THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. Ken-24-412

STATE OF MAINE
Appellee

v.

DEREK TAYLOR
Appellant

ON APPEAL from the Kennebec County
Unified Criminal Docket

BRIEF OF APPELLANT

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INTRODUCTION

(I) Based on a misstatement of M.R. Evid. 403 and a misconception of the open-the-door doctrine, the trial court allowed the State to elicit testimony that defendant, who was on trial for assaulting his wife, was then subject to a court order prohibiting him from contacting her. In the circumstances, this error was not harmless.

(II) Four years of prison and another four of probation rest on an error: The conviction on which that sentence is premised resulted from the court's omission to give a self-defense instruction, which was generated.

STATEMENT OF THE CASE

Following two jury trials across two docket numbers, defendant was acquitted of one charge and convicted of several others. On docket KENCD-CR-2023-00114, defendant was acquitted of domestic violence assault, 17-A M.R.S. § 207-A(1)(B)(1) (2022)[1] (Count I), and convicted of domestic violence criminal threatening, 17-A M.R.S. § 209-A(1)(B)(1) (2022) (Count II). On docket KENCD-CR-2023-01455, defendant was convicted of aggravated assault, 17-A M.R.S. § 208-D(1)(D) (2022) (Count I) (as enhanced by 17-A M.R.S. § 1604(5)(B) (2019)); and domestic violence assault, 17-A M.R.S. § 207-A(1)(B)(1) (2022) (Count II). Also on docket

[1] The incidents upon which the conviction in CR-2023-00114 is based were alleged to have occurred on or about January 24, 2023. Those pertaining to CR-23-01455 were alleged to have occurred on or about August 16, 2023. Though the statutes of conviction have since been amended by the legislature, none of those amendments appear to have had any material effect on this case.

2023-01455, the bench convicted defendant of violating a condition of release, 15 M.R.S. § 1092(1)(B) (2014) (Count III).

During a consolidated sentencing hearing, the court (Lipez, J.) imposed a four-year term of imprisonment on CR-2023-00114, fully suspended for the duration of four years' probation, and – important to this appeal – ordered a further *consecutive* twenty-five-year term of incarceration on CR-2023-01455, three years of which it suspended for the duration of six years' probation. This timely appeal follows.

I. The trials

As he does not press an argument that the State's evidence was legally insufficient, defendant discusses the State's case in a "balanced" and "objective" manner. *See United States v. Rodriguez*, 115 F.4th 24, 33 n. 1 (1st Cir. 2024) (internal quotation marks omitted) (such is appropriate when no sufficiency-of-the-evidence argument is raised).

A. The first trial: CR-2023-00114

Defendant and his wife, [redacted], lived together in Benton. (1Tr. 27-28). [redacted]'s daughter also resided in the home. (1Tr. 40, 86-87).

On a January evening in 2023, defendant went outside to shovel snow from the driveway. (1Tr. 29, 86). After a couple of hours, defendant finished and went back inside the home. (1Tr. 29-30, 86). When he returned, defendant smelled of alcohol, and [redacted] was displeased about his apparent drinking. (1Tr. 30, 38, 47-48, 88, 95). Defendant requested that [redacted] fix him some eggs for dinner. (1Tr. 30). The events that followed were disputed.

According to her, defendant was frustrated when [redacted] resisted preparing defendant dinner. (1Tr. 31). Once she began to do so, defendant "grabbed" her hair and "[y]anked" her backwards. (1Tr. 32). Then he raised his hand in the air as if to hit her. (1Tr. 32). The prosecutor commendably made it clear to the jury that this hand-in-the-air testimony formed the basis for Count II (*i.e.*, the threatening count). (1Tr. 23, 116).

In contrast, defendant testified, [redacted] was so upset that he had been drinking that she threw his plate of food to the floor. (1Tr. 88-89). When defendant approached, believing that [redacted] might have simply dropped the plate, she hit him with a spatula, causing him to bleed. (1Tr. 88-89, 91-92). Apparently, the spatula broke against defendant's head. (1Tr. 32, 38-39, 93). Defendant did not grab or yank [redacted]'s hair. (1Tr. 89).

As the State rightly noted, the defense was "that [[redacted]] was the one who was upset, she was the aggressor." (1Tr. 42). In closing, again, the State noted that the defense was that [redacted] committed an "unprovoked attack." (1Tr. 118). In closing, defense counsel argued that defendant "looked like he was going to hit [[redacted]]" "in self-defense." (1Tr. 128).

After the court gave its final instructions – which did not include a self-defense instruction – it conducted a sidebar conference with the attorneys, ostensibly to ask whether either party objected. (1Tr. 148). Without notice or explanation, the sidebar was conducted "off the record." (1Tr. 148).

Defendant was acquitted of the allegation undergirding Count I – the supposed pulling of [redacted]'s hair. (1Tr. 133, 160).

B. The second trial: CR-2023-01455

According to [redacted], while defendant was on bail, in August 2023, defendant was again drunk when the two got into another argument. (2Tr. v. I 34-37). As they stepped outside of the residence, defendant punched [redacted] in the head and "choked" her. (2Tr. 38-40; *see also id*. 25, 27) (State electing these events as bases for Counts I and II). The punch caused a "unicorn bump" on [redacted]'s head; the "choking" caused her vision to go "blurry," and she believes she "blacked out." (2Tr. 40). A responding officer observed "red marks consistent with petechia[e]." (2Tr. 71).

In contrast, defendant testified that he did not hit, punch or strangle [redacted]. (2Tr. 130). He told the jury that [redacted] had been physical with him, at one point getting on top of him and hitting him. (2Tr. 132, 136-37). When police responded to the scene, however, defendant lied to them, reporting instead that he had been "jumped" by two men outside a local market. (2Tr. 76, 133, 138). He testified that he lied to police because he wanted to prevent [redacted] from getting in trouble, intimating that she might "lose" her child. (2Tr. 133-35, 138).

According to defendant, [redacted]'s physical aggression that night was caused by her anger because, during their recent wedding anniversary, "we wasn't allowed to be around each other." (2Tr. 131). His drinking, again, was a flashpoint for the couple. (2Tr. 131). During the State's cross-examination, defendant testified that he himself had not been arguing with [redacted]; rather, it was her who was "screaming and hollering" at him. (2Tr. 139, 143). It was [redacted] who "started hitting [defendant]." (2Tr. 143). The

prosecutor inquired what the argument was about, and defendant repeated, "She was yelling and screaming about our anniversary." (2Tr. 143). Defendant added that he was "not supposed to" communicate with [redacted]. (2Tr. 145).

At sidebar, the State requested permission to elicit that defendant was not permitted to contact [redacted] as a condition of bail. (2Tr. 145-46). In the State's view, defendant had "opened the door" to this by testifying that he was not supposed to be having contact with [redacted], which "makes no sense to the jury." (2Tr. 145). Defense counsel objected that defendant had "skirt[ed]" the topic of bail but "the State's own questioning" was "knocking pretty hard on that door." (2Tr. 146). Counsel contended that inquiry about the bail condition would be "extremely prejudic[ial]." (2Tr. 146). In contrast, there was no "high value" for the State to elicit such evidence. (2Tr. 146).

The court felt that defendant had "opened the door," and, recognizing defendant's M.R. Evid. 403 objection, concluded, "I don't find that the probative value substantially outweighs the risk of prejudice…" (2Tr. 148). The Court did, however, order the State not inquire as to the reasons for the bail condition. (2Tr. 148).

The prosecutor then elicited:

> Q. [A] moment ago you testified that you weren't supposed to be together. I am going to ask you a couple of questions about that.
>
> Isn't it true that you were the one who was subject to a Court order prohibiting you from having any contact with [redacted]?
>
> A. Yes.

Q. So certainly wasn't [redacted] who wasn't allowed to have contact with you; is that correct?

A. Yes.

(2Tr. 149-50). Defense counsel preserved his objection. (2Tr. 148-49).

Defendant was convicted of each of the counts. (2Tr. 257-58, 261).

II. The sentence

Finding that the crimes were committed in different criminal episodes and while defendant was on bail, the court ordered the sentences for each docket to run consecutively. (STr. 39). After selecting basic sentences of two years and between fifteen and twenty years, respectively, the court increased the maximum sentences because it determined the aggravating circumstances outweighed the mitigating ones. (STr. 30-37). The final sentences are noted above.

ISSUES PRESENTED FOR REVIEW

I. Did the court commit reversible error in CR-2023-01455 by admitting evidence that defendant was subject to a court order prohibiting him from contacting his wife, the complaining witness?

II. Did the trial court commit reversible error by omitting a self-defense instruction in CR-2023-00114?

ARGUMENT

First Assignment of Error

I. The court committed reversible error in CR-2023-01455 by admitting evidence that defendant was subject to a court order prohibiting him from contacting his wife, the complaining witness.

A. Summary of the argument

Misapplying the open-the-door doctrine and inverting the balancing test of M.R. Evid. 403, the court permitted the State to elicit that defendant was prohibited from contacting [redacted]. These errors – mistakes of law – were not harmless in this credibility contest.

B. Preservation and standard of review

This argument was preserved by defense counsel's timely objection, detailed above in the Statement of the Case and excerpted in full at pages A36 through A37 of the Appendix. Traditionally, therefore, this Court's review would be for abuse of discretion. *State v. Hussein*, 2019 ME 74, ¶ 10, 208 A.3d 752. However, a more fulsome description of that standard is warranted. Like other appellate courts, this Court should review a lower court's "legal interpretation of a rule of evidence de novo," reserving abuse-of-discretion review for the application of that law to the facts. *E.g.*, *United States v. Zarauskas*, 814 F.3d 509, 519 (1st Cir. 2016).

C. Analysis

There are multiple ways to understand the court's error. The first two are legal in nature: its misconception of the open-the-door doctrine and misinterpretation of the applicable legal standard (*i.e.*, Rule 403). The

second is the court's misapplication of the facts to the law. Its weighing of probative value and prejudicial effect is unsustainable.

1. Misconception of what it means to open the door

The court believed that defendant opened the door by testifying, on direct, merely, "[W]e wasn't allowed to be around each other." This is necessarily so, as the two subsequent iterations of such testimony came on cross-examination, at the prosecutor's behest. Needless to say, a party cannot be permitted to open the door to its own evidence. *State v. Terrio*, 442 A.2d 537, 541 (Me. 1982) ("The State cannot assert that by its cross-examination of the defendant, the door was opened.").

The opening-the-door doctrine applies only when one party has broached a subject in a manner "that creates a misleading advantage" such that the opponent, in fairness, must be permitted "to counter the misleading advantage." *State v. Gaudet*, 97 A.3d 640, 646 (N.H. 2014). In other words, to truly "open the door," "the initial evidence must have reasonably misled the fact finder in some way." *Ibid.* "[T]he doctrine is intended to prevent prejudice and is not to be subverted into a rule for the injection of prejudice." *Ibid.*

How could the jury have been misled by defendant's singular testimony that the fighting couple "wasn't allowed to be around each other"? What was the articulable prejudice to the State that justified the no-contact evidence? Defendant contends there was no meaningful threat of prejudice; the State was not disadvantaged by defendant's testimony that he was not permitted to be in contact with [redacted]. If anything, it benefitted from that evidence.

To guard against a party strategically using evidence, the admission of which it did not object to, as a basis for arguing that the door has been opened to its otherwise inadmissible responsive evidence, some courts require that party first object to such evidence. Maryland, for example is one such jurisdiction. There, an opposing party must have objected to the initial (*i.e.*, "opening") evidence before it can offer counterproof. *Clark v. State*, 629 A.2d 1239, 1242-44 (Md. 1993). That did not occur here; the State made no objection to defendant's testimony that "we wasn't allowed to be around each other," (2Tr. 131), and made no request to strike or otherwise limit such evidence. Again, the State itself elicited further testimony to this effect – clearly, a tactical choice.

Application of doctrines such as opening-the-door and curative admissibility is inappropriate when doing so grants the proponent of the "curing" evidence a tactical advantage for purposefully not objecting. *Clark*, 629 A.2d at 1246. Just as this Court does when any other lawyer makes a tactical or strategic decision to not object – indeed, rather, to double down – this Court should hold that the State waived the opportunity to fit its own evidence through the door it held, and further pried, open.

2. Misinterpretation of Rule 403

Per M.R. Evid. 403, a court must admit relevant evidence unless its "probative value is substantially outweighed by a danger of … unfair prejudice." Our court, though, explicitly found the opposite:

> I **don't** find that the probative value substantially outweighs the risk of prejudice…

(2Tr. 148; emphasis added). Yet, on this basis, the court admitted the State's evidence. That was a fundamental error, regardless whether this Court reviews de novo (as defendant suggests, *supra*) or for abuse of discretion. As the Supreme Court of South Carolina has held in comparable circumstances, a "trial court's failure to apply the correct legal standard [is …] itself an abuse of discretion." *Whitfield v. Schimpf*, 911 S.E.2d 310, 319 (S.C. 2025). In that case, the lower court had mistakenly "reversed the Rule 403 standard and considered whether the probative value exceeded the prejudice." *Ibid*. Certainly, Maine courts are held to no lesser standard.

3. Unsustainable balancing

Even assuming that the court simply misspoke, and that it did, actually, apply the correct Rule 403 standard, there remains the fact that its application of the facts to that law is unsustainable. There was nothing meaningfully probative about the bail condition. What, specifically, did it add to the State's case for jurors to understand that defendant, but not [redacted], was prohibited from contacting the other? There is only one thing: Defendant was *already* violating the law when, in the State's view, he assaulted [redacted]. In other words, this is character evidence from which jurors were left to draw the forbidden propensity inference. *See* M.R. Evid. 404(b).

Nor was there any cautionary or limiting instruction confining the objected-to evidence to some other, permissible theory of relevancy – assuming there could have been one. Jurors were left free to use it as proof of character and propensity. "[G]iven the justifiable stigma attached to

domestic abusers in the eyes of the public," *State v. Lavoie*, 453 P.3d 229, 246 (Haw. 2019), it is not highly likely that the court's error had no effect on the verdict. *Cf. State v. Judkins*, 2024 ME 45, ¶ 21, 319 A.3d 443. Mainers see domestic-abuse-assistance advertisements on the local news, in newspapers, on the radio and podcasts. The governor and the legislature have loudly decried domestic abuse, and the media and law enforcement officials have questioned Maine judges' "lenient" bail practices. *Cf. 8 Investigates: Are Maine judges taking a lenient approach to setting bail?* (May 22, 2024)[2] available at: https://www.wmtw.com/article/eight-investigates-are-maine-judges-taking-a-lenient-approach-to-setting-bail/60862089 In this credibility contest,[3] it is less than clear that, without the court's error, the verdict would have remained the same.

[2] This news report aired about three weeks before trial.

[3] The jury's acquittal, albeit in CR-2023-00114, suggests that neither party held a monopoly on credibility.

Second Assignment of Error

II. The court committed reversible error by omitting a self-defense instruction in CR-2023-00114.

A. Summary of the argument

The defense was premised on the notion that [redacted] was the initial (and sole) aggressor. Yet, the court neglected to give the jury a self-defense instruction, even though defense counsel appears to have suggested that defendant's act of raising his hand was, in fact, self-defense. In the circumstances – *e.g.*, a he-said-she-said contest in which the jury acquitted defendant of one of the charges – this error was prejudicial.

B. Preservation and standard of review

Defendant is unsure of the correct standard of review; two might be applicable. As the court completed its instructions, it beckoned the attorneys to the bench, presumably to permit the parties to lodge objections or plead for omitted instructions. This conference, however, was "off the record," seemingly without notice to the attorneys, in violation of court rule and administrative order. *See* M.R. U. Crim. P. 27; Admin. Order J.B. 12-1 (A. 9-17); *see also* M.R. Civ. P. 76H.

If an objection or request regarding the omitted instruction was made, this Court would review to determine whether the self-defense instruction "'(1) stated the law correctly; (2) was generated by the evidence; (3) was not misleading or confusing; and (4) was not sufficiently covered in the instructions the court gave.'" *State v. Russell*, 2023 ME 64, ¶ 18, 303 A.3d 640, quoting *State v. Hanscom*, 2016 ME 184, ¶ 10, 152 A.3d 632. Before

vacating a judgment, this Court, additionally, discerns whether the omission of the requested instruction was prejudicial. *Russell*, 2023 ME 64, ¶ 18.

If, on the other hand, there was no such objection, this Court's review is for obvious error. *State v. Asante*, 2020 ME 90, ¶ 10, 236 A.3d 464. That is, an error that is plain, which affects substantial rights, and which undermines the fairness, integrity or public reputation of the court system. *Ibid.*

C. Analysis

Defendant contends that the standard of review is immaterial. For the sake of concision, therefore, he will assume obvious-error review is appropriate. Obviously, if that rubric is satisfied, the less demanding standard for preserved instructional requests would also be satisfied.

1. The omission was erroneous.

"'It is the duty of the trial judge to charge the jury on all essential questions of law, whether requested or not.'" *Kelly v. South Carolina*, 534 U.S. 246, 256 (2002), quoting C. Wright, *Federal Practice and Procedure* § 485, p. 375 (3d ed. 2000). Here, self-defense was both available for the offense of threatening and generated by the evidence. The omitted instruction differentiated between perfectly lawful conduct and criminal conduct – clearly an essential question of law.

Several cases establish that self-defense is available to defendants charged with criminal threatening. In *State v. Hofland*, 2012 ME 129, ¶ 19, 58 A.3d 1023, this Court observed how a trial court had "accurately instructed the jury on the … self-defense justification as to criminal

threatening…." Years earlier, in *State v. Forbes*, 2003 ME 106, ¶¶ 13-16, 830 A.2d 417, this Court implicitly recognized that self-defense was viable against charges of criminal threatening. Threatening to use a weapon or other forms of force, after all, is considered a form of nondeadly force, *see e.g.*, *State v. Glassman*, 2001 ME 91, ¶¶ 10-11, 772 A.2d 863, and the use of nondeadly force is permitted to defend oneself and others. 17-A M.R.S. § 108(1).

On these facts, in the light most favorable to defendant, self-defense was generated. *Cf. State v. Fletcher*, 2015 ME 114, ¶ 11, 122 A.3d 966. In particular, defendant testified that [redacted], not he, was the initial aggressor – the prosecutor himself discerning this line of defense. (1Tr. 42, 118). Again, defense counsel even argued that defendant "looked like he was going to hit [[redacted]]" "in self-defense." (1Tr. 89).

Because self-defense was "in issue as a result of evidence admitted at trial," the State was required to negate that legal theory beyond a reasonable doubt. 17-A M.R.S. 101(1). In fact, the self-defense provisions are "'the functional equivalent'" of elements of the charged offense. *State v. Hernandez*, 1998 ME 73, ¶ 7, 708 A.2d 1022, quoting *State v. Begin*, 652 A.2d 102, 106 (Me. 1995). The jury should have been instructed in the necessity of making such findings.

2. The error was plain.

Respectfully, the error was quite noticeable, again, with even the State observing that the defense theory was that defendant was protecting himself from [redacted]'s aggression. Moreover, this Court's "precedents demonstrate

that typically 'where self-defense is an issue essential to the defendant's case, the court's failure to instruct on self-defense pursuant to section 108 deprives the defendant of a fair trial and amounts to obvious error.'" *State v. Bard*, 2002 ME 49, ¶ 11, 793 A.2d 509, quoting *State v. Sullivan*, 1997 ME 71, ¶ 5, 695 A.2d 115 (internal quotation marks omitted). Further, successful application of § 108(1) would have been as simple as reading that statute. Such epitomizes plain error. *Cf. People v. Kadell*, 411 P.3d 281, 288 (Colo. Ct. App. 2017) (Because "the trial court is deemed to know the statute," an error in applying the plain language of that statute "is more likely to be obvious.").

3. The plain error affected substantial rights.

The evidence against defendant was not overwhelming; the jury's acquittal of defendant on Count I establishes otherwise. Evidently, the jury had reason to doubt [redacted]'s testimony. What they lacked, however, was the legal framework to credit defendant's version of the hand-in-the-air incident. In other words, even if jurors believed the defense theory, they were not made aware of the necessary law: Threatening to use force in order to defend oneself is legally justified.

4. This Court should vacate defendant's conviction in CR-2023-00114.

It bears repeating: Without a self-defense instruction, the jury had no way to distinguish defendant's innocent conduct from unlawful conduct. Another way to put that is, even if defendant were legally justified – *i.e.*, even

were he *innocent* – the jury still would have convicted him. No court system should countenance such an error that makes an innocent man guilty.

CONCLUSION

For the foregoing reasons, this Court should vacate the lone conviction in KENCD-CR-2023-00114 and all convictions in KENCD-CR-2023-01455, and remand for resentencing.

Respectfully submitted,

April 22, 2025

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CERTIFICATE OF FILING AND SERVICE

I have filed this brief, and served opposing counsel, as listed on the briefing schedule and the Board of Bar Overseers' (email) directory, in compliance with M.R. App. P. 1D(c), 1E and 7(c).

/s/ Rory A. McNamara