

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

LAW COURT DOCKET NO. CUM-15-568

**STATE OF MAINE
APPELLEE**

v.

**MICAH DAY
APPELLANT**

ON APPEAL from the Cumberland County Unified Criminal Court

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Defendant was charged by complaint with Operating under the Influence, 29-A M.R.S. §2411(1-A)(C)(1); Refusing to Submit to Arrest, 17-A M.R.S. §751-B(1)(B); and Failure to Sign a Universal Summons and Complaint, 17-A M.R.S. §15-A(1). A jury convicted defendant of Operating under the Influence (Count 1) and Failure to Sign a Universal Summons and Complaint (Count 3), but acquitted him of Refusing to Submit to Arrest (Count 2). Defendant was sentenced to 10 days' imprisonment; a 150-day license suspension; and \$1,000 in fines. He appeals from the judgment entered in the Cumberland County Unified Criminal Docket (*Marden, J., presiding*).

I. Introduction. The sort of evidence that characterizes almost every OUI case was not available to the State in this case. No field sobriety tests or breath-alcohol tests were ever administered or introduced as evidence. Tr. 90. Nor was a blood-alcohol test ever given, so no results could have been introduced at trial, either. Tr. 55.

Instead, the State relied on two things: (1) police officers' observations that arguably suggested that defendant had been drinking; and (2) repeated, detailed evidence about defendant's refusal to submit to alcohol testing and repeated argument to the jurors that they should consider evidence of

defendant's refusal as evidence that he had been intoxicated. This appeal argues that the latter amounts to nothing more than evidence that defendant knew his constitutional rights and was willing to exercise them; therefore, the inference of guilt that the State and court invited the jurors to draw was legally impermissible.

II. Evidence of OUI obtained by law enforcement. It was almost 1:30 a.m. when Officer Hannon noticed that a car travelling behind him was going rather fast. Tr. 38. He switched on his rear radar and clocked the car's speed at 75 miles per hour in a 50-mile-per-hour zone. Tr. 38. Officer Hannon stopped his car and pulled to the side of the road, with his blinker flashing. Tr. 38. The Officer testified that the car almost hit him, paused for a moment, then pulled slowly past him, continuing on. Tr. 38-39. At that point, Officer Hannon activated his cruiser's blue lights, and the car came to a stop some 500 feet down the road. Tr. 39.

According to Officer Hannon, defendant fumbled for his license and registration. Tr. 40. This, Hannon testified, indicated that defendant "had some sort of faculty issues." Tr. 40. When asked, defendant acknowledged that he had had one drink about an hour and a half earlier. Tr. 41. While talking to him, Officer Hannon noticed "an odor of intoxicants." Tr. 41. In

Officer Hannon's opinion, defendant also had slurred speech and red, bloodshot eyes. Tr. 41.

Suspecting defendant of OUI, Officer Hannon radioed for a special OUI enforcement patrol to join him at the scene. Tr. 41-43. Before additional units arrived, however, Officer Hannon forcibly removed defendant from the car, handcuffed him, and placed him in custody.

The details of the removal are contested,¹ but suffice it to say that Officer Hannon grew uncomfortable with defendant's reaching within the car's interior. Because the officer "could not see what he was reaching for," he ordered defendant from the vehicle. Tr. 46. Defendant refused, so Officer Hannon "tried to escort him out of the vehicle" by grabbing him from the wrists, then shoulders, to physically remove him. Tr. 46. When a second officer arrived on the scene, Officer Hannon had one handcuff on defendant. Tr. 47. Defendant was transported to the Gorham Police Department. Tr. 47.

The jury was shown a video of some of defendant's and Officer Hannon's interactions at the police station. The State argued that the video depicted defendant "slurring his speech throughout, repeating himself,

¹ Defendant insists that Officer Hannon removed him from the car to stop him from recording the incident on his cell phone. Intoxilyzer video at 2:35:40

talking over everyone.” Tr. 172. On this video, defendant ultimately refused to submit to a breath-alcohol test.

Officer Ryan Martin, who attempted to administer a blood-alcohol test on defendant, testified that he observed an “odor of alcohol” and “slurred speech” coming from defendant. Tr. 99. Officer Day also testified that defendant refused to submit to the test. Tr. 99.

III. The repeated use of defendant’s refusal to submit to alcohol tests as evidence of guilt. Right from the get-go, there was all sort of discussion that encouraged the jury to infer defendant’s guilt from his refusal to submit to alcohol testing.

The court allowed the court clerk to read to the jury the following language from the complaint:

Members of the jury, harken to a complaint brought against [defendant] charging in Count 1, criminal OUI, namely that on or about September 12, 2014, in Gorham, Cumberland County, Maine, [defendant] did operate a motor vehicle while under the influence of intoxicants. *[Defendant] failed to submit to a test at the request of a law enforcement officer.*

Tr. 19 (emphasis added). The State, too, characterized the refusal to submit to tests as part and parcel of the substantive OUI offense:

[Defendant] is charged with operating under the influence, or OUI, failing to submit to and complete a test to measure his blood

alcohol level, refusing to submit to arrest and refusing to sign a summons.

Tr. 20. In fact, the State's opening statement claimed that defendant's refusals were evidence that he was intoxicated:

In this case, however, the State will be offering evidence that [defendant] refused to take a test to determine his blood alcohol level. Now, in Maine the law required a person who operates a motor vehicle while under the influence of intoxicants to take a test to determine their blood alcohol level. Maine law also provides that you can consider a person's refusal to take those tests as evidence that the person ... is guilty of – or was impaired.

Tr. 21-22. The State then told jurors to listen for evidence that defendant refused, not just one such test, but two. Tr. 25.

Next, the State showed the jury a nearly 50-minute-long video of defendant's continued refusal to take Officer Hannon's breath-alcohol test.

Tr. 49. Among much else, the video depicts: defendant saying, "I understand that if I refuse then that's a very big crime," 1:56:40; Officer Hannon telling defendant he would "go straight to jail for a refusal" if he did not cooperate with the test, 1:58:29; a second officer asking defendant, "If you only had one beer, why wouldn't you perform the FSTs?²" 2:00:58; Officer Hannon

² The officer is mistaken. The record shows that no field sobriety tests were ever requested or attempted, Tr. 90, and, defendant, therefore, could not have refused them.

repeatedly urging defendant to take the test to “Prove [him] wrong,” e.g., 2:05:28; Officer Hannon advising defendant to “take the Intoxilyzer test and show me that you’re not over the legal limit,” 2:32:17; Hannon beseeching defendant, “If you haven’t been drinking or had one drink at 10:30, this will show zeroes. It will show that I’m wrong. I would think that you would be happy to show me that I’m wrong,” 2:32:25; a flurry of repeated commands by Officer Hannon to “show me I’m wrong,” 2:32:30 to 2:35; and Officer Hannon asking defendant, “Are you afraid to show me I’m wrong?” 2:34:46 (repeated).

The State then introduced as an exhibit the “implied consent form” indicating that defendant refused to submit to a chemical test at the request of law enforcement. Tr. 52.

Next, the State elicited testimony that Officer Martin offered to give defendant a blood-alcohol test, but defendant refused. Officer Hannon, who overheard the exchange, noted that defendant’s refusal happened “in the same manner as what we could see on the video.” Tr. 55. Officer Martin offered the test “multiple times,” but defendant refused each time. Tr. 99.

When it came time to instruct the jury, the State proposed an instruction that commanded jurors to “consider a person’s failure to submit to a chemical

test as evidence on the issue of whether that person was under the influence of intoxicants.” Tr. 158; Apdx. 25.

Ultimately, the court instructed the jury that:

A refusal to submit to a blood alcohol test, if you find such a refusal occurred, may be considered in determining whether the defendant was under the influence and may be considered in conjunction with any other relative – relevant evidence in this case.

Tr. 199. The court added:

Maine law allows you to consider a person’s failure to submit to a chemical test as evidence on the issue of whether that person was under the influence of intoxicants. Now, if you find beyond a reasonable doubt that [defendant] operated a motor vehicle while under the influence of intoxicants you will be asked an additional question, and I’ll go over this again later, whether you find beyond a reasonable doubt that [defendant] in fact failed to submit to an Intoxilyzer test at the request of a law enforcement officer. If you do not find that [defendant] operated a motor vehicle under the influence of intoxicants, then you do not have to decide the second question. Now, that’s the law with respect to Count 1, the charge of operating under the influence.

Tr. 200.

In its closing argument, the State first reminded the jury of defendant's refusals, Tr. 173-174, and then it argued that these refusals were evidence of guilt:

I suggest to you that [defendant] did not take either of these two tests for one simple reason. [Defendant] knew that if he took these tests it would – if [defendant] had taken either one of these two tests he would not have passed and he knew it and that's why he did not take either of the tests. You saw in the video, Officer Hannon pleading with [defendant], prove me wrong, that's something that Officer Hannon, other than his answers, repeated over and over again, prove me wrong. You saw him holding the device that belongs to the breath test inches from [defendant's] mouth. Prove me wrong, that's all Officer Hannon kept saying in that situation, and [defendant] refused.

Tr. 177-78. Finally, the State reminded the jury that it can “consider his refusal as evidence of his impairment.” Tr. 179. According to the State, “in Maine, there is no right to refuse.” Tr. 179.

IV. Defendant repeatedly and strenuously objected to use of his refusals as evidence that he was guilty of operating under the influence. Before the trial even began, defendant moved *in limine* to exclude any reference to his refusals to submit to chemical testing. Apdx. 22. Defendant argued that the use of these refusals to prove his guilt was unconstitutional and in violation of Me.R.Evid. 403 because it undermined

his Fourth Amendment rights and had little probative value yet created a very high risk of unfair prejudice. *Id.* (citing *State v. Glover*, 2014 ME 49, 89 A.3d 1077). The trial court denied defendant's motion. Tr. 5-6.

At trial, defendant reiterated his objection. He objected to the reference to defendant's refusals read to the jury in the complaint, Tr. 4; he objected to the video being shown to the jury, Tr. 48; he objected to the admission of the implied consent refusal form, Tr. 58; to "the refusal issue in general," Tr. 58; to the instructions calling on the jury to consider the refusals as evidence that defendant was guilty of OUI, Tr. 159; and reiterated his objections to the issues raised *in limine* and the introduction of the video. Tr. 210.

All of the objections were overruled summarily. The trial court's most substantive explanation on the record was about the jury instructions. After defendant objected to the use of his refusal, the court noted that this sort of evidence was distinct from other refusal evidence (*e.g.*, refusal to submit to a DNA test):

Court: Considerably different because it's statutory. And certainly constitutionally tested. You don't have to have a driver's license. It's considered a privilege. There's cases that say

that. So when you do that, you in effect waive your right to refuse, that's your waiver.

Defendant: Well, I mean other states have invalidated their similar implied consent laws.

Court: States much less qualified and intellectually not the same as Maine.

Tr. 160.

V. The State introduced evidence – and argued it to the jury – that the court had ruled was inadmissible. In addition to the video from the Intoxilyzer room at the Gorham Police Department, this State's case also included a video of Officer Hannon's and defendant's interactions at the Cumberland County Jail. But, despite defendant's discovery requests and motion for sanctions, this second video was never produced. Tr. 5-6; Apdx. 24.

The State's failure to ever produce the Cumberland County Jail video prompted defendant to move for dismissal or, in the alternative, exclusion of the video from the Gorham Police Station. Apdx. 24. The trial court denied those remedies, but instead ordered:

The Court recognizes based upon the information provided by counsel that there were issues of discovery with respect to

activities at the Cumberland County Jail and the Court has ruled that in the absence of the video as requested, in the normal defense request for discovery, that *the activities and the refusal [to sign a USAC] at the Cumberland County Jail will not be admitted.*

Tr. 5-6 (emphasis added).

Despite the court's order, the State went right to the off-limits evidence in its opening statement: "Officer Hannon will then tell you how he brought [defendant] to the Cumberland County Jail where on top of everything he attempted to give [defendant] a summons, which [defendant] again refused."

Tr. 25.

The State proceeded to elicit evidence from Officer Hannon about the incident at the jail:

Prosecutor: Did you try to give him anything?

Ofc. Hannon: I did. I tried to have him sign the summons for the speeding ticket I also asked him to have him sign ... the USACs, he did not want to do that. He was read the bottom of it, which has the warning on it. He was also informed that if he didn't sign it he would be charged with another crime for refusing to sign. He still did not want to sign. So he was taken away by the jail staff and placed in a – what they call the detox holding cells.

Tr. 56-57.

The State then sought and received admission of State's Exhibit #3, the USAC which Officer Hannon testified defendant refused to sign. Tr. 57. Defendant did not object. Tr. 57.

During closing, the State argued: "Finally, as you heard, when Officer Hannon brought [defendant] to the Cumberland County Jail he gave [defendant] a summons to sign, which [defendant], as you know, again refused. Officer Hannon explained the consequences of not signing the summons and [defendant] refused again, never signing that summons." Tr. 175.

QUESTIONS PRESENTED

1. Did the trial court err by admitting evidence of defendant's refusal to submit to chemical tests as evidence of his intoxication, and by instructing the jury that it should consider his refusals as evidence of intoxication?
2. Did the State commit obvious error by introducing and arguing evidence about the "activities" at the Cumberland County Jail after the court had explicitly ruled that this evidence inadmissible?

SUMMARY OF THE ARGUMENT

A refusal to submit to a chemical test is informative of nothing, other than a defendant's knowledge of his right to refuse. Introduction of this evidence at defendant's trial to prove intoxication is both wrong as a matter of the Rules of Evidence and substantive Fourth Amendment law. The provisions of Maine's implied consent law purporting to authorize admission are unconstitutional usurpations of this Court's exclusive authority to set the rules for admissibility and, anyways, counter to the Fourth Amendment.

As to the second assignment of error, the State repeatedly introduced evidence that the court had ruled was inadmissible. This evidence constituted the sole proof that supported a conviction for Count 3 (Failure to Sign a Universal Summons and Complaint). Introduction of evidence that is obvious, reversible error.

ARGUMENT

FIRST ASSIGNMENT OF ERROR

I. This Court reviews constitutional interpretations de novo. *State v. Larsen*, 2013 ME 38, ¶ 17, 65 A.3d 1203. For rulings about the admissibility of evidence under the Rules of Evidence, this Court reviews for abuse of discretion. *Glover*, 2014 ME 49, ¶ 8..

II. Refusal to submit to chemical tests is not probative of intoxication or, if it is, its probative value is outweighed by the risk of unfair prejudice. “There are myriad reasons that a person, whether innocent or not, may exercise a constitutional right.” *Glover*, 2014 ME 49, ¶ 11. Many of those reasons have “no legitimate bearing on the likelihood that a defendant is guilty of a criminal offense.” *Id.* The exercise of one’s right to withhold consent is irrelevant to just about everything except the question of whether the person knows it is his right to refuse. *Id.* at ¶ 11.

In *Glover*, this Court held that the “minimal probative value” of refusal evidence – in that case, refusal to submit to warrantless DNA testing – was almost always outweighed by its tendency to lead to unfair prejudice. *Id.* at ¶ 12. The very same logic applies here.

Before proceeding further, defendant pauses to address the elephant in the room: the Rules of Evidence promulgated by this Court – and not the implied consent statute enacted by the Legislature – dictate what is and what is not admissible in Maine courts – both statutorily and constitutionally. 4 M.R.S. §9-A; ME. CONST. ART. III, SEC. 1 & 2. In other words, this Court has the ultimate say over admissibility.

A. The implied consent statute’s attempt to make refusal evidence admissible at trial to prove intoxication is an unconstitutional

violation of separation of powers principles. Maine's implied consent statute, 29-A M.R.S. §2521(3)(B), purports to make refusal evidence "admissible in evidence." Elsewhere, it is provided that this sort of evidence "is admissible on the issue of whether that person was under the influence of intoxicants." 29-A M.R.S. §2431(3). Those provisions, however, are both counter to the Court's exclusive statutory authority to determine admissibility and unconstitutional because they violate Separation of Powers principles of the Maine Constitution.³

This Court – not the Legislature – has "the power and authority to prescribe, repeal, add to, amend or modify rules of evidence" 4 M.R.S. §9-A; *see also State v. Pinkham*, 383 A.2d 1355, 1356 (Me. 1978) (Me.R.Evid. 609(a), not statute purporting to make admissible evidence of witnesses' convictions "involving moral turpitude," governs admissibility).⁴ Upon promulgation of the Rules by this Court, "all laws in conflict therewith

³ ME. CONST. ART III, SEC. I separates the State government into "3 distinct departments," and ME. CONST., ART. III, SEC. II prohibits departments from "exercis[ing] any of the powers properly belonging to either of the others...."

⁴ This Court wrote: "When it considered adopting Maine Rules of Evidence, the Court continued the practice it had begun when it enacted the Maine Rules of Civil Procedure in 1959 of seeking legislative authorization to promulgate such rules, (P.L. 1957, c. 15). However, we reaffirm that the Court has inherent power to establish rules for the orderly conduct of business before it. The Court considers that when it exercises its inherent rule-making power, consultation with and approval of the Legislature is advisable as a matter of policy." *Pinkham*, 383 A.2d 1355, 1356, n.2 (internal quotations and citations omitted).

shall be of no further force or effect.” 4.M.R.S. §9-A. Separation of Powers principles, in addition to this statute, prohibit the Legislature from bypassing or usurping this Court’s authority. The rules of this Court, then, rather than the dictates of any other department or entity “bind” the courts of the State of Maine. *Anderson v. Elliott*, 555 A.2d 1042, 1047 (Me. 1989).

So, when the Legislature, in the implied consent statute, purports to make refusal evidence “admissible,” it has bypassed this Court and its Rules of Evidence, offending the Maine Constitution. Admissibility is a complicated, context-dependent matter which is determined by the judicial interpretation of judicially derived Rules of Evidence, not by Legislative *ipse dixit*. Courts, applying those Rules, must screen any proffered evidence for relevance, reliability, unfair prejudice, hearsay, and much else. Those considerations – not the Legislature’s command – control. Defendant contends that if this Court screens refusal evidence through the Rules, it will determine that refusal evidence is not admissible to prove intoxication.

B. Defendant’s refusal to submit to the tests is not relevant to prove intoxication. Relevance is “any tendency to make a fact more or less probable than it would be without the evidence.” Me.R.Evid. 401. Such a “tendency” is not demonstrated if the proffered evidence is “too attenuated to warrant its consideration by the jury....” *State v. Adams*, 2015 ME 30, ¶

16, 113 A.3d 583. In other words, evidence is relevant only if it has “sufficient value to raise a reasonable” implication about guilt or innocence. *Id.* A refusal supports no reasonable inferences about whether an individual was intoxicated. *Glover*, 2014 ME 49, ¶ 11 (“Invocation of this right has no legitimate bearing on the likelihood that a defendant is guilty of a criminal offense.”)

The implied consent statute does not change the analysis. As discussed, *infra*, because a defendant’s refusal (to submit to warrantless DNA testing or to submit to warrantless blood or breath testing) evinces his willingness to assert his Fourth Amendment rights, the inference of guilt does not logically follow.

Those of a certain political or philosophical persuasion may have their own reasons for refusing. Those, like defendant, who, in the video shown to the jury, was seen to be skeptical of law enforcement’s motives, have their own reasons. In neither case does an individual’s refusal lead to the conclusion that they are intoxicated.

This principle is a part of American culture, as recognized by U.S. Supreme Court case-law. See *e.g.*, *Camera v. Municipal Court of the City & County of San Francisco*, 387 U.S. 523, 530-31 (1967) (“[E]ven the most law-abiding citizen has a very tangible interest in limiting the circumstances

under which the sanctity of his home may be broken by official authority.”); *Dist. of Columbia v. Little*, 339 U.S. 1, 7 (1950) (“The right to privacy in the home holds too high a place in our system of laws to justify a[n] ... interpretation that would impose a criminal punishment on one who does nothing more” than object “to the officer’s entry of her house without a search warrant.”)

Many sister courts have adopted this reasoning. *United States v. Prescott*, 581 F.2d 1343, 1352 (9th Cir. 1978) (refusal evidence is “so ambiguous as to be irrelevant”); *United States v. Moreno*, 233 F.3d 937, 940 (7th Cir. 2000) (“of little probative value”); *State v. Turner*, 39 M.J. 259, 262-63 (C.M.A. 1994) (“not relevant”); *Anable v. Ford*, 653 F.Supp. 22, 36 (W.D. Ark. 1985) (“supports no inference at all”); *State v. Sellers*, 507 N.W.2d 235, 236 (Minn. 1993) (“ambiguous”); *Commonwealth v. Welch*, 585 A.2d 517, 520 (Pa. 1991) (not probative of guilt); *Garcia v. State*, 712 P.2d 1375, 1376 (N.M. 1986) (“ambiguous”); *State v. Thomas*, 766 N.W.2d 263, 272 (Iowa Ct. App. 2009) (refusal evidence proves defendant knew his rights, nothing more); *Burchette v. Commonwealth*, 425 S.E.2d 81, 85 (Va. Ct. App. 1992) (“proof of nothing”).

C. Even if evidence of defendant’s refusal has some probative value, it is substantially outweighed by the danger of unfair prejudice.

Looming on the other side of the Rule 403 equation “the danger is that the jury is likely to assign much more weight to the defendant’s assertion of the right than is warranted.” *Glover*, 2014 ME 49, ¶ 12 (internal citations, quotations, and brackets omitted). Worse still, “[t]he value of constitutional privileges is largely destroyed if persons can be penalized for relying on them.” *Id.* ¶ 13 (quoting *Grunewald v. United States*, 353 U.S. 391, 425-26 (1957) (Black J., concurring)). This logic applies here.

In some ways, defendant’s situation resulted in more unfair prejudice than did *Glover*’s. In *Glover*, *the State* argued that the defendant’s refusal was indicative of his consciousness of guilt.⁵ In contrast, *the court here specifically instructed the jury* to use defendant’s refusals to prove an element of the offense: intoxication. This represents a far greater concern than testimony or argument; it is legal instruction that jurors were bound to follow. Jurors were told they could find an element of the offense – intoxication – based on the mere fact of refusal. These circumstances are far more troublesome than those in *Glover* or, indeed, most of the case-law cited in this brief. The jury was invited to return a guilty verdict on something

⁵ *Glover* was convicted of gross sexual assault, 17-A M.R.S. §253(2)(D). *Glover*, 2014 ME 49, ¶ 1. As gross sexual assault does not have a *mens rea* component, evidence of *Glover*’s consciousness of guilt or innocence was irrelevant to any element of the offense. See *State v. Ashley*, 490 A.2d 226, 229 (Me. 1985) (no *mens rea* requirement in 17-A M.R.S. §253(1)(B)).

less than proof beyond a reasonable doubt that defendant committed the crime.

It is an unyielding principle of constitutional law that the State cannot convict a defendant with less than proof beyond a reasonable doubt of every element of the crime charged. *Jackson v. Virginia*, 443 U.S. 307, 315 (1979). A conviction based on less would violate the Due Process Clause. *In re Winship*, 397 U.S. 358, 364 (1970). Yet here, the trial court and the State told jurors they should consider refusal evidence – something this Court has said never has more than “minimal probative value” for any purpose – to decide whether defendant was intoxicated. *Glover*, 2014 ME 49, ¶ 12. This removes any doubt that the error here was harmless.

Indeed, the court’s instructions that jurors use evidence of defendant’s refusal is also unfair because such an instruction “misleads the jury by unnecessarily emphasizing one evidentiary fact” over others. *Ham v. State*, 826 N.E.2d 640, 642 (Ind. 2005) (court’s instruction that jury consider refusal as evidence of intoxication is abuse of discretion). Maine case-law likewise supports the notion that “instructions giving special focus to particular evidence should be avoided.” *State v. Just*, 2007 ME 91, ¶ 15, 926 A.2d 1173. Defendant suffered unfair prejudice as a result of the court’s instructions.

III. Admission of evidence about defendant's refusal to take the tests violates the Fourth Amendment. Recognizing this Court's adherence to the doctrine of constitutional avoidance, defendant has first advanced a Rules-of-Evidence based argument. It alone is sufficient to decide this case in defendant's favor. However, the problems with the implied consent are of constitutional magnitude, as other state courts have held in light of recent U.S. Supreme Court case-law.

There is a sea change underway in the doctrine of consent since the U.S. Supreme Court's decision in *Missouri v. McNeely*, 133 S.Ct. 1552 (2013). Numerous state courts recognize, for Fourth Amendment purposes, valid consent is no longer obtained simply by the legal fiction of implied consent statutes. Instead, as several state courts have reasoned, a defendant's consent to blood or breath testing cannot be categorically obtained by statute; rather, voluntariness must be evaluated on a case-by-case, totality-of-the-circumstances approach. Many have likewise reasoned that to be effective (*i.e.*, for Fourth Amendment purposes) consent must be revocable. In other words, after *McNeely*, implied consent statutes will not absolve the prosecution from proving voluntariness under the specific facts of each individual case.

All of this matters greatly for defendant's case. Having not, in fact, offered valid consent to be subjected to chemical tests by sole virtue of the implied consent statute, defendant's Fourth Amendment privilege remained intact throughout his trial. Defendant certainly did not consent in the totality of the circumstances; he steadfastly and repeatedly refused to consent, such that the State desired to penalize him for this refusal. As he argues, this lack of consent means that admission of evidence of his refusals – that is, evidence of his exercise of his Fourth Amendment right – at trial against him is unconstitutional.

A. For Fourth Amendment purposes, the implied consent statute did not operate to obtain defendant's consent to chemical tests.

Both breath-alcohol and blood-alcohol tests are “searches” that implicate the Fourth Amendment. See *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 617 (1989); *McNeely*, 133 S.Ct. at 1558. This means that a person need not submit to such a test unless and until a warrant or court order requiring him to do so is obtained or some other “well-recognized exception” to the warrant requirement applies. *Id.* at 1558-59.

Consent to a search is one such exception to the warrant requirement. For some time, courts viewed the sort of “consent” obtained by operation of an implied consent statute as valid for Fourth Amendment purposes. This

meant that the right to refuse a chemical test was once viewed as “simply a matter of grace bestowed by the [state] Legislature.” *South Dakota v. Neville*, 459 U.S. 553, 565 (1983); *State v. Roberts*, 609 A.2d 702, 703 (Me. 1992). That is no longer the correct interpretation of the Fourth Amendment and the doctrine of consent.

In deciding *McNeely*, the U.S. Supreme Court treated the “standard implied consent” law as if it did not in fact constitute consent for Fourth Amendment purposes. See *E.g. McNeely*, 133 S.Ct. at 1558 (referring to “nonconsensual blood testing,” Missouri’s implied consent statute notwithstanding). In that case, a defendant was pulled over for a traffic infraction. *Id.* at 1556. After noticing signs of intoxication, including failed field sobriety tests, a police officer requested McNeely submit to a breath-test, which he declined. *Id.* at 1556-57. On the way to the police station, McNeely again refused to submit, so the officer headed instead to a hospital to obtain a blood test. *Id.* at 1557. At the hospital, McNeely refused the blood test, even after the officer read him “a standard implied consent form” informing him that his refusal could be used against him at trial and that his license to drive would be immediately suspended for one year. *Id.* A lab technician then drew a blood sample from McNeely. *Id.*

Again, it is important to note that, despite Missouri's law purporting to garner implied consent, the Supreme Court was not persuaded that *McNeely* had given valid, Fourth Amendment consent. Instead, the Court went on to analyze the case under the exigent circumstances exception to the warrant requirement. It held that the dissipation of alcohol in a suspect's body is not enough to create a *per se* exigency. *Id.* at 1561. It directed, "[w]hether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances." *Id.* at 1563. This is the crux of the matter: Fourth Amendment reasonableness is determined case by case, not through legislative fiat or a *per se* mechanism such as "implied consent." See *Aviles v. Texas*, 134 S.Ct. 902 (2014) (on remand *Aviles v. State*, 443 S.W.3d 291, 294 (Tex. 4th Ct. of App. 2014) (after remand from U.S. Supreme Court, implied consent and mandatory blood draw statutes are not valid exceptions to the warrant requirement)). Thus, contrary to the State's mantra that "in Maine, there is no right to refuse," Tr. 179, Maine's implied consent statute does nothing to impede the Fourth Amendment.

Since *McNeely*, state courts have modified their existing case-law about implied consent. Two general theories have emerged to explain why the sort of "consent" obtained by operation of an implied consent statute does

not constitute valid consent for Fourth Amendment purposes: (1) consent depends on the totality of the circumstances and, therefore, cannot be extracted en masse by operation of a statute; (2) whatever “consent” might be obtained from such a statute is revocable, and evidence of the defendant’s revocation cannot be criminally punished. Both theories support the conclusion that, in this case, defendant had every right to stand on the Fourth Amendment and refuse testing.

This first conception rejects the idea that a driver’s license (or simply the act of driving a vehicle) yields categorially valid (*i.e.*, Fourth Amendment) consent without case-by-case determinations of voluntariness and reasonableness. After all, U.S. Supreme Court precedent “requir[es] a totality of the circumstances analysis to determine voluntary consent.”⁶ *State v. Wulff*, 337 P.3d 575, 582 (Idaho 2014) (citing *McNeely*). Implied consent statutes notwithstanding, it is the State’s burden to show that such “consent was, in fact, freely and voluntarily given” on a case-by-case basis. *Wulff*, 337 P.3d at 581 (quoting *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968)).

⁶ This is hardly an innovation in Fourth Amendment jurisprudence. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973) (“[W]hether a consent to a search was in fact ‘voluntary’ or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of the circumstances.”)

Several state courts have adopted this framework for invalidating the theory of implied consent post-*McNeely*: *State v. Butler*, 302 P.3d 609, 613 (Ariz. 2013) (“We hold now that independent of [implied consent statute], the Fourth Amendment requires an arrestee’s consent to be voluntary to justify a warrantless blood draw.”); *People v. Arredondo*, 245 Cal. App. 4th 186, 196 (Cal. App. 6th Dist. 2016) (“Compelling the defendant to choose between exercising Fourth Amendment rights and his right to travel constitute coercion; the government cannot be said to have established that the defendant freely and voluntarily consented to the search when to do otherwise would have meant foregoing the constitutional right to travel.”) (internal quotations omitted); *People v. Harris*, 234 Cal. App. 4th 671, 689-90 (Cal. App. 4th Dist. 2015) (“Where the validity of a search rests on consent, the State has the burden of proving that the necessary consent was obtained and that it was freely and voluntarily given, a burden that is not satisfied by showing a mere submission to a claim of lawful authority.”); *People v. Schaufele*, 325 P.3d 1060, 1067 (Colo. 2014) (“So, until a majority of the Supreme Court tells us otherwise, we must apply the totality of the circumstances approach.”); *Flonny v. State*, 109 A.3d 1060, 1065 (Del. 2015) (Statutory implied consent does not, on its own, constitute valid consent); *Williams v. State*, 167 So.3d 483, 490 (Fla. Dist. Ct. App. 5th Dist.

2015) (“The vast majority of courts have found that statutory implied consent is not equivalent to Fourth Amendment consent. We agree.”); *Williams v. State*, 771 S.E.2d 373, 377 (Ga. 2015) (“[T]he need for the State to demonstrate *actual consent* for the purpose of exception to the warrant requirement and its constitutional implications is reinforced by the analysis of the United States Court in *McNeely*.”); *State v. Yong Shik Won*, 361 P.3d 1195, 1221 (Haw. 2015) (“Beyond mere statutory compliance, it is clear that an approach that accounts for the totality of the circumstances is invariably required to determine the voluntariness and validity of consent.”); *Wulff*, 337 P.3d at 582 (because it operates as a per se exception, implied consent statute “does not fall under the consent exception to the Fourth Amendment of the United States Constitution.”); *State v. Modlin*, 867 N.W.2d 609, 618-19 (Neb. 2015) (“in accord” with courts holding that “mere compliance with statutory implied consent requirements does not, per se, equate to actual, and therefore voluntary, consent on the part of the suspect to as to be an exception to the constitutional mandate of a warrant.”); *State v. Wells*, 204 Tenn. Crim. App. LEXIS 933, *32 (Tenn. Crim. App. Oct. 6, 2014) (“The implied consent law does not, in itself, create such an exception.”); *State v. Villareal*, 475 S.W.3d 784, 813 (Tex. Ct. Crim. App. 2014) (implied consent

statute provisions “do not, taken by themselves, form a constitutionally valid alternative to the Fourth Amendment warrant requirement.”).

Adopting the second line of thinking about consent, the Kansas Supreme Court recently struck down its state’s implied consent statute because “consent to a search may be revoked or withdrawn at any time before the search has been completed.” *State v. Ryce*, Kan. LEXIS 107, *55 (Feb. 26, 2016) (slip opinion). The Kansas court reasoned that “[i]t would be inconsistent with Fourth Amendment principles to conclude consent remained voluntary if a suspect clearly and unequivocally revoked consent.” *Id.* at 75. As the Kansas Supreme Court noted, this is the conclusion of the vast majority of states that have considered the issue in the context of implied consent statutes after *McNeely*, *id.*: *Wulff*, 337 P.3d at 581 (“[I]rrevocable implied consent operates as a per se rule that cannot fit under the consent exception because it does not always analyze the voluntariness of that consent.”); *State v. Fierro*, 853 N.W.2d 235, 241 (S.D. 2014) (“Once given, consent to search may be withdrawn at any time prior to the completion of the search.”); *Byars v. State*, 336 P.3d 939, 945 (Nev. 2014) (“A necessary element of consent is the ability to limit or revoke it.”); *State v. Garza*, 2015 Wash. App. LEXIS 102, *12 (Wash. Ct. App., Jan. 27, 2015) (“the driver may withdraw his consent”) (internal citation omitted).

These states – Arizona, California, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Kansas, Nebraska, Nevada, South Dakota, Tennessee, and Washington – are all “qualified” and “intellectual.” *But see* Tr. 160. These states are also right, as a matter of law.⁷ The trial court’s apparent reluctance to seriously consider defendant’s argument and evaluate how *McNeely* impacts this case is puzzling. See Apdx. 22; Tr. 160.

Whatever “consent” might be extracted from a licensed Maine driver by the implied consent statute, it, in and of itself, does not satisfy the Fourth Amendment. Defendant – who vociferously and repeatedly refused chemical testing – had a Fourth Amendment right to do so. Nothing about Maine’s implied consent statute changes that.

B. Considering the totality of the circumstances, defendant did not consent to chemical testing. Without valid consent simply by virtue of the implied consent statute, the “the totality of the circumstances must be examined.” *State v. Kremen*, 2000 ME 117, ¶ 35, 754 A.2d 964. “The State

⁷ In a fifty-state survey of post-*McNeely* treatment of states’ implied consent laws, defendant found only two states – Minnesota and North Dakota – that purport to retain categorical implied consent. The U.S. Supreme Court consolidated both cases and granted certiorari to review them. See *Bernard v. Minnesota*, 136 S.Ct. 615 (2015) to review *State v. Bernard*, 859 N.W.2d 762,767 (Minn. 2015) (implied consent is valid as a search incident to arrest); *Birchfield v. North Dakota*, 136 S.Ct. 614 (2015) to review *State v. Birchfield*, 858 N.W.2d 302 (N.D. 2015) (consent is not coerced by implied consent statute; punishing refusal does not violate Fourth Amendment). Oral argument is scheduled for April 2016.

must prove and the court must find that the consent was free and voluntary and not the product of coercion, whether express or implied.” *Id.* (quotation omitted); see also *Schneckloth* 412 U.S. at 248-249.

The State cannot prove that here. The video, the testimony, the refusal form – everything – says that defendant did not consent. But an additional note is in order. There is a strong presumption against voluntariness when law enforcement misrepresents to a citizen that he has no right to refuse a search. *United States v. McWeeney*, 454 F.3d 1030, 1035 (9th Cir. 2006) (“[S]o too would the right to withdraw consent be valueless if law enforcement officers are permitted deliberately to coerce a citizen into believing that he or she had no authority to enforce that right.”); *State v. Bailey*, 2012 ME 55, ¶ 55, 41 A.3d 535 (“Consent is not voluntary if the consent was induced by deceit, trickery or misrepresentation of the officials making the search....”) (internal quotation omitted). Where it is standard practice – enshrined in statute – to inform a person “in Maine, there is no right to refuse,” Tr. 179, the possibility of ever obtaining voluntary consent from such a process is highly dubious.

C. Admission of defendant’s refusal to submit to chemical testing violates his Fourth Amendment rights. “The value of constitutional privileges is largely destroyed if persons can be penalized for

relying on them. It seems peculiarly incongruous and indefensible for courts which exist and act only under the Constitution to draw inferences of lack of honesty from invocation of a privilege deemed worthy of enshrinement in the Constitution.” *Grunewald*, 353 U.S. at 425-26. This Court stopped short of saying that in *Glover*, choosing instead to rely on a Rules-approach to the problem. Nevertheless, the admission of refusal evidence is an error of constitutional magnitude. This is because, on one hand, refusal evidence encumbers the free exercise of a constitutional right, creating a no-win situation for anyone asked to submit: do so or have your refusal used to make you look guilty.

There are really two threads to this jurisprudence. The first is that refusal evidence offends the constitution because it impermissibly encumbers the free exercise of constitutional rights, and any encumbrance is in and of itself unconstitutional. U.S. Supreme Court case-law supports this notion. See e.g., *Griffin v. California*, 380 U.S. 609, 614 (1965) (any “comment on the refusal to testify” amounts to “a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion more costly.”); *United States v. Jackson*, 390 U.S. 570, 581 (1968) (“If a [statutory] provision had no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to

exercise them, then it would be patently unconstitutional.”) It is difficult to conceive of the wide-berth the State was given to imply that defendant was intoxicated by simple virtue of his exercise of his right not to consent as anything other than a penalty.

A second, albeit closely related, principle is that the admission of refusal evidence chills the invocation of Fourth Amendment rights, which makes it unconstitutional. To illustrate this danger, recall the prosecutor’s statement that “in Maine, there is no right to refuse.” Tr. 179. This is wrong as a matter of law in light of *McNeely*.

Admission of refusal evidence violates the constitution because it impermissibly creates a Hobson’s choice: “one would have to choose between allowing a search of one’s possessions, or having the refusal be construed as evidence that one was hiding something.” *Commonwealth v. Welch*, 585 A.2d 517, 519 (Pa. Super. 1991). Because “an assertion of such a right will often be construed by the lay juror as an indication of a guilty conscience, allowing testimony of the assertion of the right will essentially vitiate any benefit conferred by the extension of the right in the first instance, thus, rendering the right illusory.” *Id.* Only a Fourth Amendment privilege with teeth retains the protections promised on its face.

SECOND ASSIGNMENT OF ERROR

I. **This Court reviews unpreserved claims of prosecutorial misconduct for obvious error.** *State v. Dolloff*, 2012 ME 130 ¶ 35, 58 A.3d 1032. This standard requires a defendant to show (1) that there was an error; (2) that was plain, (3) which affected substantial rights; (4) and “seriously affects the fairness and integrity of public reputation of judicial proceedings.” *Id.* (internal quotation omitted).

II. **The State’s argument about – and elicitation of – evidence from the “activities” at the Cumberland County Jail was error because the trial court had ruled that this evidence was inadmissible.** The court did not rule on defendant’s written motion *in limine*/motion for sanctions until trial. Tr. 5-6. This meant that the court’s ruling came only moments before opening statements. The parties had little time to digest the court’s order, all the more so because the order excluding evidence of the “activities” at Cumberland County Jail was relevant only to a minor charge⁸ and because the remedy was not actually one previously requested by defendant. In other words, the parties had other, more pressing, matters to attend to and the court’s order granting a remedy not mooted by either party, was not one that the parties had likely contemplated in preparing for trial.

⁸ Failure to Sign a Universal Summons and Complaint charge (Count 3).

Excuses aside, there is no ambiguity whatsoever in the court's ruling excluding evidence of the alleged refusal at the jail: "[T]he activities and the refusal at the Cumberland County Jail will not be admitted." Tr. 5-6. But the State went ahead, just minutes later, telling the jury that it would hear about this evidence. Tr. 25. The State proceeded to deliver on this promise, eliciting on the witness stand the very evidence that the court said was inadmissible. Tr. 56-57. It even introduced an exhibit about the inadmissible evidence. Tr. 57. Finally, the State argued that the jury should use this evidence to convict defendant of Count 3 – failure to sign a USAC. Tr. 175.

The reason for the State's actions – an unexpected ruling, an inexperienced student-attorney prosecuting the case,⁹ or the relatively minor nature of the charge affected by the ruling – matters not. *Cf. State v. Hinds*, 485 A.2d 231, 235 (Me. 1984) (distinguishing between "improper prosecutorial conduct" and "prosecutorial bad faith"). This confluence of events is the epitome of obvious error: it was clearly error for the prosecutor to argue and introduce evidence that the court had just said was inadmissible, and the State never filed a cross-appeal to challenge that ruling; instead, it just ignored it at trial.

⁹ The court complimented the student-attorney who prosecuted the case for his "preparation and civility with respect to this entire matter." Tr. 215.

In determining whether there was error, “[t]he central question is whether the prosecutor’s comment is fairly based on evidence.” *Dolloff*, 2012 ME 130, ¶ 41 (internal quotation and brackets omitted). Here, the prosecutor’s comments and questions (as well as the responses they yielded) had *explicitly* been ruled inadmissible just moments before. That is what makes this error so plain; it is obviously a fundamental premise of the law that the court’s ruling on admissibility must be followed. *Hinds*, 485 A.2d at 235 (“As part of its obligation to ensure a fair trial for the defendant, the prosecution must avoid eliciting inadmissible testimony.”)

Having established that the error was plain, defendant can also demonstrate “a reasonable probability that the error affected [his] substantial rights.” *Dolloff*, 2012 ME 130, ¶ 37. Plainly, if the prosecutor had not ignored the court’s ruling, there would no evidence at all to convict defendant of Count 3 (“Failure to Sign a Universal Summons and Complaint”). “[A] conviction based upon a record wholly devoid of any relevant evidence of a crucial element of the offense charged is constitutionally infirm.” *Jackson*, 443 U.S. at 314. The U.S. Supreme Court has said this right to be convicted by nothing less than evidence beyond a reasonable doubt “secures to an accused the most elemental of due process rights: freedom from a wholly arbitrary deprivation of liberty.” *Id.* .

Though it is true that “[t]rial counsel’s failure to object to the inadmissible evidence, whether as a result of tactical decision or oversight, will itself be a consideration in determining whether the error is obvious and highly prejudicial,” *Dolloff*, 2012 ME 130, ¶ 38, prejudice here cuts cleanly against that: if the evidence had been excluded, as the court ordered, defendant would have been acquitted of Count 3. There was simply nothing else the State could have done to garner a conviction on that count.

Having established a conviction that should not have occurred, based on the court’s own ruling, if the State had not ignored it, defendant has demonstrated a serious deprivation of due process. This Court should not countenance prosecutors ignoring trial courts’ evidentiary rulings.

CONCLUSION

For all the foregoing reasons, this Court should vacate the trial court’s judgment of conviction as to Counts 1 and 3 and remand for proceedings consistent with that mandate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 29, 2016, I hand-delivered 10 copies of this brief to the Office of the Clerk of this Court, I further certify that I caused a copy of the brief to be served on opposing counsel, as listed on the Briefing Schedule, via U.S. Mail.