

# Maine Law Review

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Volume 47  
Number 2 *Tribute to Dean Edward Settle  
Godfrey III*

Article 9

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January 1995

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Melvyn H. Zarr University of Maine School of Law

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### Recommended Citation

Melvyn H. Zarr University of Maine School of Law, *Justice Edward Godfrey and the Role of the Trial Judge in the Criminal Process*, 47 Me. L. Rev. 315 (1995).

Available at: <https://digitalcommons.mainerlaw.maine.edu/mlr/vol47/iss2/9>

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# JUSTICE EDWARD GODFREY AND THE ROLE OF THE TRIAL JUDGE IN THE CRIMINAL PROCESS

*Melvyn Zarr\**

Justice Edward Godfrey served seven years on the Maine Supreme Judicial Court (1976-1983) and wrote nearly one hundred opinions in criminal cases. Any attempt to write about his work product in these criminal cases must, of necessity, depend a good deal on the perspective of the writer. What jumps out at me after reading these opinions is Justice Godfrey's particular sophistication about the role of the trial judge. This perspective might seem mildly surprising at first glance, given that Justice Godfrey never served as a trial judge. But upon reflection, his point of view appears part of a realistic approach to law that looks at the practical possibilities for action on the part of those who have been given a role to play in the process.

This piece looks at how Justice Godfrey analyzed and shaped the role of the trial judge at a number of stages of the criminal process: instructing the jury, ruling on the admissibility of evidence and on the sufficiency of the evidence to go to a jury, and sentencing. At each stage Justice Godfrey analyzed what the trial judge should be expected to do on his or her own, unaided by counsel, and what the trial judge reasonably could rely on counsel to do. Where Justice Godfrey drew the line in various situations reflects an approach to law that warrants study. The piece concludes by trying to pull together the various line drawings to form a coherent picture.

## I. INSTRUCTING THE JURY

Justice Godfrey believed it was up to the trial judge to instruct the jury on all the elements of the crime charged. Failure to do so could not be harmless error and could not be excused by the failure of counsel to assist the judge in this endeavor.

At first this position was in the minority. In *State v. Smith*,<sup>1</sup> the trial judge had failed to correctly instruct the jury on all the elements of the crime. The majority opinion deemed this error harmless, drawing a spirited dissent from Justice Godfrey, who argued that this kind of error could not be harmless. Such an error "withdraws from jury determination an essential element, which he has

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\* Professor of Law, University of Maine School of Law; A.B., Clark University; LL.B., Harvard University.

1. 394 A.2d 259 (Me. 1978).

not admitted, [and] effectively denies the defendant the right to trial by jury . . . ."<sup>2</sup>

Justice Godfrey's position was adopted by the Law Court before the end of his term in 1983. In *State v. Earley*,<sup>3</sup> the court held that "a failure to properly instruct the jury on each of the essential elements of the offense charged affects the defendant's substantial rights," whether or not defense counsel has asked for the proper instructions. The only unfortunate aspect of the court's reversal of its position was that Justice Godfrey's contribution went unrecognized; the court failed to note Justice Godfrey's dissent in *Smith* or even to overrule *Smith* explicitly.

The year following *Smith*, in *State v. Sommer*,<sup>4</sup> Justice Godfrey had occasion to consider the issue of what assistance from defense counsel the trial judge could reasonably expect in framing instructions on the theory of the defense rather than on the elements of the crime.

Sommer had been charged with criminal threatening with a dangerous weapon; he was charged with intentionally or knowingly placing his mother in fear of imminent bodily injury by holding a knife against her throat.<sup>5</sup> The trial judge correctly instructed the jury on all the elements of the crime, including the requirement that the jury find beyond a reasonable doubt that Sommer had acted to intentionally or knowingly place his mother in fear.<sup>6</sup> But the trial judge had not instructed on the defense theory that the defendant had been too mentally ill to have had the requisite intent or knowledge. The reason was that defense counsel had not asked for such an instruction and had not objected to the trial judge's failure to give one.

Justice Harry Glassman, in lone dissent, argued that it was the responsibility of the trial judge to instruct on the defense theory whether or not defense counsel had asked for it. Justice Glassman argued:

[T]he failure to instruct the jury on the appropriate use of the evidence relating to the defendant's abnormal condition of mind deprived the defendant of a substantial right—the right to have the jury consider *all of the evidence* relating to his state of mind at the time of the commission of the prohibited acts.<sup>7</sup>

The majority disagreed with Justice Glassman on the ground that the evidence had failed to generate the defense theory and, therefore, no such instruction would have been warranted even if it had

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2. *Id.* at 264.

3. 454 A.2d 341, 343 (Me. 1983).

4. 409 A.2d 666 (Me. 1979).

5. *Id.* at 667-68.

6. *Id.* at 670.

7. *Id.* at 672.

been asked for by defense counsel: “[I]n view of our conclusion that the evidence was insufficient even to generate that issue, no such instruction by the presiding Justice was warranted.”<sup>8</sup>

The majority’s evaluation of the evidence was so implausible that Justice Godfrey concurred only in the result. To him the issue of the sufficiency of the evidence to warrant the instruction was not presented; the issue that was presented was whether the trial judge had erred in not instructing on a defense theory that had not been requested by defense counsel. Put another way, the issue was whether the trial judge was required on his or her own to discern the defense theory and instruct upon it, without the assistance or even the encouragement of defense counsel. Justice Godfrey answered no:

Although the instructions did not highlight any issue of the defendant’s capability of having the requisite mental state, they cannot be said, in the absence of objection or request by counsel, to have contained any “obvious error or defects” within the meaning of Rule 52(b), M.R.Crim.P. Certainly, on the instructions given, the jury could have found defendant guilty only after considering whether he had the necessary knowledge or intention and deciding that he did.<sup>9</sup>

Justice Godfrey did not state the reasons for allowing the trial judge to rely upon defense counsel, but they can be inferred. First, the trial judge does not know as much as defense counsel about the theory of defense. Unlike elements of crimes, there are myriad theories of defense, with many variations and nuances. Unless defense counsel is incompetent, defense counsel can and should be expected to know what theory of defense he or she is pursuing and to properly pursue it. The trial judge lacks the information to confidently intervene. Second, there is a species of harmless error at work here. If defense counsel is not asking for a particular instruction, it is unlikely that defense counsel would be stressing this particular point in closing argument. Instructions are a far less understandable or persuasive means of getting a point across to a jury than closing argument. If the point is given scant attention in closing argument, it is less likely to be significant to the jury as a result of instructions alone.

## II. RULINGS ON ADMISSIBILITY AND SUFFICIENCY OF EVIDENCE

Justice Godfrey wrote the definitive opinion of the Law Court placing squarely on the shoulders of the trial judge the duty to weigh the sufficiency of the prosecution evidence to get to the jury. This duty would be borne by the trial judge whether or not defense coun-

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8. *Id.* at 670 n.4.

9. *Id.* at 670 (Godfrey, J., concurring).

sel had given assistance. Just as a trial judge is expected to know and correctly instruct on the elements of the crime, a trial judge is expected to correctly weigh the prosecution evidence against these elements in order to determine whether it is enough to get to the jury.

In *State v. Van Sickle*,<sup>10</sup> Justice Godfrey held that "the trial justice should assess the sufficiency of the evidence at the close of all evidence and enter judgment of acquittal if he concludes the evidence is insufficient."<sup>11</sup> The assistance of defense counsel was deemed inessential but desirable, because it could focus the trial judge's attention on a particular defect in the prosecution's presentation. Justice Godfrey wrote:

Our holding in this regard, however, should not be interpreted by the bar as an invitation to abandon the use of the motions for acquittal or new trial. . . . Such a motion, when appropriate, serves the valuable function of focusing the trial court's attention on the precise weakness in the evidence so that an intelligent and careful ruling can be made by the presiding justice.<sup>12</sup>

Rulings on admissibility of evidence are different, however. Here the assistance of counsel is required. Counsel knows more about the overall shape of the evidence than the trial judge and can be expected to know what is harmful and what is not. In *State v. Bazinet*,<sup>13</sup> the complaining witness in a rape case, a fifteen-year-old girl, testified on direct examination of her prior virginity. Defense counsel made no objection. Justice Godfrey ruled that defense counsel lost the objection by failing to make it.<sup>14</sup> The unstated rationale was that here the trial judge could reasonably rely upon the judgment of defense counsel. If defense counsel, who knew the evidence as a whole and the defense theory, did not feel harmed enough by the evidence to object, the trial judge could not be reasonably expected to intervene on his or her own.

A different case is presented, however, when it is the trial judge who is doing the questioning. In such a case Justice Godfrey would not have required an objection by defense counsel to a prejudicial line of judicial questioning, although this position was taken in dissent in *State v. Bachelder*.<sup>15</sup>

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10. 434 A.2d 31 (Me. 1981).

11. *Id.* at 34.

12. *Id.* at 35.

13. 372 A.2d 1036 (Me. 1977).

14. *Id.* at 1040.

15. 403 A.2d 754, 761-62 (Me. 1979).

## III. SENTENCING

Justice Godfrey took a realistic view of the trial judge's role at sentencing in *State v. Plante*.<sup>16</sup> Plante had been charged with operating a motor vehicle under the influence of intoxicating liquor.<sup>17</sup> At trial his testimony minimized the amount of his drinking prior to his arrest. After the jury found him guilty, the trial judge sentenced Plante to the maximum sentence of ninety days' imprisonment. The trial judge candidly stated that an important reason, if not the principal reason, for giving the maximum sentence to Plante was the trial judge's belief that the defendant had perjured himself and had also procured perjured testimony: "On the basis of that testimony I feel he perjured his testimony, and he got his witnesses to come in and perjure themselves also, and on that basis I am going to impose a ninety-day County Jail sentence . . . ."<sup>18</sup>

Plante appealed the sentence on the ground that the trial judge had impermissibly based the sentence solely on his conclusion that the defendant had perjured himself, thereby violating his due process right to be indicted, tried, and convicted of the crime of perjury, before, in effect, being sentenced for that crime. In sum, Plante contended that the trial judge had taken on the roles of prosecutor, judge, and jury.

Justice Godfrey, for a unanimous court, rejected this argument, saying:

As a practical matter, the sentencing judge will almost certainly consider that factor, among others, in deciding on the defendant's sentence. It would be an unwise rule that constrained him to do so *sub silentio*.<sup>19</sup>

Thus, Justice Godfrey recognized that it would be contrary to human nature for a sentencing judge to ignore his or her own belief that the defendant had perjured himself at trial. Given the choice between candor and driving candor underground, Justice Godfrey chose the former.

## IV. CONCLUSION

Justice Godfrey demonstrated a coherent vision of the role of the trial judge in criminal cases. He distinguished what the trial judge should be expected to know and do on his or her own from what the trial judge reasonably could rely on counsel to do. In Justice Godfrey's jurisprudence, the trial judge is expected to know and correctly instruct juries on the elements of crimes and to assess the sufficiency of the evidence on those elements to get to the jury. The

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16. 417 A.2d 991 (Me. 1980).

17. *Id.* at 992.

18. *Id.* at 995.

19. *Id.* at 996 (citing *United States v. Grayson*, 438 U.S. 41, 54 (1978)).

trial judge reasonably could expect help from defense counsel on the theory of the defense, the relevance of defense evidence, and the harmfulness of prosecution evidence. In the latter category Justice Godfrey applied concepts of unreserved error and harmless error. Moreover, Justice Godfrey appreciated the practical side of the judicial role and was unwilling to impose on judges rules that ignored or denied human nature.

Justice Godfrey's great virtue as a judge was that he inspired trust in the reader of his opinions that he was playing straight. Justice Godfrey's judicial persona can be described aptly by the words of Oliver Wendell Holmes, Jr. Then a Justice of the Massachusetts Supreme Court, Holmes in 1891 had occasion to write about another judge, a former colleague and friend, who had served on that court:

In discussion, if you did not agree with him, you always reached an exact issue, and escape in generalities was impossible. I know few qualities which seem to me more desirable in a judge of a court of last resort than this accuracy of thought, and the habit of keeping one's eye on the things for which words stand. Many men, especially as they grow older, resent attempts to push analysis beyond consecrated phrases, or to formulate anew. . . . Judge [William] Allen had none of this weakness . . .<sup>20</sup>

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20. Answer to Resolutions of the Bar, Greenfield (Sept. 15, 1891), in *SPEECHES BY OLIVER WENDELL HOLMES* 52, 53 (1913).