STATE OF MAINE
AROOSTOOK, ss.

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
LAW DOCKET NO. ARO-24-207

STATE OF MAINE
APPELLEE

v.

HEATH DEMERCHANT
APPELLANT

ON APPEAL FROM UNIFIED CRIMINAL COURT, AROOSTOOK COUNTY

** BRIEF OF APPELLEE**

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RELEVANT FACTS AND PROCEDURE

On June 8, 2023, Appellant was indicted for the offense of Domestic Violence Assault "with priors" (17-A M.R.S.A. § 207(1)(B)(1))[1] and the case was tried before a jury over April 17 and 18, 2024. (A. 9, 13.) During that trial, the State introduced the testimony of six witnesses along with four exhibits. (1 TTr 2.) The defense introduced Defendant's testimony.[2] (1 TTr. 2.)

Following the presentation of evidence and instruction by the Court, the jury found Appellant guilty. (A. 9.) On April 18, 2024, the Court sentenced Appellant to the Department of Corrections for five years with all but three years suspended followed by four years of probation. (A. 12-14.)

The victim, Melissa Demerchant (hereafter Melissa), testified that she was Appellant's wife at the time of the offense. (1 TTr. 127:9-11.) Melissa testified that she allowed Appellant to use her debit card on the day of the offense. (1 TTr. 129:11-23.) Melissa testified that she believed Appellant was taking her son to McDonald's. (1 TTr. 130:9-11.) Melissa testified that Appellant and her son had been gone for hours. (1 TTr. 130:12-14.) Melissa testified that she had been attempting to reach

[1] Appellant was indicted with other offenses in addition to Domestic Violence Assault that were dismissed prior to trial and not relevant to this appeal. (A. 9, 13.)

[2] In addition to Appellant's testimony, the defense published to the jury a handful of photos depicting the alleyway, streets, and buildings where these events were alleged to have occurred. (1 TTr 63:20-23.) At least one witness was questioned about these photos (1 TTr. 64-67) and Appellant referenced the photos in his testimony (1 TTr 241:20-22), but they were never marked and never offered as exhibits, (1 TTr 253:12-21.)

them by phone and had been tracking her son's location through their phones. (1 TTr. 130:15-23.) Melissa testified that eventually her son returned home with her friend Russell Delong (hereafter Delong) who had accompanied Appellant and her son. (1 TTr. 132:1-9.) Melissa testified that Delong and her son returned without her debit card. (1 TTr. 19-20.) Melissa testified that she and Delong traveled to the approximate location where they believed Appellant was and began looking for Appellant at an apartment until they found him. (1 TTr. 133:1-12.) Melissa testified that she and Appellant were upset with one another and were speaking in raised voices. (1 TTr. 135:5-10.) Melissa testified that she was concerned about her debit card. (1 TTr. 136:4-8.) Melissa testified that their argument escalated to physicality. (1 TTr. 137:18-24.) Melissa testified that Appellant had grabbed her while they were inside of the apartment building. (1 TTr. 138:3-12.) Melissa testified that Appellant became physical again once on State Street when he cinched her jacket up around her neck and pulled her into him. (1 TTr. 138:18-25, 139:1-15.) Melissa testified that she asked for help because she was scared of what could happen to her. (1 TTr. 140:17-24.) Melissa testified that after letting her go Appellant tried to hug her to calm her down. (1 TTr. 141:12-16.) Melissa testified that a female came down the alley and Melissa learned that this female had her debit card and had taken it to an ATM machine. (1 TTr. 141:18-23.) Melissa obtained her card back and she left with

Delong. (1 TTr. 141:24-25, 142:1-4.) Melissa testified that before they could return home, they were intercepted by police responding to the incident. (1 TTr. 142:5-9.)

Officer Miranda Varnum (hereafter Officer Varnum) of the Presque Isle Police Department testified that she responded to a report of an assault involving Appellant and Melissa. (1 TTr. 196:1-7.) Officer Varnum testified that she photographed an apparent injury to Melissa's throat during the course of Officer Varnum's response to the incident. (1 TTr. 202:14-25, 203:1-12.) Officer Varnum testified that Appellant denied hitting Melissa but admitted having grabbed her by the jacket. (1 TTr. 204:24-25.)

officer Samuel Fuller (hereafter Officer Fuller) of the Presque Isle Police Department testified that he participated in the response to the report of this assault. (1 TTr. 214:7-13.) Officer Fuller testified that during his participation in the investigation he observed injuries to Melissa neck just above her collar bone. (1 TTr. 217:12-20.)

Eva Kirk (hereafter Kirk) testified she manages some buildings in downtown Presque Isle. (1 TTr. 50:14:22.) Kirk testified that during May of 2023 she was present at one of the buildings she managed and hollering and screaming. (1 TTr. 54:3-5.) Kirk said she went to the window and was able to see two men and a woman. (1 TTr. 54:6-7.) Kirk testified that she had never met any of these people before. (1 TTr. 54:17-22.) Kirk testified that one of those two men had a woman

backed up against a car and was screaming at her and pushed her several times. (1 TTr. 55:8-13, 55:20-25, 56:1-4.) Kirk testified that she called the police while was perceiving the altercation.[3] (1 TTr. 9-11.) Kirk identified Defendant in the courtroom as the man she had seen assault the female. (1 TTr. 59:11-19.)

Sherri Theriault (hereafter Theriault) testified that she owns the "Second Chances" thrift store on State Street in Presque Isle. (1 TTr. 72:9-11.) Theriault testified that she was present with Kirk when Kirk called the police during May of 2023. (1 TTr. 74:4-16.) Theriault testified that she could hear arguing and that she looked down the alley to see what was happening. (1 TTr. 74:23-25, 75:1-2.) Theriault testified that she saw two males and a female. (1 TTr. 75:20-23, 76:21-22.) Theriault testified that she had never met the males before but recognized the female as "Melissa" who Theriault knew to be a friend of one of Theriault's friends. (1 TTr. 76:23-25, 77:1-15.) Theriault identified Appellant as one of the two males who had been present. (1 TTr. 78:7-23.) Theriault testified that during the altercation Appellant had his back to her and she was unable to see Appellant make physical contact with Melissa but saw Appellant reach for Melissa and saw Melissa's hands go up. (1 TTr. 74:20-25, 75:1, 80:8-9.) Theriault testified that Appellant was reaching for Melissa's throat. (1 TTr. 81:22-24.)

[3] This call was admitted as State's Exhibit 4.

Delong testified that he knew both Appellant and Melissa. (1 TTr. 85:4-16.) Delong testified that during May of 2023, he went with Appellant and Melissa's son to the area near "Second Chances" thrift store to work on Delong's truck. 87:10-16, 87:23-25, 88:1-3, 88:11-15.) Delong testified that Appellant had given Melissa's debit card to a female named Tanika. (1 TTr. 90:4-7.) Delong testified that at some point Appellant left Delong and Melissa's son and went to an apartment and did not return. (1 TTr. 90:20-25, 91:18-22.) Delong testified that he took Melissa's son home after a while. (1 TTr. 92:17-20.) Delong testified that he took Melissa back to find Appellant. (1 TTr. 93:6-7.) Delong testified that after they located Appellant, Appellant and Melissa were angry with each other. (1 TTr. 96:21-25.) Delong testified that the argument between Appellant and Melissa escalated to the point of physicality. (1 TTr. 99:7-10.) Delong testified that it started at the top of the stairs while in the apartment building. (1 TTr. 99:17-25, 100:1-2.) Delong testified that after they had left the apartment and returned to State Street that Delong saw Appellant grab Melissa by the throat. (1 TTr. 100:11-24.) Delong testified that after Appellant released Melissa, Melissa and Delong returned to Delong's truck and Appellant followed them. (1 TTr. 102:3-14.) Delong testified that Appellant them went to get Melissa's debit card from the female he had given it the card to. (1 TTr. 102:15-18.)

Following the presentation of the State's case, Appellant moved for a judgment of acquittal and that motion was denied. (1 TTr. 223:23-25, 224:1-25, 225:1-11.) Then Appellant elected to testify. (1 TTr. 226:13-19.)

Appellant testified that he, Delong, and Melissa's son went to work on Delong's truck. (1 TTr. 230:5-7.) The work was being done behind Appellant's cousin Kurt's apartment in a parking lot. (1 TTr. 231:18-24.) Appellant testified that Melissa gave Appellant her debit card to get Dunkin' Donuts or McDonald's for her son. (1 TTr 230:14-22, 231:2-6.) Appellant testified that while they were working on the truck, Melissa kept trying to call because she was nervous about her debit card. (1 TTr. 232:4-8.) Appellant testified that Melissa was likely upset that Appellant was at his cousin Kurt's residence and "using." (1 TTr. 232:16-17.) Appellant testified that he needed someone to go to the store for him so that work on the truck could continue and so he gave the card to a female that "Kurt verified" and who "seemed like the most sober one in the house." (1 TTr. 233:12-25.) Appellant testified that Delong and Melissa's son had left and he found his phone had been shut off. (1 TTr. 235:5-9.) Appellant testified that based upon those circumstances he believed Melissa would arrive soon and so Appellant went back to his cousin Kurt's apartment. (1 TTr. 235:18-21.) Appellant testified that Melissa eventually appeared at the apartment and she was upset, screaming, calling people names, and trying to go inside. (1 TTr. 236:3-18.) Appellant testified that he

believed it was dangerous inside the apartment and that Melissa "had never been part of that world." (1 TTr. 236:20-225, 237:1-2.) Appellant testified that he stood in front of the door and grabbed Melissa's jacket to keep her from entering the apartment. (1 TTr. 237:10-15.) Appellant testified that they then left and Melissa continued to be upset. (1 TTr. 238:3-14.) Appellant testified that Melissa wanted his phone so he threw it against a store, but that the phone did not break. (1 TTr. 238:18-23.) Appellant testified that he was nervously waiting for the female with Melissa's debit card to return and they can see this female near a local grocery store. (1 TTr. 239:23-25.) Appellant testifies that Melissa is still upset and saying that she's going to "go after" this girl. (1 TTr. 240:4-5.) Appellant says that when this female started to enter the alleyway Melissa was "gonna go after her." (1 TTr. 240:12-15.) Appellant testified that Melissa "ran for her" and that stepped in front of Melissa." (1 TTr. 240:17-20.) Appellant testified that he put his hands on Melissa's chest and grabbed her jacket. (1 TTr. 240:19-24.) Appellant testified that this woman then went back up the alleyway and "wouldn't even come close to Melissa because of the way Melissa was acting." (1 TTr. 241:11-13.) Appellant described the female as running away. (1 TTr. 241:24-25.) Appellant conceded that physical contact between he and Melissa had occurred, but then attributed that contact to his efforts to (1) protecting Melissa from going into his cousin Kurt's

apartment and (2) protect Melissa from getting in trouble for what she might have done to the female with the debit card. (1 TTr. 247:25, 248:1-13.)

The defense rested following the presentation of Appellant's testimony and the jury was dismissed for the day. (1 TTr. 249:10, 254:19-21.)

On the morning of the second day of trial, Appellant submitted a written motion seeking an instruction on a competing harms defense. (A. 20-21.) The Court denied that motion on the basis that, viewing the evidence presented in the light most favorable to Appellant, there was no evidence that could support a finding physical harm was imminent. (2 TTr. 9:21-25, 1-11.)

ISSUE

Whether the Court correctly determined that the evidence presented did not support a competing harms instruction.

ARGUMENT

A. Standard of Review

"Whether a jury should be instructed on a particular defense in a criminal case almost always depends on whether the evidence presented at trial generates the defense." *State v. Neild*, 2006 ME 91, ¶ 9 (Quoting *State v. Christen*, 1997 ME 213, ¶ 4). The evidence presented generates that defense when "the evidence is sufficient to make the existence of all the facts constituting the defense a reasonable hypothesis for the factfinder to entertain." *State v. Gagnier*, 2015 ME 115, ¶ 2 (Quoting *State v. Doyon*, 1999 ME 185, ¶ 7). The Law Court reviews the "record in the light most

favorable to the defendant to determine whether the evidence generates a particular defense." *State v. Lacourse*, 2017 ME 75, ¶ 12.

B. The evidence presented did not generate a competing harms defense

"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." *Nadeau*, 2007 ME 57, ¶ 13 (Citations and quotation marks omitted). Further, the defense is unavailable when a defendant recklessly or with criminal negligence brings about the circumstance creating that competition between harms.

> **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.

17-A M.R.S.A. § 103. The defense is similarly unavailable when a defendant intentionally or knowingly brings about the circumstance creating the competition between harms. 17-A M.R.S.A. § 34(3); *see also State v. Heffron*, 2018 ME 102, ¶7 n. 7.

The physical harm contemplated by 17-A M.R.S.A. § 103 must be "specific and imminent." *State v. Case*, 672 A.2d 586, 589 (Me. 1996); *see also State v. Moore*, 577 A.2d 348, 350 (Me. 1990) ("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.") (emphasis added).

The fact patter of the trial generated two occasions where Appellant's conduct could have constituted an assault: (1) at the entry way of Appellant's cousin's apartment and (2) in the alley way when the female with Melissa's debit card reappeared. Appellant testified that Melissa was upset throughout the time she was present at the apartment and in the alley, but a person's upsettedness alone does not support an inference that violence by that person is imminent. *State v. Forbes*, 2003 ME 106, ¶ 16.

Appellant testified that Melissa was upset while at the entry way of his cousin's apartment and that it was dangerous inside. Appellant had alluded to drug use within the apartment. It is not clear whether Appellant was concerned about the

physical harm Melissa may cause or the physical harm that may occur to her. Appellant testified that his intention was to protect Melissa from going into the apartment. (1 TTr. 247:25.) Those circumstances do not support an inference that physical harm would be imminently caused by Melissa or visited upon Melissa by another person.

Appellant testified that he subjectively believed Melissa was going to assault the female who Appellant had given Melissa's debit card. (1 TTr. 241:4.) Appellant also testified that this female never "even come close to Melissa". (1 TTr. 241:11-12.) Viewing the evidence presented in the light most favorable to Appellant, physical harm was not possible unless or until Melissa closed the physical space between herself and the female who had her debit card, which never happened. The suggestion that Melissa would have become violent is purely speculative, but that speculative violence was never actually possible which prevents it from ever having been imminent. The Court correctly denied the requested instruction upon that basis.

The Court never addressed whether Appellant was reckless or criminally negligent in bringing about the circumstances that created this competition of harms. Viewing the evidence presented in the light most favorable to him, he clearly did. An upset response is sometimes the most predictable response. The evidence presented, viewed in a light most favorable to Appellant, is that Appellant visited an apartment that he knew to be dangerous because of illegal drug use while Appellant

had Melissa's son in his care and then Appellant gave Melissa's debit card to the apartment's "most sober" occupant despite only having had permission to use that debit card to buy Melissa's child McDonalds. Melissa's upsettedness at these circumstances was reasonable. If Melissa had used physical force to regain possession of her debit card, that would have also been reasonable. *See* 17-A M.R.S.A. § 105. Viewing the evidence presented in the light most favorable to Appellant, Appellant was at least reckless in bringing upon the circumstances necessitating his choice between harms. Consequently, the defense of competing harms is not available to Appellant.

CONCLUSION

For the foregoing reasons, Appellant conviction must be affirmed.

October 7, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on October 7, 2024, I mailed two copies of Appellee's brief to Appellant's attorney, via first-class mail, at the below referenced address:

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