

MAINE SUPREME JUDICIAL COURT

SITTING AS THE LAW COURT

Law Court Docket No. Som-24-390

STATE OF MAINE v. NEIL T. MACLEAN

On Appeal from the Unified Criminal Docket (Somerset County)

**Brief of Appellant
Neil T. MacLean**

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STATEMENT OF FACTS

The following statement of facts derives from the evidence admitted at trial, the sentencing hearing, and from the procedural record.

I. Historical Facts Admitted at Trial

Former Skowhegan Police Department Officer Jacob Pierce (“Officer Pierce”) and current Skowhegan Police Department Officer Alex Burns (“Officer Burns”) responded to a structure fire on Court Street in Skowhegan, Maine, on October 30, 2022. (Tr. 21.) P [REDACTED] MacLean (“P [REDACTED]”) initiated law enforcement’s response after waking up to smoke in her bedroom, causing her to flee the home to her porch and call 911. (Tr. 50, 55-56.) P [REDACTED] went back inside the home, and Officers Pierce and Burns arrived on the scene and saw smoke coming out the second story of the building. (Tr. 22, 56.) The officers heard P [REDACTED] hollering inside and entered the burning building. (Tr. 22.) They retreated from the building to catch their breath due to smoke inhalation and then proceeded back into the building, where they found P [REDACTED] and her husband, Neil MacLean (“MacLean”), in the building. (Tr. 22.)

MacLean was in the middle of the living room, sitting or laying on the floor in his underwear, with his pants around his ankles. (Tr. 22, 38.) The officers ordered P [REDACTED] and MacLean to exit the building; P [REDACTED] complied, but MacLean did not stand up, and the officers had to drag him out of the building. (Tr. 23.) MacLean

was limp and was not coherent with what the officers were telling him. (Tr. 43.) While removing MacLean from the building, MacLean stated: “I did a good one this time.” (Tr. 23.) The officers began evacuating the building, and the fire department arrived on the scene. (Tr. 25.) None of the occupants of the building were harmed or injured as a result of the fire, but the officers were later treated for smoke inhalation. (Tr. 26, 40.)

According to Officer Pierce, MacLean said that he used matches to light the fire and admitted to consuming alcohol. (Tr. 25.) Firefighter Spencer Wyman testified that the fire primarily stemmed from a bed in a bedroom and was contained to only that bedroom. (Tr. 75-76.) Officer Pierce also noted that MacLean tried to follow firefighters back into the burning building. (Tr. 25.) The footage from both officers’ body-worn cameras (“BWC”) was admitted en masse without objection from defense counsel and was played for the jury. (Tr. 27-28, 40-41; *see* State’s Ex. 1 (Officer Pierce’s BWC) and State’s Ex. 2 (Officer Burns’s BWC).)

P [REDACTED] testified that earlier that day, she and MacLean had a conversation, and the plan was to admit him to the hospital the following day. (Tr. 48.) She explained that something was going on in his brain, that he did not know what was going on, was not “right in the head,” and that he was sick for two weeks and prone to falling. (Tr. 48, 71.) P [REDACTED] testified that MacLean was not drinking alcohol that night and that when she woke up from the smoke, she spoke to MacLean, who

did not know what happened. (Tr. 50.) The State pressed P [REDACTED] on this point. They referred P [REDACTED] to a conversation she had with an investigator shortly after the fire. (Tr. 54.)

Q. Do you remember saying something different to him than what you have stated her today?

A. No, he is the one that told me how – what happened.

(Tr. 54.) Then, the State purported to attempt to refresh P [REDACTED]'s recollection about “saying something different” to a fire marshall—to which P [REDACTED] responded that she did not recall saying something different than what she had testified. (Tr. 54-56.)

The State asked for a sidebar and, at that sidebar, requested to treat P [REDACTED] as a “hostile witness.” (Tr. 57.) Defense counsel objected. (Tr. 57.) The Court granted the State’s request and explained that it would “immediately” issue a limiting instruction. (Tr. 58.) The sidebar conference concluded, the Court instructed the State’s attorney to continue, and the State’s attorney stated in open court: “Your Honor, I request permission to treat Ms. Maclean as a hostile witness as we discussed at sidebar.” (Tr. 60.) This statement drew an objection and a request for a mistrial from defense counsel. (Tr. 60.) The Court declined to grant a mistrial: “At this point I would conclude there is not a manifest necessity. I am not sure it needed to be stated in front of the jury that she is a hostile witness, but I do not find at this point there is a manifest necessity for a mistrial.” (Tr. 61.)

With P [REDACTED] being characterized and treated as a hostile witness, the State used State's Exhibit X to now impeach her; this was the same exhibit used to "refresh" P [REDACTED]'s recollection. (Tr. 61-64.) This time, after cross-examination, P [REDACTED] conceded that what she told the Fire Marshal was what had actually happened and that MacLean told her that he was trying to kill himself by lighting the fire. (Tr. 61-64.) Because of this, the Court did not issue the limiting instruction that it initially planned to issue. (Tr. 64-65.)

The State's examination of P [REDACTED] continued, and, unsatisfied with P [REDACTED]'s answers, the State again asked for a sidebar conference and again asked to treat P [REDACTED] as a hostile witness. (Tr. 66-67.) The Court, over the defense counsel's objection, again allowed the State to treat P [REDACTED] as a hostile witness. (Tr. 66-67.) Then, the State asked (again) if P [REDACTED] "recall[ed] any other statements that Mr. Maclean stated about the fire?" (Tr. 68.) P [REDACTED] said "[n]o." (Tr. 68.) Again, the State then sought to "refresh" P [REDACTED]'s recollection—which defense counsel objected to because she did not state that she had a failure of recollection. (Tr. 68-69.) The Court overruled the objection, and the State continued to "refresh" P [REDACTED]'s recollection, which ultimately resulted in her testifying that she told investigators that MacLean stated that he "didn't care if he killed everyone." (Tr. 69-70.)

MacLean was hospitalized as a result of this event, and State Fire Marshall's Office Investigator Jeremy Damren ("Investigator Damren") visited MacLean at the hospital to question him about the event just three and half hours after the fire at approximately 7:30 in the morning. (Tr. 104-105, 109.) MacLean was "[v]ery direct" with Investigator Damren, who noted: "He was in a hospital after his apartment burned, so his demeanor seemed okay to me but this was the first time I met with Mr. Maclean." (Tr. 104.) Although MacLean did not know what day it was, he was able to confirm the month and where he was located. (Tr. 110.) However, Investigator Damren was concerned with MacLean's mental health, and he acknowledged that MacLean told him he had set another fire while he was married in 1967—which would have been when MacLean was eight years old. (Tr. 111-112.)

Critically, MacLean admitted during his questioning by Investigator Damren that he started the fire on his bed using matches and that he felt "good" about it and was trying to kill himself, his wife, and the rest of the people in the apartment. (Tr. 104-105.) State's Exhibit 22—an audio recording of this interview—was admitted without objection by defense counsel and played to the jury in open court. (Tr. 106.) No motion to suppress was filed with the trial court to attack the voluntariness of MacLean's statements and/or the voluntariness of MacLean's purported waiver of *Miranda*. (A. 3-13.)

II. Procedural History & Sentencing

Neil T. MacLean (“MacLean” or “Appellant”) was charged by Indictment dated February 24, 2023, with two counts of Arson, *see* 17-A M.R.S. § 802(1)(A) & 17-A M.R.S. § 802(1)(B)(2), and one count of Attempted Murder (Class A), *see* 17-A M.R.S. §§ 152(1)(A), 201. (A. 23-24.) The Indictment alleged that MacLean committed this conduct on or about October 30, 2022, in Skowhegan, Maine. (A. 23-24.)

MacLean first appeared in court on November 2, 2022, where the Somerset County Unified Criminal Docket (“trial court”) raised the cash bail component from \$5,000 secured cash bail to \$25,000 secured cash bail. (A. 3-4.) The trial court also ordered a competency evaluation to take place at the initial appearance on November 2, 2022. (A. 3-4.) The State Forensic Service’s competency evaluation report was filed with the Court on January 27, 2023. (A. 4.)

After the February 24, 2023, Indictment was returned by the Somerset County Grand Jury, MacLean appeared on March 22, 2023, for arraignment and pled not guilty to the charges. (A. 5, 23-24.) A dispositional conference was held, as was a judicial settlement conference, but the case remained unresolved, and trial counsel for MacLean moved for a mental examination to take place on issues related to competency, insanity/abnormal condition of the mind, and other mental condition(s) (“OMC”). (A. 5-7.) The State Forensic Service filed these three reports on

September 11, 2023. (A. 7.) It is unclear from the record below whether there was ever a finding of MacLean's competency to proceed, but it appears that no competency hearing was ever held. (A. 3-13.)

A one-day trial was held on June 17, 2024. The trial lasted approximately six hours before the case was given to the jury for deliberations, and in less than an hour, the jury came back with guilty verdicts on all counts. (A. 14-16, 31; Tr. 186-188.)

The following month, the parties appeared for MacLean's sentencing on July 26, 2024. (Sentencing Tr. 3.) P [REDACTED] spoke at the sentencing hearing and implored the sentencing judge to order the "least possible sentence" and noted that he "is my husband . . . is a grandfather . . . has a heart of gold . . . [and] has mental illness" and that she "would like him getting help with his mental illness to help him." (Sentencing Tr. 4.) The State asked for 23 years, all but 18 years suspended, with probation. (Sentencing Tr. 4.) The defense asked for a sentence of 12 years, all but 21 months (credit for time served), with four years of probation. (Sentencing Tr. 8-9.) The sentencing court ended up imposing a sentence of a 25-year term of imprisonment, with all but 15 years of the sentence suspended, with 4 years of probation. (A. 10-16.)

This timely appeal followed. (A. 12-13.)

ISSUES PRESENTED FOR REVIEW

- I.** Whether MacLean's Double Jeopardy Clause Protections Were Violated.
- II.** Whether the Court Obviously Erred by Failing to Instruct the Jury on the Defense of Abnormal Condition of the Mind *Sua Sponte*.
- III.** Whether the Court Erred by Overruling Defense Counsel's Objection to the State's Purported Attempt to Refresh the Recollection of its Witness, P [REDACTED] MacLean.
- IV.** Whether the Court Erred in Declining to Grant the Defense's Request for a Mistrial or Issue a Curative Instruction.

ARGUMENT

I. Counts I and II of the Indictment are Duplicative, and the Court's Failure to Merge These Counts Resulted in a Double-Jeopardy Violation under the Maine and United States Constitution.

Neither party raised this double-jeopardy issue at trial, and, therefore, the trial court's failure to merge duplicative counts must be reviewed for obvious error. *See State v. Armstrong*, 2019 ME 117, ¶¶ 24-25, 212 A.3d 856. For this Court to vacate a conviction based on the obvious error standard of review, "there must be (1) in error, (2) that is plain, and (3) that affects substantial rights" and, "if these conditions are met, [this Court] will exercise [its] discretion to notice an unpreserved error only if we also conclude that (4) the error seriously affects the fairness and integrity or public reputation of judicial proceedings." Alexander, *Maine Appellate Practice* § 403 at 240 (6th ed. 2022).

"The double jeopardy clauses of the Maine and federal constitutions prohibit, among other things, multiple punishments for the same offense." *State v. Chase*, 2023 ME 32, ¶ 21, 294 A.3d 154 (quotation marks omitted). A constitutionally protected right to be free from double jeopardy is a fundamental right of all citizens in this court, and it is recognized that this right is "clear and well-established." *State v. Robinson*, 1999 ME 86, ¶ 14, 730 A.2d 684.

As this Court has noted, “[t]his prohibition can easily conflict with the ubiquitous and necessary prosecutorial practice of charging multiple, duplicative counts for the same criminal act.” *State v. Armstrong*, 2020 ME 97, ¶ 7, 237 A.3d 185. As this Court has also noted, “if the duplicative counts are not identified and the problem resolved before conviction and sentencing, the double jeopardy clause is violated.” *Id.*

When a trial results in multiple verdicts for the same offense, the appropriate procedure to prevent a double jeopardy violation is to merge, not dismiss, the duplicative counts. If a double jeopardy violation is discovered on appeal, we will vacate the convictions and remand for merger of the duplicative counts. The result of this procedure will be multiple findings of guilt but only one conviction and one sentence.

Chase, 2023 ME 32, ¶ 21, 294 A.3d 154; *see also Armstrong*, 2020 ME 97, ¶ 12, 237 A.3d 185 (“Merger is the correct remedy because it prevents the constitutional injury while preserving multiple verdicts.”). Furthermore, even where a duplicative conviction does not expressly result in a greater sentence, it is nonetheless an impermissible punishment under the state and federal constitutions. *See Ball v. United States*, 470 U.S. 856, 864-865 (1985); *Armstrong*, 2020 ME 97, ¶ 7, 237 A.3d 185.

Here, MacLean was indicted for two counts of Arson that stem from the same date and conduct. The only difference with regard to Counts I & II is the *mens rea* element alleged in each of the charges. The Court erred by failing to merge the

duplicative counts of Arson, and this error must be viewed as an obvious error. *See e.g., Chase*, 2023 ME 32, ¶ 26, 294 A.3d 154; *State v. Armstrong*, 2019 ME 117, ¶ 25, 212 A.3d 856. Therefore, this Court should vacate the conviction and remand to the trial court for resentencing. *See id.* “In order to resentence [MacLean] on the merged conviction,” this Court should require “the trial court ... to hold a new sentencing proceeding at which both parties could be heard and conduct a new sentencing analysis” as a failure to do so will “deprive[] [MacLean] of a substantial right.” *Armstrong*, 2020 ME 97, ¶¶ 14, 237 A.3d 185 (cleaned up).

II. The Court Committed Obvious Error by Failing to Instruct the Jury on the Abnormal Condition of the Mind Defense *Sua Sponte*.

When a defendant properly preserves an objection to a trial court’s jury instructions, this Court will review the jury instructions of the trial court in their entirety to determine whether they fairly and correctly apprise the jury in all necessary respects of the governing law. Alexander, *Maine Appellate Practice* § 422 at 271 (6th ed. 2022). If a defendant makes no such request for a jury instruction, the defendant on appeal can only prevail on the failure to instruct the jury if the trial court’s failure to do so *sua sponte* amounts to an obvious error. *See State v. Rainey*, 580 A.2d 682, 685-686 (Me. 1990). The obvious error standard of review “calls for an evaluation of the error in the context of the entire trial record to determine . . . whether the error was so seriously prejudicial that it is likely that an injustice occurred.” *State v. Pabon*, 2011 ME 100, ¶ 19, 28 A.3d 1147. For an error to be

obvious, there must be “(1) an error, (2) that is plain, and (3) that affects substantial rights. If these conditions are met, we will exercise our discretion to notice an unpreserved error only if we also conclude that (4) the error seriously affects the fairness and integrity or public reputation of judicial proceedings.” *Id.* ¶ 29.

The statutory defense of mental abnormality is set out in 17-A M.R.S. § 38; it provides that “[e]vidence of an abnormal condition of the mind may raise a reasonable doubt as to the existence of a required culpable state of mind.” 17-A M.R.S. § 38. When this defense is generated and put at issue, the State continues to bear the burden of proving the required culpable state of mind beyond a reasonable doubt. *See State v. Graham*, 2015 ME 35, ¶ 17, 113 A.3d 1102. An abnormal condition of the mind is separate from the insanity defense, *see* 17-A M.R.S. § 39, in that abnormal condition of the mind negates *mens rea*, where insanity serves as an excuse. The Maine Criminal Code does not define what constitutes an abnormal condition of the mind “because the phrase is one of common usage and understanding.” *See State v. Estes*, 418 A.2d 1108, 1116-1117 (Me. 1980).¹ The abnormality need not possess a specific character; rather, the defense only “requires

¹ “The insanity defense requires proof that the defendant suffered from a ‘mental disease or defect’ that rendered the defendant unable to appreciate the wrongfulness of his or her conduct. For purposes of the insanity defense, ‘mental disease or defect’ is specifically defined as a ‘severely abnormal mental condition[] that grossly and demonstrably impair[s]’ the defendant’s ‘perception or understanding of reality.’ The insanity defense is an affirmative defense, which the defendant must prove by a preponderance of the evidence. If the fact-finder determines that a defendant has a mental disease or defect ‘of a specific character—that which substantially affects cognitive or substantially impairs volitional processes’—that defendant may be found ‘not guilty by reason of insanity.’” *State v. Graham*, 2015 ME 35, ¶ 19, 113 A.3d 1102 (cleaned up).

sufficient evidence that the defendant suffered from an abnormal condition of the mind that raises a reasonable doubt as to whether the defendant possessed the requisite culpable mental state for the particular offense charged.” *Graham*, 2015 ME 35, ¶ 20, 113 A.3d 1102 (quotation marks omitted).

In *State v. Berube*, this Court reviewed a trial court’s “failure to instruct the jury on a statutory defense in order to maintain the basic integrity of judicial proceedings and to avoid depriving the defendant of his constitutional right to a fundamentally fair trial” and vacated a conviction after holding that it was obvious error for the trial court to not instruct on a statutory defense. *See* 669 A.2d 170, 171-172 (Me. 1995) (quotation marks omitted). Following the *Berube* decision, the Legislature amended the Maine Criminal Code to “specify that a trial court is not required to instruct on an affirmative defense that has been waived by the defendant.” *State v. Ford*, 2013 ME 96, ¶¶ 15-16, 82 A.3d 75. Furthermore, this Court noted in *State v. Cleaves* the Legislature’s departure from the *Berube* decision and that it was not obvious error for the trial court to not instruct justification defenses where it was a “matter of trial strategy” that “could have suggested an inference that the defense was conceding that the crime may have been committed but may have had a justification.” 2005 ME 67, ¶ 13, 874 A.2d 872. The Court in *Cleaves* also relied on the trial court’s engaged and well-tailored jury instruction preparation practice and the defense expressly waiving any other instructions. *Id.*

¶¶ 11-14; *see also Ford*, 2013 ME 96, ¶ 17, 82 A.3d 75 (rejecting a similar obvious error instructional challenge where “[Defendant] was represented by experienced defense counsel who pursued an abnormal state of mind defense, a completely appropriate tactic under the circumstances, and made strategic decisions not to pursue self-defense or voluntary intoxication defenses. The record clearly shows that [Defendant] not only failed to request or argue for self-defense and voluntary intoxication instructions but that he explicitly objected to their introduction after the trial court suggested that they might be relevant. He cannot now after his first strategy failed, take the opposite position on appeal.” (footnotes omitted)).

Here, the defense of abnormal condition of the mind was obviously available, and MacLean’s impaired and abnormal mental state was a centerpiece of the trial. MacLean was found laying on the floor of a burning building with his pants around his ankles, was not getting up, was incoherent (according to Officer Burns), and had to be carried out of a burning building. He tried to re-enter the burning building when firefighters arrived. Witnesses testified that he was not right in the mind, that he was sick, and that he and P [REDACTED] even had plans to admit him to the hospital the following day. MacLean testified about his mental health problems as well and the fact that he was in and out of consciousness and was transferred to Dorothea Dix Psychiatric Hospital for two months after this event. (Tr. 120-143.) In short, there was sufficient evidence in the trial record that MacLean suffered from an abnormal

condition of the mind that raised a reasonable doubt about whether he possessed the requisite culpable mental state for the charges brought by the State.

Yet, following the close of evidence, the subject of jury instructions came up, and the following dialogue occurred:

THE COURT: Do you know whether there are other, bearing in mind these are just the instructions dealing with the elements of the specific offenses, do you know if there are other instructions you are going to ask the Court to give in particular, [trial counsel]?

[TRIAL COUNSEL]: No, Your Honor.

(Tr. 145.) The trial judge did not ask this same question to the State’s attorney, and it can be reasonably inferred that this is because the trial judge was honed in on the defense’s potential to raise an issue related to some affirmative/statutory defenses.

Unlike in *Cleaves* and *Ford*, this was not a case where an express waiver of a jury instruction was based on some kind of trial strategy, as the issue raised by the defense related to MacLean’s intent (or lack thereof) would have been buttressed by an instruction on abnormal condition of the mind. An abnormal condition of the mind defense would be consistent with that trial strategy—not counterintuitive or a “second bite at the apple” like in *Cleaves* and *Ford*. This is especially so here, given that this was not a case where the defense shied away from the fact that MacLean caused this fire. The defense embraced that fact and instead pointed to this being a suicide attempt, not a murder attempt.

Finally, the lack of a jury instruction on abnormal condition of the mind allowed the State's attorney to argue at closing the following:

Obviously a great portion of this trial, or at least a certain portion of this trial dealt with Mr. Maclean's mental health. This jury should not excuse Mr. Maclean's behavior because he was depressed or suicidal. There is no -- there is no evidence that the defendant was in any sort of mental state that would legally excuse his behavior. There is no option on the verdict form, as there is in some cases, for you to find him not guilty by reason of insanity. Also there are no jury instructions explaining the law of insanity or mental illness, that's because his depression is not a legitimate defense to the crimes he has been charged with.

(Tr. 153-154.)

In short, and notwithstanding the fact that defense counsel declined to request any additional instructions, the trial court should have stepped in and *sua sponte* issued an instruction on abnormal condition of the mind, given the focus at trial on MacLean's mental state and abnormalities which generated the defense and had the potential to negate the required *mens rea*—of course, depending on the fact finder's view of the evidence in light of such a jury instruction.

III. A Proper Foundation Was Not Laid to Refresh P[REDACTED]'s Recollection Because She Did Not Demonstrate a Lack of Memory Concerning Her Statements to Investigators, and the Admission of this Evidence was Erroneous.

Whether a document is properly used to refresh the recollection of a testifying witness is a question of fact that this Court will review deferentially for clear error. *State v. Hamel*, 2007 ME 18, ¶ 3, 913 A.2d 1287; *see also State v. Dominique*, 2011

ME 18, ¶ 1, n. 2, 12 A.3d 53 (“[T]he court did not clearly err in permitting a testifying witness to refresh his recollection using a police report he had authored.”). This Court will “review the court’s decision on the adequacy of foundation for an abuse of discretion, though [it will] review underlying factual findings of a fact for clear error.” *State v. Rutherford*, 2019 ME 128, ¶ 8, 214 A.3d 27; *see also Adoption of Isabella T.*, 2017 ME 220, ¶ 41, 175 A.3d 639 (“We review the trial court’s determination that the necessary factual foundation to admit evidence has or has not been established for clear error, and its ultimate determination to admit or exclude the evidence for an abuse of discretion.”).

Generally, any kind of writing, article, or document “which might tend to serve another purpose” and is “genuinely calculated to revive the witness's memory” may be used to revive a witness’s memory on the stand. *See State v. Robbins*, 2019 ME 138, ¶¶ 35-36, 215 A.3d 788. However, prior to refreshing a witness’s recollection, a proper foundation must be laid. *See id.* ¶ 36. Critically, to establish this foundation, an attorney must demonstrate first that the witness actually lacks memory with regard to a line of questioning. *See id.* Absent an adequate foundation, the trial court acts properly by barring an attorney from purporting to refresh a witness’s memory. *See id.* Furthermore, this Court has held that where the true purpose of a line of questioning is not to refresh a witness’s recollection “but rather to impeach her testimony as a whole by demonstrating that she did not testify

accurately as to the date of the victim's statement," error is committed. *See id.* ¶ 37; *see also Brewner v. State*, 804 S.E.2d 94 (Ga. 2017) ("The failure of a witness to remember making a statement may provide the foundation for offering extrinsic evidence to prove that the statement was made.").

Here, there were two occasions in which a proper foundation was not laid establishing P [REDACTED]'s lack of memory, and, therefore, the State should not have been permitted to "refresh" her recollection.

First, the State's attorney and P [REDACTED] engaged in the following inquiry:

Q. Ms. Maclean, if you could answer with a yes or no, do you remember speaking with an investigator shortly after the fire?

A. The police officer?

Q. Yes.

A. I don't know. I can't remember.

Q. A moment ago you made a statement that you have spoken with somebody at the hospital, do you remember that?

A. Yeah, fire marshall.

Q. So you remember speaking with a fire marshall about what happened?

A. Yeah.

Q. Do you remember saying something different to him than what you have stated here today?

A. No, he is the one that told me how – what happened.

Q. Okay. Would looking at a copy of the report potentially refresh your recollection, help you remember what happened.

A. Yeah, I know I did run out on my porch and called 911.

Q. Okay.

A. When I ran into the living room.

Q. Would a copy of the report possibly refresh your memory about what you said to the investigator?

A. Sure.

(A. 18; Tr. 54-55.) The State's attorney then purported to refresh P [REDACTED]'s recollection. However, the only time where P [REDACTED] demonstrated a lack of memory was with regard to the conversation *with the police officer, not the fire marshall*. There was not a sufficient foundation to permit the State to "refresh" P [REDACTED]'s recollection of what she told the fire marshall because the State never established a proper foundation.

Second, the State again pressed P [REDACTED] on her conversation with the fire marshall:

Q. Mrs. Maclean, while you were sleeping did Mr. Maclean make any attempts to wake you up?

A. No.

Q. Did Mr. Maclean tell you while you were sleeping that he started a fire?

A. No.

Q. Did he make any statements about a fire prior to you discovering the smoke in the room?

A. No.

Q. And did you have – I believe you may have answered this question earlier, but did you and him have any arguments that night?

A. No.

Q. Did you receive any medical treatment related to the fire or smoke inhalation?

A. I went to the hospital in the ambulance like Neil did, but they checked my lungs and I was let out at eleven o'clock that morning.

[A sidebar conference was held to request permission to again treat P [REDACTED] as a hostile witness, which was granted by the trial court over defense counsel's objection.]

Q. Mrs. Maclean, during the fire do you recall any other statements that Mr. Maclean stated about the fire?

A. No.

Q. Would a copy of the report potentially refresh your memory as to that?

A. Sure.

(A. 21-22; Tr. 65-68.) As the State approached P [REDACTED] to show the writing, defense counsel objected to the State refreshing P [REDACTED]'s recollection because she was not even asked if she did not remember the statements the State was trying to elicit. (A. 22.) The Court overruled this objection, stating:

THE COURT: I think that's exactly what she was asked and she said – Mr. Snyder asked her, do you remember Mr. Maclena saying anything else, she said no, blanket denial, so I mean my inference is she has a failure of recollection, if she is claiming to have a failure of recollection she said she doesn't remember him saying anything else, do you think she has to say, I don't remember saying anything else to the police in addition to that?

. . . .

THE COURT: I think if she says she has a failed recollection of – about him having said anything, I think that's enough for Mr. Snyder to use to refresh her recollection so I will overrule the objection.

(A. 22; Tr. 68-69.) Contrary to the Court's finding, P [REDACTED] never established a failure of recollection; instead, like in the questioning leading up to the State's question about MacLean's other statement, P [REDACTED] answered with a "no." This alone did not establish a failure of recollection—it was a responsive answer to the State's attorney's question consistent with her prior answers. P [REDACTED]'s "blanket denial" was to the State's inquiry of whether MacLean stated anything else that she had not already testified about, not an expression of lack of memory that would permit the State to proceed with refreshing her recollection with a writing. *See Armstrong*, 2019 ME 117, 212 A.3d 856 (noting that the proponent of evidence has the burden of developing a foundation that would allow the court to properly admit the evidence).

The trial court erred and abused its discretion by permitting the State's attorney to refresh P [REDACTED] MacLean's recollection without first establishing a proper foundation. Her testimony was critical in the present case, and the most damaging portions of her testimony stemmed from the State improperly refreshing her recollection because it lacked an adequate foundation. Therefore, this Court should hold that the trial court erred and/or abused its discretion, vacate the conviction, and remand for a new trial.

IV. The State Committed Prosecutorial Error in Labeling P [REDACTED] as a Hostile Witness and Erred by Failing to Grant the Defense's Motion for a Mistrial or, at least, Issuing a Curative Instruction.

"A mistrial is intended to address circumstances in which the trial is unable to continue with a fair result and only a new trial will satisfy the interest of justice." *State v. Carrillo*, 2021 ME 18, ¶ 18, 248 A.3d 193 (quotation marks omitted). In determining whether to grant a mistrial, a trial court must decide whether it is "confident that the trial can proceed to a fair and just verdict in the context of the proceedings before it" and must "consider the totality of the circumstance, including the severity of the misconduct, the prosecutor's purpose in making the statement (i.e., whether the statement was willful or inadvertent), the weight of the evidence supporting the verdict, jury instructions, and curative instructions." *Id* (quotation marks omitted). A motion for mistrial is only granted in rare circumstances, such as "exceptionally prejudicial circumstances or prosecutorial bad faith." *Id* (quotation

marks omitted). This Court reviews a trial court's denial of a motion for a mistrial under the abuse of discretion standard and gives a high degree of deference to the trial court. *Id.* ¶ 19. This Court has consistently held that a curative instruction, in most cases, is sufficient to overcome "even significant prejudice." *Id.* ¶ 25.

"The role of a prosecutor in the courtroom is unique, serving as a "minister of justice" who is obligated "to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence." *State v. Hanscom*, 2016 ME 184, ¶ 18, 152 A.3d 632 (quotation marks omitted). "As a representative of an impartial sovereign, the prosecutor is under a duty to ensure that a criminal defendant gets a fair trial and this duty must far outweigh any desires to achieve a record of convictions." *State v. Collin*, 441 A.2d 693, 697 (Me. 1982). In other words, "[p]rosecutors must walk a careful line to avoid overreaching, and [a]lthough permitted to strike hard blows, a prosecutor may not strike foul ones." *State v. Dolloff*, 2012 ME 130, ¶ 41, 58 A.3d 1032 (quotation marks omitted).

This Court has explained that "[a] lawyer should not "state a personal opinion as to . . . the credibility of a witness." *State v. Hassan*, 2013 ME 98, ¶ 33, 82 A.3d 86 (citing M.R. Prof. Conduct 3.4(e)). "Determining what credence to give to the various witnesses is a matter within the *exclusive province* of the jury." *State v. Crocker*, 435 A.2d 58, 77 (Me. 1981). "A prosecutor may not use the authority or prestige of the prosecutor's office to shore up the credibility of a witness, sometimes

called ‘vouching.’” *State v. Fahnley*, 2015 ME 82, ¶ 40, 119 A.3d 727 (quotation marks omitted). Of course, a prosecutor may properly suggest to the jury ways to analyze the credibility of witnesses when those arguments are “fairly based on facts in evidence.” *See Hassan*, 2013 ME 98, ¶ 33, 82 A.3d 86 (quotation marks omitted). “It is improper, however, for a prosecutor to vouch for a witness by impart[ing] [his] personal belief in a witness's veracity or impl[ying] that the jury should credit the prosecution's evidence simply because the government can be trusted.” *State v. Williams*, 2012 ME 63, ¶ 46, 52 A.3d 911 (quotation marks omitted).

Here, the State’s attorney “[used] the authority or prestige of the prosecutor’s office . . . to shore up the credibility of witness[es]” in this case. *See Alexander, Maine Appellate Practice* § 422A at 272. Specifically, after the sidebar conference concluded, the State’s attorney immediately stated in open court: “Your Honor, I request permission to treat Ms. Maclean as a hostile witness as we discussed at sidebar.” (A. 20; Tr. 60.) In this vein, the prosecutor directly assigned a lack of credibility to the witness by announcing to the jury that, *as counsel and the judge discussed in private at the sidebar conference*, P [REDACTED] was a “hostile witness.” More concerning is that this pronouncement not only invoked the State’s attorneys’ view that P [REDACTED] was a hostile witness but it also confirmed that the trial court held that view in the private sidebar conference. As many courts have recognized, “it was [the jury’s] determination of the facts, not the opinion of the prosecutor, that

mattered.” *Dolloff*, 2012 ME 130, ¶ 58, 58 A.3d 1032; *see also State v. McFarland*, 232 A.2d 804 (Me. 1967) (noting that the trial court is “proscribed from casting aspersions on the credibility of a witness” and that “[t]he extent to which a witness is to be believed is entirely for the jury.”).

After defense counsel objected, counsel appeared at the sidebar conference and defense counsel moved for a mistrial. The trial court held that:

At this point I would conclude there is not a manifest necessity [to grant a mistrial]. I am not sure it needed to be stated in front of the jury that she is a hostile witness, but I do not find at this point there is a manifest necessity for mistrial. I would deny the request for mistrial.

. . . .

This was a decision made at sidebar [to treat P [REDACTED] as a hostile witness]. I would direct you, [State’s attorney], not to refer to her being, before the jury, as a hostile witness. You can treat her as a hostile witness.

. . . .

Not to refer to her. The objection is overruled.

(A. 20; Tr. 61.) As highlighted above, P [REDACTED] was a critical witness who was called by the State. It was highly prejudicial for the State’s attorney to announce to the jury that P [REDACTED] was a hostile witness, as discussed with the trial court at the sidebar conference, and yet no remedial action was taken by the trial court—even though the trial acknowledged that the comment did not need to be made. *See State v. Goodrich*, 432 A.2d 413, 418 (Me. 1981) (“Having been apprised of the nature of

the defendant's objection and being aware of the prosecutor's misjudgment, the trial court either should have granted the motion for mistrial, or, at the very least, on its own initiative, it should have issued an immediate curative instruction to the jury. The court's failure to do either, in these circumstances, was prejudicial error." And the trial court's jury instructions, "at the end of the trial . . . buried within the charge-in-chief, are of minimal value in countering seriously prejudicial testimony.").

CONCLUSION

This Court should vacate the conviction of MacLean for the above-described reasons. If this Court vacates MacLean's conviction on any of the challenges raised in Sections II, III, and IV of this brief, *see supra* pp. 11-26, then this Court should remand to the trial court for a new trial. If this Court only vacates MacLean's conviction on the challenge raised in Section I of this brief, *see supra* pp 9-11, then this Court should remand to the trial court with instructions to "hold a new sentencing proceeding at which both parties could be heard and conduct a new sentencing analysis" as a failure to do so would "deprive[] [MacLean] of a substantial right." *Armstrong*, 2020 ME 97, ¶¶ 14, 237 A.3d 185 (cleaned up).

Date: 02/12/2025

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CERTIFICATE OF SERVICE

I, Kurt C. Peterson, Attorney for the Appellant, Neil T. MacLean, hereby certify that this appellate brief was filed and that the service requirements were complied with by copying opposing counsel on the email and hand-delivered filing with the Court.

Date: 02/12/2025

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