

**MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT**

LAW DOCKET NO: ARO-21-366

**STATE OF MAINE
Appellee**

v.

**JOMO WHITE
Appellant**

*ON APPEAL FROM THE SUPERIOR COURT FOR
AROOSTOOK COUNTY*

BRIEF OF APPELLANT

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FACTS AND PROCEDURAL HISTORY

At trial, the State introduced testimony that Mr. White and Picollo “Val” Robinson, two black males, were in Aroostook County from out of state and selling drugs in the Presque Isle area. *See Trial Transcript, Volume 6, at pp. 87:11-100:12 (audio recording of Appellant’s interview with Detective Lindsey)*. At some point, Mr. White returned to his home state of Georgia and Robinson remained in the Presque Isle area continuing to sell drugs to the local residents of the community. *Id.* Mr. White and Mr. Robinson were part of a larger drug conspiracy. *Id.* At some point around September of 2019, Mr. White returned to Aroostook County to obtain drug proceeds that Robinson was keeping from the conspiracy. *Id.*

Two days before the events at issue in this case, Mr. White and Mr. Robinson were at the home of Samantha St. Peter and the two were arguing about money. *Trial Transcript, Volume 6, at pp. 87:11-100:12 (audio recording of Appellant’s interview with Detective Lindsey)*. Ms. St. Peter told the two to take it outside of her home, at which point, Robinson put a gun to her head and told her to “Shut the fuck up.” *Id.* Mr. White intervened by getting between Mr. Robinson and Ms. St. Peter and the two men then pointed guns at each other, before exiting the residence. *Id.*

Two days later, on September 9, 2019, at around 5:00a.m., Mr. White and two other individuals went to the residence where Mr. Robinson was staying. *Trial Transcript, Volume 1, at pp. 109:12; 115:3-25*. Mr. White was wearing a mask when he entered the residence. *Trial Transcript, Volume 2, at p. 114:1-6*. The female with Mr. White went down the stairs to the basement, where Mr. Robinson was located and told him that Mr. White wanted to speak to him. *See Trial Transcript, Volume 6, at pp. 87:11-100:12 (audio recording of Appellant’s interview with Detective Lindsey)*. When Mr. White tried to descend the stairs to the basement, Mr.

Robinson began firing at Mr. White and chased him up the stairway into the living area of the home, where Mr. White took cover in the entry way. *Trial Transcript, Volume 2, at p.114:6-11; 118:7-19; Volume 5, at pp. 136:20-138:25.* Shooting reconstruction confirmed that Mr. Robinson shot twice in the direction of the entry way, where Mr. White was taking cover. *Trial Transcript, Volume 4, at pp. 141:20-149:23.* Mr. White was able to get a shot off back at Mr. Robinson and Mr. Robinson went back into the basement. *See Trial Transcript, Volume 6, at pp. 87:11-100:12 (audio recording of Appellant's interview with Detective Lindsey).* When Mr. White attempted to approach the stairway again to tell Mr. Robinson to stop firing, that he was just there to speak to him and did not want to kill him, Mr. Robinson again began firing and Mr. White returned fire. *Id.* It is unclear when Mr. Robinson was struck, but he sustained multiple bullet injuries and needed to be transported by ambulance to a nearby hospital. *Trial Transcript, Volume 1, at pp.110:4-23; 120:23-130:25.*

On September 10, 2019, officers located Mr. White and placed him under arrest. *Trial Transcript, Volume 5 at p. 83:6-18.* Detectives then conducted a lengthy interrogation of Mr. White, where he described in detail how he was only acting to defend himself from Mr. Robinson, when he shot him. *See Trial Transcript, Volume 6, at pp. 87:11-100:12 (audio recording of Appellant's interview with Detective Lindsey).* He admitted that he was there to retrieve a drug debt owed by Mr. Robinson, but repeatedly stated he had no intention of killing Mr. Robinson. *Id.* He also repeatedly asked if Mr. Robinson was okay and if Mr. Robinson would be charged with anything related to starting the gun fight. *Id.*

The State charged Mr. White with Attempted Murder, Elevated Aggravated Assault, Reckless Conduct With a Dangerous Weapon, Robbery, and Possession of a Firearm by a Prohibited Person. Appellant requested a jury trial on all counts except the Possession of a

Firearm by a Prohibited Person, for which he elected to have a jury waived trial with the Court. Trial began on July 27, 2021, and concluded on August 5, 2021, with a finding of guilty on all counts in the Indictment. *Trial Transcript, Volume 7.*

Prior to trial, Appellant requested a change of venue based on two factors. Mr. White's race and the likely bias of an Aroostook County jury based on the fact that he was from out of State selling drugs in their small community. *See Transcript, Jury Selection, at pp. 415:2-426:9.*

During opening statement the State argued:

“Ladies and gentlemen of the jury, after you have considered all of the evidence in this case...at the end of the case the State will have met its burden beyond a reasonable doubt and we will ask you to hold the defendant accountable for his criminal actions and to find him guilty...”
Trial Transcript, Volume 1, at pp. 30:18-31:8.

During the State's opening, Appellant objected to the argumentative nature of the State's statement. *Trial Transcript, Volume 2, at pp. 26:21-28:8.* At the conclusion of the State's opening statement, Appellant moved for mistrial based on the State's urging the jury to hold Appellant accountable for his actions. *Id., at pp.31:18-33:4.* The Court expressed concern about the statement and took a recess to consider Appellant's request. *Id.* The Court ultimately denied Appellant's motion but did note its concern regarding the State's statements in opening. *Id., at pp. 34:23-37:3.*

During closing arguments, the State again urged the jury to find Appellant guilty:

“And on that verdict form, you will have the opportunity to find the defendant guilty. And the evidence suggest very strongly that **you should**, that the defendant should be held—and be found guilty of each and every charge. So, **I urge you once you're in that jury room and have had the chance to deliberate to find the defendant guilty on all charges.**”
Transcript, Volume 6, p. 71:1-7.

Also, during closing argument, the State specifically referred to Mr. White's lack of live testimony compared to the audio recording:

“...and we heard the audio recording of the defendant, there’s a couple of things I want you to keep in mind about that. It’s hard to assess the testimony of an audio recording separately from the witnesses who were on the stand and you’re able to look at them and see them make certain assessments. The audio recording makes that a little bit more difficult. But there were some insights that Mr. White gave during the course of his interview, um, that you may find helpful in assessing the credibility of the statement that he gave Detective Lindsey.” *Transcript, Volume 6, pp. 55:21-56:7.*

At the conclusion of the State’s closing argument, Appellant renewed his motion for a mistrial based on the direct reference to Appellant not testifying at trial and on his urging that the jury should find Appellant guilty. *Transcript, Volume 6, p. 72:5-23.* Despite the Court finding the comments about Appellant’s lack of testifying to be misconduct and that they were made to contrast the video statement with live testimony, the Court denied Appellant’s motion on both grounds. *Id., at pp. 76:19-78:20.* The Court provided the jury with a curative instruction rather than grant the mistrial. *Id., at pp. 79:17-80:22.* At the conclusion of the State’s rebuttal argument, Appellant again renewed his request for mistrial due to the State’s urging the jury to find Appellant guilty, which the Court again denied. *Id., at pp. 100:4-102:7.*

The jury returned a verdict of guilty as to each count it considered, and the Court returned a verdict of guilty on the Possession of a Firearm by a Prohibited Person count. *Id., at pp. 4:1-7:4.*

The Court sentenced Mr. White to 26 years with all but 16 years suspended and 4 years of probation on the Criminal Attempt; 15 years on Elevated Aggravated Assault, concurrent with Count 1; 5 years on Reckless Conduct with a Dangerous Weapon and Possession of Firearm by a Prohibited Person, concurrent with each other and with Counts 1 and 2; and 16 years on Robbery, concurrent with all other counts.

Judgment and Commitment.

ISSUES PRESENTED FOR REVIEW

- 1. Whether the Court abused its discretion by not granting Appellant's repeated requests for mistrial due to improper opening and closing statements by the State.**
- 2. Whether the Court abused its discretion by not changing venue of this matter to a larger County, removed from the community in which the events occurred.**

SUMMARY OF THE ARGUMENT

The Court abused its discretion in not granting Appellant's Motions for mistrial at the conclusion of the State's opening statement and closing argument. During opening statement, the State asked the jury to hold Mr. White accountable for the charges and then in closing came close to doing the same thing, but instead "urged" the jury to convict Appellant, improperly suggesting it had a duty to do so. These statements went straight to the concerns Appellant raised pre-trial regarding removing the case from Aroostook County. Appellant's concerns were that the jury could not put aside bias and a feeling that it should convict to "clean up the community." The opening and closing statements urged them to do that and created substantial risk that the jury's verdict was based on feelings of obligation to the community.

Next, and equally as troubling, the State made a direct and unambiguous comment regarding Mr. White's failure to testify on the witness stand like other witnesses had and that the jury should find him less credible for not taking the stand. The Court again expressed concern with the State's comment, but still denied Appellant's request for a mistrial, abusing its discretion.

Further, pretrial publicity of the matter had the immediacy, the intensity, or the invidiousness sufficient to arouse general ill will and vindictiveness against the accused at the

time of jury selection. As stated, Appellant raised concern about the ability to obtain a jury from the rural Aroostook County community, given the nature and circumstances of the allegations. Appellant was concerned that the rural community jury would be more inclined to convict Appellant based on bias given that he was from out of State, only in the area to sell drugs, and had engaged in a gunfight on the area reservation. A jury in that community would be more likely to want to send a message, so to speak, in an attempt to remove and discourage others from doing the same thing. The State's statements in opening and closing further encouraged the jury to do just that. Such a risk would have been far less in a larger county, such as Penobscot or Cumberland.

ARGUMENT

I. The Court abused its discretion in denying Appellant's repeated motions for a mistrial based on repeated prosecutorial misconduct despite warnings from the Court.

A. Prosecutor's urging the jury to hold Appellant accountable.

When examining instances of alleged prosecutorial misconduct, the Law Court will first determine whether the misconduct occurred, and, if it did, view "the comments of the prosecutor as a whole," looking "at the incidents of misconduct both in isolation and in the aggregate." *See State v. Clark*, 2008 ME 136, ¶7, 954 A.2d 1066, 1068-69 (quoting *State v. Young*, 2000 ME 144, ¶6, 755 A.2d 547, 548). When the defense has objected to prosecution statements at trial, the Court reviews the alleged prosecutorial misconduct for harmless error. *Id.* The harmless error inquiry in these circumstances is whether, after a review of the whole record, the Law Court is satisfied beyond a reasonable doubt that the error did not contribute to the verdict obtained. *See State v. Warren*, 1998 ME 136, ¶17, 711 A.2d 851, 857.

Prosecutors are held to a higher standard regarding their conduct during trial because they represent the State and because they have an obligation to ensure that justice is done, as opposed to merely ensuring that a conviction is secured. *See State v. Young*, 2000 ME at ¶6, 755 A.2d at 548 (citing *State v. Ashley*, 666 A.2d 103, 105 (Me. 1995)). Because of that unique position of authority, the words used by a prosecutor during closing argument should be and are closely scrutinized. *See* Robert W. Clifford, "Identifying and Preventing Improper Prosecutorial Comment in Closing," 51 Me.L.Rev. 241, 258 (1999)(citing *State v. Ashley*, 666 A.2d at 105). While prosecutors may present summation with vigor and zeal and may use wit, satire, invective and imaginative illustration, he must "refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the prevailing law." *See State v. Weisbrode*, 653 A.2d 411, 416 (Me. 1995). A prosecutor may "strike hard blows, [but] he is not allowed to strike foul ones" and must refrain from improper methods calculated to produce a wrongful conviction. *See State v. Reily*, 446 A.2d 1125, 1128 (Me. 1982). Improper argument may be so prejudicial as to deny the defendant a fair trial. *See State v. Hinds*, 485 A.2d 231, 237 (Me. 1984).

Admittedly, the Law Court has held that 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 interests of justice." *See State v. Poblete*, 2010 ME 37, ¶26, 993 A.2d 1104 (quoting *State v. Bridges*, 2004 ME 102, ¶ 11, 854 A.2d 855). Because the trial court has a "superior vantage point," the Law Court reviews the denial of a motion for a mistrial for an abuse of discretion. *Id.* The Law Court 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, 749 A.2d 1274). "[T]he trial court's determination of whether exposure to

potentially prejudicial extraneous evidence would incurably taint the jury verdict or whether a curative instruction would adequately protect against consideration of the matter stands unless clearly erroneous." *See State v. Nelson*, 2010 ME 40, ¶ 6, 994 A.2d 808.

A prosecutor's request that a jury hold a defendant "accountable" improperly suggests to the jury that it has a civic duty to convict or that it should consider the broader societal implications of its verdict, and thereby detracts from the jury's actual duty of impartiality. *See State v. Begin*, 2015 ME 86, ¶ 27, 120 A.3d 97, 103. In *Begin*, the Law Court determined that the prosecutor's statement was harmless error given the instruction by the Court and defendant's ability to address the issue in his own opening. However, in *Begin*, the prosecutor made no further inappropriate arguments.

In this case, the State's improper argument was not limited to one comment. The State's comments during opening statements urging the jury to hold Mr. White accountable are sufficient by themselves to generate a mistrial. However, the State's additional comments during closing argument following the strong warning by the Court after the State's opening argument, can only be the result of prosecutorial bad faith. Even if the Court finds the State did not act in bad faith, its actions resulted in exceptionally prejudicial circumstances to Appellant.

Appellant, a black male from Atlanta, was on trial in an almost exclusively white County, for charges asserting that he and the victim were in Aroostook County to sell drugs and that he had come back to the County in order to collect drug proceeds from the victim. Appellant moved to change venue for fear that given the makeup of the small community in the Presque Isle area, along with the risk that members of the jury would not take kindly to a black drug dealer coming from out of State to sell drugs and then shoot someone and would be inclined to side with the State in order to enforce order in the community. The facts of the case presented a

great risk of jurors feeling an obligation to the community to “send a message.” The Court denied Appellant’s request to remove the trial from Aroostook County, but the prosecutor’s urging the jury to hold Appellant accountable was exactly the type of argument that went straight to the heart of Appellant’s arguments regarding getting a fair trial in that County.

The Trial Court expressed its concerns with the State’s opening statement at the time of the first mistrial motion. However, in closing argument, the State did the exact same thing in urging the jury to find Appellant guilty. The State not only told the jury it “should” find Appellant guilty, but also that it “urged” them to do so. This improper conduct clearly led to or contributed to the verdict in this case and the Court’s denial of Appellant’s request for mistrial was an abuse of its discretion. Only a new trial will satisfy the interests of justice in this matter.

B. Prosecutor’s reference to Appellant not testifying at trial.

The Court should have also granted a mistrial when the prosecutor referred to Appellant not testifying at trial.

When a defendant preserves a challenge to a prosecutorial comment about his or her choice not to testify, the content of the offending statement determines the standard of review on appeal. *See State v. Tibbetts*, 299 A.2d 883, 889 (Me. 1973). Such a statement is prejudicial as a matter of law if it unambiguously and unequivocally comments on the defendant's silence at trial or suggests to the jurors "that they must accept the State's evidence as true because the defendant has not denied it as a witness." *See State v. Tarbox*, 2017 ME 71, ¶ 12, 158 A.3d 957, 962. An impermissible comment of this type will necessarily result in the granting of a mistrial unless under appropriate standards the comment can be deemed harmless error. *Tibbetts*, 299 A.2d at 888. Impermissible prosecutorial comment can never be deemed harmless error as a

matter of law under either of two circumstances: “1. A direct, non-ambiguous and unequivocal prosecutorial comment on the failure of a criminal defendant to become a witness.

2. An indirect prosecutorial comment which, without equivocation or ambiguity, suggests that a jury must accept as true the State's evidence because it is undenied by a criminal defendant as a witness.” *Id.*, at 889.

If the prosecutor's statement is ambiguous because "the jury could construe [it] as a remark on the defendant's failure to testify," the State must demonstrate beyond a reasonable doubt that the misconduct, when "viewed in the context of the entire record," did not affect the jury's guilty verdict. *State v. Lyons*, 1998 ME 225, ¶¶ 6-8, 718 A.2d 1102. When an objection is made to the prosecutor's statements, the Law Court will review the matter for harmless error. *Tarbox*, 2017 ME at ¶13, 158 A.3d at 962.

In this case, the prosecutor's following statement to the jury was an unambiguous and unequivocal comment about his failure to testify at trial:

“...and we heard the audio recording of the defendant, there's a couple of things I want you to keep in mind about that. It's hard to assess the testimony of an audio recording separately from the witnesses who were on the stand and you're able to look at them and see them make certain assessments. The audio recording makes that a little bit more difficult. But there were some insights that Mr. White gave during the course of his interview, um, that you may find helpful in assessing the credibility of the statement that he gave Detective Lindsey.” *Transcript, Volume 6, pp. 55:21-56:7.*

Because these statements were an unambiguous and unequivocal comment on Mr. White's failure to testify at trial, it is prejudicial as a matter of law and on that basis alone is enough to warrant a new trial for Appellant.

However, even if this Court determines that the statements were ambiguous, the State will have to prove beyond a reasonable doubt that the misconduct, when "viewed in the context

of the entire record," did not affect the jury's guilty verdict. It is difficult to imagine the State can meet this burden, when considered in the context of the entire record and the other improper arguments made by the State.

Following trial, Appellant learned from another attorney in the Aroostook County area that a jury member had reported that the jury focused significantly on the fact that Appellant did not testify. Appellant filed a request for new trial, which the Court denied. While Appellant understands that jury deliberations are "sacred" and not to be disturbed, this information proves that the State's comment about his testimony had the exact effect that Appellant feared.

Courts should inquire into the validity of a jury verdict only in "very limited circumstances," and should be very cautious in overturning jury verdicts. *See State v. Watts*, 2006 ME 109, ¶ 17, 907 A.2d 147, 151. Although serious allegations of juror bias in the context of juror dishonesty or inaccuracy in answering a voir dire questionnaire is one such limited circumstance when the court, within its discretion, may proceed with a post-trial hearing to inquire into potential juror bias, a court must make such an inquiry with great caution. *See State v. Chesnel*, 1999 ME 120, ¶¶29, 31, 734 A.2d 1131, 1141.

In this case, the jurors answered during voir dire that they could follow the Court's instructions and the law. Clearly, they did not follow the instruction that they could not consider Appellant's lack of testimony in any manner.

It is clear that the jury gave significant weight to Appellant's lack of testimony, and it is likely because of the improper statements by the State. Combined with the other improper argument, the prejudice to Appellant was significant and Appellant is entitled to a new trial.

II. Change of venue

At the time of jury selection, Appellant renewed his Motion for Change of Venue on two grounds, both being somewhat intertwined with each other. First, Appellant argued that he could not get a fair trial in Aroostook County based on potential bias due to his race, being from out of state and in the community for the sole purpose of selling drugs, and engaging in a gun fight with another drug dealer. Second, Appellant argued that he could not obtain a jury that represented a fair cross section of the community under the Sixth Amendment.

The Law Court reviews a denial of a Motion for Change of Venue for an abuse of discretion. *See State v. Saucier*, 2001 ME 107, ¶14, 776 A.2d 621, 626. Maine law provides that a change of venue based upon pretrial publicity is required in two circumstance: the first is a situation of presumed prejudice, and the second is actual prejudice. *Id.* Where the publicity is so extensive and pervasive or so taints the atmosphere of the trial, the court should presume that an impartial jury in that location is not possible. *Id.* at ¶15. "Prejudice is presumed when the defendant demonstrates that the pretrial publicity has the immediacy, the intensity, or the invidiousness sufficient to arouse general ill will and vindictiveness against the accused at the time of jury selection." *Id.* at ¶15 (*quoting State v. Cochran*, 2000 ME 78, P21, 749 A.2d 1274, 1280).

The Sixth Amendment guarantees every criminal defendant the absolute right to a fair trial by an impartial jury. *See State v. Townes*, 2019 ME 81, ¶ 17, 208 A.3d 774, 779-80. "In order to ensure that defendants have the opportunity to exercise this inviolable constitutional right, courts are charged with assembling a pool of prospective jurors from the surrounding community who are then selected and empaneled to hear the evidence and cast judgment on cases pending before the court." *Id.* The United States Supreme Court has "unambiguously declared that the American concept of the jury trial contemplates a jury drawn from a fair cross

section of the community . . . [and] that the jury be a body truly representative of the community." *Id.* (quoting *Taylor v. Louisiana*, 419 U.S. 522, 527, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975)). Fair cross-sectional representation does not require that the jury ultimately chosen "mirror" the community, nor does it entitle a defendant to a jury of "any particular [racial] composition" *Id.* (quoting *Taylor*, 419 U.S. at 538). Rather, jury venires "must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative" of the community. *Id.* (quoting *Taylor*, 419 U.S. at 538).

To establish a prima facie case that the jury selection process violated the Sixth Amendment requirement for a fair cross section, a defendant must show:

(1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in jury venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Townes, 2019 ME, ¶18, 208 A.3d at 780 (Quoting *Duren v. Missouri*, 439 U.S. 357, 364, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979)).

It was Appellant's contention that given his race and the nature of the crimes and the small rural community in which the event took place, that the Court could presume that he would not get a fair trial in Aroostook County. As the facts above show, Appellant and the victim were two black men selling drugs in the Presque Isle area and engaged in gun fight in the community. Given the significant potential bias against out of state drug dealers in the rural Presque Isle community, combined with Appellant's race, the prejudice to Appellant was readily apparent.

According to Census Bureau information and the Court's finding, only 1.2 percent of the Aroostook County population identify as black or African American. *See Transcript, Jury Selection, p. 424:9-24.*

Appellant pointed out at the conclusion of voir dire that none of the potential jurors appeared to be of color or identified as being so. One juror did identify as Mic Mac, but not of African American descent.

The Court denied Appellant's request on both the pre-trial publicity and the Sixth Amendment challenge. *See Transcript, Jury Selection, pp. 422:4-426:23.* With regard to publicity, the Court found that only a few jurors had familiarity with the case and that pre-trial publicity appeared to have had a "minimal" impact on the process. *Id.* The Court did not give much consideration to Appellant's argument regarding implicit bias of potential jurors in the small community based on the nature and circumstances of the allegations. *Id.* With regard to the Sixth Amendment challenge, the Court held that Appellant had not made the requisite showing under *Townes*, that the venire did not represent a fair cross section of the community or that there was a systematic exclusion of African Americans in the community. *Id.*

Appellant submits that his race, combined with the other factors already mentioned above concerning the nature and circumstances of the allegations, created a significant potential of implicit bias against Appellant in the small community of Presque Isle. While individual voir dire was conducted of a significant number of jurors regarding his and her ability to put any potential bias aside, there is a potential that some of those jurors answered yes in a perceived effort to appease the Court, or because at the time of selection, he or she believed he or she could be unbiased but had not heard all of the evidence at that time. Once again, the risk was very real that the jury would feel an obligation to the community to convict Appellant and that risk

became even more real as stated above when the State urged the jury to hold Appellant accountable and find him guilty. All of this combined with what appeared to be a lack of any African American venire panel member, deprived Appellant of his Sixth Amendment right to a fair and impartial jury.

CONCLUSION

Because of the prosecutorial misconduct that was intertwined with the potential of jury bias that already existed given the facts of the case, Appellant was clearly denied a fair trial in this matter and is entitled to a new trial on all counts of the indictment.

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CERTIFICATE OF SERVICE

I, Verne E. Paradie, Jr. hereby certify that I have forwarded two copies of Appellant's brief via first class United States Mail to the following individuals:

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