SUPREME JUDICIAL COURT OF THE STATE OF MAINE

Sitting as the Law Court

Law Court Docket Number: KEN-25-299

STATE OF MAINE

v.

STEVEN TRUMAN

On Appeal from Unified Criminal Court sitting in Kennebec County.

Brief for Appellee – The State of Maine

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STATEMENT OF FACTS

Procedural History

The grand jury returned a three count indictment against the defendant, Steven Truman, on September 19, 2024. (A. 28). The first count was tampering with a victim, 17-A M.R.S. § 454(1-B)(A)(1). (Id.) The second count was improper victim contact pre-bail, 15 M.R.S. § 1094-B(1). (Id.) The third count was violation of conditions of release, 15 M.R.S. § 1092(1)(B), but that charge was dismissed prior to trial as a result of the defendant not being informed about the consequences of violating his bail conditions. (A. 7). The tampering charge was alleged to have occurred on July 28, 2024, the same day the defendant had been arrested for domestic violence aggravated assault against the victim. (State's Ex. 7). The domestic violence charges were dismissed prior to the tampering trial. (Def. Ex. 19).

The defendant pled not guilty to the charges on October 8, 2024. (A. 5.) The defendant filed a motion for in camera review of victim-witness advocate notes which was argued on December 20, 2024. (A. 6). That motion was denied on January 14, 2025. (A. 13 (Davis, C.J.).)

The defendant and State filed motions in limine prior to trial in relation to the definition of the term "victim" in the tampering statute. (A.38-39, 41.) The State

also filed a motion seeking to admit recordings of jail calls which were the basis of the tampering charge. (A. 42.) After argument, the trial court granted the State's motion and denied the defendant's motion. (A. 21.) The trial court held that the statute was ambiguous and, therefore, looked to the legislative history which supported the State's reading of the tampering statute. (A. 19-21.)

The case went to a jury trial beginning on March 17, 2025. (1Tr. 1, Murphy, J.) The jury reached a unanimous verdict of guilty on both counts on March 18, 2025. (2Tr. 105.)

Factual Background

The defendant was arrested and charged with domestic violence aggravated assault occurring on July 28, 2024. (1Tr. 33.) The arresting officer noted marks on the victim's neck. (Id.) The children in the home appeared to be distraught and upset. (A. 34.) The officer told the defendant that he was not allowed to contact the victim. (A. 36-37.) The officer collected the victim's phone number as a part of the investigation. (A. 38.) He used this number to set up a 48-hour follow up with the victim after the arrest. (A. 39.)

Once at the jail, the defendant was provided a form which was explained to him stating that he was prohibited from having any contact with the alleged victim and that he could be charged if he had contact. (St. Ex. 2, 1Tr. 73-74.)

The defendant ignored this prohibition. (St. Ex. 3.) On the call, which was the basis of the tampering charge, the defendant can be heard speaking with the victim. (1Tr. 78.) On that call, when discussing how to help the defendant out of his current situation, the victim asks, "What can I do?" (St. Ex. 3.) The defendant first responds, "I don't know," but then says, "The only thing I can think of is you redacting [sic] what you said and what you did." (Id.) The victim responds, "I can try. It's not that though. The fucking marks, dude." (Id.) The defendant responds, "You can play it off," and describes her playing with the kids with a dog collar and them pulling on the leash. (Id.) Within the context of the case, it appears that this is a version of events which would absolve the defendant of responsibility and explain the marks on the victim's neck.

The Trial

The State called Detective Phil Lynch to testify about the calls made by the defendant while in custody. (1Tr. 76.) He testified that the call was made to the phone number collected by the arresting officer and was made by the defendant using his PIN number assigned to him at the jail. (1Tr. 77.) The content and context of the call also showed the identities of the parties. (1Tr. 78.) Detective Lynch testified about the date of the call being July 28, 2024. (1Tr. 77.) The defense did not object to that testimony. (Id.)

Prior to Detective Lynch's testimony, a conference occurred off the record where the defendant agreed to the admission of the call. (1Tr. 79, 80.) Nonetheless, the defense objected when the State attempted to play the call. (1Tr. 78.) The defendant initially indicated that the basis for the objection was a lack of foundation but proceeded to make an argument relating to M.R. Evid. 803(6), records of a regularly conducted activity. (1Tr. 79, 80.) At no point in time had the State attempted to admit the recordings as a record of regularly conducted activity. The separation between the Rule 803(6) issue and the issue of authentication became muddled. (1Tr. 82-83.) The defense relied on *State v. Coston*, 2019 ME 141, 215 A.3d 1285. After extensive argument, the lower court recognized that there was no Rule 803(6) issue in relation to the phone call. (1Tr. 114.) Eventually, the lower court admitted the call in its entirety. (1Tr. 117.)

The victim-witness advocate testified that she met with the victim outside of the District Attorney's Office and the victim told her that nothing happened and that she wanted the defendant home. (1Tr. 136.) During this conversation, the defendant called the victim from jail and a portion of the conversation was, as one would expect, recorded. (St. Ex. 4.) The recording of the call included more information than the advocate recalled when she wrote the letter summarizing the interaction. (St. Ex. 4, A. 67.) The advocate indicated that she is normally taking notes at her desk when she speaks with victims but that was not an option in this

interaction. (1Tr. 137.) The defense raised the issue of a discovery violation. (1Tr. 155.) The lower court proceeded to examine the witness itself about the advocate's recollection of that interaction. (1Tr. 166-69.) On the discovery violation issue, the lower court stated that "there's nothing there regarding the phone, and nothing happened. . . . You haven't establish anything exculpatory. What you have is emptiness." (1Tr. 173.) The trial court went on to say, agreeing with the prior judge's ruling on the motion, that even if there was a discovery violation, that dismissal would not have been a sanction. (1Tr. 176.) The court specifically found that there was no violation in this case. (1Tr. 178.)

After the evidentiary portion of the trial was complete, the State made its closing argument. (2Tr. 60.) There was no objection during or after the State's initial closing argument. (2Tr. 67.) The defense then made its closing argument. (Id.) The State then made its rebuttal argument which the defendant objected to, specifically citing that it was the rebuttal where he thought the State had shifted the burden of proof onto the defendant. (2Tr. 83.) When asked by the lower court what remedy the defense was requesting, the defense requested a curative instruction. (2Tr. 84.) The defense stated "Give curative instructions. Well, I should move for a mistrial, but jury instructions." (Id.) The lower court then properly instructed the jury on the burden of proof. (2Tr. 87-88.)

ISSUES PRESENTED

I. Whether the lower court properly interpreted the tampering statute, 17-A M.R.S § 454(1-B).

II. Whether the State laid sufficient foundation for the admission of the call made by the defendant while he was in custody.

III. Whether the lower courts erred when they twice denied the defendant's request for in camera inspection of the victim-witness advocate records.

IV. Whether the trial court erred when the defense asserted that the State had improperly shifted the burden of proof in its rebuttal.

ARGUMENT

I. The lower court did not err when it determined that the tampering statute does not require that the State prove beyond a reasonable doubt that the defendant was guilty of the underlying criminal conduct.

This Court reviews the interpretation of a law de novo. *State v. Legassie*, 2017 ME 202, ¶ 13, 171 A.3d 589. The Court first looks "to the statutory language to discern the Legislature's intent." *Id.* Said another way, "in interpreting statutes, we look first to the plain language of the statute to determine its meaning if we can do so while avoiding absurd, illogical, or inconsistent results." *State v. Marquis*, 2023 ME 16, ¶ 14, 290 A.3d 96. Only if a statute is ambiguous does this Court look to legislative history. *Id.* "A statute is ambiguous if it is reasonably susceptible to different interpretations." *Legassie*, 2017 ME 202, ¶ 13, 171 A.3d 589 (citing *Carrier v. Sec'y of State*, 2012 ME 142, 60 A.3d 1241). The purpose of looking to legislative history is to uncover the Legislature's intent. *See State v. McLaughlin*, 2018 ME 97, ¶ 17, 189 A.3d 262.

a. <u>The plain meaning of the statute supports the determination that the State need not prove the underlying conduct beyond a reasonable doubt.</u>

Turning to the statute at issue here, the language itself clearly shows that the Legislature intended to criminalize tampering with alleged victims. The tampering statute states:

> A person is guilty of tampering with a victim if, believing that an official proceeding, . . . or an official criminal investigation is pending or will be instituted, the actor:
>
> A. Induces or otherwise causes, or attempts to induce or cause, a victim:
> (1) To testify or inform falsely; or
> (2) To withhold testimony, information or evidence.

17-A M.R.S. § 454(1-B).

An official proceeding is defined as "any proceeding before a legislative, judicial, administrative or other governmental body or official authorized by law to take evidence under oath or affirmation including a notary or other person taking evidence in connection with any such proceeding." 17-A M.R.S. § 451(5)(A). The term "victim" is not defined by the statute.

The plain meaning of the statute supports the lower court's interpretation. The purpose of the statute is clear – to criminalize those who attempt to influence the victim of an alleged crime to either give false information or to withhold information altogether. The Legislature sought to prohibit those being investigated, or having been charged, with crimes from forcing their victims to either not speak to law enforcement or to give false information to law enforcement. It would be absurd and illogical if the statute required that the State actually prove that the underlying crime occurred beyond a reasonable doubt.

As an initial matter, the statute includes victims of official criminal investigations or proceedings that have not yet even been instituted. 17-A M.R.S. §

454(1-B). If a person successfully tampers with a victim prior to an official proceeding even being instituted, it obviously makes it more challenging to prove the underlying conduct – because that is exactly why a defendant would tamper with a victim.

Additionally, the clear purpose behind the tampering statute is to ensure the integrity of the judicial process. If that judicial process is thwarted through tampering, it impacts the State's ability to hold the defendant accountable for the underlying conduct. It would be illogical to then require the State to prove the very case, beyond a reasonable doubt, where the judicial process had been severely impacted. That would be an absurd interpretation of the statute. The statute clearly envisions punishing those who successfully, or unsuccessfully, thwart the legal process by causing victims to be unavailable, withhold testimony, or testify or inform falsely.

To put it simply, under the appellant's interpretation of the statute, defendants or suspects would be incentivized to tamper as forcefully as they possibly can. After all, if they successfully stop law enforcement from hearing incriminating evidence, the State has a much more challenging path toward showing that the underlying crime occurred beyond a reasonable doubt and also, under the appellant's interpretation, any tampering case.

Why would the Legislature include investigations that the defendant knows will be instituted in the tampering statute? *Id*. The clear purpose behind the Legislature's broad prohibition is to include even those scenarios where no charges are brought on the underlying conduct. It would, again, be absurd to assert that the Legislature envisioned that a person who successfully tampers with the alleged victim in a pending investigation would not be punished under the tampering statute.

The plain meaning of the statute's text clearly shows that the Legislature intended it to cover alleged victims in criminal investigations, not just those for which the State can prove beyond a reasonable doubt. For that reason, this Court should affirm the lower court's interpretation of the statute.

b. If the statute is ambiguous, the legislative history is incredibly clear that the tampering statute includes alleged victims.

A statute is ambiguous if it is reasonably susceptible to two different meanings. *Legassie*, 2017 ME 202, ¶ 13, 171 A.3d 589.

Although, from the State's perspective, the statute's plain meaning supports the lower court's interpretation of the statute, if this Court were to find the statute is ambiguous the legislative history is strongly in favor of that interpretation. In 1989, the Legislature amended the prior tampering statute to include juror tampering as a class B crime as well as to remove the existing definition of

"victim" as it relates to the tampering statute. *See* L.D. 1119, Statement of Fact (114th Legis. 1989). The prior definition was the definition of victim as it related to restitution which, obviously, occurs after a conviction. *Id*. The statement of fact could not be clearer as to the Legislature's intended definition of victim as it relates to the tampering statute: "The victim of the crime for purposes of this bill is the person named in the charging instrument as the object of the criminal conduct or a person who suffered the consequences or result of the prohibited acts." *Id*. The statement of fact also stated, "the risks of intimidating, bribing or influencing a victim or a juror should be commensurate with the perceived benefits of tampering." *Id*.

The Legislature undoubtedly amended this statute with a central purpose of the State not needing to prove that the victim was subjected to actual harm by the defendant in order for the defendant to be convicted of tampering. Given that reality, if this Court were to determine that the statute is ambiguous, the lower court's interpretation was proper and should be affirmed.

II. The State laid sufficient foundation to admit the recording of the phone call the defendant made to the victim while incarcerated.

"A trial court's evidentiary ruling is reviewed for clear error or abuse of discretion." *State v. Churchill*, 2011 ME 121, ¶ 6, 32 A.3d 2016 (citing *State v. Berke*, 2010 ME 34, 992 A.2d 1290). "To authenticate an item of evidence,

including an item of electronic evidence, ‘the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.” *State v. Coston*, 2019 ME 141, ¶ 8, 215 A.3d 1285 (quoting M.R. Evid. 901(a)). This test “embodies a flexible approach to authentication reflecting a low burden of proof.” *Coston*, 2019 ME 141, ¶ 8, 215 A.3d 1285 (citing *Churchill*, 2011 ME 121, 32 A.3d 1026). If there is an actual issue surrounding the authenticity of a recording, “that question generally goes to the weight of electronically based evidence, not its admissibility.” *Coston*, 2019 ME 141, ¶ 8, 215 A.3d 1285 (internal quotations omitted). In order to admit a recording, the “party seeking the admission . . . must provide a sufficient foundation to show that the recording was created and stored securely and systematically.” *Id*. The State is not required to disprove any possible tampering. *Id.* ¶ 11.

In *Coston*, this Court held that the State need not prove definitively that a recording was not tampered with when there is no evidence that the recording was altered. *Id*. The defendant had objected to the recording of the call made by the defendant while in jail because there had not been sufficient foundation. *Id*. ¶ 5. The State, through the testimony of officers, presented the following evidence in relation to the recordings: (1) the recordings were stored on a server operated by an outside company; (2) inmates are assigned unique identification numbers for making calls from jail; (3) all calls are recorded except for those to attorneys; (4)

the recordings can be accessed by law enforcement via the internet by using a username and password; (5) no one else had access to the officer's password; and (6) the officer did not alter the recordings. *Id*. ¶ 3-4. This Court found that amount of evidence is sufficient to lay a foundation for the admission of the phone call. *Id*. ¶ 10. The Court also noted that the defendant's call from jail was not hearsay because it is an opposing party's statement. *Id*. ¶ 8, n. 4. It is also worth noting that the Court did not hold that the evidence elicited in *Coston* was the minimum required for authentication but, instead, that this was an example of sufficient foundation. *See id.* ¶ 10.

Applying *Coston* to the facts in this case is strikingly straightforward. In this case, the State presented the following evidence relating to the recording: (1) the call recordings are stored on a server operated by an outside company; (2) inmates are assigned personal identification numbers to use when they make calls; (3) all calls are recorded other than those made to attorneys; (4) the officer accesses the recordings by using a username and password; (5) no one else had access to his password; (6) the officer did not alter the recordings. (1Tr. 115-16.) With just this evidence, the State has exactly matched what was approved by this Court in *Coston*. However, the State elicited even more testimony to lay the foundation for the admission of the recording. The recording included the defendant identifying himself by name. (*Id.* at 77.) The phone number associated with the call was the

same number which the detective later called and spoke to the victim. (*Id*. at 78.) The content and context of the call corroborated all of the other evidence supporting the call was exactly what the State asserted it was – a call between the defendant and the victim. (Id.)

To put it simply, the State elicited more evidence than in *Coston* where this same issue has already been decided in the State's favor. Given that fact, the State laid sufficient foundation for the admission of the call.

a. The detective's knowledge regarding the date and time of the recording of the call is not hearsay**.**

The appellant now asserts that the information relating to the time and date of the call was an additional layer of hearsay that required an exception. As an initial matter, the appellant did not object to this testimony at trial and only objected to the admission of the call. Further, in *Coston*, this Court has specifically held that calls made by defendants while in custody fall under the opposing party statement exception under M.R. Evid. 801(d)(2).

When an argument is made for the first time on appeal, this Court reviews for obvious error. *State v. Hall*, 2017 ME 210, ¶ 25, 172 A.3d 467, M.R. Crim. P. 52(b). In order for a defendant to succeed under the obvious error standard, there must be an error, that is plain, that affects substantial rights and the error "seriously

affects the fairness and integrity or public reputation of judicial proceedings." *Hall*, 2017 ME 210, 172 A.3d 467 (citing *State v. Fahnley*, 2015 ME 82, 119 A.3d 727).

Hearsay is an out-of-court statement which a party offers to prove the truth of the matter asserted. M.R. Evid. 801(c). A statement is "a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion." M.R. Evid. 801(a).

The State did not offer an out-of-court "statement" as it relates to the time and date of the call. The detective testified to his personal knowledge of when the call occurred. The detective's personal knowledge, testified to under oath at trial, is not an out-of-court statement offered for the truth of the matter asserted. Because no out-of-court statement was offered by the State, there is no hearsay issue as to that evidence. Given that fact, it surely was not obvious error for the lower court to admit the evidence without an objection.

b. Any error as it relates to the date of the calls was harmless.

Evidentiary errors are analyzed under the general harmless error standard. *State v. Judkins*, 2024 ME 45, ¶ 20, 319 A.3d 443. Any error that does not affect substantial rights shall be disregarded. M.R. Crim. P. 51(a). An error is harmless when it is "highly probable that the error did not affect the judgment." *State v. Guyette*, 2012 ME 9, ¶ 19, 36 A.3d 916 (citing *State v. Mangos*, 2008 ME 150, 957

A.2d 89). Said another way, an "error is harmless if it was not sufficiently prejudicial to have affected the outcome of the proceeding." *State v. Dobbins*, 2019 ME 116, ¶ 38, 215 A.3d 769 (citing *State v. Dolloff*, 2012 ME 130, 58 A.3d 1032) (internal quotations omitted).

In *State v. Dobbins*, 2019 ME 116, 215 A.3d 769, this Court found that the erroneous exclusion of a codefendant's guilty plea was harmless error. In that case, Dobbins's codefendant had previously pled guilty to murdering the same victim Dobbins was accused of murdering. *Id.* ¶ 1. Both defendants asserted that the other was the true perpetrator of the crime. *Id.* ¶ 4. However, before trial, Dobbins's codefendant pled guilty to the murder. *Id.* The defense's theory of the case was that Dobbins stood back in shock and watched as his codefendant murdered the victim. *Id.* ¶ 5. After the codefendant invoked his Fifth Amendment rights when called to the stand, the defense attempted to admit the docket record of the codefendant's guilty plea. *Id*. ¶ 6. That evidence was erroneously excluded. *Id.* ¶¶ 6, 37. Nonetheless, this Court held that the error was harmless due to the other evidence presented at trial. *Id.* ¶ 39.

Turning to this case, the time and date of the call was not challenged at any point in the trial. This makes sense as the specific date of the call is not particularly probative of whether the defendant was guilty of tampering. The recording itself clearly shows that the defendant was in custody, that the two parties were

discussing the defendant's recent arrest, the victim mentioned having marks on her neck, and the defendant told her to "play it off" like they were playing a game with the children involving a dog collar. The content of the call itself shows that the call was made after the defendant had been arrested for the underlying crime and that they were speaking about that incident. Whether that call occurred on the day he was arrested or a week later does not change the defendant's culpability.

Additionally, the appellant's theory of the case was clear from the beginning of trial – the defendant's statements were not asking the victim to lie but, instead, asking the victim to correct the version of events given to police previously. This theory is entirely detached from particular dates or times of the call made from jail. The defendant himself also offered other calls made from jail and cited to the dates and times through the same officer. The appellant cannot both assert that information about the dates and times of the calls were inadmissible and also use the same information to benefit their case.

Given that, in *Dobbins*, the erroneous exclusion of a codefendant's guilty plea was harmless error, the evidence challenged here is surely harmless as well. For that reason, even if this Court were to hold that the lower court erred, any error is harmless.

III. The lower court did not abuse its discretion when it denied the defendant's request for in camera review of the notes of the victim

witness advocates and, instead, questioned the advocate under oath about her communications with the victim.

"[A] victim, advocate or coordinator . . . may not be required, through oral or written testimony or through production of documents, to disclose to a court in a criminal . . . proceeding[]. . . confidential communication between the victim and the advocate." 16 M.R.S. ¶ 53-C(2)(B). However, if a court determines, in its discretion, that the disclosure of the communications is necessary for the proper administration of just, the judge may inspect the records in camera. 16 M.R.S. 53-C(3)(C).

The appellant asserts that no in camera inspection occurred in this case, and he is correct. However, the trial court nonetheless questioned the victim witness advocate in open court about her recollection of the entirety of the conversation with the victim in this case. (1Tr. 166-69.) The State indicated it was reticent to allow the court to examine the advocate, given the confidentiality concerns. (1Tr. 158-59, 163, 165.) This decision by the trial court clearly contravened section 53-C because the proper procedure was for the court to review any information in camera. Instead, the trial court elicited as much information that was available in public, on the record. (Id.) This decision by the trial court was also directly opposed to a prior judge refusing to grant the defendant's motion for in camera inspection of records months prior to trial. (A. 12-13.) The trial court assured the State that it would only be inquiring as to exculpatory information that the

advocate received. (1Tr. 165.) However, the court proceeded to simply ask the advocate about the content of the communication whether it was exculpatory or not. (1Tr. 167.) The lower court clearly went further than what the defense had requested – an in camera inspection of notes or records – and examined the witness itself in open court. Nonetheless, the appellant continues to assert that he was somehow aggrieved by the lower court.

The victim in this case showed up to the District Attorney's Office unannounced and the advocate met with her outside. (1Tr. 136.) As this conversation was occurring, her phone connected with the defendant in jail and was recorded. (1Tr. 167.) The State provided both the recording of the call and the advocates recollection of the encounter. (1Tr. 162-63.) At trial, the advocate testified that when speaking to victims she is normally in her office taking contemporaneous notes which was not an option in this circumstance. (1Tr. 135.) Further, she testified that she did not recall any other information from the interaction. (1Tr. 167.)

To put it simply, the defense was provided with all of the information in the State's possession about the interaction between the victim and the advocate. Further, the lower court itself questioned the advocate on the stand, under oath, about her recollection of the contents of her communication with the victim.

Because the lower court did not abuse its discretion in denying to inspect the records in camera and, instead, questioned the advocate under oath in open court, there is no error and this Court must affirm.

IV. The State did not shift the burden in its closing argument.

The first step this Court takes in its review of alleged prosecutorial misconduct is whether any misconduct actually occurred. *State v. Cheney*, 2012 ME 119, ¶ 34, 55 A.3d 473. "Shifting the burden of proof to the defendant or suggesting that the defendant must present evidence in a criminal trial is improper closing argument." *Id*. If the prosecutor erred, the Court looks at the State's comments as a whole. *Cheney*, 2012 ME 119, ¶ 34, 55 A.3d 473 (citing *State v Gould*, 2012 ME 60, ¶ 17, 43 A.3d 952). If objected to, this Court reviews for harmless error and will affirm "if it is highly probable that the jury's determination of guilt was unaffected by the prosecutor's comments." *State v. Clark*, 2008 ME 136, ¶ 7, 954 A.2d 1066.

In *State v. Cheney*, the Court held that a prosecutor's emphasis that the defendant "had no evidence" to support their alternative suspect theory was improper but nonetheless harmless. This Court emphasized that over the course of a trial it is "understandable that prosecutors may, at times, slip into a more familiar vernacular." *Id.* ¶ 35. While holding that the prosecutor's argument was improper,

it nonetheless held that the prosecutor's error was harmless because "(1) the improper argument was mild and isolated; (2) the trial court instructed the jury on the proper burdens . . . and (3) the significant evidence against the defendant does not suggest that the statement tipped a close case in favor of the State." *Id*. ¶ 36. The Court also emphasized that "the State is free . . . to forcefully argue to the jury that the evidence does not support or is not consistent with the defendant's theory of the case." *Id.*

As an initial matter, the appellant did not object to the portion of the closing argument which he cites in his brief. (Bl. Br. 10.) The portion cited by the appellant in its brief is in the State's closing argument not its rebuttal. The appellant specifically cabined his objection to the rebuttal and made that objection after the rebuttal had been completed. "A couple of issues in the rebuttal burden shifting, a couple of points." (2Tr. 83). To be clear, the appellant did not object during the State's closing argument nor immediately afterwards. Therefore, this Court reviews for obvious error. *State v. Hall*, 2017 ME 210, ¶ 25, 172 A.3d 467, M.R. Crim. P. 52(b).

Additionally, as to the motion for a mistrial, the appellant likewise never moved for mistrial during the trial. When asked what remedy he was seeking by the trial judge, the appellant stated, "Give curative instructions. Well, I should move for a mistrial, but jury instructions." (2Tr. 84). That statement can mean

nothing other than that the appellant was *not* asking for a mistrial but, instead, asking for a curative instruction. Therefore, both the issue and the remedy is at least unpreserved and arguably waived.

To summarize, the appellant neither objected to the argument referenced in its brief nor requested the remedy it is now seeking.

a. The prosecutor's argument was not prosecutorial misconduct because it did not shift the burden of proof.

The State's argument that the defendant must have a different definition of the phrase "play it off" is not shifting the burden but merely commenting on the question before the jury. As is made abundantly clear throughout the trial, the central issue in this case was whether the phrase "play it off" within the context of the phone call, meant to tell the police something that was untrue or to merely correct the victim's prior misstatement to law enforcement. When the State argued that the defendant had to "have a definition" which did not mean "to minimize, to falsify, to come up with a story, to pretend it didn't happen" in order for the defendant to have merely been asking the victim to tell the truth, it was directly commenting on the evidence and the defense's theory of the case. As noted in *Cheney*, the State is free to forcefully argue that the defendant's theory of the case is not supported by the evidence – just as in this case. The State did not argue that the defendant must produce evidence of some other definition. The State did not

assert that the defense had not or was required to provide evidence of another definition. Instead, the State was simply asking the question of whether it is reasonable that the defendant had a different definition than the common usage of the phrase within his own mind.

Compared to *Cheney*, the State did not come close to shifting the burden. Whereas in *Cheney*, the prosecutor specifically argued that the defendant had no evidence as to the alternative suspect theory, in this case, the prosecutor did not make any statement which can be read as asserting that the defendant was required to produce evidence to show his innocence.

The State did not shift the burden in its argument and, therefore, there was no prosecutorial misconduct in this case. For that reason, this Court should affirm the conviction.

b. <u>Even if this Court were to hold that the prosecutor's statement was error, it was harmless.</u>

The State immediately after the appellant's quoted section in closing stated:

> [Y]ou're the judges of the facts. I want you to look at all this evidence in your collective memories and think about it, and if at the end of your deliberations, you find that what the defendant meant by 'play it off' is to say something that's not accurate beyond a reasonable doubt, then you must find him guilty of the charge of tampering, as well as the other elements of that crime.

(2Tr. 67).

The State never shifted the burden in this case and the statement immediately after the challenged person of the closing made abundantly clear that the State was the one with proving the elements beyond a reasonable doubt. Additionally, just as in *Cheney*, any error was mild and isolated, the trial court properly instructed the jury on the burden of proof immediately after closing argument, and there was significant evidence in this case to support a finding of guilt. Given these facts, any error is harmless.

CONCLUSION

For the aforementioned reasons, this Court should affirm the jury's verdict.

Dated: November 19, 2025

_/s/ Jacob Demosthenes_____
Jacob Demosthenes
Attorney for the State
Bar Number: 10247

Certificate of Service

I, Jacob Demosthenes, Assistant District Attorney, hereby certify that two (2) copies of the within Brief for Appellee were mailed to Appellant's Attorney addressed as follows:

Daniel Lawson, Esq.
Capital Region Public Defenders
153 State House Station
Augusta, ME 04333

The State has sent a native .pdf file for submission to the court (at lawcourt.clerk@courts.maine.gov). The State has also hand filed ten (10) paper copies of the Brief of the Appellee to the Law Court.

Dated: __November 19, 2025

/s/ Jacob Demosthenes
Jacob Demosthenes
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