(1). Step-Two considerations are, by law, confined to "all *other* relevant sentencing factors." 17-A M.R.S. § 1602(1)(B) (emphasis added). This is a statutory error, even under the State's interpretation.

Second, defendant doubts that there is but a distinction without a difference between "brandishing" and "armed with." *See* 17-A M.R.S. § 651(1)(E) (statute of conviction: "The actor is armed with a dangerous weapon in the course of a robbery...."). "Armed with" means more than "possession." *See State v. Lynch*, 88 Me. 195, 198 (1895) ("'Armed' means furnished or equipped with weapons of offense or defense. A person who has

in his hand a dangerous weapon with which he makes an assault, is certainly 'armed' within the meaning of the statute."). In other words, to be "armed with" requires proof of possession *and* proof of possession (either intentionally or knowingly) "in such a manner as to indicate his willingness or present ability to use it as a 'weapon.'" *State v. Befford*, 715 P.2d 761 (Ariz. 1986), superseded by statute by Ariz. Laws 1988 (2d Reg. Sess.) Ch. 24l, § 1 (eff. Sept. 30, 1988). To prove a defendant is "armed with" a weapon, the State must prove both possession and "something more indicating the use or involvement of the weapon in the crime." *State v McHenry*, 74 N.E.3d 577, 581 (Ind. Ct. App. 2017). In our case, isn't that "something more" really just the very same "brandishing" the court counted twice?

CONCLUSION

For the foregoing reasons, this Court should vacate and reverse for further proceedings not inconsistent with its mandate.

Respectfully submitted,

January 2, 2025

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CERTIFICATE OF SERVICE

I have filed this brief, and served opposing counsel, as listed on the briefing schedule and the Board of Bar Overseers' (email) directory, in compliance with M.R. App. P. 1D(c), 1E and 7(c).

/s/ Rory A. McNamara