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

LAW COURT DOCKET NO. Han-23-421

STATE OF MAINE
Appellee

v.

JEFFREY WITHAM, JR.
Appellant

ON APPEAL from the Hancock County
Unified Criminal Docket

BRIEF OF APPELLEE

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Any relevant disagreement with the facts as stated by the appellant are highlighted in other portions of this brief.

STATEMENT OF THE ISSUES

I. The trial court violated the defendant's Sixth and Fourteenth Amendment right to "hire" counsel of his choice.
II. The trial court committed obvious error by neglecting to give a specific unanimity instruction
III. The trial court erred by denying defendant's motion for a mental examination
IV. The sentencing court impermissibly and unlawfully aggravated defendant's carceral sentence because defendant did not accept responsibility
V. The sentencing court improperly and unlawfully increased defendant's sentence because defendant was forty-four years old at the time of the offense
VI. The sentencing court unlawfully increased defendant's sentence because it found that "there were firearms involved" in the offenses of conviction, despite the jury's findings that none of the offenses were committed with the use of a firearm.

SUMMARY OF ARGUMENT

I. THE DEFENDANT DID NOT FOLLOW THE PROPER PROCEDURE TO SEEK RELEASE OF HIS FUNDS, THE COURT LACKED AUTHORITY TO ADDRESS SUCH A REQUEST, AND THE ASSIGNMENT OR HIRING OF THE DEFENSE ATTORNEY OF HIS CHOICE COULD NOT BE ACCOMPLISHED BECAUSE AT THE TIME OF THE TRIAL, THE ATTORNEY PREFERRED BY THE DEFENDANT HAD BEEN SUSPENDED FROM THE PRACTICE OF LAW IN MAINE.

II. THERE WAS NO NEED FOR A SPECIFIC UNANIMITY INSTRUCTION BECAUSE THE CHARGES RELATED TO A COMPACT COURSE OF CONDUCT OCCURING OVER MERE HOURS ON OR ABOUT JUNE 24, 2020.

III. THE DECISION WHETHER TO APPROVE A MENTAL EXAMINATION WAS DISCRETIONARY, AND THE MOTION COURT PROPERLY DENIED SAID REQUEST.

IV. CONSIDERATION OF ACCEPTANCE OF RESPONSIBILITY IS A REGULARLY ACCEPTED FACTOR AT SENTENCING.

V. CONSIDERATION OF THE DEFENDANT'S AGE IS A REGULARLY ACCEPTED FACTOR AT SENTENCING.

VI. CONSIDERATION OF THE "INVOLVEMENT OF FIREARMS" WAS NOT A MISSAPPLICATION OR AN ABUSE OF AUTHORITY.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN ITS ASSIGNMENT OF COUNSEL.

Defendant complained that funds seized in *a different case* should have been the subject of a hearing at which the motion court could have potentially released said funds for defendant's use in hiring a lawyer of his choice. When confronted by this issue, the court properly considered that the grand jury had returned an indictment in that case (still pending as HANUCD-CR-2022-0196) which included two counts for criminal forfeiture. Right, title and interest to those funds was thus generated as an issue to be disposed of during *trial.* Since there was no indication on the part of the defendant that he would waive a jury in the matter, a single justice could not assume that role as fact-finder.

But even if the Law Court rejects the above analysis, the appellant failed to preserve this issue because the court sitting in CR-2020-618 was not the proper venue for the issue. The defendant would have had to bring the issue to the court in the context of his pending drug case, CR-2022-196. Further, there is no evidence on this record that defendant perfected his claim by filing under 15 MRSA §5828.

Thus, the State argues that constitutional infirmities concerning the Sixth and Fourteenth Amendments are not at play here because the court did not take any action, or fail to take any action, which it was required to take in order to assure that Mr. Witham had competent counsel. This point may be illustrated by way of an extreme example. Let us assume that Mr. Witham had a valuable inheritance expectancy in an estate which was tied up in probate court litigation pending from the time that he was charged in this case till well after his criminal trial was concluded. Could Mr. Witham argue that the criminal court judge violated his constitutional rights to counsel by refusing to intervene in the probate court, a place where the UCD justice had no statutory authority? In the same way, the UCD *justice* had no authority to usurp the role of the *jury* in determining the ownership of funds subject to a properly returned indictment. Reference may be had to 15 MRS Sec. 1526 (4) which states that: "*Trial against property charged by indictment…may be by jury and must be held in a single proceeding together with the trial of the related criminal violation.*"

The appellant complains of the actions of both Justice Robert Murray and Justice Patrick Larson. The State has already discussed the effect of Justice Murray's comments, and it now asserts that Justice Larson's comments, coming, as the appellant concedes, after the trial was completed and the verdict was returned, had no material impact.

Further, the defendant repeatedly asserted throughout the pendency of the instant case that he wished to be represented by Attorney Scott Fenstermaker. Mr. Fenstermaker was unavailable because for months preceding the trial, he had been unable to practice law by virtue of a suspension order issued by Justice Thomas McKeon on March 17, 2023.

II. THERE WAS NO NEED FOR A SPECIFIC UNANIMITY INSTRUCTION.

The appellant attempts to leap the Grand Canyon by asserting without any support in the record that the obviously carefully considered return of the jury was rather a "… result of numerous patchwork jury votes rather than unanimity about which incidents were actually committed." *Appellant's Brief at page 27.* Mr. Witham speculates that various

verdicts "*might have resulted from some patchwork of votes",* but without any more than mere guesswork about what occurred during the secret deliberations of the jury, he cannot surmount the obvious error standard of review as further defined in *State v. Russell,* 2023 ME 64, in which this Court held that "*in the case of review for obvious error, a defendant is entitled to relief only when the jury instructions, viewed as a whole, are affected by highly prejudicial error tending to produce manifest injustice." Id at paragraph 15.*

The State offers three arguments which defeat appellant's contention:

1. **Certain counts, as in *Russell,* were subsumed by guilty findings on counts which clearly did not qualify for a unanimity instruction**

The *Russell* court found that certain counts which might have required a unanimity instruction escaped that requirement because they were subsumed by a guilty verdict on a count which did not require said instruction. That holding applies to refute the appellant's contentions as to some of the counts, and for purposes of clarity, the State will organize its discussion in the same manner which was set out by the appellant:

Counts I, II and VI "Restraints"

In count one, the jury found Mr. Witham guilty of using a weapon, but not a firearm, to kidnap [A..]. In count two, the jury found Mr. Witham guilty of kidnapping [E.]. In count six, the jury found Mr. Witham guilty of using a weapon, but not a firearm to restrain [A.]. The State contends that count six is subsumed by count one, because the counts are identical with the exception that count one contains an additional element. The interplay between count two and counts one and six, need not be discussed in this context, because count two relates to a different victim.

Count one did not qualify for a unanimity instruction because, as more fully discussed below, the evidence showed activity over a fairly compact period, and the primary operative element of kidnapping is restraint, an element that encompasses a pattern or course of action which must, *per force,* occur over a span of time.

Counts V and XI "Assaults"

In count five, Mr. Witham was found guilty of causing bodily injury to [A.] with indifference to the value of human life. In count

eleven, Mr. Witham was convicted of causing bodily injury or offensive physical contact to [A.]. Count eleven was subsumed within count five because the jury had already found that Mr. Witham caused bodily injury in the former charge.

Count five did not require a unanimity instruction because [A.] described only one incident which could have given rise to that verdict, and that was the choking incident which caused her to lose consciousness. *Transcript 8/13/23 at page 43.*

Counts VII, XIII and XV

Count seven is not germane, because the jury returned a not guilty verdict. In count thirteen, Mr. Witham was found to have possessed a firearm. In count fifteen, Mr. Witham was found to have endangered the welfare of a minor. None of these counts are directly susceptible to a "subsummation" argument, although the State could argue that given the findings on earlier counts involving [E.], count fifteen was inferentially establishing by those verdicts (e.g. count two). A stronger argument for the validity of count fifteen appears in the next section.

2. The facts in the instant case are similar to those in *State v. Rosario,* 2022 ME 46, a case in which the Court found that a unanimity instruction was not required

The *Rosario* court reviewed an appellant's claim that a unanimity instruction was required because the State argued that the crime was committed at multiple points, there were multiple legal theories upon which the jurors could determine that Rosario was guilty, and the jurors "all had to agree on" a "discrete instance." *Rosario, LEXIS at P33* But the Court rejected that contention, finding that "*The court did not commit obvious error in failing to give a specific unanimity instruction. The evidence does not suggest that Rosario committed multiple crimes on multiple occasions that could be the basis for a guilty verdict, but rather relates to a single, continuous incident on December 18, 2019 to support a single count." Id at P35* The same situation confronts this Court in *Witham.* The State alleged that each crime charged occurred on or about June 24, 2020, in one town. The witnesses described a terrifying day into night of abuse, relating to a "single, continuous incident", as was the situation in Rosario.

Specifically, the appellant contends that the guilty verdicts on counts one, two and six could have resulted from different jurors accepting different events, but the argument fails because kidnapping (counts one and two) is defined as a crime of "restraint", as is the count six crime. And the term "restraint" may be defined as "confining the other person for a substantial period…." *17-A MRS Sec. 301(B)(2)(C)* That same definition is incorporated in the criminal restraint statute by reference. *17-A MRS Sec. 302.* Thus proof of these three charges must necessarily include demonstration of a course of conduct. In such cases, specific unanimity is not required. *State v. Elliott,* 2010 ME 3 The jury's unanimous decision that the crimes were not committed with a firearm shows that they were all "on the same page" about the pattern of conduct which met the definition.

The appellant makes the same argument by linking counts seven, eight and fifteen. Count seven resulted in a "not guilty" verdict, and the "course of conduct" argument pertains to counts eight and fifteen.

3. The jury instructions, viewed as a whole, are sufficient

The State could take the Court's valuable time engaging in a tedious dissection of the instructions, but the standard of review is set forth elsewhere, and the instructions were comprehensive, complete, and based on pattern language with which this Court is extremely familiar. There was nothing worth noting about the instructions, other than the argument about unanimity, which is discussed above.

III. THE DECISION WHETHER TO APPROVE A MENTAL HEALTH EXAMINIATION WAS DISCRETIONARY AND THE MOTION COURT PROPERLY DENIED SAID REQUEST.

After indicating before trial that he did not wish to have a Title 15 exam, Mr. Witham changed his mind after the jury had returned its verdict. The decision about whether to approve an exam must be based on "good cause shown", and the motion judge must "set forth the issue or issues to be addressed by the State Forensic Service". *15 MRS Sec. 101-D(3).* The moving party did not demonstrate good cause for the following reasons:

1. His only stated basis for examination was a "family history of blackouts". *Appendix at page 77* Mr. Witham did not even claim that ***he*** suffered from blackouts. Even presuming that other members of his family had such a history, how did the assertion show good cause for an examination of the defendant?
2. Even assuming *arguendo* that Mr. Witham was claiming personal blackouts, he failed to offer any nexus between that medical condition and any legitimate sentencing factor. He made no claim during the trial or otherwise that he suffered unconsciousness prior to or during the events of June 24th which would mitigate his conduct, and as Justice Larson pointed out, Mr. Witham testified clearly about the events leading to his charges. *Appendix at page 76.* The argument in support of the request was full of "mights" in that such an examination "might help explain in his mind how all this stuff fit together and might be beneficial to the court in coming up with sentencing and how all this stuff happened". *Appendix at page 75.* But as the court pointed out, Mr. Witham was clear in his responses in front of the jury that this "stuff" didn't happen.

The motion court acted well within its discretion in denying Mr. Witham's request and its decision should be upheld.

IV. CONSIDERATION OF ACCEPTANCE OF RESPONSIBILITY IS A REGULARLY APPROVED AND LEGITIMATE FACTOR AT SENTENCING.

The Law Court reviews the determination of a sentence *de novo* for mis-application of legal principles and for an abuse of the court's sentencing power. *State v. Athayde,* 2022 ME 41

There is no suggestion on the record that Justice Larson impermissibly considered Mr. Witham's election to go to trial in reaching his sentence. *State v. Moore,* 2023 ME 18. Instead, the record supports that the sentencing court properly considered Mr. Witham's trial testimony in the context of determining the existence or genuineness of an acceptance of responsibility or a showing of remorse, which are allowable factors. *State v. Grindle,* 942 A.2d 673 (Me. 2008) The Court noted specifically at pages 679-680, that:

"*Here, the sentencing court did state, explicitly, that it considered Grindle's 'exculpatory testimony' which the court suggested was untruthful, to be an aggravating factor, because it demonstrated his unwillingness to accept responsibility for his actions and his lack of*

remorse. Such a consideration is permissible to support our goal that the court properly individualize the sentence, considering all aggravating and mitigation factors regarding the offender and the offense."

The propriety of Justice Larson's review of acceptance finds its roots at least as far back as this Court's seminal decision in *State v. Hewey,* 622 A.2d 1151 (Me. 1983), where Justice Glassman, writing for the Court, held that judges are only limited in what can be considered for sentencing by due process requirements that the information used must be factually reliable and relevant. Id at page 1154.

The instant case provides a framework similar to that addressed in *Middleton v. State,* 129 A.3d 962 (Me. 2015), in which the Court commented at page 968 that "*A defendant's protestation of innocence can signify an affirmative refusal to accept responsibility or remorse, which the court is entitled to treat as an aggravating factor at sentencing."*

V. CONSIDERATION OF THE DEFENDANT'S AGE IS A REGULARLY APPROVED AND LEGITIMATE FACTOR AT SENTENCING.

The Law Court reviews the determination of a sentence *de novo* for mis-application of legal principles and for an abuse of the court's sentencing power. *State v. Athayde,* 2022 ME 41

The appellant suggests that the sentencing court isolated the defendant's age as a factor. A review of the transcript excerpt, quoted at page (37) of the brief, clearly shows otherwise. Justice Larson's point was that Mr. Witham was at a stage in his life where he should have addressed any problems which led to his criminal conduct, and that said conduct had lasted for a period of fifteen years. Justice Larson went on to identify several domestic violence convictions. These comments demonstrated the court's focus on the defendant's *prior record,* and his *character,* both of which are explicit in Maine's sentencing statute, and in case law. *17-A MRS Sec. 1602(1)(B); State v. Athayde, 2022 Me. 41.*

The appellant also suggests that courts may appropriately mitigate the sentences of persons age eighteen to twenty-five because their brains are not fully developed (Appellant's Brief at 38). To suggest that the court cannot consider the age of a defendant with a presumably fully developed brain is irrational.

The appellant also suggests that age has already been incorporated implicitly by virtue of Mr. Witham's inclusion in the general category of "adult offenders" (*Appellant's Brief at page 39*). His argument leads to the wrongful conclusion that the court must be blind to age if a convicted person is between the age of twenty-five and let's say, sixty-five. Again, Justice Larson did not focus on Mr. Witham's age in a vacuum, he viewed the defendant's age as he analyzed a course of conduct including prior convictions. The appellant argues that the sentencing court failed to individualize the sentence, but to the contrary, the judge's consideration of age in the context of prior convictions and character as evidence of Mr. Witham's unwillingness to address any problems which might have contributed to his criminality was the very touchstone of individualization.

It is also noteworthy that Justice Larson imposed a period of probation (*Appendix at A*42). Consideration of the benefit and societal protection offered by supervision must rely in part on the assessment of the defendant's stage of life in determining the likely success of probation.

VI. CONSIDERATION OF THE "INVOLVEMENT" OF FIREARMS WAS NOT A MISSAPPLICATION OR AN ABUSE OF AUTHORITY.

As with age, the appellant attempts to blow up a passing reference into a point of concentration and significance for the sentencing court. The entire discussion of the firearms consisted of two sentences, as quoted at Appellant's Brief, at page 42. There is no way for the reviewing court to know on the record presented what, if any, weight the sentencing court assigned to the presence of firearms.

Next, it is significant that the jury found Mr. Witham guilty of count eleven, Class C domestic violence assault, and count thirteen, Class C possession of firearm by a prohibited person, and he was sentenced to the maximum period of incarceration for those offenses. *Appendix at A42.* The judge was charged with assigning the appropriate sentence

to each offense, and the presence and number of firearms was a perfectly legitimate subject of comment by Justice Larson and it was entirely reconcilable with the jury's verdicts.

Date: June 6, 2024

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CERTIFICATE OF SERVICE

On the date shown below, I mailed two copies of this document to Rory McNamara, Esq. PO Box 143, York, Maine 03909. A copy of the brief was also provided to Mr. McNamara by electronic transmission.

Date:

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