

State of Maine v. Nicholas Sexton

Appeal from Penobscot County Unified Criminal  
Court

Supreme Judicial Court sitting as the Law Court  
Law Court Docket number PEN-15-389

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Maine Supreme Judicial Court

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## PROCEDURAL HISTORY

Nicholas Sexton, the appellant, was indicted on three count of Murder, under Title 17-A M.R.S.A. § 201(1)(A),<sup>1</sup> and one count of Arson (Class A), under Title 17-A M.R.S.A. § 802(1)(A)<sup>2</sup> on September 26, 2012 by a Penobscot County grand jury. Mr. Sexton was arraigned on November 5, 2012 and entered not guilty pleas to all charges.

The State filed a notice of joinder on October 1, 2012 in order to try Mr. Sexton with his co-defendant Randall Daluz (docket number PENCDCR-2012-3778). On July 1, 2013 Mr. Sexton filed a motion for relief from prejudicial joinder and a hearing was held on this motion on August 15, 2013. The Penobscot County Unified Criminal Court granted Mr. Sexton's motion for relief from prejudicial joinder on October 24, 2013, but left open the question of simultaneous trials with two juries in the same court room. A new motion for relief from prejudicial joinder was filed by Mr. Sexton on December 2, 2013, along with a motion to suppress. The State filed a memorandum in opposition to Mr. Sexton's motion on January 28, 2014. A new hearing on the motion for relief from prejudicial joinder was held on March 12, 2014. Mr. Sexton filed an amended motion for relief from prejudicial joinder on March 20, 2014. The Penobscot

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<sup>1</sup>A person is guilty of murder if that person "[i]ntentionally or knowingly causes the death of another human being." Title 17-A M.R.S.A. § 201(1)(A).

<sup>2</sup>A person is guilty of arson if "he starts, causes, or maintains a fire or explosion. . . [o]n the property of another with the intent to damage or destroy property thereon." Title 17-A M.R.S.A. § 802(1)(A).

County Unified Criminal Court issued a written order denying Mr. Sexton's motion for relief from prejudicial joinder on April 8, 2014. A motion to reconsider the motion for relief from prejudicial joinder was filed on April 28, 2014 and was denied by the Court on the same day for reasons the Court stated on the record.

Jury selection occurred over a four day period from April 28, 2014 until May 1, 2014. Mr. Sexton's trial commenced on May 1, 2014, with opening statements and a view that resulted in the jurors being bussed to various locations around Bangor. From there, the trial continued for nineteen days. The State officially rested their case on May 19, 2014, on the thirteenth day of trial. Mr. Sexton made a verbal motion for acquittal on May 16, 2014, in anticipation of the State resting, which the Court denied. Mr. Sexton presented testimony in his own defense on May 19, 2014, after which he rested his case. Mr. Sexton's co-defendant, Randall Daluz, presented a defense on May 20, 2014, after which his case was officially rested and closing arguments were made to the jury. A renewed motion for a judgment of acquittal was made at the close of all the evidence on May 20, 2014 which the Court again denied. Jury instructions were given on May 20, 2014 and the jury began deliberations the same day.

After numerous notes from the jury for clarification on their instructions, a verdict was reached by the jury on May 28, 2014. The jury returned a verdict of guilty on only two of the charges against Mr. Sexton, the murder charge contained

in Count 2 and the charge of Arson found in Count 4. A mistrial was declared on the remaining two Counts, Counts 1 and 3.

Mr. Sexton was sentenced on July 28, 2015 and received a sentence of 70 years on Count 2, the murder charge, and a consecutive sentence of 20 years on Count 4, the arson charge.

Mr. Sexton then filed a notice of appeal and for application for leave to appeal his sentence on July 28, 2015. Mr. Sexton's application to appeal his sentence was denied on October 2, 2015.

### **STATEMENT OF FACTS**

On August 13, 2012 a car fire was discovered and reported at 3:30 a.m. in the parking lot of Automatic Distributors, which is located in the Target Industrial Circle area of Bangor.<sup>3</sup> (Tr. T. vol. II at 9, 11-12, 13-14, 16). The vehicle was identified as a 2001 white Pontiac Grand Am belonging to DRS Enterprises, a car rental company in Warwick, Rhode Island.<sup>4</sup> (Tr. T. vol. IV at 13, 15, 21; Tr. T. vol. VI at 133, 137; Tr. T. vol. XI at 71). The Bangor Fire Department responded to the

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<sup>3</sup> Automatic Distributors had a video surveillance system that picked up the car burning and a person leaving the scene. (Tr. T. vol. II at 156-158, 165-166; 177; Tr. T. vol. III at 51-52). The video was admitted into evidence and played for the jury. (Tr. T. vol. II at 180-181). An FBI agent who did enhancement work on the video noted that due to the fact the video was taken at night time, from a great distance, and recorded digitally that the colors in the video are unreliable. (Tr. T. vol. II at 187-188, 193-194, 200, 210).

<sup>4</sup> The car had been rented from the company by Mr. Sexton. (Tr. T. vol. IV at 15-16, 21, 24-25).

reported fire and the fire was extinguished around 3:30 a.m.<sup>5</sup> (Tr. T. vol. II at 19-20). After the fire had been extinguished, three bodies were identified within the passenger compartment of the car and the Bangor Police Department was called to the scene. (Tr. T. vol. II at 26-28, 30, 45-46). The Bangor Police Department, along with the Fire Marshal's Office and Dr. David of the Medical Examiner's Office worked to extract the bodies and all other content from the vehicle.<sup>6</sup> (Tr. T. vol. II at 57-60, 64, 66, 72, Tr. T. vol. III at 23, 24-25, 26-27, 30-33, 38, 59-68). Among the items removed from the burnt vehicle was a blue plastic mass, that was sent to the Maine Crime Laboratory for testing, and thought to be a fuel container.<sup>7</sup> (Tr. T. vol. III at 33, 64-66, 85-86; Tr. T. vol. VI at 141).

The Medical Examiners Office's performed autopsies on the bodies on August 14, 2012. (Tr. T. vol. II at 72). The Medical Examiner determined that

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<sup>5</sup> The Fire Marshal's Office determined cause of the fire to be "a result of an intentional human element with the use of an ignitable liquid." (Tr. T. vol. III at 70). The ignitable liquid was defined as being in the range of lighter fluid, kerosene, or gasoline. (Tr. T. vol. III at 70). Fire analysis testing done by the Maine State Police Crime Laboratory established the presence of heavy petroleum distillates in all but one of the seven samples it received for fire analysis testing. (Tr. T. vol. III at 101, 102-103, 106-115). Three items also presented positive tests for a diesel range product. (Tr. T. vol. III at 111, 114-115).

<sup>6</sup> It was later determined that the body in the front passenger seat was Daniel Borders, the body in the back on the driver's side was Lucas Tuscano, and the body in the back passenger side was Nicolle Lugdon. (Tr. T. vol. II at 73-75, 87-88, 93-94). All victims had a cornucopia of drugs in their systems. (Tr. T. vol. II at 84-85, 91-92, 96, 105-109, 114-120, 122-124, 144-145, 151).

<sup>7</sup> A blue fuel container was found to be missing from 65 Holyoke Lane in Dedham, where Mark Rowe and Darren Bishop lived, around August 17, 2012. (Tr. T. vol. VII at 68, 128; Tr. T. vol. VIII at 55, 58, 65-66, 82-83). Mr. Daluz and Mr. Sexton had been to the 65 Holyoke Lane location in the past on a few occasions. (Tr. T. vol. VII at 72; Tr. T. vol. VIII at 59, 62)

Daniel Borders and Nicolle Lugdon died of gun shot wounds entering from the left and exiting to the right and that Lucas Tuscan died from head trauma that could have also been a gun shot. (Tr. T. vol. II at 80, 86-87, 88-89, 93, 95-96, 97, 121, 136-138, 142-143). A bullet was located during Nicolle Lugdon's autopsy and bullet fragments were located during Daniel Borders' autopsy.<sup>8</sup> (Tr. T. vol. II at 81-82, 89; Tr. T. vol. VI at 143-144, 147-148). It was the Medical Examiner's belief that the victims had died recently, "within a day or so," before the fire occurred. (Tr. T. vol. II at 133).

Mr. Sexton and Mr. Daluz travelled to Maine together on August 11, 2012. (Tr. T. vol. IX at 53-54, 105-106; Tr. T. Excerpt 5/19/14 at 25-26). Katelyn Ludgon, the sister of Nicolle Lugdon and girlfriend of Daniel Borders testified at trial that she rented a room for Mr. Sexton and Mr. Daluz on the night of August 11, 2012 at the Brewer Motor Inn.<sup>9</sup> (Tr. T. vol. IV at 36, 37-38, 47-48, 50). She

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<sup>8</sup> Two guns, ammunition and a cell phone were discovered in the tidal area of the Penobscot River in Bangor. (Tr. T. vol. VI at 245-255). These items were given to the Bangor Police Department. (Tr. T. vol. VI at 155-162, 256-259). One of the guns was matched to the bullet found in Nicolle Lugdon and the other gun was a possible match for the gun that left fragments in Daniel Borders. (Tr. T. vol. VII at 14-15, 20-21).

<sup>9</sup> Katelynn Lugdon used her sister's identification to rent the room because she was not old enough to rent one under her own name. (Tr. T. vol. IV at 50, 67-68, 124-125).

said that she saw them with drugs and two guns in the hotel room that night.<sup>10</sup> (Tr. T. vol. IV at 50-52, 59, 62-63, 65-66, 80-81, 120-122). She also testified that Mr. Sexton made threatening phone calls to her sometime around her sixth interview with police officers in the months following the investigation.<sup>11</sup> (Tr. T. vol. IV at 99, 133-134). On August 12, 2012,

Mr. Sexton and Mr. Daluz switched hotels the following day, and Mark Rowe rented a room for them at the Ramada Inn in Bangor. (Tr. T. vol. VII at 73, 75-76, 79; Tr. T. vol. VIII at 107-108, 111). Mr. Rowe testified that he saw no guns on Mr. Sexton or Mr. Daluz on August 12, 2012. (Tr. T. vol. VII at 164-165). Mr. Rowe was involved in the drug trade with the two men. (Tr. T. vol. VII at 61-62, 65, 136-139).

Later, on the night of August 12, 2012, Mr. Sexton, Mr. Daluz, and Mr. Rowe all went to a bar in Bangor some time between six and nine in the evening. (Tr. T. vol. VI at 87, 124; Tr. T. vol. VII at 83-84, 86; Tr. T. vol. VIII at 20, 22). Various drug acquaintances and friends were met up with at the bar. (Tr. T. vol. VI at 87; Tr. T. VII at 86; Tr. T. vol. VIII at 89, 91-95). Mr. Daluz left the bar for

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<sup>10</sup> The State presented witness testimony that guns were given to John Oliveria, who was involved in the drug trade in the Bangor area, in exchange for a drug debt. (Tr. T. vol. VI at 43, 45, 46-47, 49, 56, 58, 66-67). The guns exchanged were three Jimenez 380s and one "older revolver." (Tr. T. vol. VI at 45, 48-49, 57-59, 66-67). One of these guns was identified as being involved in this case. (Tr. T. vol. VI at 44-45, 58-59, 67). The State also presented testimony about a second gun transaction involving Mr. Sexton. (Tr. T. vol. VI at 79, 81-82, 83-86, 126). This gun was also involved in this case and identified at trial as the gun given to Mr. Sexton. (Tr. T. vol. VI at 81-82, 84-85).

<sup>11</sup> Mr. Sexton denied making any threats towards her. (Tr. T. vol. XIII at 115).

about a half hour and then returned. (Tr. T. vol. VII at 89-90). Mr. Daluz and Mr. Sexton then left the bar together after that, leaving Mr. Rowe behind between 10:00 p.m. and 11:00 p.m.<sup>12</sup> (Tr. T. vol. VII at 93-94, 99; Tr. T. vol. VIII at 26). The expectation was that they would return to the bar to get Mr. Rowe, which never happened.<sup>13</sup> (Tr. T. vol. VII at 94, 101).

Daniel Borders, Nicole Lugdon, and Lucas Tuscano were all involved in the drug trade in the Bangor, Maine area.<sup>14</sup> (Tr. T. vol. IV at 11; Tr. T. vol. IV 40-46, 53, 55-57, 71-72, 150-151, 154, 169; Tr. T. vol. V at 169-170 ). All three were also involved in making drug deals on the night of August 12, 2012. (Tr. T. except

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<sup>12</sup> A hotel key was used to open the Ramada Inn hotel room of Mr. Daluz and Mr. Sexton at 10:25 p.m. on August 12, 2012 and at 3:05 p.m. on August 13, 2012. (Tr. T. vol. VIII at 104, 116-118).

<sup>13</sup> After waiting at the bar for a while, and being unable to get in touch with Mr. Sexton or Mr. Daluz, Mr. Rowe went to the apartment of an ex-girlfriend, which was close by, and spent the night there. (Tr. T. vol. VII at 101-103; Tr. T. vol. VIII at 10, 15-16). He spoke to both Mr. Sexton and Mr. Daluz the next day and they both said they had been at a party and got drunk or wasted. (Tr. T. vol. VII at 120, 122). Mr. Rowe also got a second call from Mr. Daluz around the time of his first call at 2:45 a.m. asking what the hotel room number was. (Tr. T. vol. VII at 121).

<sup>14</sup> Nicolle Lugdon and Lucas Tuscano were both selling drugs in the State of Maine for James Natri. (Tr. T. excerpt 5/6/14 at 10-11, 18). Nicolle Lugdon was also romantically involved with Mr. Natri. (Tr. T. excerpt 5/6/14 at 14-15; Tr. T. vol. V at 174-175). On August 12, 2012 Ms. Lugdon arrived at the home of Beverly and Jeramie Schell shortly after 1:00 p.m. (Tr. T. excerpt 5/6/14 at 22-25, 76-78; Tr. T. vol. IV at 89; Tr. T. vol. V at 92-93, 172). Lucas Tuscano arrived at the Schell's house around 9:30 p.m. to restock Ms. Lugdon with drugs to sell. (Tr. T. excerpt 5/6/14 at 28-29; Tr. T. vol. V at 10, 57-59, 95, 174, 182). Daniel Borders arrived at the Schells' house in the early afternoon. (Tr. T. vol. V 175-176). At around 10:00 to 10:30 p.m. all three went to a nearby convince store, only Nicole Lugdon and Lucas Tuscano were captured on the store's video feed because Mr. Borders was not allowed to enter the store. (Tr. T. vol. V at 33, 44, 45, 106, 113-116, 145-146, 182-184). The parties stipulated at trial that they left the store at 10:39 p.m., the store could be walked to in a matter of minutes from the Schell's home. (Tr. T. vol. V at 106, 113, 115, 131, 156; Tr. T. vol. VI at 5).

5/6/14 at 11; Tr. T. vol. V at 173-174, 177-178, 182). They were at the home of Jeramie and Beverly Schell, 15 Bolling Drive in Bangor, until around 11:00 p.m. when they all left that house with Mr. Sexton. (Tr. T. vol. V at 121-122, 123, 168, 186, 189; Tr. T. vol. VI at 26). Mr. Sexton and Mr. Borders had been communicating through the evening and planned a meet up. (Tr. T. vol. V at 99-101, 159, 179-181; Tr. T. vol. VI 12-13; Tr. T. vol. VII at 91-93, 148-149, 153, 155; Tr. T. vol. XI at 94-95; Tr. T. vol. XII at 13-15; Tr. T. Excerpt 5/19/14 at 32). None of the three returned to the house after they left, as they were anticipated to do. (Tr. T. vol. V at 122, 190, 194).

The cell phone records of Mr. Sexton and Mr. Daluz were used to establish their location on the night of August 12, 2012 and on August 13, 2012.<sup>15</sup> (Tr. T. vol. X at 165-167, 205-232; Tr. T. vol. XI at 74, 78-9, 82; Tr. T. vol. XII at 81). Members of the FBI Cellular Analysis Survey Team (CAST) and Maine State Police Maine Information Analysis Center (MIAC) digested this phone information

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<sup>15</sup> Daniel Borders', Nicolle Lugdon's, and Lucas Tuscano's cell phone records were also used to track their locations. (Tr. T. vol. XI at 108-110, 119-131; Tr. T. vol. XII at 7-8). The last cell phone communication with Nicolle Lugdon's phone and Daniel Borders phone was shortly after 11:00 p.m.; and Lucas Tuscano phone appeared to have a dead battery before the events at issue here arose (the last activity on his phone was at 10:18 p.m.). (Tr. T. vol. XI 131, 128; Tr. T. vol. XII at 19, 28-33). The cell phone information places all three in the Bolling Drive area at some time between 10:18 p.m. and shortly after 11:00 p.m. (Tr. T. vol. XI at 117-124; 128, 130, 132,

and presented it to the jury through powerpoint presentations.<sup>16</sup> (Tr. T. vol. X at 139, 169; Tr. T. vol. XI at 100-101, 109; Tr. T. vol. XII at 5, 9).

A car was seen at Mark Rowe's home, by his roommate, on the night of August 12, 2012 at around 10:30 p.m. (Tr. T. vol. VIII at 63, 70). A car matching the description of Mr. Sexton's rental car was also seen at around 12:45 a.m. in the Ramada Inn, Hammond Street Extension, and Route 2 area of Bangor.<sup>17</sup> (Tr. T. vol. VIII at 183-188, 201, 204).

A call for a taxi was made at 3:15 a.m. on August 13, 2012 and a call was returned to Mr. Daluz's cell phone at 3:25 a.m. (Tr. T. vol. VII at 118; Tr. T. vol. IX at 8-9, 13, 28). A man that may have been Mr. Daluz was picked up at the Ramada Inn and taken to the end of First Street and Davis Court in Bangor. (Tr. T. vol. IX at 5, 9, 13-16). Mr. Daluz's friend Ricky Harris lived at 69 First street in the summer of 2012. (Tr. T. vol. IX at 25-26). Mr. Daluz appeared at his apartment on August 13, 2012 at sometime around 3:00 a. m.. (Tr. T. vol. IX at

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<sup>16</sup> The cell phone records of Mr. Sexton showed location information for the night of August 12, 2012 into August 13, 2102, where the phone data showed locations in the 15 Bolling Drive area (ending at 11:06 p.m.), the Old Town area (11:22 p.m.), then back to the Bangor area (11:29 p.m.), then to the Holden/Dedham area (from 11:50 p.m.-12:30 a.m.), then back to the Bangor area (1:32 a.m.), and in the area of the burnt Pontiac at 3:03 to 3:19 a.m.). (Tr. T. vol. X at 205-212; Tr. T. vol. XI at 142-156; Tr. T. vol. XII at 34-44). Mr. Sexton's phone also showed his presence in the Hermon area (around 2:30 to 3:00 a.m.). (Tr. T. vol. XI at 64-66; Tr. T. vol. XII at 40-41). Mr. Daluz's cell phone records showed movement that was very similar to that of Mr. Sexton, and his last location in the Bolling Drive area was at 11:05 p.m. (Tr. T. vol. X at 220-232; Tr. T. vol. XI at 144-161; Tr. T. vol. XII at 34-44).

<sup>17</sup> Mr. Sexton was identified as the driver of that car. (Tr. T. vol. VIII at 187, 189, 206, 209). A basketball size shatter in the glass of the driver's side passenger's window was also observed. (Tr. T. vol. VIII at 185-186, 193).

28-29, 33, 36). Mr. Daluz did his laundry while at his friend's apartment. (Tr. T. vol. IX at 30, 36, 40). He left the apartment around August 14, 2012.<sup>18</sup> (Tr. T. vol. IX at 33).

Mr. Sexton remained at the Ramada Inn on August 13, 2012 and renewed the hotel room there himself for one night. (Tr. T. vol. VIII at 111-112, 118). He phoned his girlfriend in Rhode Island at 9:30 a.m. on August 13, 2012 to join him in Maine and he was adamant that she bring their children with her. (Tr. T. vol. IX at 46, 47-48, 63, 64-65, 73-74). After ordering some food for the children, Mr. Sexton and his girlfriend headed back to Rhode Island about an hour after her arrival. (Tr. T. vol. IX at 66, 67-68, 74-75). Mr. Sexton's girlfriend was driving and had severe back pain so they searched for a hotel in Massachusetts and obtained a room at the CoCo Keys Resort.<sup>19</sup> (Tr. T. vol. IX at 67-68).

The only evidence presented at trial to set out the details surrounding the deaths of the three victims was the testimony of Mr. Sexton. (Tr. T. Excerpt 5/19/14 at 2, 52-92). Mr. Sexton stated that he and Mr. Daluz went to the Schells' home at around 11:00 p.m. on August 12, 2012. (Tr. T. Excerpt 5/19/14 at 58-59). Mr. Daluz stayed in the car while Mr. Sexton went into the residence to see Daniel Borders who was expecting him based on their prior cell phone communications

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<sup>18</sup> Mr. Daluz returned to his home in Taunton, Massachusetts sometime around August 15, 2012. (Tr. T. vol. IX at 97-98, 114).

<sup>19</sup> Member of the Bangor Police Department travelled to Massachusetts to speak with her and Mr. Sexton on August 14, 2012. (Tr. T. vol. IX at 69).

that evening. (Tr. T. Excerpt 5/19/14 at 32, 59). After Mr. Sexton arrived he went to smoke marijuana with Mr. Borders, Nicole Lugdon, and Lucas Tuscano. (Tr. T. Excerpt 5/19/14 at 59, 62-64; Tr. T. vol. XIII at 73). Mr. Borders sat in the front passenger seat, Mr. Daluz sat in the back passenger seat, Ms. Lugdon was in the back middle seat, and Lucas Tuscano was in the back seat behind the driver, Mr. Sexton was driving the car. (Tr. T. Excerpt 5/19/14 at 63-64). Mr. Sexton drove to the highway to smoke the marijuana. (Tr. T. Excerpt 5/19/14 at 59).

Shortly after getting on the highway, Mr. Borders was shot accidentally by Mr. Daluz. (Tr. T. Excerpt 5/19/14 at 71-72; Tr. T. vol. XIII at 103). Mr. Tuscano's reaction resulted in Mr. Daluz intentionally shooting him shortly thereafter in the back seat, resulting in the window being blown out. (Tr. T. Excerpt 5/19/14 at 72-73). Mr. Daluz then collected everyone's phones in the car and threw some phones out the window. (Tr. T. Excerpt 5/19/14 at 73). Mr. Daluz told Mr. Sexton to keep driving and when Mr. Sexton said he needed gas, Mr. Daluz ordered him to go to Mark Rowe's house in Dedham to get gas from one of their gas containers.<sup>20</sup> (Tr. T. Excerpt 5/19/14 at 75-78; Tr. T. vol XIII at 39). Mr. Sexton was then instructed to go back to their hotel in Bangor, but because they were seen by another car, Mr. Sexton was told to keep driving past the hotel in the direction of

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<sup>20</sup> Mr. Sexton was ordered by Mr. Daluz to get a gas tank from Mark Rowe's garage and to put the gas in the car, and to save some because he was going to burn the car. (Tr. T. Excerpt 5/19/14 at 77). Mr. Sexton testified that he did not know that he had taken a tank with diesel in it. (Tr. T. vol. XIII at 14).

Hermon. (Tr. T. Excerpt 5/19/14 at 78-79). Mr. Sexton was told to stop the car down a dirt road. (Tr. T. Excerpt 5/19/14 at 79). Mr. Daluz then tried to force Ms. Lugdon to overdose on pills and shortly thereafter shot her from outside the car through the broken window. (Tr. T. Excerpt 5/19/14 at 80-82). Mr. Daluz then ordered Mr. Sexton to drive him back to the hotel.<sup>21</sup> (Tr. T. Excerpt 5/19/14 at 83). After which, Mr. Sexton was give his cell phone back and ordered to burn the car. (Tr. T. Excerpt 5/19/14 at 84-85). Mr. Sexton was told to call Mr. Daluz when he had burned the car. (Tr. T. Excerpt 5/19/14 at 84-85).

After Mr. Sexton rested his case, the defense for Mr. Daluz put on witnesses that included an auto mechanic that was deemed a diesel gas expert for the trial by the trial court. (Tr. T. vol. XIV at 5, 48, 50-65). The diesel expert testified about the adverse effects diesel gas would have on a gasoline powered vehicle. (Tr. T. vol. XIV at 50-65).

After the jury's deliberations, it returned a guilty verdict for the murder of Nicolle Ludgon and a guilty verdict for arson. (Tr. T. vol. XIX at 24). A mistrial was declared by the Court for the murder Daniel Borders and the murder of Lucas Tuscano. (Tr. T. vol. XIX at 23). Mr. Sexton was sentenced on July 28, 2015.

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<sup>21</sup> Mr. Sexton was informed that the only reason he was not killed as well was because everyone would think that Mr. Daluz had done it. (Tr. T. Excerpt 5/19/14 at 82). Mr. Sexton was also told that if he said anything Mr. Daluz would shoot him and his kids. (Tr. T. Excerpt 5/19/14 at 82-83, 87).

(Sent. T. at 1, 72). The trial court imposed a sentence of 70 years for the murder of Nicolle Lugdon and a consecutive sentence of 20 years for arson. (Sent. T. at 72).

Upon imposition of Mr. Sexton's sentence, he has timely brought this appeal.

### **ISSUES PRESENTED FOR REVIEW**

- I. WHETHER THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON DURESS.**
- II. WHETHER THE TRIAL COURT ERRED IN DENYING MR. SEXTON'S MOTION FOR RELIEF FROM PREJUDICIAL JOINDER**
- III. WHETHER THE OUT OF COURT AND IN COURT IDENTIFICATIONS OF GUNS BY KATELYN LUGDON WERE SUGGESTIVE AND IMPERMISSIBLE, AND, IN THE ALTERNATIVE, EXCLUDABLE UNDER THE MAINE RULES OF EVIDENCE.**
- IV. WHETHER THE TRIAL COURT ERRED IN DENYING MR. SEXTON'S MOTION TO SUPPRESS HIS CELL PHONE RECORDS.**
- V. WHETHER THE TESTIMONY OF MR. SEXTON'S INVOLVEMENT IN PRIOR BAD ACTS IN RELATION TO DRUG DEBTS CONSTITUTES REVERSIBLE ERROR.**

## SUMMARY OF THE ARGUMENT

Mr. Sexton asserts that the trial court provided incorrect instruction to the jury on the defense of duress. The jury was instructed on the defense as it related to the charge of arson. The jury asked for clarification on the instruction three times and specifically inquired whether the defense could be used for murder. The trial court instructed the jury that the defense was not applicable to murder. This is a misstatement of the current law. Since the jury was instructed on the concept of accomplice liability, the defense of duress was applicable to the charges of murder. Moreover, even without the jury's inquiry into this area of the law, it was reversible error for the trial court to not provide an instruction for duress on all charges. Also, the trial court erred in providing an instruction to the jury when it requested a definition of the word imminent in the duress instruction, upon which grounds Mr. Sexton requested a mistrial.

Unpreserved jury instructions claims are reviewed for obvious error. When preserved, jury instructions are reviewed as a whole for prejudicial error and, in criminal cases, which affect constitutional rights, they are reviewed to determine that beyond a reasonable doubt the error did not affect substantial rights or contribute to the verdict.

Mr. Sexton next asserts that the trial court erred in not granting his motion for relief from prejudicial joinder and severing his trial from that of his

codefendant, Randall Daluz. The defenses presented by the co-defendants were irreconcilable and antagonistic, resulting in Mr. Daluz assisting the State in proving a case against Mr. Sexton. Also, the joint trial hampered Mr. Sexton's ability to present alternative suspect evidence and evidence of prior incriminating statements by Mr. Daluz's. As such, the trial court abused its discretion in not granting the motion for relief from prejudicial joinder and severing the cases.

The trial court's denial of the motion to sever trials is reviewed by this court for abuse of discretion.

Additionally, Mr. Sexton asserts that the out of court identification and in court gun testimony by Katelyn Lugdon should have been excluded from evidence. The procedure used to identify the guns was highly suggestive. Ms. Lugdon lacked a general knowledge of guns, she saw the guns briefly, and there was a huge delay between when she saw them and when she identified them. As such, the identification should have been suppressed. And, given the significance of the inanimate objects being identified, Mr. Sexton suggests that the law applicable to the identification of people is also applicable to the guns identified by Ms. Lugdon. The trial court also erred in not excluding the gun testimony by Ms. Lugdon under Maine Rules of Evidence 401 and 403.

A suppression court's findings of fact are reviewed for clear error and its legal conclusions are reviewed de novo. And, a preserved objection to a motion in limine ruling is reviewed for both clear error and abuse of discretion.

Next, Mr. Sexton asserts that the trial court erred in denying his motion to suppress cell phone location data that was obtained without a warrant under the Stored Communications Act (SCA). The records were obtained on the basis of locating him because of his importance to the investigation in this case. However, he provided no information to the police when he was located and he was not arrested when they first located him. Moreover, the records obtained from one of his cell phones was for a timeframe immediately preceding the active attempt to locate him. There were no exigent circumstances that warranted the use of the SCA and, as such, a warrant was necessary to gain access to the information.

A suppression court's findings of fact are reviewed for clear error and its legal conclusions are reviewed de novo.

Lastly, Mr. Sexton asserts that trial testimony was admitted in error that attributed prior acts of violence to him in the drug trade. No objection was raised at trial to the testimony, although the trial court pointed out the issue and said it would provide an appropriate instruction, if desired. The testimony was excludable under Maine Rules of Evidence 404(b), 801 and 403.

Since no objection was raised to this testimony, it is reviewed for obvious error.

Wherefore, for the reasons enumerated above, Mr. Sexton requests that this Court vacate his convictions.

## ARGUMENT

### I. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON DURESS.

The trial court erred in instructing Mr. Sexton's jury on the defense of duress. A request for a duress jury instruction was made by Mr. Sexton's counsel for the charge of arson. (Tr. T. vol. XIV at 91-93). The jury asked for clarification on the duress instruction three times during their deliberations and specifically inquired if the defense could be used for the charge of murder. (Tr. T. vol. XV at 7-20; 27-29, 32; Tr. T. vol. XVII at 13-19). The trial court continuously instructed the jury on duress only as it related to the arson charge, and said the jury could not consider the defense for the charge of murder. (Tr. T. vol. XIV at 165; XV at 14-15, 32; Tr. T. vol. XVII at 18-19).

The defense of duress may be used when:

a person engages in conduct that would otherwise constitute a crime, the person is compelled to do so by threat of imminent death or serious bodily injury to that person or another person or because that person was compelled to do so by force.

Title 17-A M.R.S.A. § 103-A(1).

The duress statute also provides that the defense is not available, among other reasons, to "a person who intentionally or knowingly committed the

homicide for which the person is being tried[.]”<sup>22</sup> Title 17-A M.R.S.A. § 103-A(3)

(A). However, Mr. Sexton’s jury was also instructed on accomplice liability.<sup>23</sup>

Title 17-A M.R.S.A. § 57. Which means a guilty verdict could result in his case where he did not personally commit a murder.

A “defendant is entitled to an instruction [on a defense] when the evidence is sufficient to make the existence of all the facts constituting the defense a reasonable hypothesis for the factfinder to entertain.” State v. Gagnier, 123 A.3d 207 (Me. 2015)(citation omitted). “A threat that serves the basis of a duress defense must be real and specific, and the specific harm that is feared must be imminent.” State v. Tomah, 1999 ME 109, ¶ 19, 736, A.2d 1047, 1053 (Me. 1999).

Jury instructions are reviewed “as a whole for prejudicial error, and to ensure that they informed the jury correctly and fairly in all necessary respects of the governing law.” State v. Baker, 2015 ME 39, ¶ 10, 114 A.3d 214, 217 (Me. 2015)(citation and quotation omitted). When an error in the instruction of the jury

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<sup>22</sup> The trial court was confused as to whether this portion of the statute expressed “an intent. . . to leave out an accomplice to a homicide as opposed to the principal to the homicide.” (Tr. T. vol. XV at 21). The trial court stated that it did not “know the answer to that question. And we’ve looked a little bit to see if we could find the answer and we can’t find the answer.” (Tr. T. vol. XV at 21). However, State v. Tomah presents a similar fact pattern where there was a joint murder trial and a duress instruction was given to the jury. State v. Tomah, 1999 ME 109, ¶ 1, ¶ 6, ¶¶ 18-20, 736, A.2d 1047, 1048, 1050, 1053 (Me. 1999)

<sup>23</sup> “A person may be guilty of a crime if he personally does the acts that constitute the crime or if he is an accomplice of another person who actually commits the crime.” State v. Hurd, 2010 ME 118, ¶ 29, 8 A.3d 651, 657 (Me. 2010)(citation omitted); see also State v. Chapman, 2014 ME 69, ¶ 10, 92 A.3d 358, 362 (ME 2014)(citation omitted). “Accomplice liability may be found in ‘any conduct promoting or facilitating, however slightly, the commission of the crime.’” State v. Nguyen, 2010 ME 14, ¶ 15, 989 A.2d 712, 715 (Me. 2010)(citation omitted).

is raised for the first time on appeal, an obvious error standard of review applies.<sup>24</sup> See State v. Gauthier, 2007 ME 156, ¶ 26, 939 A.2d 77, 84 (Me. 2007); State v. Morelli, 493 A.2d 336, 340 (Me. 1985); State v. Lafferty, 309 A.2d 647, 660 (Me. 1973); U.C.D.R.P.—Bangor 52(b); M.R.U. Crim.P. 52(b); U.C.D.R.P.—Bangor 30(b); M.R.U. Crim.P. R. 30(b).<sup>25</sup> Obvious error occurs when jury instructions, “viewed as a whole, are affected by highly prejudicial error tending to produce manifest injustice.” State v. Baker, 2015 ME 39, ¶ 11, 114 A.3d 214, 218 (Me. 2015) (citation and quotations omitted); see also State v. Weaver, 2016 ME 12, ¶ 11, 130 A.3d 972, 972 (Me. 2016); State v. Christen, 2009 ME 78, ¶ 11, 976 A.2d 980, 984 (Me. 2009).

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<sup>24</sup> When an objection is appropriately raised, this Court “review[s] jury instructions as a whole for prejudicial error, to ensure they informed the jury correctly and fairly. . . consider[ing] the effect of the instruction as a whole and the potential for juror misunderstanding. . . [and e]rrors in criminal cases that affect constitutional rights are reviewed to determine that. . . [it is] satisfied, beyond a reasonable doubt, that the error did not affect substantial rights or contribute to the verdict.” State v. Gauthier, 2007 ME 156, ¶ 14, 939 A.2d 77, 81 (Me. 2007)(citations omitted). “In order to demonstrate that failure to give the requested instruction was erroneous . . . [one must] show the instruction they requested (1) states the law correctly; (2) is generated by the evidence in the case; (3) is not misleading or confusing; and (4) is not otherwise sufficiently covered in the court’s instructions.” Id. at ¶ 15, 81; see also State v. Nguyen, 2010 ME 14, ¶ 8, 989 A.2d 712, 713 (Me. 2010).

<sup>25</sup> “To show obvious error, a defendant must show (1) an error, (2) that is plain, and (3) that affects substantial rights. State v. Dolloff, 2012 ME 130, ¶ 35, 58 A.3d 1032 (2012)(quotation marks omitted). In order to demonstrate that an error affects substantial rights, a defendant must show a “reasonable probability that the error . . . was sufficiently prejudicial to have affected the outcome of the proceeding. Even when the defendant succeeds in meeting these three conditions, [this court] will set aside a jury’s verdict only if [it] conclude[s] that (4) the error seriously affects the fairness and integrity or public reputation of judicial proceedings.” State v. Weaver, 2016 ME 12, fn 4, 130 A.3d 972, 972 (Me. 2016)(quotations omitted).

Prior to the jury's initial instruction, a discussion occurred on the record about the defense of duress. (Tr. T. vol. XIV at 91-93). The trial court inquired at that point as to whether Mr. Sexton would be requesting a duress instruction on just the charge of arson or on "the other acts as an accomplice" as well. (Tr. T. vol. XIV at 92). The trial court sought further confirmation that at such a request was not being made by stating: "So you would be arguing that he was not an accomplice, not that he was an accomplice under duress?"<sup>26</sup> (Tr. T. vol. XIV at 92). And the trial court inquired one more time about the decision to only instruct on the arson charge by inquiring: "What about duress as being an accomplice. . . [t]echnically according to his testimony, he's being threatened the entire time they're in the car, et cetera, and things like that." (Tr. T. vol. XIV at 93). At this point in time, it is clear that the court would have instructed on the duress offense

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<sup>26</sup> The trial court continued the colloquy by stating that: I will listen to the arguments, but I would be -- I'm inclined to be giving a duress instruction in some form right now [for the arson charge]. I recognize that it may be a little bit of an issue, but I think I'd be committing error if I didn't give it. . . I'm debating whether arson— whether just give them duress as a defense to crime and let you guys argue it all. The instruction is the same no matter what. I have indicated in here somewhere where the jury does not have to unanimous in theory. (Tr. T. vol. XIV at 93).

if it was request for all charges. In the end, the trial court only gave a duress instruction to the jury on the charge of arson.<sup>27</sup> (Tr. T. vol XIV at 165-166).

After the jury began its deliberations, it asked for guidance on what the word “imminent” meant in the duress instruction. (Tr. T. vol. XV at 7-16). The trial court answered this request and a short time later, the jury submitted another note that requested, among other things, instruction as to whether it was “being asked to consider that Nick Sexton was under duress during the murders? We have been asked to consider duress for arson.” (Tr. T. vol. XV 14-15, 17, 18).

The trial court stated on the record that it would not instruct the jury on duress for the charge of murder, noting:

Even if you wanted it, I would not be giving it for a couple of reasons. One reason is it was not requested in the first place. Another reason is it was not argued in the first place. I think it's too late to inject this into the deliberation of the jury. And the third issue is that there's a significant issue as to whether it's appropriate anyway. I believe we discussed in chambers that it seemingly does not apply to at least being a principal to a homicide. There is maybe some questions as to whether

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<sup>27</sup> [I]n the substantive portion of the instructions, defense counsel has asked you to consider the defense of duress — and I should say Mr. Sexton's defense counsel has asked you to consider the defense of duress with regards to the offense of arson. Under certain circumstances, a person may be excused from criminal responsibility for acts committed under duress. A person is not criminally responsible if he is compelled to do an act by threat of imminent death or serious bodily injury to himself or another person or by direct physical force. However, duress exists only if the force or threat or circumstances are such as would have prevented a reasonable person in the defendant's situation from resisting or escaping from the force or threats. Because the evidence generates an issue of whether the defendant was acting under duress, the State must prove beyond a reasonable doubt either that the defendant was not acting under duress, or that the force or threat or circumstances claimed to have created the duress were not such as would have prevented a reasonable person in the defendant's situation from resisting or escaping from such force or threats or overcoming the circumstances. (Tr. T. vol. XIV at 165-166).

it applies - - whether duress applies to being an accomplice to a homicide. I think that is a complex legal question. There's no immediate, easy answer. And maybe if it had been raised a while ago, I could come up with something that I would be confident in, but I do not have the time at the moment. Not that I'm making an expedient decision, but I'm primarily making a decision because it's unclear whether it should be given in the first place and it hasn't been requested earlier. So that's what I'm doing. (Tr. T. vol. XV at 28-29).

The trial court then instructed the jury in open court that the answer to the jury's questions was no, "it does not play a part in— it is not being posed as a defense in that situation." (Tr. T. vol. XV 32).

Two days later, during deliberations, the trial court again received a note from the jury stating: "one of the juror has the following question. Did you say we cannot use. . . duress as a defense for murder. Question two, if yes, why is this missing in the instructions. And three, can duress be used to find a defendant not guilty of murder if the defense has not requested it." (Tr. T. vol. XVII at 13).

The trial court's discussion with counsel about this request follows:

I think I'm quite far down this road. I think it would be— I mean maybe— if I thought I was committing absolute and total error, maybe I would change my mind, maybe not. I don't think I am committing absolute error. I have no idea, I don't.

I looked at the statute in the M.R.S.A. volume through this year and I didn't find anything dispositive or anything. There was one interesting case, State v. Tomah, where they could have said this didn't apply, but nobody— it was never raised. Nobody said anything about it. So one could argue, well, that means tacitly that you can— you should give the instruction when appropriate in a murder case. Or you could say, well, nobody thought about it, agreed it, so you're expressing it for— so its

precedent for nothing, which is true. I didn't want to mention it so I didn't. (Tr. T. vol. XVII at 13-14).

After this discussion, the trial court answered the jury's questions as follows:

Question one: Did you say we cannot use duress as a defense for murder? You cannot consider duress as a defense for murder.

Question two: If yes, so I guess I did say yes, why is this missing from the instructions. I didn't actually think it was missing from the instructions. I didn't indicate that you could, but I just want to clarify that now. I realize that I didn't put those words in there, you cannot consider murder, but I didn't include it as something you could consider to— but in any event, you can't consider duress as a defense for murder.

And then the third question I think I've answered as well. Can duress be used to find a defendant not guilty of murder if the defense has not requested it. And the answer is you cannot use duress as a defense for murder. That's it. (Tr. T. vol. XVII at 18-19).

The trial court's above instructions to the jury improperly states the law.

Since the jury was instructed on accomplice liability, duress was an appropriate instruction to give to the jury for the charge of murder. And, since the trial court directly instructs that duress cannot be considered for the charge of murder, this was an incorrect statement of the law.

Moreover, the fact that the jury was not originally instructed on the defense of duress for murder does not prohibit this instruction from being given to the jury at a later point in time. This Court has noted that "in exceptional circumstances is it acceptable for a court to re-instruct the jury . . ." State v. Delano, 2015 ME 18,

¶ 13, 111 A.3d 648, 651 (Me. 2015)(this re-instructing related to instructing on “choices for lesser included offenses not presented in the initial instructions”).

The prejudice that needs to be demonstrated for a conviction to be vacated, due to a late instruction, can be found when a “defendant. . . suffer[s] prejudice if the new instruction is flawed or incomplete” and when “late instruction suggest[s] to a jury that the court is encouraging a conviction.” *Id.* at ¶14, 651-2. The trial court’s instruction to Mr. Sexton’s jury incorrectly stated the law because duress was an appropriate justification to murder when they were also instructed on accomplice liability.<sup>28</sup> Cf. State v. Tomah, 1999 ME 109, 736, A.2d 1047 (Me. 1999)(a duress instruction was given in this murder case, however it was not clear in this case if the jury was also instructed on accomplice liability, but that assumption could be made).

Moreover, the evidence presented at trial generated a duress instruction for the charge of murder. There is evidence established through Mr. Sexton’s testimony that any actions by him were the result of duress. (Tr. T. Excerpt 5/19/14 at 71-92). His testimony provided that he was held at gun point during a large

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<sup>28</sup> As an aside, the defense of duress has been allowed by many states when a person has been charged under a felony murder statute. See Shankland, Russell, *Duress and the Underlying Felony*, 99 J. Crim. L. & Criminology 1227, 1227, 1238-45 (noting two states allow the duress defense for all classifications of murder). Moreover, this Court has found the felony murder statute to be a related statute to the accomplice liability statute. State v. Linscott, 520 A.2d 1067, 1070 (Me. 1987). Therefore, it seems logical that in a situation where accomplice liability has been instructed that there is a corollary argument to be made that duress should apply to the charge of murder.

portion of the time that the murders were occurring and while Mr. Daluz shot Nicolle Lugdon. (Tr. T. Excerpt 5/19/14 at 82; Tr. T. vol. XIII at 41, 86, 108). Moreover, presumably based on Mr. Sexton's testimony, the trial court approved the use of the duress defense for the charge of arson. And, in relation to this charge, Mr. Sexton only testified that he was told that Mr. Daluz would kill him and his family if he did not commit the arson, making the threat to him slightly less imminent.

In sum, because the jury directly asked for a statement of the law it was a plain error, established on the record, when the trial court did not instruct the jury on the defense of duress for the murder charges. This error has affected Mr. Sexton's ability to receive a fair trial. Furthermore, the general failure to instruct the jury on the defense of duress, regardless of any discussion about the defense taking place, amounts to obvious error and prevented Mr. Sexton from receiving a fair trial.

Additionally, the trial court erred in instructing the jury on the definition of imminent.<sup>29</sup> Mr. Sexton's counsel raised objection and requested a mistrial when

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<sup>29</sup> The trial court chose to answer the request with this portion of the Maine Jury Instruction Manual's duress instruction: "however, duress exists only if the force or threat of force or circumstances are such as would have prevented a reasonable person in the defendant's situation from resisting or escaping from the force or threat." *Maine Jury Instruction Manual* § 6-57 at 6-95 (2013 ed.); (Tr. T. vol. XV at 14-15).

the trial court gave the jury an instruction on this definition.<sup>30</sup> (Tr. T. vol. XV at 7-16). Since there is no clear definition of the word, it was error for the trial court to provide a definition to the jury, particularly when Mr. Sexton requested that none be given. (Tr. T. vol. XV at 7-16). The trial court's first instructions to the jury were sufficient to explain the concept of duress and the additional, opposed definition, did not provide direct help for defining the single word in the duress instruction for which a definition was sought by the jury. It was error for the trial court to provide this instruction.

## **II. THE TRIAL COURT ERRED IN DENYING MR. SEXTON'S MOTION FOR RELIEF FROM PREJUDICIAL JOINDER.**

The State filed notice, under Maine Rule of Unified Criminal Procedure 8(b)<sup>31</sup> to join Mr. Sexton's case with Randall Daluz's case for trial. (App. at 2). Following that notice, Mr. Sexton filed a motion to sever joinder, which the trial court granted. (App. at 3). However, the State decided that it would not use any statements by the co-defendants at trial and the trial court reversed its prior

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<sup>30</sup> Mr. Sexton's counsel stated: "We object to this definition. It talks specifically only about timing. It doesn't take into consideration the nature of the threat in this particular case. The evidence would support two threats, one a gun to his head if he didn't go do it and a then going around, finding a lighter; and then threats to kill his children that he testified about. As they need to take into consideration the nature of the threats and if and when and if they could be carried out. That would be imminent. That would be it goes to the state of mind of the actor at the time he's under this circumstance, and imminent would take into — must take into consideration these factors, the nature of the threat and the timing. You've just got timing." (Tr. T. vol. XV at 13). Counsel further noted that the "weight of the harm contemplated ha[d] to be thrown into the equation." (Tr. T. vol. XV at 14).

<sup>31</sup> While the U.C.D.R.P.—Bangor applied at the time of trial, those rules applied the same rule found in the Maine Unified Rules of Criminal Procedure.

decision and allowed the defendants to be tried together in a single trial. (Hearing T. (March 12, 2014) at 4); (Jury Sel. T. vol I at 2-14); (Order (April 8, 2014) at 5).

Maine Unified Rule of Criminal Procedure 8(b) provides, in pertinent part:

The attorney for the State who initiates a prosecution against two or more defendants may file a Notice of Joinder with respect to defendants who are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting a crime or crimes.

However, Maine Rules of Unified Criminal Procedure Rule 8(d) provides for relief from prejudicial joinder, stating “[i]f it appears that a defendant or the State is prejudiced by a joinder of . . . defendants, the court may . . . grant a severance of defendants or provide whatever other relief justice requires, including ordering multiple simultaneous trials.”

“In making a determination on a Rule 8(d) motion, the court must balance the general policy in favor of joint trials against the prejudice to a defendant which may result.” State v. Lakin, 2006 ME 64, ¶ 8, 899 A.2d 777, 779 (Me. 2006) (citations and quotations omitted); see also State v. Chesnel, 1999 ME 120, ¶ 13, 734 A.2d 1131, 1137 (Me. 1999)(“[i]n determining whether to grant a motion to sever, the trial court must balance the general policy in favor of joint trials against the prejudice to a defendant which may result.”)(citations and quotations omitted); see also State v. Knight, 623 A.2d 1292, 1294 (Me. 1993). A trial justice has the “continuing duty to keep a watchful eye over the proceedings and to order a

severance if prejudice does appear.” State v. Smith, 415 A.2d 553, 556-557 (Me. 1980).

The party moving for severance must “make a clear showing of facts presented to the trial justice prior to trial which should have caused him to believe that the defenses of appellant and his codefendant were necessarily antagonistic or that he would be prejudiced by a joint trial.” State v. Smith, 415 A.2d 553, 556 (Me. 1980); see also State v. Lakin, 2006 ME 64, ¶ 7, 899 A.2d 777, 779 (Me. 2006)(noting the moving party has the burden to show “facts prior to trial that a joint trial would result in prejudice.” (citation omitted)). “A defendant opposing joinder may show prejudice to his right to a fair trial by showing that either (1) his defense is irreconcilable with that of his co-defendant or (2) the jury will be unable to compartmentalize the evidence as it relates to the separate defendants.” State v. Williams, 2012 ME 63, ¶ 22, 52 A.3d 911, 917 (Me. 2012).

Mutually antagonistic defenses are not prejudicial per se. Zafiro v. U. S., 506 U. S. 534, 538, 113 S.Ct. 933, 122 L.Ed.2d 317 (1993). And, severance is not required solely on the fact that “co-defendants offer conflicting defenses.” State v. Lakin, 2006 ME 64, ¶ 10, 899 A.2d 777, 779 (Me. 2006).

Additionally, the United States Supreme Court “[has] held that, when incriminating extrajudicial statements are made by one codefendant against another, their admission into evidence may be seriously prejudicial, and this by

itself may provide a reason for separate trials.”<sup>32</sup> State v. Johnson, 472 A.2d 1367, 1370 (Me. 1984)(citing Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968)). This Court has “recognized that severance or some alternative means of guarding a defendant's sixth amendment rights. . . is required where Bruton violations can be foreseen clearly before trial.” State v. Bleyl, 435 A.2d 1349, 1365 (Me. 1981).

A decision on a “severance or joinder motion will not be reversed on appeal absent an abuse of discretion.” State v. Smith, 415 A.2d 553, 556 (Me. 1980) (citation omitted); see also State v. Williams, 2012 ME 63, ¶ 20, 52 A.3d 911, 917 (Me. 2012); State v. Lakin, 2006 ME 64, ¶ 7, 899 A.2d 777, 779 (Me. 2006); State v. Chesnel, 1999 ME 120, ¶ 13, 734 A.2d 1131, 1137 (Me. 1999); State v. Johnson, 472 A.2d 1367, 1370 (Me. 1984); State v. Wing, 294 A.2d 418, 420 (Me. 1972)(“a defendant claiming that an order of joinder constituted an abuse of discretion would be required to show that he had been prejudiced thereby.”); State v. Coty, 229 A.2d 205, 214 (Me. 1967)(noting, ““a denial of separate trials when it is not clearly shown that defenses were necessarily antagonistic or that the defendants would be prejudiced by joint trial is not error. . .” (internal citation committed)). “[W]hat constitutes abuse of discretion in denying separate trials depends upon the whole situation in each case.” State v. Coty, 229 A.2d 205, 214 (Me. 1967). Abuse

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<sup>32</sup> In the Bruton case the “confessing codefendant did not take the witness stand and thus no opportunity to cross-examine him was afforded.” State v. Johnson, 472 A.2d 1367, 1370 (Me. 1984)(citation omitted).

of discretion is found when a “‘palpable error’ or ‘apparent injustice’ is established by the party charging the abuse.” State v. Tracy, 415 A.2d 824, 826 (Me.1980) (citation omitted).

The trial court issued a final order denying Mr. Sexton’s request for relief from prejudicial joinder on April 8, 2014. (Order (April 8, 2014) at 1, 5). The Court’s order was based on the following logic:

Mr. Sexton argues that because the defendants potentially have antagonistic defenses, holding a joint trial will be prejudicial and deprive him of a fair trial. From the Court's knowledge of the case derived from hearings held so far, it is probable that each defendant will urge a jury to conclude that the other committed the crimes. It is also represented that defendant Sexton could pose an alternate suspect defense that would be at odds with a potential Daluz defense that directly blames Sexton. The classic antagonistic defenses involve each defendant pointing the finger at the other and there is ample case law concerning whether this type of antagonistic defense is so prejudicial to a defendant that it creates an unfair trial. It also appears to this Court that if defendant 1 in a joint trial poses an alternate suspect defense and defendant 2's defense involves blaming defendant 1, that scenario could pose similar antagonistic defense problems. For purposes of this Order, the Court will assume that there is a fair probability that it could encounter either type of antagonistic defense during this trial[.]

...

In this case, the Court does not anticipate that evidence of a codefendant’s wrongdoing, otherwise inadmissible, would be admitted in a joint trial. In the absence of any statements by the accused to the police, the court cannot conceive of admitting any meaningful evidence admissible only against one defendant. Finally, the Court does not foresee the exclusion of any exculpatory evidence against a defendant because the defendants are being tried together. To counteract any tendency that a jury may have to convict both in sorting out which defendant is telling the truth. The Court will aggressively instruct the jurors that they are to independently evaluate the evidence

admitted against each defendant and that the State must prove the charges beyond a reasonable doubt with regard to each separate defendant. Concerning the claim that one defendant could be joining with the State to get the other convicted, the Court notes that one defendant could testify against the other at a separate trial anyway, and the theory that not only one defendant's testimony, but the efforts of that defendant's attorney would be aligned with the State, assumes that the State will miss important evidence that could only be developed by the cooperating defendant. Order (April 8, 2014).

The trial court's order in denying severance failed to adequately account for the prejudices that were raised before trial.

In his motions for severance, Mr. Sexton set out issues foreseen with this joint trial. One issue involved Mr. Daluz's pretrial statements. See Def. M. Relief (March 20, 2014) at 5-8; Def. M. Reconsider (April 28, 2014) at 2-4; M. Relief (Dec. 2, 2013) at 6-8, 10-11; Tr. M. Hearing Aug. 15, 2013 at 10-16. Mr. Sexton's inability to use these statements came to fruition during the joint trial when he was barred from the possibility of using Mr. Daluz's statements and confession to one of the murders. Def. M. Relief (March 20, 2014) at 6. Mr. Sexton in fact made this request at trial more than once and the request was denied. The first request came after Katelyn Lugdon testified and placed a gun resembling the one used to kill Nicolle Lugdon in Mr. Sexton's possession. (Tr. T. vol. IV at 80-83, 85). After this testimony, Mr. Sexton moved to enter Mr. Daluz's prior statements that

he had shot and killed Nicolle Lugdon.<sup>33</sup> (Tr. T. vol. IV at 80-83, 85). The second unsuccessful request by counsel to use this information was stated as follows:

MR. TOOTHAKER: I heard the last question from team Daluz to basically insinuate that my client made this up and his decision to testify was based upon the staggering events [sic] against him. Does not that allow him to comment on some of the evidence that his codefendant may have provided that may have led to that decision? I mean, I didn't ask that question and he wants to leave the impression that there's a few other considerations that went into his decision to testify, including the one where he's accused of being -- of showing up in Dedham with two dead bodies and he just happened to get in the car, that would be Daluz. And then the statements from the cellmate where Mr. Daluz acknowledges that he shot and killed Ms. Lugdon with the derringer to gain Mr. Sexton's trust. I mean, it seems to me that if you're going to leave the jury with an impression that his decision to testify was based upon the status of the evidence in this case, there's other considerations I should be able to ask for.  
...

MR. TOOTHAKER: can I ask him if there's any evidence to -- from any source that he's aware of that Mr. Daluz shot Ms. Lugdon?  
(Tr. T. vol. XIII at 117-120).

Moreover, as pointed out by Mr. Sexton prior to trial, the uncertainty as to how Mr. Daluz would proceed with his trial limited Mr. Sexton's defense strategy of potentially presenting an alternative suspect defense that did not involve Mr. Daluz. See Def. M. Relief (March 20, 2014) at 2; (JurySelection T. vol I at 2-14). If Mr. Daluz testified, then his testimony and prior statements to police would be

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<sup>33</sup> A renewed motion to sever was made so that Mr. Daluz's prior statement could be used to demonstrate his possession of the silver gun Katelyn Lugdon said was in Mr. Sexton's possession. (Tr. T. vol. IV at 85). The trial court held that it would be improper to bring that information out through Katelyn Lugdon and that the issue would be dealt with later if the informant who attributed the statement to Mr. Daluz was called as a witness. (Tr. T. vol. IV at 85-87).

placed at the forefront of trial in opposition of Mr. Sexton's alternative suspect defense and lead to confusion and diminishment of the defense.

The incompatibility of Mr. Daluz's and Mr. Sexton's defense resulted in a highly prejudicial environment to try a case. Mr. Sexton pointed out the irreconcilability and due process implications of trying these two cases together prior to trial. Def. M. Relief (March 20, 2014) at 4-8; Def. M. Reconsider (April 28, 2014) at 2-4; M. Relief (Dec. 2, 2013) at 6-8, 10-11; Tr. M. Hearing Aug. 15, 2013 at 10-16. And, the trial itself validated Mr. Sexton's pretrial fears. At trial, Mr. Sexton's and Mr. Daluz's defenses did not in fact line up. The questioning of witnesses and presentation of evidence provided Mr. Daluz with an opportunity to

assist the State with proving their case against Mr. Sexton.<sup>34</sup> Mr. Daluz's counsel often objected to witness questioning by Mr. Sexton's counsel and a review of Mr. Sexton's testimony at trial demonstrates at least twenty-seven objections by just Mr. Daluz's counsel. (Tr. T. Excerpt May 19, 2014 at 13-115). This far outnumbers those made by the State. Moreover, Mr. Daluz, and not the State, put on a diesel expert during its case in chief to dispel the credibility of Mr. Sexton's testimony. (Tr. T. vol. XIV at 50-71). Additionally, during Mr. Daluz's closing, he attacked

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<sup>34</sup> The irreconcilability and antagonistic nature of the joint trial was demonstrated through the following events at trial. First, Mr. Daluz's cross examination of the video enhancement expert at trial focused on undoing the favorable testimony Mr. Sexton has elicited about the color accuracy of the person seen in the video of the burning car on August 13, 2012. (Tr. T. vol. II at 185-188, 199-200). At another point, Mr. Daluz argued for the admission of evidence that the State originally stated it did not intend to question a witness about (because it felt one of the statements was hearsay and not permitted). (Tr. T. vol. III at 173-174; Tr. T. vol. IV at 133-134). However, after that discussion the State, and then Mr. Daluz, raised this evidence about threatening phone calls to Katelyn Lugdon. (Tr. T. vol. IV at 99-100, 133-134). During the trial, carefully crafted cross-examinations were opened beyond their intended scope when counsel for Mr. Daluz asked questions on cross-examination. (Tr. T. vol. VI at 62). For example, Mr. Sexton did not ask any cross-examination question of the gentleman that located guns and ammunition in the Penobscot River, but Mr. Daluz's counsel did and then the State's redirect simply focused on him estimating how long the guns had been in the river. (Tr. T. vol. VI at 244, 249-154, 259, 266-267). Mr. Daluz's defense also put on a witness that felt she had seen a car matching the description of Mr. Sexton's Pontiac with a smashed out back window and a women inside with a male driver in the early hours of August 13, 2012. (Tr. T. vol. VIII at 150-176). Moreover, Mr. Daluz's cross-examination of a witness, that identified Mr. Sexton as the driver of a Pontiac she saw in the early hours of August 13, 2012, got hearsay evidence admitted about the location of a cemetery on the road she said the Pontiac turned onto. (Tr. T. vol. VIII at 201-204). Through cross-examination, Mr. Daluz's counsel had earlier got into evidence that gas cans were located in a cemetery not far from the burned car site in the Hammond Street Extension area. (Tr. T. vol. VI at 192-195). The State also provided evidence that solely was admissible to Mr. Daluz in the form of testimony about a taxi cab ride from the Ramada Inn at 3:25 a.m. on August 13, 2012. (Tr. T. vol IX at 5, 13-17). Another witness, pertaining solely to Mr. Daluz, provided testimony that was clearly intended to benefit Mr. Daluz, as the court noted in his decision on the motions for acquittal, "it seemed fairly apparent that [the witness] was bending over backwards to . . . help Mr. Daluz." (Tr. T. vol. IX at 24-43; Tr. T. vol. XII at 123).

Mr. Sexton's credibility as a witness to an extreme extent. A significant portion of his closing argument was geared towards attacking Mr. Sexton's credibility and defense at trial. Counsel for Mr. Sexton was also specifically mentioned by name on numerous occasions. (Tr. T. vol. XIV at 110, 114-115, 117, 118-119, 140). Mr. Daluz's closing made the following attacks on Mr. Sexton's case and credibility:

"We knew coming in that the State's case was one directed at Mr. Sexton with overflow, if you will, or the association component capturing Mr. Daluz." (Tr. T. vol. XIV at 113).

"Well, I just listened for an hour, give or take, to Mr. Toothaker criticize the State for engaging in poetic license. And then to suit his client's needs, he turned around and did the exact same thing. In order to deflect attention from Sexton, *he made up a great story about Daluz*. But there's no facts to support it. This is Toothaker on Daluz. And that's not part of the evidence. . . I'm going to stick to what the facts show and what they don't show and not suggest to you a third version of made up stuff." (Tr. T. vol. XIV at 114-115)(emphasis added).

"Well, I don't want to elaborate and spend a huge amount of time on *Sexton's testimony, it's just not worth it*, but I'm going to make a couple of comment." (Tr. T. vol. XIV at 115)(emphasis added).

"Toothaker says, well, how about Nicolle? *And then pauses to allow Mr. Sexton to drag up the emotion to the point where he can shed a tear or two.* (Tr. T. vol. XIV at 118-119)(emphasis added).

"He [Mr. Sexton] doesn't provide you with anything reliable upon which you can help to answer some of the questions that remain." (Tr. T. vol. XIV at 119-120).

"Remember Sexton was running around town seeing lawyers, trying to chase down people who owed him money. He was acting not like Nick Sexton." (Tr. T. vol. XIV at 136).

"*Ms. Marchese, she's smart, she's really a brilliant prosecutor, she*

*knows Sexton's in trouble, that they got him solid."*  
(Tr. T. vol. XIV at 137)(emphasis added).

"Sexton chose to testify. He chose to put his credibility on the line. He chose to put himself as the focus of attention and subject himself to cross-examination. He could very well have opted against that. Maybe his lawyers told him to do it. Maybe he disregarded their advice and said, no, I want to—I want to talk, Whatever it was, he thought he had some advantage to gain. I suggest to you he saw his ship sinking and decided he's going to bring Daluz down with him. *Daluz wasn't that desperate.*" (Tr. T. vol. XIV at 143)(emphasis added).

The co-defendants were clearly put in the position where they were attacking each other in their closing remarks.

Lastly, the fact that Mr. Sexton was faced with presenting evidence before Mr. Daluz resulted in him being faced with the decision to testify before he knew if Mr. Daluz would be testifying. This meant that Mr. Sexton's defense was limited because he did not know if, or how, Mr. Daluz would testify and his trial strategy was tied to that fact. This affected how he presented his case to the jury and whether or not he presented any alternative suspect testimony, as outlined above and in extensive details in his pretrial filings.

In total, the trial court abused its discretion in not granting the severance of Mr. Sexton's trial from Mr. Daluz's trial. Mr. Sexton has established that he was hugely prejudiced by the trial court's decision and that he is entitled to a trial separate from Mr. Daluz in the interest of fairness and due process.

### **III. THE OUT OF COURT AND IN COURT IDENTIFICATIONS OF GUNS BY KATELYN LUGDON WERE SUGGESTIVE AND IMPERMISSIBLE, AND, IN THE ALTERNATIVE, EXCLUDABLE UNDER THE MAINE RULES OF EVIDENCE.**

At trial Katelyn Lugdon made statements that placed a sliver gun, suggested to be a murder weapon in this case, in the possession of Mr. Sexton the night before the murders of Daniel Borders, Nicolle Lugdon, and Lucas Tuscano.<sup>35</sup> (Tr. T. vol. IV at 48-50, 59-60, 62). Prior to trial, on May 1, 2014, law enforcement showed Katelyn Lugdon a photograph of each of the two guns that were found in the Penobscot River and identified, to varying degrees, at trial as the guns used to commit the murders and then she was asked if she could identify the guns as the guns she saw on August 11, 2012.<sup>36</sup> (Tr. T. vol. III at 151, 155-157; Tr. T. vol. IV at 115, 121-122; Tr. T. vol. VI at 245-255). Katelyn Lugdon was not shown these photographs or actual guns at trial, but discussion of her May 2014 viewing of the two gun photographs was extensive. (Tr. T. vol. IV at 120-122, 179, 182-183, 189). Nonetheless, her in court description of the guns she saw on August 11, 2014 amounts to an identification of the two guns. (Tr. T. vol. IV at 48-50, 59-60, 62).

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<sup>35</sup> Katelyn Lugdon was the girlfriend of Daniel Borders and the sister of Nicolle Lugdon. (Tr. T. vol. IV at 36, 37-38).

<sup>36</sup> One of these guns was positively identified as the gun that killed Nicolle Lugdon and the other gun was identified as a possible match to the gun that killed Daniel Borders. (Tr. T. vol. VII at 14-15, 20-21). This was the first time Katelyn Lugdon had mentioned seeing guns on the night of August 11, 2012, despite having at least six interviews with the police right after the murders occurred. (Tr. T. vol. IV at 104, 111-113, 115, 142, 148).

Additionally, her testimony about two gun photographs shown to her by police was extensive. (Tr. T. vol. IV at 120-122, 179, 182-183, 189).

The court system has long recognized the harm that may be caused by tainted identifications. See State v. Levesque, 281 A.2d 570, 575 (Me. 1971). “The due process clause of the Fourteenth Amendment to the United States Constitution protects criminal defendants from the use of evidence derived from suggestive out-of-court identifications that are conducive to an irreparable mistaken identification.” State v. Philbrick, 551 A.2d 847, 849 (Me. 1988)(internal citations and quotations omitted). A two step test is used to weed out unreliable identifications:

First, the burden is on the defendant to demonstrate by a preponderance of the evidence that the identification procedure used by law enforcement personnel was unnecessarily ‘suggestive.’ Second, assuming the defendant meets that burden, the burden then shifts to the State to show by clear and convincing evidence that the corrupting influence of the unnecessarily suggestive procedure is outweighed by the reliability of the identification.”<sup>37</sup> Id. at 849 (internal citations

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<sup>37</sup> When reviewing the reliability of an identification, the court looks to the “totality of the circumstances” surrounding the identification. State v. True, 464 A.2d 946, 950 (Me. 1983). In assessing reliability, the type of factors that are relevant include the identifier’s opportunity to view the person being identified, the identifier’s degree of attention, the accuracy of the identifier’s description, the identifier’s degree of certainty, and the amount of time between the crime and the identification. State v. Toussaint, 464 A.2d 177, 180 (Me. 1983). A court weighs, “[a]gainst the suggestivity of the pre-trial identification procedures, factors indicating an accurate identification must be weighed. . . these factors include the opportunity. . . to view the assailant at the time of the crime, . . . [the] degree of attention, the accuracy of [the] description of the criminal, the level of. . . certainty demonstrated at the time of the confrontation, and the time between the. . . [crime] and the identification.” State v. St. Onge, 392 A.2d 47, 51 (Me. 1978) (citing Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972)).

omitted); see also State v. True, 464 A.2d 946, 950 (Me.1983).

The suppression court's findings of fact are reviewed for clear error and its legal conclusions are reviewed de novo. State v. DiPietro, 2009 ME 12, 964 A.2d 636, 640 (Me. 2009).

In ruling on whether Katelyn Lugdon could testify about the guns at trial, the trial court stated as follows:

I think that one form of identification of the firearm is admissible. I think the case law is quite clear that the principles that apply to out of court identification of defendants does not apply to out of court identification of inanimate objects. I've been unable to find any case anywhere where there was suppression. Every case I've read says that the principle does not apply. I imagine I could keep it out in a discretionary way, some sort of balancing test. But, since I haven't seen that done anywhere, I'm not going to do it. (Tr. T. vol. IV at 4).

I agree that 403 applies and that was the only— my conclusion last night was that is the only ground upon which it could be excluded. . . I can always keep something out if I want to, but I'm not going to. . . I have identified there's a problem, perhaps, with trying to do the out of court identification anyway, so what we'd end up being left with is— and the firearms are kind of gorilla in the room. I mean, they haven't been admitted into evidence yet, but it wouldn't take much to show firearms to the witness. And I'm not sure I could prevent the State from doing that and be sustained on appeal. I don't think there's anything that prevents them from showing the witness photographs now, showing guns, whatever they want to do. And then all of the prior statements and things would be— the witness could be cross-examined on all of the other facets of her statements.” (Tr. T. vol. IV at 7-8).

Mr. Sexton opposed this order. (Tr. T. vol. III at 170; Tr. T. vol. IV at 6-7, 59-60).

At issue here is the identification of an inanimate object, which many courts have not afforded the same constitutional protections as identifications of people.<sup>38</sup> However, this case presents a situation where such protection is warranted. Furthermore, most of the aforementioned cases dealt with the identification of vehicles.<sup>39</sup> The objects at issue here consist of the description of two guns, one matching the description of the gun that killed Nicole Lugdon and the other matching the description of the gun that most likely killed Daniel Borders. There is a heightened and more serious risk in the identifications of these weapons, as opposed to the identification of a car.

In Commonwealth v. Simmons, 383 Mass. 46, 417 N.E.2d 1193 (Ma. 1981) the Massachusetts Supreme Judicial Court found that a heightened, constitutional treatment of inanimate objects could be warranted in some cases. The Court stated:

We do not accept the defendant's argument that constitutional principles concerning one-to-one confrontations between victims and suspects

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<sup>38</sup> See Commonwealth v. Crock, 2009 PA Super 24 (Pa.Super. 2009); People v. Reed, 216 P.3d 55 (Colo.App.Div. 3 2008); State v. Delgado, 902 A.2d 888, 188 N.J. 48 (N.J. 2006); Commonwealth v. Lourenco, 54 Mass.App.Ct. 1115, 767 N.E.2d 1134 (2002); State v. Taylor, 657 A.2d 659, 37 Conn.App. 464 (Conn.App. 1995); State v. Cyr, 453 A.2d 1315, 122 N.H. 1155 (N.H. 1982); Commonwealth v. Simmons, 383 Mass. 46, 417 N.E.2d 1193 (Ma. 1981); Inge v. Commonwealth, 228 S.E.2d 563, 217 Va. 360 (Va. 1976).

<sup>39</sup> See all cases cited supra in fn 41, except for Commonwealth v. Crock, 2009 PA Super 24 (Pa.Super. 2009), which involved a tattoo, and State v. Taylor, 657 A.2d 659, 37 Conn.App. 464 (Conn.App. 1995), which involved a gun, however the identifying party had seen the gun on multiple occasions and gave very detailed description- neither of which Ms. Lugdon could do. (Tr. T. vol. IV at 59-65, 103-122, 142-148, 182-183).

should be applied to "confrontations" between a victim and an inanimate object. Granting that in some instances due process considerations might limit the admissibility of testimony of an identification of an inanimate object, we conclude that this case simply does not present such a situation.

...

Although we are aware of no case in which due process considerations have led to the suppression of an out-of-court identification of an inanimate object, we recognize that, in an extreme case, the degree of suggestiveness of an identification procedure concerning an inanimate object might rise to the level of a denial of due process. Even if constitutional considerations did not apply, an appropriate rule of evidence might require that an identification of an inanimate object not be admitted in evidence where the government used a highly suggestive identification procedure because the unfair, prejudicial, and unreliable quality of the identification would outweigh its probative value. Id. at 48, 51-52, 1194, 1196.

Given that Katelyn Lugdon was shown only one photograph of each of the guns at the same time, the procedure used by the police was highly suggestive, especially given her lack of general gun knowledge (which was apparent in her descriptions of the guns), the actual details given to describe the guns, and the fact that she claimed she saw the guns on August 11, 2012 and law enforcement showed her the photographs on May 1, 2014, almost two years later. The corrupting influence of the unnecessarily suggestive procedure is clearly outweighed by the any reliability that might be found in the identification of the guns. The identification and discussion of the guns should have been suppressed by the trial court.

Moreover, law enforcement's showing of photographs of the guns to Katelyn Lugdon tainted her in court gun testimony. "The due process right to a fair trial is

violated when an out-of-court confrontation occurs which is unnecessarily or impermissibly suggestive and which creates a substantial likelihood of error in identification.” State v. Flash, 418 A.2d 158, 159 (Me. 1980)(internal citations omitted). Due to the taint caused by the out of court viewing of the gun photographs, Mr. Sexton’s due process rights to a fair trial were again violated and the in court description of the guns, which amounts to an identification of the guns, should have been suppressed.

Lastly, the trial court should have kept the gun testimony out based on Maine Rules of Evidence 401 and 403.<sup>40</sup> Given the vague description of the guns, the witness’ clear lack of general gun knowledge, the amount of time that passed, and her connection to two victims in the case, the Court should have exclude the testimony and abused its discretion in not doing so.

#### **IV. THE TRIAL COURT ERRED IN DENYING MR. SEXTON’S MOTION TO SUPPRESS HIS CELL PHONE RECORDS.**

Mr. Sexton moved for the trial court to suppress the location data information from his cell phone providers because it was gathered illegally, without a search warrant or an applicable exception to the warrant requirement,

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<sup>40</sup> A preserved objection to a motion in limine ruling is reviewed for both clear error and abuse of discretion. State v. Patterson, 651 A.2d 362, 366 (Me. 1994). Questions as to the relevancy of proffered evidence is reviewed for clear error and a trial court’s decision to admit or exclude evidence is reviewed for abuse of discretion “because the question of admissibility frequently involves the weighing of probative value against considerations militating against its admissibility.” State v. Patterson, 651 A.2d 362, 366 (Me. 1994). Defense counsel objected to the gun testimony on the grounds of Maine Rule of Evidence 401 and 403 as well. (Tr. T. vol. IV at 6-8).

under the Fourth Amendment to the United States Constitution. (Def. M. Suppress (Dec. 13, 2013) at 1); (Suppress. H. T. at 209).

The trial court, after hearing, and in denying Mr. Sexton's motion, found that

1. On August 14, 2012 at 1:12 a.m. Detective Sargent Kenniston faxed an emergency phone records request to AT&T for 207-4040673<sup>41</sup> indicating that he was investigating a triple homicide, the suspect was mobile and at large with an unknown female, they may be crossing state lines, and the public was in danger. He requested call records with site location information for the last 48 hours. This is the phone number used by Mr. Sexton in renting the car that ultimately was burned.

2. On August 14, 2012 at 10:14 a.m. Det. Kenniston faxed an emergency request for 386-5764173 to Metro PCS, a provider of cell phone services, asking for call detail records and cell site information for August 12, 2012 to August 14, 2012.<sup>42</sup> They sought the records related to this phone, another Sexton phone, because it was the number most frequently appearing on Chantee Andrews' [sic] records during the relevant time period.

3. Detectives actually located Mr. Sexton and Ms. Andrews on August 14, 2012 by obtaining site location information related to Ms. Andrews' phone, and not by obtaining such information from either Sexton phone.

...

The Court finds that in making the emergency request for these cell phone records, the police were not engaged in a Fourth Amendment "search." The Court incorporates its analysis in the Daluz suppression Order of today's date in reaching that decision. Furthermore there is strong probable cause existing on August 14, 2013 that Sexton had killed three people, was fleeing, and posed a significant threat to others. Even if obtaining the records constituted a search, the records and their fruits are admissible because of the existence of probable cause and

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<sup>41</sup> The request was sent at 1:13 a.m. on August 14, 2012. (Suppress. H. T. at 165-169).

<sup>42</sup>The request was sent at 10:41 a.m. on August 14, 2012. (Suppress. H. T. at 176).

exigent circumstances. *See State v. Moulton*, 481 A.2d 155 (Me. 1984). Finally, the officers exercised good faith, based on what was authorized by statute, in obtaining the records. (Order (April 1, 2014) at 1-2).

The aforementioned phone records were obtained under the Stored Communications Act (SCA), 18 U.S.C. § 2702(c)(4), which provides that disclosure “to a government entity, if the provider, in good faith, believes that an emergency involving death or serious physical injury to any person requires disclosure without delay of information relating to the emergency.” (Daluz Order (April 1, 2014) at 4-5).

Under the Fourth Amendment to the United States Constitution and Article 1, section 5 of the Maine Constitution “a warrantless search is generally unreasonable unless it was conducted pursuant to a recognized exception to the warrant requirement. See State v. Rabon, 2007 ME 113, ¶ 11, 930 A.2d 268, 274.” State v. Melvin, 2008 ME 118 ¶ 6, 955 A.2d 245, 247 (Me. 2008); see also State v. Philbrick, 436 A.2d 844, 854 (Me. 1981). “The Fourth Amendment does not require suppression of evidence seized pursuant to a facially valid warrant if officers relied on the warrant based on an objectively reasonable belief in the

existence of probable cause.”<sup>43</sup> State v. Johndro, 2013 ME 106, ¶ 17, 82 A.3d 820, 825 (Me. 2013). “Evidence obtained in violation of a defendant's right to be free from unreasonable searches and seizures must be excluded at trial.” State v. Drewry, 2008 ME 76, ¶ 20, 946 A.2d 981, 988 (Me. 2008)(citation omitted).

Review of a suppression ruling presents a mixed question of law and fact, where factual findings are reviewed for clear error and legal conclusions are a matter of law and reviewed de novo. State v. Sylvain, 2003 ME 5, ¶ 8-11, 814 A.2d 984, 986-7 (Me. 2003); see also State v. Nadeau, 2010 ME 71 ¶ 15, 1 A.3d 445, 453 (Me. 2010); State v. Donatelli, 2010 ME 43, ¶ 10, 995 A.2d 238, 241 (Me. 2010); State v. DiPietro, 2009 ME 12, ¶ 13, 964 A.2d 636, 640; (Me. 2009); State v. Sargent, 2009 ME 125 ¶ 9, 984 A.2d 831, 833 (Me. 2009).

In denying Mr. Sexton’s motion, the trial court ruled that Fourth Amendment protection did not apply to the emergency request exception of the SCA. (Daluz Order at (April 1, 2014) at 7-9, 11). The trial court further found that the good faith exception to the warrant requirement<sup>44</sup>, based on a good faith reliance on the

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<sup>43</sup> Other exceptions are for exigent circumstances and the inevitable discovery doctrine. State v. Nadeau, 2010 ME 71, ¶ 38, 1 A.3d 445, 459 (Me. 2010); State v. Rabon, 2007 ME 113, ¶ 11, 930 A.2d 268, 274; The inevitable discovery requirement requires that “the evidence could ... have been gained lawfully from information that is truly independent from the warrantless search, [that]. . . the evidence inevitably would have been discovered by such lawful means. . . and that “the application of the inevitable discovery exception neither provides an incentive for police misconduct nor significantly weakens fourth amendment protections.” State v. Nadeau, 2010 ME 71, ¶ 38, 1 A.3d 445, 459 (Me. 2010).

<sup>44</sup> Since no warrant was obtained, there was no warrant to be relied on for a good faith exception to be applied by the trial court.

SCA statute, would protect law enforcement actions under the Fourth Amendment. (Daluz Order at (April 1, 2014) at 7-9, 11).

However, Mr. Sexton's whereabouts were pretty well established early on August 14, 2012 when three police officers from Bangor were confident enough to head to Danvers, Massachusetts because they felt Mr. Sexton was at a location there with his girlfriend Chantee Andrews.<sup>45</sup> (Suppress. H. T. at 156-158). In fact, Mr. Sexton was located and interviewed on August 14, 2012. (Suppress. H. T. at 67-72, 128, 146). Mr. Sexton was not arrested when law enforcement spoke to him on August 14, 2012 when he was interviewed in Massachusetts, nor did he provide any useful information to them. (Suppress. H. T. at 67-72, 128, 146). This would suggest that there were in fact no exigent circumstances that related to law enforcements' request of Mr. Sexton's phone records under the SCA.

Additionally, the request for Mr. Sexton's AT&T records was only for August 11, 2012 to August 13, 2012.<sup>46</sup> (Suppress. H. T. at 120). This request

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<sup>45</sup> The Danvers police department was providing surveillance for the Bangor police department when they located Chantee Andrews in Danvers and the Bangor police department received confirmation that had she checked into a hotel with two kids and a male in Danvers. (Suppress. H. T. at 156-157). The Danvers police department got in contact with the Bangor police department at around 9:45 a.m. on August 14, 2012. (Suppress. H. T. at 156-157). Three officers decided to go to Danvers at 11:30 a.m. and began to travel down around 12:30 p.m.. (Suppress. H. T. at 1157-8). Mr. Sexton was interviewed by the Bangor officers some time after 4:00 p.m.. (Suppress. H. T. at 145).

<sup>46</sup> The request for the cell phone location information for Mr. Sexton's AT&T phone was sent in at 1:13 a.m. on August 14, 2012 and the request for the MetroPCS cell phone records was sent in at 10:41 a.m. on August 14, 2012. (Suppress. H. T. at 167, 177). Interestingly, information was obtained from Mr. Sexton's Metro PCS cell phone at 11:19 a.m. on August 14, 2012 that placed his phone in the same location as Ms. Andrews. (Suppress. H. T. at 177-8).

therefore was beyond the temporal scope of the exigent circumstances. Moreover, the use of the SCA to get the records violated Mr. Sexton's Fourth Amendment rights, and the inevitable discovery exception would not apply in this situation because the exception cannot be used to provide an incentive for police misconduct nor in situations that significantly weaken Fourth Amendment protection. As such, the cell phone information should have been suppressed.

**V. THE TESTIMONY OF MR. SEXTON'S INVOLVEMENT IN PRIOR BAD ACTS IN RELATION TO DRUG DEBTS CONSTITUTES REVERSIBLE ERROR.**

At trial, testimony was admitted that associated Mr. Sexton with harming people over drug debts. This testimony was impermissible as it was both evidence of prior bad acts and hearsay.

Maine Rule of Evidence 404(b) provides that “[e]vidence of a crime, wrong, or other act is not admissible to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character.”

The Maine Rules of Evidence define hearsay as an out of court statement that “[a] party offers in evidence to prove the truth of the matter asserted in the statement.” M. R. Evid. R. 801(c).

Maine Rule of Evidence 403 provides that “[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”

Since no objection was made during trial to the testimony, or mistrial requested, an obvious error standard of review applies. State v. Dolloff, 2012 ME 130, ¶ 35, 58 A.3d 1032, 1043 (Me. 2012); State v. Lockhart, 830 A.2d 433, 449 (Me. 2003); M.R.U. Crim.P. 52(b).<sup>47</sup>

The following testimony was elicited by the State at trial:

Q. What are some of the other occupational hazards that you have observed with some of the people you know to sell drugs?

A. I mean, some people if you don't pay them or whatever, they'll get rough with you, but didn't really— that never was the case really.

Q. Well, you have friends that that's happened to, haven't you?

A. Yeah.

Q. And are you aware some of those people are connected to Mr. Sexton?

A. Yeah, I was told about the events, yeah.

Q. Are they connected to Mr. Daluz as well?

A. I have no idea.  
(Tr. T. vol. VII at 177-178).

The State then immediately followed this colloquy with asking about whether sending mass texts to engage in drug deals was smart and if this practice upset Mr.

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<sup>47</sup>The obvious error test requires a showing, by the defendant, of “(1) an error, (2) that is plain, and (3) that affects substantial rights. . . [e]ven if these three conditions are met. . . a jury’s verdict [is] only [set aside] if. . . (4) the error seriously affects the fairness and integrity or public reputation of judicial proceedings.” State v. Dolloff, 2012 ME 130, ¶ 35, 58 A.3d 1032, 1043 (Me. 2012) (internal citations and quotations omitted).

Sexton. (Tr. T. vol. VII at 178). No objection was raised to this questioning, however the Court itself pointed out concern over the testimony, stating:

Concerning the liabilities of dealing in drugs question that was just asked and I overruled an objection to and I let him indicate that, you know, people can get mad at you, then there was a question about Mr. Sexton. I'm not sure I understood everything, but it almost appeared that there was a comment that Mr. Sexton had harmed somebody in the past.

...

I was left with the perception that there had been testimony that Mr. Sexton had harmed people in the drug trade previous to this.

...

I think that laid that at the feet of Mr. Sexton. Am I wrong?

...

I wanted to indicate that had there been an objection to the second question that in my belief elicited that response, I would have sustained the objection. If that did come out, I would give some sort of instruction to the jury about it, because some prior bad act in that regard I'm not going to let in.

...

I wanted to clarify that in case that is what happened. I thought that's what happened.

(Tr. T. vol. VII at 185-187).

The above testimony clearly connects Mr. Sexton to prior acts where drug debts were settled through violent means. The State's bridge from the above cited colloquy into questioning about how Mr. Sexton felt about Mr. Borders' drug dealing techniques was intended to demonstrate a likelihood that Mr. Sexton was attempting to settle a drug disagreement with Mr. Borders in the same manner. As such, it is impermissible under Maine Rule of Evidence 404(b). The transcript clearly establishes that the trial court felt the same way and was willing to provide,

at the least, instruction to the jury on the issue. Additionally, this testimony was hearsay and excludable under Maine Rule of Evidence 801(c), and is actually double hearsay because the witness had no personal knowledge and was restating something he was told. (Tr. T. vol. VII at 177-8). Lastly, the testimony was excludible under Maine Rule of Evidence 403 as it was unfairly prejudicial, confusing, and misleading to the jury.

The error in allowing the jury to hear this testimony was substantial and seriously affected the fairness of Mr. Sexton's trial. It provided an unfair basis for the jury to find that Mr. Sexton had a violent nature and would act in accordance with the testimony provided. As such, it was obvious error.

### CONCLUSION

For the above-reasons, Mr. Sexton asks this Court to vacate his convictions.

Dated: April 29, 2016

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### CERTIFICATE OF SERVICE

I, Jeremy Pratt, Esquire, hereby certify that on this date I mailed via the U.S. postal service, first class mail, two copies of the foregoing Brief of Appellant to the Attorney General's Office, 6 State House Station, Augusta, ME 04333.

Dated: April 29, 2016

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