Maine Supreme Judicial Court
Sitting as the Law Court

Docket No. Cum-24-407

State of Maine,

Appellee,

v.

Christopher Deroche,

Appellant.

On Appeal from the Maine
Superior Court, Cumberland County

Appellant's Brief

Tyler J. Smith, Bar No. 4526
LIBBY O'BRIEN KINGSLEY & CHAMPION, LLC
62 Portland Road, Suite 17
Kennebunk, ME 04043
(207) 985-1815
tsmith@lokllc.com

Attorney for Appellant Christopher Deroche

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Statement of the Case

I. Procedural history.

On July 7, 2022, the State filed an indictment charging Christohper Deroche with unlawful sexual touching (Class D) (Count 1), 17-A M.R.S. § 2601(1)(C), unlawful sexual contact (Class B) (Count 2), 17-A M.R.S. § 255-A(1)(E-1), gross sexual assault (Class A) (Count 3), 17-A M.R.S. § 253(1)(C), and gross sexual assault (Class A) (Count 4), 17-A M.R.S. § 253(1)(C). (A. 32.) The trial court scheduled the case for a jury trial beginning on June 4, 2024. (A. 10.)

Deroche filed a motion for attorney-led voir dire. (A. 11, 23-24.) The motion argued that judge-led voir dire and questionnaires can only go so far in unearthing bias and cited 15 M.R.S. § 1258-A, reading "[a]ny rule of court or statute to the contrary notwithstanding, the court shall permit voir dire examination to be conducted by the parties or their attorneys under its direction." (A. 23-24.) The Court held a hearing on May 30, 2024 and denied the defense's motion. (Transcript of Motions Proceedings on May 30, 2024 ("MT") at 1:1-15:1.) After denying the motion, the trial court explained that it had already provided the jury pool with two special questionnaires, and that the trial court's intention was to bring in only "clean" jurors for the jury selection. (MT at 10:24-18:5.)

The trial court held a trial from June 4 through 6, 2024.[1] The State called the alleged victim and the investigating officer, and the defense called the alleged victim's grandmother. During the investigating officer's testimony, he explained that he confronted Deroche with the alleged victim's allegations, and that Deroche was unable to adequately explain why she would fabricate:

> I confronted Mr. Deroche about the fact that the timeline of the disclosures came years after [the alleged victim] and her mother had already moved out so there's no real incentive to make up these disclosures to get him kicked out because they were already moved out.
>
> I also confronted him with the fact that [the alleged victim] had first told a separate aunt who then relayed the information to her mother. So it did not make sense the way he was describing any lying or -- lying about these allegations may have come about. He had no explanation for that.

(TT2 at 113.) Deroche objected to that testimony as burden shifting, and the trial court overruled that objection. (TT2 at 113.)

Much in the same way, during closing arguments, the attorney for the State urged the jury to consider that nobody had identified a motive for the victim to lie:

> That point relates to the last credibility instruction that I want you to think about. The judge will tell you that you may consider whether any evidence has been introduced of any motive or lack of motive for a witness to exaggerate or lie. This is an incredibly important test in this

[1] Trial transcripts for these three days are abbreviated as "TT1," "TT2," and "TT3" for ease of reference.

> case. There's been absolutely no evidence introduced suggesting that [the alleged victim] had any motive to lie.

(TT3 at 96:5-13.) The defense objected to the State's argument which, in the defense's view, implied that the defense is under a burden to supply evidence of a motivation to lie. (TT3 at 96:14-23.) The attorney for the State responded that, although the defense does not have a burden of proof, it does have "the burden of persuasion[.]" (TT3 at 97:3-4.) The trial court overruled Deroche's objection and stated that pointing out the absence of evidence is not burden shifting. (TT3 at 96:24-97:9.) Defense counsel began asking the trial court "to instruct the jury that—", but trial court interrupted to say "[n]o, just a straight up overruling." (TT3 at 97:10-13.) In the wake of this straight-up overruling, the State repeated that "there's been absolutely no evidence introduced suggesting that [the alleged victim] has any motive to lie[,]" "[e]ven Christopher Deroche admitted in his interview with Detective Schaeffer that he had no idea why [the alleged victim] would do this[,]" that Deroche "described her as a sweet and honest kid when she

was living with him[,]" and that "there's no evidence of a falling out between Chris and [the alleged victim] in January of 2020[.]"

The jury found Deroche guilty of unlawful sexual touching (Count 1) and gross sexual assault (Count 4).[2] (A. 19-22.) The trial court sentenced Deroche to 19 years imprisonment with all but 10 years suspended and six years of probation on Count 4, and 364 days imprisonment on Count 1 concurrent to Count 4. (A. 19-20.) Deroche filed his appeal on the same day that he was sentenced. (A. 16-17.)

II. Statement of facts.

Between Fall 2019 and January 2020, the alleged victim lived at her grandmother's house Standish with her grandmother, mother, brother, and Deroche. (TT1 at 42-44.) There were three bedrooms; the alleged victim slept in Deroche's bedroom, her brother in a spare bedroom, her mom in a camper outside, her grandmother in her own room, and Deroche on the couch. (TT1 at 44.)

Over two years later, the alleged victim spoke to her "Aunt T" about things that happened with Deroche and began crying. (TT1 at 48-49.) Aunt T told the alleged victim's mother, and the alleged victim's mother told the alleged victim's Aunt Mel. (TT1 at 50.) Aunt T did much of the talking because the alleged victim was too upset and didn't want to say it to her mother's face. (TT1 at 50-51.) They

[2] The State dismissed Count 2 and 3. (A. 12.)

also told the alleged victim's grandmother. (TT1 at 51.) The family informed the police. (TT1 at 51-52.)

The alleged victim participated in an interview at the child advocacy center on April 1, 2022. (TT2 at 107-09, 155.) Deputy Ben Schaeffer watched the interview and later interviewed Deroche. (TT2 at 109-112.) Deroche denied the alleged victim's allegations, revealed that he had a prominent scar on his leg, and stated that he would be surprised if the alleged victim could identify it. (TT2 at 114-115, 179; *see also* TT2 at 40, 179; TT3 at 15-20; Def.'s Ex. A, B (photographs of Deroche's scar).)

Schaeffer contacted the alleged victim's mother on April 15, 2022 to schedule a follow-up interview in which he could ask about the scar. (TT2 at 43-44, 180.) He told her the questions he planned to ask and she, in turn, told the alleged victim. (TT2 at 43-44, 180.) At the follow-up interview, the alleged victim was accompanied by two other people with everyone "chiming in at once[.]" (TT2 at 42-44, 180-81.) The alleged victim described a scar, but claimed it was on his left leg when it was, in fact, on his right leg. (TT2 at 42-44, 180-81)

On May 31, 2024, just five days before trial, the alleged victim participated in an interview with Schaeffer and the assistant district attorneys. (TT1 at 124, TT2

at 186-87). The trial testimony showed that the alleged victim modified her story from the child advocacy center during this final interview. For example, she added allegations of digital penetration with Deroche's fingers (TT2 at 158, 161, 182-83, 188-89); added that her grandmother and mother nearly walked in on her and Deroche, and that Deroche covered up with a pillow (TT1 at 73-75; TT2 at 186-87); added that Deroche would give her alcohol (TT2 at 187-89); doubled the number of occurrences from five to ten (TT2 at 187-89); and added that there were instances of oral sex (TT2 at 75, 189). The alleged victim was also shown a defense trial exhibit depicting Deroche's scar, contaminating the defense's opportunity to test the alleged victim's memory of Deroche's scar. (TT2 at 39-40.)

Issues Presented for Review

1. Whether the trial court erred by denying Deroche's motion for attorney-led voir dire and, if so, whether that error affected Deroche's substantial rights.

2. Whether the trial court impermissibly allowed evidence and argument suggesting that Deroche had a burden of proof, and if so, whether that error was harmless.

Argument

I. The trial court violated 15 M.R.S. § 1258-A by denying Deroche's motion for attorney-led voir dire.

Deroche preserved his challenge to the trial court's conduct of voir dire. (A. 23-24.) This Court reviews such challenges for abuse of discretion. *State v. Roby*, 2017 ME 207, ¶ 11, 171 A.3d 1157. "An error of law is, inherently, an abuse of discretion." *State v. Hussein*, 2019 ME 74, ¶ 10, 208 A.3d 752 (quoting *Saka v. Holder*, 741 F.3d 244, 250 (1st Cir. 2013)). If denying Deroche's request was error, this Court must reverse if the error affected Deroche's substantial rights. *State v. Judkins*, 2024 ME 45, ¶¶ 20-21, 319 A.3d 443.

The meaning of section 1258-A is a question of statutory interpretation.[3] "The first and best indicator of legislative intent is the plain language of the statute itself." *Wawenock, LLC v. DOT*, 2018 ME 83, ¶ 7, 187 A.3d 609 (citing *Foster v. State Tax Assessor*, 1998 ME 205, ¶ 7, 716 A.2d 1012). "If the language is unambiguous, [the Court] interpret[s] the provisions according to their unambiguous meaning unless the result is illogical or absurd." *Mainetoday Media, Inc. v. State*, 2013 ME 100, ¶ 6, 82 A.3d 104 (internal quotation omitted). But "if

[3] This Court recently considered this issue in *State v. Healey* but was unable to reach consensus on whether the trial court erred and did not analyze the issue in detail. 2024 ME 4, ¶ 11, 307 A.3d 1082.

the plain language of a statute is ambiguous—that is, susceptible of different meanings—[the Court] will then go on to consider the statute's meaning in light of its legislative history and other indicia of legislative intent." *Id.*

Section 1258-A provides that, "[a]ny rule of court or statute to the contrary notwithstanding, the court shall permit voir dire examination to be conducted by the parties or their attorneys under its direction." 15 M.R.S. § 1258-A. In the State's words, this language "ostensibly removes the Court's discretion to [prohibit attorney-led voir dire.]" (A. 34 (State's Opp. to Def.'s Mot. for Attorney-Led Voir Dire).) Rule 24(a) of the Maine Rules of Unified Criminal Procedure, however, provides that attorney-led voir dire is allowed as a matter of discretion:

> The court shall conduct the initial examination of the prospective jurors unless the court, in its discretion, elects to allow the parties or their attorneys to conduct an initial examination, either directly or indirectly through the court. If the court conducts the initial examination, when that examination is completed, the court, in its discretion, may allow the parties or their attorneys to address additional questions to the prospective jurors, either directly or indirectly through the court, on any subject that has not been fully covered in the court's examination and that is germane to the jurors' qualifications.

M.R.U. Crim. P. 24(a). These two authorities are therefore in conflict.

Resolving this conflict leads to another conflict. Rule 24 was promulgated pursuant to 4 M.R.S. § 9, which provides:

> The Supreme Judicial Court shall have the power and authority to prescribe, repeal, add to, amend or modify rules of pleading, practice and procedure with respect to any and all proceedings through final judgment, review and post-conviction remedy in criminal cases before justices of the peace, District Courts, Superior Courts and the Supreme Judicial Court.
>
> Such rules shall take effect on such date not less than 6 months after their promulgation as the Supreme Judicial Court may set. After their promulgation the Supreme Judicial Court may repeal, amend, modify or add to such rules from time to time without a waiting period. After the effective date of said rules as promulgated or amended, all laws in conflict therewith shall be of no further force or effect.

4 M.R.S. § 9. The last sentence suggests that the Maine Rules of Unified Criminal Procedure prevail over any conflicting statutes. But section 1258-A contains its own conflict-of-laws provision: "[*a*]*ny rule of court or statute to the contrary notwithstanding*, the court shall permit voir dire examination to be conducted by the parties or their attorneys under its direction." 15 M.R.S. § 1258-A (emphasis added). These two statutes therefore have conflicting conflict-of-laws provisions: section 9 says that a judicially-created rule prevails over any then-existing statute to the contrary, whereas section 1258-A says that it controls over any other rule of court or statute to the contrary.

When two statutes conflict, as here, this Court applies the principle that "a statute dealing with a subject specifically prevails over another statute dealing with the same subject generally." *Butler v. Killoran*, 1998 ME 147, ¶ 11, 714 A.2d 129

(citing 2B Sutherland, Statutory Construction § 51.05, at 174 (1992 & Supp. 1998)). Section 9 deals with the Supreme Judicial Court's authority to prescribe rules of criminal practice. Section 1258-A, in contrast, deals with the specific issue of voir dire and also states that it prevails over "[a]ny rule of court *or statute* to the contrary[.]" 15 M.R.S. § 1258-A (emphasis added). Section 1258-A is not only the more specific law, but its express language reading that it prevails over any "statute to the contrary" indicates legislative intent that, in the event of a conflict, section 1258-A controls. Thus, section 1258-A controls over section 9 and, in turn, over Rule 24(a).

This result is consistent with the separation of powers considerations raised in the State's opposition below. In the federal context, "Congress has undoubted power to regulate the practice and procedure of federal courts, and may exercise that power by delegating to this or other federal courts authority to make rules not inconsistent with the statutes or constitution of the United States." *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9 (1941). Like its federal counterpart, the Maine Constitution contains no provision vesting the courts with independent rulemaking power apart from the Legislature. Me. Const., art. VI. Like Congress and the federal courts, the Maine Legislature has the power to regulate the conduct of state courts. Indeed, this Court has held that the Legislature has the power to regulate

the rules of evidence, *Irish v. Gimbel*, 1997 ME 50, ¶ 15, 691 A.2d 664, establish the mandatory sentencing scheme, *State v. Thibeault*, 621 A.2d 418, 419 n.1 (Me. 1993), and "remove a sentencing court's discretion when it determines it is appropriate to do so" by enacting a mandatory sentence, *State v. Gilman*, 2010 ME 35, ¶ 19, 993 A.2d 14. Limiting a court's discretion to deny attorney-led voir dire, as in section 1258-A, is consistent with these principles.

The trial court's denial of attorney-led voir dire prejudiced Deroche's defense. "Experienced trial lawyers agree that the jury selection process is the single most important aspect of the trial proceedings. In fact, once the last person on the jury is seated, the trial is essentially won or lost." Margaret Covington, *Jury Selection: Innovative Approaches to Both Civil and Criminal Litigation*, 16 St. Mary's L.J. 575, 575-76 (1985). "[T]he purpose of the voir dire process is to detect bias and prejudice in prospective jurors, thus ensuring that a defendant will be tried by as fair and impartial a jury as possible." *State v. Fleming*, 2020 ME 120, ¶ 14, 239 A.3d 648 (quoting *Roby*, 2017 ME 207, ¶ 11). Bias may include actual bias, implied bias, and implicit bias. *State v. Hemminger*, 2022 ME 32, ¶ 6, n.3, 276 A.3d 33.

While a questionnaire such as those here may help with identifying implied bias—that is, "extreme situations in which the law presumes that a juror should be disqualified from service because of the likelihood that the average person in the

juror's position would be unable to serve impartially as a juror in the case[,]" *see id.*—they otherwise fall short. "Because lawyers almost always know the case better than the trial judge, lawyers are in the best position to determine how explicit and implicit biases among potential jurors might affect the outcome." Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of* Batson*, and Proposed Solutions*, 4 Harv. L. & Policy Rev. 149, 160 (2010). Unlike judges, trial lawyers have access to jury consultants and other resources "to develop voir dire strategies to address both explicit and implicit biases of prospective jurors[,]" and can "formulate questions that can more thoroughly and realistically evaluate the jurors' answers." *Id.* In contrast, trial judges are more limited to questions akin to "[c]an all of you be fair and impartial in this case?"—a question that "does not begin to address implicit bias, which is by its nature not consciously known to the prospective juror." *Id.*

The charges here implicate areas where prospective jurors could harbor implicit biases. Deroche was charged with a terrible crime: sexually assaulting a child-family member. In the State's words after return of the verdict, "he is now a convicted child molester." (TT3 at 163.) With the increasing social awareness of sexual assault, culminating in national movements such as #MeToo and

#BelieveSurvivors, many prospective jurors may be understandably predisposed to start a trial presuming, consciously or subconsciously, that a person charged with sexual assault is probably guilty unless the defense shows why the alleged victim would fabricate. A juror questionnaire's series of "Yes-No" questions is poorly suited to identifying this sort of presumption, undermining the burden of proof and the presumption of innocence.

Another consequence of the trial court's denial of attorney-led voir dire is that it forced Deroche to exercise uninformed peremptory challenges. Trial attorneys are forced to make life-changing judgment calls about jurors' attitudes, biases, and perceptions based on a stack of juror questionnaires containing limited rank-and-file information like age, education, and occupation. This information gives attorneys little to rely on when deciding when and how to exercise challenges, and pales in comparison to the perspective gathered through attorney-led voir dire. While no system is perfect, attorney-led voir dire would at least have given counsel the tools to better identify what jurors *might* harbor bias and exercise peremptory challenges accordingly.

In sum, we cannot say that the denial of attorney-led voir dire was harmless. Attorney-led voir dire would have almost certainly led to a different jury. And had

Deroche's trial been decided by a different jury, it may well have yielded a different result.

II. The trial court impermissibly allowed evidence and argument implying that Deroche had a burden of proof.

Deroche objected to the prosecutor's comments urging the jury to consider that "[t]here's been absolutely no evidence introduced suggesting that [the alleged victim] had any motive to lie[.]" (TT3 at 96:5-97:13.) He also objected to Schaeffer's testimony that he had no explanation for the alleged victim's allegations. (TT2 at 112-113.) Deroche's evidentiary challenge is therefore reviewed for abuse of discretion, and his prosecutorial error challenge for harmless error. *State v. Osborn*, 2023 ME 19, ¶¶ 19, 21, 290 A.3d 558.

"A closing argument is improper if it conveys a shift in the burden of proof to the defendant or suggests 'that the defendant must present evidence in a criminal trial.'" *State v. Penley*, 2023 ME 7, ¶ 24, 288 A.3d 1183 (quoting *State v. Cheney*, 2012 ME 119, ¶ 34, 55 A.3d 473). To avoid burden shifting, "[a] prosecutor must 'focus . . . on the evidence itself and what the evidence shows or does not show, rather than on the defendant and what he or she has shown or failed to show.'" *Id.* (quoting S*tate v. Chan*, 2020 ME 91, ¶ 25, 236 A.3d 471). "Thus, a prosecutor may say that *the record contains* no evidence to support a proposed finding but may not say that *the defendant failed to provide* evidence to support a

proposed finding." *Penley*, 2023 ME 7, ¶ 24. (quoting *Chan*, 2020 ME 91, ¶ 25) (emphasis in original). Courts have found, for example, that statements like "it's easy to make an accusation and not have to back it up with evidence[,]" *Penley*, 2023 ME 7, ¶ 27, and that the defendant "had no evidence" of someone else committing the crime, *Cheney*, 2012 ME 119, ¶ 35, improperly shift the burden of proof to the defense.

The closing argument here fails this test. Although referencing the lack of evidence of a motive for a witness to testify falsely does not "inherently imply" that the defendant has a burden of proof by itself, a prosecutor may not "link[] the lack of evidence to the defendant." *State v. Lipscombe*, 2023 ME 70, ¶¶ 14-15, 304 A.3d 275. Here, the prosecutor's use of the past participle "introduced" highlight that someone—Deroche—failed introduce evidence of a motive to lie. It was not as if the State was arguing that it proved that the alleged victim has no motive to lie, but instead that nobody introduced evidence to the contrary. And after the trial court overruled defense counsel's objection, the prosecutor went on to point out that "even Christopher Deroche admitted in his interview with Detective Schaeffer that he had no idea why [the alleged victim] would do this[,]" further highlighting the defense's purported failure of proof and linking it to Schaeffer's testimony about Deroche's statements during the interview. (TT3 97-98.)

Next, as an evidentiary matter, "Rule 403 provides that a 'court may exclude evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice.'" *State v. Williams*, 2024 ME 37, ¶ 31, 315 A.3d 714 (quoting M.R. Evid. 403). Highlighting Deroche's inability to explain the allegations to Schaeffer was unfairly prejudicial, because it improperly suggested that Deroche was under a duty to disprove the alleged victim's accusations. As trial counsel noted, Deroche was under no obligation to do so. Moreover, Deroche's statements to Schaeffer lacked foundation, as he had no way of knowing the alleged victim's state of mind. The danger of unfair prejudice from Deroche's statements substantially outweighed the statements' probative value, and it was therefore an abuse of discretion for the trial court to overrule Deroche's objection.

These errors were not harmless. An error is harmless where it is "highly probable" that the error did not affect the outcome. *Cheney*, 2012 ME 119, ¶ 34. Not so here. But for the errors, this trial could have easily gone either way. As recounted in more detail above, the alleged victim substantially modified her story shortly before trial in the May 31, 2024 interview. The evidence also revealed a shoddy police investigation: when Deroche provided Schaeffer with evidence about his scar, Schaeffer did the worst thing possible by telling the alleged victim's mother the questions he planned to ask. In a similar vein, the alleged victim was

shown the defense's photograph of the scar days before trial—depriving the jury of the opportunity to see the alleged victim's memory of the scar tested in cross-examination. But for the burden-shifting errors, a rational jury could find that these issues could have created reasonable doubt as to Deroche's guilt. Moreover, by "straight up overruling" Deroche's objection, the trial judge reinforced to the jury the perception that it could consider Deroche's failure to provide a motive to lie as affirmative evidence corroborating the alleged victim's testimony. It is not "highly probable" that the verdict was unaffected by the burden shifting errors, and this Court should vacate Deroche's convictions and remand for a new trial.

Conclusion

Deroche requests that the Court vacate his convictions and remand for a new trial.

Respectfully submitted,

Dated: May 8, 2025

/s/ Tyler Smith
Tyler J. Smith, Bar No. 4526
Libby O'Brien Kingsley & Champion, LLC
62 Portland Road, Suite 17
Kennebunk, Maine 04043
(207) 985-1815
tsmith@lokllc.com

Certificate of Service

I hereby certify that on the date stated below I caused an electronic copy of this document to be served on the following counsel via email. In addition, upon acceptance of this brief by the Court, two paper copies of this brief will be served on the following counsel.

Sara Shannon, Esq.
Assistant District Attorney
142 Federal Street
Portland, Maine 04101
shannon@cumberlandcounty.org

Chris Coleman, Esq.
Assistant District Attorney
142 Federal Street
Portland, Maine 04101
ccoleman@cumberlandcounty.org

Dated: May 8, 2025

/s/ Tyler Smith
Tyler J. Smith, Bar No. 427
Libby O'Brien Kingsley & Champion, LLC
62 Portland Road, Suite 17
Kennebunk, Maine 04043
(207) 985-1815
tsmith@lokllc.com