STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

DOCKET NO. PIS-24-424

STATE OF MAINE

APPELLEE

v.

TERRI MOULTON

APPELLANT

ON APPEAL FROM THE PISCATAQUIS COUNTY UNIFIED CRIMINAL DOCKET, DOVER-FOXCROFT, ME

BRIEF OF APPELLEE

R. Christopher Almy
District Attorney

Mark A. Rucci
Assistant District Attorney
Bar No. 5796

Prosecutorial District V
97 Hammond Street
Bangor, ME 04401
(207) 942-8552
mark.rucci@maineprosecutors.com

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STATEMENT OF THE FACTS

In February of 2022, Anson Dewitt, part owner of Dewitt Machine and Fabrication Company, received a call from the branch manager of Camden National Bank. (I Tr. 47-49.); (II Tr. 98-99.) She had noticed discrepancies in the Dewitt Machine and Fabrication business account and needed him to come to the bank. (I Tr. 49.) This phone call presaged a nightmare scenario for the Dewitt's and their company. Review of the accounts revealed that a long-time company employee, the appellant Terri Moulton, had stolen hundreds of thousands of dollars from the company through ATM withdrawals using her company issued debit card, forged checks, and online purchases with the company's card. (I Tr. 50, 53-54, 59-60, 65-66.) Later that day, Anson Dewitt confronted Moulton. (I Tr. 53-54.) In the first of a series of confessions presented to the jury, Moulton told Dewitt that she had taken the money because she "needed stuff." (I Tr. 53.) She asked Dewitt not to call the police and said she would pay the money back. (I Tr. 54.) She later sent him two text messages admitting her misdeed and reiterating that she would pay the company back. (I Tr. 113, 117.)

Dewitt did call the police. (I Tr. 112.) The case was assigned to Guy Dow of the Piscataquis County Sheriff's Department. As part of his investigation, Dow spoke with Moulton in a recorded interview. State's Exhibit 12; (III Tr.

169-70.) In that interview, played for the jury in its entirety, Moulton again admitted to theft, specifically acknowledging payments to one Brad McKechnie, which, when compared to Camden National Bank records, totaled well over the $10,000 threshold required for class B theft. *See* State's Exhibit 1; *See* State's Exhibit 12, 8:40-17:10. Ultimately, an employee of the District Attorney's Office reconciled the accounts and arrived at thefts totaling well over $500,000. (III Tr. 135, 137-38, 140-43, 147.)

Moulton was charged by complaint with theft (Class B) and forgery (Class B) on April 25, 2022. (A. 3.) An initial appearance was held on April 28, 2022. (A. 4.) Moulton was indicted on June 30, 2022, and entered pleas of not guilty at arraignment on July 11, 2022. (A. 5.) On December 19, 2022, Moulton filed a motion to compel discovery, seeking Quickbooks online login information. (I Tr. 14.); (A. 6.) That motion was withdrawn on January 30, 2023. *Id.*

The matter proceeded to trial beginning on July 22, 2024. (I Tr. 3.) Prior to the jury being brought in, Moulton moved to exclude any financial information in the case, telling the court for the first time since filing its original motion to compel that it never received login information for the Dewitt Quickbooks account. (I Tr. 4-5.) Upon inquiry, the prosecutor represented that he never had the Quickbooks password and thus could not provide it. (I Tr. 15-17.) The trial court (*Roberts, J.*) denied the motion, reasoning that the original

written motion had been withdrawn and that the request was untimely. (I Tr. 13-14, 18.) Moulton also moved that the judge recuse himself from hearing the trial, arguing that the judge had previously worked under the prosecutor for the State. (I Tr. 3-4.) The judge denied the motion, reasoning that he could be fair and impartial because he and the prosecutor worked in separate offices for much of that time, had not had a personal relationship since he took the bench many years prior, and because this was a jury trial where he would not be acting as the finder of fact. (I Tr. 4.)

The prosecutor's theme of the trial was trust and betrayal, and he referenced those words throughout his opening statement and closing and rebuttal arguments. (I Tr. 29, 35.); (IV Tr. 43, 87-88.) His theory was that Moulton, who had worked for the company since 2008 or 2009 and who enjoyed a close personal relationship with the Dewitt family, had betrayed the significant trust placed in her by stealing from the company over the course of several years. *Id.*; (II Tr. 96.); (III Tr. 49.) Defense counsel objected to one instance in rebuttal where the prosecutor stated that Moulton had betrayed her employer. (IV Tr. 88.) ("That's really sad. That's a betrayal.") Moulton did not object to any other use of the prosecutor's theme.

In his closing argument, the prosecutor told the jury that they were not to consider what punishment, if any, would be imposed upon a guilty verdict.

(IV Tr. 33.) Moulton objected, arguing that any mention of punishment was inappropriate. *Id.* The court overruled the objection and later instructed the jury that "[they] should not be concerned about the consequences of any verdict [they] may reach." (IV Tr. 95.) The prosecutor also reminded the jury that they had heard multiple confessions from Moulton. (IV Tr. 22.) He suggested rhetorically that the jury might be wondering why Moulton was having a trial in light of her confessions. *Id.* He then immediately told the jury that was not their concern; that everyone has a right to trial that the jury needed to respect. *Id.* Moulton objected and moved for a mistrial, which was denied. (IV Tr. 23-24.)

The jury trial concluded on July 25, 2022. (A. 11.) The jury found Moulton guilty as to both counts in the State's indictment. *Id.* She was sentenced on September 16, 2024, to nine (9) years with all but four (4) years suspended and three (3) years of probation. (A. 12-13.) This appeal timely followed. (A. 14.)

STATEMENT OF THE ISSUES PRESENTED

I. Whether the prosecutor committed error warranting reversal as to multiple statements made over the course of his opening statement and closing and rebuttal arguments, when the trial court overruled multiple objections?

A. Whether the prosecutor improperly referenced Moulton's right to have a trial?

B. Whether the prosecutor erred by telling the jury that it was not to consider what punishment, if any, Moulton would receive in the event of a guilty verdict?

C. Whether the prosecutor erred in consistently reiterating his theme that this was a case about trust and betrayal?

II. Whether the trial court abused its discretion in denying Moulton's motion to recuse, when the trial court was not the factfinder?

III. Whether the prosecutor committed a discovery violation when, after Moulton withdrew her discovery motion seeking a Quickbooks password the prosecutor did not have, the prosecutor did not acquire that password and provide it to Moulton?

ARGUMENT

I. The prosecutor did not commit error warranting reversal as to multiple statements made over the course of his opening statement and closing and rebuttal arguments, when the trial court overruled multiple objections.

This Court views "allegations of prosecutorial [error] in the overall context of the trial." *State v. Tripp*, 2024 ME 12, ¶ 25, 314 A.3d 101 (quoting *State v. Dolloff*, 2012 ME 130, ¶ 44, 58 A.3d 1032). "'[P]rosecutors [must] walk a careful line' due to the 'competing obligations' of making 'unflinching and assertive efforts to prosecute those who are alleged to have committed crimes' and 'avoid[ing] inviting a jury to make its decision based on bias, prejudice, conjecture, or any other impermissible basis.'" *Id.* (quoting *Dolloff*, 2012 ME 130, ¶¶ 40-41, 58 A.3d 1032). Certain types of comments "almost always" constitute prosecutorial error, including so-called witness vouching, burden shifting, "injecting personal opinion regarding the guilt or credibility of the accused," and "[m]aking statements pandering to jurors' sympathy, bias, or prejudice . . . ." *Dolloff*, 2012 ME 130, ¶ 42, 58 A.3d 1032 (internal citations omitted). Even where an isolated comment itself does not warrant reversal, this Court considers the cumulative effect of multiple instances of prosecutorial error. *See State v. Sholes*, 2020 ME 35, ¶ 9, 227 A.3d 1129 (citation omitted).

This Court reviews preserved objections to a prosecutor's comments for harmless error. *Dolloff*, 2012 Me 130, ¶ 32, 58 A.3d 1032. In conducting harmless error analysis, this Court "review[s] to determine whether there was actual misconduct . . . and, if so, whether the trial court's response remedied any prejudice . . . ." *Id.* (internal citation omitted). "Finally, [this court] determine[s] whether, if error exists, it was harmless." *Id.*; *see* M.R. Crim. P. 52(a) ("Any error . . . that does not affect substantial rights shall be disregarded.") An error affects substantial rights when "the error was sufficiently prejudicial to have affected the outcome of the proceeding." *Id.* ¶ 33 (citation omitted). This Court "determine[s] the effect of error by looking to 'the totality of the circumstances, including the severity of the misconduct, the prosecutor's purpose in making the statement (*i.e.,* whether the statement was willful or inadvertent), the weight of the evidence supporting the verdict, jury instructions, and curative instructions.'" *Id.* (quoting *U.S. v. De La Paz-Rentas*, 613 F.3d 18, 25 n. 2 (1st Cir. 2010)). The State carries the burden of persuasion in harmless error review. *Id.* ¶ 34.

Unpreserved errors are reviewed for obvious error. *Id.* ¶ 35. This inquiry asks whether there is "(1) an error, (2) that is plain, and (3) that affects substantial rights." *Id.* (quoting *State v. Pabon*, 2011 ME 100, ¶ 29, 28 A.3d 1147). "Even if these three conditions are met, [this Court] will set aside a jury's

verdict only if [it] 'conclude[s] that (4) the error seriously affects the fairness and integrity or public reputation of judicial proceedings.'" *Id.* Moulton bears the burden in establishing obvious error. *Id.* ¶ 39.

A. The prosecutor did not improperly reference Moulton's right to have a trial.

Moulton first alleges that the prosecutor committed error by stating in closing, "[n]ow, you might [ask] . . . the defendant in this case confessed, so why are we having a trial? We need to understand that we need to respect the process. Everybody is entitled to have a trial. We need to respect that right that this defendant has." (IV Tr. 21-22.) Moulton timely objected, and this comment is reviewed for harmless error.

Moulton's argument that the State "insinuat[ed] that the defendant did not actually have the right to a trial" is unsupported by the record. (Blue Br. 13.) The State expressly conveyed the exact opposite, instead telling the jury that Moulton was "entitled to a trial . . . ." (IV Tr. 21-22.) The prosecutor repeated that phrase twice. (IV Tr. 22.) As the prosecutor noted in response to Moulton's objection, "I am not saying anything different from what the law is."

(IV Tr. 23.) This is true, and the prosecutor's statement was not error, let alone harmful error.[1]

To the extent there was error, it was harmless. The comment was isolated, and the trial court instructed the jury that closing arguments are not evidence, (IV Tr. 95.), and that Moulton was cloaked throughout trial with the presumption of innocence. (IV Tr. 103.) Finally, Moulton made a tape-recorded confession to Guy Dow of the Piscataquis County Sheriff's Office. *See* State's Exhibit 12, 4:20-4:30, 6:05-6:40, 8:40-17:10, 21:40-23:30. Any error was not "sufficiently prejudicial to have affected the outcome" of the trial, and the verdict of the trial court should be affirmed.[2] *Dolloff*, 2012 ME 130, ¶ 33, 58 A.3d 1032.

B. The prosecutor did not err in telling the jury that it was not to consider what punishment, if any, Moulton would receive in the event of a guilty verdict.

Moulton next alleges that the prosecutor erred by telling the jury that "one of the things you are not here to do is decide what punishment there is, if any . . . ." (Blue Br. 13.); (IV Tr. 33.) Moulton objected through counsel, and this

[1] Contrary to Moulton's assertion, the statement also did not inject the prosecutor's opinion into the case. The comment was based fairly upon evidence that Moulton had made several admissions of theft. (I Tr. 53-54, 113, 117.); State's Exhibit 12.

[2] To illustrate the point, during her video recorded interview, Moulton admitted to making payments to a Brad Mckechnie, who was working on her vehicle. *See* State's Exhibit 12, 15:15-17:10. Those payments are reflected in Camden National Bank Records entered in evidence as State's Exhibit 1. They alone total well over the class B theft value of $10,000.

statement is reviewed for harmless error. *See Dolloff*, 2012 ME 130, ¶ 32, 58 A.3d 1032.

As above, the prosecutor correctly stated the law and committed no error in stating that the jury decides only the question of guilt and does not address punishment. It is not error for the prosecutor to "mention" punishment, as asserted in Moulton's brief. It is error for the prosecutor to either impliedly or expressly charge the jury with punishing Moulton or holding her accountable. *See State v. White*, 2022 ME 54, ¶ 24, 285 A.3d 262 (citing *State v. Begin*, 2015 ME 86, ¶¶ 6, 27-28, 120 A.3d 97). Here, the prosecutor told the jury that this was *not* their role. That was proper argument not rising to the level of any error, let alone harmful error.

Moulton again states that the prosecutor improperly inserted his personal opinion into the argument. Again, this claim is unsupported. In context, the prosecutor told the jury that "[y]our job is to decide what the facts show and then take the facts as you find them and . . . apply it to the law, then come to a verdict." (IV Tr. 33.) After that, he told the jury that punishment was not theirs to determine and that they were there to determine "whether the defendant is guilty or not." *Id.* This statement constitutes accurate, appropriate

instruction to the jury that was consistent with the judge's later instructions. There was no error, and the verdict should be affirmed.[3]

C. The prosecutor did not err by consistently reiterating his theme that this was a case about trust and betrayal.

Prosecutors often try to align themselves with the jury by selecting a compelling theme: a word or phrase that serves as a summary of the "core" of the State's case. In this case, where a decades-long employee and self-described member of the company family embezzled hundreds of thousands of dollars, the prosecutor chose as his theme two words: trust and betrayal.

Moulton argues that the prosecutor erred in returning to his theme multiple times in opening, closing, and rebuttal, but she fails to point to any principle of law suggesting that this is so. As the court noted, the prosecutor did not comment on the decision to testify, shift the burden of proof, or make any argument that was not permissibly based upon the evidence. (IV Tr. 92.) Instead, he returned repeatedly to a theme that was clearly supported by the evidence: trust and betrayal. Far from being an inappropriate commentary on the evidence, the prosecutor's actions in repeatedly emphasizing his theme and theory of the case would be lauded by every trial practice law professor in the

[3] As to harmless error, the State reasserts and incorporates its argument made *supra.*

country. There was nothing wrong with his emphasis on these words, and the verdict of the trial court should be affirmed.[4]

II. The trial court did not abuse its discretion in denying Moulton's motion to recuse, when the trial court was not the factfinder?

"[R]ecusal 'is a matter within the broad discretion of the trial court.'" *State v. Atwood*, 2010 ME 12, ¶ 20, 988 A.2d 981 (quoting *Johnson v. Amica Mut. Ins. Co.*, 1999 ME 106, ¶ 11, 733 A.2d 977). A judge must recuse if his or her "impartiality might reasonably be questioned," but "the 'mere belief' that a judge might not be completely impartial is insufficient to warrant recusal." *Id.* ¶ 21 (quoting *DeCambra v. Carson*, 2008 ME 127, ¶ 8, 953 A.2d 1163) (quoting *Johnson*, 1999 ME 106, ¶ 11, n. 1, 733 A.2d 977). A judge's decision not to recuse is reviewed for abuse of discretion. *Id.* ¶ 20.

Here, the judge denied the motion and noted that he had not been employed by the Office of the District Attorney for nearly nine years, worked in a separate office from the prosecuting attorney for much of his tenure, had not had a personal relationship with the prosecuting attorney since leaving the office, and was not the factfinder in the present matter. (I Tr. 4.) This decision

[4] To the extent one of these statements, (IV Tr. 87-88.), was preserved and thus subject to review for harmless error, the State reasserts and incorporates its argument made *supra.*

was not an abuse of discretion, and the verdict of the trial court should be affirmed.

To the extent the court erred in declining to recuse, the error was harmless. As argued both *supra* and *infra*, the judge's rulings in the case were legally correct. In addition, the judge was not the factfinder in the case. He did not make the determination of guilt. Thus, any failure to recuse was not "sufficiently prejudicial to have affected the outcome of the proceeding." *Dolloff*, 2012 Me 130, ¶ 33, 58 A.3d 1032 (citation omitted).

III. The prosecutor did not commit a discovery violation when, after Moulton withdrew her discovery motion seeking a Quickbooks password the prosecutor did not have, the prosecutor did not acquire that password and provide it to Moulton.

"[A] defendant may make a written request to have the State provide any . . . electronically stored information . . . that [is] material and relevant to the preparation of the defense." M.R. Crim. P. 16(c)(1). The State must respond within a reasonable time. M.R. Crim. P. 16(c)(2). When the State objects to a request, the defendant "may file a motion with the court, asking that the court order the State to provide any . . . electronically stored information . . . that the defendant has requested and that [is] material and relevant to the preparation of the defense." M.R. Crim. P. 16(d)(2). However, it is a defense to a request for discovery that the material sought is "not within the possession or control of

the State . . . ." M.R. Crim. P. 16(c)(2)(C). Under the rules, a hearing is only contemplated when the State *objects* to a request to produce discovery. M.R. Crim. P. 16(d)(2). This Court "afford[s] the trial court substantial deference in overseeing the parties' discovery, and review[s] its decisions on alleged discovery violations only for an abuse of discretion." *State v. Silva*, 2012 ME 120, ¶ 8, 56 A.3d 1230 (citation omitted).

The trial court did not abuse its discretion in declining to sanction the State for the alleged discovery violation of failing to produce a Quickbooks password that was not within its possession or control. First, as the trial court noted, the motion was untimely and otherwise not properly preserved because the written motion, which is required pursuant to M.R. Crim. P. 16(d)(2), was withdrawn.[5] (I Tr. 13, 18.) Moulton first moved to compel production of Quickbooks passwords on December 19, 2022. (I Tr. 13.) The motion was withdrawn on January 30, 2023. *Id.* While the parties apparently argued over production of the password in the interim, the issue was not raised with the trial court until the first day of trial, which occurred on July 22, 2024, approximately eighteen months after the motion was withdrawn. The trial court correctly concluded that nothing prevented Moulton from filing a

[5] Because Moulton withdrew her motion, even if this court find that the judge abused his discretion in denying the motion, the issue is reviewed for obvious error. *Pabon*, 2011 ME 100, ¶ 29, 28 A.3d 1147 (Obvious error is "(1) an error, (2) that is plain, and (3) that affects substantial rights.")).

subsequent motion to compel upon the prosecutor's written refusal to produce the password, made no later than January 19, 2024. (I Tr. 18.) Trial did not start for another six months. As the Court noted, by the time the issue was raised a jury was empaneled and trial was about to begin. *Id.*

In addition, the trial court did not err because the State did not violate its discovery obligations. The documents at issue did not constitute automatic discovery because the State was not seeking to use them. M.R. Crim. P. 16(a)(2)(F). Further, the State is not obligated to provide information that is not within its custody or control. *State v. Hassan*, 2018 ME 22, ¶¶ 15-19, 179 A.3d 898 (discussing the limits of a prosecutor's automatic discovery obligations). Under Rule 16, the State may respond to a request for discovery that "the requested material is not within [its] possession or control." M.R. Crim. P. 16(c)(2)(C). Upon inquiry, the State represented, and Moulton does not challenge, that it did not have access to the company's Quickbooks password. That is the end of the inquiry.

Had Moulton wanted to compel production of the password at issue, she was not without recourse. When a defendant seeks information from an alleged victim that is not within the State's possession or control, the proper course of action is to seek production by issuing a subpoena to a records custodian under M.R. Crim. P. 17(c).

Moulton's motion for discovery sanctions was untimely and not preserved for appellate review. The State did not violate its discovery obligations, and the verdict of the trial court should be affirmed.

CONCLUSION

None of the prosecutor's comments in this case, taken either individually or in their totality, constituted error, much less harmful error. The prosecutor's statements in opening, closing, and rebuttal correctly stated the law and were tied to the evidence. Likewise, the trial judge did not abuse his discretion in declining to recuse himself from a case prosecuted by an individual with whom he worked nearly a decade prior, particularly where the case was to be decided by a jury. Finally, the State did not violate its discovery obligations in declining to turn over a password that it never had, particularly where the motion to compel production of that password was withdrawn and not revisited until the day of trial. To the extent any of the preserved objections stated above constituted error, such error was harmless in light of Moulton's multiple confessions to theft and the overwhelming evidence as to her culpability. The jury verdict should be affirmed.

Respectfully Submitted,

Dated: May 16, 2025

/s/ Mark A. Rucci

Mark A. Rucci, Esq.
Assistant District Attorney
Prosecutorial District V
Maine Bar No. 5796

97 Hammond St.
Bangor, ME 04401
(207) 942-8552

CERTIFICATE OF SERVICE

As required by M.R. App. P. 7(c)(1), I have this 16th day of May, 2025 sent a native .pdf version of this brief to the Clerk of the Law Court and attorney Neil Prendergast at the email address of record. Upon acceptance by the Clerk of the Law Court, I will deliver ten hard copies to the Law Court and two copies to opposing counsel Neil Prendergast at PO Box 263, 34 East Main St., Fort Kent, ME 04743.

/s/ Mark A. Rucci
Mark A. Rucci Esq.
Bar No. 5796
Assistant District Attorney
Maine Bar No. 5796