STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket No.: LINCD-CR-2025-379

STATE OF MAINE

V.

THOMAS COST

ON APPEAL FROM THE
LINCOLN COUNTY UNIFIED CRIMINAL DOCKET

APPELLANT'S BRIEF

Scott F. Hess, Esq., BBO # 4508
The Law Office of Scott F. Hess, LLC
Attorney for Appellant Thomas Cost
114 State Street
Augusta, ME 04330
Tel: (207) 430-8079
scott@hesslawme.com

Table of Contents

Table of Authorities

Maine State Cases

Maine Revised Statutes

INTRODUCTION

The Appellant, Thomas ("Tom") Cost was charged with Domestic Violence Assault and Domestic Violence Criminal Threatening. The facts of the case required that a self-defense instruction be provided to the jury. The Trial Court provided a self-defense instruction as to the charge of Domestic Violence Assault, but erroneously failed to provide that instruction as to the charge of Domestic Violence Criminal Threatening. Tom was acquitted of Domestic Violence Assault, but convicted of Domestic Violence Criminal Threatening. He appeals from this judgment, as it was obvious error for the Trial Court to fail to provide a self-defense instruction as to the charge of Domestic Violence Criminal Threatening.

FACTUAL AND PROCEDURAL HISTORY

Tom and the Complainant were in a romantic relationship. (Tr. I. at 26.) On October 20, 2023, there was a domestic dispute at the residence. (Tr. I. at 26-35). As a result, Tom was charged with Domestic Violence Assault (class D) and Domestic Violence Criminal Threatening (class D). He was arraigned on November 16, 2023. (A. at 3.)

At trial, which was held on April 15-16, 2025, the Complainant alleged that the altercation began when Tom "slapp[ed] me on the butt…" (Tr. I at 28.) She went on to testify that this escalated and eventually he "grabbed me and – by one arm and by the back of my neck, and he threw me down the hall. And then when I turned around, he brought his foot up and he kicked me further back down into the hall, to where I was, like, in the --- in the bedroom door…And he said he was going to kill me." (Tr. I at 28-29.) During cross examination Defense counsel highlighted multiple inconsistencies between the Complainant's prior statements and her testimony. (Tr. I at 56-64.) Following the close of the State's case-in-chief the Defense moved for Judgment of Acquittal, which was denied.[1] (Tr. II at 25.)

Tom took the stand in his defense and testified to a much different version of events. He stated that he got home at maybe 1:30 a.m. from working on the mud flats digging worms. (Tr. II at 49.) He went to sleep with his toddler, who has autism. (Tr. II at 50.) He testified that the child woke up around 3:00 a.m. with night terrors. (Tr. II at 51-53.) Tom attentively tried to play with the child to help

[1] The State did call another witness. However, their testimony is not germane to the issue on appeal.

comfort him after the child woke up. (Tr. II at 52-53.) At that time, the Complainant woke up and "walked out into the living room very frustrated because she was awake and everybody else was awake in the house." (Tr. II at 53.) She stated, "great, looks like we're all fucking awake now and stormed into the kitchen." (Tr. II at 53-54.) Tom went on to explain that "I know, when she was angry, to shut my mouth, because if I said anything, it would just make it carry on for hours and hours, and it would just – her anger would scare the kids and everybody in the house." (Tr. II at 54.)

Tom suggested that she "take your five minutes and smoke [marijuana] so that you can take a deep breath and calm down. And she said, shut the fuck up and I will, then." (Tr. II at 54.) She then smoked marijuana using Tom's pipe and then walked into the bathroom. (Tr. II at 54-55.) Tom had also wanted to smoke marijuana. (Tr. II at 55.)

Tom then went into the kitchen and "grabbed the pipe that was meant for her," so that he could smoke marijuana as well. (Tr. II at 55.) When the Complainant came back into the room and saw Tom smoking out of her pipe "she got mad and grabbed that pipe and started swinging it at my head, swinging at my face. And I put my

hand up to my face so that she wouldn't make contact with my face directly." (Tr. II at 56.) Tom went on to testify that she did strike him in the face with one of the blows. (Tr. II at 56-57.) He responded by grabbing the pipe and held onto it. (Tr. II at 57.) He went on to explain that she then "started throwing everything on the kitchen – kitchen counter at me…Just yelling and screaming, cursing, go F yourself, you're a piece of shit, stuff like that…" (Tr. II at 57.)

Tom tried to leave the house, and "she got between me and the exit in the kitchen, and she started pushing me up against the wall." (Tr. II at 58.) She continued to attack him. (Tr. II at 59.) At one point when he got his hands free, Tom grabbed her by the arms. He "restrained her, escorted her down to the bedroom, sat her down on the bed, holding her arms. And I said, stop attacking me, stop attacking me, are you done, are you done." (Tr. II at 59.) Tom would later send a text message to his mother stating that the Complainant had attacked him. (Tr. II at 62.)

Following the close of the evidence the Court had a conference with the attorneys. (A. at 14; Tr. II at 74.) The Court stated in relevant part:

THE COURT: Folks may be seated. I gave you -- and you folks have been busy, so you may have -- probably haven't had a chance. But I gave you both drafted jury instructions. The -- they are -- I read through them during the trial again. I don't think there's anything unusual here. I think it's fairly standard for this type of case. In the jury instructions, I had put in italics the self-defense instruction, because until Mr. Cost testified, that had not been generated. It's my view that it's been generated at this point. Doesn't take much to generate the instruction. Obviously, if the State disagrees with that, State would be heard on that...

But anyways, if you folks could take a look at those instructions, let me know if you see anything problematic. But the – reading through them, this is not one where there's anything sort of unique here. But obviously, if counsel disagrees, you can let me know.

I assume the State agrees, based upon Mr. Cost testifying, that the self-defense instruction has been generated. Obviously, I understand you disagree that the facts support it. But as far as generating it, I assume –

MR. SMITH: Yes.

THE COURT: -- you agree.

MR. SMITH: It's – it's an issue.

THE COURT: Okay. So we'll take a break, take a look at those. And we'll come back.

THE COURT OFFICER: All rise.
(Recess at 10:55 a.m., until 11:17 a.m.)

THE COURT: Mr. Smith, any comments or objections to the proposed jury instructions?

MR. SMITH: No, Judge.

THE COURT: Mr. Banda?

MR. BANDA: No.

THE COURT: So we ready to go?

MR. BANDA: Yeah.

THE COURT: Okay. We can have the jury brought in when they're ready.

(A. at 14-15; Tr. II at 74-75.)

The Court then read the instructions to the jury. (Tr. II at 76-86.) However, the self-defense instruction was only provided in the context of count one, Domestic Violence Assault. (A. at 19-20; Tr. II at 79-80.) At the conclusion of the instructions the Court did not again inquire if there were any objections to the instructions, and no objections were lodged. (A. at 26; Tr. II. at 86.) The Parties then provided closing arguments, and the jury began deliberations. (Tr. II. at 86-109.)

Once deliberations began, the Court and the Parties had a discussion about the jury instructions. The Defense inquired about sending in written instructions with the jury while they deliberate. (A. at 35; Tr. II at 110.) The Court explains that it usually provides the jury "written instructions from the burden of proof through the

elements of the charge…" (A. at 35-36; Tr. II at 110-111.) The Court goes on to say that "[a]nd part of the reason why I think it's important here is that there's two different counts, and there's different elements of both and different states of mind in regards to both." (A. at 36; Tr. II at 111.) The Court goes on to repeat that "when I send it back I always send back burden of proof and the elements. But I don't know if the parties have strong feelings otherwise." (A. at 36; Tr. II at 111.)

The following exchange then occurs:

MR. BANDA: I don't, I mean, just as long as that -- we're talking about the elements, that includes the self-defense --

THE COURT: Oh, yes.

MR. BANDA: -- elements.

THE COURT: It would be --

MR. BANDA: Yeah.

THE COURT: -- it would be from the -- if you look at the -- the headings, it's the first heading that says "burden of proof". And then that would go all the way down to the --

MR. BANDA: Evaluation of evidence?

THE COURT: Yeah. It would stop at the evaluation of evidence. And I would also change the font so the -- the -- in the printed copy, we have the -- the self-defense is in italics. I'd change that, because, obviously --

MR. BANDA: Yeah.

THE COURT: -- I don't want to set it off differently. Is that acceptable to State?

MR. SMITH: Absolutely.

(A. at 36-37; Tr. II at 111-112.)

After answering some questions from the jury that are not germane to the appeal, the jury retuned a verdict of not guilty on the charge of Domestic Violence Assault, and guilty of Domestic Violence Criminal Threatening. (Tr. II at 116.)

The Defense then orally renewed its Motion for Judgment of Acquittal, arguing that the verdict was inconsistent. The following is the relevant portion of that exchange[2]:

> [MR. BANDA] … you cannot have a guilty finding – if someone is lawfully engaged in self-defense, you cannot have -- they can't be -- they can't be engaged in lawful use of force on the one hand, but then guilty of creating a fear in -- in the -- in the person that they used lawful force on on (sic) the other. It can't be -- that can't be the law.
>
> So my -- my renewal of the judgment on Count II is for that reason, is that the jury's verdict is inconsistent with the law and -- and inconsistent internally verdicts. That can't possibly -- I don't -- I don't know how you would -- you would legally make

[2] Mr. Cost is not appealing the denial of the Motion for Judgment of Acquittal, as the basis for that Motion was that the verdict was inconsistent. However, this portion of the transcript is relevant to the issue on appeal, because it illustrates the Trial Court's reasoning as to why the Court did not include a self defense instruction as to the charge of Domestic Violence Criminal Threatening in the jury instructions. The entirety of the argument is provided for context, but the relevant portion of the discussion is found at Appendix page 42, Tr. II at 125.

sense of that. If he's lawfully engaged in defense, you cannot commit criminal threatening, because you're allowed to use force. So therefore, clearly, the person would be in fear.

THE COURT: Well, I'm not --

MR. BANDA: And that's justified.

MR. SMITH: I don't understand why it can't be, I'm going to kill you.

THE COURT: Right, because that's sort of where I'm looking at it. I guess I'm not -- not sure I accept your argument that criminal threatening can't be words. So again, need to be careful about speculating to the -- the jury's rationale or behind the jury's verdict, because that's not appropriate for the Court. So I'm not going to do that.

But I would agree with the point that you made. It's likely the not-guilty plea on -- not-guilty verdict on Count I could've been because the jury found that the State didn't disprove self-defense beyond a reasonable doubt, which is, obviously, a high burden. **But on the second charge, they could believe that Mr. Cost threatened to kill Ms. Victim, that met the elements of criminal threatening, and found him guilty of that. And based upon the facts here that were -- the evidence here, fact finder could certainly find that Mr. Cost was justified in using nondeadly force to defend himself under the circumstances, but there's not -- there wouldn't have been justification for deadly force given the circumstances**. So --

MR. BANDA: But it doesn't -- but bodily injury's not deadly force.

THE COURT: **Right. But they could've believed that he threatened to kill her, and that could support the criminal threatening conviction. And that's different conduct than the physical force, which triggered the -- the self-defense.** And if you remember the way the jury -- jury -- the jury

instructions were structured -- and they were structured this way intentionally, and they weren't objected to -- is, on Count I, after the elements to Count I, the Court indicated, if you find that the State has proven the elements of domestic violence assault beyond a reasonable doubt, then you have to consider self-defense. But self-defense was not instructed as a defense to Count II.

MR. BANDA: Yeah. I think that that -- I think that that probably was a mistake, I mean, now that I think about it. Well, I mean, I don't see how you -- the way it's pled -- the way the charge is pled, I don't see how you can reconcile those two -- I don't --

THE COURT: Well --

MR. BANDA: -- see how you can reconcile that -- those two charges. So that's my --

THE COURT: Okay.

MR. BANDA: -- that's my --

THE COURT: Fair enough. So I'm going to deny the motion at this point, because I -- I'm -- it is my belief that -- that words can meet the elements of criminal threatening. And in particular here, I don't see this as an inconsistent verdict, because there was evidence by which the jury could've found that Mr. Cost threatened to kill Ms. Victim. And in the Court's view, that would meet the elements of criminal threatening. And that's separate from the allegations in regards to the physical altercation, which Mr. Cost's testimony triggered the -- or generated the self-defense instruction, which I gave…

(A. at 40-43; Tr. II at 123-126.) (emphasis added).

The Court then proceeded to sentencing. However, the Court struggled with reconciling the two verdicts, stating:

THE COURT: -- to the -- so I guess, what I struggle with here is -- and obviously, I'm interested in Mr. Smith's take on this as well -- is -- so the domestic violence assault, which what was alleged here would support a sentence along the lines of what Mr. Smith is arguing. But the defendant was found not guilty of that conduct. And I can't sentence on Count II based upon what was alleged and testified to on Count I.

The thing I'm struggling with is -- is the allegations with Count -- Count II were sort of intwined with the -- the events that gave rise to Count I. I don't think that matters in regards to the -- the jury's verdicts. And I'm not suggesting I agree with Mr. Banda on the inconsistency, as I -- I don't see that. But it's -- it's difficult to assess sentencing sort of taking that out, because if --

MR. BANDA: Well, that's why I say they're intertwined.

THE COURT: Yeah. No, I understand what you're saying, because if you make those statements in the context of -- of a physical confrontation, it's more serious than if you -- if you make those statements outside the context of a physical confrontation. Again, this is a misdemeanor. I don't have to do a Hewey analysis. But if you were putting this on the -- the -- putting on a continuum for the most serious way you could commit this crime to the least serious way, if you're making these threats at the same time you're physically assaulting someone, they're more serious than if that's not what's going on.

(Tr. II. at 128-129.)

The Defense filed a Motion for a New Trial on May 5, 2025.[3] (A. at 8.) The Defendant attached a copy of an editorial written by one

[3] The Motion for a New Trial alleged that one of the juror's had been untruthful in responding to the juror questionnaire regarding domestic violence. The juror had authored numerous editorials speaking on the topic. That Motion for a new Trial is not an issue on appeal. However, the juror's comment that self-defense was not available to the charge of Criminal Threatening is relevant to the appeal, as it is direct evidence that Mr. Cost's right to a fair trial

of the jurors as an exhibit to that Motion. In that article, the juror stated: "The defendant was found guilty of the lesser charge of domestic violence criminal threating, because you cannot threaten to kill someone even if you're in a self-defense situation." (A. at 45.) The Defendant timely appealed from the judgment. (A. at 8.)

ISSUES PRESENTED FOR REVIEW

I. **Was the failure of the Trial Court to provide a self-defense instruction in regard to the charge of Domestic Violence Criminal Threatening obvious error where the facts were sufficient to generate the instruction?**

ARGUMENT

I. **It was obvious error for the Trial Court to fail to provide a self-defense instruction as to the charge of Domestic Violence Criminal Threatening, because the facts were sufficient to generate the instruction**.

"Obvious errors are "highly prejudicial error[s] tending to produce manifest injustice." *State v. Villacci*, 2018 ME 80, ¶ 9, 187 A.3d 576. This Court has long held that "where self-defense is an issue essential to the defendant's case, a failure to so instruct amounts to obvious error because the instructions are crucial to

was prejudiced by the omission of the self-defense instruction regarding the charge of Domestic Violence Criminal Threatening.

defendant's receiving a fair trial." *State v. Pabon*, 2011 ME 100, ¶ 42, 28 A.3d 1147 (*Silver,* dissenting), citing *State v. Corbin*, 1997 ME 41, ¶ 8, 691 A.2d 188 (quoting *State v. Davis*, 528 A.2d 1267, 1270 (Me.1987).

In *State v. Bard*, this Court explained:

> our 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. Rather than engaging in a standard harmless error analysis, we analyze the evidence to determine whether the instruction was generated in the first place. In our analysis we must view the evidence in the light most favorable to the defendant. We have held that the failure to give an instruction when the evidence generated one is obvious error.

2002 ME 49, ¶ 11, 793 A.2d 509 (internal citations and quotations omitted, cleaned up.)

One of the most relevant cases is *State v. Cannell*, 2007 ME 30, 916 A.2d 231. In *Cannell*, the Defendant was charged with, *inter alia*, criminal threating with a dangerous weapon. The defendant pointed a gun at a person in their yard following an argument. At trial the Defendant testified that he felt he needed to point the gun at the neighbor because the neighbor had threatened him. *Id.* at ¶ 3. The judge evaluated the defense of self-defense "as if it were justification

for the use of deadly force…" and convicted the defendant, finding that deadly force was not justified. *Id.* at ¶ 3.

On appeal, the Law Court held that the act of pointing the firearm at the neighbor and threatening to shoot him was nondeadly force. *Id.* at ¶ 8, 10. In addition, the Law Court found that the error of failing to apply the correct justification defense was "both obvious and not harmless." *Id.* at ¶ 10. The judgment was vacated. This case illustrates two points. First, a threat to use deadly force is nondeadly force.[4] Second, the failure to provide a self-defense instruction is obvious error.

Here, just like in *Cannell*, there was a threat allegedly made by Tom to the Complainant. The conduct also involved Tom physically restraining the Complainant. Whether the basis for the charge of Criminal Threatening was Tom's physical actions, physical actions and statement, or just the statement, "I will kill you," Tom was entitled to a self-defense instruction, as those actions are all nondeadly force. All of the alleged conduct arose from the same

[4] Nondeadly force is "any physical force which is not deadly force and can be used in defense of a person in order to defend himself or a 3rd person from what he reasonably believes to be the imminent use of unlawful, nondeadly force by [another] person." *State v. Cannell*, 2007 ME 30, ¶ 5, citing 17-A M.R.S. 108(1) (2006) (bracket in original quotations, internal quotations omitted).

incident and course of conduct. It was undisputed that the testimony was sufficient to generate a self-defense instruction regarding the charge of Domestic Violence Assault. Therefore, it was also sufficient to generate that instruction as to the charge of Criminal Threatening.

It appears that the Court may have believed that the comment, "I am going to kill you," constituted deadly force, and therefore the self-defense instruction was not warranted. During a discussion with Defense counsel about the inconsistency in the verdict, the Trial Court made the statement that:

> THE COURT: Right, because that's sort of where I'm looking at it. I guess I'm not -- not sure I accept your argument that criminal threatening can't be words. So again, need to be careful about speculating to the -- the jury's rationale or behind the jury's verdict, because that's not appropriate for the Court. So I'm not going to do that.
>
> But I would agree with the point that you made. It's likely the not-guilty plea on -- not-guilty verdict on Count I could've been because the jury found that the State didn't disprove self-defense beyond a reasonable doubt, which is, obviously, a high burden. **But on the second charge, they could believe that Mr. Cost threatened to kill Ms.** Victim **that met the elements of criminal threatening, and found him guilty of that. And based upon the facts here that were -- the evidence here, fact finder could certainly find that Mr. Cost was justified in using nondeadly force to defend himself under the circumstances, but there's not -- there wouldn't have been justification for deadly force given the circumstances.** So –

MR. BANDA: But it doesn't -- but bodily injury's not deadly force.

THE COURT: **Right. But they could've believed that he threatened to kill her, and that could support the criminal threatening conviction. And that's different conduct than the physical force, which triggered the -- the self-defense.** And if you remember the way the jury -- jury -- the jury instructions were structured -- and they were structured this way intentionally, and they weren't objected to -- is, on Count I, after the elements to Count I, the Court indicated, if you find that the State has proven the elements of domestic violence assault beyond a reasonable doubt, then you have to consider self-defense. But self-defense was not instructed as a defense to Count II.

(A. at 41-42; Tr. II at 125-126.) (emphasis added).

Therefore, it appears the Trial Court made the same error as this Court recognized in *Cannell.* The Trial Court considered the verbal threat to be deadly force, which it is not.

Also, in this case there is clear evidence that the failure to provide the self-defense instruction as to the charge of Criminal Threatening resulted in actual prejudice to Tom. As reflected in the juror's editorial, she and the jury considered the jury instructions. They believed, based on the instruction, that "you can't threaten to kill someone even if you're in a self-defense situation." (A. at 45.) This is a completely inaccurate belief as to the law, which was adopted by the jury due to the erroneous jury instruction. Although Tom does

not need to show actual prejudice to prevail on obvious error review, this observation by a juror underscores that fact that the error deprived Tom of a fair trial.

CONCLUSION

For the above reasons, the Appellant respectfully requests that this Honorable Court vacate the conviction and remand the matter for further proceedings consistent with this opinion.

Respectfully Submitted,

/s/ Scott F. Hess

Scott F. Hess, Esq., Bar No. 4508
Law Office of Scott F. Hess, LLC
Attorney for Appellant Thomas Cost
114 State Street
Augusta, Maine 04330
(207) 430-8079

CERTIFICATE OF SERVICE

I, the Undersigned, do hereby certify that on December 5, 2025, I caused to be served upon all parties an electronic copy of the brief, by emailing the parties below.

Kent Murdick, Esq at kent.murdick@maineprosecutors.com

Dated: December 5, 2025

/s/ Scott F. Hess

Scott F. Hess, Esq., Bar No. 4508