

STATE OF MAINE

v.

BRYAN HAMILTON

Argued September 18, 2020  
Decided November 24, 2020

Panel: MEAD, GORMAN, JABAR, HUMPHREY, HORTON, and CONNORS, JJ.

#### MEMORANDUM OF DECISION

Following a two-day jury trial, Bryan Hamilton was found guilty of unlawful sexual contact (Class B), 17-A M.R.S. § 255-A(1)(E-1) (2020); visual sexual aggression against a child (Class C), 17-A M.R.S. § 256(1)(B) (2020); assault (Class D), 17-A M.R.S. § 207(1)(A) (2020); and gross sexual assault (Class A), 17-A M.R.S. § 253(1)(C) (2020). In closing argument, the prosecutor twice indicated to the jury that when Hamilton was given an opportunity to talk to a police officer “he testified with his feet.” Hamilton did not object at the time of the closing argument but did file a motion for new trial alleging prosecutorial misconduct. Hamilton appeals the trial court’s (Aroostook County, *Stewart, J.*) denial of his motion for a new trial contending that the prosecutor made improper comments during closing argument.

Because there was no objection to the prosecutor’s comments during closing, we review for obvious error. To find obvious error we must find (1) an error; (2) that is plain; and (3) that affects substantial rights. *State of Maine v. Michaud*, 2017 ME 170, ¶ 11, 168 A.3d 802. Even if these conditions are met, however, 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.*

The trial court stated that the prosecutor's decision to use the phrase "testified with his feet," was not appropriate. We agree. Whether she was (1) commenting on Hamilton's failure to testify during the trial in violation of his Fifth Amendment rights, *see State v. Tarbox*, 2017 ME 71, ¶ 11, 158 A.3d 957; or (2) commenting on Hamilton remaining silent when confronted by a police officer in violation of his Fifth Amendment rights, *see State v. Lovejoy*, 2014 ME 48, ¶ 89, A.3d 1066; or (3) suggesting that Hamilton's flight from a police officer, not from the scene of the crime, was evidence of his consciousness of guilt, *see State v. Haji-Hassan*, 2018 ME 42, ¶ 27, 182 A.3d 145, the statement was improper.

We also agree, however, that the trial court properly concluded that because there was substantial evidence of Hamilton's guilt at trial, because the prosecutor's statements were fleeting, and because the court properly instructed the jury that the statements made by counsel were not evidence, the prosecutor's statements did not "seriously affect the fairness and integrity or public reputation of judicial proceedings." *Lovejoy*, 2014 ME 48, ¶ 9, 89 A.3d 1066.

The entry is:

Judgment affirmed.

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John W. Tebbetts, Esq. (orally), Tebbetts Law Office, LLC, Presque Isle, for appellant Bryan Hamilton

Todd R. Collins, District Attorney, and Carrie L. Linthicum, Dep. Dist. Atty. (orally), Office of the District Attorney, Presque Isle, for appellee State of Maine