BRIEF FOR APPELLEE

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 18-CF-582

DAVON L. PEYTON, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

APPEAL FROM THE SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

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Cr. No. 2015-CF1-16248

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ISSUES PRESENTED

I. Whether the trial court plainly erred, when it instructed the jury on criminal-negligence involuntary manslaughter, including that self-defense was a defense to the charge.

II. Whether the trial court plainly erred when it instructed the jury on the forfeiture of self-defense, where appellant provoked the encounter necessitating the use of deadly force, or erred in including an instruction on forfeiture of the defense where appellant was the first-aggressor.

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COUNTERSTATEMENT OF THE CASE

On August 17, 2016, appellant was charged by indictment with second-degree murder while armed (D.C. Code §§ 22-2103, -4502), possession of a firearm during a crime of violence ("PFCV") (D.C. Code § 22-4504(b)), and unlawful possession of a firearm (prior felony conviction) ("FIP") (D.C. Code § 22-4503(a)(1)) (R. 28).[1] Following a jury trial before the Honorable Danya Dayson, the jury found appellant

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[1] "R." refers to the record on appeal. "Tr." refers to the 2018 transcript. "App. Br." refers to appellant's brief. "[redacted] Tr." refers to the transcript excerpts in appellant's motion to supplement the record on appeal. "App. Mot. Doc." refers to the documents attached to appellant's motion to supplement the record.

guilty of involuntary manslaughter while armed (a lesser-included offense of second-degree murder while armed), PFCV, and FIP (2/16 Tr. 4-7).

On May 11, 2018, Judge Dayson sentenced appellant to an aggregate term of 102 months' incarceration, followed by five years of supervised release (R. 90). Appellant noted a timely appeal on May 24, 2018 (R. 91).

The Trial

The Government's Evidence

[redacted] and appellant were friends that were together quite often after they met in the summer of 2015 (2/7 Tr. 62; 2/8 Tr. 65). [redacted], [redacted]'s fiancée, met appellant through [redacted], and knew him as "Smoke" or "Day-day" (*id.* at 62-64). Initially, [redacted] and [redacted] "only called [appellant] to find weed" and saw him occasionally (*id.* at 63). Later, [redacted] and [redacted] saw appellant approximately two to three times a week when appellant "would need rides" (*id.* at 62-63). [redacted] and [redacted] would "drive him around and [appellant] would then pay in marijuana or money" (*id.* at 62-63; see also 2/8 Tr. 63). Both [redacted] and [redacted] had been in appellant's apartment on multiple occasions, sometimes for a "short visit" and sometimes "for a little while" (2/7 Tr. 56-57, 63-64).

In November 2015, [redacted] surprised [redacted], her childhood friend, by flying from her home in Texas to Washington, D.C. (2/7 Tr. 24-25, 27, 53-54). In the early morning of November 13, 2015, [redacted] and [redacted] decided with [redacted]

to "go out and have fun" (*id.* at 28-29; see also *id.* at 55). [redacted] suggested that they get marijuana from appellant (*id.* at 29, 56-57, 62).

[redacted] tried to call appellant multiple times (2/7 Tr. 56-57 117).[2] Appellant, who was at the apartment he shared with [redacted] and her seven-year-old daughter, saw that [redacted] was calling (2/8 Tr. 54-55, 72-73; Gov't Ex. 601P). Appellant told [redacted], "It's [redacted] calling, I'm not answering nigger's phone call because he took my phone" (Gov't Ex. 601P; 2/8 Tr. 72-73).[3]

Unable to reach appellant on the phone, [redacted] "just decided to show up" at appellant's apartment with [redacted] and [redacted] (2/7 Tr. 56-57). Although it was around 2:00 a.m., [redacted] and [redacted] "didn't think it was going to be a problem," as they had been to appellant's apartment "at late hours before," and it "wasn't uncommon for . . . the dynamics of [their] relationship with him" (*id.* at 56, 71).

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[2] T-Mobile records showed that four unanswered calls to appellant's phone were made at 12:58:16 a.m., 12:58:56 a.m., 1:52:22 a.m., and 1:54:32 a.m. from [redacted]'s phone (2/12 Tr. 114-17, 120-21). [redacted] frequently used [redacted]'s cell phone because it was consistently in service while his own was not (2/7 Tr. 57).

[3] Appellant was referencing an incident from the prior weekend when appellant left his phone in the car after getting a ride from [redacted] (2/7/ Tr. 65). [redacted] and [redacted] returned the phone in the next few days (*id.* at 67; 2/8 Tr. 67). Appellant was angry that he waited more than a day to get his phone back, and it was assumed that [redacted] had stolen appellant's phone (2/8 Tr. 67, 69). When [redacted] and [redacted] gave appellant the phone, appellant was "[k]ind of agitated" and told them he had already paid $200 to buy a new phone (2/7 Tr. 68, 70).

[redacted] drove to appellant's apartment building with [redacted] and [redacted] (2/7 Tr. 29, 31, 71-72). When they left, [redacted] was "a ball of joy," "making jokes[,] and . . . very happy" (*id.* at 30, 59). [redacted] had been drinking, but did not appear to be drunk (2/7 Tr. 58-59).

[redacted] parked in front of appellant's apartment building at [redacted] Adams Street, NE (2/7 Tr. 73; 2/8 Tr. 54-55). [redacted] Adams Street was "a brick building with four individual units" and "a single front door" (2/7 Tr. 12; 2/8 Tr. 157). Appellant's apartment was on the first-floor to the left of the entrance (2/8 Tr. 123, 157, 177), and the window to the left of the building's front door, which was covered by a metal gate and bars, was [redacted]'s daughter's room (2/7 Tr. 16-17, 102; 2/8 Tr. 61; Gov't Exs. 104, 105, 143, 188). [redacted] explained that because the front door was "actually the door to the entire building," she and [redacted] "knock on the window instead" when at appellant's apartment (2/7 Tr. 73-74).

While [redacted] and [redacted] waited in the car, [redacted] knocked on appellant's apartment window (2/7 Tr. 31, 73). Inside, appellant told [redacted] that he heard someone knocking on the window (2/8 Tr. 78). When [redacted] told him to "stop playing," appellant reiterated that there was someone at the window and pulled a gun out from either his waist or his back as he walked into [redacted]'s daughter's room (*id.* at 79-80-81; Gov't Exs. 601Z, 601CCC; 601AA). [redacted] went to the apartment door, and appellant came right behind her and was at the door before her

(2/8 Tr. 82-84; Gov't Ex. 601EE). Appellant and [redacted] went out into the building's common hallway, walked to the front door of the building, and appellant asked who was there (*id.* at 84-85; Gov't Ex. 601GG). [redacted] identified himself, and appellant stepped out the door (*id.* at 84-85; Gov't Ex. 601GG). The men were outside on the steps of the building (see 2/7 Tr. 33, 75; 2/8 Tr. 84-85; Gov't Ex. 601GG).

Appellant was angry and upset (2/7 Tr. 74, 108, 118). He asked [redacted], "Why is you coming to my house and why is you banging on my daughter's window at 1:00 in the morning?" (2/8 Tr. 84-85; Gov't Ex. 601GG.) [redacted], whose car window was down (*id.* at 129), heard appellant complaining, saying "something about[, 'M]an, it's 3 o'clock in the morning. You knocking on . . . my door . . . like the police.[']" (*Id.* at 74; see also *id.* at 119.) [redacted] thought this was "a little strange" because she and [redacted] "had done it before" (*id.* at 74). Appellant's voice was "a little escalated because he was frustrated" (*id.* at 108).

[redacted] tried to calm appellant down (2/7 Tr. 33-34, 75-76). Throughout his interaction with appellant, [redacted] "sounded calm" and was not confrontational or aggressive (*id.* at 33-34, 75-76, 126-27). [redacted] never heard [redacted] threaten appellant or yell at him, nor did she see [redacted] try to hit appellant (*id.* at 108). When [redacted] saw [redacted] "coercing [appellant] to calm down and go inside," she turned away, realizing that they were not going inside (*id.* at 75-77).

In the backseat, [redacted] was listening to the radio and playing on her phone (2/7 Tr. 31). [redacted] could tell that the men were "definitely outside . . . on the steps" (*id.* at 33). She heard "some sort of words" and realized that "there was a little bit of tension," but said it was not "a loud argument or anything" (*id.*). It sounded to [redacted] like "a small disagreement of some sort" that "didn't have a pleasant undertone" but also "wasn't very escalated or anything that . . . cause[d her] to be concerned" (*id.* at 33). [redacted] did not hear any physical fighting at all, and described [redacted] as "kind of calm" and "trying to diffuse the situation" (*id.* at 34).

A few seconds later, [redacted] and [redacted] heard a gunshot (*id.* at 31, 77). [redacted] "hit the floor of the car" while [redacted] looked out the car window and asked [redacted] if he had been shot (*id.* at 31, 77). [redacted] nodded and stumbled down the steps holding his chest (*id.* at 31, 77).

[redacted] ran over to [redacted] and grabbed him as he fell (2/7 Tr. 77-78). She lifted his shirt and saw "a bullet hole through his tattoo that he had over his heart" (*id.* at 78). [redacted] came outside and tried to help (*id.* at 82). She and [redacted] propped [redacted] up and were "trying to get him to be a bit more responsive" (*id.* at 32, 38). Both women were frantic and screaming (*id.* at 31-32, 80, 82). [redacted] yelled for [redacted] to call 911 (*id.* at 32, 80).

Appellant "was not frantic at all" but was "very logical" (2/7 Tr. 37). He came down the steps to try to help and "see what could be done about what had just

happened" (*id.* at 124). He held [redacted]'s head up and tried to keep him awake by talking to him (*id.* at 124-25). Upset and yelling at [redacted], appellant apologized and asked, "['W]hy did you have to come at me[']" (*id.* at 31-32, 43, 78, 81). [redacted] was surprised to hear appellant's question and did not believe [redacted] would have hit appellant because "the last thing [she] saw [redacted] doing was telling [appellant] to calm down" (*id.* at 120-21). Also, [redacted] did not see any cuts, bruises or injuries on appellant, nor did appellant complain of any injuries (*id.* at 109-10). Appellant, who seemed to feel bad about what happened, told the women, "['C]all an ambulance, I got to go[']" (*id.* at 81-82, 113). He offered to help put [redacted] into the car, and repeated that he had to leave (*id.* at 32).

[redacted] called 911 and asked for an ambulance (2/7 Tr. 32, 38, 82-83; Gov't Ex. 609 at 0:05-20). When [redacted] told the dispatcher that the address was [redacted] Adams Place, appellant shouted "[redacted] Adams Place"—an address for a residence across the street—multiple times in the background (Gov't Ex. 609 at 0:31-44; see also 2/7 Tr. 85-87). [redacted] repeated the address appellant fed her to the dispatcher (Gov't Ex. 609 at 0:41-55). [redacted] gave the phone to [redacted], and the dispatcher again asked for the address (*id.* at 01:11-20; 2/7 Tr. 32, 38, 86-87). When [redacted] asked the others for the address, appellant again responded, "[redacted] Adams Street," which [redacted] repeated to the dispatcher (Gov't Ex. 609 at 1:20-31; 2/7 Tr. 86-87).

Before the paramedics and police arrived, appellant "disappeared" (2/7 Tr. 93-94; see also *id.* at 39).

Metropolitan Police Department ("MPD") Officers [redacted] and [redacted] arrived at approximately 2:23 a.m. and saw [redacted] lying unconscious by the parked car with a gunshot wound to his chest (2/7 Tr. 11, 17-19; 2/8 Tr. 153-54).[4] [redacted] was tending to [redacted] while [redacted] and [redacted] stood behind the car speaking on their phones (2/7 Tr. 17, 22; 2/8 Tr. 154-55). All three women were upset (2/7 Tr. 20; 2/8 Tr. 155-56).

After speaking with officers, [redacted] and [redacted] rode to the hospital with the police (2/7 Tr. 39, 93-94). [redacted] spoke with Officer [redacted] in the apartment (2/8 Tr. 158-59). [redacted] was upset, said that she hated appellant, punched the wall, and said appellant was "so fucking stupid" (*id.* at 93-95; Gov't Ex. 614-I at 0:25-36). She told Officer [redacted] that she and appellant had been ignoring [redacted] all day because they thought he was stealing from them (Gov't Ex. 614-I at 0:50-1:01). According to [redacted], [redacted] came "banging on the door" and he and appellant started fighting (*id.* at 1:01-08). She said [redacted] punched appellant and then

[4] DNA testing of blood from the curb near the car as well as from the car's taillights, tag area, and interior of the rear passenger door panel found that it matched [redacted] (2/8 Tr. 176, 186; 2/12 Tr. 27-28, 58-60, 84, 87, 89).

pushed her when she tried to stop them from fighting (*id.* at 1:08-23). Everything happened very fast and [redacted] got shot (*id.* at 1:15-20; 1:54-2:01).

At the police station that night, [redacted] told detectives that after [redacted] identified himself, appellant "step[ped] out the door" and confronted him about knocking on his daughter's window early in the morning (2/8 Tr. 47, 79, 84-85; Gov't Ex. 601GG). [redacted] asked why appellant was "carrying [him] like that," which [redacted] understood as referring to appellant ignoring [redacted]'s phone calls (*id.* at 86-87; Gov't Ex. 601HH). When appellant responded, "Son, you just our . . . Uber driver[, w]e're not friends like that," (2/8 Tr. 129; [redacted] Tr. 20 at 2-4), [redacted] replied, "Oh we're not friends," and punched appellant (2/8 Tr. 129-30; [redacted] Tr. 20 at 4-6). When [redacted] tried to get between them, [redacted] pushed her away; the men tussled a little bit and the gun went off (2/8 Tr. 131, 134; [redacted] Tr. 20 at 6). While at the police station, [redacted] left a voicemail for appellant saying that she was mad at him and that he needed to "learn how to make better decisions" (2/8 Tr. 151-52; Gov't Ex. 601DDD).

At trial, [redacted] testified that she opened the building's front door and stood in the doorway with appellant behind her (2/8 Tr. 87-88). When [redacted] asked, "[w]hy you carrying me like that," he "tried to push the door open, but the door . . . didn't open all the way" (*id.* at 88). "[O]nce [[redacted]] realized [appellant] was behind [her], he pushed [her], and the two started fighting over the top of [her]" (*id.*).

They fought for two minutes while she tried to break it up, and appellant was behind her the entire time (*id.* at 88-89, see also *id.* at 130-31). Appellant never came out of the doorway of the building until after [redacted] was shot (*id.* at 88).[5]

[redacted] was taken to MedStar Washington Hospital Center, where he died from his gunshot wound (2/13 Tr. 225). An autopsy by Dr. [redacted] determined that the bullet had entered [redacted]'s mid-chest and moved in a down- and leftward direction, fracturing one of [redacted]'s ribs and his sternum, and damaging the right atrium of his heart (*id.* at 199-200, 203-06).[6] Based on a review of the autopsy report and photographs of [redacted]'s injuries, Dr. [redacted], the Chief Medical examiner in Washington, D.C., concluded that the gunshot wound was a "contact/near contact gunshot wound," meaning "the barrel of the weapon [was] up against the chest of [redacted]" (2/8 Tr. 10, 17, 23).[7]

Appellant was arrested in Apartment 6 at [redacted], NE, on November 20, 2015 (2/12 Tr. 129). In the apartment, officers found a loaded gun with a magazine wrapped in a gray t-shirt that was in a tote container in the hallway

[5] [redacted] admitted that she was under subpoena and would not otherwise be testifying at trial (2/8 Tr. 43).

[6] Dr. [redacted] also saw "small abrasions on the back of the ring and little fingers of the hands," but could not opine about their cause (2/13 Tr. 209, 221).

[7] Dr. [redacted] did not form and opinion on the "range of fire in this case," but noted that "[a]nother medical examiner could have a different opinion" (2/13 Tr. 200-03).

closet (2/7 Tr. 153, 155, 162-63, 168). No fingerprints were found on the gun or the magazine (2/13 Tr. 225-27), no DNA profile was obtained from the gun, and no conclusions could be made about the partial mixture DNA profile obtained from the magazine (2/12 Tr. 56-58). Forensic testing determined that (1) a cartridge case found on the steps leading to appellant and [redacted]'s apartment building on the morning of the shooting (see Gov't Exs. 118, 164) and (2) a bullet found in the rubber lining of the front passenger door of [redacted]'s sister's car were both fired from this gun (2/7 Tr. 145-147; see also 2/8 Tr. 171, 187; 2/12 Tr. 26-27).

The parties stipulated that appellant was right-handed and "had been convicted of a crime punishable for a term exceeding one year" (2/13 Tr. 228).

The Defense Evidence

Appellant testified that he first met [redacted] when [redacted] walked past as appellant was smoking on his porch, and they "shar[ed] a blunt together" (2/13 Tr. 294). [redacted] said that he was an Uber driver, and appellant called him for rides once or twice a week, paying with marijuana (*id.* at 294-95).

On November 13, 2015, appellant came home around midnight (2/13 Tr. 299). [redacted] called twice, but appellant did not answer (*id.* at 299-300). Appellant told [redacted] about the calls, and went to sleep on a couch in the back room (*id.* at 300).

A couple of hours later, appellant woke up to a "loud, consistent banging" from his daughter's room and thought someone was trying to break through the

window (2/13 Tr. 300-01).[8] Instead of telling [redacted] to call the police, appellant grabbed his gun, which he knew was loaded, "took the safety off" and "cocked it back" (2/13 Tr. 302; 2/14 Tr. 406-07, 414). When appellant did not see anyone from the window, he went out to the front door of the building with [redacted] (2/13 Tr. 303-04). [redacted] opened their apartment door (which had both a deadbolt and a key lock), and appellant then opened the front door of the building (which also had two locks on it) (2/14 Tr. 403, 408-09).

Appellant asked who was there, and [redacted] announced himself (2/13 Tr. 304). Appellant was "a little relieved," but did not set his gun down or otherwise put it away (*id.* at 305; 2/14 Tr. 413). Appellant repeatedly asked [redacted], "[W]hy you knocking on my daughter's window at two-something in the morning. . . . [Y]ou my Uber driver. Like, it's 2:00 in the morning. Why are you knocking? I'm just confused, like, why you knocking at my daughter's window like that?" (2/13 Tr. at 305-06). When appellant told [redacted] that he was just his Uber driver, [redacted] punched him in the face (*id.* at 306). Appellant "curled up" to avoid being punched again (*id.* at 307).

[redacted] tried to get between them, and yelled for [redacted] to get off of appellant (2/13 Tr. 307-08, 2/14 Tr. 418). [redacted] "stopped hitting [appellant] for

[8] There was a gate on the window, which would open if pulled (2/13 Tr. 302). There was a significant dropoff between the window and the ground (2/14 Tr. 392-93).

a quick second and kind of . . . pushed [redacted] to the side" (2/13 Tr. 307-08). [redacted] grabbed appellant by the hair and continued punching him (*id.* at 308-09). Appellant was hunched over and "tried to push up to try to push him outward," and the gun went off (*id.* at 308-09; 2/14 Tr. 418-19). Appellant did not aim the gun at [redacted] or intend for the gun to fire (2/13 Tr. 309).

Appellant dropped the gun and yelled for [redacted] to call 911 (2/13 Tr. 309). [redacted] walked to the front part of the car and collapsed by it (*id.* at 310). Appellant tried to lift [redacted] up and held him as one holds a baby (*id.* at 311). Appellant told [redacted] and [redacted] that he was sorry (2/14 Tr. 420).

Worried that he was in trouble, appellant took his gun into the apartment and left through the back door (2/14 Tr. 421-23, 428). Appellant hid the gun in a closet at [redacted], covering it with clothes and other things (*id.* at 423).[9]

[redacted], the chief toxicologist in the Medical Examiner's office, testified that the autopsy revealed that [redacted]'s blood alcohol level was 0.16%, equivalent to having consumed eight beers or three to four mixed-drinks in one hour (2/13 Tr. 243-44, 246-47, 274). He explained that individuals can be too impaired to

[9] Appellant had previously been convicted of possession with intent to distribute marijuana in 2010, possession of a prohibited weapon (an extendable baton) in 2009, and possession with intent to distribute marijuana in 2008 (2/13 Tr. 322).

drive with a 0.08% blood alcohol level, but that the effects of alcohol on an individual "are affected by tolerance" (*id.* at 252, 268-69, 272).[10]

DNA analyst [redacted] obtained a DNA profile from fingernail clippings from [redacted]'s right and left hands (2/14 Tr. 437). The DNA profile from the right hand matched [redacted] and excluded appellant (*id.* at 440). The DNA profile from the left hand clippings was a mixture from two contributors (*id.* at 439-40, 444). [redacted] was "an assumed contributor to that mixture," and the other profile matched appellant (*id.* at 440). The amount of left hand DNA that matched appellant was higher than would be expected to be left behind from just a passing touch (*id.* at 445, 447). [redacted] confirmed that if a person were holding a gun and someone else grabbed their wrist, resulting in the grabber's nails digging into the wrist, one would expect to find the gunman's DNA under the grabber's fingernails (*id.* at 446).

SUMMARY OF ARGUMENT

The trial court did not err when it instructed the jury. The trial court correctly instructed on the elements of criminal-negligence involuntary manslaughter and the defenses available with respect to that charge. Additionally, the trial court's

[10] [redacted] also noted that a screening test indicated the presence of cannabinoids; but no confirmatory test was performed (2/13 Tr. 257, 284).

instruction on forfeiture-of-self-defense-by-provocation in the instructions on self-defense was a correct statement of the law and supported by the evidence.

ARGUMENT

I. The Trial Court Did Not Plainly Err When It Instructed on Involuntary Manslaughter and Self-Defense.

A. Additional Background

1. Deliberations on Jury Instructions

Following the third day of testimony, the parties discussed jury instructions (2/12 Tr. 141). The government requested instructions on second-degree murder while armed, PFCV, and FIP (*id.* at 142). Appellant requested instructions on self-defense and accident (*id.* at 143, 145). The government requested time to consider its position on an accident instruction (*id.* at 146).

That evening, appellant requested a standalone instruction clarifying that appellant was "not guilty of murder or manslaughter if he killed someone as a result of an accident while acting [in] self[-]defense" (App. Mot. Doc. 1). The government objected to appellant's proposed instruction, distinguishing the case law on which appellant relied and arguing that the evidence did not support appellant's proposed accident instruction (App. Mot. Doc. 2; see also 2/13 Tr. 170, 174-75). The government also requested that the trial court instruct on the lesser-included offense of voluntary manslaughter while armed (App. Mot. Doc. 2).

The next morning, the trial court ruled that there was sufficient circumstantial evidence to support a standalone "excusable homicide[/]accident" instruction (2/13 Tr. 175-77). The parties discussed how to incorporate such an instruction, but left the matter open while they returned to trial (*id.* at 179-88).[11] The trial court proposed language to address appellant's proposed accident defense, and requested comments by the next morning (*id.* at 332-38). Later that day, the government emailed a request for an instruction on involuntary, criminal-negligence manslaughter (App. Mot. Doc. 3). Appellant also proposed additional instructions via email, including a theory-of-the-case instruction on its defense that the gun discharged accidentally while appellant was acting in self-defense (App. Mot. Doc. 4).

The next day, the government pointed to decisions of this Court "firmly establish[ing] that accidental killings can amount to involuntary manslaughter" and that "accident is not a defense to involuntary manslaughter" (2/14 Tr. 355, 358). Appellant objected to instructing on involuntary manslaughter at all, arguing that the timing of the government's request was prejudicial (2/14 Tr. 361-62).[12] The

[11] The trial court was concerned that the language of appellant's proposed instruction inaccurately stated the intent element of second-degree murder and voluntary manslaughter (2/13 Tr. 178, 181-83).

[12] The previous day, appellant had asked whether he was aware of all the offenses he would need to address in closing (2/13 Tr. 343). The trial court instructed that if the government had a request for additional offense instructions that it "alert everyone immediately" (*id.* at 344; 2/14 Tr. 363).

government defended the timing of its request (which it noted was prompted in part by appellant's own "insistence on including this language[] on accident") and pointed out that appellant had adequate prior notice given the lesser-included nature of the charge (*id.* at 362-63).

The trial court found sufficient evidence to support an involuntary manslaughter theory, and offered appellant additional time to prepare his closing or argument against inclusion of the charge (2/14 Tr. 364-65). Appellant asked to continue with the current schedule (*id.* at 365). The court then proposed changes to the jury instructions to clarify that (1) accident was a defense applicable to second-degree murder and voluntary manslaughter but not to involuntary manslaughter, and (2) self-defense applied to all three charges (*id.* at 367-72). Appellant stated that he was "fine with the proposed change[s]" (*id.* at 372).

Before closing arguments, the trial court asked whether there were any final requests as to jury instructions. Appellant requested that the trial court include as an element of involuntary manslaughter while armed that the government must prove appellant did not act in self-defense (2/14 Tr. 455). The trial court assented to the request and, after discussion of certain language concerning the self-defense instruction, appellant stated that it did not have any further issues with the proposed instructions (*id.* at 456-57). The parties proceeded to closing arguments (*id.* at 460).

The next day, before the government's rebuttal argument, the trial court informed the parties that it intended to insert the following language after its instruction on involuntary manslaughter: "[A]ccident is a defense to second[-]degree murder while armed and voluntary manslaughter while armed. It is not a defense to involuntary manslaughter while armed." (2/15 Tr. 533-34.)[13] The government did not object (*id.* at 534). Appellant objected, arguing that the trial court's proposal misstated the law because "accident is a defense [to involuntary manslaughter] if you are not the cause of the accident" (*id.*). When the trial court proposed to add the clause, "[a]s long as you find that he was the cause of the accident," the government objected that the proposed language was not a correct statement of the law and requested the trial court revert to its originally proposed language (*id.* at 534-35).[14]

[13] The trial court explained that this was "the law that everyone has agreed is the law," and the language was simply meant as a clarification based on certain sustained objections that the government had made during appellant's closing arguments based on his misstatements of the law on the elements of the crimes and failure to distinguish between voluntary and involuntary manslaughter (2/15 Tr. 534-36, 543-44; *id.* at 536 ("[T]he words intentional and accidental got thrown around a lot yesterday in places where it, I think, frankly, had the potential to confuse the intent element of each of the offenses."); see 2/14 Tr. 513-19).

[14] The government quoted the applicable standard from *Morris v. United States*, 648 A.2d 958 (D.C. 1994), that involuntary manslaughter applied to one "who unintentionally causes the death of another as the result of non-criminal conduct where that conduct both creates extreme danger to life or of serious bodily injury and amounts to a gross deviation from a reasonable standard of care" (2/15 Tr. 535).

In response to the government and appellant's positions, the trial court proposed to instruct that accident "is not a defense to involuntary manslaughter while armed if you find that Mr. Peyton engaged in conduct that was a gross deviation from reasonable standard of care and that . . . created an extreme risk of death or serious bodily injury" (2/15 Tr. 536). When appellant noted that the court's proposed language was not "different from reading the elements of the offense," the trial court explained that its proposal was "not changing the statements of law that everyone have agreed are the correct statements of law . . . [but] trying to make very, very clear what elements have to be found with regard to each of the offenses" (*id.*). Appellant then requested that if the court included the proposed language it also include the following corollary: "[A]ccident is a defense if you find that Mr. Peyton's conduct . . . was not a gross deviation from the reasonable standard of care and the conduct did not cause the death or extreme risk of bodily injury" (*id.* at 537).

When the government objected, the trial court stated

> I think it's a fair statement to say that, if they find that it is a gross deviation from the reasonable standard of care and the conduct that caused the death created the extreme risk of death or serious injury, then accident is not a defense. But if they find that it was not a gross deviation from the reasonable standard of care or that the conduct that caused the death created an extreme risk of death or serious bodily injury, then it is a defense. (2/15 Tr. 538.)

The government objected that this language essentially repeated the elements of involuntary manslaughter, but phrased in a way in which "there's some extra step

involved between accident and the elements of the offense" (*id.* at 541). The government requested that rather than include this language, the trial court revert to the language agreed upon the prior day informing the jury that "accident is a defense to second[-]degree murder while armed and voluntary manslaughter, period" (*id.*).

Appellant responded that the parties had spent significant time "hashing out" what he considered "an appropriate statement of the law" (2/15 Tr. 541). The trial court noted that "two minutes ago you were asking for none of this language to be in, and now, because the Government is asking for it to be out, you are taking the exact opposite position you did two minutes ago" (*id.* at 542). Appellant argued that his prior position had been incorrect, and that the proposed language was a correct statement of the law and should be included (*id.* at 542).

The government pointed out that appellant's desire to now incorporate language to which he had previously strongly objected was "very telling," and explained that the proposed language would be "confusing [to] the jury as to whether there is some . . . reason the Government would have to . . . disprove accident along with the actual elements of involuntary manslaughter while armed," which was not the law (2/15 Tr. 543). The government requested the language be removed (*id.*).

The trial court found that, absent a request from the government for the proposed language, it was "not inclined to add it at this time" after the parties had

spent significant time discussing the instructions and there had been no prior request from appellant to include such language (2/15 Tr. 543-44).

2. The Instructions

With respect to Count 1, the trial court instructed the jury on second-degree murder while armed and voluntary manslaughter while armed (2/15 Tr. 571-73). The trial court instructed that, as an element for each of these charges, the government was required to prove that appellant "did not act in self-defense or by accident" (*id.* at 571, 573). The court then instructed:

> In order to prove the defendant guilty of either murder in the second degree while armed or voluntary manslaughter while armed, the prosecution has the burden of proving beyond a reasonable doubt that Mr. Peyton did not shoot [redacted] by accident. Therefore, the prosecution must prove beyond a reasonable doubt that Mr. Peyton intended to shoot [redacted] or that he acted in conscious disregard of extreme risk of death or serious bodily injury to [redacted]. (*Id.* at 573.)

The trial court next instructed the jury on the charge of involuntary manslaughter:

> The elements of involuntary manslaughter while armed, each of which the Government must prove beyond a reasonable doubt, are that, one, Mr. Davon Peyton caused the death of [redacted]; two, the conduct that caused the death was a gross deviation from a reasonable standard of care; three, the conduct that caused the death created an extreme risk of death or serious bodily injury; four, Mr. Peyton did not act in self-defense; and, five, at the time of the offense Mr. Peyton was armed with a firearm.
>
> Now the difference between a required state of mind for second degree murder while armed and involuntary manslaughter while armed is in

> whether the defendant is aware of the risk. To show guilt of second degree murder the Government must prove that Mr. Davon Peyton was aware of the extreme risk of death or serious bodily injury. For involuntary manslaughter the Government must prove not that he was aware of the risk, but that he should have been aware of it. (2/15 Tr. 573-74.)

The trial court then instructed the jury on the applicability of self-defense (2/15 Tr. 574-77). After detailing the principles governing self-defense, the trial court instructed:

> [s]elf-defense is a defense to the charge of second degree murder while armed, voluntary manslaughter while armed and involuntary manslaughter while armed. Mr. Davon Peyton is not required to prove that he acted in self-defense. Where evidence of self-defense is present, the Government must prove beyond a reasonable doubt that Mr. Peyton did not act in self-defense. If the Government has failed to do so, you must find Mr. Peyton not guilty. (*Id.* at 577.)

Finally, the trial court provided the following defense-theory-of-the-case instruction:

> The defense contends that Mr. Peyton did not intentionally shoot [redacted]. [redacted]. The defense contends that [redacted] was assaulting Mr. Peyton at the time of the gunshot and that Mr. Peyton was acting in self-defense when the firearm accidentally went off. The defense contends that the Government has not satisfied their burden of proving beyond a reasonable doubt that the firearm did not go off by accident while Mr. Peyton was acting in self-defense. (*Id.* at 580-81.)

B. Standard of Review and Applicable Legal Principles

"Where the question of whether a jury instruction was proper is a legal question . . . [this Court] review[s] the instruction *de novo*." *Appleton v. United*

States, 983 A.2d 970, 977 (D.C. 2009). To preserve a jury instruction issue for appeal, a party must "inform the court of the specific objection and the grounds for the objection before the jury retires to deliberate." Super. Ct. Crim. R. 30. Additionally, the objection below must "be made with sufficient precision to indicate distinctly the party's thesis." *(Erick) Williams v. United States*, 858 A.2d 984, 990 (D.C. 2004).

Where a challenge to a jury instruction is not preserved, "review is limited to plain error." *Wheeler v. United States*, 930 A.2d 232, 240 (D.C. 2007). "Under the plain error standard . . . [a defendant] not only must establish 'error,' but also that the error is 'plain' and 'affects substantial rights.'" (*Erick*) *Williams*, 858 A.2d at 998 (alterations in original). "If he satisfies these three hurdles, he must then show either a 'miscarriage of justice,' that is, actual innocence; or that the trial court's error 'seriously affected the fairness, integrity or public reputation of judicial proceedings.'" *Id.* (quoting *Wilson v. United States*, 785 A.2d 321, 326 (D.C. 2001)).

"[T]here is no statutory definition of manslaughter in the District of Columbia" and it "is defined, rather, by reference to the common law." *Comber v. United States*, 584 A.2d 26, 35 (D.C. 1990) (en banc) (quoting *United States v. Bradford*, 344 A.2d 208, 213 (D.C. 1975), and (*Robert*) *Williams v. United States*, 569 A.2d 97, 98 (D.C. 1989). "A homicide which constitutes manslaughter is distinguished from murder by the absence of malice." *Id.* at 36. "Voluntary

manslaughter is the intentional killing of another, but under circumstances in which the existence of malice is somehow mitigated," whereas "[i]nvoluntary manslaughter is the unintentional killing of another." *Reed v. United States*, 584 A.2d 585, 588 n.3 (D.C. 1990).

Involuntary manslaughter "includes 'two categories of unintentional killing,' roughly labelled 'criminal[-]negligence involuntary manslaughter' and 'misdemeanor involuntary manslaughter.'" *Morris v. United States*, 648 A.2d 958, 959-60 (D.C. 1994) (quoting *Comber*, 584 A.2d at 48-49). Criminal-negligence involuntary manslaughter encompasses unintentional killings that occur "in the course of lawful acts carried out in a[] . . . criminally negligent[] fashion." *Comber*, 584 A.2d at 48. Specifically, otherwise non-criminal conduct that results in an unintentional death will constitute involuntary manslaughter where it "both creates extreme danger to life or of serious bodily injury, and amounts to a gross deviation from a reasonable standard of care." *Id.* (internal quotation marks omitted); *Smith v. United States*, 686 A.2d 537, 545 (D.C. 1996). "[T]he intent necessary to prove criminal-negligence involuntary manslaughter is a lack of awareness or failure to perceive the risk of injury from a course of conduct under circumstances in which the actor should have been aware of the risk." *Donaldson v. United States*, 856 A.2d 1068, 1073 (D.C. 2004).

C. Discussion

1. Appellant Did Not Preserve His Assertion of Instructional Error.

Appellant never objected below that the trial court's jury instructions precluded consideration of a valid defense to involuntary manslaughter. Rather, once the trial court determined it would instruct on the lesser-included included offense of involuntary manslaughter,[15] appellant affirmatively agreed to proposed instructions that were intentionally designed (in language and structure) to convey to the jury that accident was an available defense to second-degree murder and voluntary manslaughter while self-defense was an available defense to second-degree murder, voluntary manslaughter, and involuntary manslaughter (2/14 Tr. 366-72). While appellant requested the trial court specify that proof that appellant was not acting in self-defense was an element of involuntary manslaughter itself (a request the trail court granted) (*id.* at 455), he made no corollary request with respect to accident (*id.* at 455-57).

Although appellant objected when the trial court sought to make explicit that accident was not a defense to involuntary manslaughter (2/15 Tr. 534), the basis of appellant's objection was that issues of causation determine whether an accident can

[15] Appellant does not challenge the inclusion of an instruction on the lesser-included offense of involuntary manslaughter.

constitute involuntary manslaughter (*id.*). Additionally, appellant's last minute request to include language that accident sometimes is and sometimes is not a defense to involuntary manslaughter, relied upon a determination of whether a defendant was utilizing the appropriate standard of care (*id.* at 535-44). None of these arguments advance the claim of error appellant now asserts on appeal.

Appellant argues (at 22-32) that the trial court should have instructed the jury that accident constitutes a defense to involuntary manslaughter where it occurs in the course of a lawful act of self-defense. However, appellant did not request that the jury be instructed on accident in the context of self-defense below. Instead, he requested an instruction on accident as a stand-alone defense to involuntary manslaughter, the applicability of which he asserted was governed by the standard of care the individual was using at the time of the accident (not whether the individual was engaged in lawful self-defense) (see 2/15 Tr. 536-38, 541-42). Because the positions taken by appellant below with respect to permissible defenses to involuntary manslaughter did not raise with sufficient specificity the particular issue he now asserts on appeal, his claim is subject to review for plain error. *See (Henry) Brown v. United States*, 881 A.2d 586, 593 (D.C. 2005) (objection to particular portion of a jury instruction preserved that asserted error for appeal but did not preserve argument developed on appeal regarding further error arising when objected-to instruction was read in conjunction with other instructions because "the

trial court never had the opportunity to address that argument"); *Wheeler*, 930 A.2d at 240-41 (objection to an instruction as an incorrect statement of law not sufficient to preserve more specific objection raised on appeal).

2. The Trial Court Did Not Err, Let Alone Plainly Err.

The trial court did not err, plainly or otherwise, when it instructed the jury on the elements of involuntary manslaughter and the available defense of self-defense. The trial court's instructions informed the jury that it could only find appellant guilty of involuntary manslaughter while armed if it found that appellant, while armed with a firearm, engaged in conduct that (1) caused [redacted]'s death, (2) was a gross deviation from a reasonable standard of care, (3) created an extreme risk of death or serious bodily injury, and (4) did not constitute self-defense (2/15 Tr. 573). The court's instructions correctly set forth the law applicable to the charge of criminal-negligence involuntary manslaughter and were not erroneous. *See Comber*, 584 A.2d at 47-49.

Appellant argues (at 22-29) that the jury instructions constituted error because they precluded the jury from considering an accident defense to the involuntary manslaughter charge. However, the District of Columbia has never recognized "accident" as a valid defense to the crime of involuntary manslaughter. Rather, this Court has repeatedly recognized that the unintended or accidental nature of the

killing is what defines and distinguishes involuntary manslaughter from other forms of homicide. *Comber*, 584 A.2d at 47-48 ("[U]nintentional or accidental killing is unlawful, and thus constitutes involuntary manslaughter, unless it is justifiable or excusable."); *Bradford*, 344 A.2d at 214 ("Involuntary manslaughter is an unlawful killing which is unintentionally committed . . . [meaning] there is no intent to kill or to do bodily injury. . . . A death which occurs accidentally corresponds to this set of requirements."); *Reed*, 584 A.2d at 588 & n.3 ("Involuntary manslaughter is the unintentional killing of another."); *Hebron v. United States*, 625 A.2d 884, 886 (D.C. 1993) ("[E]ven an accidental or unintentional killing will constitute involuntary manslaughter if it resulted from a reckless course of conduct."); *see also Reed*, 584 A.2d at 588 ("The essence of involuntary manslaughter, the factor that distinguishes it from other types of homicides, is the defendant's lack of awareness of the risk to others from his conduct when he should have been aware of the risk.").

Appellant attempts (at 27-29) to sidestep this logical impediment to recognizing accident as a defense to involuntary manslaughter by arguing that a killing cannot constitute involuntary manslaughter if it is justifiable or excusable—such as when it is accidentally committed in self-defense. Appellant's argument ignores that this Court has found that the standard of risk expressed in the elements of criminal-negligence involuntary manslaughter—requiring that a defendant's conduct be a gross deviation from a reasonable standard of care and create an

extreme risk of death or serious bodily injury—"implicitly incorporates the absence of excuse element . . . except in cases of self-defense." *Comber*, 584 A.2d at 48 n.31; Criminal Jury Instructions for the District of Columbia, No. 4.212 cmt. (5th ed. 2019) (the "Redbook"). Therefore, "the trial court need only charge the jury separately as to the requirement that the killing be without justification or excuse when there is evidence of self-defense." *Comber*, 584 A.2d at 48 n.31. Where such evidence does exist, "the trial court can explain that the absence of justification or excuse means that the government must prove beyond a reasonable doubt that the killing was not in self-defense and then define that concept for the jury." *Id.* That is precisely what the trial court did in this case (2/15 Tr. 573-78).[16]

Appellant's reliance (at 23-25) on *Clark v. United States*, 593 A.2d 186 (D.C. 1991), to establish that the District of Columbia recognizes that "accidental discharge of a weapon during a lawful act of self-defense is a complete defense to all grades of homicide, including involuntary manslaughter while armed" is misplaced. Clark was convicted of second-degree murder while armed rather than

[16] Because criminal negligence involuntary manslaughter is not excused by accident/lack-of-intentionality (unlike second-degree murder and voluntary manslaughter), the sole question regarding whether the killing was excusable or justifiable was whether appellant was acting in self-defense. By rejecting appellant's assertion of self-defense and finding appellant criminally negligent, the jury resolved the question of whether the killing was excusable or justifiable against appellant and no further deliberation was necessary.

involuntary manslaughter while armed. *See id.* at 188. Second-degree murder requires that a defendant act with "either specific intent to kill or inflict serious bodily harm, or a conscious disregard of the risk of death or serious bodily injury." *Coleman v. United States*, 948 A.2d 534, 550 (D.C. 2008). Therefore, evidence that the gun wielded by the victim went off accidentally during a struggle in which Clark attempted to defend himself negated a necessary element to the charge, and the court was correct[17] to instruct that accidental discharge during self-defense constituted a defense to the charge. *See Comber*, 584 A.2d at 42 n.19 (mental state requiring defendant "intended to kill or seriously injury the victim or acted in conscious disregard of an extreme risk of death or serious bodily injury" precludes conviction on the basis of "accidental, negligent, or otherwise excused unintentional killings"). By contrast, involuntary manslaughter by definition applies to accidental homicides, imposing liability where they result from either (1) unlawful or (2) lawful *but negligent* conduct. *See Morris*, 648 A.2d at 959-60 ("Involuntary manslaughter, . . . is an 'unintentional or accidental killing'" that includes "'two categories of unintentional killing,'" roughly labelled 'criminal negligence involuntary

[17] In *Clark*, the Court did find instructional error; however, that error did not result from instructing that accident was a defense to the second-degree murder charge but arose from language within the instruction that implied it was defendant's burden to prove the killing was accidental, improperly shifting the burden off of the prosecution. *Clark*, 593 A.2d at 194.

manslaughter' and 'misdemeanor involuntary manslaughter.' The first . . . applies to 'one who unintentionally causes the death of another as the result of non-criminal conduct,' where that conduct 'both creates extreme danger to life or of serious bodily injury, and amounts to a gross deviation from a reasonable standard of care.'" (quoting *Comber*, 584 A.2d at 47-49 (internal quotation marks and citations omitted))). Accordingly, *Clark* is neither controlling nor persuasive authority for recognizing "accidental discharge" as a defense to involuntary manslaughter.[18] Indeed, it would be nonsensical to recognize accident as a defense to an offense that applies exclusively (if at all) to accidental homicides.

Valentine v. Commonwealth, 48 S.E.2d 264 (Va. 1948), supports the government's position rather than that of appellant. In characterizing *Valentine* as establishing "accident during a lawful act of self-defense" as an absolute defense to involuntary manslaughter, appellant omits involuntary manslaughter's negligence requirement entirely. He instead mischaracterizes the *Valentine* court's recitation of a broad, black-letter law principle that "where a man, lawfully defending himself, unintentionally kills his assailant, the circumstances not authorizing a killing in self-defense, it is nevertheless deemed excusable homicide," as *Valentine's* central holding with respect to criminal liability for involuntary manslaughter (App. Br. 26-

[18] For the same reason, appellant's reliance on *Braxon v. Commonwealth*, 77 S.E.2d 840 (Va. 1953), is unfounded.

27). This reading, however, ignores entirely *Valentine*'s statement of the controlling standard for determining when criminal responsibility for involuntary manslaughter may lie even when one is engaged in lawful self-defense:

> Though it be established that the accused at the time of the killing was engaged in a lawful act, the culpability or lack of culpability is to be determined by the circumstances of the case. The character of the attack made upon her and the manner and means of self-defense exercised are to be considered to determine *whether or not the accused was guilty of such negligence or recklessness* under the circumstances obtaining as to constitute her action an 'improper performance of a lawful act' and so render her criminally responsible.

Valentine, 48 S.E.2d at 954-55 (emphasis added). *See also id.* at 952 ("Homicide by misfortune or misadventure, is when a man doing a lawful act, *and using proper precaution to prevent danger*, unfortunately happens to kill another" (emphasis added; internal quotation marks and citations omitted). The focus of the *Valentine* court's inquiry, therefore, was not on whether Valentine was acting in self-defense, or whether the death was accidental, but rather on the standard of care she exhibited when engaging in self-defense. *Id.* at 954-55.[19]

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[19] Appellant argues (at 28) that "*Comber* explicitly recognizes that an accidental killing may be justified or excused, depending on the attendant circumstances[.]" This is precisely our point: Involuntary manslaughter is *premised* on the fact that the killing is accidental. As such, it cannot be true that one of the "attendant circumstances" that might excuse this accidental killing is the very fact that it was accidental. Instead, if the defendant acted in lawful self-defense, but nonetheless did so negligently, this would constitute involuntary manslaughter under *Comber*, 584 A.2d at 47-49 (involuntary manslaughter applies to "one who unintentionally causes the death of another as the result of non-criminal conduct," where that conduct "both

Multiple other states also incorporate consideration of the standard of care utilized by a defendant into the elements of the defense of homicide excusable by accident or misadventure. *See State v. Goodson*, 440 S.E.2d 370, 372 (S.C. 1994) ("For a homicide to be excusable on the ground of accident, it must be shown that the killing was unintentional, that the defendant was acting lawfully, *and that due care was exercised in the handling of the weapon*.") (emphasis added); *Gunn v. State*, 365 N.E.2d 1234, 1238 (Ind. 1977) ("[T]he defense of homicide by accident or misadventure includes three elements: 1. The killing must be unintentional, or without unlawful intent or evil design on the part of the accused, 2. the act resulting

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creates extreme danger to life or of serious bodily injury, and amounts to a gross deviation from a reasonable standard of care.") (internal quotation marks and citations omitted). *See also Valentine*, 48 S.E.2d at 268-69 (describing lawful self-defense that is nonetheless negligent as the "improper performance of a lawful act," so as to "render [defendant] criminally responsible" for accidental death); *Scott v. State*, 86 S.W. 1004, 1005 (Ark. 1905) (instruction that involuntary manslaughter may be found where a defendant was justified in the use of deadly force in self-defense but did so "in a careless, reckless manner" resulting in the death of a bystander was proper statement of the law) (citing *Ringer v. State*, 85 S.W. 410 (Ark. 1905)). Appellant conflates the lawfulness of self-defense with the question of negligence, in declaring (at 29) that "lawful self-defense constitutes a 'lawful act in a lawful manner.'" To the contrary, under *Comber* and *Valentine*, lawful self-defense constitutes a "lawful act"; but the question of whether that lawful act was conducted in a "lawful manner" turns on whether appellant was negligent. Here, even if appellant was acting in lawful self-defense by using non-deadly force by pushing [redacted] away, appellant did so in a negligent manner, i.e., while holding a loaded, cocked pistol in his hand. The fact that the gun's discharge may have been accidental is the very thing that would make it *involuntary* rather than *voluntary* manslaughter; but would not be a basis for exonerating him entirely.

in death must not be an unlawful act, 3. nor an act done recklessly, carelessly, or in wanton disregard of the consequences. . . . Although proof of the first element of the accident defense will avert a finding of murder or voluntary manslaughter, it will not avoid a conviction for involuntary manslaughter."); 40 C.J.S. *Homicide* § 180 ("A homicide is excusable when a defendant accidentally kills while brandishing a weapon in self-defense *if the defendant acted with the usual and ordinary caution*.") (emphasis added); 2 Wharton's Criminal Law § 138 (15th ed.) ("If, in performing the lawful act of using deadly force to defend himself, the defendant misses his assailant and kills an innocent bystander, this would constitute an 'excusable' homicide, *provided the defendant was not guilty of criminal negligence in performing the act*.") (emphasis added) (collecting cases).[20] The trial court's instruction on involuntary manslaughter similarly focused the jury on determining whether or not appellant's conduct constituted a gross deviation from a reasonable standard of care and created an extreme risk of death or bodily injury and was not error.[21]

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[20] This focus on whether a defendant was exercising the proper standard of care is also reflected in the instructional language that appellant himself requested the trial court incorporate highlighting the standard of care elements of the involuntary manslaughter charge (see 2/15 Tr. 536-44).

[21] Appellant also cites (at 24) *Curry v. State*, 97 S.E. 529 (Ga. 1918), and *State v. Sprague*, 394 A.2d 253 (Me. 1978), in support of his proposition that accidental discharge of a weapon during self-defense is a complete defense to homicide. These

Even if this Court finds that the trial court's instructions were erroneous, such error was not plain. As discussed above, the applicability of appellant's proposed defense to involuntary manslaughter in the District of Columbia is neither clear nor obvious. *See (Erick) Williams*, 858 A.2d at 995-97. Therefore, reversal is unwarranted.

3. Any Instructional Error Was Harmless Under Any Standard.

Any error was harmless under any standard, because the jury rejected appellant's claim of lawful self-defense, and would therefore have rejected appellant's proposed defense of accident during the use of lawful self-defense as well. Appellant argues (at 30) that he suffered prejudice because "[t]he erroneous instructions permitted the jury to find [him] guilty of involuntary manslaughter even if it . . . had a reasonable doubt that [] he was lawfully acting in self-defense when the gun accidentally discharged." However, the jury was instructed that self-defense was a defense to involuntary manslaughter while armed, and that the government had to prove beyond a reasonable doubt that appellant "did not act in self-defense" (2/15 Tr. 574). This instruction was followed by fulsome instruction on the law of self-defense, including when a defendant is entitled to use force and under what

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cases, however, stand for a different proposition not applicable here: where lethal force is justified in self-defense, accidental use of such lethal force will also constitute a defense. *Curry*, 97 S.E. at 530-31; *Sprague*, 394 A.2d at 258.

circumstances that right is forfeited (*id.* at 574-78). In order to find appellant guilty, the jury was required to find beyond a reasonable doubt that appellant was not acting in lawful self-defense, defeating any defense of accident in the course of lawful self-defense.[22]

Moreover, the trial court provided the jury with appellant's defense-theory-of-the-case instruction that specifically highlighted appellant assertion that the killing was the result of an accident that occurred while he was acting in self-defense (2/15 Tr. 580-81). This put the issue squarely before the jury, who nevertheless found appellant guilty. Because the jury received proper instruction permitting them to consider whether appellant was acting in lawful self-defense, any error in providing the instruction as requested by appellant was harmless. *See Faunteroy v. United States*, 413 A.2d 1294, 1299 (D.C. 1980) (erroneous instruction not a ground for reversal where entirety of instruction provided jury with applicable standard).

[22] If anything, this instruction placed an unduly high burden on the government. As discussed supra, *Comber* and *Valentine* held that even if a defendant engages in a lawful act, such as self-defense, he is nonetheless guilty of involuntary manslaughter if he does so in an unlawful manner, i.e., negligently. Here, the trial court's instruction precluded liability in such a case.

II. The Trial Court Did Not Err When It Gave First-Aggressor and Provocation Instructions.

A. Additional Background

Following initial discussions regarding jury instructions, the government emailed a request for Redbook Instruction No. 9.504 "Self-Defense—Where Defendant Might Have Been the Aggressor" (App. Mot. Doc. 2). Appellant objected that the evidence did not support either a first-aggressor or provocation instruction (2/13 Tr. 162). Appellant argued that "[t]aking a gun in self-defense to your own door is not provocation" and that the instruction was meant to apply to "entirely different circumstances," such as where there was a prior conflict and a defendant returns to the scene with a gun (*id.* at 163).

The government responded that "[i]n this case the fact that the defendant, in response to the knocking and/or banging on the window, goes to the door, opens that door with a loaded gun, and there's no evidence that he withdraws from that fight, it is a proper instruction on the law" (2/13 Tr. 164). The trial court agreed that the evidence was sufficient to support instructing on provocation, but stated it did not believe "there's evidence of first aggressor" because there was no "evidence in the record thus far that [appellant] engaged in a fight" (*id.* at 165).

The government pointed to evidence "that the defendant was angry, why he was angry, why he took the action he did, the words that he said, his tone and demeanor," all of which "amount[ed] to aggression on the part of the defendant"

(2/13 Tr. 165). Finding that there was record evidence of appellant being upset with [redacted], the trial court found sufficient evidence for the instruction (*id.* at 165-66).

Appellant reasserted its objection that, where an unknown individual arrives unannounced and bangs on a defendant's window, evidence that appellant answered the door would not be sufficient to support provocation (2/13 Tr. 166). The trial court responded that it could be "if the jury credits the testimony" that appellant did or did not know who was at his door, referencing testimony by [redacted] supporting the inference that appellant was aware of [redacted]'s identity when he was outside (*id.* at 166-67). Appellant disputed that [redacted] had testified that appellant knew who was outside or that appellant's knowledge could be inferred from the missed phone calls from [redacted] (*id.* at 167).[23] The government argued that the evidence of [redacted] and appellant's prior interactions and appellant's knowledge that [redacted] was repeatedly trying to reach him supported an inference that appellant "probably had a good idea of who was banging on the door" (*id.* at 167-68). The trial court noted that "it's a question of fact for the jury to decide" and that "based on the evidence in the record" the first aggressor and provocation issues were a "question

[23] The trial court noted that it "thought that there was some conflicting testimony about" appellant's knowledge of who was at the door, and noted it would "look back and see if [it was] mistaken" (2/15 Tr. 167).

of fact for the jury" (*id.*). The parties never revisited the first-aggressor/provocation instruction.

In the course of its final jury instructions on self-defense, the trial court gave the following first-aggressor/provocation instruction:

> If you find that [appellant] was the aggressor or provoked imminent danger of bodily harm upon himself, he cannot rely upon the right of self-defense to justify his use of force. One who deliberately puts himself in a position where he has reason to believe that his presence will provoke trouble cannot claim self-defense. Mere words without more by [appellant], however, do not constitute aggression or provocation.
>
> If you find that [appellant] was the aggressor or provoked imminent danger of bodily harm upon himself, he cannot invoke the right of self-defense to justify his use of force. However, if one who is the aggressor or provokes an imminent danger of bodily harm later withdraws from it in good faith and communicates that withdrawal by words or actions, he may use deadly force to save himself from imminent danger of death or serious bodily harm. (2/15 Tr. 575.)

B. Standard of Review and Legal Principles

Where a claim is preserved, this Court reviews a trial court's decision to provide a challenged jury instruction for an abuse of discretion. *See Tyler v. United States*, 975 A.2d 848, 857-59 (D.C. 2009); *accord Broadie v. United States*, 925 A.2d 605, 621 (D.C. 2007) ("When the trial court gives a jury instruction that the defense has challenged, [this Court] review[s] the instruction for abuse of discretion."). "In determining whether the evidence presented supports the requested jury instruction, [this Court] must view that evidence in the light most favorable to

the party requesting the instruction." *Johnson v. United States*, 756 A.2d 458, 463 (D.C. 2000). The trial court has "broad discretion in fashioning appropriate jury instructions," and this Court will analyze "each case on its own facts and circumstances in determining whether a jury instruction was appropriate." *Broadie*, 925 A.2d at 621 (internal citations and quotation marks omitted).

"'[T]he law of self-defense is a law of necessity; the right of self-defense arises only when the necessity begins, and equally ends with the necessity.'" *Rorie v. United States*, 882 A.2d 763, 771 (D.C. 2005) (quoting *United States v. Peterson*, 483 F.2d 1222, 1229 (D.C. Cir. 1973) (internal quotation marks and additional citations omitted)). Thus, "[i]n order to invoke a legitimate claim of self-defense, a defendant must satisfy the following conditions: (1) there was an actual or apparent threat; (2) the threat was unlawful and immediate; (3) the defendant honestly and reasonably believed that he was in imminent danger of death or serious bodily harm; and (4) the defendant's response was necessary to save himself from the danger." (*Robert*) *Brown v. United States*, 619 A.2d 1180, 1182 (D.C. 1992).

This right is not unlimited: "[i]f one has reason to believe that he will be attacked, in a manner which threatens him with bodily injury, he must avoid the attack if it is possible to do so, and the right of self-defense does not arise until he has done everything in his power to prevent its necessity." *Sams v. United States*, 721 A.2d 945, 953 (D.C. 1998) (quoting *Laney v. United States*, 294 F. 412, 414

(D.C. Cir. 1923)). Hence, "a defendant cannot claim self-defense if the defendant was the aggressor," or if "s/he provoked the conflict upon himself/herself." *Swann v. United States*, 648 A.2d 928, 930 n.7 (D.C. 1994) (internal quotation marks and citations omitted); *see also Sams*, 721 A.2d at 953 ("[S]elf-defense is not available to a defendant who deliberately puts himself in a position where he has reason to believe that his presence will provoke trouble, even if his purpose in putting himself in that position was benign") (citing *Howard v. United States*, 656 A.2d 1106, 1111 (D.C. 1995)); *Nowlin v. United States*, 382 A.2d 9, 14 n.7 (D.C. 1978) (defendant had "no legitimate claim to the defense of self-defense [when] he had voluntarily placed himself in a position which he could reasonably expect would result in violence").

This Court has accordingly held that a first-aggressor instruction is "appropriately given when there is both evidence of self-defense and evidence that the defendant provoked the aggression from which he was defending himself." *Rorie*, 882 A.2d at 775; *accord Tyler*, 975 A.2d at 858-859. Further, a jury instruction is appropriate if supported by any evidence in the record. *Coleman v. United States*, 948 A.2d 534, 551 (D.C. 2008).

C. Discussion

1. The Trial Court Did Not Err, Let Alone Plainly Err, When It Gave a Provocation Instruction.

The trial court did not err in giving the provocation portion of the first-aggressor instruction because there was "both evidence of self-defense and evidence that the defendant provoked the aggression from which he was defending himself." *Rorie,* 882 A.2d at 775. Specifically, testimony that appellant was concerned there was a potential intruder, armed himself with a loaded gun, readied the gun for immediate use, left the safety of his locked apartment, and then left the safety of the separately locked apartment building itself, to go outside in order to confront that individual provided evidence that appellant's conduct provoked the near-deadly conflict. *See Andrews v. United States*, 125 A.3d 316, 323 (D.C. 2015) ("The jury could infer from the fact that appellant brought a loaded gun with him that he foresaw he was about to face a grave danger and prepared to meet it head-on. . . . [T]he jury could find that he easily could have avoided the fatal encounter . . . by refraining from going [to the location] that night."). Moreover, evidence that appellant learned that it was [redacted], went outside to confront him in an angry manner, chastised and exchanged words with him, all while continually armed with a loaded gun prepared to fire, provided further evidence that appellant was an instigator of the conflict. That was all that was needed to support the instruction. *See Coleman*, 948 A.2d at 551.

Appellant asserts (at 33-44) that instruction on provocation was error because "[f]orfeiture of self-defense in the home requires an intent to provoke violence," rather than a reasonable belief that violence will result. As an initial matter, this claim was not raised in the trial court and is subject to plain error review. *See (Henry) Brown*, 881 A.2d at 593. Although appellant objected to the provocation instruction below, this objection was based on the lack of evidence to support such an instruction (2/13 Tr. 162-63, 166-67). Evidentiary sufficiency, however, is not the core of the argument appellant now advances on appeal. Instead, appellant now asserts that an entirely different, and more stringent, legal standard applies to the doctrine of provocation when a defendant's conduct occurs in the home (see App Br. 33-44). This specific claim was not advanced in the trial court. Nor did appellant request that the trial court instruct the jury that the government must prove appellant intended to provoke [redacted] before it could find his right to self-defense forfeited. Therefore, appellant's claim was not preserved and is subject to plain error review. *See (Robert) Brown*, 881 A.2d at 593.

Appellant's claim fails under any standard. His claim that the *location* of an individual's conduct, i.e., in the home, is dispositive of the legal standard for application of the forfeiture-of-self-defense-by-provocation doctrine finds no support in this Court's case law. Rather, this Court has specifically rejected the proposition that the applicability of the provocation doctrine depends on upon where

a defendant's conduct occurs. *Andrews*, 125 A.3d at 322 & n.15 ("Forfeiture ensues, . . . even if the area of confrontation was a public street or other place where the defendant had a right to be present.") (citing *Mitchell v. United States*, 399 A.2d 866, 869 (D.C. 1979).[24]

Appellant's argument that its rule finds support in this Court's decision in *Laney* (at 37) misconstrues that decision and its discussion of *Beard v. United States*, 158 U.S. 550 (1895). *Laney* recognized that the rule set forth in *Beard*, which did not concern D.C. law, merely provided *dicta* and was not controlling. *Laney*, 294 F. at 415 ("Thus, [Beard] *implied* that, if [the defendant] had gone out to provoke an affray, a different rule would apply."). Nowhere does *Laney* hold that provocation occurring in the home is subject to a different standard than provocation occurring on a public street or that *Beard* requires any such distinction.

Similarly, neither *Beard* nor *Wallace v. United States*, 18 App. D.C. 152 (1901), hold (or even contain language supporting appellant's position) that D.C. law recognizes a fundamental distinction between what constitutes provocation

[24] Similarly, to the extent appellant is arguing that provocation is not applicable because appellant's purpose in arming himself and exiting his apartment was to investigate the noise rather than to instigate a confrontation (see App. Br. at 33), his argument has previously been rejected. This Court has repeatedly found that forfeiture of self-defense results even where a defendant's "purpose in putting himself in that position [where his presence would trigger violence] was benign." *Andrews*, 125 A.3d at 322 (quoting *Sams*, 721 A.2d at 953) (alteration in *Andrews*).

within a home as opposed to outside a home. As noted above, *Beard* did not construe D.C. law, nor did it articulate a holding regarding what standard applies to application of the provocation doctrine whether within or without a home. *Wallace* similarly did not articulate a standard governing when provocation may defeat self-defense, but rather simply approved the trial court's instruction that self-defense is forfeited "[i]f the jury believe from the evidence that the defendant . . . provoked the difficulty with [the victim], and in the progress thereof it became necessary to kill the latter to save himself." 18 App. D.C. at 160-61. This statement of the law makes no mention of the place in which the provocation occurs, and in the Court's recitation of the evidence that supported giving the instruction no mention is made of the fact that the events occurred on the defendant's property. Therefore, neither of these decisions support the distinction appellant now urges this Court to make.

Nor do the general principles of law on which self-defense rest provide support for distinguishing between provocation in the home and in public.[25] This Court has recognized that "[t]he law of self-defense is a law of necessity," *Rorie*, 882 A.2d at 771, and that "one cannot support a claim of self-defense by a self-generated necessity," *Andrews*, 125 A.3d at 322. As such, "[a] defendant cannot

[25] Even if such a distinction were appropriate, it would not be applicable here, where the evidence showed appellant had not only left his apartment itself, but also exited his apartment building to confront the individual knocking on his window.

successfully claim self-defense when he le[aves] an apparently safe haven to arm himself and return to the scene" or goes "out of his way to look for trouble." (*Henry*) *Brown*, 619 A.2d at 1182 (internal quotation marks omitted) (citing *Rowe v. Unites States*, 370 F.2d 240, 241 (D.C. Cir. 1966), and *Nowlin*, 382 A.2d at 14 n.7). It is therefore clear that the availability of the very right to defend oneself turns on whether a defendant bears responsibility in bringing about the circumstances that necessitated the use of self-defense. Such considerations are not affected by *where* the need for defense arises, but rather *why* the need arose in the first place and what role appellant played in creating those circumstances. Although a jurisdiction may determine that the correct rule is that forfeiture of self-defense is appropriate only where there is an intent to provoke violence (App. Br. at 38-40 (surveying state laws on provocation)), "[t]hat is not and has never been the law in the District of Columbia," where "[c]ase law from *Laney* to *Howard* makes clear that self-defense is not available to a defendant who deliberately puts himself in a position where he has reason to believe that his presence will provoke trouble, even if his purpose in putting himself in that position was benign." *Sams*, 721 A.2d at 952-53.

Given that the availability of self-defense rests upon the manner in which the necessity for its use arose, appellant's arguments (at 41-44) that its position is supported by the home's special status is misguided. Appellant references the "castle doctrine" to support differentiating between provocation in the home or elsewhere

because, historically, an individual only had a duty to retreat to the wall of his home but did not require retreat within the home (App. Br. at 41-42).[26] As this Court recognized, however, the castle doctrine applies (in those jurisdictions in which it does apply) only where "one who through no fault of his own is attacked in one's own home." *Cooper v. United States*, 512 A.2d 1002, 1005 (D.C. 1986); *see also Smith*, 686 A.2d at 545. These cases illustrate that even in the context of the home, the common law recognized that self-defense was not available where a defendant brought about the necessity for his use of deadly force.[27]

Moreover, any error was not "plain" or "obvious." *See (Erick) Williams*, 858 A.2d at 995-97. Furthermore, reversal is not required because ay error was not prejudicial. The evidence showed that appellant was outside of his home when he shot [redacted]. Not only had appellant left the safety of his double-locked apartment,

[26] The applicability of the castle doctrine in the District of Columbia "has never been squarely decided." *Smith v. United States*, 686 A.2d 537, 545 (D.C. 1996). As appellant notes, there is no general duty to retreat prior to using deadly force in the District of Columbia; however, the failure to retreat may be considered by a jury in determining whether the use of such deadly force was necessary. *Gillis v. United States*, 400 A.2d 311, 312-13 (D.C. 1979).

[27] For the same reason, appellant's reliance on *District of Columbia v. Heller*, 554 U.S. 570 (2008), is also misplaced. The *Heller* decision was concerned with the scope of the Second Amendment's right to keep and bear arms. Although that decision referenced the right of self-defense in the context of analyzing individuals' Second Amendment rights, it did not address the circumstances under which that right existed or may be forfeited. *Id.*

and even the building itself, the evidence—including the testimony of all witnesses and the ballistic evidence recovered—confirmed that appellant shot [redacted] while the men were in an altercation on the front step outside appellant's apartment building rather than in his home. As such, the jury was properly instructed on the law with respect to self-defense and provocation under the facts of the case, and the trial court's failure to instruct on provocation within the home was not error.[28]

2. The Trial Court Did Not Err When It Permitted the Jury to Consider Whether Appellant was the Aggressor.

The trial court did not err when, in giving the first-aggressor/provocation instruction, it included language permitting the jury to find that appellant was "the aggressor." When viewed in a light most favorable to the government, the evidence permitted a reasonable inference that appellant knew that [redacted] was at the door of his apartment building when he stepped outside with a loaded gun that was cocked and ready to fire; that he was upset with [redacted] not only for banging on his window but also for stealing from him; and that he spoke in an elevated voice to [redacted] while [redacted] attempted to calm him down. This supported an inference that

[28] For the same reason, even if this Court finds that appellant's challenge to the legal standard governing provocation within the home was preserved, any error was harmless beyond a reasonable doubt.

appellant, rather than [redacted], provoked the deadly conflict, and thus supported the instruction. *See Tyler*, 975 A.2d at 858-59; *Coleman*, 948 A.2d at 551.

Appellant asserts that the trial court's instruction "directly contradicted" her finding that there was no evidence that appellant was the aggressor. But the statement appellant relies upon was made preliminarily, before further argument of the record. When the government explained its position, the trial court correctly determined that the question of whether the evidence established that appellant was the aggressor was "a question for the jury," and found that the evidence was sufficient to provide the instruction (2/13 Tr. 165-66).

Next, appellant asserts (at 46) that the trial judge erred because it failed to instruct the jury that it could find that appellant was the aggressor only if it found that appellant knew it was [redacted] at the door to his building. First, the trial court never found that appellant could be considered an aggressor only if the jury found that appellant was aware it was [redacted] at his door prior to stepping outside. Rather, the trial court simply acknowledged that the questions of fact regarding precisely how the encounter between appellant and [redacted] occurred were questions for the jury rather than the court (2/13 Tr. 165-67). Once the trial court recognized that there was some evidence from which the jury could find that appellant was an aggressor and/or provoked imminent danger of bodily harm, the trial court had broad discretion in fashioning an appropriate jury instruction. *See Broadie*, 925 A.2d at 621.

CONCLUSION

WHEREFORE, the government respectfully submits that the judgment of the Superior Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have caused a copy of the foregoing to be served by electronic means, through the Court's EFS system, upon counsel for appellant, Samia Fam and Stefanie Schneider, Esqs., Public Defender Service, on this 21st day of January, 2020.

/s/
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