

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

LAW COURT DOCKET NO. Yor-25-189

STATE OF MAINE

Appellee

v.

ERIK P. VALERIANI

Appellant

ON APPEAL from the York County
Unified Criminal Docket

BRIEF OF APPELLANT

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STATEMENTS OF THE CASE

Erik Valeriani was indicted for five counts: domestic violence reckless conduct with a dangerous weapon (Class C), 17-A M.R.S. §211-A(1)(A), 1604(5)(A), domestic violence aggravated assault (two counts) (Class B), 17-A M.R.S. §208-D(a)(D), domestic violence criminal threatening with a dangerous weapon (Class C), 17-A M.R.S. § 209-A(1)(A), 1604(5)(A), and domestic violence assault (Class D), 17-A M.R.S. §207-A(1)(A). Following a three-day jury trial, he was convicted of one count of aggravated assault and domestic violence assault. The court sentenced him to seven years, with all but three suspended and four years of probation on Count I, aggravated assault, and 364 days on Count V, domestic violence assault, concurrent to Count I.

STATEMENT OF FACTS

██████████ and Erik Valeriani, the father of her two children, 4 and 2 years old at the time, had been in an “off and on relationship for about 6 years.” (A. 28; T3. 22). On December 13, 2023, ██████████ went out Christmas shopping about 6:30 PM. (T1. 143). She returned home with her two children about 8:00 (*Id.*). ██████████ put her daughters to bed “somewhere between 8:30, 9.” (*Id.*; T3. 28). Erik was playing videogames

in the couple's bedroom. (*Id.*). "The bedrooms are downstairs right next to each other, off of a hallway. And the upstairs is kitchen, living room, bathroom, dining room" and a mudroom. (T1. 144). The mudroom is partially located above the children's bedroom. (T3. 22). Gift-wrapping began in the couple's bedroom, where Erik was playing videogames. (T1. 144; T3. 29).

A. The State's case

██████ testified that an argument started because Erik was after her wallet to go and buy more alcohol (T1. 127). ██████ testified that a "tussle" for her phone,¹ which was the first time that Erik put his hands on her on the night of the incident. (T1. 152)

"At that point, I knew he was trying to get my phone and my keys and my wallet. The phone was in my sweatshirt, and he started thrashing me around. And then he took my glasses. I can't see without my glasses. It says in on my license that I'm legally not allowed to operate a vehicle without glasses. So I am very hard of sight when I don't have my glasses. So my phone flew somewhere . . . I couldn't see because he had taken my glasses off . . . So I was sitting there [on the couch], freaking out. I couldn't see. I couldn't find my phone. But I still had my keys and my wallet. So I took my keys and my wallet and . . . I locked them in my car because this was a . . . frequent thing for him to do."

¹ ██████ stated that the Erik had "smashed" his own phone two weeks prior to the incident and that she kept a spare phone in her safe, where there was also a machete. (T1. 148-49).

(T1. 128). [REDACTED] then went upstairs and sat on the couch. (T1. 128). There is about “an eight-foot difference between the top of the staircase and where [[she] was sitting on the couch.” (T1. 149-50). There is a “big round coffee table” in between. (T1. 150).² She testified that,

“I was just sitting on the couch when he first came up with the machete. I had just - - I can still see it in my brain where he was the first time I saw him with it. He was at the top of the stairs. It was in his right hand . . . I was sitting on the couch. And in front of me was our coffee table. And he slammed it down on the coffee table really loud, and he did that, I think, like, three or four times. And then I have this, like, Medusa statue, and he decapitated it. He was just, kind of, hitting everything with it.”

(T1. 131-32). According to [REDACTED] Erik then sat next to her, stuck the machete on her leg, and said, “are you scared of me now?” (T1. 128). She pleaded with Erik to just leave, to which he responded, “I’m not going anywhere.” (T1. 129). [REDACTED] went downstairs and the “around the house and back inside” and then “hid in a closet for . . . like, 20 minutes.” (*Id.*). The closet is in the mudroom, above the children’s bedroom. (T3. 22).

When asked why she did not run to a neighbor for help when she was outside, [REDACTED] responded “I wasn’t going to leave my kids alone with him.” (T1. 153). And she testified that she did not scream for help because

² Erik testified that the couple had gotten the coffee table in used condition, with imperfections. (T3. 25).

she “was scared of what he was going to do.” (*Id.*). ██████ claimed that while hiding in the mudroom closet, she realized that Erik had gone outside. (T1. 154-55). The main entrance to the house was through the mudroom. (T1. 155). When asked why she then did not lock Erik out of the house, and call for help, ██████ responded that she “just was focusing on trying to hide. And he would have just broken down the door.” (T1. 156). She testified that, at this point, she was scared for her life. (*Id.*).

According to ██████ Erik then found her in the mudroom closet and strangled her. (T1. 129). As she testified,

“He squeezed my esophagus so hard like this. I couldn’t breathe. And then he slammed me against the wall, and I hit my head real hard, and I fell. And I was laying there for a minute, just figuring out what I should do. And he - - he dumped a bucket of - - a bottle of water on me. Then he just - - he just called me a bunch of names. And - - he disappeared. And I saw the machete. He left it, like, I don’t know, on the counter or something. So - - so I saw it, and I hid it in my bedroom closet behind the wall so he couldn’t use it again. I forgot to mention, at one point, he did hold it to my neck and said, don’t fuck with me. And I - - so I - - hid the machete.”^{3 4}

(T1. 129). ██████ testified that Erik strangled her with “one hand, and it

³ ██████ had earlier testified that Erik put down the machete, but she could not remember when or where; she thought “it was on the coffee table.” (T1.164).

⁴ ██████ told the first police officer she talked to, Det. Sheahan, that Erik threw her “to the ground six or seven times.” (T1. 164). In her written statement, ██████ stated that Erik threw her “against the wall five or six times.” (*Id.*). There was no mention of a bucket or bottle of water in ██████’s statement to a detective on December 14, 2023. (A. 28-32).

was probably around my neck for . . . eight to ten seconds. It was long enough to where my vision started tunneling, like closing in.” (T1. 132-33). She added that Erik then “shoved me into the wall behind me where there - - it was a window frame. So my head hit really hard on that, and I believe that’s how I got a concussion.” (T1. 132-33)

At some point, [REDACTED] texted a friend of Erik’s, Alex, to come and pick him up. (T1. 156). [REDACTED] testified that she was not aware whether Alex arrived at the house or not because she “couldn’t figure out” where her phone was.” (T1. 157). She added that she saw texts from Alex on her iPad “an hour after all of her messages” because she “hadn’t read the messages yet” to know that Alex had actually arrived and was at the vicinity of the house, waiting outside (T1.157-58).

According to [REDACTED] Erik then “went into the bathroom, and he got in the shower, and locked the door. And he was in there for, God, I don’t know, three or four hours. When I finally got in there.” (T1. 129). [REDACTED]

later got in because the,

“paint on the walls were - - was sagging because there was so much water in there because the shower had been going for so long. So I tried to turn off the shower, and he just kept turning it back on. And then at one point, he shoved me right into the sink, and I still have a scar on my arm from that cut. And yeah, so I - - I just gave up. And I just - - went and got in bed with my babies cause they

had woken up, and they wanted to sleep with me. So I let them come in, and I locked the door, and we fell asleep. And then it must have been, I don't know, like, 6 or 7 in the morning. He broke the door down, and he was naked."

(T1. 130). On cross-examination, when asked whether she had pictures of the broken-down door, ██████ said that Erik had not broken it down; he had just "pushed it in, and - - it's an old door handle, so it doesn't lock very well. It didn't break anything." (T1. 163). ██████ added that Erik then,

[G]ot in bed with us. And I said, please get away from me. Please get out of my room. Please just go. And he said, or what? And I said, or I'm going to call the police, and you're going to leave in a cruiser. And he goes, if you call the police, you'll be leaving in an ambulance. So I waited for him to fall asleep. And I got my kids up, and I brought them to school. And I drove to my best friend's house, and she brought me to the hospital. And I had a concussion and a fractured elbow and all kinds of stuff."

(T1. 130). ██████ confirmed having told a police officer during an interview the day after that "thankfully my kids slept through the entire thing." (T2. 53). When asked again why she did not leave the house, ██████ answered "my kids were sleeping. My glasses were taken. I couldn't find my keys because that was - - well, no, my keys were in my car, but my glasses were gone. I honestly was afraid that he would try to stop me." (T1. 136). With respect to the extent of her injuries, ██████

testified “I had to work in a cast for three weeks. And I - - couldn’t swallow solid food for at least two weeks. Like, I couldn’t eat, like, a sandwich. It had to be soup or something because my throat was hurting so bad.” (T1.138).

B. The defense case

Erik testified that upon his family’s return home, he “noticed a brown paper bag that [REDACTED] had bought on the way home that had two Bota boxes in it and three or four empty nips.”⁵ (T3. 29). Erik was concerned that [REDACTED] had been drinking while driving home with their children. (T3. 30). Erik made a comment to that effect to [REDACTED] which did not immediately lead to an argument because they wanted to avoid having an argument in the presence of their children. (T3. 30). Erik added that “[b]ut then when I said it, she got like, annoyed and kind of just said, like, it’s my money. They were mine. I can do what I want with them . . . we knew we were going to talk about it when the kids went to sleep.” (T3. 30-31). Erik testified that,

“While she was putting them to bed, I went back into the bedroom and I was playing video games again. She came in after they went to bed, and I - - we talked for a bit. Just normal stuff. Like how the

⁵ Erik testified that Bota boxes are “small boxes of wine . . . and I think they equal out to, like, two and a half glasses of wine.” (T3. 30).

night went and stuff, and then she started to grab all the stuff that she needed, like scissors, and tape, and all the wrapping paper, and proceeded to start bringing the unwrapped presents from our closet bedroom upstairs to the living room.”

(T3. 31-32). Erik and ██████ were both drinking. (T1. 145; T3. 32). An argument then ensued over why Erik had stayed home instead of going with ██████ “to pick up the girls from her parents [which] was believed to be that I was on the iPad messaging Erika Wormwood.” (*Id.* 34). ██████ testified that Erika was whom Erik “had been on and off with in between us breaking up.” (T1.145). Erik testified that Erika was his “ex-girlfriend” and that he was with her “right before we had moved into this new place in December.” (T3. 35). Erik “started saying some not so nice words about []█████’s] ex-boyfriend that she was with at the time that [][Erik] was with Erika.” (*Id.*). After about thirty minutes of arguing,

“[i]t starts getting, like, ruder . . . It’s said that I should have Erika come and pick me up if I wanted to continue to stand up for her . . . I said . . . I will if that’s what you want me to do. I just need a way to communicate with her. And so that’s when I went downstairs, began looking for the iPad and or phone, and couldn’t find either one, and realized that she had hidden them, which was a common occurrence . . . it was like a continuous thing that would happen every single time, that she would just start to hide things . . .”

(T3. 36-37). Realizing that “this was going to be, like, a long night of just arguing,” Erik wanted to just leave the house. But he had no phone and

could not find one either. (Tr. 37). He returned back upstairs, where the couple continued arguing about Erika. (*Id.*). Erik testified that, at that point, ██████ was,

“[G]etting in my face just, like, yelling at me. She at one point in the night, just, like, maybe within like, five or ten minutes of that, she punched me right in the face.

And that’s when I began grabbing her by her arms and just trying to keep her at, like, arm’s length from hitting me or continuing to get in my face because she just, like, kept walking away, coming right back, walking away. And during that exact time is when she bumped into the statute that you guys saw and it fell onto the floor and the head popped off.”

(T3. 37-38). Erik had to grab and hold ██████ away for three or four times to keep her from hitting him. (T3. 38). He asked for ██████’s phone to “get ahold of somebody to come and get [][him] and to find a place where[] [he] could go because unlike her,” Erik had no family at all, except for Erika or his friend Alex. (T3. 28). Erik testified that ██████

“[I]n the midst of, like, this arguing, just blurts out, your phone is in the safe . . . I just bolted downstairs to go into our bedroom closet where the safe was to grab my phone, because obviously at this point, like, I just want. To leave. Like, that’s all I care about, and when I start running down the stairs to go downstairs into the bedroom, she runs right straight after me. I hear her trip and fall on the stairs, and I heard it happen, but I didn’t bother to, like, turn around or say anything, or help, or anything like that.

At that point, I just wanted to get my phone and be done with things. So I got into the closet. I opened up the safe, I grabbed my

phone. The machete fell out of the safe. As that happened, she came into the room. She grabbed the machete and said, I'm taking this, like, I'm scared of you to have it or something along those lines. And I didn't even bother to respond. Nothing. I just grabbed my phone, let her have the machete, and I ran right back upstairs and I went straight into the bathroom. I locked the door, I turned the lights off, and I was just sitting there for a while until I - - finally, after a while, I just started to take a bath and I ran the tub.”⁶

(T3. 38-39). Erik locked himself in the bathroom at about 11:30 to midnight. (*Id.* 40). He did not call Erika because he knew it would lead to another argument and she had also already “made it clear she didn't want Erika to know where she or the girls lived.” (T3. 41). And he did not call his friend Alex because it was late at night and this had become a common occurrence, for the couple to drink and argue, for Alex to come and pick up Erik, only for Erik to be then picked up by ██████ the next day. (*Id.*). Erik was embarrassed by that pattern. (*Id.*). Erik stayed in the bathroom, taking a bath with “very calming, chill music” on his phone; he eventually fell asleep in the bathtub. (*Id.*). At some point, ██████ got into the locked bathroom and “turned off the tub.” (T3. 42). Erik got out of the bathroom around 1:30 to 2:00 in the morning. (*Id.*). He testified

⁶ Erik and ██████ had purchased the machete three years earlier while camping. (T1. 135). According to ██████ Erik “wanted it for cutting trees and sticks and stuff for making fires [] at the campground.” (*Id.* 136).

that,

“I dry off, get in a towel, go downstairs. The door was open. [REDACTED] was laying in the bed by herself, and I just got into bed, and I assumed she was sleeping. But as a soon as I laid in the bed, she randomly was just like, I want you gone in the morning, and the petty side of me said, don’t worry, tomorrow I’ll be in bed with Erika so you don’t have to worry. And she said, no, you won’t, you’ll be in jail. And that was the last thing. We just both went to bed after that.”

(T3. 45). Erik testified that on the night of the incident, he “never laid hands on the machete at all” and that he “never threatened [REDACTED] with the machete.” (T3. 43). Nor did he strangle her. (T3. 44).

Erik’s friend, Alex, testified that, on the night of the incident, she saw on her partner’s phone (also called Alex) a text message from [REDACTED] asking them to come and pick up Erik. (T3. 10). Alex’s partner gave her “a rough idea of where [[REDACTED] and Erik] lived, and I took off to Old Orchard . . . it was about 10:30 at night.” (T3. 10). Alex drove around the vicinity of [REDACTED]’s house, looking for her vehicle. (*Id.* 11). Having noticed girls’ bikes outside a garage, and assuming it was the destination, she parked and waited in the car. (*Id.*). That “was the only house with lights on.” (*Id.* 12). She then “continuously” call and texted [REDACTED] she also attempted reaching Erik. (*Id.*). Alex had been waiting in the car since about 10:45, calling and texting [REDACTED] she left about midnight when she

did not hear back from [REDACTED] (*Id.* 13).

C. Medical records and testimony

As testified by an emergency room physician at Maine Health, medical records from December 14, 2024, the day [REDACTED] visited the hospital indicate that [REDACTED] was “breathing normally [and] speaking in full sentences.” (T2. 20). With respect to her neck, there was no signs of “hematoma, palpable thrill, strider, hoarse voice, or other evidence of impending airway collapse.” (*Id.*). There was “[n]o obvious head trauma,” no neck or chest tenderness, and no collar bone bruising,” but she had “scattered bruises, including to both shoulders, both elbows, neck, and knees” as well as “superficial injury to left thigh, surrounding bruising.” (T2. 20-22). [REDACTED]’s “elbow was placed in a splint.” (T2. 25). A staff nurse, at Maine Medical Center’s emergency room, testified about domestic violence strangulation, describing the signs and symptoms of strangulations and choking. (T2. 106-19)

D. Charge Conference and Motion for Judgment of Acquittal

At the close of the State’s case, defense counsel moved for a judgment of acquittal on all counts. (T2. 120, 124). With respect to Count I, domestic violence reckless conduct with a weapon, counsel argued, “as

I understand the evidence here, that would be referring to the injury to her thigh. And there is no serious bodily injury there. It was a small puncture. The [ER] doctor called it very superficial.” (T2. 120). Opposing the motion, the State maintained that no actual injury was required for Count I, and it was rather “substantial risk of serious bodily injury” and that ██████’s testimony with respect to the machete proves all the elements of that count. (T2. 125). When inquired by the court whether Count I contained “the injury to the thigh,” the State clarified that “it’s the swinging around machete, banging it on the table, in her close vicinity.” (T2. 126). The court denied the motion. (*Id.*). The jury later found Erik not guilty of this count. (Sent. T. 162).

On Count II and III, counsel pointed out that,

“I could not from Ms. ██████’s testimony, delineate more than one count of aggravated assault. You flagged this before the trial started and asked if there were two separate instances. But from her testimony, I can only delineate one, not two. So I’m saying one count should fail for lack of enough evidence.”

(T2. 128). The State opposed, saying that one count was based on strangulation and the other on Erik “jabbing” ██████ “in the leg with the machete.” (*Id.*). The State added that the use of the machete manifested extreme indifference to the value of human life. (T2. 131). ██████ “had

many injuries. She had bruises. She had the possible concussion. She had the thigh laceration, the elbow. This count is based off the laceration, but in considering those circumstances, those injuries are considered.” (*Id.*). Counsel highlighted to the court that this count was not about “criminal mischief and property damage” but rather “causing bodily injury.” (T2. 132). He added that, per ██████’s testimony, “other injuries occurred in the bathroom hours after he was passed out. So I don’t think the State gets to combine everything.” (*Id.*). The court granted counsel’s motion on one count without prejudice until the next day, providing the State with time to present to the court caselaw in support of its opposition. (T2. 133). In granting defense counsel’s motion for dismissal of a second count of aggravated assault, the court expressed its doubt whether the State could find caselaw in support of the proposition that “you can accumulate actions within a series of events and - - and sort of throw into one count.” (T2. 134). This jury found Erik guilty of one remaining count of aggravated assault- strangulation. (T2. 163).

With respect to Count IV, criminal threatening, counsel argued that ██████ “should not be believed that actually happened.” The State clarified that this count involved Erik “holding [[]the machete] up to her

neck and saying, don't fuck with me." The Jury found Erik not guilty of this count. The court denied counsel's motion on this count. (T2. 135). The jury later returned a not-guilty verdict on this count. (T2. 163).

On Count V, the State clarified that it was based on "pushing her into a wall and causing the bruising and banging her head that she testified to." (T2. 133). In support of his motion, counsel said that the Count was,

"just a general catch-all that [] she never testified that those arm bruises came from Mr. Valeriani . . . for the alleged tossing around [] or to the wall . . . But in that case, being supposedly tossed into a - - or slammed into a wall is not always elbow. And she didn't have other back injuries. So there is - - there's a broad swath here."

(T2. 135). The court denied counsel's motion on this count. (*Id.*). The jury found Erik guilty of this count. (T2. 163).

E. Sentencing

The court held a sentencing hearing on March 21, 2025. Both parties submitted a Sentencing Memorandum. (A. 52, 94). The State recommended "eight years imprisonment, all but five years suspended, with four years of probation for the Domestic Violence Aggravated Assault conviction and a consecutive 364 days for the Domestic Violence Assault conviction." (A. 111). Defense counsel argued for a sentence of

three years, all but 15 months suspended, and three years of probation for aggravated assault, and 364 days, concurrent to the felony offense, for domestic violence assault. (A. 66).

Defense counsel alerted the court to the inconsistencies in [REDACTED]'s statements and her unreliable testimony. With respect to the presence of the children, in her July 2024 Victim Impact Statement, [REDACTED] had stated that her "kids saw Erik physically hurt me and they were terrified and still tell me to this day how scary Daddy is." (Sent. T. 16). This, counsel reminded the court, was in stark contrast to [REDACTED]'s trial testimony, where she testified that "thankfully, my children slept through the whole thing." (*Id.* 23). Counsel added that "the evidence in the case never presented or proved that the children saw anything or were aware of anything." (*Id.* 17).

Counsel additionally highlighted [REDACTED]'s claim that Erik took her glasses:

"Ms. [REDACTED] says that Mr. Valeriani took her glasses, and the State uses that as a power and control aggravating factor . . . her glasses are gone, according to her. But then she has the ability to go to her car and lock her keys and wallet in the car. Yet, the State's arguing she's legally blind and this is an aggravating factor. Okay. And I'm not doubting that her vision is impaired without glasses. I'm doubting - - I'm doubting that she could've noticed things that she's claiming that I don't believe are accurate. So she can get to her car."

(Sent. Tr. 18-19). He reminded the court that “the jury rejected all of that. They did not believe Ms. ██████ about a machete, and that’s why all counts with the machete were - - he was acquitted of. And, that, of course, is a 12-0 votes by the jury that this machete incident were not proven.” (*Id.* 20).

Next, taking issue with the State’s claim that the incident was an hours-long assault, defense counsel argued that,

“The arguing as part of this probably was a couple hours. But again, we’re talking roughly 10:00 at night or for the - - he supposedly doesn’t want to wrap Christmas gifts, and they’re both drinking. The State brought her back on the stand at the end to admit she had been drinking after Mr. Valeriani’s testimony. So they’re both drinking. They’re both mad. Maybe he – maybe he helps with Christmas presents or not, and then things do escalate. But this escalation is roughly 15 [minutes].”

“And then he strangles her. That’s not hours, because then, what does Mr. Valeriani do if he’s this incredibly, according to the State, violent man? Locks himself in the bathroom and passes out in the shower. That’s not hours. The hours are from when he does that to when he wakes up, sleeps with Ms. ██████ [] until the morning when he leaves first. This is not hours of conduct. And that’s actually a mitigating factor. . . this is less than half hour of conduct.”

(Sent. T. 33-34). Counsel added that this was in addition to the alleged bathroom incident. (*Id.* 35). Thereafter, Erik addressed the court and the victim, apologizing for his failures. (Sent. T. 47-59).

The trial court set the basis period of incarceration at six years.

(Sent. T. 63). The court explained its decision as follows:

“The credible testimony was that there was an incident where the strangulation occurred. Then there was another incident in the bathroom as well. So it was not a single event. It took some time, and there was also some credible testimony, sort of, the terror or fright that occurred from the beginning to the end, including carrying over into the next day by the victim, and she explained why she did or didn’t do certain things based on that.

“There was taking away of glasses, which is - - for anyone that has vision issues, that is significant. Even if you can see somewhat, it does inhibit you, and it inhibits your ability to defend yourself or to take further action like get in a car and drive away. A person that has significantly injured - - or impaired eyes is not going to be able to do that safely. And the phone was taken away as well, which anyone that does domestic violence cases knows, preventing someone from calling the police is a significant factor that you often see, And all of that makes me put the basis sentence at at least six.”

(Sent. T. 63-64). Thereafter, weighing the mitigating and aggravating factors, the court acknowledged Erik’s efforts while incarcerated, by taking classes, and counted the efforts as a mitigating factor. (Sent. T. 64). The court, however, refused to accept Erik’s letters to the court and ██████ as a mitigating factor, because it found that they were indicative of his general remorse for being “in this situation and generally about the relationship and everything else” and not specifically about the night in question. (*Id.* 65). The court then put the sentence at seven years, taking

into account Erik's three adult conviction, his having done well on probation, an ODARA score of 12, impact on the family, and the presence of children at the house. (*Id.* 65-67). The court clarified that "I don't believe at all that the children saw the assault itself, but that's not really my main concern. My main concern is that they were in fact in the house . . . One of the stated reasons why the victim didn't flee the house." (*Id.* 66).

Having considered comparative sentences, the court sentenced Erik to seven years, with all but three years suspended and four years of probation on Count I, and 364 days on Count IV, concurrent to Count I. (*Id.* 67).

ISSUES PRESENTED FOR REVIEW

1. Did the trial court error by failing to give a specific unanimity instruction for Count V, domestic violence assault, where there were multiple incidents, each sufficient to establish assault?
2. Was Mr. Valeriani's sentence unconstitutional on the ground that the trial court found aggravating factors, which were unsupported by a preponderance of the evidence?
3. Did the trial court abuse its discretion when it imposed a sentence which was excessive compared to similar offenses?

ARGUMENT SUMMARY

The trial court committed obvious error when it ignored to give a specific unanimity instruction for Count V, domestic violence assault, which contained allegations for multiple separate incidents, each of which was sufficient for a finding of assault. Additionally, the trial court erred when it increased appellant's sentence based on aggravating factors that were not proved by a preponderance of the evidence. Both errors violated appellant's constitutional due process rights.

ARGUMENT

- I. The trial court erred by failing to give a specific unanimity instruction on Count V, domestic violence assault, and the error violated appellant's due process rights.**

Appellant contends that the trial court erred in failing to give a specific unanimity instruction. It was required because there was evidence of multiple incidents potentially sufficient to establish Count V, domestic violence assault. Without a specific unanimity instruction, there might not have been unanimous agreement among the jurors that a single incident formed the basis for conviction on that count.

A. Preservation and standard of review

The issue is unpreserved, as the record contains neither a request for a specific unanimity instruction nor an objection to the court's jury instructions. Therefore, this Court reviews for obvious error. *See State v. Asante*, 2020 ME 90, ¶ 10, 236 A.3d 464. “Error is obvious when there is (1) an error, (2) that is plain, and (3) that affects substantial rights . . . [and] 4) the error seriously affects the fairness and integrity or public reputation of judicial proceedings. . . .” *State v. Watson*, 2024 ME, ¶ 18, 319 A.3d 430. (quotation marks omitted).

With respect to jury instructions, obvious error occurs “when jury instructions, viewed as a whole, are affected by ‘highly prejudicial error tending to produce manifest injustice.’” *State v. Baker*, 2015 ME 39, ¶ 11, 114 A.3d 214 (quoting *State v. Ashley*, 666 A.2d 103 (Me.1995)). To determine whether there is an error in jury instructions, this Court “will consider the total effect created by all the instructions and the potential for juror misunderstanding, and whether the instructions informed the jury correctly and fairly in all necessary respects of the governing law.” *Id.* ¶ 14 (quotation marks omitted).

B. There were multiple incidents, each of which alone could sufficiently form the basis for a conviction on Count V of the indictment – domestic violence assault.

“Courts regularly encounter indictments that may aggregate, in one count of the indictment, several identical crimes committed against one or more victims.” *State v. Fortune*, 2011 ME 125, ¶ 26, 34 A.3d 1115. “When a defendant believes that he or she is prejudiced by the consolidation of several identical crimes into a single count of an indictment, the defendant may move for relief from prejudicial joinder.” *Id.* ¶ 27. Here, as the trial court indicated at sentencing, “we don’t know exactly which incident the jury found the assault on.” (Sent. T. 63). In effect, what the jury was asked to do was to return a general verdict for each of the charged offenses.

In *Fortune*, this Court acknowledged the “continuing validity of general verdicts.” *State v. Fortune*, 2011 ME 125, ¶¶ 28-29, 34 A.3d 1115. However, “if the State alleges multiple instances of the charged offense, any one of which is independently sufficient for a guilty verdict as to that charge, specific unanimity instructions are proper.” *State v. Osborn*, 2023 ME 19, ¶ 34, 290 A.3d 558; *see also Fortune*, 2011 ME 125, ¶31, 34 A.3d 1115 (“[w]hen separate, similarly situated victims or similar incidents . . . are

the evidence supporting a single charge, the jury must unanimously find that one specific incident occurred . . . in order to convict.”) (internal citation and quotation marks omitted).

In *Chase*, this Court concluded that a specific unanimity instruction was not required. *State v. Chase*, 2023 ME 32, ¶¶ 17-19, 294 A.3d 154. There, Chase was charged with one count of aggravated assault based on the alleged strangulation of the victim. He denied the allegation, and it was up to the jury to determine whether the State proved beyond a reasonable doubt that Chase had strangled the victim. There, the jury was tasked with considering *only one alleged instance of conduct* for a conviction of aggravated assault. This Court concluded that the same incident that was the basis for the jury's unanimous verdict on Chase's aggravated assault conviction could have been the basis for a unanimous verdict on the domestic violence assault. Accordingly, a specific unanimity instruction was not required.

Here, in contrast, as explained in the Statement of Facts, the evidence included *multiple alleged instances of conduct*, each of which was potentially sufficient to establish domestic violence assault. Those included the allegation that the complainant had been thrown to the

ground six or seven times, thrown against the wall five or six times, both in the evening of December 23, 2023, and pushed into the bathroom sink sometime after midnight in the early hours of December 24, 2023.

In contrast to *Chase*, here, none of these factual allegations forming the basis for Count V included the strangulation incident—the separate and sole basis for appellant’s aggravated assault conviction. The indictment did not specify any additional facts underlying this any of the charges either. And ██████ was the alleged victim of all charges. Furthermore, appellant was convicted of *only one count* of domestic violence assault, meaning that the jury had to agree *unanimously* on one of the above alleged incidents that could qualify as domestic violence assault.

“When separate . . . similar incidents . . . are the evidence supporting a single charge, the jury must unanimously find that one specific incident occurred . . . in order to convict.” *Fortune*, 2011 ME 125, ¶ 31, 34 A.3d 1115. Such a necessity is constitutionally derived. *See State v. Reynolds*, 2018 ME 124, ¶ 15, 193 A.3d 168; *Richardson v. United States*, 526 U.S. 813, 802-21 (1999). That is because, without a specific-unanimity instruction, there may not be “unanimous agreement among

the jurors that a single incident of [the charged offense] occurred.” *State v. Hanscom*, 2016 ME 184, ¶ 11, 152 A.3d 632. Here, the State even argued as much in its Closing Argument, with prosecutor identifying a number of different ways the jury could find appellant guilty of domestic violence assault:

“For Count V, domestic violence assault . . . [REDACTED] testified that after the defendant fell asleep in the bathtub . . . she turned the water off, and when the defendant woke up, he pushed her into the sink. [REDACTED] [REDACTED] testified that Erik Valeriani pushed her into the bookshelf. She testified that she felt like she had a concussion and had a headache for days afterwards . . . [REDACTED] testified that Erik threw her to the ground six times.

(T3. 73). Therefore, the trial court erred by neglecting to give a specific unanimity instruction in addition to the given general unanimity instruction. This error, furthermore, was plain. *See, e.g., State v. Villacci*, 2018 ME 80, ¶ 1 n. 1, 187 A.3d 576 (“we note that the court also erred by failing to give the jury a specific unanimity instruction” even though “[i]t does not appear that either [the defendant] or the prosecutor requested such an instruction, despite the obvious need for one.”). The language of Maine Constitution itself (unlike its federal analogue, which is implicit) is clear: “unanimity:” is “indispensable.” Me. Const. art. I, § 7. *See United States v. Hoffman*, 710 F.3d 1228, 1232 (11th Cir. 2013) (second prong of

plain error test is satisfied when error “is contrary to explicit statutory provisions or to on-point precedent”). Therefore, it was unreasonable and plain error for the trial court to fail to give such an instruction. The plain error was also prejudicial, as it is not possible to know which of the multiple alleged incidents the jury adopted in its conviction on Count V. Finally, this Court should reverse because it is evident that experienced attorneys and judges have not uniformly heeded the Law Court's precedent about the specific-unanimity requirement.

II. The sentence is facially illegal because the trial court imposed an increased sentence based on aggravating factors which were not supported by a preponderance of the evidence. It is also excessive compared to similar offenses.

Appellant argues that his sentence is illegal on its face because the court erred in finding multiple aggravating factors not supported by a preponderance of the evidence. He furthermore challenges the constitutionality of his sentence, as it is excessive compared to similar offenses.

A. Preservation and standard of review

This Court reviews the sentence on direct appeal “when a defendant claims that the sentence is illegal and when the illegality appears on the

face of the record.” *State v. Winslow*, 2007 ME 124, ¶27, 930 A.2d 1080; *see State v. Discher*, 597 A.2d 1336, 1343 (Me. 1991). “[T]he discretionary appeal afforded by [15 M.R.S. § § 1251-2157] is broad enough to include claims of facial illegality.” *State v. Tellier*, 580 A.2d 1333 n.1 (Me. 1990).

When preserved, this Court reviews a sentencing court's factual findings for clear error to determine whether competent evidence in the record supports the finding. *See State v. Prewara*, 687 A.2d 951, 954-55 (Me.1996); *see also State v. Rosario*, 2022 ME 46, ¶¶ 39-40, 280 A.3d 199 (reviewing the sufficiency of the evidence to support a sentencing fact when reviewing the legality of the sentence). Because appellant did not draw the sentencing court’s attention to its erroneous findings, this Court reviews for obvious error. *See* M.R.U. Crim. P. 35(a) (authorizing a motion for correction of a sentence).

B. Aggravating factors not supported by a preponderance of the evidence.

The State must establish sentencing facts by a preponderance of the evidence. *State v. Carrillo*, 2021 ME 18, ¶ 42, 248 A.3d 193; *see also McMillan v. Pennsylvania*, 477 U.S. 79, 91-92 (1986); *United States v. Watts*, 519 U.S. 148, 157 (1997) (per curium). Here, the trial court acted

as a factfinder by finding additional facts at sentencing. Appellant contests the following findings of the trial court.

The court set the basis sentencing at six years, finding that “credible testimony” had shown that 1) in addition to the strangulation incident, there was also a bathroom incident; 2) there was “some credible testimony” about “the terror or fright that occurred from the beginning to the end, including carrying over into the next day;” 3) There was taking away of glasses. (Sent. T. 63-64).

Having found that Erik had subjected ██████ terror or fright that occurred from the beginning to the end, including carrying over into the next day,” the trial court then attempted to ignore the elephant in the room: despite allegedly having been in an hours-long life-threatening ordeal, and despite having had multiple opportunities to seek neighbors’ help or call the police, ██████ never did so. The court sufficed it to say that, “she ██████ explained why she did or didn’t do certain things on that.” (Id. 63). The court then attempted to further explain ██████’s failure to call help:

“There was taking away of glasses, which is - - for anyone that has vision issues, that is significant. Even if you can see somewhat, it does inhibit you, and it inhibits your ability to defend yourself or to take further action like get in a car and drive away. A person that

has significantly injured - - or impaired eyes is not going to be able to do that safely. And the phone was taken away as well, which anyone that does domestic violence cases knows, preventing someone from calling the police is a significant factor that you often see, And all of that makes me put the basis sentence at at least six.”

(Sent. T. 64). Th jury rejected the above factual allegations.

In finding Erik not guilty of Count I, domestic violence reckless conduct with a dangerous weapon, the jury made it clear that it did not find ██████’s testimony credible with respect to the alleged events involving Erk’s use of a machete to threaten and injure her. It follows that they rejected the allegations that Erik “swung the machete within close proximity to [] ██████ . . . that the defendant struck her in the leg with the machete and stated, are you scared of me now?” (T3. 70).

Likewise, in finding Erik not guilty of Count IV, domestic violence criminal threatening with a dangerous weapon, the jury did not believe ██████’s claims that Erik,

“held the machete . . . to ██████’s neck, and stated, don’t fuck with me . . . [and that he] came at her with the machete at his hand and slammed in on the coffee table . . . that he looked like he wanted to kill [] ██████ . . . that she hid in the closet for about 20 minutes, and that she was scared and terrified of what Erik was going to do that night . . . [and that] when she mentioned calling the police, he stated, if you call the police, you’ll be leaving in an ambulance.”

(T3. 71-72). The trial court additionally ignore the fact that Erik retreat to the bathroom, locking himself up in there, which was a mitigating factor—an attempt on his part to deescalate the situation.

The error affects appellant’s substantial rights, namely his due process right arising from his liberty interest in a sentence in which each aggravating factor has a basis in fact and law. *See Green v. State*, 247 A.2d 117, 121 (Me. 1968) (“a sentence substantially predicated upon assumptions concerning past criminal activity untrue in fact or upon misinformation as to other material facts, either as a result of carelessness or design, would be in violation of due process.”); *State v. Watson*, 2024 ME 24, ¶ 34, 319 A.3d 430 (vacating a sentence and remanding for resentencing due to obvious error given “the importance of the liberty interest at stake . . . and the need to ensure that due process consideration is given to all relevant and proper sentencing factors—and no improper factor—when determining a sentence.”).

To determine whether a sentencing error affects substantial rights, this Court considers whether there is “a reasonable probability that, but for the error, the [sentencing] court would have imposed a different, more favorable sentence.” *United States v. Gonzales-Castillo*, 562 F.3d. 80, 83

(1st Cir. 2009) (quotation marks omitted); *see also State v. Pabon*, 2011 ME 100, ¶¶ 25-29, 28 A.3d 1147 (emphasizing, in following federal caselaw, that the principles that underlie the federal plain-error rule also underlie Maine's obvious-error rule). A defendant's rights are substantially affected when a sentencing court assumes an unsupported fact of significance in the sentencing. *See State v. Moore*, 2023 ME 18, ¶25, 290 A.3d 533 (citing *Commonwealth v. Bethea*, 474 Pa. 571, 379 A.2d 102, 106 (1977) (stating that “a sentence based in part on an impermissible consideration is not made proper simply because the sentencing judge considers other permissible factors as well”)); *United States v. Alviles-Santiago*, 558 F. App'x 7, 10 (1st Cir. 2014) (“[a sentence based on an unsupported fact cannot stand.”).

There is a reasonable probability that the error affected the sentence and thus affected appellant's substantial rights. Furthermore, the error “seriously affects the fairness and integrity or public reputation of judicial proceedings.” *Watson*, 2024 ME 24, ¶ 18, 319 A.3d 430 (quotation mark omitted). The error in this case was material and affected the sentence, by finding aggravating factors not supported by a preponderance of the evidence, which led to the imposition of an

excessive sentence. It follows that ignoring the error could undermine public confidence in the fairness and integrity of the sentencing process. Therefore, remand is appropriate so that the sentencing court may impose a lesser sentence that does not rest in any manner on the inadequately supported findings.

C. The sentence was excessive compared to similar cases

Appellant additionally argues that his sentence was exceptionally long in comparison to other factually similar cases. A review of the following cases reveals the excessive nature of appellant's sentence in the case at bar.

In *Treadway*, the defendant “assaulted the victim by putting his hand around her neck, which caused her to have difficulty breathing and impaired her vision. This assault also left the victim with neck and throat pain for a few days after the incident.” *State v. Treadway*, 2020 ME 127, ¶ 2, 240 A.3d 66. Three days later, *Treadway* assaulted the victim again by “putting his hands around the victim’s neck and applied more pressure than he had just days earlier. This time *Treadway*’s actions caused the victim to slip toward unconsciousness. *Treadway* then threw the victim by the arm into the closet and told her that ‘there was no piece of paper

that could protect her and some day she would set him off and he could kill her.” *Id.* At the time of the incidents, Treadway and the victim were living together with their infant twins. *Id.* ¶ 2. Moreover, “during both incidents, the victim was holding one of their infants.” *Id.* In two separate indictments, Treadway was charged with seven counts, among which were aggravated assault and two counts of domestic violence assault. There, “the court then set the basic sentence at three years for the aggravated assault charge and two years for the charge of domestic violence assault.” *Id.* ¶ 8. Since the two incidents constituted “separate criminal episodes” for sentencing purposes, the court imposed consecutive sentences, after considering the defendant’s criminal record and the impact of the victim: five years for aggravated assault, three years for domestic violence assault. The court imposed concurrent sentences on the other three counts, including one count of domestic violence assault. He was found not guilty of one count of violation of condition of release. *Id.* ¶ 8.

In *Perry*, where the defendant was found guilty, among others, of three counts of aggravated assault, two counts of domestic violence assault, “the evidence demonstrated that he engaged in a prolonged,

violent course of conduct which included pushing the victim to the floor, fracturing her wrist, strangling her to the point where she lost control of her bowels and bladder, beating her head against the wall and toilet, and cutting her hand with a knife.” *State v. Perry*, 2017 ME 74, ¶ 24, 159 A.3d 840, 847. With respect to the aggravated assault charges, Perry was sentenced to nine years, consecutively to five years, all suspended, and four years of probation. *Id.* ¶ 11.

In *Maderios*, where the defendant was convicted of two counts of aggravated assault, and two counts of domestic violence assault, the court “imposed consecutive sentences on the aggravated assault convictions resulting in an aggregate sentence of fifteen years’ imprisonment, with all but three years suspended, and six years of probation.” *State v. Maderios*, 2016 ME 155, ¶ 7, 149 A.3d 1145. (No fact pattern in the decision).

In *Saucier*, the defendant was convicted of one count of aggravated assault and one count of domestic violence assault. *State v. Saucier*, 2015 ME 144, ¶ 1, 126 A.3d 1159. Despite what the State maintains in its Sentencing Memorandum, this case is in fact similar to our case. Similar to our case, there, “Saucier and the victim, a woman with whom Saucier

was in a relationship, became involved in an argument that escalated into a physical altercation.” *Id.* ¶ 2. Saucier “threw a television remote at the victim . . . grabbed the victim’s ponytail with one hand and strangled her with the other hand . . . squeezed the victim’s neck for approximately eight seconds with sufficient force to impede her breathing . . . the victim felt pressure behind her eyes, felt light-headed, and thought she was going to lose consciousness. The strangling was forceful enough to leave red marks on the victim’s neck, and to affect her voice for several days.” *Id.* ¶ 3. Saucier was sentenced “to two years’ imprisonment for the aggravated assault conviction, and to a concurrent term of nine months’ imprisonment for the domestic violence assault conviction.” *Id.* ¶ 4. Similarly, according to ██████’s testimony, Erik applied pressure to her neck for about eight to ten seconds, she felt as though she could not breathe and her vision started tunneling. She did not lose consciousness.

Likewise, the State’s reliance in *Footman* is misplaced. *State v. Footman*, 2023 ME 52, 300 A.3d 810, 812. There, Footman was convicted of domestic violence aggravated assault, domestic violence assault. *Id.* ¶ 1. He “was sentenced to nine years’ incarceration, with all but six years suspended, followed by four years of probation.” *Id.* There, “Footman and

the victim were involved in a heated argument that became physical. In the shared hallway of their apartment, Footman choked the victim while her child was present . . . Footman pushed the victim against the apartment door and then grabbed her by the hood of her sweatshirt, pulling her back into the apartment. Police responded and the victim was taken to the hospital and treated for her injuries.” *Id.* ¶ 3. In contrast, the children in our case, as ██████ testified in court, “slept through the whole thing.” They never witnessed anything.

In *Chase*, where the defendant was convicted of four counts, including one count of aggravated assault and one count of domestic violence assault, the court imposed a sentence of “five years in prison with all but 24 months suspended followed by three years of probation on the aggravated assault charge, with concurrent sentences on the other charges.” *Id.* ¶ 1. There, Chase “put his hands on the victim’s throat, pushed her against the counter, and kept squeezing with a lot of pressure until it became hard for the victim to breathe. Chase continued to apply pressure to the victim’s throat for a couple of minutes while continuing to yell at her. The victim described the sensation of the room spinning, but she never passed out.” *Id.* ¶ 3 The case was remanded for

resentencing, as there was “doubt as to whether the defendant was punished for exercising his right to trial.” *Id.*, ¶ 30. In contrast to Chase’s continued squeezing of the victim’s neck for about two minutes, in our case, per ██████’s testimony, Erik applied pressure to her neck for about eight to ten seconds.

The above case, some of which defense counsel highlighted in his Sentencing Memorandum, reveal why appellant’s sentence was grossly disproportionate and, therefore, illegal. As such, a remand for resentencing is appropriate

CONCLUSION

For the foregoing reasons, this Court should vacate and reverse Mr. Valeriani’s conviction on Count IV, and remand for imposition of a lesser sentence.

January 21, 2026

Respectfully submitted,

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CERTIFICATE OF SERVICE

I sent a native PDF version of this brief to the Clerk of this Court and to opposing counsel, Madelyn P. Thomas, at the email address provided in the Board of Bar Overseers' Attorney Directory. I mailed 10 paper copies of this brief to this Court's Clerk's office via U.S. Mail, and I sent 2 copies to opposing counsel at the address provided on the briefing schedule.

/s/ Rezvaneh Ganji, Esq.