STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Docket No. CUM-24-407

STATE OF MAINE,
Appellee,

- against -

CHRISTOPHER DEROCHE,
Appellant,

Appeal from the Unified Criminal Docket for the
County of Cumberland and State of Maine

Brief of the Appellee

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Statement of Facts

The trial court held a motion *in limine* hearing on May 30, 2024 and denied the Appellant's motion for attorney led *voir dire*. A27, 10-12. At that hearing Appellant refused to disclose the substance or nature of his proposed *voir dire* questions for the jury to the trial court. A25, 4. Appellant claimed that would be to "completely show their hand" and that the questions must be kept secret so as not to "disclose aspects of the defense strategy in advance." A25, 5.

The trial court's ruling was based, in part, on the fact that it had 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. A. 28, 13. The trial court offered Appellant an opportunity to follow up with any of the 75 "clean" questionnaires selected saying "if there's something in the questionnaires that rubs you the wrong way." A27, 15. The trial court offered Appellant an opportunity to submit questions for the trial court to pose to the prospective jurors orally at jury selection. A28, 14. The trial court said "any proposed voir dire that you want to ask in the general group, I can do it" and reiterated that "if there's anything else you want me to ask, please send in a set proposed written voir dire by Monday." *Id.* Appellant never submitted any such questions.

Statement of Issues

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

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.

A. Waiver

In Maine waiver "occurs when a defendant voluntarily, knowingly, and intentionally relinquishes or abandons a known right." *State v. True*, 2017 ME 2, ¶ 14, 153 A.3d 106. A waiver of a constitutional right need not be *express* in the record. *State v. Murphy*, 2015 ME 62, ¶ 21, 124 A.3d 647. Waiver may be inferred based on the defendant's conduct given the totality of the circumstances. *State v. Ericson*, 2011 ME 28, ¶ 16, 13 A.3d 777. In deciding whether a particular right has been waived, this Court applies "a bifurcated review. The factual findings made by the trial court are reviewed for clear error, while 'the ultimate issue of waiver' is reviewed de novo." *Id*. ¶ 15 (internal citations omitted).

Maine law mandates that a trial court permit attorney led *voir dire* but it still requires that *voir dire* be done "under its direction." 15 M.R.S. §1258-A (2024). In the instant case, Appellant refused to disclose the questions he intended to ask as part of attorney-led *voir dire* to the trial court and opposing counsel. A25, 5-6. Appellant claimed that would be to "completely show their hand" and that the questions must be kept secret so as not to "disclose aspects of the defense strategy

in advance." A25, 5. Thus, Appellant's only proposal was that attorney-led *voir dire* be conducted *without* direction from the trial court. The fact that Appellant refused to disclose his questions formed "a second reason" that Appellant's suggested *voir dire* procedure risked a mistrial in the eyes of the trial judge. A26, 12. The trial court noted in its ruling that it is particularly problematic "if the questions are not vetted in advance and that the State has had an opportunity to object to it in advance." A26, 11-12.

This Court specifically noted that "[t]he mere circumstance of having the questions put to the jurors by the presiding justice, instead of by defense counsel, does not, without more, constitute prejudicial error warranting reversal of the judgment of conviction" in a case wherein a defendant doesn't assert their rights under § 1258-A. *State v. Bernier*, 486 A.2d 147, 150 (Me. 1985). In *Bernier,* as in the instant case, the defendant failed to properly invoke § 1258-A. When the "totality of circumstances" are examined, Appellant's failure to advance any real right created by the statute effectively relinquished the right. *Ericson*, 2011 ME 28, ¶ 16, 13 A.3d 777. While Appellant claimed to be invoking § 1258-A, the relief he requested was not offered under that statute.

In essence, Appellant only asserted the right to unfettered attorney-led *voir dire*; not § 1258-A's statutory right to attorney-led *voir dire* under the direction of the trial court. Appellant's refusal to provide proposed questions, or even the

general topics those questions would relate to, acted as a waiver of their rights under § 1258-A.

B. Statutory Interpretation

Interpreting § 1258-A is a relatively straightforward matter that this Court has done before. The State's focus is on this Court's interpretation of the language "under its direction". § 1258-A. In interpreting an earlier version of § 1258-A with identical language, this Court observed that "Counsel has no right to conduct voir dire examination outside of the court's direction." *State v. Rancourt*, 435 A.2d 1095, 1099 (Me. 1981). In practice, that means the unfettered right to conduct attorney led *voir dire* being claimed by Appellant is incompatible with § 1258-A.

In *State v. Bowman*, the appeal was based upon Bowman's claim, as follows:

> [The] Superior Court abused its discretion in denying defense counsel the right to conduct the voir dire of prospective jurors. He [based] this argument on 15 M.R.S.A. § 1258–A (1980) which states: 'Any 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.

State v. Bowman, 588 A.2d 728, 729 (Me. 1991). In *Bowman*, this Court found no error where, as in the instant case, the trial court "did conduct the initial voir dire, it

also permitted defendant's counsel to submit questions and to conduct additional voir dire 'under its direction.' We find no error, much less any obvious error." *Bowman*, 588 A.2d at 730.[1] The only salient difference between the instant case and *Bowman* is that in the instant case Appellant opted to not only not submit any follow-up *voir dire* questions, he refused to submit any initial *voir dire* questions either.

The *Rancourt, Rolerson* and *Bowman* Courts read § 1258-A in a way that is consistent with the trial court in the instant case. The language in § 1258-A requiring that the trial court "permit voir dire examination to be conducted by the parties or their attorneys *under its direction*[,]" § 1258-A (emphasis added), is consistent with the language in M.R.U. Crim. P. 24(a) requiring the that the trial court "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).

[1] Another comparable case is *State v. Rolerson*, wherein this Court also found no error (citing *Bowman*) when "[p]rior to trial, the court ordered that voir dire examination of prospective jurors would be conducted by the court using its own questions and questions submitted by counsel, and that after the court's voir dire, counsel would be given an opportunity to suggest additional questions and to request and show cause why some jurors should be questioned individually. Rolerson [asserted] that the court's conduct of the voir dire examination of prospective jurors violated defense counsel's right to conduct voir dire pursuant to 15 M.R.S.A. § 1258-A (1980)." *State v. Rolerson*, 593 A.2d 220, 221 (Me. 1991).

Assuming arguendo that this Court rejects the interpretation of § 1258-A that is mostly consistent with M.R.U. Crim. P. 24(a) based upon traditional statutory interpretation engaged in by the *Rancourt, Rolerson* and *Bowman* Courts, then the cannon of constitutional avoidance still suggests this Court ought to read the above portions of M.R.U. Crim. P. 24(a) and § 1258-A consistently.[2]

"The canon of constitutional avoidance comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction; and the canon functions as a means of choosing between them." *Boumediene v. Bush*, 553 U.S. 723, 787 (2008). It provides that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 173 (2001).

If this trial court were to read § 1258-A in the way being urged by Appellant, that is mandating Appellant be permitted to ask questions on topics only to be revealed for the first-time during attorney led *voir dire*, it would be unconstitutional. First, § 1258-A would fail the constitutional requirement that the

[2] This is a pure hypothetical for the State. The canon of constitutional avoidance has no application in the absence of *real* statutory ambiguity. *United States v. Palomar-Santiago*, 593 U.S. 321 (2021). The portions of the rule and the statute defining the right of *voir dire* itself can and should be read consistently per the above cited cases.

Legislature create "a *suitable* and *impartial* mode of selecting juries." Me. Const. art. I §7. (emphasis added). Second, it would offend the separation of powers because it would tread upon the judicial power bestowed upon the Court by Me. Const. art.VI §1. Such a reading would lead to more *Rancourt*s and fewer of Maine's ever more precious judicial resources, thus threatening a court's ability to regulate "that which is essential to its existence and functioning as a court*." In re Dunleavy*, 2003 ME 124, ¶ 18, 838 A.2d 338.

The only direct conflict between the statute and the rule is the language "shall permit" as opposed to "in its discretion may" in § 1258-A and M.R.U. Crim. P. 24(a), respectively. The fact that the trial court in this matter did not permit Appellant to conduct *voir dire* as he wished does not implicate this conflict. That is because the trial court offered Appellant the same underlying right defined by both rule and statute. The trial court invited Appellant to submit additional questions that were to be generated by Appellant. That suffices the trial courts obligation to "permit voir dire examination to be conducted by the parties or their attorneys under its direction." § 1258-A. *See Bowman*, 588 A.2d at 729.

Due to the separation of powers concerns identified by the State below, § 1258-A does modify M.R.U. Crim. P. 24(a) in that it constrains the trial court from conducting *voir dire* without an opportunity for defendants and their attorneys to submit questions which, if germane to a juror's qualifications and not otherwise

offensive to judicial economy, juror privacy and the boundaries of relevance, ought to be asked in some fashion by either the trial court or the party who submitted the question. However, submitting questions is precisely what Appellant refused to do in this case.

C. Abuse of Discretion Analysis

This Court reviews "the trial court's conduct of voir dire for an abuse of discretion, affording the trial court considerable discretion over the conduct and scope of juror voir dire." *State v. Bethea*, 2019 ME 169, ¶ 16, 221 A.3d 563. Recognizing that the "purpose of voir dire 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" the *voir dire* process must be "sufficient to disclose facts that would reveal" the relevant bias in prospective jurors. *State v. Lowry*, 2003 ME 38, ¶ 7, 819 A.2d 331.

On this record, the trial court did not abuse its discretion. How could the trial court honor its "responsibility of balancing the competing considerations of fairness to the defendant, judicial economy, and avoidance of embarrassment to potential jurors" without even knowing what questions would be asked? *State v. Woodburn*, 559 A.2d 343, 344 (Me. 1989). How could the trial court evaluate whether Appellant's questions were "germane to the jurors' qualifications" if the

questions had to be kept secret? M.R.U. Crim. P. 24(a). The trial court's reliance upon specialized questionnaires in conjunction with a general oral questionnaire, and the opportunity for follow up inquiry under the court's direction was sufficient to disclose any facts which might reveal juror bias.

This Court has ruled as such in the past in a case wherein the defendant argued on appeal that "the use of the written questionnaire without further individual oral voir dire in the area of sexual abuse denied him the opportunity to evaluate the demeanor of each juror who gave negative answers to the questionnaire." *Woodburn*, 559 A.2d at 344. The Court noted that although "cases involving allegations of sexual abuse of a child are potentially ripe for juror bias, we have expressly rejected the proposition that individual voir dire be mandated in all such cases." *Id*. at 345. This Court ruled that "there was no abuse of discretion in the trial court's decision to put in written form those questions dealing with matters of potential embarrassment to the jurors" citing legitimate concerns about juror privacy. *Id.*

The trial court's articulated concerns about responses to the secret questions causing a mistrial were well placed. In the past that process had become an avenue for advocacy unconstrained by the rules of evidence. [3] It also aggravates the danger

[3] Historically that has been an issue for Maine's trial courts. "After the court conducted a general voir dire of the entire jury panel, the court at first permitted counsel to question the individual panel members. Defense counsel's

that potential jurors "cannot be expected invariably to express themselves carefully or even consistently." *Skilling v. United States*, 561 U.S.358, 397 (2010). That danger, articulated by the United States Supreme Court, was echoed by the trial court. A27, 11. At best, the process would hinder a trial court's ability to maintain judicial economy.[4] At worst, it will allow unsubstantiated claims and disinformation to reach the jury in the sheep's clothing of a question. Finally, allowing probing personal questions an affirmative response to which necessitates "the revelation by a juror of sensitive personal or family history" creates a real danger of juror embarrassment. *Woodburn*, 559 A.2d at 345. The trial court was unable to assess that danger because of the secrecy surrounding Appellant's proposed questions. That embarrassment can affect the veracity of jurors' statements jeopardizing the litigant's access to a fair trial with an impartial jury.

D. Maine's Formal Separation of Powers

Assuming arguendo that this Court finds that there was no waiver and that § 1258-A must be read as conflicting with M.R.U. Crim. P. 24(a), then it will need to resolve a constitutional conflict of laws. When it is alleged that a particular government action violates the separation of powers enshrined in Me. Const. art. III § 2, this Court must first inquire: "has the power in issue been explicitly granted

first question recited the facts to which, counsel represented, the defendant would testify. The state objected, and the juror was excused for cause." *Rancourt*, 435 A.2d at 1098.

[4] "Finally, after completing the questioning of only eight individual jurors, over the span of an afternoon and the following morning, the trial court terminated voir dire by counsel." *Rancourt*, 435 A.2d at 1099.

to one branch of state government, and to no other branch? If so, article III, section 2 forbids another branch to exercise that power." *State v. Hunter*, 447 A.2d 797, 799–800 (Me. 1982). Put another way, the question is "whether there is a 'textually demonstrable constitutional commitment' of the issue to another branch of the government." *Id.* at 800 n.4 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

The Maine Constitution has two textually demonstrable commitments of the power to regulate jury selection. The first is Me. Const. art. I § 7 which states that the "Legislature shall provide by law a suitable and impartial mode of selecting juries." Me. Const. art. I § 7. And the second is Me. Const. art.VI § 1 which grants the "judicial power" to a "Supreme Judicial Court, and such other courts as the Legislature shall from time to time establish." Me. Const. art.VI § 1.

This is where the principle of statutory interpretation recognized in *Butler v. Killoran*, 1998 ME 147, 714 A.2d 129, is relevant. Me. Const. art. I § 7's grant of power is more specific than the general grant afforded to the judicial branch per Me. Const. art.VI § 1.[5] Ergo, the State concedes that § 1258-A ought to control wherein a clause conflicts with M.R.U. Crim. P. 24(a). However, the State observes that the remaining language in M.R.U. Crim. P. 24(a), which does not

[5] General though it may be, there can be no doubt that the Maine Constitution's grant of the judicial power includes the right to promulgate rules of criminal procedure and evidence. Absent the type of specific grant of constitutional power represented by Me. Const. art. I, § 7, the Court appears to be constitutionally supreme in that arena. The Maine Constitution does not define the judicial power, but this Court has held that the inherent power of the Supreme Judicial Court "arises from the very fact that it is a court and connotes that which is essential to its existence and functioning as a court." *In re Dunleavy*, 2003 ME 124, ¶ 18, 838 A.2d 338.

conflict with § 1258-A, remains valid law set on the firm constitutional and statutory grounds of Me. Const. art.VI § 1 and 4 M.R.S. § 9.

E. Harmless Error Analysis

Assuming arguendo that the trial court's conduct during *voir dire* constitutes an abuse of its discretion, any resulting error was harmless. The United States Constitution guarantees the right of an accused "to a speedy and public trial, by an *impartial* jury." U.S. Const. amend. VI (emphasis added); *see also* Me. Const. art. I, § 6 (guaranteeing the right to a "speedy, public and *impartial* trial") (emphasis added). The Due Process Clause also guarantees this right. *See* U.S. Const. amend. XIV, § 1; *Morgan v. Illinois*, 504 U.S. 719, 727 (1992); *see also* Me. Const. art. I, § 6-A.

The trial court's denial of Appellant's motion for attorney-led *voir dire* did not prejudice Appellant's right to an impartial jury. According to this Court the "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. Roby*, 2017 ME 207, ¶ 11, 171 A.3d 1157. In selecting a jury, the trial court has "considerable discretion over the conduct and scope of juror voir dire" because only the trial court "has the responsibility of balancing the competing considerations of fairness to the defendant, judicial economy, and avoidance of embarrassment to potential jurors." *Woodburn*, 559 A.2d at 344.

This Court has also made it clear that trial courts are "not required to conduct voir dire precisely in the manner requested by a defendant so long as the voir dire process is sufficient to disclose facts that would reveal juror bias." *Bethea*, 2019 ME 169, ¶ 16, 221 A.3d 563.

The Supreme Court of the United States has previously held that attorney led *voir dire* is not essential for due process. In *Skilling v. United States*, the Court denied Skilling's assertions that *voir dire* "did not adequately detect and defuse juror bias" and that "several seated jurors prejudged his guilt." *Skilling v. United States*, 561 U.S. 358, 385 (2010) (internal quotations omitted). *Skilling* dealt with the fallout of the Enron conspiracy and the case was being covered by the media so its pre-trial publicity potentially threatened Skilling's ability to select an impartial jury. The Court analyzed the issue in terms of *voir-dire*.

The *Skilling* Court noted that "[n]o hard-and-fast formula dictates the necessary depth or breadth of *voir dire*.... Jury selection … is 'particularly within the province of the trial judge.'" *Id.* at 386 (citing *Ristaino v. Ross*, 424 U.S. 589, 594–95 (1976). In *Skilling*, the *voir dire* process was found constitutionally valid because, as in the instant case, the trial court "initially screened venire members by eliciting their responses to a comprehensive questionnaire drafted in large part by [the defendant]. That survey helped to identify prospective jurors excusable for cause and served as a springboard for further questions … [*v*]*oir dire* thus was …

the culmination of a lengthy process*." Id.* at 388 (internal quotations omitted). In Appellant's case, the ability to select only so-called *clean* jurors meant there was no need to springboard to any further questions.

The Supreme Court agreed that that process "secured jurors who were largely untouched by Enron's collapse[,]... no connection at all to Enron" or "at most an insubstantial link." *Id.* at 389. As a result, "Skilling, we conclude, failed to show that his *voir dire* fell short of constitutional requirements." *Id.* at 395. In her concurrence, Justice Sotomayor went so far as to say ""I also express no view with respect to court-led versus attorney-led *voir dire*. Federal Rule of Criminal Procedure 24(a) gives district courts discretion to choose between these options, and I have no doubt that either is capable of producing an impartial jury even in high-profile cases so long as the trial court ensures that the scope of the *voir dire* is tailored to the circumstances." *Skilling v. United States*, 561 U.S. 358, 452 n.13 (2010) (Sotomayor, J., concurring in part and dissenting in part).

In the instant case, the trial court submitted a written questionnaire to all of the jurors prior to the date of jury selection. One of the questionnaires was probative of prospective jurors' history with and feelings about sexual assaults generally and one focused on sexual assaults committed by an adult against a child. The parties were able to review all jury questionnaires prior to jury selection. The trial court excluded anyone who answered in a way that suggested the potential

presence of bias and proceeded to jury selection using the "clean" jurors only. When invited by the trial court, Appellant refused to provide the substance or nature of his proposed additional *voir dire* questions in advance.

For those reasons, even if the trial court abused its discretion to preclude Appellant from utilizing attorney led *voir dire*, that error was harmless. An error is harmless where it is "highly probable" that the error did not affect the outcome. *State v. Cheney*, 2012 ME 119, ¶ 34, 55 A.3d 473 (citing *State v. Clark*, 2008 ME 136, ¶ 7, 954 A.2d 1066). In the instant case, the jury selection process utilized methods that have been approved of by both this Court and the United States Supreme Court. Given Appellant's unwillingness to share the questions he intended to ask the prospective jurors, Appellant received "as fair and impartial a jury as possible." *Roby*, 2017 ME 207, ¶ 11, 171 A.3d 1157.

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.

A. The Burden of Proof and the Burden of Persuasion

Appellant also alleges that the trial court impermissibly allowed evidence and argument implying that Appellant had a burden of proof. Appellant claims this failure was the culmination of two instances during the trial when, in Appellant's view, the burden was shifted by the State. First, during the State's direct

examination of its lead investigator, over Appellant's objection, the attorney for the State was allowed to elicit testimony that Appellant affirmatively stated that he did not know why the complaining witness was, according to Appellant, fabricating her story when the Detective directly asked Appellant if he was able to think of such during a recorded interview. Tr. 2 at 112-113. Appellant also alleges that the State crossed the line again during its closing, which Appellant duly objected to, when the attorney for the State observed that there was no evidence *introduced* suggesting that the complaining witness had any motive to lie.

This Court has recognized that "[s]hifting the burden of proof to the defendant or suggesting that the defendant must present evidence in a criminal trial is improper closing argument." *Cheney*, 2012 ME 119, ¶¶ 34-35, 55 A.3d 473 (adding that the State can, however, "forcefully argue to the jury that the evidence does not support or is not consistent with the defendant's theory of the case"). However, "a prosecutor's reference to the lack or absence of evidence of a motive for a witness to testify falsely does not inherently imply that the defendant has a duty or obligation to present evidence of motive*." State v. Lipscombe*, 2023 ME 70, ¶ 14, 304 A.3d 275.

In the instant case, the attorney for the State made the same argument he made in the *Lipscombe* case. In *Cheney*, the prosecutor repeatedly made statements specifically referring to Cheney's failure to introduce evidence; "*they* had no

evidence." *Cheney*, 2012 ME 119, ¶ 33, 55 A.3d 473 (emphasis added). Whereas the attorney for the State in both *Lipscombe* and the instant case made no such reference. His reference to the evidence "introduced" in the instant case was neutral and was unlikely to imply that Appellant had any burden. There is no allegation that the statement was not reflective of the facts on the record. It was simply a reference to the final state of the evidence once both parties had closed. That would be especially clear when the trial court had properly instructed the jury about the burden of proof during its opening and closing instructions to them.

Appellant's suggestion that the State shifted the burden of proof during its direct examination of the lead investigator is also untrue. The State cannot shift a burden which it never carried. In Maine there are "three broad categories of criminal defenses—affirmative defenses, justification defenses, and failures of the State's proof—that differ primarily based on the allocation of the parties' respective burdens." *State v. Ouellette*, 2012 ME 11, ¶ 8, 37 A.3d 921.

The defense being raised by Appellant was a failure of proof defense. Appellant argued "that there is a failure of proof by the State, that is, that the State has failed to meet its burden to establish beyond a reasonable doubt one or more of the elements of the crime charged." *State v. LaVallee–Davidson*, 2011 ME 96, ¶ 12, 26 A.3d 828. Specifically, Appellant argued that the complaining victim fabricated the event. "When a defendant generates [a failure of poof] defense, the

burden does not shift to the State" to disprove that defense as it does with affirmative and justification defenses. *State v. Jaime,* 2015 ME 22, ¶ 32, 111 A.3d 1050. Nor was Appellant required to meet a preponderance of the evidence burden to generate his defense as he would have been had it been an affirmative or justification based defense.[6] *See* 17-A M.R.S. § 101. Therefore, "as in all criminal cases, the State's burden remains the same throughout the trial—to prove beyond a reasonable doubt all elements of the crime charged." *Jaime,* 2015 ME 22, ¶ 32, 111 A.3d 1050.

If Appellant wanted the jury to believe some ancillary fact that implied the complaining witness had a motive to fabricate their story then Appellant still bore the burden of persuasion to convince the jury of that fact as it is not an element of the crime. Unlike in the context of affirmative or justification defenses however, there would be no particular burden of proof to which Appellant was required to persuade the finder of fact of.

[6] "In asserting a failure of the State's proof, the defendant argues that the State has not established one or more elements of the crime beyond a reasonable doubt, but the defendant himself has no burden. An affirmative defense, in contrast, places the burden of persuasion on the defendant to establish certain facts by a preponderance of the evidence." *State v. Villacci*, 2018 ME 80, ¶ 10 n.6, 187 A.3d 576 (citing *State v. Ouellette*, 2012 ME 11, ¶ 8, 37 A.3d 921, 925); *see* 17–A M.R.S. § 101(2) (2011). Finally, a justification places on the defendant a burden of production to generate an issue with sufficient evidence, and then imposes on the State the burden of persuasion to disprove the defense. *State v. LaVallee–Davidson,* 2011 ME 96, ¶ 13, 26 A.3d 828. *See* 17–A M.R.S. § 101(3) (2011); *State v. Millett,* 273 A.2d 504, 508 (Me.1971*).*

Finally, Appellant's argument that "in most cases the State cannot rely on a defendant's silence as evidence of guilt" is well taken but the State notes that Appellant did not remain silent when questioned by the lead investigator. *State v. Williams*, 2024 ME 37, ¶ 35, 315 A.3d 714. Instead the testimony was that once provided the timeline of the disclosure, Appellant affirmatively acknowledged that he could not think of a reason why the complaining witness would implicate him. Appellant's statements did not lack foundation because they were asked in a way that was probative as to Appellant's then existent state of mind and any facts he was aware of. Again, "the lack or absence of evidence of a motive for a witness to testify falsely does not inherently imply that the defendant has a duty or obligation to present evidence of motive*." State v. Lipscombe*, 2023 ME 70, ¶ 14, 304 A.3d 275. Appellant waived his right to remain silent and he understood that his statements could and would be used against him.

B. Harmless Error

Finally, assuming arguendo that this Court finds that Appellant's second assignment of error was in fact error, that error was harmless. An error is harmless where it is "highly probable" that the error did not affect the outcome. *Cheney*, 2012 ME 119, ¶ 34, 55 A.3d 473. Here, the brief reference during closing was sufficiently innocuous in that, because the trial court gave clear instructions regarding the burdens of proof, there is no reason to believe that Appellant's jury

failed to understand that burden. Further, if it was error to allow the State to elicit testimony regarding the Appellant's perception that the complaining witness had no motive to fabricate the accusation then that error too was clearly harmless because it was but a small part of a long trial in which Appellant was able to aggressively cross examine the complaining witness and the investigator to expose any suggestion of bias. Under those circumstances it cannot be said that it would be "highly probable" that the error would affect the outcome of the trial. *Id.*

Conclusion

For the reasons set forth above, the State asks that this Honorable Court deny all assignments of error alleged by Appellant and affirm the conviction of the Jury. The record in this case does not reveal any abuse of discretion by the trial judge. Indeed, he had little choice but to deny Appellant's motion for attorney led *voir dire* connected as it was with the demand for secrecy surrounding the proposed questions. Appellant's conduct acted as an implicit waiver of his rights under 15 M.R.S. § 1258-A.

The Attorney for the State's closing argument did not impermissibly shift the burden of proof to Appellant. The use of the word "introduced" without more is not sufficient to confuse the jury about that burden, especially when contextualized with the trial court's instructions regarding the proper burden of proof in a criminal

case. It is proper for the State to point out the lack of evidence corroborating a defense theory. The State did not comment on Appellant's silence; in that regard, it commented on the affirmative statements Appellant made about the complaining witness' motive.

The conflict between 15 M.R.S. § 1258-A and M.R.U. Crim. P. 24(a) has caused confusion for litigants caught in the middle. This Court's inability to reach a majority opinion in *State v. Healey*, 2024 ME 4, 307 A.3d 1082 has only sown further lack of clarity. Any conflict between two branches of government in a representative democracy can only serve to diminish them both. It is this litigant's prayer that this Court collaborate with the Legislature to synthesize 15 M.R.S. § 1258-A and M.R.U. Crim. P. 24(a) in a way that forces trial courts to consider the social science referred to in Appellant's brief while protecting the sanctity of the Court's discretion.

DATED: 6/20/2025

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CERTIFICATE OF SERVICE

I, Christopher Coleman, hereby certify that a true copy of the above Appellee's Brief was sent to Appellant's attorney Tyler J. Smith, Esq. by virtue of email this June 20, 2025.

6/20/2025

X Christopher J. Coleman

Christopher J. Coleman
Assistant District Attorney
Signed by: Christopher Coleman