

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

REPLY 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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ARGUMENT

First Assignment of Error

I. Omission of the requested self-defense instruction was prejudicial error.

A. Defense counsel did not waive the instruction.

The State has not addressed the two cases, cited at Blue Br. 15-16, that demonstrate that an attorney's statement that he "withdraws" a request is *not* a waiver when such follows a judge's repeated rulings against that request. This "course of conduct" does not indicate waiver; it indicates submission to the court's repeated (five times, at least) misstatement of the law.¹ See A24-A27, A29; 3Tr. 120-23, 125.

This Court has repeatedly held that waiver – even of a non-constitutional "civil," rather than criminal, right – must be *knowing* and *voluntary*. *E.g.*, *McCarthy v. Goroshin*, 2016 ME 98, ¶ 8, 143 A.3d 138; *Roberts v. Maine Bonding & Casualty Co.*, 404 A.2d 238, 241 (Me. 1979); *Dunwoody v. Dunwoody*, 2017 ME 21, ¶ 11, 155 A.3d 422. "[P]arties' shared misunderstanding" about the law does not permit waiver, because such is neither voluntary nor knowing. *Id.* Here, we have an attorney merely

¹ The State's citation to *State v. Harding*, 2024 ME 67, 322 A.3d 1175 is misplaced for this reason. In *Harding*, defense counsel's request for a curative instruction was *granted*, but he then withdrew the request.

Likewise, in *State v. Rega*, 2005 ME 5, ¶¶ 8, 11, 16-17, 863 A.2d 917, defense counsel initially *won* exclusion of much of a video-recording. Then, mid-trial, counsel stated that he withdrew the objection because he and his client "had changed their minds." 2005 ME 5, ¶ 11. Counsel then "made an express request that the recording be played to the jury." *Id.* at ¶ 16.

saying the wrong word after vehemently requesting a self-defense instruction in the face of a court misstating the law.

If there is ever an occasion to indulge every presumption against finding a waiver, this is it. Defendant is in danger, and certainly his residence in the United States with his children is at stake. *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"); *see also Misigaro v. Blanche*, 26-1594 (1st Cir. Docket via PACER). The record suggests he may be on the wrong side of Rwanda's Hutu/Tutsi divide. *E.g.*, Tr. of 12/12/2025 at 40-46 (Rwanda area-expert testifies that sources indicate the wife is a Rwandan intelligence asset and that defendant may be a target of regime). This appeal may be all that stands between defendant and deportation.²

If, in these circumstances, "I withdraw" is a waiver, this case is as appropriate as they come for reviewing on direct appeal a claim of ineffective assistance of counsel. This Court, of course, used to permit such review, *see State v. White*, 619 A.2d 92, 93 (Me. 1993), and it should do so here when there is no rational reason for defense counsel to actually (assuming arguendo he did, of course) waive a self-defense instruction. By that point, counsel knew that defendant had testified to offensive physical contact with

² While most information about defendant's immigration proceedings is sealed, as an officer of the Court, the undersigned proffers that he has been informed by defendant's immigration attorney that a court order permits defendant to remain out of the custody of Immigration and Customs Enforcement *only for the pendency of this appeal*. *See* 14 M.R.S. § 1803. If accurate, defendant may be deported before reaching post-conviction review.

the wife (albeit in self-defense). No reasonable attorney would voluntarily surrender the lone defense justifying the otherwise criminal conduct to which his client had just admitted on the stand.

B. The State's argument on the merits is counter to precedent.

The State appears to argue that because *it* dwelled on strangulation, defendant could not get a self-defense instruction. But as *Bard* and *Thurston* hold, the potential scope of self-defense is a product, not just of the State's evidence, but also of the defendant's evidence. After all, when assessing the right to a self-defense instruction, a court must look to the evidence *in the light most favorable to the defendant*. The State would flip that.

As examples, in *Thurston*, the Court distinguished between events “as described by [the victim]” and events “as described by [the defendant].” *State v. Thurston*, 2009 ME 49, ¶ 12, 969 A.2d 906. It held that, “[b]ecause it is possible that the jury” believed the defendant's version and not the victim's, a self-defense instruction was due. *Id.* And, in *Bard*, a self-defense instruction was necessary to cover the defendant's testimony about his testimony that he “ripped” his hand away from the victim when she bit him. *State v. Bard*, 2002 ME 49, ¶¶ 4-6, 15, 793 A.2d 509.

The State has no support for its position, and it presents no argument, let alone reason, to abandon precedent. Its concern that “a [d]efendant can testify about a different assault” than that it focuses on is the way truth and the adversarial process work. Red Br. 9. The State holds no monopoly; defendants have their accounts, too. Indeed, there is irony in the State's

position, given defendants' almost-always-fruitless attempts to obtain more specificity than whatever "detail" is contained in the bare-bones charging instruments passing muster in Maine. If the State wanted to avoid situations like this, *Bard* and *Thurston's*, it could simply charge other than so-general-as-to-be-meaningless terms like "bodily injury or offensive physical contact." *See* A32 (State so alleges). Such can be accomplished in almost every other jurisdiction, and maybe it's time for Maine to do so.

Second Assignment of Error

II. The “lying” questioning and argument are obvious error.

The State contends that defendant “mischaracterizes” its closing argument and questioning. Red Br. 10. It writes that *it* “did not opine personally and did not accuse anyone of lying.” Red Br. 11. To the extent that is accurate, such is because the State forced defendant to “opine personally” and “accuse [his own children] of lying.” That tactic is forbidden by the long line of cases cited in the Blue Brief (at 21-22) and thus not repeated here. *E.g., State v. Bourgeois*, 639 A.2d 634, 638 (Me. 1994) (“Cross-examination that tries to push **a defendant** into saying that other witnesses lied is impermissible.”) (cleaned up, emphasis added).

The State’s brief continues, its “was an attempt at locking [defendant] into his own testimony which he voluntarily gave.” Red Br. 11. That would be done by asking something like, “You testified that your wife started the altercation; is that correct?” That would’ve required no questioning about “lying.” The State’s actual questioning, though, did deploy “the L-word”:

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.

To another extent, the State's assertion – it “did not opine personally and did not accuse anyone of lying” – is simply inaccurate. The State argued, [Defendant] 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 (emphasis added). It went on, “I want to suggest to you the more plausible [than lying] explanation” was that what the wife and children testified to “is what happened.” *Id.* Jurors surely saw this for what it is: a prosecutor's accusation that defendant was lying.

Other than, “[any] error was harmless,” *see* Red Br. 11, the State has made no argument about prejudice. In addition to observing that the State has thus conceded, for lack of development, any argument about the third-prong of the obvious-error test, defendant refers the Court to his discussion of that issue. *See* Blue Br. 23.

CONCLUSION

In a case bearing significant consequences for defendant, personally, the trial court committed two significant errors: omitting a requested self-defense instruction and failing to remedy obvious prosecutorial error. Separately and together, the errors are prejudicial. The remedy is vacatur.

Respectfully submitted,

August 19, 2026

/s/ Rory A. McNamara

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