State of Maine v. Keara M. Bernier

Appeal from Unified Criminal Docket in
Aroostook County

Supreme Judicial Court sitting as the Law Court
Law Court Docket number ARO-23-418

Brief for Appellant

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Introduction

The United States and Maine Constitutions and Title 14 M.R.S. § 1105 protect a defendant's right to the impartiality of a trial judge, in words and conduct. When a trial court questions the veracity of a defendant it affects the fairness and integrity of a trial proceeding. The lower court's interaction with Ms. Bernier during her trial testimony damaged her credibility. And, in doing so, the trial court was not impartial and created the impression with the jury that it entertained doubts as to Ms. Bernier's veracity.

In instructing on self-defense and the use of deadly-force, the trial court did not inform the jury that Ms. Bernier did not have to retreat if she was in her own dwelling. Ms. Bernier's entire case rested on the notion of self-defense. As such, the jury instructions are fatally flawed and there is prejudicial error.

The trial evidence failed to establish all the necessary elements of aggravated assault. The bat used by Ms. Bernier in the June 5, 2022 incident could not inflict "a substantial risk" of death or serious bodily injury in the manner it was used and Ms. Bernier's conviction should be vacated.

Procedural History

Keara Bernier, the appellant, was charged with one count of Aggravated Assault (Class B) under Title 17-A M.R.S. § 208(1)(B)[1] on June 7, 2022 by criminal complaint. An indictment was issued against Ms. Bernier on July 15, 2022. (App. at 2). Ms. Bernier was arraigned on the aforementioned charge on October 3, 2022. (App. at 2).

Jury selection occurred on September 5, 2023. (App. at 4). A jury trial was held on September 14th and 15th of 2023. (App. at 4). The jury returned a guilty verdict on September 15, 2023. (App. at 4).

On November 16, 2023, Ms. Bernier was sentenced to a seven year term of incarceration with the Department of Corrections, with all but six months suspended, and three years of probation. (App. at 5); (Sent. T. at 28).

Ms. Bernier filed a timely notice of appeal on October 6, 2023. (App. at 4).

[1] Title 17-A M.R.S. § 208(1)(B) provides that "[a] person is guilty of aggravated assault if that person intentionally, knowingly or recklessly causes. . . Bodily injury to another with use of a dangerous weapon."

Statement of Facts

Keara Bernier and Robert Wiezbicki were living together in Mr. Wiezbicki's Cross Lake home on June 5, 2022.[2] (Tr. T. (vol. 1) at 1, 42, 49, 53-54, 79, 120, 208). Ms. Bernier moved into the home with her three children a few months after their relationship started.[3] (Tr. T. (vol. 1) at 49-51, 121, 208). Ms. Bernier and Mr. Wiezbicki's relationship became strained and in January of 2022 Mr. Wiezbicki asked Ms. Bernier to move out.[4] (Tr. T. (vol. 1) at 52-54, 90). Ms. Bernier had no place else to go and was still living with Mr. Wiezbicki and attempting to find new housing in June of 2022.[5] (Tr. T. (vol. 1) at 53, 89, 189-190, 188-191, 200-201, 202-204).

June 5, 2022 was a Sunday and Mr. Wiezbicki and Ms. Bernier were alone in the Cross Lake home. (Tr. T. (vol. 1) at 53-54, 79-80, 88, 91-92, 95, 104). At

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[2] Ms. Bernier met Mr. Wiezbicki some time around January or February of 2021. (Tr. T. (vol. 1) at 49, 127).

[3] After a period of time Ms. Bernier's daughter moved into her father's home and only Ms. Bernier's two sons, Timmy and Kyrie remained in the home. (Tr. T. (vol. 1) at 51). Timmy was fourteen and Kyrie was three at the time of the incident. (Tr. T. (vol. 1) at 121, 208).

[4] According to Mr. Wiezbicki, they were yelling at each other a lot at this point. (Tr. T. (vol. 1) at 93). Mr. Wiezbicki testified that he "never laid a hand on" Ms. Bernier or her children. (Tr. T. (vol. 1) at 93-94).

[5] Ms. Bernier stated that "I — actually, my sister and I had been looking into getting help from ACAP and I had spoken to a couple places and they hadn't had any, um, openings. I think the closest they had an opening was in Houlton for the shelters." (Tr. T. (vol. 1) at 190). Ms. Bernier stated that her option at the time was to either stay where she was or go to a shelter, and that she was working with a person from the Aroostook County Action Plan in Fort Kent to try and find a new place to live. (Tr. T. (vol. 1) at 190-191).

around "suppertime" Mr. Wiezbicki became upset and moved some of Ms. Bernier's clothing to a back porch. (Tr. T. (vol. 1) at 54-55, 92, 95, 99). He then went into the kitchen and smoked a cigarette by the stove.[6] (Tr. T. (vol. 1) at 54). Ms. Bernier came into the kitchen later, where Mr. Wiezbicki had remained. (Tr. T. (vol. 1) at 55). A dispute occurred.[7] (Tr. T. (vol. 1) at 55, 58, 95, 122-132). Ms. Bernier became afraid and scared for herself and she retrieved a bat from a closet

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[6] Ms. Bernier testified that around noontime she had refused to buy Mr. Wiezbicki more alcohol and that he argued with her and she left the house to sit in her car and call friends on a tablet, at which time Mr. Wiezbicki "came out to [the] car and started, like, slamming his hands and, like, hitting my window." (Tr. T. (vol. 1) at 122). They continued to argue and as things escalated, Ms. Bernier testified that Mr. Wiezbicki started to put her stuff on the porch and told her she needed to go. (Tr. T. (Vol. 1) at 123-124). When she still would not agree to buy him alcohol, "he slammed his fist on the counter" and Ms. Bernier backed up, away from him. (Tr. T. (vol. 1) at 124). When she still would not agree to buy alcohol for him, she testified that Mr. Wiezbicki: "hit the fridge. He, like, punched it. And that's when I went to the closet and I said, if you come at me one more time, I'm gonna take the bat out. And that's when I took the bat out." (Tr. T. (vol. 1) at 125-126, 127-128, 131-132). At that point Mr. Wiezbicki hit the counter with both hands and then pushed things. (Tr. T. (vol. 1) at 126). Ms. Bernier became afraid and scared for herself. (Tr. T. (vol. 1) at 126-127, 132, 137, 149, 153). Ms. Bernier and her son testified that Mr. Wiezbicki had hit her and her two sons in the past. (Tr. T. (vol. 1) at 126-127, 132, 136, 157, 159, 162, 167-173, 182, 184, 197-199, 201-202, 210-211, 215-216, 220, 225). They were approximately three to four feet from each other. (Tr. T. (vol. 1) at 128). After Mr. Wiezbicki began to hit things, and Ms. Bernier had retrieved a bat, she testified that she "hit it off the floor" and "said, don't come come at me again." (Tr. T. (vol. 1) at 127-130, 148, 193). Ms. Bernier stated that was when Mr. Wiezbicki lunged at her and was within 2 feet of her. (Tr. T. (vol. 1) at 129, 146-148, 145-148, 193). At this point, Ms. Bernier closed her eyes and swung the bat down, Mr. Wiezbicki came towards her as she swung the bat, and the bat made contact with Mr. Wiezbicki's head. (Tr. T. (vol. 1) at 129-130, 132, 146-148).

[7] Ms. Bernier testified that the dispute erupted because Mr. Wiezbicki had requested the she buy him more alcohol and that she had refused. (Tr. T. (vol. 1) at 120-121). Mr. Wiezbicki testified that Ms. Bernier came into the kitchen upset about her clothing being on the porch and he stated that he wanted he to leave the home and Ms. Bernier's reaction was to retrieve a bat from a kitchen closet and hit him on the head with it. (Tr. T. (vol. 1) at 55-56, 58). He stated he was standing by the stove and did not move from there. ((Tr. T. (vol. 1) at 56).

in the kitchen.[8] (Tr. T. (vol. 1) at 55-56, 60, 95, 126-127, 132, 137, 142-144, 149, 153). Ms. Bernier hit Mr. Wiezbicki on the head with the bat she had retrieved from the closet.[9] (Tr. T. (vol. 1) at 56-57, 78-79, 95, 98-99, 142-143, 163, 232). The hit on Mr. Wiezbicki's head resulted in bleeding.[10] (Tr. T. (vol. 1) at 56). Ms. Bernier bandaged up the wound to Mr. Wiezbicki's head with paper towels and gauze. (Tr. T. (vol. 1) at 57-58, 61, 80, 134). The bandage had to be replaced once because it was wet with blood. (Tr. T. (vol. 1) at 62).

Mr. Wiezbicki described the bat he was hit with as a blue, Easton bat made of aluminum. (Tr. T. (vol. 1) at 56-57, 78). Ms. Bernier said she hit him with a Wilson bat that was orange and black. (Tr. T. (vol. 1) at 137, 146, 180-181). There were two bats in the kitchen closet in the home. (Tr. T. (vol. 1) at 78, 88-89, 94, 192).

Mr. Wiezbicki stated that he would have "a couple of beers after work every day," and then adjusted his estimation to say "[w]ell, like three, four beers after work." (Tr. T. (vol. 1) at 91). At the time of the incident Mr. Wiezbicki was having a beer. (Tr. T. (vol. 1) at 53, 92). He testified that he had consumed "about a six-pack or so." (Tr. T. (vol. 1) at 92, 95). Ms. Bernier testified that Mr. Wiezbicki

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[8] Mr. Wiezebicki had a larger stature than Ms. Bernier. (Tr. T. (vol. 1) at 88, 101-102, 128). Mr. Wiezbicki had a physical job doing concrete work and was in "decent physical shape" "for the most part." (Tr. T. (vol. 1) at 90-91).

[9] Mr. Wiezbicki testified that he did not put his hands up because he did not think that she was going to hit him. (Tr. T. (vol. 1) at 96).

[10] Mr. Wiezbicki testified that it took hours for the bleeding to stop. (Tr. T. (vol. 1) at 62, 80).

was drunk and that he had "at least polished off if not a 30-rack, more than a 30-rack before noon" and that the first thing he would do when he woke up on the weekend was "go to the store and buy a 30-rack."[11] (Tr. T. (vol. 1) at 130-131).

When they went to bed after the incident, Mr. Wiezbicki slept in his bed and Ms. Bernier slept on the couch. (Tr. T. (vol. 1) at 58, 81, 96, 135, 155). Mr. Wiezbicki testified that he let Ms. Bernier stay in the house, did not call the police or an ambulance, and did not go to the hospital after the incident happened. (Tr. T. (vol. 1) at 96-97, 134-135).

However, when Mr. Wiezbicki went to work the following morning, he did call the State Police to report the incident.[12] (Tr. T. (vol. 1) at 81-82, 91, 95-96, 156). He testified that he did not think to call the police until someone else at work suggested it the next morning and upon further questioning stated that he "was thinking about it but then [his boss] brought it up and I'm like, let's just do it and get it over with. And then because I had been wanting her out of the house for a

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[11] She also testified that on the weekends he would "polish off three to four 30-racks on a day." (Tr. T. (vol. 1) at 139-140). Ms. Bernier testified that Mr. Wiezbicki "wakes up first thing in the morning and cracks open a beer. He goes to sleep with a beer on his nightstand. And when he finishes that one, he goes in the fridge, gets another one, opens it. He always has an open beer." (Tr. T. (vol. 1) at 140). Ms. Bernier's eldest son testified that Mr. Wiezbicki was drunk on the day of the incident, when he returned home shortly after the altercation. (Tr. T. (vol. 1) at 209).

[12] Two pictures of Mr. Wiezbicki's head were taken by law enforcement that morning and entered into evidence at trial. (Tr. T. (vol. 1) at 83-87; 104-107). Law enforcement gave the only detailed description of the injury to Mr. Wiezbicki stating that he had a bruise on the side of his head near his hairline and that "there was like dried-up blood that was on the inside. It was like black in color. Um, didn't look like there was — it was there and there was like a ring where you could tell that it was bleeding at some point." (Tr. T. (vol. 1) at 106).

long time and, um, just not making any progress, so this is the — this is the way I could do it." (Tr. T. (vol. 1) at 97-98). Ms. Bernier was then arrested. (Tr. T. (vol. 1) at 135-136, 165).

He received no medical attention other than what Ms. Bernier supplied at the time of the incident and there was no indication that he required any further medical assistance.[13] (Tr. T. (vol. 1) at 82). He did testify that the incident had left a scar on his head. (Tr. T. (vol. 1) at 57).

After the State rested, Ms. Bernier moved for a motion for acquittal. (Tr. T. (vol. 1) at 108-109). Ms. Bernier stated that

> The victim testified, the witness, wasn't serious enough for him to seek medical treatment, to call 911, or that he did not call anyone until the next morning, some 12 to 18 hours later. I don't think this is one of those issues where we can debate serious injury. Simply put, based even on the victim's testimony, the injury was not serious as the way it is defined for, um, deadly force or anything else under the criminal code. That's all I'm gonna say at this point.
> (Tr. T. (vol. 1) at 110).

The trial court denied the motion and in response stated:

> And so as it relates to a Rule 29 motion, the State put in its case-in-chief already and the Court has to review that evidence, um, including any inferences that a rational juror could find from the evidence to determine whether for purposes of the motion no trier of fact could rationally find proof of guilt beyond a reasonable doubt including, as I said, inferences. In this matter, there's been testimony that although the time frame, um, is somewhat convoluted,

[13] While Mr. Wiezbicki testified that he "had received some calls for like— for like if I needed any help dealing with the issues, you know, dealing with being hit, you know, like, like if I needed counseling or something, you know, or like just to talk to somebody or something[,]" there was no indication that he partook in any additional services. (Tr. T. (vol. 1) at 82).

> that this particular defendant identified by the victim in the courtroom did cause bodily injury by hitting him in the head with a bat in which the manner in which it was used would qualify as a dangerous weapon, could rationally qualify as a dangerous weapon; and the manner in which it was described that she approached him and struck him, rational juror could find that it was done either knowingly, intentionally, or recklessly. So, for purposes of the motion, the motion is denied.
> (Tr. T. (vol. 1) at 111-112).

The trial court additionally determined that the evidence at trial generated instructions for self-defense. (Tr. T. (vol. 1) at 254-155). The trial court stated: "Well, there's — from the Court's perspective, there's no question about whether they get a deadly force instruction." (Tr. T. (vol. 1) at 256-257). Ms. Bernier objected to the jury being instructed on the use of deadly force in self-defense.[14] However, the jury was instructed on both theories of self-defense, with the trial court instructing:

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[14] Ms. Bernier objected to the instruction, with counsel furthering its objection to the instruction by stating: "I mean, yeah, I think it, you know, it — seemingly, it was nondeadly based not only on what she said but the result, namely that he got a bruise or a mark on his forehead and there was no further medical treatment sought or necessary. As a result, she was defending herself with what she had in her hands. And, in fact, she — I think she is entitled to the nondeadly force self-defense instruction as well. He lunged at her, according to her testimony. Um, and she was defending herself. I think she gets both of the instructions at this point. And, um, you know, I understand the Court's — I understand the Court's understanding that it feels that it needs to give the deadly force instruction; but what I want to do is, at this point, **I'll just throw an objection on the record to giving the deadly force instruction just for the record**. I think this was a nondeadly force case, and I just need to throw that on there that I object to the deadly force instruction being given; but I understand the Court feels the need to do it anyway so — . . . I'm just preserving the record for, you know, any potential appeal. So, I think she gets both and I'll leave it at that." (Tr. T. (vol. 1) at 258-259)(emphasis added). It was only after the trial court stated that there was no question it was giving the deadly force instruction that Ms. Bernier's counsel then argued for getting both of the instructions, resulting in the statements above. (Tr. T. (vol. 1) at 256-257).

I'll now instruct you on justification of self-defense. There are slightly different rules with respect to self-defense depending on whether deadly force or nondeadly force is used. If you find that the elements of the offense that I've just instructed you on have been proven beyond a reasonable doubt and if you find sufficient facts have been introduced to raise a question as to whether the Defendant acted in self-defense, then you must next determine whether deadly or nondeadly force was used.

Deadly force is physical force which a person uses with the intent of causing or which she knows creates a substantial risk of causing death or serious bodily injury. As previously instructed, intent means that it's the person's conscious object or purpose to cause a particular result. And the term death need not be further defined. Serious bodily injury again means bodily injury that creates a substantial risk of death or which causes serious permanent disfigurement or loss or substantial impairment of the function of any bodily member or organ or extended convalescence necessary for recovery of physical health. Nondeadly force means any physical force which is not deadly force.
Not knowing what your finding will be with respect to self-defense and whether deadly force versus nondeadly force was used by the Defendant, I will now instruct you on both forms of self-defense and you shall apply the one that you find to be applicable based on your findings on the degree of force used.
. . .

Moving on to self-defense with the use of deadly force, if you found deadly force was used. If, on the other hand, you found the deadly forced [sic] was used, I instruct you as follows. A person is justified in using deadly force upon another person when, one, she reasonably believes that the other person is about to use unlawful deadly force against her; and, two, that she reasonably believed that her use of deadly force is necessary to defend herself. A person is never justified in using deadly force if she provoked the encounter leading to the use of deadly force or if she knows that she can retreat from the encounter with complete safety.

Therefore, if you found deadly force was used under the circumstances of this case, in addition to proving beyond a reasonable doubt the foregoing elements — that's a typo — elements of Aggravated Assault

> as I've — I have instructed, in order to prove that the Defendant is guilty of Aggravated Assault, the State must also prove beyond a reasonable doubt one of the following facts. Either, one, that with a purpose to cause physical harm to another person, the Defendant provoked the encounter; or, two, that the Defendant knew she could retreat from the encounter with Robert Wiezbicki in complete safety; or, three, that the Defendant did not actually believe that Robert Wiezbicki was about to use deadly force against her; or, four, that the Defendant's belief that Robert Wiezbicki was about to use deadly force against her was not objectively reasonable, meaning it was not a belief that a reasonable and prudent person would have in the same situation; or, five, that the Defendant did not actually believe that her use of deadly force was necessary to defend herself; or, six, that the Defendant's belief that her use of deadly force to repel the force used again her by Robert Wiezbicki was not objectively reasonable. Again, meaning it was not a belief that a reasonable and prudent person would have in the same situation.
>
> If you find that the State has not proven one of those facts beyond a reasonable doubt, then you must find the Defendant is not guilty of the offense. If you find that the State has proven beyond a reasonable doubt that the Defendant committed Aggravated Assault and that the State has proven beyond a reasonable doubt at least one of those facts that I've just listed for you, then you should find the Defendant guilty of Aggravated Assault.
> (Tr. T. (vol. 1) at 282-288).

After Ms. Bernier's case was submitted to the jury for consideration, the jury returned a verdict of guilty. (Tr. T. (vol. 2) at 34).

The sentencing court imposed a seven year sentence, with all but six months suspended, and three years of probation. (Sent. T. at 28).

Ms. Bernier timely filed a notice of appeal. (App. at 4).

Issues Presented for Review

I. Whether the trial court's prompting of Ms. Bernier to testify truthfully and its independent questioning of her violated her constitutional rights and Title 15 M.R.S. § 1105.

II. Whether the jury instructions were deficient by failing to instruct the jury on the dwelling home exception to the duty to retreat in the use of deadly force justification for a self-defense claim.

II. Whether there was sufficient evidence to support Ms. Bernier's conviction.

Statement of Issues Presented for Review

The trial court violated Ms. Bernier's constitutional rights and Title 14 M.R.S. §1105 in questioning her and directing her to be truthful in her trial testimony. Ms. Bernier is guaranteed an impartial trial by the United States and Maine Constitutions, which includes the impartiality of a trial judge, in words and conduct. Title 14 M.R.S. § 1105 also protects a defendant's right to receive an impartial trial and prohibits a judge's trial conduct from swaying the neutrality of the proceedings to favor one party. A court must not create the impression with the jury that it entertains doubts as to a defendant's veracity. To that point, a trial court should not disparage or lower the character or credibility of a witness that is vitally connected with the facts of the case. In Ms.Bernier's case, the trial court's promptings of her to tell the truth were intertwined with the court's independent taking over of the State's cross-examination of Ms. Bernier. The trial court's comments and questioning of Ms. Bernier affected the fairness and integrity of the proceedings. Ms. Bernier's trial relied heavily on the word of Mr. Wiezbicki against the word of Ms. Bernier. The trial court's interaction with Ms. Bernier during her testimony damaged her credibility. And, in doing so, the trial court was not impartial and created the impression with the jury that it entertained doubts as to Ms. Bernier's veracity. The trial court's actions gave the impression that the court did not believe she was answering truthfully. As such, Ms. Bernier's

credibility was undermined by the trial court's actions and violated both her constitutional and statutory right to receive an impartial trial.

Additionally, Ms. Bernier objected to the jury being instructed on the use of deadly force in self-defense. The trial court instructed the jury on the use of both deadly and non-deadly force for self-defense. In instructing on the use of deadly-force, the trial court did not inform the jury that Ms. Bernier did not have to retreat if she was in her own dwelling. This Court has found that a complete instruction negating the duty to retreat in one's own dwelling place is directly relevant. Ms. Bernier's entire case rested on the notion of self-defense. When viewed as a whole, the jury instructions are fatally flawed. It is impossible to say that her case was not affected by the error. The jury was not correctly and fairly informed by the trial court as to all necessary aspects of the governing law and, as such, prejudicial error exists.

Also, the evidence presented at trial failed to establish all the necessary elements of aggravated assault. Specifically, the evidence failed to establish that that the bat used by Ms. Bernier could inflict "a substantial risk" of death or serious bodily injury. The use of the baseball bat, "in the manner it [was] used" was not capable of producing serious bodily injury. Thus, the record is devoid of evidence that establishes the way in which the bat was used meets the definition of a dangerous weapon. As a result, Ms. Bernier's conviction should be vacated.

Wherefore, for the reasons enumerated above, Ms. Bernier requests that this Court vacate her conviction and remand her case to the Aroostook County Courts for further proceedings.

Argument

I. The trial court's prompting of Ms. Bernier to testify truthfully and its independent questioning of her violated her constitutional rights and Title 15 M.R.S. § 1105.

Unpreserved errors are reviewed by this Court under an obvious error standard of review.[15] See State v. Brine, 1998 ME 191, ¶13, 716 A.2d 208, 212 (Me. 1998); State v. Thomes, 1997 ME 146, ¶ 7, 697 A.2d 1262, 1264 (Me. 1997); State v. Philbrick, 669 A.2d 152, 156 (Me. 1995); State v. Bedrin, 634 A.2d 1290, 1292 (Me. 1993); State v. Shackelford, 634 A.2d 1292, 1295 (Me. 1993); State v. Naoum, 548 A.2d 120, 125 (Me. 1988); State v. Rowe, 238 A.2d 217, 225 (Me. 1968); M.R.Crim.P. 52(b).

The trial court violated Ms. Bernier's constitutional rights and Title 14 M.R.S. §1105 in questioning her and directing her to be truthful in her trial testimony. Ms. Bernier is "guaranteed an impartial trial by the United States and Maine Constitutions[, t]his guarantee encompasses 'impartiality on the part of the trial judge, [both] in word [and] conduct.'" State v. Philbrick, 669 A.2d 152, 155-156 (Me. 1995)(citation omitted). Title 14 M.R.S. § 1105 also protects a defendant's right to receive an impartial trial.

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[15] The test for establishing obvious error has been concisely stated to include a showing, by the defendant, of "(1) an error, (2) that is plain, and (3) that affects substantial rights. . . [e]ven if these three conditions are met. . .a jury's verdict [is] only [set aside] if. . . (4) the error seriously affects the fairness and integrity or public reputation of judicial proceedings." State v. Dolloff, 2012 ME 130, ¶ 35, 58 A.3d 1032, 1043 (Me. 2012)(internal citations and quotations omitted).

Ms. Bernier has a constitutional right to an impartial trial under the Constitution of the State of Maine, Article I, Section 6:

> the Constitution of Maine, Article I, Sec. 6, guarantees to the accused in all criminal prosecutions, the right to an impartial trial. The legislature has provided, R. S., Chap. 96, Sec. 104, that the expression of opinion upon questions of fact by the presiding justice is sufficient cause for a new trial upon exceptions. This is undoubtedly an additional safeguard to assure, beyond peradventure, the constitutional guaranty.
> State v. Howland, 137 Me. 137, 139, 16 A.2d 103, 104 (Me. 1940).

This court has further stated that

> The Declaration of Rights, otherwise known as the Bill of Rights, of the Constitution of Maine (Article I, § 6) guarantees, among other things, that
>
> '[in] all criminal prosecutions, the accused shall have a right . . . . . [to] have a speedy, public and impartial trial . . . .' (Emphasis supplied)
>
> Impartiality of the trial process is the very foundation of the American judicial system. This fundamental and basic concept of justice, expressly incorporated in the Declaration or Bill of Rights of the constitutions of several of the States of the Union as a curb on governmental power, encompasses both, 1) impartiality of the jury (Christian v. State, Me., 268 A. 2d 620 (1970); Bennett v. State, 161 Me. 489, 214 A.2d 667 (1965)), and 2) impartiality on the part of the trial judge, either in word or conduct.
> State v. Bachelder, 403 A.2d 754, 758 (Me. 1979).

Furthermore, as this Court has noted, Title 14 M.R.S. § 1105 protects Ms. Bernier's right to a fair and impartial trial, granting a new trial when a judge's trial

conduct sways the neutrality of the proceedings in the favor of one party.[16] In its entirety, Title 14 M.R.S. § 1105 states that

> During a jury trial the presiding justice shall rule and charge the jury, orally or in writing, upon all matters of law arising in the case but shall not, during the trial, including the charge, express an opinion upon issues of fact arising in the case, and such an expression of opinion is sufficient cause for a new trial if either party aggrieved thereby and interested desires it, and the same shall be ordered accordingly by the law court on appeal in a civil or criminal case. Title 14 M.R.S. §1105.[17]

In analyzing conduct under Title 14 M.R.S. § 1105, this Court has found that it is "essential" that a trial judge "exercise[s] great care that his treatment of the testimony of the witnesses does not suggest to the jury an endorsement of one party's point of view." State v. Hudson, 325 A.2d 56, 66 (Me. 1974). Additionally, this Court has found that "what a trial court judge is forbidden to do directly, he may not achieve by indirection," such as "[h]e must not create the impression with the jury that he entertains doubts as to the defendant's veracity. State v. Annis, Me.,

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[16] This Court has "previously held that section 1105 'serves the salutary purpose of ensuring judicial impartiality and authorizes granting of a new trial upon evidence of its violation.' State v. Colomy, 407 A.2d 1115, 1119 (Me. 1979) (citation omitted)." State v. Corbin, 2000 ME 167, ¶ 10, 759 A.2d 727, 730 (Me. 2000).

[17] This Court has recognized that "[o]ver a century ago, our Legislature did enact specific legislation giving definitive protection to an accused's constitutional right to have an impartial trial in the criminal prosecution against him. Indeed, 14 M.R.S.A., § 1105 is the same as its ancestral prototype (P.L. 1874, c. 212), except for wording changes made necessary by the adoption of the Rules of Criminal Procedure in 1965." State v. Bachelder, 403 A.2d 754, 759 (Me. 1979). "This statute has existed in substantially the same language since 1874. See P.L. 1874, ch. 212." State v. Hudson, 325 A.2d 56, fn 7 (Me. 1974).

341 A.2d 11 (1975)." State v. Bachelder, 403 A.2d 754, 759 (Me. 1979). To that point,

> . . . the trial judge should not assume, at any time during the trial, the posture of an advocate by conducting to a substantial degree, quantitatively or qualitatively, the examination or cross-examination of the accused or other witnesses in the case. Such conduct tends to wear down the judge's cloak of impartiality and may lend itself to generating with the jury a serious influential impact upon their deliberations which might deprive the accused of the judgment of his peers. State v. Lint, Me., 361 A.2d 926 (1976); State v. Annis, supra; State v. Haycock, Me., 296 A.2d 489 (1972).
> State v. Bachelder, 403 A.2d 754, 759 (Me. 1979).

In State v. Lint, 361 A.2d 926, 927 (Me. 1976), this Court found that the trial court had committed error and tainted the fairness of the trial through its questioning of the defendant's sole supporting witness and in doing so gave the impression "that the defendant's evidence was unworthy of serious consideration, all in violation of 14 M.R.S.A., § 1105." Additionally in State v. Annis, 341 A.2d 11, 14-15 (Me. 1975) this Court was concerned when the lower court was questioning the "defendant himself" and the "questioning bore directly upon his credibility" because it used language more of a prosecutorial than an inquiring nature" that "must certainly have suggested to the jurors that the Justice was assisting the State in emphasizing that particular fact situation[, and i]t is likely that it also suggested that the Justice entertained doubts as to the defendant's veracity." Moreover, any expression by a court, from which a jury might infer that the judge "endorses" one side over another, "generally 'is sufficient cause for a new trial at

the request of the aggrieved party.'" State v. Philbrick, 669 A.2d 152, 156 (Me. 1995)(citation omitted).

Two cases in Georgia have dealt with trial courts' questioning of defense witnesses about their truthfulness under oath. In Price v. State, 310 Ga. App. 132, 133, 712 S.E.2d 135, 136 (Ga. 2011), the court directly asked a defense witness if they were lying under oath and if everything they had said was truthful.[18] The Georgia court found that

> 'The purpose of this limitation [in OCGA § 17-8-57] at least in part is to prevent the jury from being influenced by any disclosure of the judge's opinion regarding a witness's credibility.'
>
> Certainly, '[I]t is a court's right, and oftentimes its duty, to question a witness in order to develop fully the truth of a case. However, that right should be exercised sparingly . . .' and only if the trial court 'does not violate the statutory prohibition set forth in OCGA § 17-8-57 against expressions or intimation of opinion as to what has or has not been proved as to the guilt of the accused.' It is axiomatic that '[t]he credibility of a witness is a material fact in every case, and any questions of credibility are for the jury to decide. Therefore, anything which tends to uphold, to support, to disparage, or to lower the character and the resulting credibility of the witness is vitally connected with the facts of the case.'

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[18] A mistrial was immediately requested on the basis that the court had indicated that it did not believe that the witness was telling the truth and the motion was denied by the trial court. See Price v. State, 310 Ga. App. 132, 133-134, 712 S.E.2d 135, 136-137 (2011). On appeal it was argued that the trial court's questioning violated "OCGA § 17-8-57, which provides as follows: It is error for any judge in any criminal case, during its progress or in his charge to the jury, to express or intimate his opinion as to what has or has not been proved or as to the guilt of the accused. Should any judge violate this Code section, the violation shall be held by the Supreme Court or Court of Appeals to be error and the decision in the case reversed, and a new trial granted in the court below with such directions as the Supreme Court or Court of Appeals may lawfully give." Price v. State, 310 Ga. App. 132, 134, 712 S.E.2d 135, 137 (2011).

> In this case, the trial court's questions to the witness — consisting merely of asking the witness whether she was lying or being truthful — clearly intimated the court's opinion regarding the credibility of her testimony and were therefore patently improper. Price v. State, 310 Ga. App. 132, 134, 712 S.E.2d 135, 1337 (Ga. 2011).

The Georgia court continued to state that

> Any reasonable juror, having heard the trial court's comments, might well construe them as an expression of opinion on the credibility of the [witness]. The members of the jury heard the trial court's words, and no man could dare say that they were not thereby influenced to some extent, at least. Jurors, like other human beings, are unconsciously too much affected by strong mental impressions for these impressions to be nicely segregated from the mass of evidence. Price v. State, 310 Ga. App. 132,134-135, 712 S.E.2d 135, 137 (Ga. 2011).

In Williams v. State, 329 Ga. App. 706, 712-713, 766 S.E.2d 474, 480 (Ga. 2014), the Georgia court stated that "[a]s this Court explained in Price v. State, 'the trial court's questions to the witness— consisting merely of asking the witness whether [ ]he was lying or being truthful— clearly intimated the court's opinion regarding the credibility of [his] testimony and were therefore patently improper."[19] The Williams court continued to stated that

> The purpose of [OCGA § 17-8-57], at least in part, is to prevent the jury from being influenced by any disclosure of the judge's opinion regarding a witness's credibility. The credibility of a witness is a material fact in every case, and any questions of credibility are for the

[19] The Williams case was before the court under a claim of ineffective assistance of counsel. Williams v. State, 329 Ga. App. 706, 712, 766 S.E.2d 474, 470-480 (Ga. 2014). The trial court found that "[T]he trial court's compliance with the statutory language of OCGA § 17-8-57 is mandatory, and a violation of its mandate requires a new trial. In light of the mandatory nature of the statute and the case law interpreting the statute, we must reverse [Williams's] convictions and remand the case to the trial court for a new trial." Williams v. State, 329 Ga. App. 706, 713, 766 S.E.2d 474, 480 (Ga. 2014).

> jury to decide. Therefore, anything which tends to uphold, to support, to disparage, or to lower the character and the resulting credibility of the witness is vitally connected with the facts of the case. Williams v. State, 329 Ga. App. 706, 714, 766 S.E.2d 474, 480-481 (Ga. 2014).

Maine's Title 14 M.R.S. § 1105 and Georgia's OCGA § 17-8-57 are worded slightly different but the purpose and function of the statutes is the same. While Ms. Bernier's trial court did not directly question Ms. Bernier as to whether she was being truthful, the court's direction of her that she had to tell the truth, served the same function in the eyes of the jury. The trial court did not believe that Ms. Bernier was telling the truth when she testified and that the trial court let that fact seep into the trial through its direction of Ms. Bernier to respond truthfully to questions.[20]

The first time the trial court directed Ms. Bernier to testify truthfully came after the court had first plainly directed her to answer a question:

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[20] The opinion of the trial judge as the the credibility of Ms. Bernier was apparent after the trial in its sentencing comments, when the Court stated that "[t]he evidence was overwhelming at trial, and the self-defense contention was not at all credible and was rejected -- rejected certainly by the jury." (Sent. T. at 26). Additionally, after a break was taken during the trial, and before the jury returned to the courtroom, the trial court told Ms. Bernier she need to answer questions truthfully: "THE COURT: All right. And so let's go get the jurors and we'll resume. Ma'am, you can retake your position up here on the— in the witness stand; and when we resume, we're gonna pick up right where we left off. I just want to make sure that you understand the Court allowed a little bit of jousting between the witness and the questioner. Please just listen to the question. **Just answer the question truthfully**. Um, doesn't need to be— I understand some of these areas of inquiry may be difficult, **but it's absolutely crucial that just listening to the question, answering truthfully.** Allow the full question to be asked. Allow the full answer to be provided. So, that way the stenographer can keep on track of it and this runs a little more smoothly than occurred prior to the noon hour." (Tr. T. (vol. 1) at 176-177)(emphasis added).

> Q. Okay. And so immediately after you hit him with the bat, you were not scared anymore?
>
> A. Have you ever seen someone's eyes go black?
>
> THE COURT: Do you understand the question?
>
> THE WITNESS: Yeah, I do understand the question.
>
> **THE COURT: Please, just answer the question.**
>
> THE WITNESS: So, can you say — ask the question again?
> (Tr. T. (vol. 1) at 143).

When Ms. Bernier stated that she did not understand a question shortly thereafter, the trial court interjected again and instructed her to be truthful in her answer: "Well, just rephrase the question and listen carefully to the question and just answer it **truthfully**."[21] (Tr. T. (vol. 1) at 145)(emphasis added).

As tension appeared to rise in the cross-examination of Ms. Bernier, the court interjected itself and again directed Ms. Bernier to answer questions truthfully, stating:

> So, I'm not sure the witness clearly understood the question in terms of — because the answer related to not that time. And so the Court's unclear as to whether the witness truly understood the question. Please ask that question again. If you don't understand it, ma'am, please let us know. Otherwise, listen to the question and, again, just answer **truthfully**.
> (Tr. T. (vol. 1) at 161-162)(emphasis added).

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[21] Additionally, the State also began its questioning of Ms. Bernier by stating that she was "under an obligation to always answer my questions truthfully." (Tr. T. (vol. 1) at 138).

The trial court again directed Ms. Bernier's to be truthful during the following exchange during her cross-examination:

> Q. Okay. But do you recall telling him that— telling Trooper Martin that you didn't hit Robert with a closed fist, closed fist?
>
> A. I — no, I didn't say that.
>
> Q. Okay. Do you remember later telling Trooper Martin that you did?
> THE COURT: Do you recall?
>
> THE WITNESS: Can you repeat the question?
>
> BY THE STATE:
> Q. Do you remember later telling Trooper Martin that you did hit Robert with a closed fist?
>
> A. I really don't.
>
> Q. You don't remember? Okay. You told the officer that Robert never used a weapon?
>
> A. He never used a weapon, so why would I?
>
> Q. That's fine, if it's — just say yes if you agree and no if you don't,
>
> A. Is it necessary for all of this? Is it necessary for — like the — because I have a huge—
>
> THE COURT: Ma'am, ma'am.
>
> THE WITNESS: Yeah.
>
> THE COURT: The witness's job is simply to listen to the questions and testify **truthfully**. If there's any question that's objected to, the Court will rule on it and my determination will be whether you have to answer or whether you do not. And so that's the way it's going to proceed. Mr. Inglis, you may proceed with your next question.

THE STATE: Okay.
(Tr. T. (vol. 1) at 165-166)(emphasis added).

The trial court's promptings of Ms. Bernier to tell the truth are also intertwined with the court's independent taking over of the State's cross-examination of Ms. Bernier. The trial court eventually appeared to become frustrated with the interaction between the State and Ms. Bernier and her responses to the State's questions and it took over questioning her during the State's cross-examination:

Q. Okay. So, in the past, you had pushed and shoved him?

A. You really want me to go into detail about everything that went on with this man and I because—

THE COURT: Do you or do you not understand the question? Because that's the only — do you or do you — do you or — this is a yes or no. Do you or do you not understand that question, yes or no?

THE WITNESS: I don't understand it.

THE COURT: Ask it again.

BY THE STATE:
Q. Do you recall telling Trooper Martin that you pushed and shoved Robert?

A. I did not push and shove him on that —

THE COURT: Well, the question— and this is where we're getting bogged down. The question to you is do you recall telling Trooper Martin that you pushed him? And so that question is/ do you recall saying — making such a statement—

THE WITNESS: But—

THE COURT: — making such a statement to the trooper? Either you remember saying that to the trooper or you do not remember saying that to the trooper, which could either be you simply don't remember it or that you did not in fact say it. But that's the question. Do you understand what the question is, yes or no?

THE WITNESS: Yes, I understand the question.

THE COURT: And do you recall telling Trooper Martin that you had pushed Robert?

THE WITNESS: I did not push Robert.

THE COURT: That's not the question.

THE WITNESS: So—

THE COURT: That's not the question. The question is do you recall telling Trooper Martin that you pushed Robert?

THE WITNESS: I recall telling him that, but it was not about this incident. He asked me if there was —

THE COURT: So, the answer to the question is, yes, you recall telling Trooper Martin that you had pushed Robert, is that true?

THE WITNESS: Yes, in the past.

THE COURT: Go — okay. Go ahead with the next question. The witness— we were speaking over one another. You said in the past.

THE WITNESS: Yes.

THE COURT: Go ahead.
(Tr. T. (vol. 1) at 163-165).

The trial court's direction of Ms. Bernier to provide truthful testimony and its independent questioning of Ms. Bernier during her cross examination affected her ability to receive a fair and impartial trial. This error is plainly seen from the above cited portions of the trial court's interaction with Ms. Bernier. To that point, the trial court's comments and questioning of Ms. Bernier affected the fairness and integrity of the proceedings. The case relied heavily on the word of Mr. Wiezbicki against the word of Ms. Bernier. The court's interaction with Ms. Bernier during her testimony damaged her credibility. And in doing so, the trial court was not impartial and "create[d] the impression with the jury that he entertains doubts as to the defendant's veracity." State v. Bachelder, 403 A.2d 754, 759 (Me. 1979) (citation omitted). Mr. Wiezbicki was not repeatedly reminded by the trial court to testify truthfully, nor did the court take over the questioning him during the course of his testimony. This Court has shown concern "when the court was questioning the 'defendant himself' and the 'questioning bore directly upon his credibility'" suggestion that "that the Justice entertained doubts as to the defendant's veracity." State v. Annis, 341 A.2d 11, 14-15 (Me. 1975). The trial court's interactions with Ms. Bernier, both in repeatedly reminding of her to testify truthfully and its interjection of itself into the trial by taking over the questioning of Ms. Bernier affected her ability to receive an impartial trial. It gave the impression that the court did not believe she was answering truthfully. Her credibility was undermined

by the trial court's actions and violated both her constitutional and statutory right to receive an impartial trial.

As such, Ms. Bernier is requesting that this Court remand her case to the trial court for a new trial.

II. The jury instructions were deficient by failing to instruct the jury on the dwelling home exception to the duty to retreat in the use of deadly force justification for a self-defense claim.

Jury instructions are reviewed "as a whole to ensure that they informed the jury correctly and fairly in all necessary respects of the governing law." State v. Soule, 2001 ME 42, ¶ 8, 767 A.2d 316, 319 (Me. 2001)(citation and quotations omitted); see also law State v. Mahmoud, 2016 ME 135, ¶ 10, 147 A.3d 833, 837 (Me. 2016); State v. Fortune, 2011 ME 125, ¶ 25, 34 A.3d 1115, 1121 (Me. 2011); State v. Foster, 405 A.2d 726, 730 (Me. 1979). "When a party challenging the court's instruction has preserved his or her objection at trial, [this Court] will vacate the [trial] court's judgment only if the erroneous instruction resulted in prejudice."[22] Caruso v. Jackson Lab., 2014 ME 101, ¶ 12, 98 A.3d 221, 226 (Me. 2014); see also State v. Sapiel, 432 A.2d 1262, 1270 (Me. 1981).

More succinctly, when an objection is timely raised, this Court "review[s] jury instructions as a whole for prejudicial error, to ensure they informed the jury correctly and fairly. . . consider[ing] the effect of the instruction as a whole and the

[22] Just as the court "review[s] a trial court's decision to deny a party's request for a jury instruction for prejudicial error. State v. Doyon, 1999 ME 185, P 7, 745 A.2d 365, 367." State v. Graham, 2004 ME 34, ¶ 12, 845 A.2d 558, 561 (Me. 2004).

potential for juror misunderstanding. . . [and e]rrors in criminal cases that affect constitutional rights are reviewed to determine that. . . [it is] satisfied, beyond a reasonable doubt, that the error did not affect substantial rights or contribute to the verdict." State v. Gauthier, 2007 ME 156, ¶ 14, 939 A.2d 77, 81 (Me. 2007) (citations omitted).

Additionally, a "jury instruction that 'creates the possibility of jury confusion and a verdict based on impermissible criteria' is erroneous . . . [and s]uch an error is harmless only if the court believes it highly probable that it did not affect the verdict." State v. Soule, 2001 ME 42, ¶ 8, 767 A.2d 316, 319 (Me. 2001)(citation and quotations omitted).

Ms. Bernier objected to the jury being instructed on the use of deadly force in self-defense.[23] See supra fn 14; (Tr. T. (vol. 1) at 256-257). The trial court instructed the jury on the use of both deadly and non-deadly force for self-defense.[24] (Tr. T. (vol. 1) at 282-289). In instructing on the use of deadly-force,

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[23] Ms. Bernier preserved an objection to the trial court instructing the jury on the deadly force self-defense justification, but did not specifically state that the instruction failed to inform the jury that the duty to retreat does not apply when one is in their home. (Tr. T. (vol. 1) at 256-257). Ms. Bernier asserts that this objection should afford her the more favorable, standard of review, and not an obvious error standard of review, on appeal, because, if her request had been granted by the court, the jury would not have been improperly instructed.

[24] "When the court is unable to determine whether the defendant used deadly or nondeadly force as a matter of law, the court must instruct the jury as to both and allow the jury to make the preliminary determination of whether the defendant used deadly or nondeadly force." State v. Ouellette, 2012 ME 11, ¶ 16, 37 A.3d 921, 928 (Me. 2012)(citations omitted).

the trial court did not inform the jury that Ms. Bernier did not have to retreat if she was in her own dwelling place.[25]

This Court has noted that

> Section 108 provides for two possible self-defense justifications depending on whether the defendant uses deadly or nondeadly force. Deadly force is 'physical force that a person uses with the intent of causing, or that a person knows to create a substantial risk of causing, death or serious bodily injury.' 17-A M.R.S. § 2(8) (2011). A defendant's use of deadly force is justified only when: (1) the defendant has an actual belief that a person is about to use unlawful deadly force against him or another person; a person is committing or

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[25] The trial court instructed on this point as follows: "Moving on to self-defense with the use of deadly force, if you found deadly force was used. If, on the other hand, you found the deadly forced [sic] was used, I instruct you as follows. A person is justified in using deadly force upon another person when, one, she reasonably believes that the other person is about to use unlawful deadly force against her; and, two, that she reasonably believed that her use of deadly force is necessary to defend herself. A person is never justified in using deadly force if she provoked the encounter leading to the use of deadly force or if she knows that she can retreat from the encounter with complete safety. Therefore, if you found deadly force was used under the circumstances of this case, in addition to proving beyond a reasonable doubt the foregoing elements — that's a typo — elements of Aggravated Assault as I've — I have instructed, in order to prove that the Defendant is guilty of Aggravated Assault, the State must also prove beyond a reasonable doubt one of the following facts. Either, one, that with a purpose to cause physical harm to another person, the Defendant provoked the encounter; or, two, that the Defendant knew she could retreat from the encounter with Robert Wiezbicki in complete safety; or, three, that the Defendant did not actually believe that Robert Wiezbicki was about to use deadly force against her; or, four, that the Defendant's belief that Robert Wiezbicki was about to use deadly force against her was not objectively reasonable, meaning it was not a belief that a reasonable and prudent person would have in the same situation; or, five, that the Defendant did not actually believe that her use of deadly force was necessary to defend herself; or, six, that the Defendant's belief that her use of deadly force to repel the force used again her by Robert Wiezbicki was not objectively reasonable. Again, meaning it was not a belief that a reasonable and prudent person would have in the same situation. If you find that the State has not proven one of those facts beyond a reasonable doubt, then you must find the Defendant is not guilty of the offense. If you find that the State has proven beyond a reasonable doubt that the Defendant committed Aggravated Assault and that the State has proven beyond a reasonable doubt at least one of those facts that I've just listed for you, then you should find the Defendant guilty of Aggravated Assault." (Tr. T. (vol. 1) at 286-288).

> about to commit a kidnapping, robbery, or gross sexual assault; or a person has entered or is attempting to enter or remain in a dwelling place without permission and use of deadly force is necessary to prevent bodily injury to himself or another in the dwelling; (2) the defendant believes the use of such force is necessary; (3) those beliefs are objectively reasonable; (4) the defendant did not provoke the attack or does not know that the third person he is protecting provoked the attack; and (5) the defendant knows that he or the third person cannot, 'with complete safety,' '[r]etreat from the encounter' (with exceptions), '[s]urrender property to a person asserting a colorable claim of right' to it, or '[c]omply with a demand' from the attacker to 'abstain from performing an act that the [defendant] is not obliged to perform.' 17-A M.R.S. § 108(2).
> State v. Ouellette, 2012 ME 11, ¶ 10, 37 A.3d 921, 926-927 (Me. 2012).

Title 17-A M.R.S. § 108(2)(C)(3)(a) provides for a dwelling place exception to the requirement to retreat. Section 108(2)(C)(3)(a)(emphasis added) states:

> [a] person is justified in using deadly force upon another person. . . However, a person is not justified in using deadly force as provided in paragraph A[26] if. . . [t]he person knows that the person or a 3rd person can, with complete safety. . . [r]etreat from the encounter, **except that the person or the 3rd person is not required to retreat if the person or the 3rd person is in the person's dwelling place and was not the initial aggressor.**

In State v. Laverty, 495 A.2d 831, 833 (Me. 1985) this Court found that it was obvious error not to instruct on the dwelling place exception to the retreat rule. Specifically on co-dwellers' duty to retreat, the following has been established:

> Both parties agree[d] that defendant Laverty was in his 'dwelling

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[26] Paragraph A provides for the self-defense use of deadly force ". . . [w]hen the person reasonably believes it necessary and reasonably believes such other person is: (1) About to use unlawful, deadly force against the person or a 3rd person; or (2) Committing or about to commit a kidnapping, robbery or a violation of section 253, subsection 1, paragraph A, against the person or a 3rd person. . ." Title 17-A M.R.S. § 108(2)(A).

> place' when he stabbed Mark Gilbert, a co-dweller. In a majority of jurisdictions, the 'dwelling place exception' to the retreat rule is applicable even if the assailant is a co-dweller. See, e.g., Davis v. State, 48 Ala.App. 58, 261 So.2d 783, cert. denied 288 Ala. 741, 261 So.2d 785 (1972); Thomas v. State, 266 Ark. 162, 583 S.W.2d 32 (1979); People v. Lenkevich, 394 Mich. 117, 229 N.W.2d 298 (1975); C. Torcia, Wharton's Criminal Law, § 126 at 135 (1981 & Supp. 1984). But see State v. Shaw, 185 Conn. 372, 441 A.2d 561 (1981); State v. Provoid, 110 N.J. Super. 547, 266 A.2d 307 (1970). In at least one state, the Legislature has expressly limited the dwelling place exception to when the assailant is unlawfully in the defendant's dwelling place. See Mass.Gen.Laws Ann. ch. 278, § 8A (West Supp. 1985). Given the clear and unambiguous language of section 108, we conclude that the 'dwelling place exception' to the retreat rule is applicable even if the assailant is lawfully present. Unless the statute itself discloses a contrary intent, the plain meaning of the words controls. State v. Hudson, 470 A.2d 786, 788 (Me. 1984); State v. Vainio, 466 A.2d 471, 474 (Me. 1983). **Thus, a complete instruction negating the duty to retreat in one's own dwelling place was directly relevant**.
> State v. Laverty, 495 A.2d 831, 833 (Me. 1985)(emphasis added).

In State v. Pabon, 2011 ME 100, ¶ 30, 28 A.3d 1147, 1154 (Me. 2011), Pabon argued, and the State conceded, that the trial court's failure to instruct the jury on the dwelling place exception to the duty to retreat was error. However, the majority opinion believed that, in that case, the error did not meet the obvious error standard of review. State v. Pabon, 2011 ME 100, ¶ 39, 28 A.3d 1147, 1156 (Me. 2011). The dissenting justices, however, noted that "both Pabon's substantial rights and the fairness of the proceeding are implicated.. . . [and this Court has] held on many occasions that 'where self-defense is an issue essential to the defendant's case, a failure to so instruct amounts to obvious error because the instructions are

crucial to defendant's receiving a fair trial.'" State v. Pabon, 2011 ME 100, ¶ 42, 28 A.3d 1147, 1156 (Me. 2011). A key factor noted by the dissent in Pabon, and similar to Ms. Bernier's case, is the importance of the self-defense claim to the defendant's case. Id. at ¶ 44, 1157. Ms. Bernier's entire case rested on the notion of self-defense. Additionally, as in Pabon "[t]his is not a case with a minor technical error[, r]ather, the court misstated the law on a central issue in the case. . . ." Id. at ¶ 48, 1158. Particularly under a more favorable standard, when these jury instructions are reviewed, the prejudicial error from failing to properly instruct the jury on self defense is evident.

Additionally, the State highlighted the fact that Ms. Bernier did not retreat from the confrontation inside her home, highlighting this fact to the jury in its cross-examination and closing argument to the jury. In its closing argument the State agued that Ms. Bernier could have essentially retreated from the altercation:

> She became scared because she, in my opinion, and I think that's the evidence, that she wasn't ready to leave. She went, with Robert standing by the stove, and she got a bat. And she didn't get a bat and walk away. She could have walked away. She could have went into a separate room. She could have got into her vehicle. She didn't do any of those things. What she did do was to get that bat and to strike Robert Wiezbicki on the head.
> (Tr. T. (vol. 1) at 298).

When questioning Ms. Bernier, the State also insinuated that Ms. Bernier should have left the altercation, stating

> Q. Okay. So, after hitting him with the bat, you were very scared?

A. I was still scared. Why wouldn't I be? Like —

Q. But you didn't run away. You hit him with the bat and then you didn’t run. You stayed there.

A. Because I just harmed him. I was gonna help him. I'm not gonna run from him.

Q. You harmed him. You testified that you harmed him because you were afraid he was gonna hurt you, so instead you ran — no, you didn't run. You stayed.
. . .

Q. So, after you — you're very scared. You testified that you were scared after you hit him. Somebody who you say has had an — on the past hurt you.

A. Mm-hm.

Q. But you stayed. You didn't run.
. . .

A. He wasn't running at me.

Q. You testified — After I hit him, he didn't chase me, so why would I run? Like, I don't — I really don’t understand what you're trying to say here, I’m sorry.
. . .

A. Yes, I was still scared.

Q. Okay. So, instead of running from somebody who was coming at you, you help him clean up his injury?

A. Yeah.

Q. Okay. Do you have friends and family in the area?

A. Yeah.

Q. Nearby?

A. Not really but, yeah.

Q. Nearby to where Robert was living?

A. Like, 20 minutes.

Q. 20 minutes? Had you ever visited with them when you were with Robert?

A. Yes.

Q. Did they ever pick you up?

A. Yes.
. . .

A. They were on their way to the house while this happened. In the midst of this going down, my children were on their way home.

Q. Okay. They were on their way home?

A. Mm-hm.

Q. You couldn't have called your friends, your family, to have them come and pick you up?

A. I had called my son who was on his way home and we were trying to figure out what we were gonna do. Um, if I can think long enough, I can tell you exactly what was happening really; but we need about 20 minutes, half an hour, for me to think about it.

Q. What I want to know is did you call somebody asking for help?

A. Called my son to see where he was because he was getting violent.

Q. Okay.

A. And he was gonna be my ride because I had I that had no air in it.

I had a tire that was flat and could not go anywheres.
. . .

Q. Did you ask her for a ride to go somewhere else?
(Tr. T. (vol. 1) at 143-145; 149-152).

The idea that Ms. Bernier needed to retreat from the altercation with Mr. Wiezbicki was thus presented to the jury erroneously in the self-defense instruction on the use of deadly force and the State relied on Ms. Bernier's failure retreat as a key theme in proving its case against her. When viewed as a whole, the jury instructions are fatally flawed. The self-defense justification to the assault was central to Ms. Bernier's case. The instructions the trial court gave to the jury failed to properly instruct on the justification. It is impossible to say that Ms. Bernier's case was not affected by the error. The jury was not correctly and fairly informed by the trial court as to all necessary aspects of the governing law. This prejudiced her ability to receive a fair trial and, as such, her case should be remanded for a new trial.

III. There was insufficient evidence to support Ms. Bernier's conviction.

"When reviewing a judgment for sufficiency of the evidence, we view the evidence in the light most favorable to the State [to] determin[e] whether the fact-finder could rationally have found each element of the offense beyond a reasonable doubt." State v. Cummings, 2017 ME 143, ¶ 12, 166 A.3d 996, 999 (Me. 2017) (internal citations and quotations omitted); see also State v. Jeskey, 2016 ME 134, ¶30, ¶ 36 146 A.3d 127, 136-137, 138 (Me. 2016); State v. Saenz, 2016 ME 159, ¶

22, 150 A.3d 331, 335 (Me. 2016); State v. Matson, 2003 ME 34, ¶ 4, 818 A.2d 213, 214-15 (Me. 2003); State v. Ardolino, 1997 ME 141, ¶ 20, 697 A.2d 73, 80 (Me. 1997); State v. Ketchum, 1997 ME 93, ¶ 7, 694 A.2d 916, 917-8 (Me. 1997); State v. Ronan, 551 A.2d 1362, 1364 (Me. 1988); State v. Reardon, 486 A.2d 112, 117 (Me. 1984); State v. Joy, 452 A.2d 408, 411-412 (Me. 1982); State v. Flick, 425 A.2d 167, 169 (Me. 1981); State v. Perfetto, 424 A.2d 1095, 1097 (Me. 1981) (citations omitted)("[i]n reviewing the sufficiency of the evidence to support a verdict, we give due deference to the jury's evaluation of the evidence, resolve all factual questions in favor of the jury's verdict, and then 'determine whether there was credible evidence from which the jury would be justified in believing beyond a reasonable doubt that the defendant was guilty.'"). "The fact-finder is permitted to draw 'all reasonable inferences from the evidence. . .'" State v. Drewry, 2008 ME 76, ¶ 32, 946 A.2d 981, 991 (Me. 2008).

The evidence presented at trial failed to establish all the necessary elements of aggravated assault. Specifically, the evidence failed to establish that the bat used by Ms. Bernier could inflict "a substantial risk" of death or serious bodily injury in the manner it was used. As a result, Ms. Bernier's conviction should be vacated.

Title 17-A M.R.S. § 208(1)(B) provides that a person is guilty of aggravated assault under that section of the aggravated assault statue if that person

"intentionally, knowingly or recklessly causes. . . [b]odily injury to another with use of a dangerous weapon."

The jury was instructed on the definition of "use of a dangerous weapon." (Tr. T. (vol. 1) at 281). The trial court stated that

> a dangerous weapon means the use of a firearm or other weapon, device, instrument, material, or substance, whether animate or inanimate, which in the manner it is used or threatened to be used is capable of producing death or serious bodily injury. Serious bodily injury[27] means bodily injury that creates a substantial risk of death and which causes serious permanent disfigurement or loss or substantial impairment of the function of any bodily member or organ or extended convalescence necessary for the recovery of physical health.
> (Tr. T. (vol. 1) at 281).

The use of the baseball bat, "in the manner it [was] used" was not capable of producing serious bodily injury. Ms. Bernier swung the bat down onto Mr. Wiezbicki's head once. The bat was hollow and aluminum. (Tr. T. (vol. 1) at 56-57, 192). Kids get accidentally hit with these type of bats while playing sports and suffer no serious injuries. Additionally, these types of bats are not deemed inherently dangerous or deadly for kids to use. There was nothing entered into evidence to suggest that Mr. Wiezbicki suffered any substantial impairment or extended convalescence from his head injury. The record is devoid of evidence that establishes that the way in which the bat was used meets the definition of a dangerous weapon. There is no evidence to establish that the bat could produce death or serious bodily injury in the manner that it was used.

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[27] See Title 17-A M.R.S. § 2(23).

As such, the evidence at trial failed to establish the all elements necessary to prove that an aggravated assault occurred and therefore there is insufficient evidence to support Ms. Bernier's conviction.

Conclusion

For the above-reasons, the Appellant asks this Court vacate her conviction and remand her case to the Aroostook County Courts for further proceedings.

Dated: June 13, 2024

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Certificate of Service

I, Jeremy Pratt, Esquire, hereby certify that on this date I mailed via the U.S. postal service, first class mail, two copies of the foregoing Brief of Appellant to John Inglis, Esq., Aroostook County District Attorney's Office, 144 Sweden Street, Caribou, ME 04936-2353.

Dated: June 13, 2024 _____/s/ Jeremy Pratt_____
Jeremy Pratt, Esquire