
MAINE SUPREME JUDICIAL COURT SITTING AS THE LAW COURT

LAW COURT DOCKET NUMBER: Aro-25-417

State of Maine v. Timothy Burns

ON APPEAL FROM THE UNIFIED CRIMINAL COURT AROOSTOOK

BRIEF OF APPELLANT TIMOTHY BURNS.

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Defendant was charged with a single count of Unlawful Sexual Contact, Class D by Complaint on or about January 1, 2023. (Appendix, [hereinafter App.,] at 3). A warrant was issued for Defendant which was executed on or about May 22, 2023. Defendant appeared at arraignment and plead not guilty on or about July 6, 2023. (App. 3-4). On the date Defendant entered his not guilty plea, the single count complaint alleged dates of offense on or between November 1, 2021, and January 31, 2022. (App. 20). That date was later amended on or about August 8, 2025, by the State without objection from Defendant. (App. 20). Defendant had multiple different attorneys throughout the process, and his matter was not reached for trial until August 2025 when trial was held over a two-day period between

August 21 and 22, 2025. (Trial Transcripts, Volume One and Two, [hereinafter T.T. Vol. I, Vol II.,]). On or about August 22, 2025 the Jury returned a guilty verdict. (App. 12).

Prior to trial, Defendant, through counsel, filed a Motion to Compel Discovery on or about April 27, 2025. (App. 10). That Motion referenced Maine Rule of Criminal Procedure 16(d)(2) and requested electronic records contained in what is known as the "Spillman" system, an electronic system which stored police reports for all of Aroostook County law enforcement. (App. 21-24). A hearing on that Motion was held on or about May 30, 2025. (App. 11). At the hearing, multiple witnesses testified regarding Defendant's request and Defendant had an Exhibit entered into the record. (Motion Transcript, [hereinafter M.T]) Both witnesses were called by Defendant and they were respectively, Caleb Jandreau, the investigating officer and Jesse Belanger, the system administrator for the Spillman system. (M.T. 2, 9, 17).

Mr. Jandreau testified that he took the initial report in this case but that he could not recall whether he wrote anything down at the time. (M.T. 10-11). He did recall that the person in the case was Mother of the alleged victim. (M.T. 10-11). Mr. Jandreau also testified that here was a report date, of August 9, 2022 with a time stamp of 19:05:12, which Mr. Jandreau stated was likely when the incident was called in. (M.T. at 12). Mr. Jandreau also testified that there was an "original narrative" dated December 22, 2022 with a time stamp of 19:07:19. (M.T. 14). Mr.

Jandreau further testified he didn't recall what date he requested a warrant. (M.T. 15).

Jesse Belanger, the system administrator testified that the Spillman system is a comprehensive law enforcement records management suite which is used by every law enforcement Agency in Aroostook County. (M.T. 18) He testified that all the information contained by the Spillman system is housed on the same computer system. (M.T. 18). Mr. Belanger further testified that the Spillman system records just about everything, and that as an administrator, he would be able to look back and see all changes made to the original narrative in this case. (M.T. 19). He further testified that each officer has their own password, and that Spillman records changes to pretty much anything that happens within the system. (M.T. 19). In regard to the specifics of this defendant, Mr. Belanger testified he found an original version with two new modifications. (M.T. 21).

Mr. Belanger further testified that in a recent case, he had exported a series of change logs from the Spillman system (M.T. 20). He testified that extracting that information took him half and hour to an hour, but that an approximate time it would take generally for reports to be generated would be approximately an hour. (M.T. 25).

After the testimony of these two witnesses, Defendant' s counsel argued that it was ". . . our position is these are discoverable." (M.T. 29). "We don't think we should have to file a motion to compel and be in here every couple of weeks with

Mr. Belanger testifying." (M.T. 29). "That's the State that's not giving us those reports (which is) causing us to have to do that." (M.T. 29). Defense counsel argued, “It’s a police report. It's squarely within automatic discovery, and we should receive that. . . " (M.T. 36) discovery rules aside, even if we didn't have discovery rules, the district attorney should have to review this for exculpatory information. (M.T. 30). And if there are any changes to that report that . . even changes of wording, things that the defense can use, we don't have to accept the State's, or the officer's claim,. (M.T. 30). Defense counsel further argued the “State can't block us from getting discovery by choosing who has access to their information, and then telling us that it's too burdensome because they can decide whether it's burdensome or not. . . and then as far as time for Mr. Belanger to be here, the State could just give me the reports.” (M.T. 29). The trial court denied the Motion to Compel Discovery in a written order on or about June 5, 2025. (App. 11, 31-33).

At trial, the State called M.W., Child A’s Mother. (T.T. Vol. I, 27-57). During her testimony, M.W. testified regarding her living situation during specific dates. (TT. Vol. 1.). She stated that she and Defendant and her children were living at the same address, for a short period of time between six months and a year. (T.T. Vol. I, 28, 30). She stated her address was 21 School Avenue in Limestone at or near the end of November

of 2021. (T.T. Vol. I, 27). She further testified that in January 2019 that she and Defendant had ended the relationship and that by 2021, it was just M.W. and the two children living with her. (T.T. Vol. I, 30, 31). She also stated that she had immediately called the police when she became aware of the allegations made by Child A. (T.T. Vol. I, 32) M.W. also testified that she had given written statement to the police during August of 2022. (T.T. Vol. I, 33). She also testified that Defendant was out of the home for about two and a half years before Child A approached her about the incident alleged in the complaint. (T.T. Vol. I, 33-35).

M.W. was then cross-examined by Defense counsel. (T.T. Vol. I, 36-43) The State was given the opportunity for re-direct. (T.T. Vol. I, 43-44) The State then indicated to the court it did not have any further questions for M.W. . (T.T. Vol. I, 44). M.W. was allowed to leave the courtroom, and the court took a recess. (T.T. Vol. I, 45-46). At the end of the recess, the attorney for the State pointed out that there had been an issue with the testimony M.W. had given regarding the time frame Defendant was living in the house. (T.T. Vol. I, 46).

The attorney for the State then said he approached M.W. in the hallway and that, he had approached her about her recollection and testimony. (T.T. Vol. I, 46) The attorney for the State then stated that M.W. had gotten a

protective order; that his office had gotten a copy of the protective order and shown it to her, and the State having shown M.W. the same protective order wished to call her to the stand again, regarding the dates when Defendant was living in M.W. 's home. (T.T. Vol. I, 46).

When the court further inquired about the nature of the conversation the attorney for the State had with M.W., it became clear that the interaction between the attorney for the State and M.W. had been one where the Defense was not present. (T.T. Vol. I, 47). The States attorney stated he wished to refresh M.W. 's recollection with a court document (the protective order) regarding when the relationship ended. (T.T, Vol. I, 47).

The Defense objected on multiple grounds stating that the State "has now essentially talked to their witness and is trying to get a second bite at the apple because their witness didn't say what they wanted the first time." (TT. Vol. I, 47). After a brief colloquy, the Defense attorney further stated "there wasn't anything according to the witness that needed to be cleared up when she testified. . . She testified that when he was in the house and when he wasn't in the house. She didn't say she needed help with that. . . And so she shouldn't be allowed to be recalled for that purpose." (T.T. Vol. I, 48).

The court made the observation that . . "the prior testimony from the witness was, well, he was gone in 2019. And and .. and there weren't questions, you know, further up on that (T.T. Vol. I, 49). The attorney for the State replied there's

nothing nefarious about the State talking to a State's witness to get clarification in order to try to make sure that the jury has accurate information. (T.T,. Vol. I, 49). The trial court made various statements comparing this situation to refreshing the witnesses' recollection stating "And so it is accurate that the witness's recollection has been refreshed in the hall. (T.T. Vol. I, 52).The trial court ruled the State would be allowed to call M.W. back to the stand (T.T. Vol. I, 50). M.W. then gave testimony that she recalled Defendant leaving the home in January of 2022. (Not 2019 or 2021). (T.T. Vol. 1, 54).

Prior to closing statements in the case, the Court had a recess where it spoke to counsel regarding numerous matters including jury instructions before the case was sent to the jury. (T.T. Vol. II, 3-19). During that recess, the court took time to note that " .. this isn't .. wasn't part of the record in this particular case. . .the Court has expressed more than discomfort with phrasing, "we know" this, "we know" that, in terms of closing. (T.T. Vol. II, 19). "And I had mentioned that, in terms of the Court's concern that that's vouching as it relates to comments on the evidence." (T.T. Vol. II, 19). "Whereas a party can clearly argue the evidence shows or simply argue this occurred, in arguing what the evidence shows." (T.T. Vol. II, 19). I just want to make sure that .. and I know it's .. in terms of style, that might be difficult. But I want to make sure to flag that to try to avoid those issues. (T.T. Vol. II, 19). "And I understand there's disagreement with the Court's ruling in that regard." T.T. Vol. II, 19). "But nonetheless, that's the Court's view." (T.T. Vol. II, 19).

During the first part of the State's closing, the prosecuting attorney used the phrase "we know" addressing various aspects of the evidence. (T.T. Vol. II, 36-37). The phrase "we know" was used three times prior to the Defense's first objection, which was sustained. (T.T. Vol. II, 36). Prior to the first objection, the phrase was used to highlight the date range and what the State referred to as "substantive evidence that you get to rely on that she was only 14 and that what happened wasn't right because she was only 14. . . and "we know" that defendant moved out of the house in January of 2022. So that's the time frame that we have in that (Child A) was each one of those stages. (T.T. Vol. II, 36). "We know" that (Objection). (T.T. Vol. II, 36)

The phrase "we know" was again used prior to a second objection which was again sustained. (T.T. Vol. II, 37-38). This time the phrase was used in conjunction with testimony stating " And he put his hands on her vagina in that manner that she described on the video. (T.T. Vol. II, 37). "We know" part of the evidence showed that (Objection). (T.T. Vol. II, 37).

The phrase "we know" was then used twice prior to the third objection, in congruence with the statement. " Victim , being 14 years old and in the home of her mom, M.W. and M.W. engaged in a relationship with the defendant, proves that Victim was not married to the defendant. (T.T. Vol. II, 37-38). (Objection). The State also emphasized during its closing that it only needed the testimony of Child A for the Jury to find the Defendant guilty. (T.T. Vol.

II, 38). More specifically, the State noted that no corroboration of Child A's testimony was necessary, no medical evidence needed to be provided and that no additional witnesses needed to be called for the State to prove the allegations in the complaint. (T.T. Vol. II, 38).

Defendant, through counsel filed at timely Appeal. (App. 15).

III. STANDARD OF REVIEW

A. When a defendant contends that a discovery violation and the court's response to it violated the defendant's right to a fair trial, this court reviews the trial court's procedural rulings to determine whether the process struck a balance between competing concerns that was fundamentally fair." *State v. Lowery*, 2025 ME 3, ¶ 25, 331 A.3d 268. This court reviews the denial of a Motion for Discovery for an abuse of discretion. *State v. Lepenn*, 2023 ME 22, ¶ 23, 295 A.3d 139.

B. Absent an abuse of discretion which interferes with the rights of a party to a fair trial, this court will uphold the trial court's decisions concerning the scope and manner of examination of witnesses. *State v. McKenna,* 1998 ME 49, ¶ 3, 707 A.2d 1309 (Me. 1998). Under the abuse of discretion standard, this court upholds decisions unless they are made without a rational explanation, inexplicably depart from established policies, or rest on an impermissible basis. Any error of law is,

inherently, an abuse of discretion. *State v. Hussein*, 2019 ME 74, ¶ 10, 208 A.3d 752.

C. If the defendant objected at trial, this court reviews the prosecutor's comments for harmless error. *State v. Osborn*, 2023 ME 19, ¶ 21, 290 A.3d 558, 566. This court reviews claims of prosecutorial error "in the overall context of the trial." *State v. Ayotte*, 2019 ME 61, ¶ 13, 207 A.3d 614. "[T]he State has the burden of persuasion on appeal in a harmless error analysis." *State v. Nightingale*, 2023 ME 71, ¶ 27, 304 A.3d 264.

IV. ARGUMENT

A. The Court Erred in Denying Defendant' s Motion to Compel Discovery

Maine Rule of Unified Criminal Procedure 16(a) requires the State's attorneys to produce, through automatic discovery,

> (2) *Duty of the Attorney for the State*. The attorney for the State shall provide the following to the defendant:
>
> > (A) The *police report(s)* and any other documents used by the prosecutor in deciding to charge the defendant.. . .
> >
> > (F) Any books, papers, documents, *electronically stored information*, photographs (including motion pictures and video tapes), tangible objects, buildings or places, or copies or portions thereof, that the attorney for the State intends to use as evidence in any proceeding or that were obtained or belong to the defendant.

> (I) Written or recorded statements of witnesses and summaries of statements of witnesses contained in *police reports* or similar matter. M.R.U. Crim. P. 16(a)(2). (emphasis added).

That information is required to be provided "within 7 days after the arraignment or entry of a written plea of 'not guilty.'" M.R.U. Crim. P. 16(b)(2).

The defendant may make a written request of the State for materials beyond those required to be produced as part of automatic discovery. M.R.U. Crim. P. 16(c)(1). If the State objects to that request, the defendant can file a motion asking the court to order the State to provide the additional discovery. M.R.U. Crim. P. 16(d)(2). Imposing disclosure obligations on the State serves to "enhanc[e] the quality of the pretrial preparation of both the prosecution and defense and diminish[] the element of unfair surprise at trial, all to the end of making the result of criminal trials depend on the merits of the case rather than on the demerits of lawyer performance on one side or the other." *State v. Green*, 2024 ME 44, ¶ 12, 315 A.3d 755.

The rule imposes an initial duty on the defendant to "show that the items sought may be material to the preparation of his defense and that the request is reasonable." *State v. Lepenn,* 2023 ME 22, ¶ 22. "This requirement precludes a fishing expedition by the defense into the prosecution file, and requires the defendant to show necessity for the inspection. Id. Something more than a bare allegation by the defendant or his counsel that the items are material and the request is reasonable will be required.". Once the necessity is shown, "if the

request is reasonable, the court must order the prosecuting attorney to permit the inspection.” Id.

The primary concern of Rule 16, in the absence of bad faith on the part of the State, is to "protect the defendant from any unfair prejudice.” *State v. Green,* 2024 ME 44, ¶ 11-12. Thus, both Rule 16 and Brady impose an obligation on the State's prosecutors to provide information "known to" the State, i.e., information that is within the State's "possession or control." *State v. Hassan,* 2018 ME 22, ¶ 22, 179 A.3d 898. As of 2018, Rule 16(a)(2)(D) imposed a specific duty on prosecutors: they must provide to defendants "any matter or information known to the attorney for the State that may not be known to the defendant and that tends to create a reasonable doubt of the defendant's guilt as to the crime charged. *State v. Hassan,* 2018 ME 22, ¶ 21, This language requires the State to disclose "evidence [that] is material either to guilt or to punishment," which includes "impeachment evidence as well as exculpatory evidence.” Id.. Furthermore, both Brady and Rule 16 require prosecutors to "make a diligent inquiry" of investigators to determine if such "automatically discoverable information does exist in their files." *State v. Hassan,* 2018 ME 22, ¶ 21.

The State's obligation to produce evidence "extend[s] to evidence that the defense could have used to impeach the prosecution's key witnesses.” *State v. Williams,* 2022 ME 24, ¶ 9, 272 A.3d 304. A defendant's due process rights are violated when the prosecution withholds evidence favorable to him.”Id.

The due process concepts articulated in *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). require the State to disclose to the defendant evidence that is "favorable to the accused, either because it is exculpatory, or because it is impeaching . . . ." *State v. Twardus*, 2013 ME 74, ¶ 32, 72 A.3d 523 (quoting *Strickler v. Green*e, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999)). Rule 16(c), in contrast, requires the disclosure of items, including video recordings, that are "material and relevant to the preparation of the defense." M.R.U. Crim. P. 16(c). The Committee Advisory note to Rule 16(c) lucidly distinguishes the State's Rule 16(c) obligation from its Brady obligation. See M.R.U. Crim. P. 16 committee advisory note, Dec. 2014. *State v. Reed-Hansen*, 2019 ME 58, ¶ 13,207 A.3d 191

The materiality of undisclosed evidence is considered collectively. *State v. Twardus*, 2013 ME 74, ¶ 31. For a jury verdict to be overturned on appeal based on an alleged discovery violation, the alleged violation must have prejudiced the defendant to the extent that it deprived [the defendant] of a fair trial." *State v. McBreairty*, 2016 ME 61, ¶ 19, 137 A.3d 1012; When a defendant contends that a discovery violation and the court's response to it violated a defendant's right to a fair trial, this the trial court's procedural rulings to determine whether the process struck a balance between competing concerns that was fundamentally fair." *State v. Lowery*, 2025 ME 3, ¶ 25.

In issuing a decision, the trial court issued a three page decision denying the Motion to Compel. (App. 31-33). In its decision, the court did not address any of the Defendant's argument regarding Automatic Discovery. (App. 31-33). Additionally, the court made the finding". . there is nothing to indicate that the actual report information has not been disclosed in discovery." (App. 31-33). In its decision, the court also stated that the Defendant had failed to show that the requested information was "Material and Relevant." (App. 31-33). The court made finding that there were "two changes to the original narrative in question" (App. 31-33). The stated there no indication that there were any inconsistencies, deletion of any information or any substantive changes. (App. 31-33). The court's decision also likened the Defendant's requests for this information to be a "fishing expedition." (App. 31-33).[1]

Presumably, on the face of the Maine Rules of Criminal Procedure, the electronic records and prior versions of police reports which were requested by the Defense were arguably automatic discovery under Rule 16 and should have been turned over without a specific request. More specifically, prior versions or unedited versions of different versions police reports and any notes or changes or additions made to the computerized file qualified as automatically discoverable

[1] The court also chose to address the Defendant's Motion to Compel which was brought under Rule 16(d)(2) as a Motion under Rule 16(c)(1).

under 16(a)(2)(A) or (I) or alternatively under 16(a)(2)(F) as that rule requires the disclosure of electronically stored information.

Rule 16(a)(2)(A) mentions police reports which are used in the charging decision. M.R.U. Crim. P. 16(a)(2)(A). Presumably, all of the versions of the police reports in this matter were used in the charging decision, if nothing else because the officer's testimony indicated that there was an initial report some time in August of 2022, and then later a warrant request. (M.T.10-15).[2] Stated another way, the original information which was provided was, in fact, used in the charging decision in the matter. (M.T. 10-15). Given that there were changes made in December 22, 2022, approximately one month prior to the warrant request, different versions of the reports were likely discoverable automatically.

In turn, Rule 16(a)(2)(I), requires disclosure of written or recorded statements of witnesses and summaries of statements of witnesses contained in *police reports* or similar matter. M.R.U. Crim. P. 16(a)(2)(I). Again, the rule does not seemingly differentiate between different versions of reports and requires disclosure of all of the witness statements and summaries. In this case, that likely would have required the first version of what was in the Spillman system which was entered in August and whatever final version was provided by the hearing, date of May 5, 2025. It is also worth noting that none of the subdivisions of the

[2] Also, the docket record indicates that the initial complaint was filed on or about January 25, 2023 (App. 3), which would have meant that any versions of the report prior to the warrant request were used in the charging decision.

rule in any way indicate that a final report without other versions of the same report is qualify as sufficient under the rule. Even if one were to accept the fact that whatever was in the Spillman system did not qualify as police reports, the information still would have required the disclosure of electronic modifications to the law enforcement's computerized file.

More specifically, M.R.U. Crim. P. 16(a)(F) requires the disclosure of electronically stored information. M.R.U. Crim. P. 16(a)(2)(I). Based upon the testimony of the system administrator, every law enforcement Agency in Aroostook County uses the Spillman system and all the information for the Spillman system is housed on the same computer system. (M.T. 18). The system records just about everything, and an administrator would be able to look back and see all changes made to the original narrative in this case. (M.T. 19). Apparently, there were at some point changes made to the file involving Mr. Burns where there were original versions with two modifications. (M.T. 21). There is nothing in the face of the rule which states that electronically stored information such as the above would somehow be excluded under the rules, or not be discoverable automatically.

By way of example, if a defendant received a police report which was redacted where lines were physically"blacked out" the information which was removed would be discoverable, under both *Brady* and also the *Maine Rules of*

Criminal Procedure. The present situation is no different, with the exception that the records are or were electronic, instead of physical.

Setting aside the requirements automatic discovery, M.R.U. Crim. P. 16(d)(2) allowed the Defense to request materials it had previously requested under the rules. From the record, the Defense had previously requested the information under 16(b)(7) and not received a response. (App.). (M.T. 30). In addition to Defendant's counsel's arguments regarding automatic discovery, Defendant's counsel also argued that the court could compel the disclosure of the same requested information. (M.T. 29-36).

Not insignificantly, well prior to trial, defense counsel argued in writing that "A log of changes made to a police report will almost necessarily contain prior inconsistent statements of police officers. (App. 24) Even if the state offers a good faith explanation for why the reports were changed, the defense is not required to accept that explanation and is still entitled to ask the jury to infer from the changes that the reports were edited deliberately to hide evidence or make the defendant appear more likely to be guilty, or were the result of incompetence or sloppiness on the part of the police during their investigation." (App. 24). Ultimately, given that Child A was the State's sole complaining witness on almost all of the elements of the crime, any changes to her narrative or her Mother's narrative or to an investigating officer's narrative would have been material, relevant and crucial to a defense.

To buttress the argument regarding the electronically stored information in the Spillman system, Defendant' s counsel provided an Exhibit and the testimony of law enforcement's system administrator which both demonstrated when law enforcement wanted to investigate change logs in the Spillman system such an investigation was a relatively simple matter. (App. 27-30). In fact, the Exhibit which was provided contained detailed information that Aroostook County law enforcement was easily able to obtain change records for the Spillman system when it became clear that a law enforcement officer did, retroactively modify a report in the Spillman system to disguise his own involvement in the disappearance of an individual. (App. 27-30). Apparently, any officer can modify any report at any given time given they have current credentials to access the Spillman system. There is no explicit indication in any reports that the same report have or have not been retroactively modified.

Stated another way, the Defense argument and exhibit demonstrated when law enforcement chose to investigate the contents of a report which was provided to the District Attorney's office using the Spillman system to pull prior reports and change longs to demonstrate critical changes to a police report, such an undertaking was a relatively simple matter. The same investigation revealed that a law enforcement officer had modified a report to give false and dishonest information to the District Attorney's office. However, in this case when the State

decided not to disclose change records electronic information or prior reports or information, the trial court accepted a non-disclosure of identical information.

If there had been nothing useful to the defense in the Spillman system and it would have taken an hour or so to pull the information requested as the System Administrator testified, it would have likely taken less time to simply have the reports and information pulled instead of having the administrator appear to testify after preparing for court and having a hearing which took nearly an hour on May 30. 2025, from 8:43 AM to 9:38 AM. (M.T. 3, 37). More importantly, if the Defense was able to get the system administrator in this case to review the electronic files in some capacity prior to the motion hearing, there was nothing preventing the system administrator from simply producing the information requested.

Additionally, at the beginning of the hearing on May 30, 2025, the court placed on the record that the State had not filed any response to the Motion to Compel, one which would have been required under M.R.U. Crim. P. 16(d)(2) within seven days.[3] (M.T. 4). From a conversation held on May 30, 2025, there had apparently been a prior oral objection to the Motion, but there was no written response filed (M.T. 4) and the timing of the oral objection as likely also required under the Maine Rules of Criminal procedure seven days of the Motion to Compel was unclear. (App. 10-11.). For the purposes of the Maine Rules of Criminal

[3] M.R.U. Crim. P. 16(d)(2) states "The State shall respond to any such motion within 7 days."

Procedure, there was never any debate that the information in the request was in the State's possession or control. (See M.T. generally).

In sum, the Defense requested discovery in a timely fashion under the rules. The information requested was in the State's possession or control. The Defense made a specific and targeted request under the rules and did so in a timely fashion. The request was more than an exploratory request, and did not seek any information outside of information which was already part of the State's electronic file. When the state did not provide the information or file a written response under the rules, the Defense then filed a timely motion requesting the trial court compel the release of the previously requested and intentionally undisclosed information. The trial court then did not effectively address any of the Defendant's arguments regarding automatic discovery. The trial court found in error and abused its discretion when it concluded the requested information was not material or relevant, and finally that the request was a fishing expedition. (App. 31-33). [4] The Court allowed a discretionary non-disclosure of information by the State and likely erred under both a Brady analysis and the Maine Rules of Criminal Procedure, despite the fact that once Defendant showed the material was relevant,

[4] This is especially true given that under the court's analysis, there would, in effect be only one way that any defendant would ever be able to access such electronic information under the rules: if, when, and only when Law Enforcement or the District Attorney's office decided to make such records available. The only other alternative would seemingly be when a Defendant without access to the materials would before, during or after trial be able to prove that the material contained in the Spillman system qualified under *Brady* or the rules by obtaining it from another source. The entire point of the discovery process and the requirements under *Brady* is that neither party gets discretion to choose whatever they wish to disclose as the Rules impose disclosure requirements on *both* the State and Defendants as well.

the court was required under the Rule to order the production of the information. The trial court abused its discretion and Defendant was deprived of a trial which was not fundamentally fair.

This court should reverse the verdict in this matter.

B. The Trial Court Erred When it Allowed One of the State's Witnesses to be Recalled to the Stand during the State's Case in Chief

The trial court is vested with broad discretion in controlling the mode of examining witnesses." *Ricci v. Delehanty*, 1998 ME 231, ¶ 17, 719 A.2d 518 (Me. 1998); see M.R. Evid. 611(a). Absent an abuse of discretion which interferes with the rights of a party to a fair trial, we will uphold the trial court's decisions concerning the scope and manner of examination of witnesses. *State v. McKenna,* 1998 ME 49, ¶ 3, 707 A.2d 1309 (Me. 1998). This court reviews evidentiary rulings for clear error and an abuse of discretion." *State v. Hinkel,* 2017 ME 76, ¶ 7, 159 A.3d 854. *State v. Hunt,* 2023 ME 26, ¶ 50, 293 A.3d 423. Additionally, this court reviews trial court's decisions to permit witnesses testimony an abuse of discretion. *State v. Bellavance,* 2013 ME 42, 65 A.3d 1235.

Under the abuse of discretion standard, this court upholds decisions unless they are made without a rational explanation, inexplicably depart from established policies, or rest on an impermissible basis. Any error of law is, inherently, an abuse of discretion. *State v. Hussein*, 2019 ME 74, ¶ 10, 208 A.3d 752 (Me. 2019).

This court has held that a witness may revive her memory and achieve a present recollection from any type of writing (or other article) which might tend to serve the purpose. *State v. Robbins*, 2019 ME 138, ¶ 36, 36215 A.3d 788. However, in using a document to refresh a witnesses recollection the proponent must lay a proper foundation to first establish a lack of memory. Id. The only question is (whether the document used) is genuinely calculated to revive the witness's memory. Id. This court reviews a trial court's ruling on this issue de novo. Id.

In this particular case, the first witness in the case, M.W., Child A's mother testified regarding when Defendant had resided in her home. (T.T. Vol I. 27-36). During her testimony, she initially stated that in January 2019 that she and Defendant had ended the relationship and that by 2021, it was just M.W. and the two children (including Child A), living with her. (T.T. Vol. I, 30, 31). When she gave her testimony, the complaint, which had been previously modified at the request of the State had the date of offense described as taking place on a series of dates between November 18, 2021 and January 31, 2022. (App. 20). Seemingly, despite the State's opening statement and theory of the case, the testimony which M.W. gave placed the dates when Defendant was living with her squarely outside the date range in the complaint. (App. 20) During the first portion of her direct testimony, M.W. never testified she did not recall this date range, nor did she testify that she was having a memory lapse. (T.T. Vol I. 27-36). Then, after

cross-examination, and re-direct she was allowed to step down and leave the stand. (T.T. Vol I. 44)

M.W. was then approached in the hallway by the State's attorney who spoke to her, and then she was allowed to re-take the stand and give testimony which supported the date range in the complaint contradicting exactly what she had just previously stated under oath. During the discussion regarding M.W. retaking the stand the language the court used was steeped in the idea of a refreshed recollection. However, there was never a proper foundation to first establish a lack of memory, nor was there an offer that the document M.W. was shown was calculated to revive a lacking memory. Instead, after M.W. testified confidently regarding dates which did not match the dates in the complaint, then she was then allowed to then modify her story to match the allegations in the complaint over an objection.

While the trial court was vested with broad discretion in controlling the mode of examining witnesses it did not clearly verbalize any rule of evidence or point of law as to why the State should have been able to present a witness, then excuse the witness, speak to the witness and then call the witness back to the stand with no lapse in memory and have the same witness modify her recollection to match the charging instrument.

In sum, the court erred and abused its discretion in allowing M.W. to retake the stand. Additionally, the court erred and abused its discretion in allowing

the State to claim that there was a memory issue under the Maine Rules of Evidence, as no foundation was laid to show that she could not recall. Furthermore, the court made an error and abused its discretion when conflating the conversation the State's attorney had in the hallway with M.W. as one where M.W. 's recollection needed to be refreshed. This court should reverse the verdict in this matter.

C.The Prosecutor's Statements In Closing Were Error and not Harmless Error

A criminal defendant has a right to a fair trial, which is protected by the United States and Maine Constitutions. U.S. Const. amends. VI, XIV, § 1; Me. Const. art. I, § 6. *State v. Poulin*, 2016 ME 110, ¶ 25, 144 A.3d 574, 580 (Me. 2016). Under this court's primacy approach, when an appellant raises a claim under both the Maine Constitution and the United States Constitution, this court will address the claim under the Maine Constitution first. *State v. Athayde*, 2022 ME 41, ¶¶ 20-21, 277 A.3d 387 (Me 2022). If the state constitutional provision provides the relief sought by the defendant, then there is no federal violation. *Id*. ¶ 21.

There are specific types of statements that a prosecutor should avoid making in the jury's presence. *State v. Dolloff*, 2012 ME 130, ¶ 42, 58 A.3d 1032, 1045. Existing case law enumerates several types of statements made by a prosecutor, or

defense counsel, that will almost always be placed into the category of "misconduct," including the following:

> • Misrepresenting material facts in the record or making statements of material fact unsupported by any evidence,; *State v. Gould,* 2012 ME 60, ¶ 17, 43 A.3d 952 (Me. 2012).
>
> • Using the authority or prestige of the prosecutor's office to shore up the credibility of a witness, sometimes called "vouching," *see State v. Williams,* 2012 ME 63, ¶ 46, 52 A.3d 911;
>
> • Shifting the burden of proof on an issue to the defendant, *see United States v. Glover,* 558 F.3d 71, 76–79 (1st Cir.2009);
>
> • Making statements pandering to jurors' sympathy, bias, or prejudice, *see State v. Burgoyne,* 452 A.2d 393, 396–97 (Me.1982);
>
> • Injecting personal opinion regarding the guilt or credibility of the accused or other witnesses, *see State v. Schmidt,* 2008 ME 151, ¶¶ 16–17, 957 A.2d 80; and
>
> • Making unfounded and inflammatory attacks on the tribunal or opposing counsel. *State v. Dolloff*, 2012 ME 130, ¶ 42

Although this is not an exhaustive list, it encompasses many of the types of statements that will likely constitute prosecutorial misconduct in a criminal trial. In each instance, the core element of the offending statement is that it urges or encourages the jury to make its decision based on something other than the facts that have been properly presented at trial and reasonable inferences that can be drawn from those facts. *State v. Dolloff*, 2012 ME 130, ¶ 42

If the defendant objected at trial, this court reviews the prosecutor's comments for harmless error. *State v. Osborn*, 2023 ME 19, ¶ 21, 290 A.3d 558,

566 (Me. 2023). This court will affirm the conviction if it is highly probable that the jury's determination of guilt was unaffected by the prosecutor's comments." *State v. Cheney*, 2012 ME 119, ¶ 34; This court reviews claims of prosecutorial error "in the overall context of the trial." *State v. Ayotte*, 2019 ME 61, ¶ 13, 207 A.3d 614 (Me. 2019).

"[T]he State has the burden of persuasion on appeal in a harmless error analysis." *State v. Nightingale*, 2023 ME 71, ¶ 27. Harmful error is error that affects the "criminal defendant's substantial rights," see *State v. Pabon*, 2011 ME 100, ¶ 34, meaning that "the error was sufficiently prejudicial to have affected the outcome of the proceeding," Id. (citing *United States v. Olano*, 507 U.S. 725, 734, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993)).[5] This court reviews the denial of a motion for a mistrial for an abuse of discretion. *State v. Begin*, 2015 ME 86, ¶ 25, 120 A.3d 97, 103 (2015).

This Court determines 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." *State v. Dolloff*, 2012 ME 130, ¶ 33. This court review serious instances of prosecutorial error cumulatively and in context. See *State v. Dolloff*,

[5] When a trial has been infected by prosecutorial error, we are free to require a new trial based on our supervisory power regardless of the strength of the evidence against the defendant when necessary to preserve the integrity of the judicial system and to send a message that such conduct will not be tolerated. *State v. White*, 2022 ME 54, ¶ 35.

2012 ME 130, ¶ 74, (citing to article I, section 6-A of the Maine Constitution.) When a trial has been influenced by prosecutorial error, this court may require a new trial based on its supervisory power regardless of the strength of the evidence against the defendant when necessary to preserve the integrity of the judicial system and to send a message that such conduct will not be tolerated. *State v. White*, 2022 ME 54, ¶ 35, 285 A.3d 262 (Me. 2022).

By statute and rule, federal appellate courts vacate judgments only if the error at trial affects a party's substantial rights, i.e., the error at trial was not harmless. 28 U.S.C.S. § 2111 (LEXIS through Pub. L. No. 117-214); Fed. R. Crim. P. 52(a). Under both Maine and federal law, there are two types of trial errors: (1) those that are structural, in which prejudice is presumed, triggering vacatur; and (2) those that are nonstructural, triggering an analysis as to the impact of the error in that specific case. See *State v. Burdick*, 2001 ME 143, 782 A.2d 319 (Me. 2001). (differentiating between structural and nonstructural defects and stating that examples of structural errors include a total deprivation of the right to counsel at trial and the lack of an impartial judge)). *State v. White,* 2022 ME 54 ¶ 32.

In *State v. Woodard*, 2013 ME 36, ¶¶ 34–36, 68 A.3d 1250 (Me. 2013), this court found it was plain error for a prosecutor to urge the jury to "send a message" as such and argument would divert the jury from its duty to decide

the case on the evidence." In that same case, this court observed prosecutor's "efforts must be tempered by a level of ethical precision that avoids overreaching and prevents the fact-finder from convicting a person on the basis of something other than evidence presented during trial"; *State v. Woodard*, 2013 ME 36, ¶ 34-36.

In *State v. Begin*, this court specifically concluded that error occurred when the prosecutor requested that the jury hold the defendant "accountable" for violating a protective order and for his other actions. 2015 ME 86, ¶¶ 6, 27-28, 120 A.3d 97, (Me. 2015). There the court found the State's exhortation to hold Begin 'accountable' improperly suggested to the jury that it had a civic duty to convict or that it should consider the broader societal implications of its verdict, and thereby detracted from the jury's actual duty of impartiality. *State v. Begin*, 2015 ME 86, ¶ 27.

Pursuant to article I, section 6-A of the Maine Constitution, this court reviews serious instances of prosecutorial error cumulatively and in context. *See Dolloff*, 2012 ME 130, ¶ 74, 58 A.3d 1032.

> (A prosecutor) may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *State v. White*, 2022 ME 54, ¶ 38.

As a representative of an *impartial* sovereign, the prosecutor's duty to ensure that a criminal defendant receives a fair trial must far outweigh any desires which may exist to achieve a successful track record of convictions. *State v. Collin*, 441 A.2d 693, 697 (Me. 1982); *see also State v. Young*, 2000 ME 144, ¶ 6, 755 A.2d 547 ("As we have noted previously, prosecutors are held to a higher standard regarding their conduct during trial because they represent the State, and because they have an obligation to ensure that justice is done, as opposed to merely ensuring that a conviction is secured." *State v. White*, 2022 ME 54, ¶¶ 38-40.

In *State v. Osborn*, 2023 ME 19, ¶ 24, this court found that a prosecutor's statements could be viewed in isolation when the same prosecutor improperly appealed to social norms.[6] In *State v. White*, this court observed that suggestions to hold a defendant "accountable" in an opening statement were improper and constituted error. *State v. White,* 2022 ME 54 ¶ 23-24. More recently in *State v. Schooley*, 2025 ME 84, ¶ 35, 345 A.3d 78, this court observed, a prosecutor improperly vouches for a witness if the prosecutor conveys a personal belief in a witness's veracity or "implies that the jury should credit the prosecution's evidence simply because the government can be trusted."see also *State v. DesRosiers*, 2024 ME 77, ¶ 38, 327 A.3d 64 "[A]n interjection of a personal belief as to whether a witness lied is generally error."). "

[6] In that case, this court observed, it has long criticized prosecutors' appeals to public perception or other social issues that go beyond the evidence produced at trial, *State v. Osborn*, 2023 ME 19, ¶ 23.

The central question in the analysis is whether the comment is fairly based on facts in evidence, or improperly reflects a personal belief about the witness's overall credibility. *State v. Schooley,* 2025 ME 84, ¶ 35 Additionally, this court considers whether the prosecutor's comments improperly expressed a personal opinion or "invoke[d] the prestige of the government." *State v. DesRosiers*, 2024 ME 77, ¶ 39, 327 A.3d 64. [7]. An argument that does no more than assert reasons why a witness ought to be accepted as truthful by the jury is not improper witness vouching." *State v. Hassan*, 2013 ME 98, ¶ 33, 82 A.3d 86.

In the present case, State's attorney used the phrase "we know" numerous times during the beginning of the State's closing argument. (T.T. Vol. II, 36-37). The phrase "we know" was used three times prior to Defendant's first objection, which was sustained. (T.T. Vol. II, 36). In this instance, the phrase was used regarding the burden of proof and what the State referred to a substantive evidence.

> Now "we know" the date range beyond a reasonable doubt, because Victim told the interviewer that you heard and that is evidence in this case. . .substantive evidence that you get to rely on that she was only 14 and that what happened wasn't right because she was only 14. . . and "we know" that defendant moved out of the house in January of 2022. So that's the time frame that we have in that (Child A) was each one of those stages. "We know" that (Objection). (T.T. Vol. II, 36)

[7] The phrase "I think" can, under certain circumstances also be considered problematic See State v. Gervais, 2025 ME 27, ¶ 38-40 334 A.3d 645

The phrase "we know" was again used prior to the second objection which was again sustained. (T.T. Vol. II, 37-38). This time the phrase was used in conjunction with testimony stating “

> And he put his hands on her vagina in that manner that she described on the video. (T.T. Vol. II, 37). "We know" part of the evidence showed that (Objection).(Id).

The phrase "we know" was then used twice prior to the third objection, in congruence with the statement.

> "we know" .. or the evidence shows, that that was done for 21 the purposes of sexual gratification.“ Victim , being 14 years old and in the home of her mom, M.W. and M.W. Victim engaged in a relationship with the defendant, proves that was not married to the defendant. (T.T. Vol. II, 37-38). (Objection).

The trial court did not comment on that objection and the State moved on. (T.T. Vol. II, 37-38).

Taken collectively, statements were not harmless error, and were sufficiently prejudicial to have affected the outcome of the proceeding. While any one of them taken in isolation might not be problematic, the collective impact affected Defendant’s “substantial rights," and the error was sufficiently prejudicial to have affected the outcome of the proceeding,

Stated another way, all of these collectively could be taken as either vouching for Child A, her mother, or both of the State’s witnesses. The first three times the phrase "we know" was used, it was used to comment on Child A’s testimony and what the state termed “substantive evidence” which addressing basic

elements of the crime, and also the date range when the crime took place. (T.T. Vol. II, 36). The second two times the phrase "we know" was used, it was used to argue Child A's testimony wasn't open to question and factually established the physical elements of the crime, and mens rea of Defendant. (T.T. Vol. II, 36). Next, the phrase "we know" was used to state that the evidence of the engagement of Child A's Mother to the Defendant proved that Child A was not married. (T.T. Vol. II, 37-38). While this statement likely commented on M.W. 's credibility, it may also have been problematic from an evidentiary perspective as neither the State's attorney nor the Defense attorney had asked Child about her marital status during her testimony. (T.T. Vol I-II).[8]

Not insignificantly, all of these "we know" statements were made after the court had been clear that it saw that phrase as inappropriate and likely to be vouching. (T.T. Vol. II,19). Furthermore, given the fact that State emphasized during its closing did not need any more than Child A's testimony to prove its case and used the phrase "we know" in conjunction with the testimony given by Child A, these statements were likely sufficiently prejudicial to have an impact and likely deprived Defendant of a fair trial. (T.T. Vol. II, 38-39). Again, given that the only witness in the case who provided testimony regarding numerous required elements in the complaint was Child A, or in terms of the date range, M.W. who was

[8] While the jury might have been able to draw inferences based upon the testimony regarding Child A's marital status, her mother's engagement to the Defendant was not dispositive of proof on that issue and may have shifted the burden of proof on this issue to the Defendant.

allowed to change her testimony, these statements were error and deprived Defendant of a fair trial. The court should reverse the verdict in this matter.

D, Considered cumulatively, the Errors Rendered Defendant's Trial Unfair

For the sake of this argument only, defendant assumes that the Court has found that none of the errors he has demonstrated above alone justifies vacating the conviction. This argument nonetheless asks the Court to consider the cumulative effect of those errors, as, together, they denied Defendant a fair trial, in violation of the Fourteenth Amendment. See *United States v. Baptiste*, 8 F.4th 30, 39 (1st Cir. 2021)

V. CONCLUSION

This court should overturn the verdict.

Dated at Fort Kent, ME, this 6th day of January 2026 **/s/** *Neil J Prendergast*

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CERTIFICATE OF SERVICE

I, Neil J. Prendergast, Esq., hereby certify that, on this date, I have caused copies of the foregoing Brief of Appellant to be sent electronically to:

DATED at Fort Kent, ME, this 6th day of January 2025 **/s/**Neil J Prendergast

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