

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

LAW COURT DOCKET NUMBER Cum-26-145

STATE OF MAINE,

Appellee

v.

OLIVIER MISIGARO,

Appellant

ON APPEAL FROM THE CUMBERLAND COUNTY
UNIFIED CRIMINAL DOCKET

BRIEF OF APPELLEE,

STATE OF MAINE

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STATEMENT OF ISSUES

- 1. Did the court commit prejudicial error when it did not give the jury a self-defense instruction on Count 2 when it was a lesser included charge of Count 1 requiring deadly force, and the issue was waived?**
- 2. Did the State commit obvious or harmful error by clarifying the Defendant's position and quoting him in closing arguments?**

ARGUMENT

1. The Court did not commit prejudicial error when it declined to give the jury a self-defense instruction.

The instruction requested on Count 2 was for self-defense for a push, which would be non-deadly force. *State v. Oullette*, 2012 ME 11, ¶ 11, 37 A.3d 921 (quoting 17-A M.R.S. § 108(1)(1-A)). The conduct in Count 2 was the same as Count 1 which was deadly force. (A25). Therefore, the trial court did not err in omitting the self-defense instruction.

A. The Defendant did not preserve his objection to the court's denial of a self-defense instruction when he withdrew the request.

“When a party affirmatively agrees to a court action, that party has failed to preserve the action for appellate review.” *State v. Rega*, 2005 ME 5, ¶ 17, 863 A.2d 917 (citing *Med. Care Dev. v. Bryler Corp.*, 634 A.2d 1296, 1299 (Me.1993) (holding that where the Defendant did not object to jury instructions that they later claimed omitted elements of claim asserted, they did not preserve the issue for appellate review))¹; see also *State v. Harding* 2024 ME 67, ¶ 19-22, 322 A.3d 1175 (finding that a conscious and potentially strategic “withdrawal” of request for a curative instruction plus a failure to request a mistrial based on prosecutor’s comments amounted to waiver of the issues for appeal). Withdrawal of a request

¹ In *Rega*, the Defendant not only “withdrew” his objection to the playing of an audio recording for the jury, but affirmatively requested that the recording be played for the jury. The court found that he therefore, failed to preserve the issue of its admissibility for appeal.

for an instruction does not preserve the issue for appeal. *Id.* “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.” *State v. Nobles*, 2018 ME 26, ¶ 34, 179 A.3d 910 (emphasis added). A trial court is not required instruct on a defense or justification issue that has been waived by the defendant. 17-A M.R.S. § 101(1). Failure to present a defense or objection constitutes a waiver, but the trial court may grant relief upon cause shown. M.R.U. Crim. P. 12(b)(2). “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.” *State v. Nobles*, 2018 ME 26, ¶ 34, 179 A.3d 910 (emphasis added).

The Appellant suggests that withdrawing a request for the self-defense instruction is the functional equivalent of acquiescing to the trial court’s denial of the instruction. (Blue Br. 15). However, that could have been accomplished simply by replying with the customary respectful request to preserve the issue. Where the issue of instruction was explicitly withdrawn by counsel, the Appellee submits that the issue was waived for appellate review.

B. Self-defense was not generated at trial and the Court committed no error by not giving the jury instruction.

Even if this Court finds the issue of omission of the self-defense instruction to have been preserved, the trial court did not err by denying the instruction. When a defendant preserves an objection to a court's denial of his requested instruction on self-defense, that denial is reviewed for harmless error. *State v. Bard*, 2002 ME 49, ¶ 6, 793 A.2d 509. The ultimate task for the court in reviewing for both harmless and obvious error, is to determine whether the Defendant received a fair trial. *State v. Aldrich*, 2026 ME 8, ¶ 66, 353 A.3d 987. Prior to the harmless error analysis, however, the evidence first must be analyzed to determine whether the instruction was even generated. *Bard*, 2002 ME 49, ¶ 6, 793 A.2d 509.

The Defendant was charged in Count 1 with Domestic Violence Aggravated Assault by strangulation of [REDACTED]. "A person is guilty of aggravated assault if that person intentionally, knowingly or recklessly causes bodily injury to another under circumstances manifesting extreme indifference to the value of human life." 17-A M.R.S. § 208(1)(C).² An example of these circumstances provided in the statute is strangulation. *Id.* "Deadly force means physical force that a person uses with the intent of causing, or that a person knows to create a substantial risk of causing death or serious bodily injury." 17-A M.R.S.

²There was no dispute at trial about the familial relationship between the Defendant and the victim establishing the Domestic Violence element.

§ 2(8). Where strangulation is defined as conduct manifesting extreme indifference to the value of human life, strangulation is therefore a demonstration of deadly force. As applied here, use of deadly force is justified only when: (1) the defendant has an actual belief that a person is about to use unlawful deadly force against him or another person; (2) the defendant believes the use of such force is necessary; (3) those beliefs are objectively reasonable; (4) the defendant did not provoke the attack; and (5) the defendant knows that he cannot retreat from the attack completely safely. *Oullette*, 2012 ME 11, ¶ 10, 37 A.3d 921 (quoting 17-A M.R.S. § 108(2)). “In many, if not most, instances, the trial court may determine, as a matter of law, whether there is evidence that could support a self-defense finding and if so, whether deadly or non-deadly force is implicated. *Id.* at ¶ 15.

The Defendant was charged with using deadly force against the victim by strangulation. There was no evidence presented at trial which justified that there was any belief on his part that the victim was about to use deadly force against him. Therefore, on the first step of the analysis of whether the self-defense instruction was generated, it fails. Further, when assessing whether the self-defense instruction was generated, the Court properly focused on the charge of aggravated assault and the elements of strangulation. (A29). That was the only conduct alleged by the State for both Counts 1 and 2. *Id.* As stated above, self-defense for deadly force was not generated.

The Defendant was charged in Count 2 with Domestic Violence Assault of [REDACTED]. “A person is guilty of assault if the person intentionally, knowingly or recklessly causes bodily injury or offensive physical contact to another person.” 17-A M.R.S. § 207(1)(A). Count 2 was charged by the State as a lesser included offense of Count 1. The State did not provide any evidence of an assault on [REDACTED] other than the evidence of the strangulation- there was only one event. The Appellant cites *State v. Thurston* and *State v. Bard*, which both hold that when there are multiple events which could support a charge and evidence that potentially generates self-defense, the instruction must be given. *State v. Thurston*, 2009 ME 41, 969 A.2d 906; *State v. Bard*, 2002 ME 49, 793 A.2d 509. However, the State maintained that both counts were based on the same conduct and had the Defendant been found guilty of both, they would have had to be merged for sentencing. The Defendant here did not offer justification for the State’s charges- he offered a justification for a separate and distinct event that only he testified about and that was not part of the State’s case. The Appellant’s argument is that in any case involving only one instance of assault, a Defendant can testify about a different assault and claim that was in self-defense, thereby creating ambiguity in the charging instrument where there was none prior, and the Appellee submits still is none, and potentially achieve an acquittal based on a phantom second event.

The Appellant also suggests that it is possible that the jury convicted the Defendant solely on his own testimony about pushing the victim. (Blue Br. 19.) The State provided no evidence about any assault other than the strangulation. Therefore, any other information the jury received about another instance of possible assault was not proved by the State beyond reasonable doubt and could not have been the basis for a guilty verdict from the jury.

Therefore, the trial court did not commit obvious nor harmful error by not providing self-defense instructions to the jury.

2. The State did not commit harmful error.

The State neither elicited from the Defendant that his family *must* have lied, nor did it represent such a thing in its closing. The Appellant mischaracterizes the State's questioning of the Defendant, as well as its comments in closing arguments. However, the State concedes that its use of language in cross-examination was obvious error, though submits that the error was harmless.

A. The State's overall line of questioning and argument were proper and harmless, albeit abrasive.

The State concedes that its use of the word "lie" in trial was an aggressive means to an otherwise proper end. The State's cross-examination of the Defendant merely explored and highlighted further his own testimony which contradicted

each of the testimonies of his family members who testified prior to him. In its closing, the State asked the jury a series of questions about the reasonableness of the suggestion that the Defendant's family all had a shared understanding of the events that occurred but pointed out that the Defendant's version was different. The State did not opine personally and did not accuse anyone of lying, but presented its case and argument to the jury in question form, emphasizing the Defendant's logic, for them to answer for themselves in deliberation and cited the Defendant's testimony about lying exactly one time.

This line of questioning in cross was not asking the Defendant to opine on any other witness' credibility, rather was an attempt at locking him into his own testimony which he voluntarily gave. Even if the State did commit obvious error, the error was harmless.

CONCLUSION

This court should uphold the trial court's decisions and affirm the Defendant's conviction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Meredith Singleton, Assistant District Attorney, certify that I have filed this brief and served opposing counsel, Rory McNamara, Esq., via email, in compliance with the Maine Rules of Appellate Procedure.

Dated: August 13, 2026

/s/ Meredith Singleton

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