

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

LAW COURT DOCKET NO. Cum-26-145

STATE OF MAINE
Appellee

v.

OLIVIER MISIGARO
Appellant

ON APPEAL from the Cumberland County
Unified Criminal Docket

BRIEF OF APPELLANT

Rory A. McNamara # 5609
DRAKE LAW LLC
P.O. Box 143
York, ME 03909
(207) 475-7810

ATTORNEY FOR OLIVIER MISIGARO

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INTRODUCTION

Defendant was acquitted of two assault counts, one alleging strangulation of his former wife and the other alleging some manner of offensive contact with his teenage daughter. Evidently, the jury determined that there was no strangulation and that defendant's contact with the daughter was reasonable corporal discipline.

When he testified, defendant swore his wife had been the aggressor, acknowledging that he "fought back" and "pushed" her. But the court refused to instruct in self-defense, reasoning that the contact resulting from defendant's admitted use of force was not the focus of the State's case. Without the justification instruction, defendant had effectively admitted to the sole crime of which he was convicted: assault by offensive physical contact.

However, multiple decisions from this Court hold that self-defense instructions are required whenever the defense is generated as to *any* event in evidence, not just those upon which the State's case is most focused. If it is a possible basis for a conviction, in other words, a defendant is entitled to a self-defense instruction for *any* of his defensive contact. The court violated this precedent, erroneously considering only the State's theory of the case, not defendant's. In the circumstances, the error is unambiguously prejudicial.

STATEMENT OF THE CASE

After a three-day jury trial, defendant was acquitted of two charges, domestic violence aggravated assault, 17-A M.R.S. § 208-D(1)(D) (2019) (Class B) (Count I), and domestic violence assault, 17-A M.R.S. § 207-A(1)(A) (2019) (Class D) (Count III).¹ The jury found defendant guilty of one count: domestic violence assault, 17-A M.R.S. § 207-A(1)(A) (2019) (Class D) (Count II). The court (Cumberland County, McElwee, J.) thereafter imposed a 45-day carceral sentence. This direct appeal follows.

I. Defendant, the complainant, who was his wife, and their three children attended a Thanksgiving get-together.

For Thanksgiving 2021, the family attended an evening party at their neighbors' apartment. (1Tr. 70-71). By the time of the events at the heart of this case, it was "late in the night." (1Tr. 108-09). The adults were drinking alcohol. (1Tr. 71; 3Tr. 76). Some were dancing. (3Tr. 24-25).

The host, a close friend of the wife²/complainant, said something intemperate to defendant. (1Tr. 71-72; 3Tr. 69-71). Someone – defendant recalls it was the wife – snidely suggested that defendant dance with a female guest, rumored to be defendant's "mistress."³ (1Tr. 108; 3Tr. 25). An

¹ Subsequent amendments to both of the charged statutes are immaterial to the issues on appeal. *See* P.L. 2021, ch. 647 §§ B-17-19 (effective Jan. 1, 2023) & P.L. 2023, ch. 465 §§ 2-4 (effective Oct. 25, 2023).

² By using the moniker "*the* wife," defendant seeks brevity not disrespect. She was not, at the time of the allegations, an "ex-wife," nor is she now "his wife."

³ Both the woman accused of being defendant's "mistress"/"prostitute" and defendant denied there was any truth to the innuendo. (1Tr. 26; 3Tr. 72-73).

argument between defendant and the wife's friend/the host ensued. (1Tr. 168).

The former couple's three teenagers all recall defendant telling them that it was time to go. (1Tr. 169, 190, 212). Outside of the apartment, according to the middle child, defendant pinched her arm and slapped the back of her head/neck. (1Tr. 169-70, 172). The oldest child saw "grabb[ing]," as defendant complained about the girl's behavior. (1Tr. 192). The youngest child heard a slap. (1Tr. 212-14). Defendant testified that his contact with his daughter was disciplinary, given her disobedience and rudeness. (3Tr. 77-80). The jury seemingly accepted this defense, acquitting defendant of this conduct. The two remaining charges, rather, centered on defendant's interaction with the wife.

II. The complainant contends that defendant was the aggressor.

According to the wife, once the family made it to their vehicle, she sat down in the passenger seat and defendant "started" "choking" her. (1Tr. 76). He did so by placing two hands around her neck and pressing. (1Tr. 83). She testified that she was unable to breathe, speak or scream. (1Tr. 83-84). This caused the wife pain. (1Tr. 83). In her version, the three children extricated defendant from the wife. (1Tr. 87).

The children marginally supported the wife's testimony. The middle child swore that defendant put the wife in a "headlock" and was "kind of" "strangling her." (1Tr. 176). Counter to the wife's testimony that she could not vocalize, however, the child testified that the wife was screaming. (1Tr.

176). Another child testified that defendant “reached over to my mom’s neck.” (1Tr. 194). His hands were around her neck. (1Tr. 194-95). The incident lasted “a few seconds.” (1Tr. 195). Yet, the third child testified merely, “[H]e hit my mom.” (1Tr. 217).

There were no signs of physical injury to the wife. (1Tr. 90; 2Tr. 161-62). In fact, the wife was caught on video stating that she knew she had no signs of physical injury, without having even looked at her neck. (1Tr. 135-36). She denied having post-incident “external pain.” (1Tr. 142). She refused medical care. (1Tr. 181; 2Tr. 159). In the immediate aftermath, she was observed smiling, laughing and maintaining an unusually “casual” demeanor. (2Tr. 164).

In contrast, defendant incurred significant “scrapes” to his face, near his eyes. (2Tr. 171-73). The officer who arrested defendant observed “fresh blood dripping from the wounds on his face.” (1Tr. 175). Two of the children attributed these wounds to the children’s physical defense of the wife during the alleged strangulation. (1Tr. 176-77, 217).

The jury acquitted defendant of strangulation

III. Defendant contends that the wife was the aggressor.

Defendant testified that, once inside the car, he remarked how rude the host had been to him. This prompted the wife to react, “jump[ing] on” defendant and “put[ting] her fingers in” his face. (3Tr. 83-84). She scratched him. (3Tr. 84). She cut the inside of his mouth and near his eyebrow. (3Tr. 84-85). “I fought back. I – I pushed her,” defendant testified, noting that the incident lasted less than a minute. (3Tr. 86-87).

To fend her off, defendant grabbed his then-wife's hands and he "pushed" her away. (3Tr. 85-86). It simply never happened that the children, from the backseat, intervened and forced defendant off of the wife, defendant swore. (3Tr. 86-87).

On cross-examination, the prosecutor elicited from defendant, without objection:

Q So is it your testimony that [the wife] is lying? And that's a yes or no question.

A Yes.

Q And it's – it's your testimony that your daughter, [the middle child], is lying?

A Yes.

Q And it's your testimony that your daughter, [the youngest child], is lying?

A Yes.

Q And it's your testimony that your son, [the oldest child], is lying?

A Yes.

(3Tr. 94). The State accentuated this "lying" theme in its closing argument:

He testified today and sat here and told you they were all lying.

Now, if everyone was regurgitating a rehearsed story, wouldn't it probably be more precise?

(3Tr. 157).

Though defendant had sought unsuccessfully to introduce much more evidence of the wife's motive to fabricate, the little that was admitted on that score related how the allegations against defendant might serve as a springboard for the children's visa applications. (*See* 3Tr. 33-35) (unmarried children under 21 who are unable to reunify with at least one parent because of finding of "abuse, neglect or abandonment" may obtain visa, if it is in their best interest to avoid returning to their home country⁴).

Contemplating the possibility that the jury might find defendant guilty based on his admission that he "fought back" and "pushed" the wife away, defendant requested a self-defense instruction. (A24; 3Tr. 119). Counsel noted that Count II could be proven by proof of merely "offensive physical contact."⁵ (A24; 3Tr. 119). And he raised concerns about a "compromise" verdict lest the court instruct in self-defense. (A28; 3Tr. 123).

Reasoning that it only mattered what the State was focused on (*i.e.*, strangulation), not what defendant admitted had instead occurred (*i.e.*, he "fought back" and "pushed" her), the court repeatedly told defense counsel that self-defense was not generated. *E.g.*, A25; 3Tr. 120 ("So I don't believe it's been generated."); A26; 3Tr. 121 ("So if that's the case, I don't see that you've generated a self-defense."); A28; 3Tr. 123 ("Off the top of my head, I

⁴ The family is Rwandan.

⁵ That is how the jury was instructed regarding Count II: "the defendant caused bodily injury or offensive physical contact...." (3Tr. 140).

The court denied defendant's request for a special verdict form to distinguish between the various degrees of contact. (3Tr. 117-18, 127-28).

don't see how it's been generated, but I'll take a look at it, and let you know when we go in[to the courtroom]."). Back in the courtroom, the court ruled:

Having just read the self-defense instruction, I'm not convinced it was generated, and that it would confuse the jury further, given that [the prosecutor] has represented that she is only alleging, and will only discuss in her argument, the strangulation piece of Mr. Misigaro having his hands around [the wife's] neck. I'm concerned the jury is going to be further confused, and the self-defense instruction is challenging enough, but there's just not been enough generated here. The allegations of assault by the [S]tate are not in response to anything else. So how do you want to handle that, [defense counsel]?

(A29; 3Tr. 125). Defense counsel submitted: "I withdraw the request." (A29; 3Tr. 125). No self-defense instruction was provided.

ISSUES PRESENTED FOR REVIEW

I. Did the court commit prejudicial error by omitting a self-defense instruction as to Count II, incorrectly ruling that the defense was not generated?

II. Did the State commit obvious error by both eliciting from defendant that his children and then-wife must have lied when testifying and mentioning such in its closing argument?

ARGUMENT

First Assignment of Error

I. The court committed prejudicial error by omitting a self-defense instruction as to Count II, incorrectly ruling that the defense was not generated.

A. Summary of the argument

Defendant admitted that he “fought back” and “pushed” his then-wife when she attacked him – effectively an admission to Count II. Yet, the court denied defendant’s requested self-defense instruction, because it agreed with the State that such touching – the pushing and the fighting back – was not the basis for the State’s allegation. However, multiple cases from this Court hold that, even when the contact potentially justified by self-defense is discordant with the State’s version of evidence, a defendant is nonetheless entitled to a self-defense instruction. Following those cases, here as well, the jury clearly did not believe the entirety of the State’s case, which underscores the prejudice of the court’s omission.

B. Preservation and standard of review

This argument is preserved by defendant’s request for the self-defense instruction. (A24-A28; 3Tr. 119-23). This Court’s review for prejudicial error is therefore plenary. *State v. Aldrich*, 2026 ME 8, ¶ 72, ____ A.3d ____; (justification defenses, generally); *State v. Ouellette*, 2012 ME 11, ¶ 7, 37 A.3d 921 (self-defense). Whether self-defense is generated is determined by examining the evidence, including all reasonable inferences therefrom, in the light most favorable to the defendant. *State v. Delano*, 2015 ME 18, ¶ 15, 111 A.3d 648.

Defendant acknowledges his attorney's statement, after the court had repeatedly stated that a self-defense instruction was not generated, "I withdraw the request." (A29; 3Tr. 125). In the circumstances, this is not waiver; it is involuntary submission to a judge's repeated rulings. Two foreign decisions demonstrate why that is so.

The Supreme Court of North Carolina recognizes that a defense lawyer's statement that his request for a particular jury instruction is "withdrawn" is not a waiver when that "withdrawal" is based on the judge's mistaken view of the law. *State v. Spicer*, 204 S.E.2d 641, 647 (N.C. 1974). A judge's repeatedly expressed "mistaken view of the law," in other words, exerts "too much pressure to make the withdrawal of the request voluntary on the part of the defendant and his counsel." *Id.* The District of Columbia Court of Appeals is in accord, holding that the withdrawal of a request for a jury instruction, once that request has been overruled, is "at worst, an empty gesture of no substantive significance." *Simmons v. United States*, 554 A.2d 1167, 1170 n. 7 (D.C. 1989).

In our case, it was quite clear that the court determined that the instruction was not generated; it said so no fewer than five times before counsel "withdrew" his request. (See A24-A27, A29; 3Tr. 120-23, 125). Before counsel's "withdrawal," it had repeatedly reasoned – erroneously, defendant contends below – that the issue hinged on the State's version of events without regard for defendant's. (*E.g.*, A27; 3Tr. 122) ("[T]he jury instructions are focused on the allegations the [S]tate is making and the elements of the statutes that have been charged."). If, as this Court has often

held, waiver “may be shown by a course of conduct,” *e.g.*, *McCarthy v. Goroshin*, 2016 ME 8, ¶ 8, 143 A.3d 98, waiver ought not be found in a singular word counter to the significant “course of conduct” preceding it. M.R. U. Crim. P. 51 is not an exercise in formalism. It is a requirement of notice, and such was handily accomplished here. Where our rules “shall be construed to secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay,” M.R. U. Crim. P. 2, instead shunting the merits to post-conviction review would be a complicated waste – one unlikely to accord defendant meaningful remedy.⁶

C. Analysis

The analysis here is straightforward and succinct. (1) The defense was generated, and (2) the instruction’s omission was prejudicial.

1. Self-defense was generated.

Count II, the sole count of conviction, alleged that defendant caused “offensive physical contact” or “bodily injury.” 17-A M.R.S. § 207-A(1)(A); 17-A M.R.S. § 207(1)(A). The indictment for Count II reads:

On or about November 26, 2021, in South Portland, Cumberland County, Maine, **OLIVIER MISIGARO**, did intentionally, knowingly or recklessly cause bodily injury or offensive physical

⁶ Apparent throughout our record are indications of the dire immigration consequences posed by this conviction. *See, e.g.*, *Defendant’s Sentencing Memorandum*, Exhibit A (updated version) at 2 (noting immigration judge’s finding that defendant’s “life or freedom would be threatened were he to be returned to Rwanda”).

contact to [the wife]. This conduct was committed against a family or household member as defined by 19-A M.R.S. § 4002(4). (A32) (emphasis in original). The complaint was identical. (A30). Plainly, neither references a specific event, only the elastic terms of art including “offensive physical contact.”

This Court has repeatedly “held that if the complaint or indictment does not identify the particular event leading to the charge, the court cannot refuse to instruct the jury on self-defense if any one of the events [in evidence] generates a self-defense instruction.” *State v. Thurston*, 2009 ME 41, ¶ 10, 969 A.2d 906. Both *Thurston* and another case, *State v. Bard*, 2002 ME 49, 793 A.2d 509, illustrate this principle in action.

In *Bard*, two distinct versions of events were before the jury. The State, via the complainant, adduced that the defendant assaulted her. 2002 ME 49, ¶ 3. Mr. Bard, though, swore that he pushed the victim’s face away to stop her from biting his hand. *Id.* ¶¶ 3-4. On appeal, “Bard argue[d] that as long as there is some evidence of self-defense about some conduct that *could* also be the basis of the assault charge, *i.e.*, when he pushed [the complainant’s] face after she bit his finger, then the court must instruct on self-defense.” *Id.* ¶ 12 (emphasis in *Bard*). The State, in contrast, argued that no self-defense had been generated as to the contact which it felt was the basis for the assault charge. *Id.* The Court favored the defendant’s position: When there are “several incidents that could be the basis of the assault charge,” and at least one such incident is arguably justified by self-defense, a court must provide

the jury with “the means and authority” to make that determination. *Id.* ¶¶ 15-16.

Years later, in *Thurston*, the Court reaffirmed *Bard*. There, the alleged victim testified that Mr. Thurston assaulted her. 2009 ME 41, ¶ 3. According to Thurston, he touched the alleged victim only to restrain her from obtaining a knife he feared she’d use against him. *Id.* ¶ 4. Again, on appeal, “the State contend[ed] that in order to be entitled to a self-defense instruction, Thurston needed to present evidence of self-defense with respect to the conduct described by the State’s witnesses.” *Id.* ¶ 8. The defendant countered that because the charging instrument did not specify a discrete event, “the jury was free to accept his testimony that he touched [the alleged victim] only once in an effort to stop her from grabbing a knife, and, therefore, a self-defense instruction was warranted.” *Id.* ¶ 7. Again, the Law Court favored the defendant’s argument, holding that the omission to instruct in self-defense was reversible error.

Our case is remarkably similar to *Bard* and *Thurston*. The complainant’s and defendant’s versions differed. Defendant admitted to having “fought back” and “pushed” her after she initiated an assault on him. Without a self-defense instruction, the jury could not have found that he did do justifiably. He was deprived of his defense, and, without it, he effectively admitted to the crime of which he was convicted.

2. Omission of a self-defense instruction was prejudicial.

Like our case, both *Bard* and *Thurston* involved split verdicts – a smattering of convictions and acquittals. *Bard*, 2002 ME 49, ¶ 13; *Thurston*, 2009 ME 41, ¶ 12. The “jury's decision to acquit [the defendants] of numerous counts was an indication that it did not believe all of the alleged victim[s]' testimony.” *Thurston*, 2009 ME 41, ¶ 11. Thus, there was “no way to assess which specific instances of alleged conduct the jury based its verdicts on....” *Bard*, 2002 ME 49, ¶ 13. Obviously, the same is true here.

In fact, we can go a step further than *Bard* and *Thurston*. Here, it is possible that the jury believed *absolutely nothing* the complainant swore. The sole count of conviction is the one which defendant admitted committing, albeit it without the needed self-defense instruction. The jury may have believed everything defendant said yet returned exactly the verdicts it did.

Second Assignment of Error

II. The State committed obvious error by both eliciting from defendant that his children and then-wife must have lied when testifying and mentioning such in its closing argument.

A. Summary of the argument

Since the late 1970s, it has been Maine law that a prosecutor ought neither question a defendant whether other witnesses have been lying during their testimony, nor argue along those lines. Here, the State's attorney did both.

B. Preservation and standard of review

Defendant concedes that he did not object to these constituent errors. Therefore, review is for obvious error: an error that is plain, affects substantial rights, and which this Court chooses to remedy for the sake of fairness or the reputation or integrity of the judicial system. *State v. Dolloff*, 2012 ME 130, ¶ 35, 58 A.3d 1032.

C. Analysis

Defendant separately addresses the obvious-error elements, though, naturally, there is overlap between them.

1. It is error to inquire whether another witness is lying or argue that jurors can only acquit a defendant if they determine a witness has lied.

State v. Commeau, 409 A.2d 247, 249 n. 1 (Me. 1979) first set out the prohibition: "Cross-examination that tries to push a defendant into saying other witnesses lied is impermissible." In 1997, this Court added: "[W]hether conveyed in cross-examination *or in final argument*," it is

improper to “create[] the impression that the jury could believe the defendant only if the jury found another witness lied.” *State v. Goodwin*, 1997 ME 69, ¶ 5, 691 A.2d 1246 (emphasis added). Also, “the question whether the defendant believes another witness lied is irrelevant. Evaluation of credibility is for the jury, and a lay witness's opinion on credibility is simply not admissible.” *Id.*

2. The error was plain, given the abundant case-law and the context of our case.

Numerous decisions establish the impropriety of the State's tactics. *E.g.*, *Commeau*, 409 A.2d 247, 249 n. 1; *State v. Steen*, 623 A.2d 146, 149 (Me. 1993) (“Questions that force a witness to give his opinion on whether another witness is lying invade this province and are impermissible.”); *State v. Tripp*, 634 A.2d 1318, 1320 (Me. 1994) (“The jury was already in a position to come to its own conclusions, so asking defendant whether the victim lied was an obvious error.”); *State v. Gilman*, 637 A.2d 1180 (Me. 1994) (“Questions that solicit an opinion on whether another witness lied are impermissible, however, as an invasion of the jury's exclusive province to assess credibility.”); *State v. Bourgeois*, 639 A.2d 634 (Me. 1994) (“Contrary to the State's contention that the State's questions were proper, cross-examination that tries to push a defendant into saying other witnesses lied is impermissible.”) (cleaned up); *cf. State v. Corrieri*, 654 A.2d 419, 422 (Me. 1995) (“Unlike *State v. Tripp*, 634 A.2d 1318, 1319-21 (Me. 1994), where we found obvious error and set aside the conviction, the State did not ask the defendant to comment on the credibility of the other witnesses.”); *cf. State*

v. Moontri, 649 A.2d 315, 317 (Me. 1994) (“When viewed in context, the State's comment is based on the evidence and does not rise to the level of impropriety that existed in *State v. Tripp*, where the State repeatedly and pointedly questioned the defendant about whether the victim had lied on the stand and also implied in closing that the defendant had testified falsely.”); *cf. State v. Comer*, 644 A.2d 7, 10 (Me. 1994) (distinguishing *Tripp* because “the State did not ask any improper questions concerning witness credibility, and defendant was not compelled to accuse the victim of being a liar.”).

The circumstances of our case, moreover, evince just how plain the error was. On the first day of trial, the attorneys approached sidebar to discuss an evidentiary objection:

MR. TISDALE: This whole interaction between her and the police begins with a lie, and it ends with a lie. They're talking –

THE COURT: Mr. Tisdale, lower your voice.

MR. TISDALE: Okay.

THE COURT: And please don't use the L-word. It's not necessary. You obviously –

MR. TISDALE: I wouldn't use it out there. I'm using it here.

THE COURT: It's still on the record. You don't need to say it in court. It's not necessary. You obviously have a different view of the case than the State, but we need to be respectful, and we're not going to

face the jury as you are physically using the word lie and speaking loudly.

MR. TISDALE: Excuse me.

(1Tr. 116). Clearly, it was plain to the court that “lie” – “the L-word,” as it put it – is a loaded word, at least when spoken at sidebar by a defense attorney.

3. The errors affected substantial rights.

The split verdicts render untrue any assertion that the jury found the State’s case overwhelming. As discussed in the previous assignment of error, in fact, it is possible that the jury returned the verdicts it did precisely because it believed every word of defendant’s testimony. These factors weigh heavily in favor of a determination that defendant’s substantial rights have been impaired. *See State v. White*, 2022 ME 54, ¶¶ 31-33, 36, 285 A.3d 262 (discussing importance of strength of State’s case in assessing prejudice).

Of course, also, ours was a credibility contest. Properly, that has been a prime consideration in like cases. *Cf. Tripp*, 634 A.2d at 1320 (“The jury was required to determine credibility in a close case, and for this reason the State’s questioning of defendant regarding whether the victim lied was prejudicial and constitutes reversible obvious error.”). Requiring a husband and father to assert that his then-wife and still-children have lied forces that man into a difficult position. That is especially so when, as here, the court strictly limits the evidence pertaining to why they had a motive to lie.

4. The Court ought to reverse.

As it apparently was in the early- to mid-1990s (see dates in the string-citation above), the frequency of prosecutorial argument traversing this “lying”/“lie” line is on the uptick.⁷ Just as then, the integrity of the court system is at stake: Will prosecutors toe long-drawn lines, or will they overwrite them?

Also, while it is always difficult to broach, there is a noteworthy risk here to the appearance of justice. The court abruptly shut down defense counsel for having the temerity, at sidebar, to voice “the L-word.” Yet, in open court, with defendant on the stand and a multitude of decisions forbidding it, the court did nothing when it was the prosecutor who repeatedly crossed the line. Respect for, and faith in, the judicial system erodes when judges treat parties so disparately.

CONCLUSION

For the foregoing reasons, this Court should vacate defendant’s convictions, then remand for proceedings not inconsistent with its mandate.

Respectfully submitted,

May 22, 2026

/s/ Rory A. McNamara

Rory A. McNamara, #5609
DRAKE LAW LLC
P.O. Box 143
York, ME 03909

⁷ See, e.g., *State v. Hennessey*, Yor-24-502 (pending); *State v. Connors*, Ken-25-572 (pending); *State v. Tellier*, Oxf-25-489 (pending).

207-475-7810

ATTORNEY FOR OLIVIER MISIGARO

CERTIFICATES OF FILING & SERVICE

I have filed this brief, and served opposing counsel, as listed on the service list, in compliance with M.R. App. P. 1D(c), 1E and 7(c).

/s/ Rory A. McNamara