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IN THE DISTRICT OF COLUMBIA
COURT OF APPEALS

WINSTON WALKER,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

On Appeal From The Superior Court
Of The District Of Columbia

OPENING BRIEF FOR APPELLANT WINSTON WALKER

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DISCLOSURE STATEMENT

Appellee in this court is the United States. Counsel who appeared for the United States before the Superior Court were Assistant U.S. Attorneys Tamara Rubb, Bonnie Thompson, Meredith Mayer-Dempsey, Daniel Seidel, and Kathleen Houck; AUSA Eliot Folsom appeared for the U.S. in the action under D.C. Code § 23-110.

Defendant in the Superior Court and Appellant in this court is Winston Walker. Defense counsel who appeared before the Superior Court at trial was Peter Cooper. Defense counsel who appeared before the Superior Court in the action under D.C. Code § 23-110 was Brian D. Shefferman. Appellate counsel now appearing before this court is Richard P. Goldberg of Goldberg & Goldberg, PLLC.

RULE 28(A)(5) STATEMENT

This appeal is from a final order or judgment that disposes of all of the parties' claims at issue.

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ISSUES PRESENTED

1. Apparently believing that the defendant had touched his cousin, a man aggressively confronted the defendant and hurled angry profanities at him, face-to-face, with nothing between them. Where this put the defendant in reasonable fear of imminent violence, did the trial court err in denying him an acquittal of simple assault by reason of self-defense?

2. The trial court convicted the defendant of simple assault, explicitly relying upon hearsay that was plainly inadmissible. Without that inadmissible hearsay, the evidence would have been equivocal and therefore insufficient to convict as a matter of law. As a result, the defendant convicted by this inadmissible hearsay did not receive a fair trial. Should the conviction based on hearsay be vacated?

3. The defendant was convicted of simple assault of a complainant who the government did not call to testify at trial. The conviction was largely based on hearsay—statements allegedly made by the non-testifying complainant, and reported by the other complainant—to which trial counsel (without excuse) failed to object. This hearsay was essential in convicting the defendant. Did trial counsel render ineffective assistance?

STATEMENT OF THE CASE

Winston Walker was charged by criminal information with one count of simple assault, in violation of D.C. Code § 22-404, and one count of misdemeanor sexual abuse, in violation of D.C. Code § 22-3006. R.12. After a two-day bench trial, the trial court found Mr. Walker guilty of the simple-assault charge. It found that the government had failed to prove an essential element of the crime of misdemeanor sexual abuse but had proved the lesser-included offense of simple assault. For each count of simple assault, Mr. Walker was sentenced to 30 days incarceration, execution of sentence suspended as to all, with 6 months of unsupervised probation, as well as a $50 VVC fine for each count, with both periods of incarceration and both periods of probation to run concurrently, R.51.[1]

During the pendency of this appeal, Mr. Walker also filed a motion for relief for ineffective assistance of counsel, under D.C. Code § 23-110, which (by leave of court) he subsequently amended. RS.15-30 (initial motion); RS.157-171 (amended motion) (hereinafter, the amended motion is referred to as the "§ 23-110 motion" or "Mot."). Following a motion to stay the direct appeal during the pendency of the § 23-110 motion, this court held the motion to stay in abeyance until the § 23-110 motion had been decided. Order of May 9, 2022, *et seq.* On

[1] Citations to the trial record refer to the PDF record and are in the form, "R.[page number]; citations to the record of the proceedings under D.C. Code § 22-110 (ineffective assistance of counsel) refer to the supplemental PDF record and are in the form, "RS.[page number]"; citations to the transcripts are in the form Tr. [date], [page number(s)].

January 13, 2025, the § 23-110 motion was denied by the Superior Court. RS.219-230 (hereinafter, "Order").

Having filed timely notices of appeal from the judgment, R.53-54, and the § 23-110 motion, RS.231-32, Mr. Walker now appeals his convictions and the denial of his § 23-110 motion.

STATEMENT OF FACTS

At trial, two witnesses testified for the government, Codera Bracy and MPD Detective Elbert Griffen; two witnesses testified for the defense, Colleen McGraw and Rico Winston. Ms. Blankney, the alleged victim of the acquitted sexual assault, was not called to testify by the government.

A. The testimony of only one of the two complainants, Codera Bracy.

Complainant Codera Bracy testified for the government. He explained that he lives in New York, Tr. 02/06/2020, 15-16, and on the night of the altercation he and some friends, including his cousin Taylor Blankney, were out in D.C. to celebrate a friend's birthday, partying day and night on both Friday and Saturday, Tr. 02/06/2020, 18. On Friday, the festivities had begun during a late brunch, with a brief break, and then continued with celebrations at two bars. Tr. 02/06/2020, 19. On Saturday and into the early morning hours of Sunday (the day of the incident), the party began at brunch and continued later at a nightclub. Tr. 02/06/2020, 19. During the evening alone, Mr. Bracy testified, he had four drinks before eating dinner, finally eating for the first time in several hours when the group purchased takeout pizza and began eating it on the sidewalk. Tr. 02/06/2020, 20. Mr. Bracy's level of intoxication, he estimated, on a scale of one

to ten was about a six. Tr. 02/06/2020, 21. Mr. Bracy claimed that Mr. Walker approached the group, sat next to his cousin Taylor Blankney, and asked for a piece of pizza. Tr. 02/06/2020, 22. Meanwhile, Mr. Bracy was in the road, looking for their Uber car.

Mr. Bracy testified that Ms. Blankney yelled that Mr. Walker could not have any pizza. Tr. 02/06/2020, 24. He further testified that Mr. Walker, who was shoulder-to-shoulder with Ms. Blankney, dropped his hand, "touching her butt." Tr. 02/06/2020, 25. He then testified that she yelled, "Don't touch me." Tr. 02/06/2020, 26. Mr. Bracy went on to testify that Ms. Blankney moved away from Mr. Walker and, upset, said that what he did was not ok. Tr. 02/06/2020, 26. He also testified that she yelled, "move away" and used profanity. Tr. 02/06/2020, 26.

At that moment, Mr. Bracy approached Mr. Walker (who, Mr. Bracy testified, continued to insist that he could touch who he wanted to) and "became defensive." Tr. 02/06/2020, 27. He "immediately addressed the individua[l] and said you cannot do that." He also "used profanity and said things such as defending her." Tr. 02/06/2020, 28. He grew immediately frustrated. By then, he and Mr. Walker "got close"—nothing separated them—and they were "arguing, going back and forth." Tr. 02/06/2020, 28.

At that time, Mr. Bracy testified, he was "brought down in that moment from behind" by an unidentified individual. On the ground, he then had to guard his face, as he was being hit. Tr. 02/06/2020, 29. At the time he did not see the person who attacked him from behind; but later he did see the person, who was not Mr. Walker. Tr. 02/06/2020, 29-30. At the time, he said, Mr. Walker hit him in

the nose while he was down. Tr. 02/06/2020, 30-31. It was not until after the altercation, he testified, that a member of the group named Shakira got sick and threw up. Tr. 02/06/2020, 34-35.

B. The identification testimony of the officer who arrested Mr. Walker, Detective Elbert Griffin.

Detective Elbert Griffin, a nearly 30-year veteran of the D.C. Metropolitan Police Department, testified for the government. Tr. 02/06/2020, 42. He explained that he was assigned to the Criminal Investigations Division, Sexual Assault Unit, and after he arrived at the scene, he arrested Mr. Walker. Tr. 02/06/2020, 42-43. At the time, he noticed that Mr. Bracy's nose was bleeding. He also testified that Mr. Walker was arrested at 4:45 a.m., and that the incident had occurred at 3:57 a.m. Tr. 02/06/2020, 46-47.

C. The character testimony of Mr. Walker's former colleague and current friend of 20 years, Colleen McGraw.

Colleen McGraw testified for the defense. She explained that she had known Mr. Walker for 20 years, first as a work colleague and then as a friend. Tr. 02/06/2020, 8-9. They had not only worked together but socialized outside of work, as work "often has blurred boundaries sometimes in terms of socializing," including "happy hours and the like" after work. Tr. 02/06/2020, 15. Describing him as a pacifist, Tr. 02/06/2020, 7, she knew him as a proud family man, Tr. 02/06/2020, 9. She also testified that the physically assaultive behavior with which Mr. Walker was charged was not characteristic of the person she knew him to be. Tr. 02/06/2020, 12. In fact, when told what he was charged with, her reaction was, she testified, "Shock." Tr. 02/06/2020, 13. She explained that

Mr. Walker was "incredibly helpful, proactively the most pacifist person" and noted that she "would seek him out as an oasis of calm in the course of my employment." Tr. 02/06/2020, 13. She further testified that in the entire 20 years she had known him, she had "[n]ever" seen any behavior or indication that would lead her to believe that he would physically assault someone, sexually or otherwise. Tr. 02/06/2020, 13-14. When asked by the government whether she ever saw Mr. Walker under the influence of alcohol, she answered, "No, I have not. I mean . . . he wasn't one to indulge." Tr. 02/06/2020, 16-17. Asked whether he was ever intoxicated, she testified that he was not. Tr. 02/06/2020, 17. Finally, she testified that the crimes with which Mr. Walker had been charged "are not consistent with his character." Tr. 02/06/2020, 17.

D. The testimony of the defense eyewitness, Mr. Walker's friend Rico Winston.

Rico Winston testified for the defense. Tr. 03/03/2020, 19. He was with Mr. Walker at the time of the incident, as the two had been together at Rosebar, a nearby nightclub. Tr. 03/03/2020, 20-21. Mr. Walker and Mr. Winston were at Rosebar—the only bar or nightclub they had visited that evening—for about an hour and a half. Tr. 03/03/2020, 21. During that time, although Mr. Winston had about three drinks, and they were together the entire time, he didn't see Mr. Walker drink anything. Tr. 03/03/2020, 30. When they emerged, he testified, "there was a young lady on the bench kind of leaned over throwing up," Tr. 03/03/2020, 20, and she had a few friends standing nearby, Tr. 03/03/2020, 21. Mr. Walker went over to "try to assist the girl that was throwing up . . . [because] she had her hair in her face, getting[,] like[,] in the throw up, so he tried to like,

help her up." Tr. 03/03/2020, 22. "[H]e was asking her was she ok." Tr. 03/03/2020, 22.

Mr. Winston testified that he never saw Mr. Walker touch the girl he was trying to help. "Her hair was like, in her face while she was throwing up, so it was kind of like, in, on her hair . . . . He went over to help her out, asked if she was ok, and she didn't say nothing so he just—he didn't do nothing." Tr. 03/03/2020, 23. But at that point, [t]hat's when her friends, mainly her male friend, began to like, argue with him as if he was doing something, but he wasn't doing nothing." Tr. 03/03/2020, 23. Mr. Winston couldn't hear what they were saying, he testified, "I just heard shouting," which "eventually escalated into them like, shoving and stuff." Tr. 03/03/2020, 24. This turned into "pretty much a wrestling match." Tr. 03/03/2020, 25.

Mr. Winston, at first, testified that he didn't see who hit whom first. Tr. 03/03/2020, 25. But after the prosecutor used the police body-worn camera video to refresh his recollection, Mr. Winston recalled that "[t]he other gentleman," Mr. Bracy, hit Mr. Walker first. Tr. 03/03/2020, 39. Mr. Winston also testified that he was watching Mr. Walker "the whole time" during the incident, and he "didn't seem him touch her [Ms. Blankney] at all." He also testified that Ms. Blankney never said anything like "get off me." Tr. 03/03/2020, 26.

E. The testimony of the second complainant, Taylor Blankney.

The government did not call Ms. Blankney to testify. The government made no representations about why Ms. Blankney did not come to the District to testify,

and it provided no reasons about why it did not subpoena her or call her to testify. *See* Tr. 02/06/2020, 10.

F. The trial court's findings.

At the close of the government's case, the trial court denied the defense motion for judgment of acquittal. Tr. 03/03/2020, 5, and at the conclusion of the trial, it found Mr. Walker guilty of simple assault for punching Mr. Bracy; not-guilty of sexual assault for touching Ms. Blankney; and guilty of the lesser-included offense of simple assault for touching her.

The trial court found Mr. Bracy credible.[2] It credited his testimony that Mr. Bracy was pulled down by someone else, not Mr. Walker, and that Mr. Walker then punched Mr. Bracy in the nose. Tr. 03/03/2020, 62-63. The court acknowledged that the defense had argued that "there's at least some evidence that Mr. [Bracy] was the aggressor." Tr. 03/03/2020, 63. However, it did not find credible Mr. Winston's testimony, after the government refreshed his recollection with the body-camera video, that Mr. Bracy was the first aggressor. Tr. 03/03/2020, 63.

The court credited the testimony that Mr. Walker "touched Ms. Blankney on her buttocks." Tr. 03/03/2020, 64. It emphasized that it also credited the testimony that she "reacted very negatively," nothing that she refused Mr. Walker's request for a slice of pizza, "and then after he touched her, jumped back, yelled, "Don't touch me," and continued to yell at him. Tr. 03/03/2020, 65.

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[2] The court actually said that it "found Mr. Blankney to be credible." But the other purported victim was *Ms.* Blankney; and the witness was *Mr.* Bracy. This error—calling Mr. Bracy Mr. Blankney—continued throughout the trial court's findings.

However, the court acquitted Mr. Walker of misdemeanor sexual assault, because there was not sufficient evidence of the third element," which requires that the defendant have the intent to "abuse or humiliate or arouse or gratify his own or another person's sexual desire, and that there was "certainly not evidence beyond a reasonable doubt." Tr. 03/03/2020, 65. However, having found that Mr. Walker touched Ms. Blankney at all—and that he knew or should have known that he lacked permission to do so—the court found him guilty of simple assault, "which is a lesser included offense." Tr. 03/03/2020, 65.

The trial court also found that Mr. Walker "used force to injure Mr. [Bracy]" when he "punched him in the face and broke his nose." Tr. 03/03/2020, 66; *but see* Tr. 02/06/2020, 36 (Mr. Bracy: "It wasn't broken."). Finding that the contact was not accidental but rather intentional, and that Mr. Walker "had the apparent ability to injure, which he clearly did since he did in fact injure him," the trial court found Mr. Walker guilty of assaulting Mr. Bracy. The trial court further held, "I credit Mr. [Bracy]'s testimony, which was he was pushed to the ground and then the defendant pushed him." Tr. 03/03/2020, 67.[3]

G. The Sentencing.

At sentencing, the government—recognizing that Mr. Walker had very little criminal history and no history of sexual misconduct—requested a stay-away order from what the trial court recognized was "a public sidewalk," where neither of the "victims live or work," as well as 60 days' suspended time (i.e., consecutive

[3] It is also possible that the trial court meant "punched," not pushed; the *already corrected* transcript, *see* Tr. 03/03/2020, 1, says "pushed," Tr. 03/03/2020, 67.

sentences) and "one year of supervised probation to include alcohol and drug testing and treatment . . . as it appears that the events in this—of that evening were fueled largely by alcohol.[4] Tr. 09/21/2021, 4-5. The government also noted that one of the victims yelled, "don't touch me." Tr. 09/21/2021, 4.

The trial court, however, recognizing that Mr. Walker[5] was "gainfully employed in a skilled field and has been for decades, at least two, going on three," and that there were no other violations, sentenced him to 30 days on each count to run concurrently, with six months of unsupervised probation. Tr. 09/21/2021, 11-12. This appeal followed.

STANDARD OF REVIEW

When considering a challenge to the sufficiency of the evidence, this court "view[s] the evidence in the light most favorable to the government, giving full play to the right of the [fact-finder] to determine credibility, weigh the evidence, and draw justifiable inferences of fact, and making no distinction between direct and circumstantial evidence." *Brooks v. United States*, 130 A.3d 952, 955 (D.C. 2016) (second alteration original). "[T]he evidence is sufficient if, after viewing it in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* (alteration original).

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[4] Notably, there was no testimony or other evidence, during the entire trial, that Mr. Walker had any alcohol at all to drink. It is possible that the prosecutor was recalling the "seven hours of drinking in a session," without diner, that Mr. Bracy had testified to. *See, e.g.*, Tr. 03/03/2020, 55.

[5] At sentencing, the trial court actually referred to Mr. Walker as "Mr. Harris." Tr. 09/21/2021, 11.

This court reviews challenges to the sufficiency of the evidence *de novo*. *Carrell v. United States*, 165 A.3d 314, 326 (D.C. 2017) (en banc). Review of a motion for judgment of acquittal is also *de novo*. *Tann v. United States*, 127 A.3d 400, 424 (D.C. 2015). Furthermore, "[e]ven though a general motion for acquittal is broadly stated, without specific grounds, it is deemed sufficient to preserve the full range of challenges to the sufficiency of the evidence." *Newby v. United States*, 797 A.2d 1233, 1238 (D.C. 2002) (internal quotation marks omitted). In fact, "it is well settled in this jurisdiction that a 'full range of challenges' to the sufficiency of the evidence are automatically preserved at a bench trial by a defendant's plea of not guilty." *Carrell*, 165 A.3d at 326 (quoting *Newby*, 797 A.2d at 1237-38). "[S]ufficiency challenges encompass challenges to the requisite elements of the crime." *Id.* Whether a statement satisfies a particular hearsay exception is a legal question that this court reviews *de novo*. *Jones v. United States*, 17 A.3d 628, 631 (D.C. 2011).

This court reviews questions of fact under the "clearly erroneous" standard. *United States v. Felder*, 548 A.2d 57, 61 (D.C. 1988). Although this court "will not disturb the judge's factual findings unless they are clearly erroneous, or without substantial support in the record," *Harris v. United States*, 738 A.2d 269, 274 (D.C. 1999), "not all credibility findings are equal," *Stringer v. United States*, 301 A.3d 1218, 1228 (D.C. 2023). And although this court has made clear that it is "particularly unlikely to find clear error with respect to credibility determinations based on the witness's demeanor," where "[d]ocuments or objective evidence may contradict the witness'[s] story . . . we 'may well find clear

error even in a finding purportedly based on a credibility determination.'" *Id.* at 1228 (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985)) (alterations original).

As a result, this court may make its "own comparison between the witness's version of events and the objective facts" and subject the finding "to something less stringent than clear-error review." *Id.* This is particularly so where such factual finding is not "based on factors that [could] only be ascertained after observing the witness testify." *Caston v. United States*, 146 A.3d 1082, 1099 (D.C. 2016) (emphasis added). Moreover, "the significance of inconsistencies" in testimony "is a determination of law, subject to appellate scrutiny." *Stringer*, 301 A.3d at 1228 (quoting *Caston*, 146 A.3d at 1096).

ARGUMENT SUMMARY

The trial court made three fundamental errors. *First*, as set forth in **Parts I and II**, Mr. Walker was entitled to an acquittal based on a defense of self-defense. He had been confronted by an angry, excited, drunk Mr. Bracy, who hurled profanity at him and confronted him physically, face-to-face. This pent-up threat—what this court has referred to as "a clenched fist" —provided Mr. Walker with the right to defend himself from what he would have perceived as the likely coming assault by Mr. Bracy. Mr. Walker's conviction for assaulting Mr. Bracy should be vacated.

Second, as set forth in **Part III**, the court below incorrectly denied Mr. Walker's motion to vacate the judgment and sentence under D.C. Code § 23-110. Trial counsel failed to object to obvious and damning hearsay (for no

conceivable reason), which was virtually all that supported the conviction for assaulting Ms. Blankney, who did not even testify. Without that inadmissible hearsay, the evidence would have been too thin for conviction.

Third, as set forth in **Part IV**, without that inadmissible hearsay, the verdict was supported only by equivocal actions by Ms. Blankney, as described by Mr. Bracy. This court cannot be sure that it is *highly probable* that the erroneously admitted hearsay was immaterial to the trial court's assessment of Mr. Walker's guilt, because in fact it is highly probable that the improper hearsay was the basis of the conviction.

ARGUMENT

This court should vacate the judgment and sentences for two counts of simple assault, once for Mr. Bracy, and the other for Ms. Blankney, for the following three reasons: (i) Mr. Walker exercised his right to self-defense against Mr. Bracy; (ii) Mr. Walker's trial counsel rendered ineffective assistance under the Sixth Amendment by failing to object to damning but clearly inadmissible hearsay; and (iii) inclusion of this inadmissible hearsay to convict Mr. Walker of assaulting Ms. Blankney deprived Mr. Walker of a fair trial. These were all serious errors, each of which requires this court to vacate the judgment and sentence.

I. Where the defense of self-defense is fairly raised by the facts, it may defeat a conviction if the defendant felt threatened.

The elements of simple assault are now well-established.[6] Just as well-established is the rule that there can be no conviction for assault where the purported assailant acts in self-defense. "Where a defendant has presented any evidence that she acted in self-defense, the government bears the burden of proving beyond a reasonable doubt that the defendant did not act in self-defense."[7] *Dawkins v. United States*, 189 A.3d 223, 231-32 (D.C. 2018) (quoting *Williams v. United States*, 90 A.3d 1124, 1128 (D.C. 2014)). Furthermore, "[i]n evaluating whether a person claiming self-defense acted reasonably under the circumstances the fact-finder must take into account that the defendant was acting in the 'heat of the conflict.'" *Williams*, 90 A.3d at 1128 (citing *Brown v. United States*, 256 U.S. 335, 344 (1921)).

As a result, in asserted self-defense "the threshold question for the fact finder is whether the *government has disproved*, beyond a reasonable doubt, that the 'appellant actually and reasonably believed that [s]he was in imminent danger

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[6] "The government must prove that the defendant (1) touched another; (2) that [s]he did so purposely, not by accident; (3) that the touching offended the other person; (4) that the touching would offend a person's reasonable sense of personal dignity; and (5) that the defendant either acted with the purpose of causing offense or acted knowing that the touching would cause offense." *Hernandez (Winston) v. United States*, 286 A.3d 990, 1004 (D.C. 2022) (en banc) (footnotes omitted).

[7] There are, of course, limits to the defense of self-defense: The force used must be reasonable to repel the danger, and the actor must reasonably believe the harm is imminent. *Gezmu v. United States*, 375 A.2d 520, 523 (D.C. 1977) (emphasis added) (citing *United States v. Peterson*, 483 F.2d 1222, 1229-30 (D.C. Cir. 1973)).

of bodily harm.'" *Parker v. United States*, 155 A.3d 835, 845 (D.C. 2017) (emphasis added) (quoting *Higgenbottom v. United States*, 923 A.2d 891, 900 (D.C. 2007)) ("If there is evidence that the defendant actually and reasonably believed herself to be in imminent danger of bodily harm—i.e., if the government cannot prove beyond a reasonable doubt that the defendant did not have such a belief—the inquiry proceeds to the amount of force employed.").

Where a defendant has a reasonable belief in such danger (which need not be grave danger) the government *cannot* "carry its burden to rebut a claim of self-defense by showing that there was another motive guiding the defendant's action." *Id.* at 845 (holding that an assault as mild as "spitting" was sufficient provocation to justify self-defense). "[U]nder our law, the actor's subjective perceptions are *the prime determinant* of the right to use force—and the degree of force required—in self-defense, subject only to the constraints that those perceptions be reasonable under the circumstances." *Ewell v. United States*, 72 A.3d 127, 130 (D.C. 2013) (emphasis added) (quoting *Alcindore v. United States*, 818 A.2d 152, 157 (D.C. 2003)).

Furthermore, "under the District's long-standing common law test for self-defense," there are two relevant questions: (1) whether a defendant reasonably believed that she was in imminent danger of bodily harm"; and (2) if so, whether the force used was excessive."[8] *Parker*, 155 A.3d at 839.

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[8] Notably, as this Court has explained, "motive is not an additional, separate consideration. If the government has not disproved that a defendant actually and reasonably believed she was in imminent danger of bodily harm, we accept that she acted out of that belief." *Parker*, 155 A.3d at 846-47.

"Where a defendant has presented *any evidence* that []he acted in self-defense, the government bears the burden of proving beyond a reasonable doubt that the defendant did not act in self-defense." *Williams*, 90 A.3d at 1128 (emphasis added); *Dawkins*, 189 A.3d at 231-32 (same, quoting *Williams*); *Parker*, 155 A.3d at 842 (same, quoting *Williams*); *Ewell*, 72 A.3d at 131 ("If a defendant has raised th[e] defense [of self-defense], the government is required to disprove that the defendant acted in self-defense beyond a reasonable doubt.").

Once any such evidence has been presented, the defendant "has no burden to establish that he acted in self-defense." *Young v. Scales*, 873 A.3d 337, 342 (D.C. 2005). Rather, the government must prove, beyond a reasonable doubt, that he *did not* act in self-defense. *Id.* As this Court has explained in a slightly different context, "[i]n essence, a new element of proof is added." *Osborne v. District of Columbia*, 169 A.3d 876, 886 n.11 (D.C. 2017).

Because self-defense "overrides the *mens rea* required to commit the charged crime, and thus makes the defendant's action not criminal," *Dawkins*, 189 A.3d at 231, it is available wherever the defendant has "'fairly raised' the issue of self-defense because there was 'some evidence,' *however weak*, supporting the conditions for the defense." *Hernandez (Napoleon) v. United States*, 853 A.2d 202, 205 (D.C. 2004) (emphasis added).

"When a self-defense claim is raised, the trial judge must first decide, as a matter of law, if the evidence in the record supports defendant's theory of self-defense." *Brown v. United States*, 619 A.3d 1180, 1182 (D.C. 1993). Where the trial judge fails to make findings regarding the facts or law of self-defense, this

court will determine whether the facts could support a finding that the defendant did not act in self-defense. *Williams*, 90 A.3d at 1128-29.

If the facts could not support a finding that the defendant did not act in self-defense—that is, if the evidence "was insufficient to permit a reasonable factfinder to say with a 'subjective state of near certitude' or without hesitation that [the defendant] was not acting reasonably under the circumstances"—this court will reverse the conviction. *Id.* at 1129-30. Otherwise, the Court will return the case to the trial court to make adequate findings of fact. *Id.* at 1129; *Ewell*, 72 A.3d at 132-33.

II. The conviction for assaulting Mr. Bracy should be reversed because the government failed to disprove self-defense beyond a reasonable doubt.

At trial, there was no question that it was Mr. Bracy who *provoked* the physical conflict, approaching Mr. Walker and using profanity. Tr. 02/06/2020, 28. In Mr. Bracy's own telling, he was intoxicated,[9] Tr. 02/06/2020, 21, and he was "immediately frustrated." Tr. 02/06/2020, 28. The confrontation that Mr. Bracy provoked quickly escalated: "We got close. No one like, separated us or anything. . . . he and I was arguing, going back and forth." Tr. 02/06/2020, 28. There was also no testimony that Mr. Bracy's aggressive profanity was required to extricate Ms. Blankney, as by the time that the argument that Mr. Bracy provoked had escalated, Mr. Walker had moved away from Ms. Blankney and was facing

[9] At first, Mr. Bracy claimed to "remember everything." Tr. 02/06/2020, 21. And he professed to remember exactly what Ms. Blankney said. Tr. 02/06/2020, 26. But when asked to recount what he said to Mr. Walker, he could no longer "remember the exact words." Tr. 02/06/2020, 28.

Mr. Bracy; by then, any contact between Mr. Walker and Ms. Blankney had ended. *Id.* Of course, there was no evidence that Mr. Walker provoked or otherwise threatened Mr. Bracy. *See Belt v. United States*, 149 A.3d 1048, 1058 (D.C. 2016) (noting that "a defendant cannot claim self-defense if the defendant was the aggressor, or if []he provoked the conflict upon himself"). As the trial court found, Mr. Bracy "began yelling loudly at the defendant," and then, before being pulled to the ground by a third person, "got in first a verbal altercation" with Mr. Walker. Tr. 03/03/2020, 62.

This conduct—accosting Mr. Walker, yelling alcohol-fueled profanity at him, late at night, getting close to him, confronting him face-to-face with nothing between them—was threatening. Mr. Bracy's conduct would have made *anyone* reasonably afraid for what he might do next. At that moment, Mr. Walker had the right of self-defense. And nothing he did lost him the right.

For instance, Mr. Walker did not have a duty to retreat from Mr. Bracy's threatening language and physical intimidation. "In the District of Columbia, it is recognized that when an individual is faced with a real or apparent threat of serious bodily harm or even death itself, there is no mandatory duty to retreat." *Carter v. United States*, 475 A.2d 1118, 1124 n.1 (D.C. 1984). As this court explained in *Gillis v. United States*, which established the rule in D.C., the "middle ground" the court adopted permits the fact-finder to determine whether the defendant "acted too hastily, was too quick to pull the trigger." 400 A.2d 311, 313 (D.C. 1979). However, the court also explicitly held that "[d]etached reflection cannot be

demanded in the presence of an uplifted knife" *or* "even a clinched fist." *Id. A clenched fist.*

Furthermore, there is no question, even crediting Mr. Bracy's testimony, that the violence was not begun by Mr. Walker. Mr. Bracy testified that the scuffle was actually started by a third person. Tr. 02/06/2020, 29 ("And so in that moment, someone came from behind me and pulled me down."); *see id.* at 29-30 (Mr. Bracy testifying that he did not know the person who initially attacked him, from behind). There was no testimony that Mr. Walker acted in concert with this third person—or even knew who he was.

Although Mr. Walker exercised his Fifth Amendment right not to testify, Mr. Bracy's testimony alone—describing his aggressive approach and profanity-laced yelling at Mr. Walker, with whom he was face-to-face, without anything in between them—raised Mr. Walker's right to self-defense, in the face of a "clenched fist." Mr. Walker had no duty to retreat. Nor did the trial court consider whether he did.

In fact, the trial court incorrectly found that "the sole evidence of self-defense is the testimony of Mr. Winston that he ultimately testified that oh, yes, he remembered that he saw Mr. [Bracy] initiate the attack." Tr. 03/03/2020. This finding was clearly wrong. There was ample testimony *provided by Mr. Bracy* that he had confronted Mr. Winston with a threatening, intimidating, alcohol-induced, profanity-laced tirade.

The trial court's further findings on self-defense focused on, in the split-second that Mr. Bracy was taken to the ground by a third person, whether he still

presented a threat to Mr. Walker, and whether Mr. Walker's alleged punch would have been reasonable under the circumstances. It did so despite this court's admonition in *Gillis* that "[d]etached reflection cannot be demanded in the presence of . . . . a clinched fist." 400 A.2d at 313.

The trial court did not credit Mr. Winston's testimony that Mr. Bracy hit Mr. Walker first—that Mr. Bracy was the "first aggressor" in the *physical* sense. Tr. 03/03/202, 66. But with regard to whether, with Mr. Bracy on the ground for a split-second, Mr. Walker's punch would have constituted reasonable self-defense, the trial court found that the answer was "not clear,"[10] indicating that it could not make a finding one way or the other. Tr. 03/03/2020, 66-67.

Yet this was *the essence* of Mr. Walker's self-defense claim. That is to say, the trial court focused on who punched first, rather than whether Mr. Walker had a defense of self-defense in response to Mr. Bracy's overt, aggressive, profanity-laced, alcohol-fueled confrontation. Had the trial court focused on the relevant question of self-defense, which was whether Mr. Walker entitled to defend himself from Mr. Bracy's aggressive, face-to-face physical, profanity-laced confrontation—what this court described in *Gillis* as *a clenched fist*—it would have been required to acquit Mr. Walker by reason of self-defense. As a result of that permissible exercise of his right to self-defense, Mr. Walker lacked the

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[10] The trial court's full finding was this: "Indeed, if in fact Mr. [Bracy] was on the ground, even if he had started the altercation, it's not clear at that point that the use of force if Mr. [Bracy] did not present a threat to the defendant would have been reasonable under the circumstances, but I don't find—I credit Mr. [Bracy]'s testimony, which was he was pushed to the ground and then the defendant pushed him." Tr. 03/03/2020, 66-67.

required *mens rea* to commit the crime, *see Dawkins*, 189 A.3d at 231, and therefore the evidence was insufficient to convict him of assaulting Mr. Bracy. That conviction should be vacated.

III. The trial court's denial of the § 23-110 motion should be reversed because trial counsel's failure to object to obvious hearsay deprived Mr. Walker of his right to counsel under the Sixth Amendment.

Mr. Walker had been charged with two assaults—one assault on Mr. Bracy and one on Mr. Bracy's cousin, Ms. Blankney. But the government chose not to call Ms. Blankney to testify. This left the government with a problem: How could it put evidence before the court that Mr. Walker knew whether she consented to being touched—an essential element of the crime? The government's solution was to introduce Ms. Blankney's statements through Mr. Bracy. The government elicited testimony that Ms. Blankney screamed or yelled, "Don't touch me" and that she yelled, "move away." Tr 02/06/2025, 26. *This was plainly hearsay.*

Mr. Walker, in his amended motion to vacate the sentence and judgment under D.C. Code § 23-110, argued that trial counsel's failure to object to these statements was ineffective assistance under the Sixth Amendment. Mot. at 10-11; RS.219-230. He argued that these statements were "out-of-court statements offered to prove, either implicitly or explicitly, that Ms. Blankney did not consent to be touched by Mr. Walker." *Id.* (quotation marks omitted).

The court below held that these errors did not require that the motion be granted, for three reasons: (A) it asserted that the hearsay statements could have been admitted to show the effect they had on the listener; (B) it asserted that the hearsay statements could have been admitted under the state-of-mind exception;

and (C) it asserted that Mr. Walker did not show prejudice. Order at 10-11; RS.219-230. All three reasons were incorrect.[11]

A. It is well-established that the hearsay could not be admitted under the state-of-mind exception.

The state-of-mind exception to the hearsay rule "'permits the use of hearsay statements for the limited purpose of showing the state of mind of the declarant,' if the declarant's state of mind is at issue in the trial." *Jones*, 17 A.3d at 632 (quoting *Evans-Reid v. District of Columbia*, 930 A.2d 930, 944 (D.C. 2007)). And even if admitted under this exception, the factfinder is not permitted to consider the statements for their truth. *Id.* (citing *Evans-Reid*, 930 A.2d at 944). Yet the trial court *did* consider the statements for their truth. The statement, "don't touch me," is essentially a declaration that the defendant was not permitted to

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[11] The Superior Court, in its order denying the § 23-110 motion, somewhat obliquely reasoned that trial counsel may have "reasonably assumed that the statements would be amissible under a hearsay exception. As set forth below, such an assumption would not have been reasonable. But regardless, even if it *could* have been reasonable, that provides little reason for trial counsel not to object. After all, the government would then be forced to come up with a hearsay exception, defend it, and stick to it—which may or may not have occurred.

That is to say, it is no explanation for why trial counsel failed to object to simply say that he thought the objection might be overruled. The ability to make such timely objections—even if there is some reasonable basis to think they may be overruled—is part of what makes trial counsel effective; and the failure to make them shows that an essential part of the defense was let slip. Moreover, the objections, if properly lodged, would also have served another important purpose: They would have reminded the trial court of what should already have been plain: that the statements could not be used for the truth of the matters asserted. That is to say, reminding the trial judge (who should have known regardless, of course) that the hearsay statements could not be relied upon for their truth, in supporting the verdict, may have obviated the need for this appeal. *See*, *infra*, Part IV.

touch the declarant. And it was exactly that statement—that Mr. Walker did not have permission to touch her—that the trial court cited as evidence that "establish[ed] the defendant knew or should have known that he lacked any permission to touch Ms. Blankney." Tr. 03/03/2020, 65. The statement was hearsay, used to prove the truth of the matter asserted—that Mr. Walker did not have that permission. Not only was it inadmissible, the error was compounded when the trial court used the inadmissible statement, for its truth, to support the conviction.

B. It is well-established that the hearsay could not be admitted for its effect on the listener.

In rejecting the § 23-110 motion, the Superior Court also found that the statements could have been admitted "to show the effect the statements had on the listener." Mot. at 11; RS.219-230. That, too, is incorrect. If admitted for the effect the statements may have had on Mr. Walker, *after* he had already allegedly touched Ms. Blankney, they would have been inadmissible as having *no probative value*, because the question whether Mr. Walker should have known he lacked permission had to be answered *before* he allegedly touched Ms. Blankney, not after (which is when she made the statements). And there was no other listener upon whom the statements needed to have any effect. Of course, as explained *supra*, even if admitted, these statements still could not be used by the trial court for their truth.

C. The dual hearsay errors prejudiced Mr. Walker, because that hearsay was the primary basis of the conviction for assaulting Ms. Blankney.

In order to convict Mr. Walker for assaulting Ms. Blankney, the government was required to prove that he knew or should have known that he lacked permission to touch her. The evidence—cited by the trial court—was that she had yelled "Don't touch me." Tr. 03/03/2020, 65. This hearsay, like the hearsay about the pizza, could not be admitted for its truth; yet the trial court used it for exactly that purpose.

The court below, considering the prejudice prong in the § 23-110 motion, held that "this statement standing alone does not indicate that the complainant's hearsay statements were *the sole basis* for Judge Pittman's finding of guilt." Order at 11; RS.219-230. But the controlling case on the question of ineffective assistance, *Strickland v. Washington*, 466 U.S. 668 (1984), does not require that the errors be *the sole basis* for the result, but rather that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Copeland v. United States*, 111 A.3d 627, 630 (D.C. 2015) (quoting *Strickland*, 466 U.S. at 687, 694). Here, the trial court specifically relied upon—*and quoted* as affirmative evidence of a lack of permission—the very hearsay statements that the court was not permitted to use for their truth. And the trial court cited no other evidence of the lack of permission but Ms. Blankney's statements.[12] There is every likelihood that, lacking this key

[12] The court did note that "Ms. Blankney reacted very negatively." Tr. 03/03/2020, 64. But it did so *as an introduction* to her negative statements, which

[Footnote continued on next page]

evidence, the outcome would have been different, because without those inadmissible statements to provide context, the remaining evidence was equivocal at best.

D. Without this hearsay, which obviously should have been excluded, there was insufficient evidence to convict Mr. Walker of simple assault on Ms. Blankney.

The government's inescapable burden, to secure a conviction against Mr. Walker for assaulting Ms. Blankney, was to prove that Mr. Walker knew or should have known that he lacked permission to touch her. Ordinarily, *if true*, this evidence could easily have been provided by the complainant. However, the government did not call the complainant to testify. As a result, the *only* evidence was provided by Mr. Bracy.

The evidence that Mr. Walker knew or should have known that he lacked permission to touch her—as cited by the trial court—was that Ms. Blankney reacted negatively, yelling "Don't touch me."[13] Tr. 03/03/2020, 65. *This was hearsay.* And other than this hearsay, the government elicited little that proved this essential element required for a conviction of simple assault. The court below, in denying the § 23-110 motion, noted that the trial judge "indicating in his ruling that Mr. Bracey's testimony that he [1] had witnessed the offensive touching and [2] saw Ms. Blankney's negative physical reaction to Mr. Walker's actions, were

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are the hearsay at issue here, and which the trial court quoted directly following that introduction.

[13] To a lesser extent, the statement, "you can't have any" of her pizza, was also admitted for the truth, because the truth of the statement that Mr. Walker could not share her pizza could add to the notion that he was not welcome. The statement proved nothing else that was relevant.

compelling pieces of testimony that he considered." Order at 11; RS.219-230. But simply witnessing the touching did nothing to prove that it was without permission; and the "negative physical reaction" could *only* be interpreted as unambiguously negative in light of the hearsay.

Moreover, the court's mention of that negative reaction simply came by way of an introduction to the things that were negative: her negative statements, which are the hearsay at issue here, and which the trial court quoted directly following that introduction. Tr. 03/03/2020, 64.

> Ms. Blankney reacted very negatively. She had been refusing, according to the witness, refusing defendant's request for a slice of pizza, and then after he touched her, jumped back, yelled, "Don't touch me," and continued to yell at him according to Mr. Blankney.

Tr. 03/03/2025, 65. Without this hearsay, the remaining evidence was at most equivocal, and it could not prove beyond a reasonable doubt Mr. Walker knew or should have known that any touch was without permission.

Because there is "a reasonable probability that, but for counsel's unprofessional errors," and without the hearsay to provide direct evidence and context, "the result of the proceeding would have been different," *Copeland*, 111 A.3d at 630, the failure to object to this obvious hearsay was ineffective assistance under *Strickland*, and the judgment and sentence should be vacated.

IV. The conviction for assaulting Ms. Blankney should be reversed because the trial court plainly erred when it admitted and used the hearsay evidence provided by Mr. Bracy.

Admission of this hearsay was an error, as explained *supra*, and the error was plain: The rules governing the admission of hearsay—especially that if

admitted for another purpose, it may not be used for the truth of the matter asserted—are long-standing and well-known in this jurisdiction. *See, e.g.*, *Jones*, 17 A.3d at 632; *Evans-Reid*, 930 A.2d at 944. These are the first two prongs of the plain-error standard. *See Sims v. United States*, 213 A.3d 1260, 1272 (D.C. 2019) (recognizing the first two prongs as "assertions of error" and "the plainness thereof").

"[A] nonconstitutional error is harmless," this court explained in *Sims*, "if we can 'say with fair assurance' that the error did not substantially sway the judgment." 213 A.3d at 1272. "The standard for reversal where more than one error is asserted on appeal is whether the cumulative impact of the errors substantially influenced" the verdict. *Id.* (quoting *Smith v. United States*, 26 A.3d 248, 264 (D.C. 2011)). "In assessing harm," this court has further explained, "we examine the trial court's two erroneous evidentiary rulings together." *Id.* (quoting *In re C.A.*, 186 A.3d 118, 126 (D.C. 2018)).

Without Ms. Blankney's direct testimony (which the government, if it wanted to, could have adduced), the only evidence that Mr. Walker may have assaulted her was provided by Mr. Bracy. And Mr. Bracy's primary evidence that the conduct was not consensual were the hearsay statements, and a physical movement that could only be explained as "negative" by those hearsay statements. The trial court did not cite anything else. *See* Tr. 03/03/2020, 64-65.

In fact, Mr. Bracy's only additions to those statements were (1) that she moved away from Mr. Walker, and (2) that these statements were adorned with profanity and frustration. But without the statements themselves, that alleged

profanity and frustration would have been contextless, and therefore meaningless. As a result, much of the government's case and summation focused on bolstering Mr. Bracy's recounting of those hearsay statements, and without those statements, the remaining testimony was threadbare. And because the hearsay statement relayed by Mr. Bracy, with its damning but unverifiable claim that Mr. Walker did not have permission to touch Ms. Blankney, was shielded from adversarial testing and highlighted by the government, the trial court appears to have given it significant weight. *See Sims*, 213 A.3d at 1274.

Furthermore, this court's inquiry "turns not on whether the other evidence presented at trial would be sufficient to establish guilt, but rather on whether it is 'highly probable' that the errors at issue did not contribute to the verdict," and on "the combined effect of these errors against the strength of the prosecution's case." *Id.* (quoting *Gabramadhin v. United States*, 137 A.3d 178, 185 (D.C. 2016), and *Smith*, 26 A.3d at 264) (cleaned up). The remaining evidence, essentially that Ms. Blankney "jumped back," is too equivocal—unadorned with the necessary but improper context that the hearsay provided—to bear the weight of the element that the government was required to prove beyond a reasonable doubt: that Mr. Walker *knew* (or should have known) that he lacked consent. After all, without that inadmissible hearsay, the reaction may just as well have proved that Ms. Blankney was surprised but not angry. In short, without that inadmissible hearsay, none of the remaining evidence is enough to prove that it is "'highly probable' that the erroneously admitted hearsay was immaterial to the [trial court]'s assessment" of

Mr. Walker's guilt. *Sims*, 213 A.3d at 1274. The trial court's verdict on the alleged assault of Ms. Blankney should be vacated.

CONCLUSION

Therefore, this court should vacate the two simple assault convictions remand for dismissal.

June 30, 2025

Respectfully submitted,

s/ Richard P. Goldberg

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CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2025, I caused the foregoing to be served via the court's electronic filing and service system, upon all counsel of record.

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