STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket No.: LIN-25-379

STATE OF MAINE

V.

THOMAS COST

ON APPEAL FROM THE
LINCOLN COUNTY UNIFIED CRIMINAL DOCKET

APPELLANT'S REPLY BRIEF

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Table of Contents

Reply Brief Table of Contents..2

Reply Brief Table of Authorities..3

Reply Argument...4

I. The doctrine of waiver does not apply, because the Defense did not expressly request that the Trial Court omit the self-defense instruction as to Count Two, nor does the record establish hat the failure of object was "tactical."..4

II. The Defense was entitled to a self-defense instruction on the charge of Domestic Violence Criminal Threatening......................................7

CONCLUSION...10

CERTIFICATE OF SERVICE...10

Table of Authorities

Maine State Cases

State v. Cardilli, 2021 ME 31, 254 A.3d 415..........................4, 5

State v. Cannell, 2007 ME 30, 916 A.2d 231.............................8

State v. Jones, 2018 ME 17, 178 A.3d 481..............................7

Federal Cases

U.S. v. Stearns, 387 F. 3d 104 (1st Cir. 2004)...........................4

Maine Revised Statutes

17-A M.R.S. § 209...8

REPLY ARGUMENT

I. **The doctrine of waiver does not apply, because the Defense did not expressly request that the Trial Court omit the self-defense instruction as to Count Two, nor does the record establish that the failure to object was "tactical."**

The State confuses the direction provided by this Court in *State v. Cardilli*, as it applies to the concept of waiver.[1] 2021 ME 31, 254 A.3d 415. Waiver occurs when a party expressly requests that the Court take, or not take, some action. In *Cardilli,* this Court stated that waiver occurs when a "defendant *explicitly waives* the delivery of an instruction or *makes a strategic or tactical decision* not to request it. *Id.* at ¶ 33 (emphasis added). Put differently, if the record reflects that a defendant *specifically* asked for the court to take (or not take) action, such as expressly asking for a specific jury instruction, or asking that a specific instruction *not* be given, the defendant has waived that issue, including for obvious error review. In *Cardilli,* "the record clearly shows that Cardilli not only failed to request a self-

[1] The State also uses the terms "invited error." *Red Brief* at ¶ 15. It does not cite any case to differentiate between waiver (an intentional relinquishment of a right) and invited error. The State also uses the term "forfeiture" when discussing obvious error review of an argument. *Id.* This term is most often used in federal court to describe the effect when a party fails to present an argument or objection to the court. *U.S. v. Stearns*, 387 F. 3d 104, 105 (1st Cir. 2004). The federal courts review a forfeit argument using a very similar standard to our obvious error. *Id.* Thus, the concepts of an "unpreserved" objection (or issue) and a forfeit objection (or issue) are analogous.

defense justification pursuant to section 108(2)(A), but *explicitly* argued that the evidence did not generate the self-defense justification." *Id*. at ¶ 34 (emphasis added.) Thus, the facts in *Cardilli* are the opposite of the facts in this case.

At no point did the Defense *expressly request* that no self-defense instruction be given as to Count Two. At no point did the defense *argue* or *assert* that self-defense was inapplicable to Count Two. In fact, the record reveals the opposite. The Trial Court consulted with the Defense and State regarding the jury instructions. (Tr. II at 74.) The Trial Court expressly stated that it was going to give the self-defense instruction. (Tr. II. 74-75.) The State agreed that the facts generated a justification defense. (Tr. II. at 75.) The Court did not orally explain that the self-defense instruction was only going to be provided as to Count One.

Following closing arguments, the Trial Court indicated it was going to provide the written jury instructions to the jury. (Tr. II. at 111.) The Defense confirmed that the Court would include the self-defense instruction. (Tr. II. at 111-112.) Again, the Court did not

explain that the instruction was only as to Count One, nor did the Defense suggest such a limitation should be imposed.

Following the verdict, the Defense moved for a Judgment of Acquittal, arguing that it was inconsistent for the jury to acquit Tom of Domestic Violence Assault, but convict him for Domestic Violence Criminal Threatening. It was at that point the Court specifically highlighted that it had only provided the self-defense instruction as to Count One. (Tr. II at 125.) Defense Counsel candidly acknowledge that "I think that that --- I think that that probably was a mistake, I mean, now that I think about it." (Tr. II at 126.) Put differently, Defense Counsel simply overlooked the fact that the Court had only been provided the instruction as to Count One. While the failure to object triggers review only for obvious error, it does not constitute waiver.

Here, the Defense never expressly stated that it did not want the Court to provide a self-defense instruction as to Count Two. Only this level of specificity -an *express* statement- will result in waiver. After all, in other contexts, it is undisputed that a valid waiver only occurs when "a defendant voluntarily, knowingly,

and intentionally relinquishes or abandons a known right." *State v. Jones*, 2018 ME 17, ¶ 13, 178 A.3d 481. Failing to recognize a flawed instruction, and thus not lodging an affirmative objection, falls well short of this standard. Here, the Defense affirmatively requested that the self-defense instruction be given, without qualification. The failure to object, while being a "mistake," was not a waiver.

Similarly, the record does not reflect that this was a tactical decision by the Defense. A tactical decision is made when a party believes that not providing a particular instruction may result in some benefit. For example, a defendant charged with murder might specifically request that a lesser included instruction for manslaughter not be given, so as to avoid the risk of a "compromise" verdict. Here, there simply was not any "tactical" reason why the Defense would not have requested a self-defense instruction as to Count Two.

II. The Defense was entitled to a self-defense instruction on the charge of Criminal Threatening.

In its brief, the State repeats the same mistake made by the Trial Court. The State argues that Tom was not entitled to a self-defense instruction as it pertained to the statement "I'm going to kill

you," because, "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…" *Red Br.* at 20. The State is wrong. A threat to use deadly force *is* nondeadly force. *State v. Cannell*, 2007 ME 30, ¶ 7. Therefore, a threat to kill (assuming that was the factual basis for the conviction), is non-deadly force, and therefore Tom was entitled to a self-defense instruction as it pertained to Tom's use of non-deadly force in self-defense. There is no question that the testimony describing the complainant's assault on Tom was sufficient to generate a self-defense instruction on Count Two, as he would have been justified in using nondeadly force in response to the complainant's assault on him.

Furthermore, the testimony regarding Tom's alleged physical conduct also met the definition of Criminal Threatening, even if he did not make any verbal threat. *See* 17-A M.R.S. § 209: "A person is guilty of criminal threatening if he intentionally or knowingly places another person in fear of imminent bodily injury." Thus, the analysis as to whether the evidence was sufficient to generate a self-defense

instruction as to Count Two must consider all of Tom's conduct, not just the alleged verbal statement "I will kill you." Put differently, if Tom was entitled to a self-defense instruction as to Count One based on the testimony, he was also entitled to a self-defense instruction as to Count Two, because the conduct that formed the basis for the two charges was the same (except for the verbal threat). Therefore, it was error for the Trial Court to fail and provide a self-defense instruction as to Count Two.

Finally, the State misstates the Defendant's argument, asserting that "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." *Red Br.* at 21. No such mechanical argument was made by Tom. However, it is *absolutely* the law that correct instructions must be given for each count where the evidence generates a justification defense. Here, it was obvious error for the court not to provide a self-defense instruction.

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

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CERTIFICATE OF SERVICE

I, the Undersigned, do hereby certify that on March 23, 2026, I caused to be served upon all parties an electronic copy of the Reply Brief, by emailing the parties below.

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

Dated: March 23, 2026

/s/ Scott F. Hess

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