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)

Reply 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

ARGUMENT

Pursuant to M.R. App. P. 7A(c), this Reply Brief only addresses the following new arguments raised in the brief of the Appellee. Specifically, the State's new argument—not raised with the trial court and not consistent with the trial court's reasoning denying the instruction—that the competing harms defense is unavailable to Appellant, Heath Demerchant ("Demerchant") because he recklessly or negligently brought about the circumstances that created this competition of harms. *See* 17-A M.R.S. § 103(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.").

The State contends that because Demerchant visited an apartment he knew to be dangerous and gave the named victim's debit card to an unauthorized individual, he recklessly and/or with criminal negligence brought about the circumstances necessitating his choice between harms. (Red Br. 12.)

First, the State did not raise this objection to Demerchant's proposed jury instruction with the trial court. At no point in the trial did the State assert that the competing harms instruction was unavailable to Demerchant by virtue of Section

103(2); instead, the State's position—which the trial court agreed with—was that the evidence did not generate the instruction:

> THE COURT: Okay. Have you had sufficient time to review it to respond?
>
> THE STATE: I – yeah, I think so. I mean, I don't – I'm not convinced that that issue was generated by the evidence. If the Court determined that it were and, um, that a competing harms instruction was necessary, we would want the standard instruction, whatever that happens to be.
>
> THE COURT: Okay. All right. And so – and so am I to interpret that as no objection from the State to the request?
>
> THE STATE: We do object.
>
> THE COURT: You do object.
>
> THE STATE: We don't agree that that was generated by the evidence.

(A. 14-15.)

"In order to properly preserve a challenge to a jury instruction, a party must not only object but must state distinctly the ground for the objection." *Aucella v. Town of Winslow,* 628 A.2d 120, 123 (Me. 1993). There is not a sufficient basis in the record to alert the trial court, or Demerchant, to the existence of the issue of Section 103(2)'s applicability. *See State v. Dolloff,* 2012 ME 130, ¶ 39, n. 11, 58 A.3d 1032. Neither the trial court nor defense counsel were on notice of this issue only now raised on appeal by the State and it should therefore not be reached by this

Court. *Cf.* Alexander, *Maine Appellate Practice* § 402, p. 237 (noting that one of the purposes of the preservation rules is that "it assures that any review on appeal will be informed by a ruling made in the first instance by the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impact." (quotation marks omitted)).

Second, even if the State's new objection to the competing harms instruction is considered on appeal, it lacks merit. The necessity defense's codification in Maine follows the Model Penal Code's approach, which bars the necessity defense if the individual (Demerchant) was reckless or negligent in bringing about the necessity. *See* 17-A M.R.S. § 103(2). Undersigned counsel's research was not able to identify any case law in this jurisdiction analyzing Subsection 2, but it is "best interpreted as barring the defense when the level of created culpability and that of the underlying offense match." DeGirolami, Marc, *Culpability in Creating the Choice of Evils,* 60 Ala. L. Rev. 597, 612-613 (2008-2009).

Here, the State first contends that Demerchant's presence at a dangerous place recklessly or negligently created the necessity. Contrary to the State's contentions, Demerchant was not caring for the named victim's child at this time, Russell Delong and the named victim were. Also contrary to the State's contentions, it was the named victim who took to looking for Demerchant and engaged in self-help to confront Demerchant—who was merely present at a location he was permitted to be

at. Furthermore, there is nothing in the record that demonstrates that Demerchant knew or should have known that the individual who possessed the named victim's debit card would appear when the confrontation between Demerchant and the named victim took to the street. Demerchant's conduct leading up to the act that resulted in criminal charges being levied against him was not charged or culpable; he did not aim to create the situation in the "dangerous" apartment building or on the street. His conduct was reactionary to the named victim's conduct.

This conduct does not serve as a bar to his ability to invoke the competing harms defense—and for good reason, as barring a necessity defense in a case like this would create a disincentive for Demerchant, and others facing criminal liability in similar situations, to act in a way that society would approve pursuant to the competing harms defense. In any event, it should have been left to the jury to decide whether Demerchant's application of force on the named victim was necessary because of a specific and imminent threat of injury to the named victim and/or Tanika, leaving Demerchant with no reasonable alternative other than to commit physical contact to restrain the named victim.

CONCLUSION

For these reasons, the Appellant, Heath Demerchant, respectfully renews his request that this Court vacate the conviction in this matter and remand for a new jury trial.

Date: October 25, 2024

/s/ Kurt C. Peterson
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 reply 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: October 25, 2024

/s/ Kurt C. Peterson
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