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

REPLY BRIEF OF APPELLANT

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First Assignment of Error

I. The court erred by admitting evidence that defendant was subject to a court order prohibiting him from contacting his wife.

The State's entire argument rests on a faulty premise: Its case was prejudiced by defendant testifying that he and [redacted] were not allowed to see one another on their wedding anniversary. Not so, which is apparent from the fundamental irony in the State's argument on appeal: It contends such evidence was so prejudicial to its case that it "must" be permitted to elicit that the prohibition was because of a "court order" against defendant, yet, it continues in stark contrast, there was but "low" risk to defendant – the man on trial, with everything to lose – from the State being permitted to do so. Surely, both are not true. In fact, the State stood to benefit from *both* defendant's initial testimony and the additional, prejudicial evidence it was thereafter allowed to introduce. That is why it decided not to object.

A. Evidence that evidence that defendant and his wife could not see one another on their wedding anniversary was anything but prejudicial to the State.

This Court should see the State's trial tactic for what it was: It *chose* not to object to defendant's testimony that he and [redacted] were not permitted to see one another on their anniversary because it liked that evidence *and*, even more so, it liked the resulting leeway it obtained to elicit evidence that such was the result of a "court order" against defendant. Such an expansive interpretation of the open-the-door doctrine as the lower court's invites

gamesmanship providing a backdoor to admit otherwise inadmissible evidence.

The State asserts it "functionally objected" to defendant's supposedly door-opening testimony, doing so during its cross-examination of defendant. (Red Br. 21). This, however, was well *after* the State sat silent during defendant's supposedly offending door-opening testimony on direct. And, as this Court routinely recognizes when the shoe is on the other foot, a failure to object is a failure to object; there is no "functional" objection. *Cf. State v. Pendleton*, 2025 ME 40, ¶ 46, 334 A.3d 752 (a defendant's objection *in limine* does not preserve issue when no subsequent objection is made at trial). The fact that the State omitted to object when it might have excluded the evidence it now asserts was so very prejudicial to its case belies the notion that it "must" be permitted to respond as a matter of "fundamental fairness." (Red Br. 20); *see also State v. Tripp*, 2024 ME 12, ¶ 21, 314 A.3d 101 ("When a prosecutor's statement is not sufficient to draw an objection, … that statement will rarely be found to have created a reasonable probability that it affected the outcome of the proceeding.") (cleaned up).

Even after it opted not to object, moreover, the State *still* might have done something short of injecting prejudicial evidence into the trial. It could have requested a limiting or curative instruction. Permitting it to instead use the backdoor it held open *incentivizes* its choice not to avail itself of less prejudicial alternatives. When defendants' attorneys overlook such requests, this Court, in contrast, will brook no after-the-fact "strategy." *Cf. State v. Daluz*, 2016 ME 102, ¶¶ 27, 39, 60, 143 A.3d 800 (because the defendant

"made a strategic decision to decline a curative instruction," review is for obvious error). Goose again meets gander.

B. The State excuses the court's misstatement of law.

The State believes the judge simply "misspoke" when ruling on the M.R. Evid. 403 objection. (Red Br. 23). Of course, it can only guess. In either case, court systems elsewhere would not excuse such a material misstatement of law. *Cf. Whitfield v. Schimpf*, 911 S.E.2d 310, 319 (S.C. 2025) (concluding that a court that has "reversed the Rule 403 standard and considered whether the probative value exceeded the prejudice" has failed to "apply the correct legal standard" and, therefore, has abused its discretion). After all, even assuming for the sake of argument that the court simply misspoke, how does it look to the public for a judge to base her decision on a statement 180 degrees from correct? While we assume that John Q. Public knows "what the law is," *State v. Austin*, 2016 ME 14, ¶ 11, 131 A.3d 377, we should also expect judges to state the law correctly when ruling on consequential motions and objections. While we presume that jurors follow jury instructions to the letter, *State v. Baker*, 2015 ME 39, ¶ 18, 114 A.3d 214, we should also expect that judges mean what they say when they say the law incorrectly.

But we don't just have to take the court's word for it. Context, also, confirms that it must have applied the incorrect standard. As discussed above, the State's omission to do anything – *e.g.*, object, request a limiting or curative instruction, move for a mistrial, *etc.* – about it indicates that the State faced zero harm from defendant's supposedly door-opening testimony.

To the contrary, defendant, the person on trial, accused of domestic abuse, stood quite a bit to lose from the obvious reference to a previous incidence of domestic abuse and his violation of a court order meant to protect the complainant from him. If the State frets about the effect on [redacted]'s "credibility," (Red Br. 19), what about defendant's? This same axiom applies to harmlessness: If "fundamental fairness," (Red Br. 20), somehow necessitated the State forestalling any implication that [redacted] was the person subject to a no-contact order, how could it be highly probable that the rejoinder evidence – defendant was subject to a court order barring him from contacting the complainant, his wife – played no role in the verdict? *Cf. State v. Judkins*, 2024 ME 45, ¶ 21, 319 A.3d 443 (non-constitutional harmlessness standard).

Second Assignment of Error

II. The court committed reversible error by omitting a self-defense instruction.

When, during trial, it wanted to introduce evidence of defendant's "history of alcoholism and perhaps aggressiveness when he does drink," the State noted how "the defense is kind of arguing that [redacted] was the one who was upset, she was the aggressor." (1Tr. 42). When, during its closing argument, the State wanted jurors to disbelieve defendant's testimony, it characterized defendant's story as one in which redacted committed a "vicious and unprovoked attack" on him. (1Tr. 118). When, at trial, the State might have objected that defense counsel argued about facts not in evidence, it saw no such misrepresentation in counsel's contention that defendant "looked like he was going to hit [redacted], in self -defense." (1Tr. 128).

Only now, confronted with the court's omission to instruct jurors about self-defense, does the State contend that all of the above lacks a factual premise. Putting aside the actual evidentiary record, which defendant will discuss momentarily, all of the above is alone sufficient to generate the missing self-defense instruction. *State v. Paquin*, 2020 ME 53, 230 A.3d 17 tells us why and how. There, the State omitted to offer any evidence about "when or to whom the victim made a first disclosure [of sexual assault]." 2020 ME 53, ¶ 20. No matter, this Court held, the State was nonetheless entitled to introduce expert evidence about the "phenomenon of delayed reporting." *Id.* ¶¶ 1, 15-22. That was because, notwithstanding evidentiary support, the parties "accepted the premise;" "asserted it as fact in objecting"

to the expert's evidence; and "took no issue with the court's statement," at sidebar, that there had been a "substantial delay." *Id.* ¶¶ 20-21. The foregoing constituted an "implicit admission," even if not an evidentiary demonstration, that the expert's testimony was factually generated. *Id.* ¶ 22.

The Court should likewise hold that the State "implicitly admitted" that a self-defense theory was generated at trial. It sought to capitalize on the notion that the defense was the [redacted] was the aggressor; it disparaged defendant's testimony that [redacted] attacked defendant; and it tacitly accepted the defense argument that defendant held up his hand in self-defense. This is certainly an "implicit admission" of the viability of self-defense, à la *Paquin*.

Anyway, it was quite clear from defendant's testimony that, whatever happened between them, [redacted] was the aggressor. The prosecutor was right to observe as much. Jurors can "selectively reject or accept portions" of a witness's testimony. *Amero v. Amero*, 2016 ME 150, 149 A.3d 535 (quotation marks omitted). They knew that [redacted] testified that defendant held up his hand. (1Tr. 32). They knew that defendant testified that [redacted] was the aggressor – "flipp[ing] out," "hit[ting] him," and "whack[ing]" him with a spatula – while he refrained from physical force. (*See* 1Tr. 88-91). Through this morass of testimony about a stupid family scuffle, jurors were entitled to find that self-defense was a reasonable hypothesis. *Cf. State v. Villacci*, 2018 ME 80, 187 A.3d 576 (court's self-defense instructions are obviously erroneous despite fact that defendant did not claim self-defense to each instance of the conduct that might have supported conviction).

Finally, defendant addresses the standard of review. The State argues that review must be for obvious error, despite the court's omission to ensure that the final sidebar about the instructions was included in the record. (Red Br. 10). That is so, according to the State, because there was a prior charge conference at which defendant neither requested, nor raised any objection to the lack of, a self-defense instruction. (Red Br. 10). Such a holding, though, would obviate the need for a final sidebar. Why bother convene such a pointless hearing if, regardless what it entails, a party will be confined to his prior positions? That holding would formally make those final sidebars nothing more than what cynical defense attorneys already feel they are – traps in which they might only "waive" a defense or entitlement to an overlooked instruction – rather than an actual opportunity to change one's mind or correct an earlier mistake. That is not the way things ought to work.

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,

June 30, 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