THE MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket No. Som-24-390

STATE OF MAINE
Appellee

v.

NEIL T. MACLEAN
Appellant

On Appeal from the Kennebec County Unified Criminal Docket

Brief of Appellee

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STATEMENT OF THE FACTS AND PROCEDURAL HISTORY:

On October 30th, 2022, in the early hours of the morning, the defendant, Mr. MacLean, lit his bed on fire. Minutes after the fire began, P[redacted] MacLean, the defendant's wife, was awoken in her bedroom due to the presence of heavy smoke. Ms. MacLean left her bedroom and went to the living room, where she found the defendant sitting on the couch. Ms. MacLean asked the defendant what was going on and the defendant did not respond. She then called 911 and exited the apartment because of the heavy smoke. Several minutes later, Sgt. Jacob Pierce and Ofc. Alex Burns of the Skowhegan Police Department responded to the six-unit apartment building where they observed smoke coming out of the second story. (Trial Tr. 22.) The officers entered the defendant's apartment and discovered the defendant sitting on the floor of the living room with his pants around his ankles. Ms. MacLean was also present in the apartment when the officers made initial contact. Both Sgt. Pierce and Ofc. Burns instructed Ms. MacLean and Mr. MacLean to leave the burning apartment. Mr. MacLean refused to leave requiring both officers to grab his arms and lift him out of the apartment. While the officers were removing Mr. MacLean, he uttered "I did a good one this time." (Trial Tr. 23.)

Shortly after being evacuated, Mr. and Ms. MacLean were taken to the hospital where each were interviewed by State Fire Marshal Jeremy Damren. Investigator Damren administered a Miranda warning to Mr. MacLean who subsequently waived his Miranda rights. During questioning, Mr. MacLean explained that he utilized his own clothing to ignite the fire on his bed. When asked by Investigator Damren why he started the fire, Mr. MacLean explained that he wanted to kill himself. Investigator Damren questioned Mr. MacLean if he also intended to kill his wife, to which he responded "yes." Finally, the investigator asked Mr. MacLean if he was aware of the other residents being in the building and if he wanted to kill them as well. Mr. MacLean responded that he did. When asked how he felt about his attempt to kill himself, his wife, and other residents of the apartment, Mr. MacLean stated that he felt "good." (Trial Tr. 105.)

On February 24th, 2023, Mr. MacLean was indicted on two counts of Arson, 17-A M.R.S. § 802(1)(A), (1)(B)(2) and one count of Attempted Murder, 17-A M.R.S. §§ 152(1)(A), 201. On June 17th, 2024, a jury found Mr. MacLean guilty on all three counts. About a month later, on July 26th, 2024, Mr. MacLean appeared in court for sentencing. The state requested Mr. MacLean be sentenced to 23 years, with all but 18 years suspended, along with probation. Conversely, the defense requested a significantly reduced sentenced of 12 years, with all but 21 months suspended, including 4 years of probation. Ultimately, the court sentenced

Mr. MacLean to 25 years of imprisonment, with all but 15 years suspended, to include 4 years of probation. The appellant then filed this current appeal.

ISSUES PRESENTED FOR REVIEW:

I. Counts I, II, and III should have been Merged to Prevent Double Jeopardy Violations.

II. The Trial Court did not Commit Obvious Error for Failing to Instruct the Jury on the Abnormal Condition of Mind, *Sua Sponte.*

III. The State Properly Refreshed Ms. MacLean's Recollection as Permitted by M.R.Evid. 612-613 in both instances.

IV. The State's Request to Treat P[redacted] MacLean as a Hostile Witness in Front of the Jury did not Rise to the Level of Error and the Trial Court's Denial of the Defense's Motion for a Mistrial was not an Abuse of Discretion.

ARGUMENT

I. Counts I, II, and III should have been Merged to Prevent Double Jeopardy Violations.

No objection was raised by either party over the trial court's failure to merge Counts I and II for being duplicative; therefore, the trial court's decision must be reviewed for obvious error. *See State v. Lajoie*, 2017 ME 8, ¶ 13, 154 A.3d 132. Accordingly, "[t]o prevail under the obvious error standard, [one] must demonstrate that (1) there is an error, (2) that is plain, (3) that affects substantial rights, and, if so, (4) that it is error that seriously affects the integrity, fairness, or public reputation of judicial proceedings." *Id*.

The State concedes this error in regards to Counts I and II and further asks that Count III be included on remand. The underlying facts for all three counts are part and parcel of the same offense. The trial court's failure to merge counts I, II and III violates the defendant's double jeopardy protections.

This Court proscribed a "uniform rule of practice" for double jeopardy violations discovered on appeal in *State v. Armstrong*, 2020 ME 97, ¶ 11, 237 A.3d 185 (holding that "[i]f a double jeopardy violation is discovered on appeal, [the Court] will vacate the convictions and remand for merger of the duplicative counts.").

In *Armstrong,* after a jury-waived trial, the trial court (Kennebec County, *Billings, J.*) found the defendant guilty of felony murder (Class A), 17-A M.R.S. § 202(1), and robbery (Class A), 17-A M.R.S. § 651(1)(C). *Id*. ¶ 13. At sentencing, the trial court sentenced the defendant to thirty years prison on the felony murder count along with a concurrent thirty-year sentence, with all but twenty-nine years suspended and four years of probation, on the robbery count. *State v. Armstrong,* 2019 ME 117. This Court ultimately held that the convictions and sentence for both felony murder and robbery were in violation of Armstrong's double jeopardy rights as they were the same offense. This Court remanded the case back to the lower court with instructions to merge the convictions and resentence. *Id.* ¶ 26.

The State concedes an obvious error; the counts should have been merged to prevent a violation of the defendant's double jeopardy rights.

II. The Trial Court did not Commit Obvious Error for Failing to Instruct the Jury on the Abnormal Condition of Mind *Sua Sponte.*

The trial court did not commit obvious error for not supplying an instruction regarding mental abnormality *sua sponte* as there was no evidence generated to support the instruction. When a defendant fails to preserve an objection to a trial court's jury instructions generally, or raise the issue, any error raised on appeal will be evaluated by this Court for obvious error. *State v. Lajoie*, 2017 ME 8 ¶ 13, 154 A.3d 132. "To prevail under the obvious error standard, [one] must demonstrate

that (1) there is an error (2) that is plain, (3) that affects substantial rights, and if so, (4) that it is error that seriously affects the integrity, fairness, or public reputation of judicial proceedings." *Id.* In this case, the defense would only have been applicable, if raised, to Count Three charging Attempted Murder.[1]

A trial court may "give an unrequested instruction even though it conflicted with the defendant's trial strategy." *State v. Ford*, 2013 ME 96 ¶ 14, 82 A.3d 75. The Appellant has failed to show that even the first prong of the inquiry is met. Appellant can show no error.

The trial court had zero evidence to support a jury instruction regarding abnormal condition of the mind, even had trial counsel requested one. Before the court could even consider such an instruction there has to be sufficient evidence to support the instruction. *State v. Weyland*, 2020 ME 129 ¶ 26, 240 A.3d 841.

In this case, the only evidence presented by the Appellant was his own statements of depression and his response, "I just didn't think it seemed to be an issue in my life…I shrugged it off as, you know, just another thing, no big deal." (Trial Tr. 126.) Additionally, he testified:

[1] Counts One and Two charged Arson, which is a strict liability crime. Per *State v. Graham*, "[t]he mental abnormality defense is relevant to the question of the defendant's guilt when a culpable state of mind is an element of the crime charged because the defense 'tend[s] to negate the conclusion that [the] defendant had a culpable state of mind.'" 2015 ME 35 ¶ 21, 113 A.3d 1102 (citing *State v. Murphy*, 496 A.2d 623, 630-631 (Me. 1985).)

> I was taken to Dorothea Dix Psychiatric Center in Bangor for treatment for two months and they diagnosed me with chronic depression and short-term memory loss, and anxiety, all of which I wasn't completely aware of because of obviously my mental state and I didn't know it had been an issue that long, and I was depressed.
>
> (Trial Tr. 132)

"[T]he testimony of lay persons 'cannot be deemed evidence legally sufficient to raise a reasonable doubt that on the particular occasion at issue defendant had acted 'intentionally or knowingly' without evidence 'tending to show some impairment of defendant's cognitional or volitional faculties.'" *State v. Case*, 672 A.2d 586, 588 (Me. 1996) (citing *State v. Barrett*, 577 A.2d 1167, 1170 (Me.1990).) In *Barrett*, the Defendant had argued that the trial court erred in refusing to give an abnormal condition of the mind instruction. This Court affirmed the trial court's refusal to give an abnormal condition of the mind instruction based on the defendant's depression at the time of his criminal conduct, failing to find that it affected his cognitional or volitional faculties.

Simply put, the Appellant's evidence was legally insufficient to support the jury instruction. Further, a *sua sponte* decision to add the abnormal condition of the mind instruction would have subjugated trial counsel's role and responsibilities. Trial counsel had more than adequate opportunity to develop this

issue and properly develop a trial strategy.[2] Having the court step in and give such an instruction, while well within the court's discretion and authority, could as easily be argued to be error and impact any trial strategy. Therefore, there was no error in failing to give, *sua sponte*, a jury instruction on abnormal condition of the mind.

III. The State Properly Refreshed Ms. MacLean's Recollection as Permitted by M.R.Evid. 612-613 in both instances.

Whether an attorney lays the proper foundation to refresh the recollection of a witness is a question this Court will review for an "abuse of discretion" while reviewing the "underlying factual findings of fact for clear error." *State v. Rutherford*, 2019 ME 128, ¶ 8, 214 A.3d 27. In addition, this Court has determined that "[a] Court's ruling is clearly erroneous when there is no competent evidence in the record to support it." *In re Children of Danielle H.*, 2019 ME 134, ¶ 9, 215 A.3d 217. Lastly, if this Court determines the trial court abused its discretion, then a ruling must be made whether the court's error was harmless. "An error is harmless when it is highly probable that it did not affect the Jury's verdict." *State v. Jamie*, 2015 ME 22, ¶ 38, 111 A.3d 1050.

[2] Early in the process, the Appellant was ordered to undergo multiple evaluations under 15 M.R.S. § 101; competency, insanity and other conditions of the mind were ordered in July of 2023 and the evaluations were received in August and September of 2023. (A.6-A.7). None were used at trial.

The State's attorney properly laid the foundation to refresh Ms. MacLean's recollection concerning her statements to the fire marshal. Pursuant to M.R.Evid. 612, the true foundation for any attempt to refresh a witness' memory is a statement by a witness that they do not remember. On direct examination Ms. MacLean was asked if she had engaged in a conversation with an investigator shortly after the fire; she stated that she did not remember.

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

A. The police officer?

Q. Yes.

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

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

A. Yeah, fire marshal.

Q. So you remember speaking with a fire marshal 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?

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; Trial Tr. 54-55) (emphasis added)

The Appellant contends Ms. MacLean only exhibited a lack of memory in context to her conversation with police officers and not the fire marshal. (Blue Br. 22.) Although the record illustrates some confusion between the State and Ms. MacLean about which investigator the question was being posed, the State was able to clarify that the question was about her conversation with the fire marshal. Ms. MacLean demonstrated her failure to remember, allowing the State's attorney to refresh her recollection without objection from the defense. There was no objection to this exchange. The State laid the proper foundation, and the trial court did not abuse its discretion in allowing the State to refresh Ms. MacLean's recollection.

If this Court is of the opinion that the State's attorney failed to lay the required foundation and the trial court abused its discretion in allowing the State's attorney to refresh Ms. MacLean's recollection, the admission of the answer

elicited after Ms. MacLean's refreshed recollection is harmless error. After the State's attorney refreshed Ms. Maclean's recollection, the following exchange occurred:

> Q. As I show you this, I would like you not to say anything at first, just take the time to look at what is stated in the report.
>
> A. Okay.
>
> Q. Did you have a chance to read the report?
>
> A. Yes.
>
> Q. Does it refresh your memory? Does it help you remember your interaction with the fire marshal?
>
> A. Yes.
>
> Q. Do you remember saying something different when you spoke with the fire marshal?
>
> A. **No.**
>
> (A. 18; Trial Tr. 55-56) (emphasis added).

Ms. MacLean's answer, after reviewing the item, was in the affirmative, her memory was refreshed. Given her subsequent response of "no" even if the trial court did err by allowing the jury to hear Ms. MacLean's response, such error was harmless as it is "highly probably that is did not affect the Jury's verdict." *State v. Jamie*, 2015 ME 22, ¶ 38, 111 A.3d 1050.

The State's attorney also correctly laid the proper foundation when refreshing Ms. MacLean about the statements made by the defendant immediately following the ignition of the fire. On direct examination, the State's attorney and Ms. MacLean engaged in the following dialogue:

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.

At sidebar, defense counsel objected to the State's attorney refreshing the recollection of Ms. MacLean since "she was never asked if she even remembered anything." The Court overruled the objection telling the attorneys that the State's attorney did in fact ask Ms. MacLean if she remembered of anything else leading to the Court to infer she did in fact have a failure of recollection.

The trial court did not abuse its discretion by allowing the State to refresh Ms. MacLean's recollection as proper foundation was laid. The appellant contends Ms. MacLean never displayed a failure of recollection and referencing the court below, states she was engaged in "blanket denial" while answering questions from the State's attorney. (Blue Br. 25.) However, prior to refreshing the recollection of Ms. MacLean, the State's attorney asked her the following question: "Mrs.

MacLean, during the fire do you recall any other statements that Mr. MacLean?" Ms. MacLean responded "no." (A. 22; Trial Tr. 68) Although the State's attorney asked Ms. MacLean if she could "recall" instead of "remember," according to Merriam Webster, one definition of recall means "the remembrance of what has been learned or experienced," while remember is defined as "to have a recollection or remembrance." *Merriam-Webster Inc.*, MERRIAM-WEBSTER DICTIONARY (11th ed. 2019). Simply, they are synonyms. Therefore, when Ms. MacLean responded to the State's attorney's question as to whether she recalled "any other statements that Mr. MacLean stated about the fire," when Ms. MacLean answered with "no," she established a failure of recollection for which the State's attorney was entitled to refresh her memory. The court, clearly in the best position to make this determination, agreed. (A. 29, Trial Tr. pp 68-70).

There is no clear error in either the witness' refreshing or the court's decision allowing the question.

IV. The State's Request to Treat P[redacted] MacLean as a Hostile Witness in Front of the Jury was Not Error and the Trial Court's Denial of the Defense's Motion for a Mistrial was not an Abuse of Discretion.

The States request to treat Ms. MacLean as a hostile witness in front of the jury, though maybe not best practice, did not substantially prejudice the defendant. "A motion for a mistrial should be denied except in the rare circumstance that the

trial is unable to continue with a fair result and only a new trial will satisfy the interest of justice." *State v. Logan*, 2014 ME 92 ¶ 14, 97 A.3d 121 (citing *State v. Bridges*, 2004 ME 102, ¶ 11, 854 A.2d 855.)

Trial court decisions regarding the permissible mode of interrogation of a witness are reviewed for an abuse of discretion. *State v. Chapman,* 645 A.2d, 1, 2 (Me. 1994).

In this case, the results of the State's questioning were, at best favorable to the Appellant. The State's attorney, at sidebar, requested of the court to treat Ms. MacLean as a hostile witness and allow leading questions to develop her testimony. Over the objection of the defense, the trial court granted permission for the State's attorney to treat Ms. MacLean as a hostile witness. The subsequent dialogue between the State's attorney and the court then ensured:

(The following proceedings took place in front of the jury)

State's attorney: Your Honor, I request permission to treat Ms. MacLean as a hostile witness as discussed at sidebar.

Defense counsel: Your Honor, we would continue to object.

(The following conversation with the court and attorneys took place at sidebar).

Defense counsel: So because the State said that in front of the jury, Ms. MacLean is a hostile witness, we would move for mistrial. It is overly prejudicial.

The Court: Any argument about whether mistrial should be granted?

State's attorney: No, she is a hostile witness so I think that's completely appropriate.

The Court: At this point I would conclude there is not 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 mistrial. I would deny the request for mistrial. (Tr. 60-60).

Allowing the State to treat Ms. MacLean as hostile was not an abuse of discretion nor is there prejudicial error. *State v. McFarland* is exactly on point; the trial courts use of the term "hostile witness" in front of the jury was not error. *State v. McFarland,* 232 A.2d 804, 809 (Me. 1967). The denial of a motion for mistrial, likewise, was not an abuse of discretion. *Id.*

On review, this Court imparts great deference to a trial court's decision to deny a motion for mistrial "[b]ecause the trial court has a 'superior vantage point,' we review the denial of a motion for a mistrial for an abuse of discretion." *State v. Logan*, 2014 ME 92 ¶14. "We will overrule the denial of a mistrial 'only in the event of exceptionally prejudicial circumstances or prosecutorial bad faith." *Id.* (quoting *State v. Cochran*, 2000 ME 78, ¶ 28).

The trial court correctly denied the defense's motion for a mistrial. The appellant argues that the prosecutor "directly assigned a lack of credibility to the witness by announcing to the jury that . . . P[redacted] was a 'hostile witness.'"

(Blue Br. 28.) First, the State's attorney never directly stated in front of the jury that Ms. MacLean was acting hostile nor was any comment made to either bolster or impute her credibility. Instead, the State stated, "[y]our Honor, I request permission to treat Ms. MacLean as a hostile witness as discussed at sidebar." (A. 20; Trial Tr. 60).

The judge remedied the situation by instructing the State to not use the phrase "hostile" in front of the jury. There were no further issues. The Court in *McFarland* noted that there is no equating the remark of "hostile" with "disparaging remarks to the prejudice of the witness' credibility [which] constitutes reversible error. *McFarland, at 809.*

The use of the term "hostile" in this contest does not constitute error nor does it rise to the level warranting a mistrial.

CONCLUSION:

This Court should vacate the judgment of the trial court and merge all three counts for purposes of sentencing and remand for resentencing. However, this Court should decline to vacate the defendant's conviction on any of the allegations in Sections II, III, and IV for the reasons described above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Michael H. Madigan, Assistant District Attorney, hereby certify that an electronic version of the within Brief for Appellee was sent to Appellant's Attorney, addressed as follows:

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The State has sent a native.pdf file for submission to the court (at lawcourt.clerk@courts.maine.gov) pursuant to M.R.App.P. 7(c)(1) and (2)

Dated: _____

_____
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