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

LAW COURT DOCKET NO. Pen-23-461

STATE OF MAINE
Appellee

v.

ANGELENA L. QUIRION
Appellant

ON APPEAL from the Penobscot County
Unified Criminal Docket

REPLY BRIEF OF APPELLANT

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INTRODUCTION

(I) The closing argument defense counsel actually made, as opposed to that which the State mistakenly thought counsel was making, was entirely supported by the record. By sustaining the State's objection that the argument was not based on evidence, the court erroneously and improperly commented on an important factual issue: who owned the drugs.

(II) The record inferentially suggests that both William Simmons and Seirra Strout were made aware of the State's threats to prosecute each. The State's argument that only direct "admonitions" could possibly violate a defendant's rights to compulsory and due process are not borne out by case-law.

ARGUMENT

First Assignment of Error

I. The court improperly instructed jurors that there was no evidence that Jalbert owned the Walmart bag and that he admitted owning other drugs.

Respectfully, the State has put words into defense counsel's mouth. Defense counsel did *not* argue that Jalbert himself admitted to owning the Walmart bag. *But see* Red Br. 9, 12, 13 (contending otherwise). Here is what defense counsel actually said, along with citations supporting his assertions:

> And Mr. Jalbert's statement that he owned the drugs in the front[1] and the comment that the[2] – what are you doing, this is all part of the evidence. The Wal-Mart bags were Jalbert's.[3]

(A27; Tr. 861). This was the subject of the State's objection, which was sustained because, in the State's language, "That was not in evidence[.]" (A27; Tr. 861). Regardless of what the State mistakenly heard or feared defense counsel might have said, counsel's actual argument was completely supported. However, as a matter of law, the court precluded jurors from so finding.

Also respectfully, situations like ours are illustrative of the importance of properly handling objections about what is and isn't in evidence. While the State, of course, should have the opportunity to explain the basis for its objection, such is commonly done outside of the earshot of jurors, either during or after closing argument at sidebar. The prosecutor need not have done so in open court.

More concerning, though, is that the court handled the objection – despite admittedly lacking an "independent memory" of the evidence, A30;

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[1] Jalbert's "statement that he owned the drugs in the front" is supported by Officer Drouin's testimony that "Jalbert was interviewed and he said, 'The drugs under the seat are mine[.]'" (Tr. 214) (internal quotation marks added).

[2] Though cut off, defense counsel later explained that he was going to refer to the "testimony about Angela stated Adam got into the car with two bags that looked like Wal-Mart bags." (A28; Tr. 896). This is further supported by the language used by defense counsel. *Compare* Tr. 215 ("comment by my client") *with* Tr. 861 ("and the comment that…").

[3] Defendant claimed that the Walmart bag belonged to Jalbert. (Tr. 215; *see also* Tr. 172-73).

Tr. 898 – as it did. In cases of contested versions of the evidence, it is advisable for a judge to simply remind the jury that their recollection of the evidence, not counsel's, controls. It is too easy, as our case shows, for a judge to err, thereby giving an incorrect but binding legal ruling that such "evidence" either is or is not in evidence.

That segues into the State's remaining contention about this assignment of error: That the court's ruling somehow cannot be a comment on the evidence per 14 M.R.S. § 1105. That is, with all due respect, a non-starter. Here, the State raised a question (in front of the jury) about whether there were facts that might support a finding that Jalbert owned many or most of the drugs. The court erroneously expressed its mistaken opinion that no such evidence existed. That is clear from the objection, in front of the jury:

> State: Objection, arguing facts not in evidence, Your Honor.
>
> Defense: That was in evidence. That was exactly what the cop said.
>
> State: That was not in evidence, Your Honor.
>
> Court: The objection's sustained. Please move on.

(A27; Tr. 861). Instructed that when the court sustains any objection, they must "disregard" the objected-to material, *see* Tr. 915, jurors were effectively *ordered* not to believe defense counsel's argument. In this context, the court both "express[ed] an opinion upon issues of fact," *see* 14 M.R.S. § 1105, *and* also gave legal effect to that opinion. That is *more* impactful than a non-

binding judicial expression of opinion about factual issues. Jurors are presumed to follow the court's orders, after all.

Again, when it comes to whether certain evidence is or is not in the record, a judge should not express an opinion in front of jurors; § 1105 clearly prohibits that. Simply leave it to jurors' memory. Contrary to the State's exaggerated fears, there is nothing "impossible" about handling objections in this manner. *But see* Red Br. 15.

Defendant closes the discussion of this issue with some remarks about the standard of review. The State implies that courts have "discretion" to express erroneous and improper opinions about the evidence; cut off defense counsel from making an entirely proper closing argument; and prevent jurors, as a matter of law, from finding support for counsel's claim that Jalbert owned many or most of the drugs. *See* Red Br. 13. But that cannot be. There are too many constitutional rights – *e.g.*, to have a jury trial, to have an effective attorney, to make a closing argument, etc. – to simply leave this to the presiding judge's "discretion." It is also nonsensical to leave it to a judge who has made the improper comments to decide whether to grant relief. Rather, respectfully, this Court should exercise plenary authority – as the statute itself seems to grant – to determine whether a judge has violated § 1105. ("shall be ordered accordingly by the law court on appeal in a civil or criminal case").

Second Assignment of Error

II. The prosecution erred by engaging in practices that might well have driven William Simmons and Seirra Strout from testifying.

The State takes the position that only direct "admonitions" may violate a defendant's rights to compulsory and due process. *See* Red Br. 16-17. However, "'*any* practice that effectively deters a material witness from testifying is invalid unless necessary to accomplish a legitimate interest.'" *State v. Begin*, 652 A.2d 102, 104 (Me. 1995) quoting *State v. Fagone*, 462 A.2d 493, 496 (Me. 1983) (emphasis added). That is why, for example, in *United States v. MacCloskey*, 682 F.2d 468, 475 (4th Cir. 1982), the Fourth Circuit found a constitutional violation when the prosecutor phoned a potential defense witness's lawyer to tell the lawyer "that he would be well-advised to remind his client that, if she testified at [the] trial, she could be reindicted if she incriminated herself during that testimony." The court found harmful error notwithstanding the absence of any direct "admonitions." *MacCloskey*, 682 F.2d at 479.

The State attempts to portray our case as similar to *State v. Berry*, 1998 ME 113, ¶¶ 6-8, 711 A.2d 142. *See* Red Br. 19. However, in *Berry*, *neither* the potential witness *nor* his attorney were present for the prosecutor's so-called "threat." 1998 ME 113, ¶ 6. And, rather than threatening further prosecution or other adverse consequences, the prosecutor's so-called "threat" consisted of merely agreeing *to look into* whether the prior dismissal of the charge against the potential witness had been dismissed with or without prejudice. *Id.* ¶ 6 n. 2. The prosecutor never stated whether the

potential witness could be prosecuted, let alone threatened to do so. *Id.* Rather, in *Berry*, it was the defense lawyer himself who declared that he would not call the potential witness to testify unless the dismissal was with prejudice. *Id.*

Berry is distinguishable for those reasons. The *sine qua non* – a plausible threat to punish a potential witness for testifying – was not present. In contrast, the circumstances of our case reveal that both William Simmons's and Seirra Strout's decisions whether to testify fully and frankly were plausibly influenced in a manner that "could well" or "might" have caused them to refrain from doing so. *See Webb v. Texas*, 409 U.S 95, 98 (1972) (*per curiam*) ("could well"); *State v. Fagone*, 462 A.2d 493, 496 n. 2 (1983) ("might"). That constitutes a violation.

A. William Simmons

The State contends that "no admonitions were made to William Simmons" and "[t]here is nothing in the record to suggest Simmons ... was a party to any of the discussions about him." Red Br. 16-17. However, the State put on the record how four or more of its officials met with Simmons in the hallway:

> I went in the hallway with [Assistant District] Attorney Renzullo and Special Agent Huggins and Officer Ireland at a minimum – and there may have been other law enforcement officers there as well – to inform him briefly that we had listened in on calls and would no longer be sponsoring him as a witness and we were releasing him from the subpoena.

(A60-61; Tr. 479-80). Respectfully, it strains credulity to believe that any conversation in the hallway about the State no longer "sponsoring" Simmons'

testimony would not include a statement about *why* that was the case. Why else would they indicate that they had "listened in on [his] calls?" What relevance is that but to suggest that he would perjure himself? It must have been very clear to Simmons, who had recently recanted his helpful-to-the-State testimony, *see* A57-60; Tr. 476-79, why the State was changing course on the eve of trial. Clearly, Simmons' potential testimony seemed likely before the meeting in the hallway; afterwards, defense counsel understood that Simmons planned to plead the Fifth. *Compare* A49-50; Tr. 478-69 (Simmons contacts defense counsel, willing to help) *with* A52; Tr. 471 (counsel expects Simmons to take the Fifth). These dots are easily connected; they sketch out an unconstitutional potential that Simmons chose not to testify because of what the State told him. *Cf. United States v. Thomas*, 488 F.2d 334, 335-36 (6th Cir. 1973) (agent's remark to potential witness that witness could be prosecuted if takes the stand is unconstitutional).

B. Seirra Strout

The State suggests that defense counsel's objection – "Sounds like the State is threatening a witness. If the defense did this, it would be called tampering," Tr. 664-65 – did not serve to preserve the objection as to Ms. Strout. Red Br. 16. However, it is difficult to conceive of clearer language than an accusation of witness-tampering. Certainly, the objection sought judicial intervention on the basis that defense counsel felt that the State was influencing Ms. Strout. That is all that is required. *See* M. R. U. Crim. P. 51 (to preserve, counsel must state objection and grounds therefor); *see also*

Cutler v. Downeast Mortg. Corp., 2009 ME 84, ¶ 12 n. 6, 976 A.2d 929 ("[A]n issue is deemed to be raised or preserved for purposes of an appeal if there is sufficient basis in the record to alert the court and any opposing party to the existence of that issue."). Judges should not be encouraged to ignore such objections.

Noting that Ms. Strout was not present for the on-the-record discussions, the State implies that there can be no violation. Red Br. 17. But Strout's attorney was present for the prosecutor's discussion of the possibility of criminal charges, and represented to the court that she planned to share with Ms. Strout everything she was told. (Tr. 659-69). That puts our case within the uprights of *MacCloskey*, where the potential witness relayed the prosecutor's suggestion of prosecution to that witness.

C. Vacatur is the remedy.

In *Fagone*, this Court engaged in no harmless-error inquiry, suggesting by its silence on that score that such an error is structural. So, too, the Court in *Webb*: Once it held that there was error, it proceeded directly to the mandate. Defendant, in the Blue Brief at 25, cited decisional law that holds that a like violation constitutes structural error. The State's conclusory argument to the contrary, *see* Red Br. 19-20, is undeveloped. *See State v. Cummings*, 2023 ME 35, ¶ 15 n. 6, 295 A.3d 1227 (State waives undeveloped arguments).

Simply, there is no good way to gauge the effects of a constitutional violation of this sort. What would have Simmons and Strout said if they had

testified without encumbrance? Unfortunately, there is now no way to say for sure.

"The defining feature of a structural error is that it affects the framework within which the trial proceeds, rather than being simply an error in the trial process itself." *Weaver v. Massachusetts*, 582 U.S. 286, 295 (2017) (cleaned up; internal quotation marks omitted). That is true here: interfering with the free testimony of potential defense witnesses denied defendant of the right to have the trial to which he was entitled.

Finally, it is important to note the nature of the right at stake: giving free and voluntary testimony. This Court is solicitous of the constitutional guarantee that courts should not be marred by involuntary statements. *See, e.g., State v. Collins*, 297 A.2d 620, 626 (Me. 1972). It would be incongruous for the Court, on the other hand, to tolerate interference with that right based on a mere guess that such interference did not affect the verdict – an assumption defendant does not endorse, to be clear.

Rather, defendant contends that even if this Court must wrestle with the question of harm, it should nonetheless order a new trial. Both witnesses were apparently positioned to testify about who possessed the drugs and whether defendant was a trafficker. Alone or in combination with any harm established in the first assignment of error, there is good reason to believe that the errors here may have played a role in the verdicts.

CONCLUSION

For the foregoing reasons and those outlined in the Blue Brief, this Court should vacate defendant's convictions, and it should remand for proceedings not inconsistent with its mandate.

Respectfully submitted,

May 29, 2024

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CERTIFICATE OF SERVICE

I sent a native PDF version of this brief to the Clerk of this Court and to opposing counsel at the email address provided in the Board of Bar Overseers' Attorney Directory. I mailed 10 paper copies of this brief to this Court's Clerk's office via U.S. Mail, and I sent 2 copies to opposing counsel at the address provided on the briefing schedule.

/s/ Rory A. McNamara

STATE OF MAINE

SUPREME JUDICIAL COURT
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CERTIFICATE OF SIGNATURE

Angelena L. Quirion

I am filing the electronic copy of this brief with this certificate. I will file the paper copies as required by M.R.App.P. 7A(i). I certify that I have prepared the brief and that the brief and associated documents are filed in good faith, conform to the page or word limits in M.R.App.P. 7A(f), and conform to the form and formatting requirements of M.R.App.P. 7A(g).

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