

THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE

SITTING AS THE LAW COURT

LAW COURT DOCKET: SOM-24-392

**STATE OF MAINE,**

Appellee

v.

**MICHAEL KILGORE,**

Appellant/Defendant

ON APPEAL of Criminal Conviction from the Somerset Unified Criminal Docket

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BRIEF OF APPELLEE

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## **Table of Contents**

Table of Contents.....	2
Table of Authorities.....	3
Introduction.....	4
Factual and Procedural History.....	4
Argument.....	
I.    The Trial Court Did Not Err in Admitting Testimony from Officer Merry Regarding Her Recovery and Long-Term Injuries, as the Testimony Was Relevant and Not Unfairly Prejudicial Under Maine Rules of Evidence 402 and 403.....	9
a. Officer Merry’s Testimony About her Recovery was Relevant under Maine Rules of Evidence 402.....	10
b. Officer Merry’s Testimony About her Recovery was Not Unfairly Prejudicial under Maine Rules of Evidence 403.....	11
II.   The Jury Instructions Were neither Erroneous nor Structurally Defective, and Any Alleged Errors Were Harmless.....	12
a. The Jury Instructions Were Not Inconsistent or Confusing.....	13
b. The Instructions Did Not Contain Structural Errors.....	15
1. There Were Not Premature Guilty Instructions Given.....	15
2. The Court Gave Adequate Acquittal Guidance.....	16
c. Any Alleged Errors Were Not Prejudicial or Obvious.....	17
Conclusion.....	18
Certificate of Service.....	19

## **Table of Authorities**

### **Maine State Cases**

<i>State v. Baker</i> , 2015 ME 39, 114 A.3d 214.....	13,15,16, 18
<i>State v. Delano</i> , 2015 ME 18, 111 A.3d 648.....	13, 18
<i>State v. Healey</i> , 2024 ME 4, 307 A.3d 1082.....	9, 12
<i>State v. Lapierre</i> , 2000 ME 119, 754 A.2d 978.....	13, 14, 17
<i>State v. Michaud</i> , 2017 ME 170, 168 A.3d 802.....	11, 12
<i>State v. Penley</i> , 2023 ME 7, 288 A.3d 1183.....	11, 12
<i>State v. Thongsavanh</i> , 2004 ME 126, 861 A.2d 39.....	11
<i>State v. Vallacci</i> , 2018 ME 80, 187 A.3d 567.....	13, 17, 18

### **Maine Revised Statutes**

17-A M.R.S. § 2(5) .....	10
17-A M.R.S. § 108 .....	15
17-A M.R.S. § 752-A(1)(A) .....	10

### **Maine Rules of Evidence**

M.R. Evid. 401.....	10
M.R. Evid. 402.....	9, 10
M.R. Evid. 403.....	9, 11

## **Introduction**

The State of Maine, as Appellee, respectfully submits this brief in response to the Appellant, Michael Kilgore, who seeks to vacate his convictions for Assault (Class D) and Assault on an Officer (Class C) stemming from an incident that occurred on September 30, 2022. The Appellant challenges (1) the trial court's admission of Officer Chelsea Merry's testimony regarding her recovery and long-term injuries and (2) the adequacy of the jury instructions concerning affirmative defenses. The State asserts that the trial court acted within its discretion in admitting the officer's testimony, which was relevant to the bodily injury element of the charged offenses and not unfairly prejudicial. Furthermore, the jury instructions, when viewed as a whole, accurately informed the jury of the governing law, contained no structural errors, and did not prejudice the Appellant. For these reasons, the convictions should be affirmed.

## **Factual and Procedural History**

On September 30, 2022, Pittsfield Police Officer Chelsea Merry began her shift intending to address speeding complaints she had received directly from the community. (Tr. I, at 44.) Her plan was to "fly the colors"—patrol visibly to signal her presence and deter violations—which she testified helped her "get into the mindset" for duty. (Tr. I, at 44.) While driving into town, she observed a Dodge Charger pass her at a high rate of speed. (Tr. I, at 45.) Her radar recorded the

vehicle traveling at 68 and then 69 miles per hour in a 45-mph zone, and she was "shocked" to see it accelerate as it passed her, a behavior she had "never seen before." (Tr. I, at 45.) Officer Merry activated her lights and pulled the vehicle over. (Tr. I, at 46.) The driver was the Appellant, Michael Kilgore, who was returning home after watching his daughter's field hockey game. (Tr. I, at 191.) He was operating his "summer vehicle," a Dodge Charger. (Tr. I, at 191.)

Officer Merry approached Kilgore's vehicle and requested his license, registration, and proof of insurance. (Tr. I, at 48.) As he retrieved his documents, she assured him, "I won't give you any tickets as long as your stuff checks out good," intending to resolve the stop leniently if his information and driver's license was in order. (Tr. I, at 192.) Officer Merry asked how fast he was going, and Kilgore responded by asking how fast he was going when she was behind him, to which she replied, "that's not how it works." (Tr. I, at 47.) When asked if he had any "issues" with his license, Kilgore said no. (Tr. I, at 48.) However, Officer Merry observed his physical license had two notations: "6 – conditional license" and "7 – interlock system." (Tr. I, at 50.) She returned to her cruiser and ran his information through dispatch, which confirmed his license was "condition 6"—a restriction prohibiting operation of a vehicle with any alcohol in his system—but indicated the "condition 7 – interlock" was no longer required. (Tr. I, at 59, 126, 196.) Although Officer Merry was unsure of the precise meaning of "condition 6"

at the time, she suspected Kilgore had misled her about his license status. (Tr. I, at 59, 60, 122.) She also testified she believed a "condition 6" permitted her to test for alcohol or drugs, though she was mistaken about the interlock requirement still being active. (Tr. I, at 60, 129, 126.)

Returning to Kilgore's vehicle, Officer Merry questioned him about his "condition 6" status and the interlock, informing him he was supposed to have one installed. (Tr. I, at 63, 142, 194.) Kilgore insisted he no longer needed it, and when she asked for proof, he became frustrated. (Tr. I, at 194, 133, 136.) She noted no interlock device was visible, though she admitted she had never seen one before. (Tr. I, at 127.) Kilgore acknowledged his license condition related to "alcohol." (Tr. I, at 196.) This exchange heightened Officer Merry's alertness; she felt "the hairs stand up on the back of [her] neck" and developed "a lot of concerns for [her] safety." (Tr. I, at 63, 65.) She ordered Kilgore out of the car. (Tr. I, at 65, 196.) Kilgore exited and approached her, pushing his chest into her raised hand as she attempted to maintain distance. (Tr. I, at 66.) They argued about the interlock, with Kilgore questioning her accusations. (Tr. I, at 141-42.) She directed him back into his vehicle and, citing his "attitude," decided to issue a ticket. (Tr. I, at 67, 198.) Returning to her cruiser, she wrote the ticket and, upon walking back, noticed his inspection sticker had expired, adding a second citation. (Tr. I, at 68, 198.) She handed Kilgore his documents and tickets. (Tr. I, at 69.)

As Officer Merry continued speaking, Kilgore abruptly drove off, running over her foot while doing so. (Tr. I, at 70, 142.) She testified the pain "turned into go get him," spurring her to pursue him in her cruiser at a speed she deemed "excessively high for that road," catching up within a mile. (Tr. I, at 72-74.) Kilgore pulled over again, claiming he thought she had another call. (Tr. I, at 201.) Officer Merry exited her vehicle, drew her weapon, and ordered him to show his hands and get out, informing him he had run over her foot. (Tr. I, at 75, 201-02.) She holstered her gun and reached into his vehicle to restrain him, pulling on his shirt, attempting to place him in an "arm bar." (Tr. I, at 80, 202.) Kilgore pushed her hands away, and she shook his window to gain control. (Tr. I, at 80, 202.) Officer Merry chose not to wait for backup, stating, "I'm a cop. I don't have time. My job is to act." (Tr. I, at 80.) Kilgore then rolled up his window, trapping her arms, started to take off, then rolled it down and sped off again. (Tr. I, at 203.) Officer Merry recalled "seeing a bright white light," overwhelmed by intense shock, pain, and fear. (Tr. I, at 87.)

Officer Merry then pursued Kilgore a second time with lights and sirens, reaching speeds over 100 miles per hour on a road with "medium" Friday night traffic. (Tr. I, at 88-92.) She terminated the chase due to safety concerns, when she realized that she would "lose control if [she] hit the brakes." (Tr. I, at 94.) Kilgore eventually pulled over, exited his vehicle, and ran towards Officer Merry's cruiser

when she pulled over behind him. (Tr. I, at 97, 204.) Officer Merry testified that the two exchanged punches in a fight, after which she pepper-sprayed and handcuffed him. (Tr. I, at 98-99.) Kilgore claimed he only raised his hands and was unjustly pepper-sprayed. (Tr. I, at 205.)

Kilgore was indicted on seven counts: (1) Aggravated Assault, (2) Assault on an Officer, (3) Eluding an Officer, (4) Driving to Endanger, (5) Criminal Speed, (6) Refusing to Submit to Arrest, and (7) Failure to Sign a Violation Summons. (A. at 19-20.) At trial on June 20-21, 2024, Officer Merry described her recovery, including a year of "extraordinary pain" and ongoing PTSD, over defense objections that were overruled. (A. at 17-18; Tr. I, at 117-18.) The State highlighted three potential assault acts—running over her foot, trapping her arms, and the final struggle when Kilgore kicked and hit the Officer—and emphasized her trauma and pain from those assaults. (Tr. II, at 10-11, 13-14.) The court instructed the jury on all charges and the relevant defenses including self-defense, duress, and competing harms, applicable to all counts. (A. at 56-60, 65-66; Tr. II, at 44-48, 53-54.) Jury questions about defenses and the charges prompted clarifications, including that each charge and defense be considered separately, with the State required to disprove defenses beyond a reasonable doubt. (A. at 81-88; Tr. II, at 69-76.)



The jury convicted Kilgore of Assault (a lesser included offense under Count 1) and Assault on an Officer (Count 2), acquitting him of all other charges. (Tr. II, at 78.) Defense moved for Judgment of Acquittal, arguing inconsistency within the verdict, but the court denied it, noting the verdicts could stem from the arm-trapping incident or a finding that the vehicle was not a dangerous weapon. (Tr. II, at 89-92.) At sentencing on July 26, 2024, the court found the convictions arose from Kilgore running over Officer Merry's foot, merged Counts 1 and 2 to avoid double jeopardy issues, and sentenced him to 42 months, with all but 9 months suspended, plus two years' probation. (Tr. III, at 19-23.) The court reasoned the jury did not view the vehicle as a dangerous weapon. (Tr. III, at 22.) Kilgore appealed, alleging evidentiary error and defective jury instructions.

### **Argument**

#### **I. The Trial Court Did Not Err in Admitting Testimony from Officer Merry Regarding Her Recovery and Long-Term Injuries, as the Testimony Was Relevant and Not Unfairly Prejudicial Under Maine Rules of Evidence 402 and 403.**

The Appellant contends that Officer Merry's testimony about her recovery and long-term injuries was irrelevant under M.R. Evid. 402 and unfairly prejudicial under M.R. Evid. 403. This Court reviews evidentiary rulings for clear error on relevance and abuse of discretion on admissibility. *State v. Healey*, 2024 ME 4, ¶ 13, 307 A.3d 1082. The trial court's decision to admit the testimony was sound and should be upheld.

**a. Officer Merry’s Testimony About her Recovery Was Relevant Under M.R. Evid. 402.**

Under M.R. Evid. 401, evidence is admissible if it has “any tendency to make a fact more or less probable than it would be without the evidence” and that fact is “of consequence in determining the action.” Under M.R. Evid. 402, relevant evidence is admissible unless another statute or rule provides otherwise. Officer Merry’s testimony about her recovery and ongoing pain was relevant to the bodily injury element of both Assault (Count 1) and Assault on an Officer (Count 2). Bodily injury, defined under 17-A M.R.S. § 2(5) as “physical pain, physical illness or any impairment of physical condition,” was a required element the State had to prove beyond a reasonable doubt. *See* 17-A M.R.S. § 752-A(1)(A) (Assault on an Officer requires causing bodily injury to a law enforcement officer).

The Appellant argues that testimony about immediate pain (e.g., Tr. I, at 72, 87) sufficed to prove bodily injury, rendering subsequent recovery evidence irrelevant. This misstates the law. Evidence of the nature, extent, and duration of pain or impairment strengthens the State’s case by corroborating that bodily injury occurred and persisted, making it more probable that Kilgore’s actions caused such injury. Officer Merry’s description of “extraordinary pain” for a year, ongoing dull pain, and sensations like “spider webs” or “dragging skin across pavement” (Tr. I, at 117-18) directly tied her physical condition to the incident, reinforcing the

State’s burden of proof. Unlike *State v. Penley*, 2023 ME 7, ¶ 18, 288 A.3d 1183 (finding victim’s fear of defendant irrelevant to the elements of the crime), here, the testimony was tied to an essential element—bodily injury—and was not extraneous.

**b. Officer Merry’s Testimony About her Recovery Was Not Unfairly Prejudicial Under M.R. Evid. 403**

M.R. Evid. 403 allows exclusion of relevant evidence only if its probative value is “substantially outweighed by a danger of unfair prejudice.” Unfair prejudice means “an undue tendency to move the factfinders to decide the issue on an improper basis,” such as emotion rather than evidence. *State v. Michaud*, 2017 ME 170, ¶ 8, 168 A.3d 802. The trial court’s admission of Officer Merry’s testimony did not abuse its broad discretion under this rule. *See State v. Thongsavanh*, 2004 ME 126, ¶ 8, 861 A.2d 39 (balancing probative value against prejudice is within trial court’s purview).

The testimony’s probative value was significant: it detailed the physical impact of Kilgore’s actions, supporting the bodily injury element and countering any defense minimization of the incident’s severity. The Appellant claims it risked generating sympathy for Officer Merry, particularly as a police officer, but this does not rise to *unfair* prejudice. Juries are presumed to be unbiased and follow instructions to base verdicts on evidence, not emotion, and no curative instruction

was requested or deemed necessary here. *See Michaud*, 2017 ME 170, ¶ 8.

Moreover, the testimony was not graphic or inflammatory beyond its factual recounting—unlike, for example, gruesome autopsy photos that might unduly sway a jury. Its emotional impact was incidental to its relevance, not a basis for exclusion. *Penley*, 2023 ME 7, ¶ 18 (excluding testimony with no probative tie to elements of the crime). There is no evidence to support that the Jury was “protective” over Officer Merry and her position as a law enforcement officer nor that the description of Officer Merry’s ongoing issues caused by this incident unfairly swayed the jury.

The Appellant’s reliance on Officer Merry’s PTSD and “living nightmare” statements (Tr. I, at 117) overstates their prejudicial effect. These were brief remarks within a broader narrative of physical recovery, not a calculated appeal to generate sympathy. The trial court reasonably concluded that the testimony’s probative value outweighed any risk of prejudice, a decision well within its discretion. *Healey*, 2024 ME 4, ¶ 13.

## **II. The Jury Instructions Were Neither Erroneous Nor Structurally Defective, and Any Alleged Errors Were Harmless.**

The Appellant argues that the jury instructions were erroneous, contained structural errors, and prejudiced him, warranting the judgment to be vacated. This Court reviews jury instructions as a whole for prejudicial error, ensuring they

“informed the jury correctly and fairly in all necessary respects of the governing law.” *State v. Baker*, 2015 ME 39, ¶ 10, 114 A.3d 214. Preserved objections are reviewed for harmless error, while unpreserved issues require obvious error—a “highly prejudicial error tending to produce manifest injustice.” *State v. Vallacci*, 2018 ME 80, ¶ 9, 187 A.3d 567. The instructions here were legally sound, and any minor inconsistencies did not affect the verdict.

**a. The Jury Instructions Were Not Inconsistent nor Confusing**

The Appellant claims the instructions on self-defense, duress, and competing harms were inconsistent and confusing, citing *State v. Delano*, 2015 ME 18, ¶ 13, 111A.3d 648, quoting *State v. Lapierre*, 2000 ME 119, ¶ 18, 754 A.2d 978 (error exists if instructions create “possibility of jury confusion and a verdict based on impermissible criteria”). When viewed holistically, the instructions accurately conveyed the State’s burden to disprove each defense beyond a reasonable doubt, as required under Maine law. *Vallacci*, 2018 ME 80, ¶ 10.

The trial court’s initial oral instructions outlined the elements of each charge, followed by defenses (A. at 56-67; Tr. II, at 44-55). For self-defense, the court explicitly stated that if the State failed to disprove it, the jury “must find the Defendant not guilty” (A. at 56, 96, 97; Tr. II, at 45). For duress, it explained the State must prove beyond a reasonable doubt that Kilgore was not compelled by

threat or force (A. at 64, 65, 102; Tr. II, at 53). For competing harms, it required the State to disprove one of three alternatives to convict (A. at 66, 103; Tr. II, at 54). The court clarified these defenses applied to “all of the offenses” (A. at 65; Tr. II, at 53), and unanimity instructions reinforced separate consideration of each charge (A. at 51, 69; Tr. II, at 39, 57).

The Appellant highlights the jury’s questions during deliberations (e.g., applicability of duress, A. at 75-77) as evidence of confusion. However, these reflect active engagement with the instructions, not misunderstanding. The court’s responses—e.g., affirming duress applied to all charges (A. at 76) and reiterating separate consideration with the State’s burden to disprove defenses (A. at 88; Tr. II, at 76)—clarified any ambiguity. Unlike *Lapierre*, 2000 ME 119, ¶ 24 (vacating for incomplete law statement), the instructions here provided a complete framework, and supplemental responses cured any potential confusion.

The Appellant’s focus on the absence of uniform “not guilty” or acquittal language across all defense instructions ignores their collective effect. The jury was repeatedly told the State bore the burden to disprove defenses, and the self-defense instruction’s explicit acquittal directive set the tone for all justification defenses. No evidence suggests the jury misapplied the law due to phrasing differences or the Court’s option to avoid redundancy by stating that it “already

explained the law of self-defense . . . I’m not going to repeat it here.” (A. at 60, Tr. II at 48.)

**b. The Instructions Did Not Contain Structural Errors**

The Appellant alleges two structural errors akin to those in *Baker*, 2015 ME 39: (1) instructing guilt before considering defenses, and (2) failing to mandate acquittal if defenses were not disproved. Neither applies here.

**1. There Were Not Premature Guilty Instructions Given**

In *Baker*, the trial court instructed the jury to find guilt if the State proved the elements, then separately addressed self-defense, creating ambiguity about the State’s burden to disprove it. *Id.* ¶¶ 14-15. Here, the instructions integrated defenses with the charges. For Aggravated Assault and Assault, the court explained the elements and immediately tied self-defense to the State’s burden, stating acquittal was required if not disproved (A. at 56, 97; Tr. II, at 45). For Assault on an Officer, it referenced the prior self-defense instruction (A. at 59; Tr. II, at 48), avoiding redundancy while maintaining clarity. Duress and competing harms followed the charge-specific instructions but were explicitly linked to “all offenses” (A. at 64; Tr. II, at 53), with no intervening guilty directive. Unlike *Baker*, the sequence here did not authorize a guilty verdict without considering defenses. *See* 17-A M.R.S. § 108 (self-defense negates criminal liability if not disproved).

The unanimity instructions (A. at 51; Tr. II at 39) focused on separate charge consideration, not guilt determination, and did not override the defense instructions. This instruction stressed the importance of considering each charge on separate basis and that a decision on each charge must be unanimous. The jury was not misled into a premature guilty finding.

## **2. The Court Gave Adequate Acquittal Guidance**

The Appellant argues the duress and competing harms instructions lacked an explicit acquittal mandate, as in *Baker*, ¶ 16 (error found where the jury was not told to acquit if State failed on self-defense). This conclusion over reads *Baker*. The self-defense instruction here clearly required acquittal if not disproved (A. at 57, 95), establishing the legal principle for all defenses. The duress instruction mandated the State prove Kilgore was not under duress (A. at 65, 102), and competing harms required proof negating the defense to convict (A. at 66, 103). While not verbatim “not guilty” directives, their purpose was unmistakable: failure to disprove a defense precluded conviction. Juries are presumed to follow instructions as a whole (*Baker*, ¶ 17), and the consistent message throughout the instructions—the State must prove charges and disprove defenses beyond a reasonable doubt—fulfilled this duty.



The Appellant’s critique of differing phrasing (e.g., “not criminally responsible” for duress) focuses on form over substance. Maine law does not require identical wording across defenses, only clarity on the State’s burden and the outcome of its failure. These instructions met that standard.

### **C. Any Alleged Errors Were Not Prejudicial nor Obvious**

Even if errors existed, *arguendo*, they were neither prejudicial nor obvious. An error is harmless if “it is highly probable that it did not affect the verdict.” *Lapierre*, 2000 ME 119, ¶ 18. Obvious error requires a “manifest injustice” from an unpreserved, highly prejudicial flaw. *Vallacci*, 2018 ME 80, ¶ 9.

The jury’s questions (A. at 75-83) and the court’s responses (A. at 76, 88) demonstrate diligent application of the law, not confusion warranting reversal. The verdict—acquitting on Aggravated Assault but convicting on Assault and Assault on an Officer—reflects a rational distinction: the jury likely found the car was not a “dangerous weapon” under 17-A M.R.S. § 2(9)(A) (requiring capability of death or serious bodily injury), yet bodily injury occurred. This aligns with the evidence (e.g., foot incident, Tr. I, at 142) and the trial court’s sentencing rationale (Tr. III, at 19-22). The Appellant’s “all or nothing” claim ignores the jury’s ability to parse facts and law.

Preserved objections (e.g., to supplemental instructions, A. at 81) were addressed by the court’s final clarification (A. at 88), rendering any initial

omission harmless. Unpreserved issues, like specific wording, fall short of obvious error—unlike *Baker* or *Vallacci*, where instructions wholly omitted the State’s burden. Here, the jury was adequately guided, and no injustice resulted. *See State v. Delano*, 2015 ME 18, ¶ 23, 111 A.3d 654 (where this Court held that although the jury should have received the complete instructions before beginning deliberations, the record on appeal failed to demonstrate prejudice to [the Defendant] from the later reinstruction that would require The Court to vacate the judgment of conviction.)

### **Conclusion**

The Trial Court properly admitted Officer Merry’s testimony, which was relevant and not unfairly prejudicial. The jury instructions, viewed as a whole, accurately stated Maine law without structural defects or prejudicial confusion. The State respectfully requests that this Court affirm Michael Kilgore’s convictions.

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## **Certificate of Service**

I certify that on April 10, 2025, a copy of this brief was served on counsel for the appellant via an electronic copy of the brief at [Scott@hesslawme.com](mailto:Scott@hesslawme.com).

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