MAINE SUPREME JUDICIAL COURT

SITTING AS THE LAW COURT

Law Court Docket No. Aro-24-207

State of Maine

v.

Heath Demerchant

On Appeal from the Unified Criminal Docket (Aroostook County)

Brief of Appellant
Heath Demerchant

KURT C. PETERSON
Maine Bar No. 6235
Attorney for Appellant
McKee Morgan, LLC, P.A.
133 State Street
Augusta, Maine 04330
(207) 620-8294
kpeterson@mckeemorgan.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes/Rules

Secondary Sources

STATEMENT OF FACTS

The following statement of facts derives from the evidence admitted at trial and the procedural record.

Heath Demerchant ("Demerchant") was charged by a two-count Indictment dated June 8, 2023, with Aggravated Assault (Class B), *see* 17-A M.R.S. § 208-D(1)(D), and Domestic Violence Assault (Class C), *see* 17-A M.R.S. § 207-A(1)(B)(1). (A. 13.) The named victim was Demerchant's ex-wife, Melissa Demerchant ("M.D."). (A. 13.) According to the Indictment, the alleged assault occurred on May 9, 2023, in Presque Isle, Maine. (A. 13.) A two-day jury trial was held on April 17, 2024, and April 18, 2024. (A. 7.) At the outset of the trial, the State dismissed the Aggravated Assault charge because of "insufficient evidence" and proceeded on two felony counts: Domestic Violence Assault and Assault. (Tr. 3 (Apr. 17, 2024).[1])

Demerchant and M.D. were married for approximately five and a half years before getting divorced following the date at issue in this case, May 9, 2023. (Day 1 Tr. 125-126, 221.) Back in May 2023, M.D. and Demerchant lived together in an apartment complex in Presque Isle. (Day 1 Tr. 125, 127.) M.D. and Demerchant

[1]Hereinafter referred to as "Day 1 Tr." The trial transcript of April 18, 2024, is referred hereinafter as "Day 2 Tr."

lived across the street from a neighbor, and, at least for M.D.'s part, friend, Russell Delong ("Delong"). (Day 1 Tr. 85, 113-115, 127.)

On May 9, 2023, Demerchant, Delong, and M.D.'s minor child went to a parking lot near the Second Chances Thrift Store in Presque Isle in order to work on Delong's truck, which needed repair. (Day 1 Tr. 87-88.) Demerchant knew that they could work on Delong's truck in this parking lot because his cousin lived there and his cousin had told him it would be OK to work on Delong's vehicle there. (Day 1 Tr. 231.) Prior to leaving his and M.D.'s apartment to go to this parking lot to work on Delong's truck, M.D. gave her debit card to Demerchant to buy food for her child. (Day 1 Tr. 87-88, 129-130, 230.)

Demerchant went to visit his cousin who lived at the apartment complex by this parking lot, and eventually, he came back and they started to work on Delong's truck. (Day 1 Tr. 90.) M.D. was reaching out by phone to Demerchant, Delong, and her son for over an hour, but she did not get in contact with any of them until she spoke with Demerchant on her son's phone. (Day 1 Tr. 131.) Little did M.D. know at the time, but Demerchant had given her debit card to another woman, Tanika. (Day 1 Tr. 90, 102.)

Demerchant left Delong and M.D.'s son at the parking lot a second time, but this time he did not come back. (Day 1 Tr. 91.) Demerchant has a history of

substance abuse and there was a concern that Demerchant was acquiring and/or using drugs. (Day 1 Tr. 106, 116-117, 177, 186.)

Delong and M.D.'s son waited for Demerchant for a while in the parking lot, but Delong was unable to get in contact with Demerchant, so he left with M.D.'s son and took him home to his mother. (Day 1 Tr. 91-92.) After arriving back at M.D.'s apartment, Delong offered to drive M.D. back to the parking lot where they were working on his truck and where Demerchant was last seen. (Day 1 Tr. 132-133.) Delong and M.D. still were having difficulty finding Demerchant. (Day 1 Tr. 93-95.) Delong and M.D. went to the apartment building where Demerchant's cousin resided and M.D. began "banging" on doors within the apartment complex trying to locate Demerchant. (Day 1 Tr. 133, 178.) M.D. was upset, nervous, and angry at Demerchant and suspected that he was using drugs. (Day 1 Tr. 178-179.)

M.D. found Demerchant at his cousin's apartment. (Day 1 Tr. 178-179.) An argument ensued between M.D. and Demerchant outside of his cousin's apartment about him being there and about the location of her debit card. (Day 1 Tr. 134-136.) Concerned that there would be a confrontation between M.D. and Demerchant's cousin, Demerchant stood in the doorway to prevent M.D. from entering and he, M.D., and Delong left the apartment building and went outside. (Day 1 Tr. 134-136, 237-238.)

Eva Kirk, a property manager in the Presque Isle area, was at the Second Chances Thrift Shop (one of her tenants) and heard a "lot of hollering and screaming" and obscenities prompting her and the owner of Second Chances Thrift Shop, Sherri Theriault, to look out the store's back window. (Day 1 Tr. 54, 72-75.) Eva Kirk was the one who called the police, but neither of these individuals was interviewed until long after the investigation was over in January 2024. (Day 1 Tr. 68, 81.) Sherri Theriault, who knew M.D., testified that she did not see any contact and that her and Eva Kirk's perception of the event would have been the same. (Day 1 Tr. 77-81.)

Demerchant testified that he tried to calm M.D. down when they got outside of the apartment building, but Tanika—who had M.D.'s debit card—was approaching them and that M.D. started to "freak out" and threatened to Demerchant: "wait until she gets over here." (Day 1 Tr. 239-240.) M.D. ran after Tanika but he stepped in front of her, put his hands on M.D., and grabbed her jacket to avoid M.D. from attacking Tanika, who appeared fearful of M.D. (Day 1 Tr. 240-241.) Demerchant went around the building to get the card from Tanika and then came back to the other side of the building where police were already on scene. (Day 1 Tr. 242.) Demerchant was arrested by police. (Day 1 Tr. 242.)

On the second day of trial, after all of the evidence had been admitted and prior to closing arguments, the defense requested that the jury be instructed on the

competing harms defense pursuant to 17-A M.R.S. § 103. The trial court declined this request, explaining:

> the case law is pretty clear, and it's got to be more than simply that the defendant's subjective belief that, that there were competing harms or that there was risk of imminent physical harm to another. There was insufficient evidence to establish as a fact that there was any imminent risk to her at the hallway. Maybe, in the light most favorable to the Defense, maybe unwelcome, but really the only evidence was the only person who demonstrated any level that she was unwelcome in that situation was Mr. Demerchant. And so to the extent it was him creating the circumstances, it simply doesn't apply to that set of circumstances.
>
> It's a closer call as it relates the story relates to the credit card and the person coming back. . . . I believe Mr. Demerchant's testimony was that he contended that Melissa Demerchant was . . . either was or did take off or headed in the direction, um, to, in the light most favorable to him, accost the holder of the credit card. Um, and, again, that's in the light most favorable to the defense. And so that's – – that's a closer call.
>
> . . . .
>
> Unlike sticking your hand or pulling someone away who's throwing a punch or something like that, um, the Court's view of the evidence as a whole, even in the light most favorable to Mr. Demerchant, um, is such that it — it doesn't appear to the court that — because it's got to be imminent physical harm that is about to occur, which is a leap, that would change a person's physical condition adversely. Even taking statements, the hearsay statements, even if you were to consider those, that she was upset about the credit card . . . the person's a distance away, even as noted by the Defense, moving further away, um, and so it just — the courts just not satisfied that that was sufficiently generated, um, to justify the instruction. So, the request is denied

(A.14-19; Day 2 Tr. 6-10.)

Subsequently, the parties gave closing summations, at which time the State noted during rebuttal:

> There is no lawful justification for what Heath did. Even under his version of events, that wasn't – that wasn't a privileged or licensed, um, contact. There is no defense that exists in the law for him to have grabbed her to stop her from going to get this debit card from the woman. That's – that's just not a thing. When you review the Court's jury instructions, you're not gonna see that instruction in there, that he's got a justification, um, to have done that.

(Day 2 Tr. 45.)

The jury found Demerchant guilty of Domestic Violence Assault, (Day 2 Tr. 62), and Demerchant was sentenced to five years imprisonment, all but three suspended, with a four-year term of probation, (A. 10-11.) This timely appeal followed.

ISSUES PRESENTED FOR REVIEW

1. Whether the trial court erred by declining Demerchant's request to instruct the jury on the competing harms justification.

STANDARD OF REVIEW

When a defendant properly preserves an objection to a trial court's jury instructions, this court will review the jury instructions of the trial court in their entirety to determine whether they fairly and correctly apprise the jury in all necessary respects of the governing law. Alexander, *Maine Appellate Practice* § 422 at 271 (6th ed. 2022). This court's review considers "the total effect created by

all of the instructions and the potential for juror misunderstanding." *Id*. (quotation marks omitted). "The appellant has the burden to demonstrate that an erroneous instruction affected the jury's verdict." *Id.* "When a party has requested a particular jury instruction, or particular wording in instruction that party waives its capacity to challenge the jury instruction or warning on appeal." *Id*.

> For the law Court to vacate a judgment based on a denied request for a jury instruction, the appellant must demonstrate that the requested instruction (1) stated the law correctly; (2) was generated by the evidence; (3) was not misleading or confusing; (4) was not sufficiently covered in the instructions the court gave, and (5) the refusal to give the requested instruction was prejudicial to the requesting party.

Id. at 272.

In determining whether the facts at trial put a statutory justification at issue, the trial court must consider the evidence in the light most favorable to the defendant," which can derive from the evidence admitted by the defendant or the prosecution as the "source of the evidence makes no difference." *State v. Soule,* 2001 ME 42, ¶ 11, 767 A.2d 316. "Once a justification is placed at issue as a result of evidence presented at trial, the state must disprove its existence beyond a reasonable doubt." *Id*. (quotation marks omitted).

SUMMARY OF ARGUMENT

There is no question that Demerchant made physical contact with M.D. on May 9, 2023. That is not being challenged on appeal and Demerchant did not challenge this fact in his testimony at trial on April 17, 2024. On April 18, 2024,

trial counsel for Demerchant filed a memorandum of law requesting that the jury be instructed on the competing harms justification. (A. 20-22.) The trial court denied this request, finding that it was not generated by the evidence, and it declined to instruct the jury with Demerchant's proposed competing harms jury instruction. The trial court committed error by finding insufficient evidence to generate this issue and reasoning that there must be more than just the defendant's subjective belief and the defendant's testimony to generate the issue. Contrary to the trial court's reasoning, the source of the evidence is not dispositive and a defendant's testimony alone can be sufficient to generate the competing harms justification. Further, the trial court's characterization of Demerchant's testimony as being concerned that M.D. would "accost" Tanika is inconsistent with the record.

Because the evidence generated the issue, the jury should have been instructed on the competing harms justification to fairly and properly decide the case. For this reason, the conviction must be vacated and this matter should be remanded for a new trial.

ARGUMENT

I. Trial Court's Failure to Instruct the Jury on the Competing Harms Defense.

> The State is not required to negate any facts expressly designated as a 'defense,' or any exception, exclusion or authorization that is set out in the statute defining the crime by proof at trial, *unless the existence of the defense, exception, exclusion or authorization is in issue as a result of evidence admitted at the trial that is sufficient to raise a reasonable*

> *doubt on the issue,* in which case the State must disprove its existence beyond a reasonable doubt.

17-A M.R.S. § 101(1) (emphasis added). 17-A M.R.S. § 103(1)-(2) provides the statutory framework for the competing harms justification:

> 1. Conduct that the person believes to be necessary to avoid imminent physical harm to that person or another is justifiable if the desirability and urgency of avoiding such harm outweigh, according to ordinary standards of reasonableness, the harm sought to be prevented by the statute defining the crime charged. The desirability and urgency of such conduct may not rest upon considerations pertaining to the morality and advisability of such statute.
>
> 2. When the person was reckless or criminally negligent in bringing about the circumstances requiring a choice of harms or in appraising the necessity of the person's conduct, the justification provided in subsection 1 does not apply in a prosecution for any crime for which recklessness or criminal negligence, as the case may be, suffices to establish criminal liability.

This Court has explained that there are four elements of the competing harms justification:

> (1) the defendant or another person must be threatened with imminent physical harm, when viewed objectively;
>
> (2) the present conduct must be for the purpose of preventing a greater harm, or stated another way, the urgency of the present harm must outweigh the harm that the violated statute seeks to prevent;
>
> (3) the defendant must subjectively believe that his conduct is necessary; and
>
> (4) the defendant must have no reasonable, legal alternatives to the conduct."

State v. Nobles, 2018 ME 26, ¶ 32, 179 A.3d 910 (quotation marks omitted).

"A defendant is entitled to an instruction when he can point to the existence of evidence sufficient to make the existence of all the facts constituting the defense a reasonable hypothesis for the factfinder to entertain." *Soule,* 2001 ME 42, ¶ 10, 767 A.2d 316. "In order to generate the defense there must be evidence that the defendant's conduct was necessary because of a specific and imminent threat of injury to the defendant or another leaving no reasonable alternative other than violating the law." *State v. Moore,* 577 A.2d 348 (Me. 1990). "The 'competing harms' defense, however, is not generated merely because a defendant subjectively believes that a threat of imminent physical harm to person or property exists. Rather, the evidence must demonstrate 'as a fact' that physical harm was imminently threatened." *Id.* ¶ 10 (cleaned up).

If the competing harms instruction is generated, and issued by the trial court, then the State has the burden of persuasion to disprove the competing harms justification beyond a reasonable doubt. *State v. Ouellette,* 2012 ME 11, ¶ 8, 37 A.3d 921.

Other jurisdictions refer to the competing harms justification as the defense of necessity. At the root of these defenses is "an appreciation that there may be circumstances where the value protected by the law is, as a matter of public policy, eclipsed by a superseding value." *Commonwealth v. Kendall,* 883 N.E.2d 269 (Mass. 2008). The Supreme Court of the United States has similarly explained that

this defense is "designed to spare a person from punishment if he acted under threats or conditions that a person of ordinary firmness would have been unable to resist, or if he reasonably believed that criminal action was necessary to avoid a harm more serious than that sought to be prevented by the statute defining the offense." *U.S. v. Bailey,* 444 U.S. 394 (1980) (quotation marks omitted). "In other words, a necessity defense is sustainable only when a comparison of the competing harms in specific circumstances clearly favors excusing the defendant's conduct." *Commonwealth v. Pike,* 701 N.E.2d 951 (Mass. 1998) (cleaned up).

In *State v. Collins,* this Court vacated a conviction of criminal trespass and held that it was an error for the trial court to refuse the defendant's request that the jury be instructed as to the competing harms defense. 544 A.2d 312, 314 (Me. 1988). There, several men went to an apartment to request that the owner's brother case make harassing phone calls to their apartment. *See id.* 313. The occupants of the apartment, however, did not answer them and so two of the men turned to leave—including Stephen Plourde ("Plourde"). *See id*. However, one of the men proceeded to force open the apartment door and began to punch one of the occupants inside the apartment. *See id*. Plourde continued to walk away from the apartment, but then ran back into the apartment from the hallway and yelled at the man to stop, grabbed him by the arm, and pulled him out of the apartment. *See id*. In a jointly-held criminal trial against Ploude and another defendant who was there, Jon Collins, the

trial court refused to instruct the jury on the competing harms justification as to either defendant. The Law Court held that was an error, but only with respect to Plourde, reasoning: "the evidence suggests that he entered the apartment to stop Bulley from beating Stephen Clark. We find that, applying ordinary standards of reasonableness, a jury could rationally conclude that his conduct was justified by the desirability and urgency of avoiding imminent physical harm to others." *Id*. at 314. (quotation marks omitted).

Here, Demerchant did not wait for a beating to commence. Instead, there is evidence in the record that he took action to prevent this from happening in the first place. A loud argument was taking place outside of the Second Chances Thrift Shop—so loud that it attracted the attention of two individuals who were inside the store, Eva Kirk and Sherri Theriault. This occurred after an incident inside Demerchant's cousin's apartment building where M.D. began "banging" on apartment doors looking for Demerchant, who had been missing with her debit card for a long period of time. Still upset and arguing about the location of her debit card, M.D. and Demerchant went outside of the apartment building where the heated argument continued. Witnesses testified and M.D. testified that she was angry with Demerchant and that she was concerned and arguing about her debit card. This evidence did not come only from Demerchant but stemmed collectively from the testimony of Eva Kirk, Sherrit Theriault, Delong, and M.D.

Couple this evidence with the testimony of Demerchant, who testified that when M.D. got to his cousin's apartment she was "throwing a fit," "jumping up and down, screaming" and "calling everybody names" while trying to get into the apartment. (Day 1 Tr. 236.) In an attempt to keep M.D. out of a "dangerous" apartment and situation, he stood in front of the doorway and was able to get outside with M.D. (Day 1 Tr. 236-238.) Demerchant testified that M.D. wanted his phone and he did not give it to her. (Day 1 Tr. 238-239.) Demerchant was "nervously" waiting for Tanika to return with M.D.'s card and then:

> We all look down by Steaks 'N Stuff, and all three of us see her at the same time. And, oh, my God, Melissa's freaking out. . . . Yelling at me, telling me that she's gonna go after her, and that must be your girl, that must be your girl. Any girl that's around me, she thinks it's my girl. So, she's jumping up and down and calling everybody names and she's like, wait until she gets over here, wait until she gets over here. . . . Well, when she starts to walk down the alleyway in between the store and the apartment building, when she come down, Melissa was gonna go after her. . . . Because she ran for her . . . . I step in front of her. I put my hands right here. . . . Above her breasts and, like, I had to grab her jacket because she was this way, that way, you know what I mean? . . . . She's about to assault this girl. . . . The woman with the card. She wouldn't even come close to Melissa because of the way Melissa was acting. So, she goes back up the alleyway. She walks round the corner to go to [my cousin's]. I'm asking her for the card while I'm – I'm trying to hold Melissa off. She wouldn't even give it to me, she was so scared.

(Day 1 Tr. 239-242.)

"There is no question that under section 103 a defendant *must hold a subjective belief that his conduct is necessary to prevent the physical harm*." *State*

v. Nadeau, 2007 ME 57, ¶ 20, 920 A.2d 452. Here, that is plainly the case given Demercahnt's testimony. Demerchant's conduct in standing in the doorway to prevent M.D. from entering his cousin's apartment and physically restraining M.D. was done for the purpose of preventing a greater harm; namely, an assault on Tanika. The urgency of the harm that threatened Tanika does not only stem from Demerchant's testimony but should be considered in light of the other testimony that demonstrates M.D.'s emotional state and anger toward Demerchant and her missing debit card.

Contrary to the trial court's ruling, the evidence admitted at trial sufficiently generated the competing harms defense and the jury should have been instructed on this issue. The evidence generated was not a mere concern about M.D. "accosting" Tanika—it was far more significant than the trial court's downplayed characterization. Moreover, the trial court's misplaced reliance on the source of the testimony was erroneous. *See Soule,* 2001 ME 42, ¶ 11, 767 A.2d 316 ("The trial court must consider the evidence in the light most favorable to the defendant," which can derive from the evidence admitted by the defendant or the prosecution as the "*source of the evidence makes no difference*." (emphasis added)); *State v. Wilder,* 2000 ME 32, ¶ 23, 748 A.2d 444 ("The source of the evidence makes no difference, either side may introduce evidence which generates a justification. Thus, although Wilder did not testify, his son's testimony could put sufficient facts in evidence to

place the section 106(1) justification at issue in the trial."); *see also Miller v. State,* 815 S.W.2d 582, 585 (Tex. 1991) (holding that a defendant's testimony alone is sufficient to raise a defensive issue requiring instruction in the jury charge); *State v. Hudgins,* 606 S.Ed.2d 443 (N.C. 2005) ("The fact that defendant and Maney were themselves safely out of harm's way, as the State argues, is irrelevant if the jury believed that defendant's actions were necessary to protect others.").

CONCLUSION

The trial in the present case involved a lot of contradictory testimony from various witnesses' recollections about what happened on May 9, 2023. We rely on juries to sift through these inconsistencies, make factual findings, and then to apply their findings to the law they are provided by the trial court. But a jury left without a critical legal instruction on a defense that was generated by the evidence at trial leaves us without answers. It is impossible to know whether the jury believed that Demerchant's application of physical force on M.D. was necessary because of a specific and imminent threat of injury to the Tanika leaving no reasonable alternative to Demerchant other than violating the law by committing offensive physical contact and restraining M.D.

Demerechant's testimony, and the testimony from other witnesses, generated the competing harms defense, but the trial court erred by refusing to instruct the jury on the defense based on a misapplication of law and by understating the evidence

about the threat of imminent physical harm to Tanika. For these reasons, the Appellant, Heath Demerchant, respectfully requests this Court vacate the conviction in this matter and remand for a new jury trial.

Date: 08/12/2024

KURT C. PETERSON
Maine Bar No. 6235
Attorney for Appellant
McKee Morgan, LLC, P.A.
133 State Street
Augusta, Maine 04330
(207) 620-8294
kpeterson@mckeemorgan.com

CERTIFICATE OF SERVICE

I, Kurt C. Peterson, Attorney for the Appellant, Heath Demerchant, hereby certify that this appellate brief was filed and that the service requirements were complied with by copying opposing counsel on the email and hand-delivered filing with the Court.

Date: 08/12/2024

KURT C. PETERSON
Attorney for Appellant
Maine Bar No. 6235
McKee Morgan, LLC, P.A.
133 State Street
Augusta, Maine 04330
(207) 620-8294
kpeterson@mckeemorgan.com