THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE

SITTING AS THE LAW COURT

DOCKET No. LIN-25-379

STATE OF MAINE

Appellee

v.

THOMAS COST

Appellant

ON APPEAL FROM THE UNIFIED CRIMINAL DOCKET

BRIEF FOR APPELLEE, State of Maine

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STATEMENT OF FACTS

I. Procedural History

The Defendant/Appellant Thomas Cost (hereafter Appellant) was first charged in a complaint containing one (1) count of Domestic Violence Assault, a Class D violation of **17-A M.R.S. section 207-A(1)(A)** and one (1) count of Domestic Violence Criminal Threatening, a violation of **17-A M.R.S. section 209-A(1)(A)** by Complaint on November 9, 2023. (App at 3.) Appellant was arraigned on the Complaint and appointed counsel by the Court on November 17, 2023. (Id.).

A dispositional conference was held on January 1, 2024, and the matter was set for a plea to a new count three (3) Disorderly Conduct, a violation of **17-A M.R.S. Section 501-A(1)(B)** on February 12, 2024. (App at 4.) The new count 3 was filed with the Court on January 22, 2024, in anticipation of the expected plea. (Id.)

On February 7, 2024, appointed counsel for Appellant filed a Motion for Withdrawal. (App at 4.) That Motion was granted and retained counsel entered his appearance on the same day. The matter was then scheduled for a plea on the new count 3 Disorderly Conduct on April 22, 2024. (Id.)

On April 22, 2024, the matter was continued by the Appellant and set for a dispositional conference on June 17, 2024. (App at 5)

On June 17, 2024, the matter was continued by the Appellant, and a dispositional conference was scheduled for August 5, 2024. (App at 5.) At this conference the matter was scheduled for Docket Call on October 1, 2024.

On October 1, 2024, the matter was continued by the Appellant and set for Docket Call on November 26, 2024. (Id.)

On November 26, 2024, the matter was continued by the Appellant and scheduled for docket call on January 28, 2025. On this date the matter was continued by the Appellant. (App at 5-6.)

On March 26, 2025, the matter was set for a jury trial to take place on April 15-16, 2025, on one (1) count of Domestic Violence Assault, a Class D violation of **17-A M.R.S. section 207-A(1)(A)** and one (1) count of Domestic Violence Criminal Threatening, a violation of **17-A M.R.S. section 209-A(1)(A)**. (App at 6.) Jury selection took place on April 10, 2025, and the trial was conducted as scheduled. (Id.)

On April 16, 2025, the jury returned a not guilty verdict as to one (1) count of Domestic Violence Assault and a guilty verdict as to one (1) count of Domestic Violence Criminal Threatening. (Id.) The State dismissed one (1) count of Disorderly Conduct following the verdict at trial. (Id.)

As to the single count of Domestic Violence Criminal Threatening, the Appellant was sentenced by the Court to ninety (90) days, all suspended with two (2) years of probation. (App at 7.)

Appellant filed a Motion for a new trial on May 6, 2025. (App at 8) Appellee filed a Motion in opposition to a new trial on May 21, 2025. (Id.) A hearing was held on the Motion for a New Trial on May 23, 2025, at which the Court denied the Motion. (Id.)

Appellant filed a timely Notice of Appeal and a Motion for a Stay of Execution on June 12, 2025. (Id.) The Court granted the Motion for Stay of Execution on June 16, 2025. (Id.)

II. Evidence Presented

A. The Relationship

Victim (hereinafter Victim and Appellant were in a domestic relationship for approximately three to four years and shared two children, Child 1 and Child 2 (Tr. I at 25.) On October 20, 2023, they were living together with their two children. (Tr. I at 26.) Victim two older children from a prior relationship resided in the home part time. (Tr. I at 27.)

Child 1 age three at the time of the incident, has autism. (Tr. I at 25.) Child 2 nearly two at the time of trial, has a speech delay. (Id.)

B. The Early Morning of October 20, 2023 – Victim Testimony

Victim testified that at approximately 3:00 a.m. on October 20, 2023, she and Appellant became involved in an argument after one of the children awoke. (Tr. I at 27-28.) The parties had been sleeping in separate rooms pursuant to an arrangement that each would respond to a designated child during the night. (Tr. I at 27.) Victim testified that Appellant asked her to sit with Child 1 while he went to the bathroom. (Tr. I at 28.)

According to Victim after Appellant returned, he slapped her buttocks in what she described as an aggressive and unwanted manner. (Tr. I at Id.) She testified that when she told him to stop, he became upset and began yelling at her at close range. (Tr. I at Id.) She stated that he was close enough that she could feel his breath and that he made a threat during that exchange. (Tr. I at Id.)

Victim testified that she raised her forearm to create space and that "really made him mad." (Tr. I at Id.) She acknowledged on cross-examination that she pushed or shoved him with her forearm. (Tr. I at 49.)

Victim testified that Appellant then grabbed her by one arm and the back of her neck and pushed her down the hallway. (Tr. I at Id.) When she turned, she testified that he kicked her in the hip, causing her to fall backward into the bedroom doorway. (Tr. I at 28-29.) According to Victim Appellant pushed her onto the bed, pinned her down, restrained one of her arms, and drove his elbow across her face and chin while stating twice, "I will kill you." (Tr. I at 29.) Victim testified there had been previous incidents of abuse. (Id.) Victim stated she reported this attack because it was the worst one and Appellant had never threatened to kill her before. (Id.) Victim stated that during this attack she feared for her life and that Appellant had made the threat to kill her while he was hurting her. (Tr. I at 30.)

Victim testified that not only was she afraid for her life she also feared further injury. (Tr. I at 30-31.) She stated that she screamed for him to get off her and that he eventually did. (Tr. I at 29.)

She later photographed injuries to her face and lip. (Tr. I at 31-34) Photographs admitted as State's Exhibits 1, 3, and 4 depict facial bruising and a lip injury. (Tr. I at 31-34.)

On cross-examination, Victim acknowledged that during a recorded interview with Officer Tessier two days later she stated that she had "sort of lost [her] temper." (Tr. I at 44-45.) She testified at trial that she did not believe she had lost

her temper, explaining that she had interpreted raising her voice that way at the time. (Tr. I at 45.)

She further acknowledged that she did not report in her initial emergency call or recorded interview that Appellant had slapped her buttocks. (Tr. I at 56.) She maintained at trial that the slapping occurred. (Tr. I at 62-63.)

Victim denied swinging a marijuana pipe at Appellant. (Tr. I at 42.) She acknowledged that she intended to smoke marijuana that morning and had a lighter in her hand but denied that the argument began over marijuana or that she attempted to strike him with a pipe. (Tr. I at Id.) She denied grabbing his wrists, preventing him from leaving, or pushing him down the hallway. (Tr. I at 53.) She denied that he was attempting to escape from her. (Tr. I at Id.)

Victim testified that she left the residence after the incident and later returned, when Appellant's mother was present, to retrieve Child 2 and personal belongings. (Tr. I at 34.) She acknowledged that the parties are involved in ongoing custody litigation in family court. (Tr. I at 59.)

C. The Early Morning of October 20, 2023 – Appellant's Testimony

Appellant testified that he returned home between 1:00 and 1:30 a.m. after working on the mud flats digging marine worms and went to sleep in the bedroom

with Child 1 (Tr. II at 49-50.) Approximately one to two hours later, Child 1 awoke. (Tr. II at 50.) Appellant testified that he brought Child 1 to the living room and turned on cartoons. (Tr. II at 52.)

Appellant testified that Victim entered the living area appearing frustrated and made a comment indicating irritation that everyone was awake. (Tr. II at 53-54.) According to Appellant, he suggested that she smoke marijuana to calm down. (Tr. II at 54.) Appellant testified that she began smoking marijuana inside the residence. (Tr. II at 54-55.) Appellant stated that after he switched marijuana pipes, Victim became upset and began swinging a pipe at his head and face, making contact with his hand as he blocked it. (Tr. II at 55-57.)

Appellant testified that Victim threw items from the counter and blocked his attempt to leave the residence. (Tr. II at 58.) Appellant stated that Victim pushed him against a wall and chair and grabbed his wrists. (Id.) Appellant testified that he pushed Victim away with his foot, freed his hands, grabbed her arms, escorted her down the hallway to the bedroom, and held her arms while telling her to stop. (Tr. II at 59.) Appellant denied being aware of causing any injuries to Victim (Tr. II at 68-69.)

Appellant testified that after he released Victim she said she was going to report him, and Appellant contacted his mother, who came to the residence. (Tr. II at 59-60.)

D. Reporting and Subsequent Proceedings

Victim contacted law enforcement and provided a recorded interview, written statement and photographs of her injuries. (Tr. I at 31, 37-38.) Portions of those recordings were played for the jury. (Tr. I at 44.) The recordings reflect that she stated she had "sort of lost [her] temper" and did not include mention of the alleged slapping of her buttocks. (Tr. I at 56.)

The parties are engaged in ongoing custody proceedings concerning their children. (Tr. I at 67.)

STATEMENT OF THE ISSUE

I. Whether the trial court committed obvious error by failing to instruct the jury on self-defense as to the charge of Domestic Violence Criminal Threatening.

ARGUMENT

I. STANDARD OF REVIEW

Because the defendant did not object to the jury instructions or request that self-defense be extended to Count II, review is for obvious error. *State v. Villacci*, ¶ 9, 187 A.3d 576.

Where a defendant fails to object to the structure of the jury instructions at trial, appellate review is for obvious error only. Reversal is warranted only if the error is plain and so highly prejudicial and tainted the proceeding that it resulted in manifest injustice. See *State v. Dolloff*, ¶ 35, 58 A.3d 1032.

Obvious error is "highly prejudicial error tending to produce manifest injustice." Id., See *State v. Baker*, 2015 ME 39 ¶ 11, 114 A.3d 214; see M.R.U Crim. P. 52(b). To obtain relief, the defendant must demonstrate (1) error, (2) that is plain, (3) that affects substantial rights, and (4) that seriously affects the fairness and integrity of the proceedings. See *State v. Dolloff*, ¶ 35, 58 A.3d 1032, see *United States v. Olano*, 507 U.S. at 734, 113 S.Ct. 1770.

II. THE TRIAL COURT DID NOT COMMIT OBVIOUS ERROR BY LIMITING THE SELF-DEFENSE INSTRUCTION TO THE ASSAULT COUNT.

The defendant argues that the court committed obvious error by failing to instruct the jury on self-defense as to Domestic Violence Criminal Threatening. The claim fails because (A) it was unpreserved and invited, (B) the evidence did not generate self-defense as to Count II, and (C) no clear or obvious error occurred.

A. The Claim Is Unpreserved and Was Affirmatively Invited.

The defendant did not request a self-defense instruction for Count II and did not object to the instructions as given. (Tr. II at 74–75.) The court expressly noted that the structure of the instructions—limiting self-defense to Count I—was intentional and "wasn't objected to." (Tr. II at 125–126; A. 41–42.) Accordingly, review is limited to obvious error. *State v. Villacci*, ¶ 9, 187 A.3d 576.

However, this case goes beyond mere forfeiture. Defense counsel participated in the instructional conference, reviewed the proposed structure, and acquiesced in limiting the self-defense instruction to the assault count. (Tr. II at 74–75.) When counsel is aware of and agrees to an instructional framework, the claim approaches waiver. In State v. Samson, the court stated that Rule 51 of the Maine Rules of Criminal Procedure "requires a party to make known to the court at the time of an order any objection he may have to the action of the court and his grounds therefor"

State v. Samson, 366 A.2d 856 (1976). Failure to object "must be considered as trial strategy and a waiver by the accused of any objection respecting the judicial action involved" Id.

The doctrine of invited error independently bars relief. By agreeing to the charge structure and failing to request the instruction now claimed to be essential, the defendant invited the alleged error. When a party has invited error, courts will not undertake obvious-error review, which would otherwise allow correction of unpreserved errors affecting substantial rights. The doctrine reflects respect for the party-presentation principle where affirmative decision that is not a mere omission is respected. For instance, this Court has found that "[w]hen a party affirmatively agrees to a court action, that party has failed to preserve the action for appellate review"); *State v. Cardilli*, 2021 ME 31, ¶ 33, 254 A.3d 415 ("If a defendant explicitly waives the delivery of an instruction or makes a strategic or tactical decision not to request it, we will decline to engage in appellate review, even for obvious error." quoting *State v. Nobles*, 2018 ME 26, ¶ 34, 179 A.3d 910; *State v. Ford*, 2013 ME 96, ¶ 16, 82 A.3d 75 ("[Section] 101(1) ... specif[ies] that a trial court is not required to instruct on an affirmative defense that has been waived by the defendant."); 17-A M.R.S. § 101(1) ("This subsection does not require a trial court to instruct on an issue that has been waived by the defendant.")

As this court has further noted, A party who affirmatively accepts a position at trial may not later challenge that same position on appeal; the law does not permit a litigant to have it both ways. See *State v. Rega*, 2005 ME 5, ¶ 17, 863 A.2d 917 ("When a party affirmatively agrees to a court action, that party has failed to preserve the action for appellate review.")

This doctrine ensures the integrity of judicial proceedings and prevents strategic manipulation of the trial process.

Because the self-defense instruction was affirmatively agreed to and waived by the Appellant, he is not entitled to relief under any standard much less the high bar of obvious error for an unpreserved issue.

B. Evidence Did Not Generate Self-Defense as to Domestic Violence Criminal Threatening.

Although a court must instruct on self-defense when the evidence generates it, see *State v. Bard*, ¶ 11, 793 A.2d 509, generation is offense specific. A justification defense must be supported by evidence relating to the particular conduct charged. See *State v. Ouellette*, ¶ 12-13, 37 A.3d 921.

Domestic Violence Assault required proof of intentionally, knowingly or recklessly causing bodily injury or offensive physical contact[1], 17-A M.R.S. section 207-A(1)(A) (App. at 13) and Domestic Violence Criminal Threatening required proof that the defendant intentionally or knowingly placed the complainant in fear of imminent bodily injury[2], 17-A M.R.S. section 209-A(1)(A), (App at 13).

The trial court concluded that the evidence generated self-defense as to the assault count. (Tr. II at 74-75, 125-126.) Because the defendant did not request a self-defense instruction as to Domestic Violence Criminal Threatening or object to the instructions as given, review is for obvious error only. See *State v. Villacci*, ¶ 9, 187 A.3d 576; M.R.U. Crim. P. 52(b).

In the instant matter Victim testified that the Appellant pinned her down, drove his elbow across her face and jaw, and stated twice, "I will kill you." (Tr. I at 29). The Appellant testified that he restrained the complainant and escorted her to the bedroom. (Tr. II at 59.) Appellant did not testify that he threatened to kill her to stop an attack or that such a threat was necessary to defend himself.

[1] 17-A M.R.S section 207 states; "A person is guilty of assault if: A. The person intentionally, knowingly or recklessly causes bodily injury or offensive physical contact to another person… The conduct as alleged is charged under the Domestic Violence Statute for the assault.

[2] 17-A M.R.S. section 209-A states; " A person is guilty of criminal threatening if he intentionally or knowingly places another person in fear of imminent bodily injury." The conduct as alleged is charged under the Domestic Violence Statute for the criminal threatening.

Viewing the evidence in the light most favorable to the Appellant, *State v. Bard*, ¶ 11, 793 A.2d 509, the jury could rationally find that physical restraint was defensive while concluding that a threat to kill was not necessary or reasonable force under 17-A M.R.S. § 108.

In Maine, the governing principle is that justification is force-specific and proportional. A defendant is entitled to self-defense instruction only to the extent the evidence generates justification for the level of force used. See 17-A M.R.S. § 108; State v. Ouellette, ¶ ¶ 16-17, 37 A.3d 921.

Because Domestic Violence Criminal Threatening required proof that the Appellant intentionally or knowingly placed the complainant in fear of imminent bodily injury, the justification analysis must focus on the level of force inherent in the threatening conduct. See 17-A M.R.S. 209-A(1)(A). Deadly force and nondeadly force are governed by distinct statutory standards. 17-A M.R.S. § 108(1), (2); State v. Cannell, ¶¶ 8–10, 916 A.2d 231.

A defendant is entitled to self-defense instruction only if the evidence, viewed in the light most favorable to the defendant, generates justification for the specific level of force used. *State v. Ouellette*, ¶¶ 16, 17, 37 A.3d 921. Thus, even if the evidence generates justification for nondeadly physical restraint, the defendant is not entitled to a justification instruction for a separate threat to kill unless the evidence

independently satisfies the statutory requirements for deadly force under 17-A M.R.S. § 108 (2). Absent such evidence, no self-defense instruction is required as to threatening conduct.

Because no evidence supported the necessity and reasonableness of the threatening conduct as defensive force, the court was not required to instruct on self-defense for Count II.

C. *State v. Cannell* Does Not Establish Error.

The defendant's reliance on *State v. Cannell*, 916 A.2d 231, is misplaced.

Cannell addressed whether the trial court applied the wrong statutory standard by treating the pointing of a firearm as deadly force rather than nondeadly force. Id. ¶¶ 8–10. The Law Court vacated the judgment because the incorrect legal standard was applied.

Here, the court did not misclassify the level of force. Nor did it refuse to instruct on self-defense based on a mistaken belief that threats constitute deadly force. Instead, the court distinguished between potentially defensive physical force and separate threatening conduct. (Tr. II at 125–126.)

Cannell does not hold that every threat uttered during a physical altercation automatically generates a self-defense instruction. This case concerns whether the

evidence supported the defense as to a separate charge—not whether the wrong statutory standard was applied.

D. No Clear or Obvious Error Occurred.

To prevail under *Villacci*, the Appellant must show clear and indisputable error resulting in manifest injustice.

Appellant cites no Maine authority holding that once self-defense is generated for one count, it must be given for all related charges arising from the same incident. At most, Appellant identifies a debatable instructional question. Debatable issues do not constitute obvious error.

The jury's mixed verdict—acquittal on Assault and conviction on Criminal Threatening—demonstrates a charge-specific evaluation of the evidence rather than confusion or structural unfairness.

Assuming, arguendo, this is not invited error, Counsel's acquiescence confirms that any alleged defect was not clear or obvious at the time of trial—an essential element of obvious-error review. Because an error must be "plain," the absence of a contemporaneous objection is significant: if the alleged defect was not apparent to the court and counsel at the time of trial, it will rarely satisfy the demanding plainness requirement. *State v. Villacci*, ¶ 9, 187 A.3d 576; See *United*

States v. Olano, 507 U.S. at 734 stating ("the error be "plain." "Plain" is synonymous with "clear" or, equivalently, "obvious.")

When no objection is made, review is for obvious error only. *State v. Villacci*, ¶ 9, 187 A.3d 576; M.R.U. Crim. P. 52(b). Obvious error requires (1) error, (2) that is plain, and (3) that affects substantial rights, and relief is granted only if the error seriously affects the fairness and integrity of the proceedings. *State v. Dolloff*, ¶ 35, 58 A.3d 1032 (citing *United States v. Olano*, 507 U.S. 725, 732–36 (1993)). The Appellant has not met the demanding standard for obvious-error relief.

Finally, the defendant's reliance on a juror's post-verdict editorial (A. 45) is legally irrelevant. Juror deliberations cannot impeach a verdict, and such commentary does not establish manifest injustice[3]. See Maine Rule of Evidence 606(b)(1); *State v. Chesnel*, ¶ 16, 734 A.2d 1131; *State v. Fuller*, ¶ 6, 722 A.2d 457; *State v. Watts*, ¶ 14, 938 A.2d 21.

[3] Maine Rule of Evidence 606(b)(1) provides that: "During an inquiry into the validity of a verdict, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict."

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Honorable Court affirm the judgment of conviction for Domestic Violence Criminal Threatening.

Dated: February 23, 2026, Respectfully,

/s/ Kent G. Murdick

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Certificate of service

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

Dated: February 23, 2026

Respectfully,

/s/ Kent G. Murdick
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