STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
Boonstra, Tukel, and Letica, JJ.

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v MICHELINE NICOLE LEFFEW, Defendant-Appellant.	Supreme Court No. 161797 Court of Appeals No. 343818 Arenac Circuit Court No. 17-004120-FH
PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v JEREMIAH JAMES LEFFEW, Defendant-Appellant.	Supreme Court No. 161805 Court of Appeals No. 344240 Arenac Circuit Court No. 17-004119-FH

SUPPLEMENTAL BRIEF ON APPEAL OF APPELLEE PEOPLE OF THE STATE OF MICHIGAN

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

The Michigan Court of Appeals affirmed both defendants' convictions and sentences on April 9, 2020. Both defendants timely filed an application for leave to appeal to this Court. This Court has jurisdiction over the appeal under MCR 7.303(B)(1).

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Was the common-law affirmative defense of defense of others available for the charges against the defendants?

Appellants' answer:	Yes.
Appellee's answer:	Yes, with respect to the home invasion charges. No, with respect to the assault charge.
Trial court's answer:	The defendants did not give the trial court the opportunity to answer this question.
Court of Appeals' answer:	No.

2. Although neither defense counsel requested the defense-of-others instruction, the jury was aware that the defendants' claim that they were acting to defend Lisa Seibert was the sole issue in the case, and the jury was explicitly instructed that this was a valid defense with respect to the charge against Micheline Leffew. Were the defendants denied the effective assistance of counsel?

Appellants' answer:	Yes.
Appellee's answer:	No.
Trial court's answer:	Did not answer.
Court of Appeals' answer:	No.

STATUTES INVOLVED

Section 2 of the Self Defense Act, MCL 780.972, provides:

(1) An individual who has not or is not engaged in the commission of a crime at the time he or she uses deadly force may use deadly force against another individual anywhere he or she has the legal right to be with no duty to retreat if either of the following applies:

> (a) The individual honestly and reasonably believes that the use of deadly force is necessary to prevent the imminent death of or imminent great bodily harm to himself or herself or to another individual.
>
> (b) The individual honestly and reasonably believes that the use of deadly force is necessary to prevent the imminent sexual assault of himself or herself or of another individual.

(2) An individual who has not or is not engaged in the commission of a crime at the time he or she uses force other than deadly force may use force other than deadly force against another individual anywhere he or she has the legal right to be with no duty to retreat if he or she honestly and reasonably believes that the use of that force is necessary to defend himself or herself or another individual from the imminent unlawful use of force by another individual.

Section 3 of the Self Defense Act, MCL 780.973

Except as provided in section 2, this act does not modify the common law of this state in existence on October 1, 2006 regarding the duty to retreat before using deadly force or force other than deadly force.

Section 4 of the Self Defense Act, MCL 780.974, provides:

This act does not diminish an individual's right to use deadly force or force other than deadly force in self-defense or defense of another individual as provided by the common law of this state in existence on October 1, 2006.

INTRODUCTION

This Court should either deny leave to appeal from the unpublished decision below because this case is fact-bound and without jurisprudential significance, or in the alternative, affirm the decision below albeit on different grounds. Resolution of the prejudice prong of the ineffective-assistance claims presented in this case requires an inherently fact-specific inquiry grounded in the evidence and arguments presented at trial.

The case arises out of a love triangle of sorts that went awry. Longtime partners (and now married couple) Lisa Seibert and Donna Knezevich each entered into a romantic relationship with Michael Porter. Seibert and Knezevich had a falling out, and Seibert went to stay with Porter for a few days. Eventually, Seibert wanted to come back, so Knezevich went, with her son and daughter-in-law, defendants Jeremiah and Micheline Leffew, to pick her up.

That much everyone agrees on. But from there, the stories diverge. According to Porter and Seibert, Seibert was voluntarily at Porter's home simply waiting to be picked up. When they arrived, the Leffews, furious at Porter for his relationship with Seibert and Knezevich, broke into his home. Micheline kicked the door in and entered first, and when Porter knocked her down, Jeremiah found a knife and attacked Porter, calling, "Let's kill him!"

According to the Leffews, when they arrived, they saw Porter through the window dragging Seibert from the door, forcing her into a chair, and essentially holding her hostage. Desperate to rescue her, they did what was necessary and forced their way into Porter's home.

This is the question presented to the jury—were the Leffews telling the truth, sincerely trying to rescue Seibert from what was essentially a kidnapping, and therefore innocent? Or were Porter and Seibert telling the truth, was Seibert there voluntarily, and were the Leffews attacking Porter out of rage? Both defense counsels framed the question this way at trial, as did the prosecutor. Yet, through an apparent oversight, neither defense counsel requested a jury instruction on the defense of others, and no such instruction was given.

The question before this Court is whether the failure to request the instruction deprived the defendants of the effective assistance of counsel. But because the lack of an instruction did not affect the outcome of the trial, the answer is no. The jury was instructed, with respect to Micheline, that it could find her guilty only if it was convinced beyond a reasonable doubt that she knew what she did was wrong and that she acted without just cause or excuse. Having received that instruction, the jury deliberated for less than an hour, asked no questions of the judge during deliberation, and returned a guilty verdict. And that same jury returned a guilty verdict with respect to both charges against Jeremiah.

These facts make clear that the jury did not believe the Leffews' story about their invasion of Porter's home. If it had, it would necessarily have acquitted Micheline, and it would almost certainly have acquitted Jeremiah. If the jury had heard an instruction as to defense of others, it would not have changed the fact that it found the prosecution witnesses more credible. The verdict would be the same.

Because the Leffews cannot show prejudice, they are not entitled to relief.

COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

Trial facts

Codefendants Micheline and Jeremiah Leffew are married to each other. Jeremiah's mother is Donna Knezevich. Lisa Seibert was, at the time of the events giving rise to this case, Knezevich's romantic partner (and now Knezevich's wife). Jeremiah and Seibert also consider their relationship to be that of a mother and son, as Seibert had been Knezevich's partner for 25 years. (247a.)

At some point, both Knezevich and Seibert, who lived together at the time, entered into parallel romantic relationships with a man named Michael Porter. (227a.) Knezevich eventually became jealous of Seibert's relationship with Porter, and she kicked Seibert out of the house. (219a, 250a.) Porter came to the house to pick Seibert up, and Knezevich told him to take her—"she was done with her." (155a.) While Porter was there, Jeremiah was there as well, and he lunged at Porter with a knife. (155a, 219a–220a.)

Seibert went to stay with Porter, and she was staying with him a few days later, on November 18, 2017, the day of the events at issue in this case. (154a, 220a.) Porter did not hear anything from Knezevich, Jeremiah, or Micheline during the time Seibert was with him. (156a.) Seibert had her phone, and Porter never prevented her from calling anyone. (156a–157a, 221a.)

On November 18, Seibert got a phone call, and Porter came to understand that somebody would be coming to pick her up. (157a.) A while later, a vehicle arrived, and when Porter saw that it was Jeremiah, who had previously threatened

him with a knife, he called 9-1-1. (158a, 222a.) Porter testified that he called 9-1-1 because of the previous incident, and because he did not want any trouble. (*Id.*)

Jeremiah, Micheline, and Knezevich got out of the car and walked toward the house. (159a.) Micheline and Knezevich walked to the front door and began beating on it. (*Id.*) Porter opened the front door a little bit. (*Id.*) He testified that at that time, Seibert was standing somewhere behind him. (*Id.*) Porter's house also had a backdoor, and someone could have walked out easily while Porter was at the front door. (159a–160a.) Micheline and Knezevich told Porter they were there to get Seibert, and Porter asked them to give him five or ten minutes. (160a.) The women tried to enter the house, but Porter would not let them in. (*Id.*) He asked them to let him talk to Seibert. (*Id.*) He then shut the front door and locked it. (161a.)

By that point, Jeremiah had gotten to Porter's back door and was beating on Porter's patio window threatening to kill Porter. (161a.) Porter walked from the front door to his living room and told Jeremiah to "knock it off." (*Id.*) When he turned around, he saw Seibert was leaning against the front door, and had slid down the door to the floor. (*Id.*) Porter helped her up and walked her to the dining room. (161a–162a.)

Shortly after that, Porter's visitors began beating and kicking his backdoor, and Porter saw the door moving, as if it was going to be broken down. (163a.) Porter called 9-1-1 again because he thought the door would eventually give way. (*Id.*) The door did give way, and Micheline came through with Jeremiah right

behind her. (164a.) Porter, afraid for his life, hit Micheline with an ashtray, knocking her down. (*Id.*) He then hit Jeremiah a couple of times. (164a–165a.) Jeremiah hit Porter and knocked him against the kitchen sink. (165a.) He jumped on Porter's back, yelling, "Let's kill him, let's kill him." (*Id.*) Jeremiah found a steak knife in one of the kitchen drawers and tried to stab Porter with it, cutting Porter's wrist and damaging his watch in the process. (*Id.*)

Eventually Knezevich called Jeremiah off, and Jeremiah helped Micheline outside through the front door. (167a.) By that time, Seibert had already gone outside—Porter did not see her leave, but she left during the fight. (167a, 223a.) Knezevich came back in the house, and Porter returned a ring to her that she and Seibert had given him during their relationship. (168a–169a.) Before the four left, Jeremiah threw the steak knife across the living room into a clock, and Micheline picked up a chair and made a hole in Porter's wall with it. (169a–170a.)

Micheline testified at trial. (275a–290a.) According to her testimony, when they arrived at Porter's house to get Seibert, Micheline asked Seibert if she wanted to leave, and Seibert said, "Yes," after which Porter said, "Give me a few minutes" and slammed the door. (277a–278a.) She testified that she saw Porter grab Seibert and drag her away from the door, after which Seibert tried to get loose and get to the door, and Porter grabbed her again. (278a.) She testified that she heard Seibert screaming for help, so she had to break in to help her. (280a.)

After that, her testimony was consistent with Porter's—she admitted she kicked down Porter's door and entered his house, after which she got hit in the head

and knocked out. (280a.) She denied, however, throwing a chair through Porter's wall. (285a.)

Jeremiah also testified on his own behalf. (293a–319a.) According to his testimony, when Porter came to the front door initially, he said, "Lisa's not coming" and slammed the door. (296a.) He testified that he saw Porter drag Seibert away from the door and push her into a chair. (297a.)

Proceedings Below

Micheline was charged with third-degree home invasion. Jeremiah was charged with first-degree home invasion and assault with a dangerous weapon. Following a two-day trial, the jury returned a guilty verdict on all counts as to both defendants. (381a–384a.) Micheline was sentenced to five months in jail and two years of probation. (399a–402a.) Jeremiah was sentenced as a third-offense habitual offender, MCL 769.11, to 25 to 40 years in prison for the home-invasion conviction, and 2 to 8 years for felonious assault, running concurrently. (417a.)

Both defendants appealed. Micheline's appeal raised two claims of ineffective assistance of trial counsel, one based on a failure of defense counsel to request a jury instruction on defense of others either under the self-defense act or the common law, and one based on a failure to impeach prosecution witnesses. Jeremiah's appeal also raised two claims of ineffective assistance of trial counsel, including one based on the failure to request a jury instruction relating to the defense of others under the self-defense act.

The Court of Appeals consolidated the appeals and affirmed, rejecting all arguments of both defendants. (509a–519a.) The court expressed serious doubt that the defense of defense-of-others is available at all for the charge of home invasion. (511a.) But without reaching a holding on that point, it held that Micheline could not show ineffective assistance of counsel because the argument would have been so novel that trial counsel could not be held deficient for failing to raise it. (*Id.*) The court of appeals also considered and rejected Jeremiah's ineffective-assistance claim, holding in part that the facts did not support the defense of defense-of-others, but also that he was not entitled to the defense for reasons similar to Micheline. (513a.)

Both defendants then sought leave to appeal in this Court, raising the same claims they raised in the Court of Appeals. This Court ordered supplemental briefing and oral argument on the questions whether the common-law affirmative defense of defense of others was applicable to the charges against both defendants, and whether they were denied the effective assistance of counsel based on counsels' failure to request such an instruction.

STANDARD OF REVIEW

The first question this Court has asked is whether the common-law affirmative defense of defense of others could have been raised as a defense to the charges against the defendants. Whether a common-law affirmative defense is available for a statutory crime is a question of law that this Court reviews de novo. *People v Dupree*, 486 Mich 693, 702 (2010).

The second question this Court has asked is whether trial counsels' failure to request an instruction on defense of others denied the defendants the effective assistance of counsel. A claim of ineffective assistance of counsel is governed by the standard in *Strickland v Washington*, 466 US 668 (1984). Under the *Strickland* standard, a defendant must establish both that counsel's performance was deficient and that the defendant was prejudiced by counsel's deficient performance. *Id.* At 687–688. "[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." *Id.* at 697.

Regarding the performance prong, judicial scrutiny of counsel's performance must be "highly deferential" and a reviewing court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. Beyond the general requirement of reasonableness, "specific guidelines are not appropriate." *Id.* at 688. "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate

decisions . . . ." *Id.* at 688–689. "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Id.* at 689.

Regarding the prejudice prong, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "[T]he question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently." *Harrington v Richter*, 562 US 86, 111 (2011). Rather, "[T]he likelihood of a different result must be substantial, not just conceivable." *Id.* at 112.

Between the deference afforded to trial counsel's decisions and the burden on the defendant of showing a reasonable probability of a different result, "[s]urmounting *Strickland*'s high bar is never an easy task." *Padilla v. Kentucky*, 559 US 356, 371 (2010).

ARGUMENT

I. Jeremiah Leffew was entitled to an instruction on defense of others for his home invasion charge, but not for his felonious assault charge. Micheline Leffew was entitled to an instruction on defense of others.

This Court has first asked the parties to address whether the common-law defense of defense of others could be raised as a defense to the three charges against the two defendants. The answer is yes with respect to the home invasion charges, but no with respect to the assault charge.

A. The defense of defense of others is available for home invasion as a general matter.

The first question is whether defense of others may be raised as a defense to a charge of home invasion in general. It may. Although it may be usual to think of self-defense and defense of others as defenses raised in response to an assaultive crime, there is no such requirement. This Court has held that self-defense is available as a defense to being a felon in possession of a firearm. *Dupree*, 486 Mich at 712. This Court has also held that self-defense is available for carrying a concealed weapon under certain circumstances. *People v Triplett*, 499 Mich 52, 59 (2016). And the Court of Appeals has held that self-defense is available for possession of a firearm during the commission of a felony. *People v Goree*, 296 Mich App 293, 305 (2012). The court below therefore erred to the extent it rejected the defendants' claims because of its belief that, "[g]enerally, the defense-of-others defense is used to excuse assaultive conduct." (511a.) This may be *generally* true,

but it is not exclusively true. Where this Court and the Court of Appeals have already recognized the availability of self-defense for non-assaultive crimes, that should apply here as well.

There is no apparent reason, as a matter of policy or as a matter of justice, why a defendant can be acquitted of murder based on a showing of self-defense or defense-of-others but could not be acquitted of the much less serious crime of home invasion on the same showing. Under the holding below, someone might be excused from taking the life of a kidnapper if they reasonably and sincerely believed a hostage's life was in imminent danger, but they could not be excused from crossing the threshold of the kidnapper's home in order to kill that kidnapper. That cannot be the law.

The court below also erred in holding that the Self-Defense Act abrogated the common law with respect to self-defense and defense-of-others. The SDA only abrogated the common law with respect to the duty of retreat, and it only did so to a limited extent. Section 2 of the SDA lays out statutory defenses of self-defense and defense-of-others *without* a duty retreat, which would have been unavailable at common law, see *Pond v People*, 8 Mich 150, 175–176 (1860), but are made available with the passage of the SDA. MCL 780.972. Section 3 then explains that the SDA "does not modify the common law . . . regarding the duty to retreat" except as provided in section 2. MCL 780.973. And section 4 makes as plain as possible that the SDA "does not diminish an individual's right to use deadly force or force other

than deadly force in self-defense or defense of another individual as provided by the common law of this state . . . ." MCL 780.974.

The plain language and structure of the SDA demonstrate that the SDA only *expanded*, and did not diminish, the availability of self-defense and defense-of-others. The court below therefore erred in holding that the statutory requirements of section 2 of the SDA applied here. Those requirements are what a defendant must show before raising a claim of self-defense or defense-of-others with no duty to retreat. This defense would have been unavailable before the SDA but is now available only if the defendant can make the required showing, which includes a showing that the defendant is somewhere "he or she has the legal right to be." MCL 780.972(2). But the duty to retreat does not even enter into this case. Assuming for the sake of argument that the Leffews actually broke into Porter's house out of fear that Seibert would suffer the imminent unlawful use of force, there is no way they could have saved her from such force by retreating.

In sum, the court below erred in holding that the defense of defense-of-others was not available to a charge of home invasion.

B. Both defendants were entitled, on request, to an instruction on defense of others with respect to the home invasion charges against them.

The next question is whether defense-of-others was available to these defendants on these facts. And the People agree that both defendants presented prima facie evidence that they broke into Porter's home because they believed that they needed to do so in order to protect Seibert from "the imminent unlawful use of

force by another." M Crim JI 7.22(3). The evidence, if believed, would have been sufficient to create reasonable doubt as to whether their belief that Seibert was in danger of the use of force was reasonable and sincere, and whether their action in breaking into his home to save Seibert was appropriate under the circumstances, see M Crim JI 7.22(4).

C. Jeremiah Leffew was not entitled to an instruction on defense of others with respect to the assault charge against him.

Although the defense of defense-of-others was available to Jeremiah on the charge of first-degree home invasion, it was not available to him on the charge of felonious assault, because Jeremiah used deadly force against Porter, and there was no evidence adduced at trial of an imminent danger that would justify the use of deadly force. See M Crim JI 7.21.

In support of the charge of felonious assault against Jeremiah, the jury heard testimony that Jeremiah attacked Porter, yelling, "Let's kill him, let's kill him," searched Porter's silverware drawer for a steak knife, and attacked Porter with the steak knife. This constitutes the use of deadly force. For force to be deemed "deadly force," it is not necessary that a death result. Rather, an act is one of deadly force if "it is an act for which 'the natural, probable, and foreseeable consequence . . . is death.' " *People v Anderson*, 332 Mich App 622, 629 (2018), quoting *People v Pace*, 102 Mich App 522, 534 (1980).

Because Jeremiah tried to kill Porter with a steak knife, he would not be entitled to an instruction on the use of non-deadly force in defense of others.

Rather, the instruction that would apply is Michigan Criminal Jury Instruction 7.21: "Defense of Others—Deadly Force." This includes a requirement that Jeremiah "must have honestly and reasonably believed that [Seibert] was in danger of being killed, seriously injured, or sexually assaulted." M Crim JI 7.21(3) (punctuation altered). The jury would also have been instructed that, "if [Leffew] was only afraid that [Seibert] would receive a minor injury, then [he] was not justified in killing or seriously injuring [Porter]." M Crim JI 7.21(4). No evidence was presented that would allow a rational juror to harbor a reasonable doubt that Jeremiah could have honestly and reasonably believed that Seibert was in danger of death, serious injury, or sexual assault.

Jeremiah also argues that his felonious assault against Porter was justified because Porter hit his wife and codefendant in the head with an ashtray, knocking her out and, he alleges, causing her to have a seizure. But that argument fails as well. There is no way that attacking Porter *after* he knocked out Micheline would protect Micheline from imminent danger of death, serious injury, or sexual assault.

II. Neither defendant was denied the effective assistance of counsel based on the lack of an instruction on the defense of others.

Although the defendants were entitled to jury instructions on defense-of-others for two of the three charges against them, they cannot show that they were denied the effective assistance of counsel for the reasons discussed below.[1]

[1] As discussed in Argument I.B.3 above, Jeremiah was not entitled to an instruction on felonious assault. The People's primary argument on ineffective assistance with respect to the felonious assault charge is therefore that counsel cannot be ineffective

A. Micheline was not denied the effective assistance of counsel because the instructions given to the jury were sufficient to present the defense.

The jury was instructed, with respect to the charge of third-degree home invasion against Micheline, that it could not convict her of home invasion without finding that she intended to commit a misdemeanor. (377a.) The predicate misdemeanor was malicious destruction of property, and the trial court instructed the jury that one of the elements of that crime was that "the defendant did this knowing that it was wrong, without just cause or excuse[.]" (*Id.*)

Micheline, in her brief to this Court, lays out a list of evidence that the jury heard that she contends would justify an acquittal. (Micheline Leffew's Supp Br, pp 26–27.) She goes so far as to say that "any reasonable juror" would have acquitted having heard this evidence, if properly instructed. (*Id.*, p 27.) But she cannot explain how the same jury that heard this evidence and was instructed that the prosecution needed to prove beyond a reasonable doubt that Micheline knew what she was doing was wrong and that she had no just cause or excuse to do it was able to quickly find Micheline guilty. She argues that, "[h]ad the jurors been properly instructed on defense of others, they would have considered the events as Ms. Leffew honestly and reasonably believed them to be, making allowances for the excitement of the moment." (*Id.*, p 26.) But that principle is captured in the

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for failing to make a meritless argument. *People v Ericksen*, 288 Mich App 192, 201 (2010). If this Court disagrees with the People and holds that Jeremiah was entitled to an instruction with respect to the felonious assault charge, then Argument II.B applies with equal force to that ineffective-assistance claim.

instruction that the jury had to find that Micheline knew what she was doing was wrong. There is no way to answer that question *except* for considering the events as Micheline believed them to be and making allowances for the excitement of the moment.

Micheline also asserts in her brief that she was prejudiced because "the jury was not instructed that the prosecution bore the burden of disproving Ms. Leffew's affirmative defense beyond a reasonable doubt." (*Id.*, p 25.) But that is not true. The trial court instructed the jury that it could not convict Micheline unless it was "satisfied beyond a reasonable doubt that . . . she is guilty." (364a–365a.) And the court explained that "[t]he prosecutor must prove each element of the crime beyond reasonable doubt. The defendant is not required to prove . . . her innocence or to do anything. If you find that the prosecutor has not proven every element beyond a reasonable doubt, then you must find the defendant not guilty." (365a.) And the jury was informed that the intent to commit a misdemeanor was one of the elements of third-degree home invasion (376a–377a), and that one of the elements of that misdemeanor was "that the defendant did this knowing that it was wrong, without just cause o[r] excuse[.] (377a).

The instructions to the jury made unmistakable that it was the prosecution's burden to disprove Micheline's defense—that she did not believe she did anything wrong in kicking down Porter's door and entering his home and that she did so with the just cause of rescuing her mother-in-law from Porter. "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich

476, 486 (1998). If the jury had harbored any reasonable doubt as to whether Micheline was telling the truth about her intentions and her view of the situation, this Court must presume that it would have acquitted Micheline. And so, because the jury found Micheline guilty, this Court must presume that it found that the prosecution had proven, beyond a reasonable doubt, that she knew what she did was wrong, and that she had no just cause or excuse for doing it.

Micheline argues that the defense-of-others instruction would have given the jury a more specific framework within which to judge her defense, rather than leaving the jurors "to their own devices to consider what constituted 'just cause' under the law." (Micheline Leffew's Supp Br, p 26.) And for this reason, she argues that the "without just cause or excuse" instruction is "no substitute for an affirmative defense instruction." (*Id.*) But that is not the question here—certainly, if the defense-of-others instruction had been requested and the trial court had denied it by holding that the "without just cause or excuse" instruction was an adequate substitute, that would have been error. But the question here is not whether the instruction given was a proper substitute for the correct instruction, but whether there is a reasonable probability that, under these facts, it made any difference.

The jury in this case did not come back with any questions for the judge on what constitutes "just cause or excuse." (379a–380a.) It deliberated for less than an hour. (*Id.*) It understood based on all three counsels' closing arguments (as more fully discussed below) that the key question in the case was whether the

Leffews were truly there to rescue Seibert from Porter, or whether they broke into Porter's house and attacked him without any excuse. (343a–378a.) It heard *no* argument from the prosecutor that Micheline or Jeremiah could be found guilty if in fact they were sincerely there to rescue Seibert. (343a–347a, 359a–361a.) In sum, there is no reasonable probability that *this* jury, which convicted Micheline under the instructions that it was given, would have acquitted her if it had received an instruction on defense of others.

Micheline has failed to satisfy the prejudice prong of her ineffective-assistance claim, and this Court should deny leave to appeal or affirm.

B. Jeremiah was not denied the effective assistance of counsel because there was no reasonable probability that an instruction on defense of others would have resulted in a different outcome.

As discussed in Argument I above, Jeremiah would have been entitled to an instruction on defense-of-others with respect to his home invasion charge, if he had asked for one. But even assuming his trial counsel performed deficiently for declining to request such an instruction, he cannot show that he was denied the effective assistance of counsel, because there is no reasonable probability that there would have been a different result even if the jury had been given the instruction.

Although the jury did not receive an instruction with respect to Jeremiah that was similar to the "just cause or excuse" instruction it received with respect to Micheline, it is important to note that the same jury considered the charges as to both defendants. The defense with respect to both defendants was nearly identical.

There is no reasonable probability that the jury might have believed that the prosecutor proved beyond a reasonable doubt that Micheline knew what she was doing was wrong and acted without just cause or excuse, and simultaneously harbored reasonable doubt as to whether Jeremiah sincerely and reasonably believed that Seibert was in danger, but still convicted him only because it did not receive an instruction on defense of others.

Making even more clear that the lack of an instruction did not prejudice Jeremiah (or Micheline) is the fact that the issue was unambiguously framed for the jury in such a way that it was clear that the sole issue for the jury was whether he was acting to rescue Seibert or not. The arguments of all three attorneys made clear to the jury that the issue in the case was whether there was a reasonable doubt that the Leffews were telling the truth, in which case they were entitled to an acquittal, or whether Porter and Seibert were telling the truth, in which case the Leffews could not have had a reasonable belief that Seibert was being subjected to unlawful physical force.

The prosecutor began his closing argument by reminding the jury, "You guys are now the fact finders, so you get to determine who was telling the truth, and who wasn't telling the truth, because there's totally different stories here." (343a.) There was no suggestion that, even if the Leffews were telling the truth in their testimony, the jury should still convict. After discussing the elements of the charges, the prosecutor then made an argument as to one motive Jeremiah might have had in invading Porter's home and attacking him, suggesting, "There was an

axe to grind here between Mr. and Mrs. Leffew and Mr. Porter, and they seized the opportunity at this point to go in." (345a.) This would have been irrelevant if the Leffews' claimed motive of defending Seibert had not been on the table as the Leffews' theory of defense.

The prosecutor then reiterated that it was the jury's job, "and it's a tough one, to determine who's telling the truth and who['s] lying in this situation." (345a–346a.)

The prosecutor then briefly discussed some of the evidence supporting the assault charge, before again discussing the importance of the jury's credibility determination between the witnesses: "You seen everybody testify, and you've heard different versions of what happened." (346a.) The prosecutor then discussed how the jury might make its credibility determination: "You know there's, you have to, I guess, look at who has something to gain. And Mr. Leffew is, well, he admits that he didn't like Mr. Porter because he was having sex with his mom." (*Id.*) The prosecutor then pointed out some inconsistencies in Jeremiah's testimony. (347a.)

None of this would have had any relevance if the Leffews' testimony that they believed Seibert was in danger and broke into Porter's home to save her lacked legal significance. The prosecutor never argued that the Leffews' motivation did not matter because defense of others was not available as a defense.

Jeremiah's attorney framed the question in the case in the same way. He referred to it as a "he said, he said, she said, she said situation." (348a.) He explained to the jury why, in his view, "there was a real sincere issue that Ms.

Seibert was being held there against her will." (*Id.*) He attacked Seibert's credibility by comparing her trial testimony to her preliminary examination testimony and pointing out inconsistencies. (349a–350a.)

Near the end of his closing argument, Jeremiah's attorney asked rhetorically, "Did Mr. Leffew do anything wrong[?]," and then answered, " 'no', he went there and rescued, as he calls it, his mother-in-law, who'd been his mother for 25 years. He went there because he was requested to be there by Lisa." (352a.) Counsel concluded, "All in all, ladies and gentlemen, Mr. Leffew did nothing wrong. I would ask you to come back with two verdicts, 'not guilty' as to both counts. Thank you." (353a.) The prosecutor never objected to any of this argument.

Micheline's attorney's argument was in the same vein. He told the jury that the Leffews showed up at Porter's home "knowing that Lisa clearly wanted to leave, she testified she wanted to leave. They were there to go into rescue mode, to rescue Jeremiah's mother and his wife's mother-in-law, Lisa Seibert." (354a.) He described Porter as "a controlling, overbearing man," and claimed, "Lisa can't call who she wants, she has to sneak around to call who she wants. They see her getting thrown around, through the window, and dragged around the house. Of course they went in to get her out of that situation." (*Id.*) Counsel then discussed the task the jury had of determining which witnesses were being truthful, and made arguments as to that point. (355a–356a.)

Micheline's counsel then moved on to the elements of the charge, spending significant time on the "without just cause or excuse element," and arguing that the entry into Porter's home was justified by her belief that Seibert was in danger:

> But just keep in mind that that third element, knowing that i[t] was wrong without just cause or excuse, because that's where this whole crime that Ms. Leffew is charged with falls apart. She had just cause to go kick in that door and let Ms. Seibert out. You know, it's her mother-in-law; she sees a woman get thrown around, that's not right at all. Of course she's going to get in there and let her out. Whether it was wrong or not that's for you to decide. It wouldn't have been wrong in that situation because, like we said, she's rescuing her mother-in-law. That's what they were there to do after they were only there to pick her up. You know, they didn't want to engage in some altercation with Mr. Porter that day. Mr. Porter didn't want to let Lisa Seibert go, that's what he wanted to do. The Leffews wanted to get her out of there, which I would say a reasonable person would want to be let out of that situation when you have some controlling, overbearing man, who probably thinks he's the cock of the walk with his two ladies. Making people have to sneak around to call on a phone. It's for you to decide factually what's going on there because I can't tell you. [358a–359a.]

Micheline's counsel closed by asking for a "not guilty" verdict for both defendants. (359a.) As with Jeremiah's attorney, the prosecutor did not object.

The prosecutor then had rebuttal argument. He did not attack the legal relevance of the arguments of the defense attorneys, as he might have done if defense of others were not in play as a potential basis for acquittal. Rather, he met the defense arguments on their own terms, pointing out differences between what was stated in closing and what the evidence at trial was. (359a–361a.) And he closed by telling the jury, "I don't envy your job to figure out who's telling the truth or what the facts are. But, unfortunately that's what you get to do." (361a.)

If the jury were not being asked to consider defense of others, all of these arguments would have been irrelevant and improper. But not only did the prosecutor decline to object to any of defense counsels' arguments, he made the same arguments himself (but from the other direction) in his own closing. There could have been no question in the jury's mind what question they were being asked to answer, and it all boiled down to the defense of others.

And after less than an hour of deliberation, the jury returned with a guilty verdict as to all three counts. As discussed above, that verdict can only mean that the jury found that she knew what she did was wrong and that she acted without just cause or excuse.

In order for there to be a reasonable probability that an instruction on defense of others would have led to a different outcome, it would have to be the case that four things were all true at that same time:

- the jurors believed beyond a reasonable doubt that Micheline knew what she was doing was wrong and had no just cause or excuse for doing what she did;
- the jurors understood that all three attorneys were asking them to determine whether Jeremiah was also justified in his actions,
- the jurors actually believed that Jeremiah was justified in his actions (despite the compelling evidence that he was not[2] and contrary to their finding that Micheline was not), and

[2] The jury heard evidence that, among other things, (1) it was Porter who called 9-1-1 twice despite supposedly holding Seibert captive in his home, (2) that Jeremiah had attacked him with a knife on a previous occasion, and (3) that Seibert, by her own testimony, was free to leave or to make phone calls at any time.

- the jurors, without asking any questions of the judge or taking any significant time to deliberate, returned a guilty verdict for a man they believed was justified in rescuing his mother from an abuser.

Is it conceivable that this is what the jury did? Barely. Is there a reasonable probability that this is what the jury did? There is not.

The jury convicted Jeremiah (like Micheline) *not* because it was inadequately instructed as to the law, but because it believed Porter and Seibert's testimony over the Leffews'. There is no reasonable probability that counsels' failure to request a defense-of-others instruction altered the result of the trial. This Court should deny leave to appeal or affirm.

CONCLUSION AND RELIEF REQUESTED

Although the defendants were entitled to the defense of others instruction, they have not shown that the failure to request one affected the outcome of the trial. The jury was asked to decide whether the prosecution witnesses or the defendants were telling the truth, and its verdict reflected a belief in the prosecution witnesses.

Although the court below erred in holding that defense of others was not available to these defendants, it reached the correct result in holding that they were not denied the effective assistance of counsel, and its decision was unpublished. This Court should deny leave to appeal, or in the alternative, affirm both defendants' convictions.

Respectfully submitted,

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