

STATE OF MAINE  
SUPREME JUDICIAL COURT  
SITTING AS THE LAW COURT

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Law Docket No.: SOM-24-392

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State of Maine  
APPELLEE

V.

Michael Kilgore  
APPELLANT/DEFENDANT

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ON APPEAL FROM THE  
SOMERSET COUNTY SUPERIOR COURT

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APPELLANT'S BRIEF

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## **INTRODUCTION**

This appeal follows the Appellant's conviction for Assault on an Officer. The charges arose following multiple interactions with a Pittsfield Police Officer on September 30, 2022. Michael was charged with Aggravated Assault (class B), Assault on an Officer (class C), Eluding an Officer (class C), Driving to Endanger (class E), Criminal Speeding (class E), Refusing to Submit to Arrest (class E), and Failure to Sign Violation Summons and Complaint (class E).

Trial was held on June 20th and 21st, 2024. Michael raised defenses of duress, competing harms, and self defense. He was found not guilty of Aggravated Assault, but guilty of the lesser included offense of Assault (class D) under count 1. He was also convicted of count 2, Assault on an Officer (class C). He was acquitted of the remaining charges. The Court merged the counts for sentencing. Michael was sentenced to 42 months, with all but 9 months suspended for the conviction of Assault on an Officer. The factual basis for the guilty finding was disputed at sentencing, as it was not clear what act gave rise to the conviction. The appeal challenges an evidentiary ruling by the Court, as well as the jury instructions.

## **FACTUAL AND PROCEDURAL HISTORY**

On September 30, 2022, former Pittsfield Police Officer Chelsea Merry began her shift with the expectation she would be investigating speeding complaints, as she had directly received a report of speeding. (Tr. I, at 44.) She intended to “fly the colors where you just drive around and let people know, hey, I’m on duty, I’m paying attention.” (Tr. I, at 44.) This helped the Officer “get into the mindset.” (Tr. I, at 44.)

After beginning her shift, she was driving into town when she observed a car driving past her above the speed limit. (Tr. I at 45.) Her radar read 68 and then 69 miles per hour in a 45-mph zone. (Tr. I at 45.) Officer Merry was “shocked” that the car increased its speed as it drove past her. (Tr. I at 45.) She had “never seen that before.” (Tr. I at 45.) Merry pulled the vehicle over, which was operated by the Appellant, Michael Kilgore. (Tr. I at 46.) Michael was returning home after watching his daughter’s field hockey game. (Tr. I at 191.) He was driving his “summer vehicle” a Dodge Charger. (Tr. I at 191.)

The Officer approached the vehicle and asked Michael for his license, registration, and proof of insurance. (Tr. I. at 48.) As Michael was looking for his credentials, Officer Merry told him that “I won’t

give you any tickets as long as your stuff checks out good.” (Tr. I, at 192.) The Officer asked Michael how fast he was going, which prompted Michael to ask how fast he was going when Merry was behind him. (Tr. I at 47.) The Officer replied, “that’s not how it works.” (Tr. I at 47.) The Officer asked Michael if he had any “issues” with his license. (Tr. I at 48.) Michael replied in the negative. (Tr. I, at 48.) The Officer noticed that the physical driver’s license had the following notations: 6 – conditional license, and 7 – interlock system. (Tr. I, at 50.)

The Officer returned to her vehicle, where she ran Michael’s information through dispatch. (Tr. I at 59.) Dispatch indicated that Michael’s license was a “condition 6.” (Tr. I, at 59.) The Officer didn’t know what “condition 6” meant.<sup>1</sup> (Tr. I, at 59, 122.) The Officer also had access to Michael’s license information directly from the BMV through the terminal in her cruiser. (Tr. I, at 121.)

Despite the fact that the Officer was ignorant as to what, if any, restrictions accompanied a condition 6, she concluded that Michael was lying to her. (Tr. I, at 60.) The Officer also believed (and

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<sup>1</sup> Condition 6 refers to a restriction that a person may not operate a motor vehicle with any alcohol in their system. (Tr. I, at 196.)



continued to believe at trial), that a condition 6 allowed her to randomly search and test Michael for alcohol or drugs-just like bail conditions. (Tr. I, at 60, 129.) Furthermore, dispatch also told the Officer that the condition 7 – interlock, was no longer a requirement. (Tr. I. at 126.) The issue date on the license was August 31, 2017, and therefore the physical driver’s license reflecting a condition 7 was over five years old. (Tr. I, at 122-23.) Yet, despite the fact Michael’s license was old, and dispatch told the Officer that Michael was only a condition 6, the Officer continued to believe that Michael was required to have an interlock installed on his car. (Tr. I, at 126.) The Officer was wrong. (Tr. I, at 126.)

The Officer then returned to Michael’s vehicle and confronted him about the “condition 6” status of his license, as well as the interlock. (Tr. I, at 63, 142.) She told Michael he was supposed to have an interlock installed in his car. (Tr. I, at 194.) Michael said that he didn’t need it anymore, and the Officer asked if he had any “proof.” (Tr. I, at 194.) During this time the Office was “talking down,” to Michael and “insinuating I was lying to her...” (Tr. I, at 199).

The Officer didn’t see any device in the car that looked like an interlock system, but she also had never seen one before. (Tr. I, at

127.) Michael was getting frustrated because the Officer was accusing him of lying. (Tr. I, at 133, 136.) The Officer then asked about the condition on his license, to which he responded “alcohol.” (Tr. I, at 196.) Based on this interaction, the Officer had a “hairs stand up on the back of [the] neck kind of feeling.” (Tr. I, at 63.) She was “on alert.” (Tr. I at 63.) The Officer developed “a lot of concerns for my safety.” (Tr. I, at 65.) The Officer then yelled at Michael to get out of the car. (Tr. I., at 65, 196.)

Michael got out of the vehicle and walked over to the Officer. (Tr. I, at 66.) She put her hand up, and he “pushed his chest” into her hand. (Tr. I, at 66.) Michael continued to question why the officer was accusing him of lying. (Tr. I, at 141.) The two argued over whether Michael was required to have an interlock device. (Tr. I, at 142.) The Officer then told Michael to get back in the vehicle. (Tr. I, at 67.) The Officer then said she was going to write Michael a ticket because she didn’t like his “attitude.” (Tr. I at 198.) The Officer then returned to her cruiser to write Michael the ticket. (Tr. I, at 68.)

As she walked back to Michael’s car for the third time, the Officer noticed that his inspection sticker had expired. (Tr. I, at 68.) So she wrote him a ticket for that as well. (Tr. I, at 198.) The Officer

then handed Michael back his credentials and the tickets. (Tr. I, at 69.) He was frustrated, put the tickets in the glovebox, and drove off.<sup>2</sup> (Tr. I at 198-200.) As he drove away, the vehicle ran over the Officer's foot. (Tr. I, at 142.)

The Officer felt pain, which "turned into go get him." (Tr. I, at 72.) The adrenaline got the Officer "charged back up." (Tr. I, at 72.) The Officer then began to "chase him down in my cruiser." (Tr. I, at 73.) The Officer sped up to a speed, "that felt excessively high for that road," and caught up to Michael in less than a mile. (Tr. I, at 73, 74.)

Michael saw the Officer's vehicle behind him again. (Tr. I at 201.) He thought she might have another call and he pulled over to the side of the road. (Tr. I at 201.) The Officer parked her car in the middle of the road and started "running at me with her gun drawn." (Tr. I at 201.) The Officer was yelling at him to show his hands and get out of the car, and Michael was yelling at her asking "why are you attacking me." (Tr. I, at 75.) The Officer told Michael that he had ran over her foot. (Tr. I. at 202.)

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<sup>2</sup> The Officer testified that she was not done speaking with Michael when he drove away. (Tr. I, at 70.)

The Officer then holstered her gun and reached into the vehicle to try and put Michael in an “arm bar.” (Tr. I, at 80.) She started, “pulling on [Michael’s] shirt.” (Tr. I at 202.) He pushed her hands off him, and then the Officer started trying to break his window by shaking it violently. (Tr. I at 80, 202.) The Officer decided not to wait for backup because “I’m a cop. I don’t have time. My job is to act.” (Tr. I, at 80.)

The Officer’s actions instinctively put Michael into fight or flight mode - he was panicking and scared. (Tr. I at 202.) He rolled the window up and started to take off. (Tr. I at 203.) He noticed the Officer’s arms were in the window, and he rolled the window down to release her. (Tr. I at 203.) Michael was scared by how bizarre the Officer acted. He wasn’t sure if she was “reaching for a gun,” and he “just wanted to get away from her.” (Tr. I at 203.) He drove away. (Tr. I, at 204.) For her part, when her arms were stuck in the window, the Officer “remember[ed] seeing a bright white light, and it was just – it was just shocking ... Everything was so shocking, and the pain was intense, and the fear was intense.” (Tr. I. at 87.)

The Officer then got back into her cruiser and pursued Michael with lights and sirens. (Tr. I, at 88-89.) She reached speeds of over

a hundred miles per hour, and Michael was “doing the same speed.” (Tr. I, at 90.) There were other vehicles on the road, as it was Friday night and traffic was “medium.” (Tr. I, at 91-92.) The Officer decided to terminate the pursuit due to safety concerns, when she realized that she would “lose control if I hit the brakes.” (Tr. I, at 94.)

Similarly, after a short time, for Michael “the panic started wearing off,” and he decided “to try to slow up and talk with her again.” (Tr. I at 204.) He pulled off onto a road, and shortly thereafter the Officer pulled in. (Tr. I at 204.) According to Michael, he got out of his car with his hands raised. (Tr. I at 205.) The Officer “came running at me all hysterical ... And she pepper maced me with my hands up.” (Tr. I at 205.) The Officer describes that Michael getting out of his car and running toward her vehicle. (Tr. I at 97.) She claimed they started throwing punches at each other and were in a “fight.” (Tr. I, at 98.) The Officer pepper sprayed Michael and put him in handcuffs. (Tr. I, at 99.) Michael was arrested and later indicted on the following seven charges:

Count 1: Aggravated Assault (class B), pursuant to 17-A M.R.S. § 208(1)(B), alleging:

On or about September 30, 2022, in Pittsfield, Somerset County, Maine, MICHAEL KILGORE, did intentionally, knowingly, or recklessly cause bodily injury to Chelsea Merry with the use of a dangerous weapon, a motor vehicle.

Count 2: Assault on an Officer (class C), pursuant to 17-A M.R.S.

§752-A(1)(A), alleging:

On or about September 30, 2022, in Pittsfield, Somerset County, Maine, MICHAEL KILGORE, did intentionally, knowingly, or recklessly cause bodily injury to Chelsea Merry, a law enforcement officer performing official duties.

Count 3: Eluding an Officer (class C), pursuant to 29-A M.R.S.

§2414(3), alleging:

On or about September 30, 2022, in Pittsfield, Somerset County, Maine, MICHAEL KILGORE, after being requested or signaled to stop, did intentionally or knowingly attempt to elude a law enforcement officer by driving a motor vehicle at a reckless rate of speed that resulted in a high-speed chase between his motor vehicle and a law enforcement vehicle using a blue light and siren.

Count 4: Driving to Endanger (class E), pursuant to 29-A M.R.S.

§2413(1), alleging:

On or about September 30, 2022, in Pittsfield, Somerset County, Maine, MICHAEL KILGORE, did, with criminal negligence, drive a motor vehicle in any place in a manner that endangered the property of another or a person, including the operator or passenger in the motor vehicle being driven.

Count 5: Criminal Speed (class E), pursuant to 29-M.R.S. §2074(3),

alleging:

On or about September 30, 2022, in Pittsfield, Somerset County, Maine, MICHAEL KILGORE, did operate a motor vehicle at a speed of 100 MPH in a posted 55 MPH zone.

Count 6: Refusing to Submit to Arrest (class E), pursuant to 17-A M.R.S. §751-B(1)(A), alleging:

On or about September 30, 2022, in Pittsfield, Somerset County, Maine, MICHAEL KILGORE, with intent to hinder, delay or prevent a law enforcement officer from effecting MICHAEL KILGORE arrest or detention, did refuse to stop on request or signal of a law enforcement office.

Count 7: Failure to Sign Violation Summons and Complaint (class E), pursuant to 17-A M.R.S. §17(1), alleging:

On or about September 30, 2022, in Pittsfield, Somerset County, Maine, MICHAEL KILGORE, did refuse to sign a Violation Summons and Complaint after having been ordered to do so by a law enforcement officer.

(A. at 19-20.)

A jury trial was held on June 20th and 21st, 2024. While questioning the Officer, the State sought to elicit testimony “describe[ing] [the Officer’s] recovery in the one and a half years since this incident occurred.” (A. at 17, Tr. I. at 117.) The Defense objected to this testimony on the grounds of relevance. (A. at 17; Tr. I, at 117.) The Court overruled the objection. (A. at 17; Tr. I, at 117.) The following testimony was elicited from the Officer:

Q: Sure. How would you describe your recovery from this incident in the last year and a half?

A: I lost a lot as a result of this. And it's been a difficult challenge getting my life back on track to where it was. Physically, it was a year of -- of extraordinary pain. Since then, it's developed into PTSD, and it's just been -- this has been a living nightmare for me.

Q: What pain -- what physical pain, if any, do you still have?

A: So the pain is -- it's on both arms. It's like a dull pain at times, and other times, it'll feel -- like, right here, on my left elbow, it feels like I just dragged that skin across pavement all the time. It'll feel like I have spider webs coming down the back of my -- my triceps. Or it'll feel like I -- I'm itchy underneath, or it will be a dull pain under -- in -- in my elbow. It was -- it was several months before I could really start taking care of myself easily again.

(A. at 17-18; Tr. I at 117, 118.)

Otherwise, the testimony from the Officer and Michael is reflected *supra* at 6-13. Two other witnesses also testified.<sup>3</sup>

During closing arguments, the Prosecutor highlighted three different acts that could have formed the basis of convictions for various assaults: driving over the Officer's foot, rolling the officer's arm up in the window, and kicking and hitting the officer during the arrest. (Tr. II, at 10, 11, 13.) The prosecutor also emphasized that

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<sup>3</sup> The testimony of the witnesses is not relevant to the issues on appeal and is therefore not discussed further.



“[s]he told you how she’s had a hard time dealing with what happened to her on September 30<sup>th</sup>, 2022. And how she has post traumatic stress disorder from the incident.” (Tr. II, at 14.)

Following the close of the evidence, the Court instructed the jury as to counts 1 and 2. (A. at 44; Tr. II, at 32.) As it pertained to count 1, the Court also provided instructions regarding lesser included offense of Assault. (A. at 55-56; Tr. II at 43-44.) In regard to counts 1 and 2, the jurors were instructed on self-defense. (A. at 56-60; Tr. II, at 44 – 48.) The Court then instructed the jury as to the remaining charges. Finally, the Court instructed the jurors as to the affirmative defenses of duress (A. at 65; Tr. II, at 53) and competing harms (A. at 66; Tr. II, at 54). The Court stated these defenses were applicable “to all of the offenses that you will have to consider.” (A. at 65; Tr. II. at 53.)

The Court also provided verbal instructions that resembled unanimity instructions both before and after the instructions as to the offenses and justification defenses. (A. at 51, 69; Tr. II, at 39, 57.) To aid in deliberations, the Court also provided a hard copy of “Partial Jury Instructions” to the jury (A. at 90.) The Court’s oral explanation

to the jury as to the substantive charges and defenses closely followed the written instructions.

The jury sent in several notes during deliberations. The first two notes related to the defense of self-defense and “[w]ho has a right to use it.” (A. at 76; Tr. II at 64.) The jury was instructed that the definition applies to the defendant. (A. at 76; Tr. II at 64.) The jury then sent in a note asking if the duress instruction applies just to the assault charge. (A. at 75; Tr. II at 63.) The Court returned a note indicating that the defense applies to any of the charges. (A. at 76; Tr. II. at 64.) The jury then sent out a note asking if “being under duress chang[es] the outcomes of guilty or not guilty on all charges?” (A. at 77; Tr. II. at 65.) The jury also asked for a readback. (A. at 77; Tr. II, at 65.) The Court indicated that it intended to go beyond the simply answering the note yes or no, because “[r]eading between the lines, it’s my clear impression that they are not considering them separately and independently for each charge.” (A. at 77-78; Tr. II. at 65, 66.)

The defense objected, on the grounds that further explanation on this point was not necessary. (A. at 78-82; Tr. II. at 66-70.) The Defense then requests that the response to the note also include a

statement that that “you must consider each charge separately and independently, along with any applicable defense that the State is required to disprove beyond a reasonable doubt.” (A. at 81-82; Tr. II at 69-70.) The Court refused to provide this instruction, despite the fact that it accurately stated the law. (A. at 82; Tr. II. at 70.) The Court’s instruction as given reads, “[y]ou may consider whether the defendant acted under duress with respect to each charge. Remember that you must consider each charge separately and independently.” (A. at 81; Tr. II at 69.)

A short time later the jury sent in a note asking, “if we choose he is guilty of one of the assaults, would he then be guilty of an additional assault.” (A. at 83; Tr. II at 71.) The Court indicated that it was inclined to give the same instruction as it did in response to the prior note. (A. at 83, Tr. II at 71.) The Defense again argued that the Court needed to instruct the jury that the instruction should “remind[] them that the defenses have been generated and that those defenses also have to be considered and disproved beyond a reasonable doubt.” (A. at 85, Tr. II, at 73.) After discussions with Counsel, the Trial Court agreed and provided the following instruction in open court:

I want to remind you of the instruction that I gave earlier, that each of the charges has to be considered separately and independently. And you have to make the decision about whether the State has proven each of the elements of the separate offense beyond a reasonable doubt and has disproven any appropriate defenses beyond a reasonable doubt. So you have to consider them separately and independently.

(A. at 88; Tr. II at 76.)

After a readback of the Defendant's testimony, the jury reached a verdict. As to count 1, Michael was acquitted of Aggravated Assault but convicted of its lesser included offense of Assault. (Tr. II at 78.) As to count 2, he was convicted of Assault on an Officer. (Tr. II at 78.) He was acquitted of every single other charge.

Following the verdict, the Defense noted that the verdict was inconsistent, stating that "it seems at least somewhat clear that the jury did not find that an assault -- the assault was -- the -- that the conduct that formed the basis of the assault was the conduct involving the -- the vehicle. So we're talking about some other physical conduct." (Tr. II. at 89.) The Court acknowledged that "I think it is difficult to read the tea leaves of exactly what the jury found...So there has to be an event causing bodily injury." (Tr. II. at 90.)

The Defense then moved for Judgment of Acquittal based on the fact the verdict was internally inconsistent. (Tr. II at 91.) The Court denied the Motion, indicating that the jury could have found that the verdict could have been based on the incident where the Officer's arms were stuck in the window, or that the vehicle was not a dangerous weapon. (Tr. II at 91- 92.)

Sentencing was held on July 26, 2024. The Defense argued that there were four incidents that could have formed the basis of the verdict: running over the Officer's foot, her arms being stuck in the window, Michael pushing her arms away from him, and "throwing blows" during the arrest. (Tr. III. at 13.) The Defense pointed out that if the verdict was based on running over the foot or the arms being stuck in the car, Michael would have been convicted of Aggravated Assault, because the car was a deadly weapon. (Tr. III, at 13-14.)

The Court found that the factual basis for the two convictions "arose out of the incident in which the defendant drove over Ofc. Merry's foot..." and merged count 1 with count 2, to avoid a "double jeopardy issue." (Tr. III at 19-20.) The Court then asserts that "the only conduct for which the defendant stands convicted is essentially

running over Ofc. Merry's foot, and the Court does not consider any conduct after that initial interaction for purposes of sentencing." (Tr. III. At 19.)

During the sentencing analysis the Court found that Michael did not use a dangerous weapon to cause the injury, but "it is really hard to imagine [other ways to commit the offense] without either causing literal, serious bodily injury or without the use of a dangerous weapon." (Tr. III at 22.) The Court again stated its "theory is the jury in this case did not consider the automobile in the manner in which it was used to be a dangerous weapon." (Tr. III, At 22.)

Michael was then sentenced on that count to 42 months in prison, with all but 9 months suspended, and two years of probation. (Tr. III, at 23.) This appeal follows.

### **ISSUES PRESENTED FOR REVIEW**

- I. Did the Trial Court err by admitting testimony from the Officer describing the recovery from her injuries during the year and a half after the incident, where serious bodily injury was not an element of any offense?**
- II. Were the jury instructions regarding the affirmative defenses erroneous and contain structural errors such that the conviction should be vacated?**

## ARGUMENT

- I. **It was error for the Trial Court to admit testimony from the Officer regarding her recovery and long-term injuries, as aspects of the testimony were either not relevant pursuant to M.R. Evid. 402, or unfairly prejudicial pursuant to M.R. Evid. 403.**

The Trial Court erred by allowing the Officer to testify as to her long-term physical and mental injuries, as such testimony included statements that were not relevant pursuant to M.R. Evid. 402, and unfairly prejudicial pursuant to M.R. Evid. 403. This Court reviews “a trial court's evidentiary rulings for clear error or abuse of discretion, reviewing determinations on relevancy for clear error and reviewing decisions on admissibility for an abuse of discretion.” *State v. Healey*, 2024 ME 4, ¶ 13, 307 A.3d 1082.

In *State v. Penley*, 2023 ME 7, ¶ 18, 288 A.3d 1183, 11990, this Court found that admission of testimony that the victim was afraid of the Defendant and wanted a protection from abuse order was in error. The Court reasoned that the statement was not admissible, as it was not “relevant to either an element of a crime or a defense or justification and (b) the danger of unfair prejudice is significant.” *Id.*

Here both counts 1 and 2 contain an element requiring the State to prove that Michael caused bodily injury to the Officer. Bodily injury

is defined as “physical pain, physical illness or any impairment of physical conditions.” 17-A M.R.S. § 2(5). None of the elements of the offenses required the State to prove serious bodily injury.

The Officer described in detail the pain she experienced during the interactions with Michael. In regard to the foot incident, she testified “I felt pain for a moment. It felt like a horse had stepped on my foot.” (Tr. I, at 72.) In regard to the incident where her arms were stuck in the window, the officer testified, “the pain was intense...” (Tr. I, at 87.) There was additional testimony as well. These statements were more than sufficient for the State to prove the bodily injury element of counts 1 and 2.

However, the Court allowed the State to present testimony far beyond any evidence relevant to bodily injury. The Officer testified about her recovery over the last “year and a half...” (A. at 17, 18; Tr. I, at 117, 118.) The Officer testified that “she lost a lot as a result of this ... it’s been a difficult challenge to get my life back on track to where it was. Physically, it was a year of – of extraordinary pain. Since then, it’s developed into PTSD, and it’s just been –this has been a living nightmare for me.” (A. at 17; Tr. I at 117.)



The State then asks what physical pain “do you still have?” (A. at 17; Tr. I at 117.) The Officer responded:

So the pain is -- it's on both arms. It's like a dull pain at times, and other times, it'll feel -- like, right here, on my left elbow, it feels like I just dragged that skin across pavement all the time. It'll feel like I have spider webs coming down the back of my -- my triceps. Or it'll feel like I -- I'm itchy underneath, or it will be a dull pain under -- in -- in my elbow. It was -- it was several months before I could really start taking care of myself easily again.

(A. at 18; Tr. I at 118.)

The Officer’s testimony regarding developing PTSD, her ongoing pain, and that her life over a year and a half was a “living nightmare...” was not relevant as to whether the State had proven that the officer suffered bodily injury at the time of the incident. Therefore, its admission ran afoul of M.R. Evid. 402.

In addition, assuming *arguendo* that some of the above-cited testimony was relevant, it was inadmissible under M.R. Evid. 403, because any probative value was substantially outweighed by its unfairly prejudicial effect. Under a 403 analysis, this Court essentially examines whether, “the evidence had enough probative value to justify its admission despite the danger of prejudice.” *State v. Thongsavanh*, 2004 ME 126, ¶ 8, 861 A.2d 39.

The Officer's testimony about her recovery and ongoing pain posed a substantial risk of prejudicing the jury by generating sympathy for the Officer, and had little (if any) relevance to the elements of the offense. "Prejudice means an undue tendance to move the factfinders to decide the issue on an improper basis." *State v. Michaud*, 2017 ME 170, ¶ 8, 168 A. 3d 802, 805 (quotations omitted.) Here the alleged victim was a police officer. As a society we are protective of law enforcement officers, given their role to "protect and serve." Accordingly, harms inflicted upon Officers are viewed more seriously.

Here the Officer basically testified that that this incident was career-ending for her. She described ongoing pain and years of physical recovery. She also testified that she developed PTSD as a result of the incident. To the extent some of the testimony was minimally relevant, the graphic descriptions to the jury of her recovery weeks, months, and years later, were unfairly prejudicial.

Accordingly, the conviction should be vacated and the matter remanded for a new trial.

**II. The judgment should be vacated, because when viewed in their totality the jury instructions were erroneous and contained structural errors.**

The judgement should be vacated because of two separate, but similar errors in the jury instructions. First, the instructions were erroneous, because they tended to create confusion. Second, the instructions contained structural flaws. This Court reviews “jury instructions as a whole for prejudicial error, and to ensure that they informed the jury correctly and fairly in all necessary respects of the governing law.” *State v. Baker*, 2015 ME 39, ¶ 10, 14 A.3d 214. Providing the jury with an “incomplete statement of the law,” is grounds to vacate the judgement. *State v. Lapierre*, 2000 ME 119, ¶ 24, 754 A.2d 978.

As it pertains to justification defenses:

[i]t is the State's burden to both disprove [the justification] beyond a reasonable doubt and prove each element of the crime charged beyond a reasonable doubt. If the State fails to disprove at least one of the elements of the justification beyond a reasonable doubt, the justification constitutes a complete defense, meaning that it negates the commission of the crime, even if the State otherwise proves all the elements of the crime charged.

*State v. Vallacci*, 2018 ME 80, ¶ 10, 187 A.3d 567 (internal and quotations citations omitted). Accordingly, the instructions provided

to a jury explaining justification defenses must be precise and accurately reflect the steps the jury must follow to reach its verdict. Failure to do so is fatal to a conviction.

- a. The instructions provided to the jury regarding the defenses were erroneous, because they were inconsistent and created juror confusion.

The conviction in this matter should be vacated, because the jury instructions were erroneous. “A jury instruction is erroneous if it creates the possibility of jury confusion and a verdict based on impermissible criteria.” *State v. Delano*, 2015 ME 18, ¶ 13, 111A.3d 648, quoting *State v. LaPierre*, 2000 ME 119, at ¶ 18

Furthermore, “[s]uch an error is harmless only if the court believes it highly probable that it did not affect the verdict.” *LaPierre*, at ¶ 18. “On review we must consider jury instructions in their entirety to determine whether they accurately stated the law to the jury. We must review the entire charge ... taking into consideration the total effect created by all the instructions and the potential for jury misunderstanding.” *LaPierre*, 2000 ME at ¶ 20 (internal citations and quotations omitted).

## 1. Initial Oral Instructions

The Court's oral instructions provided directly before its explanation of the substantive law begin with a unanimity instruction, stating, *inter alia*:

You must consider each charge separately and independently of the other charges. You must make a separate decision as to each charge. You may find that the defendant is guilty of all charges, that he is not guilty of all charges, or that he is guilty of one or more of them but not guilty of one or more of the others. The point is that each charge must be considered by itself, and you must reach a unanimous verdict on each side, independent of the verdicts that you may reach on the other charges.

(A. at 51; Tr. II. at 39)

However, the Court failed to explain in this instruction that the State is required to disprove the applicable defenses as to each charge contemporaneously with the unanimity instruction.

The Court then goes on to separately instruct on the charge of aggravated assault, the lesser included charge of assault, and self-defense. (A. at 57-60, 91-95; Tr. II at 45-48.)<sup>4</sup> In regard to the self-defense instruction, the Court explains that if the State does not

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<sup>4</sup> The instructions to the jury regarding the substantive offenses and the defenses appear to have been read to the jury verbatim from the written instructions. Those written instructions are contained in the appendix and are titled "Partial Jury Instructions." (A. at 90.) The citation to the appendix here refers to both the page number in the appendix where the oral instructions are given, as well as the page in the appendix containing the written instruction.

disprove self-defense, they jury must find Michael “not guilty.” (A. at 57, 95; Tr. II at 45.) The Court then instructs the jury as to the elements of the charge of Assault on an Officer. (A. at 58, 95; Tr. II, at 46.) The Court notes that self defense also applies to this offense, but that because it has “already explained the law of self-defense to you. I’m not going to repeat it here.” (A. at 60, Tr. II at 48.)

The Court goes on to instruct the jury as to the remaining charges. (A. at 60-65, 98-102; Tr. 48-53) The Court then instructs them on the duress and competing harms defenses. (A. at 65-67, 102-104; Tr. II at 53-55.) The Court states these justification defenses are applicable to all of the charges. (A. at 65; Tr. II. at 53.)<sup>5</sup>

The instruction to the jury on duress states, *inter alia*:

A person is not criminally responsible if he's compelled to do an actual threat of imminent death with serious bodily injury to himself or another person or by direct physical force. However, duress exists only if the force or threat or circumstances are such as would have prevented a reasonable person in the defendant's situation from resisting or escaping from the force or the threats.

Because the evidence generates an issue of whether the defendant was acting under duress, the State must prove beyond a reasonable doubt either [explains what must be proven to disprove the defense].

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<sup>5</sup> The written instruction on duress does *not* state the defense is applicable to all of the charges, (A. at 102-103), whereas the written instruction on competing harms does state that it is applicable to “any of the alleged offenses...” (A. at 103.)

(A. at 65, 102; Tr. II at 53.) Of note, the instruction does not clearly direct the jury to acquit Michael if the State cannot meet their burden of proof.

The Court then turns to competing harms, explaining that:

to convict the defendant of any of the alleged offenses, the State must prove beyond a reasonable doubt one of the following three alternatives, that:

- (1) the defendant did not believe his actions were necessary ....
- (2) the defendant had a reasonable, legal alternative to the actions he took; or
- (3) the desirability and urgency of avoiding the imminent physical harm ... does not outweigh the harm sought to be avoided by the law prohibiting any of the alleged offenses.”

(A. at 66, 103; Tr. II at 54.) Again, the Court does not indicate that Michael must be acquitted if the State cannot meet this burden.

The Court then provides another unanimity instruction, stating:

Remember that in order to convict the defendant, you must all agree beyond a reasonable doubt that the defendant committed the crime on at least one specific occasion or during -- or during one specific incident.

(A. at 69; Tr. II. at 57.) The Court again fails to reference that convicting Michael *also* requires the State to disprove the defenses

beyond a reasonable doubt in this second unanimity instruction, not just to prove the elements of the offenses.

b. Instructions in Response to Notes during Deliberations

The confusion created by the instructions was apparent and pervasive throughout deliberations. First, in regard to the self defense question, the jury asked whether “Ofc. Merry or Mr. Kilgore...has the right to use it? (A. at 76; Tr. II at 64.) The jury then sent a note asking if the duress defense applied only to the assault charge. (A. at 75; Tr. II, at 66). The Court replied that it was applicable to all of the charges. (A. at 76; Tr. II at 64.)

The jury then sent out a note asking if “being under duress change[s] the outcome of guilty or not guilty on all of the charges.” (A. at 77; Tr. II. 65.) The Court indicated that in response it would go beyond simply answering the question yes or no, but would also reinstruct the jury that they must consider the defenses “separately and independently.” (A. at 77; Tr. II. at 65.)

The Defense objected on the grounds that the question did not prompt a need to instruct the jury. (A. at 78; Tr. III. at 66.) The Court noted that the “written instruction doesn’t include the instruction that I gave at the beginning of the trial or end of the trial that they



have to consider each charge separately and independently.” (A. at 78; Tr. II. at 66.) The Defense then requested that the instruction also specify that the jury must consider the charges separately and independently, *along with any applicable defenses that the State is required to disprove beyond a reasonable doubt.*” (A. at 81; Tr. II. at 69) (emphasis added.)

Despite the fact that the proposed instruction accurately stated the law, the Court declined to include that further explanation. (A. at 82; Tr. at 70.) Over objection, the jury was sent a note that stated, “[y]ou may consider whether the defendant acted under duress with respect to each charge. Remember that you must consider each charge separately and independently.” (A. at 81; Tr. II. at 69.)

A short while later, the jury sent in a note that listed, “by number, aggravated assault, 1; assault, 2; and 3, assault on an officer. And their question is, if we choose he is guilty of one of the assaults, would he then be guilty of an additional assault.” (A. at 83; Tr. II. at 71.)

The Court again indicated it would instruct the jury to “consider whether the State has proven the elements of each offense separately.” (A. at 84; Tr. II. at 72.) The Defense, again, argued that

the jury must also be instructed that, “those defenses also have to be considered and disproven beyond a reasonable doubt.” (A. at 85; Tr. II at 73.)

This time the Court *agreed*, and provided the jury with an instruction stating:

I want to remind you of the instruction that I gave earlier, that each of the charges has to be considered separately and independently. And you have to make the decision about whether the State has proven each of the elements of the separate offenses beyond a reasonable doubt and has disproven any defenses beyond a reasonable doubt.”

(A. at 88; Tr. II. at 76.)

Therefore, the jury received two different instructions about how to apply the defenses in response to their notes. One explanation instructed that the State had to disprove any defenses beyond a reasonable doubt, and the other one did not. The inconsistency between these instructions created an impression that the State did not have to disprove duress as to the assault charges, which was not accurate. A similar error was found in *LaPierre*, where the conviction was vacated, because the defendant was “convicted ... on an incomplete statement of the law.” *LaPierre*, 2000 ME at ¶ 24.

“A jury instruction is erroneous if it creates the possibility of jury confusion and a verdict based on impermissible criteria.” *State v. Delano*, 2015 ME 18, ¶ 13. Here the significant juror confusion and inconsistent instructions demonstrate the instructions were erroneous.

b. The Jury Instructions Contained Two Structural Errors, Which Are Fatal

In *State v. Baker*, 2015 ME 39, 14 A.3d 214, the defendant was charged with aggravated assault and domestic violence terrorizing. The issue of self-defense was generated, and the trial court provided self-defense instructions. The defendant was convicted of these offenses. On appeal, the Law Court found that there were obvious errors in the jury instructions as it pertained to the justification defense of self defense that were structural, and vacated the judgment.

1. First structural error-Instruction Required Guilty Finding Before Consideration of Defenses

The first structural error in *Baker* occurred, because “the court completed its instructions on the charge of aggravated assault by telling the jury that if the State were to prove that charge beyond a reasonable doubt, it should find [the defendant] guilty.” *Id.* at ¶ 14.

The Court later “instructed the jury on the law of self defense. This resulted at least in an ambiguity because it conflicted with the court’s previous instruction authorizing a guilty verdict merely upon proof of the charge without regard to the State’s burden to disprove the justification of self defense.” *Id.* at ¶ 15.

Here, the instructions contained the same structural error as it related to the assault charges. The Trial Court instructed the jury as to the elements of Aggravated Assault and Assault. At the end of the explanation as to the substantive charge, the written instructions conclude that if the State proves the elements “beyond a reasonable doubt, then the Defendant is guilty” of that offense. (A. 93). The Court then goes on to explain self defense. The instruction as to Assault on an Officer follows the same pattern where the Court explains Michael must be found guilty if the elements of the offense are proven, and *then* instructs on self-defense. (A. at 96-97.)

In addition, the instructions also contained a structural error for the same reason as applied to the defenses of duress and competing harms. These defenses were applicable to the various assault charges. However, the instructions regarding these defenses are not proved until *long* after the instructions on the assault

charges. (A. at 102, 103.) This separation between the instructions on the assault charges and the duress and competing harms instruction also “resulted in at least an ambiguity .... because it conflicted with the Court’s previous instruction authorizing a guilty verdict merely upon proof of the charge without regard to the State’s burden to disprove the justification [defenses of duress and competing harms].” *Baker* at ¶ 15.

Furthermore, the Trial Court here proved unanimity instructions to the jury. Those instructions generally stated:

You must consider each charge separately and independently of the other charges. You must make a separate decision as to each charge. You may find that the defendant is guilty of all charges, that he is not guilty of all charges, or that he is guilty of one or more of them but not guilty of one or more of the others. The point is that each charge must be considered by itself, and you must reach a unanimous verdict on each side, independent of the verdicts that you may reach on the other charges.

(A. at 51; Tr. II. at 39) A similar unanimity instruction was repeated after the instructions on the substantive law, but before deliberations. (A. at 69.) These instructions were structural errors, because they make no reference that the State must disprove any applicable defenses beyond a reasonable doubt to find Michael guilty. The jury is only told to consider the charge.

1. Second Structural Error-Two Justification  
Defenses Did Not Expressly Instruct on Acquittal

The second structural error in *Baker* occurred because the instruction “did not instruct the jury that is was required to acquit Baker if the State failed to meet its burden of proof on that issue.” *Id.* at ¶ 16. The Court explained:

When a court's instructions fail to inform the jury of its duty to render a verdict of not guilty when the State does not meet its burden on the issue of self-defense, then the instruction fails to state that self defense is, in fact, a defense. In other words, the instruction failed to notify the jury it was bound to acquit [the defendant] if it found that he acted in self defense. Assuming, as we do that juries follow the instructions given to them by the trial court[,] this means the jury could not have acquitted [the defendant] based upon self defense because it was not informed of any law permitting them to do so.

*Id.* at ¶ 17 (internal citations omitted.)

This second structural error in this case was generated not from the self-defense instructions, but from the instructions on competing harms and duress, which are also justification defenses. The written *self-defense* instruction states: “if you find that the State has not proven either that a Defendant was not acting in self-defense ... then you must find the Defendant not guilty.” (A. at 57, 95; Tr. at 45.) This instruction was proper to show the jury the path to an acquittal based on this defense.

The *competing harms* instruction states, *inter alia*, that “to convict the defendant of any of the alleged offenses, the State must prove beyond a reasonable doubt one of the following three alternatives...” (A. at 66, 103; Tr. II at 54.) This instruction was insufficient, because, unlike the self-defense instruction, it does not specifically instruct the jury that “if you find that the State has not proven [the defense], ... then you must find the Defendant not guilty.” (A. at 57, 95; Tr. at 45.)

The *duress* defense instruction is worse. In relevant portion it states:

Under certain circumstances, a person may be excused from criminal responsibility for acts committed under duress. A person is not criminally responsible if he is compelled to an act by threat of imminent death ...or by direct physical force ...  
Because the evidence generates an issue of whether Defendant was acting under duress, the State must prove beyond a reasonable doubt either (1) that the Defendant was not acting under duress, or (2) that the force or threat ...”

(A. at 65, 102-103; Tr. II at 53.)

Again, this instruction fails to expressly state that the jury must acquit Michael if the State does not disprove the defense. It does not even articulate that the State cannot convict Michael, unless disproves the defense. It also interjects a new term, “criminal

responsibility.” The instruction also does not specify if it applies to all of the charges. Accordingly, it suffers from the same structural error as was present in *Baker*.

The structural error here is aggravated because very different language is used between all three instructions to illustrate the same concept - that Michael must be found not guilty if the State fails to disprove the defenses beyond a reasonable doubt. The instruction regarding self defense explains that the defendant must be found “not guilty” if the State fails to disprove the defense. (A. at 57, 95; Tr. at 45.) The competing harms instruction states that “to convict the defendant the state must prove...” (A. at 66, 103; Tr. II at 54.) The duress defense instruction states a person may not be “criminally responsible [if under duress] ...” and that “because the evidence generates an issue of whether Defendant was acting under duress, the State must prove...” (A. at 65, 102-103; Tr. II at 53.) There was a significant risk here that the jury thought the differing explanations required different outcomes.

Jury instructions are complicated even in “simple” cases. Their complexity is amplified in cases where justification defenses are raised. For this reason, a justification instruction must clearly and



unambiguously instruct the jury that they must acquit the defendant if the State fails to disprove the defense. The jury should not be left to infer what their verdict should be. This consideration is especially critical here, because the language to provide the jury a pathway to acquittal was inconsistent across all three defenses.

c. These errors were prejudicial, as evidenced by juror confusion and an inconsistent verdict.

The facts of the case here demonstrated that the jury was confused by the instructions. This is reflected by the jury asking for clarification as to seemingly basic issues. First, the jury needed clarification as to who “has the right [to raise self defense].” (A. at 76; Tr. II at 64.) The fact that the jury thought that someone other than the defendant (presumably the Officer) could raise a defense is troubling.

The jury then asked if the duress defense was applicable just to the assault charge. (A. at 75; Tr. II. at 63.) The jury later asked if being under duress changes the outcome “on all charges.” (A. at 77; Tr. II. at 65.) Finally, the jury asked if Michael was guilty of one assault, “would he be guilty of an additional assault.” (A. at 83; Tr. II. at 71.)

The jury's confusion is not surprising, given the instructions were inconsistent and contained the structural errors noted above. The jury was simply not given an accurate and clear pathway explaining the law.

Prejudice is also reflected by the verdict, because it simply did not make sense. Michael was found not guilty of aggravated assault, but guilty of the lesser included offense of assault. He was also convicted of assault on an officer. This outcome required the jury to find either that 1) the car was not a dangerous weapon, or 2) that an assault with bodily injury occurred that did not involve the car. 17-A M.R.S. § 2(9)(A) defines dangerous weapon as "a device, instrument...which, in the manner it is used or threatened to be use is capable of producing death or serious bodily injury."

There was no logical fact pattern that would result in Michael being convicted the lesser included offense of assault and assault on an officer, but not aggravated assault. It was really an all or nothing fact pattern when it came to the assault charges. As the Trial Judge even noted right after the verdict, "it's difficult to read the tea leaves of exactly what the jury found." (Tr. II. at 90.) This suggests that the jury was confused in regard to the defenses, and were therefore

reluctant to fully apply them to the assault charges. Therefore, Michael was prejudiced.

d. These errors were obvious

The Defense did object when the Court failed to include in its instruction that “the jury must consider the charges separately and independently, along with any applicable defenses that the State is required to disprove beyond a reasonable doubt.” (A. at 81; Tr. II. at 69.) Therefore, some aspects of the above arguments were preserved. To the extent some of the issues argued above were not preserved, they constitute obvious error.

“Obvious errors are “highly prejudicial error[s] tending to produce manifest injustice.” *State v. Villacci*, 2018 ME 80, at ¶ 9. This Court has vacated judgments under nearly identical situations. The judgment in *Baker* was vacated after a review for obvious error based on the same two structural errors outlined above. *Baker*, 2015 ME at ¶ 13-17.

Furthermore, in *Villacci*, the Law Court notes that the trial court did not explain that “the State had a burden to disprove the justification” defense beyond a reasonable doubt.” *Id.* at ¶ 19. The Law Court observed this caused the instructions to be “even more

incomplete and more inaccurate” than *Baker. Id.* at 19. Similarly, here the written instructions do not instruct the jury that they must acquit Micheal unless the State disproves the duress and competing harms defenses beyond a reasonable doubt.

Here, the justification defenses were critical to Michael’s defense. As noted above, the verdict that was delivered by the jury is puzzling and inconsistent with the facts. This is evidence that the jury instructions resulted in a manifest injustice. Therefore, obvious error is established.

### **CONCLUSION**

For the above reasons, the Appellant respectfully requests that this Honorable Court reverse the conviction and remand the matter to the Trial Court.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I, the Undersigned, do hereby certify that on February 24, 2025, I caused to be served upon all parties an electronic copy of the brief, by emailing the parties below.

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