IN THE DISTRICT OF COLUMBIA
COURT OF APPEALS

Appeal No. 23-CF-852
(Crim. No. 2021-CF1-005603)

SHAKA HALTIWANGER

Appellant,

v.

UNITED STATES OF AMERICA

Appellee.

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

BRIEF FOR APPELLANT

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LIST OF PARTIES

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STATEMENT OF THE CASE AND JURISDICTION

Appellant Shaka Haltiwanger was charged in an Indictment (R. 899-90 (PDF)) [1] with Second Degree Murder While Armed in violation of D.C. Code §§ 22-2103, 4502; [2] Possession Of A Firearm During A Crime Of Violence in violation of D.C. Code § 22-4504(b); Carrying A Pistol Without A License in violation of D.C. Code §§ 22-4504(a)(1) and possession of a large-capacity

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[1] Citations to "R. * (PDF) or "RS" * (PDF) refer to the Record on Appeal or Supplemental Record on Appeal (Sealed) followed by its PDF electronic page number, followed by the specific page number of the original document, if applicable. *See* D.C.App. R. 28(e).
"*/*/* Tr. *" refers to the date of transcript proceedings in Superior Court followed by the court reporter's designated page number.

[2] All D.C. Code references are to the 2001 edition.

ammunition feeding device in violation of D.C. Code §§ 7-2506.01.

Pretrial proceedings and a jury trial were presided over by D.C. Superior Court Associate Judge Rainey Brandt. On March 22, 2023, the jury returned guilty verdicts on all counts (R. 1260-61 (PDF); (3/22/23 Tr. 7)). On September 19, 2023, the court sentenced Mr. Haltiwanger to 24 years of incarceration followed by 3 years of supervised release for second degree murder while armed, a concurrent term of 60 months for possession of a firearm during a crime of violence, and concurrent terms of 12 months each for possession of a large capacity feeding device and carrying a pistol without a license. Four hundred dollars was assessed under the Victims of Violent Crimes Act (R. 1292 (PDF); (9/19/23 Tr. 41)).

A timely Notice of Appeal was filed on October 11, 2024 (R. 1296-97 (PDF)). This court has jurisdiction pursuant to D.C. Code § 11- 721(a)(1), which provides the Court of Appeals with jurisdiction to review "all final orders and judgments" of the District of Columbia Superior Court.

STATEMENT OF FACTS

Government's Evidence

Keith Taylor testified he suffered a stroke about four or five years before that affected his motor functions and speech. His 39-year-old son, Anthony Kelley, moved into his one bedroom apartment at 1400 29th Street Southeast apartment

number 13 to help him for about a year and a half before moving out. Mr. Kelley slept in the living room where there was a bed and couch. Mr. Kelley moved out of his father's apartment about six months before the events in this case (*id.* at 144). Mr. Taylor opined he was an absent parent who missed his son's childhood because of his longtime addiction to crack cocaine (3/8/23 Tr. 128-35, 144). [3]

Mr. Taylor knew his son drank liquor regularly but never saw him violent or angry (*id.* at 137-38). When Mr. Taylor smoked crack in his apartment, his son worried to him the vapor could affect him and his Amtrak job because they would test for drugs (*id*. at 141-42). Mr. Taylor knew his son was had strong feelings against his drug use and wanted him to stop. When his son was not in the apartment he would buy crack there like he did with Mr. Haltiwanger the evening of September 10, 2021, but if his son was present he would leave the apartment to purchase drugs. Mr. Taylor never introduced Mr. Kelley to his dealers and Mr. Haltiwanger was no exception, they didn't know each other (*id*. at 143-44).

Mr. Taylor's apartment was situated at the end of a hallway on the second floor across from Ms. Pittman in apartment 12. Their hallway led to stairs down to the first floor and lobby area. Mr. Taylor was home in his apartment on September

[3] Mr. Taylor testified his son told him he was moving out of the apartment in order to spend more time with his young children but his mother testified, *infra*, the move was because he did not like the bad company his father kept (*id*. at 107, 144).

10, 2021 (3/8/2023 Tr. 144-45). Between 2:00 a.m. and 4:00 a.m., Mr. Taylor was in the company of his girlfriend Vanessa Green who also lived in the building and they were smoking crack together that Mr. Taylor purchased from Mr. Haltiwanger, who he identified in court as someone he knew as "Yungin" (*id*. at 146-47, 153). Mr. Taylor had bought drugs from Mr. Haltiwanger at an average of four or five times a week in the past month or two. That day he used Ms. Green's phone to call Mr. Haltiwanger and ask him for a "tix", meaning allowing him to buy the crack on credit in exchange for paying back double later (*id.* at 147-50).

Mr. Haltiwanger arrived at Mr. Taylor's apartment and sold him $50 worth of crack cocaine on credit (3/8/23 Tr. 151-52). Sometimes Mr. Haltiwanger would sleep at Mr. Taylor's apartment like he did that night (*id.* at 155). [4] After Mr. Taylor purchased the crack, Mr. Haltiwanger stayed in the living room and Mr. Taylor and Ms. Green went and smoked the crack in Mr. Taylor's bedroom. That took about 15 minutes, Mr. Haltiwanger would not sell him more on credit and Ms. Green went home at about 4:15 a.m.. Mr. Haltiwanger had the same red backpack with him he often carried, but Mr. Taylor never saw the contents (*id.* at 158-59). At about 5:00 or 6:00 that morning Mr. Taylor saw Mr. Haltiwanger asleep on the

[4] When he would tell Mr. Haltiwanger he could not stay the night, he always left without any argument. Mr. Haltiwanger was never violent in their frequent 4-5 times a week drug dealings and never forced him to buy drugs (*id*. at 174-75, 182).

couch in the living room and he went to sleep in his bedroom (*id.* at 159).

Mr. Taylor testified it had been two to three weeks since he had spoken to his son and that morning he apparently entered the apartment unannounced with his key (*id*. at 159-60). The way the apartment was configured, from the living room where Mr. Haltiwanger was sleeping, he would not be able to see Mr. Kelley coming in from the front door (*id*. at 136). Mr. Taylor was suddenly awakened when he heard his son yelling and screaming angrily (*id*. at 176). He went from his bedroom to the living room and saw his son aggressively grabbing Mr. Haltiwanger with both hands and saying, "Get the fuck out. Get the fuck out" (*id*. at 161, 176-78). Mr. Haltiwanger did not resist in any way, did not threaten him, fight back or put his hands on him. Mr. Haltiwanger only grabbed his backpack as Mr. Kelley was shoving him out the apartment door. Mr. Taylor testified he tried to intervene and stop his son from continuing the assault on Mr. Haltiwanger but his son pushed him out of the way and followed Mr. Haltiwanger out. When Mr. Taylor recovered from being pushed and made his way out into the hallway he did not see either of the men but then heard a shot. Ms. Pittman came out of her apartment and was saying she heard a shot and to call police (*id*. at 161-64, 178-81). Mr. Taylor rushed downstairs and saw his son had been shot. Ms. Green's daughter Tamika was holding a towel to his wound. Mr. Kelley told his father to

call 911. His 911 call was made at 11:29:46 a.m. and played for the jury (*id.* at 165-68, 172-74). [5]

Linda Pittman from apartment 12 testified she heard very loud arguing for several minutes and came out to tell whoever that was to stop and at the same time saw Mr. Taylor emerge from his apartment door. (3/13/23 Tr. 131, 151). They both walked to the top of the steps on the second floor hallway and she heard a male voice from below say, "I'll drag your ass" (*id.* at 135). Two seconds later she heard a gunshot and she ran back into her apartment as Mr. Taylor started down the stairs (*id*. at 135, 144). Ms. Pittman's 911 call was played for the jury (*id*. at 144-46).

Vanessa Green identified Mr. Haltiwanger in court as the person she knew as "Forty", a drug dealer she purchased crack from a few times a month for three or four months prior to the shooting. [6] She saw Mr. Kelley almost every day before

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[5] Videos were introduced into evidence showing Mr. Taylor identifying a picture of Mr. Haltiwanger to police as the person who was in his apartment and telling police at 12:26:35 that Mr. Haltiwanger had called him from private numbers after the shooting (*id.* at 168-7; 3/9/23 Tr. 100-102).

[6] The telephone number Ms. Green had in her phone for Forty was (202) 940-2332 (3/9/23 Tr. 55). A custodian of records for T-Mobile testified the number was associated with an account for an individual named Kevin Bey (*id*. at 111). FBI Special Agent Luis DeJesus, qualified as an expert in cell site analysis, testified he performed a historical analysis of that number and one associated with Ms. Green (*id.* at 157-61). He concluded both numbers were in the same vicinity of the shooting between the hours of 10:01 a.m. and 11:27 a.m. and afterwards the number ending in 2332 moving east away from the scene (*id.* at 171-77).

he died because he had a close dating relationship with her daughter Tamika (3/9/23 Tr. 24-25, 48-56). Ms. Green smoked crack with Mr. Taylor and had a continuing close dating relationship with him (*id.* at 49, 57, 85). Ms. Green suffered a stroke at some point after Mr. Kelley was shot that affected her physically and her memory but said she remembered the events of September 10, 2021 (*id*. at 26, 28). Ms. Green was present when Mr. Haltiwanger came over to Mr. Taylor's apartment at their behest to sell them crack and testified that she bought ten dollars worth from him too that she and Mr. Taylor smoked before she went back to her first floor apartment for the night (*id*. at 57-59). At about 11:30 a.m. Ms. Green was awakened by her dog and heard a noise that made her think her son was trying to get into the front door of the building and had not key but when she went to the front door and looked he was not there (*id.* at 30-31, 37-38).

As she went back toward her apartment but while still in the hallway she heard footsteps coming down the stairs and assumed a dispute on the second floor was occurring after hearing a female saying not to fight in the hallway and to take it elsewhere (*id.* at 34-35). Then she saw Mr. Kelley, who she referred to as "Ant" come toward her looking unhappy and right behind him Mr. Haltiwanger, who she said shot Ant in his back (*id.* at 39, 66, 72). She testified at trial she heard the shot

but did not see a gun, she believed the gun was in the backpack Mr. Haltiwanger had and Mr. Haltiwanger must have shot through that, but after being refreshed with her grand jury testimony where she testified she saw a beige or gray color gun come out of the backpack, she adopted her grand jury testimony (*id.* at 67-69). Ms. Green testified after he was shot Mr. Kelley fell backwards onto his back and she said to Mr. Haltiwanger, "Damn, you just shot him" (3/9/23 Tr. 39-40). She said he just looked at her and left the building in a hurry (*id*). Ms. Green went into her apartment retrieved her cell phone and called 911 at 11:29:19 a.m.. A recording of that call was admitted into evidence and played for the jury (*id.* at 41-43). [7]

Ms. Green testified she knew Mr. Haltiwanger to have two cars and one was an Infiniti (*id.* at 59-60). At a friend's house a few months prior to the shooting she saw the handle of a gun hanging out of a backpack he had on the floor (*id*. at 62). She could not recall the color of the backpack or of the handle of the gun but recognized it as a gun (*id*.). She denied seeing Mr. Kelley with a gun or picking up a gun from the floor after he was shot (*id*. at 64).

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[7] On the scene Ms. Green identified a picture of Mr. Haltiwanger from a DMV photo shown to her by Detective Kevin Becker and told him that a jacket located on the floor in the hallway belonged to him. Ms. Green reported to police she thought unknown and blocked calls she did not answer from a private number she got the day after the shooting and then before her grand jury testimony were from the defendant and not coincidental but couldn't tell (*id*. at 43-45, 47, 93-98).

On cross-examination Ms. Green acknowledged (3/9/23 Tr. 75-77) that body-worn camera video taken on the scene at 11:48:13 that day and played in court by defense counsel showed her telling police "the dude turned around and shot him" (*id.* at 77). She was also captured on video on the scene telling another officer she first heard a pop and after that she turned around and saw Mr. Kelley lying on the floor (*id.* at 77-78, 82-83*)*. She acknowledged that on the scene she did not tell any officer Mr. Haltiwanger shot Mr. Kelley in the back and that the first time she said that was in her grand jury testimony two weeks after the shooting, and after her daughter Tamika had been arrested for a serious but unrelated felony in D.C. (killing her ex-boyfriend) that carried a potential of significant jail time and was still pending (*id.* at 84). Tamkia was arrested later that very same day Mr. Kelley was shot. She denied her daughter's situation with the government led her to change her statements (*id.* at 48-49, 88-89). Ms. Green testified it was "possible" her memory of what occurred was better on the scene when speaking to police than two weeks later in grand jury (*id*. at 85-86, 88-89). [8]

[8] Ms. Green testified she was nervous on the scene the day of the shooting and did not know who knew Mr. Haltiwanger and might be listening to her talking to police where she was inculpating him (*id*. at 90). Detective Becker stated Ms. Green was nervous and stated a preference to talk to police in the privacy of her apartment where she identified for him a photo of Mr. Haltiwanger (*id*. at 99).

Donna Kelley testified she was briefly married to Keith Taylor, Anthony Kelley's biological father, and was aware her son had strong feelings about his father's drug addiction and toward those he saw as bad company his father kept as a result of his addiction (3/8/23 Tr. 102-04). She knew her son frequently drank liquor and had been living with his father until February or March 2021, to help him out due to his health issues, but then moved out because he could not tolerate "the company he [Mr. Taylor] kept" (*id*. at 107). [9] Ms. Kelly learned of the shooting from a call Mr. Taylor made to her from the scene (*id.* at 108).

In response to the 911 calls of a shooting Metropolitan Police Department Officer Jack Krycia arrived on the scene at about 11:30 a.m. (3/8/23 Tr. 62-63). The apartment building did not have surveillance cameras but Officer Krycia's body-worn camera video that was played for the jury (Government Exhibit 401) showed Mr. Kelley lying on the first floor inside the building and being treated by a paramedic for an apparent gunshot wound before pronounced dead at the scene (*id*. at 65-67, 71, 77, 83). Numerous Government Exhibits (*id.* at 73) were admitted

[9] Antonia Jackson, Mr. Kelley's estranged wife, testified she had lived with Mr. Kelley for 3 years but for the 3 years before he was shot she had not been living with him and did not have a lot of personal contact with him. In her experience she knew that Mr. Kelley drank liquor excessively (3/8/23 Tr. 116, 119-20). When drunk he would alternate between a sad and happy state of mind, she did not see him act violent and did not know him to carry a weapon (*id*. at 117-18).

into evidence through Officer Krycia. *See* Exhibit Summary (R. 1186-90 (PDF)). He testified one bullet fragment on the scene and no shell casings (*id*. at 80).

Rosemarie Schuster, a forensic scientist for the Department of Forensic Science processed and swabbed for DNA a silver Infiniti. Among other things she observed and collected was a leafy substance, scale in the front console, four cartridge casings, a prescription receipt with the defendant's name on it (3/9/23 Tr. 129, 133, 138-47). Over objection, Ms. Schuster was permitted to testify she also found a recently dated retainer agreement signed by Mr. Haltiwanger with another individual to represent him in a legal matter (*id.* at 148-49).

Ms. Hackett testified she reported to police hearing a gunshot and then seeing an African-American man with a limp walking on O Street, stop at a parked silver Infiniti and place something underneath the front passenger side of the vehicle. She did not see his face but saw him walk to the back of a nearby house and then come out a couple of minutes later and get in the back of a white vehicle speeding down the street (3/13/23 Tr. 157-59, 162). Keys found in the jacket on the floor of the apartment building opened the door to the Infiniti (3/13/23 Tr. 63-65, 74-77). Officer Krycia located a black firearm on the front passenger side wheel of the vehicle (3/8/23 Tr. 83, 87; 3/13/23 Tr. 79-80). No fingerprints were recovered from the firearm. Swabs from the firearm indicated the presence of Mr.

Haltiwanger's DNA and DNA from unknown individuals and excluded Mr. Kelley. The same results were found from swabs of the jacket and the Infiniti (3/13/23 Tr. 12-13, 41-43, 46-57, 91-93).

Stephen Rasso, the deputy chief toxicologist for the D.C. Office of the Chief Medical Examiner testified that a toxicology analysis performed on Mr. Kelley as part of the autopsy showed a high blood alcohol level of .29 at time of death and as high as .35 at some point earlier (3/13/23 Tr. 94, 107-110, 115-16, 118). He agreed that high reading could impaired judgment, inhibitions lessened and a possible rise in belligerence and aggressive behavior (*id.* at 119). [10]

Over objections, the government was permitted to bring out testimony in its case-in-chief that Mr. Haltiwanger had a monthly telephone check-in with a government employee and that after the shooting he failed to keep those appointments (3/13/23 Tr. 125-28).

Ryan Iorio was the lead crime scene technician in the case. He did not see any weapon in the hallway of the apartment building or shell casings but he

[10] During a discussion of jury instructions the court mentioned the numbers meant to it Mr. Kelley's blood alcohol level was "more than three times the legal limit in the District of Columbia, so he was not by any stretch of the imagination sober" (3/20/23 Tr. 135). In what the judge described as vast experience presiding over driving while intoxicated cases (*id.* at 135) she wondered "how in the world he [Mr. Kelley] drove that day without getting pulled over, because he was not clear-headed by any stretch of the imagination." (*Id*. at 136).

recovered among other items a bullet fragment from the stairs in the foyer of the apartment building, and a jacket in the hallway and its contents which included the title to a 2006 Infiniti (3/15/23 Tr. 7-8, 14-15, 17-20). What was suspected to be blood was found on the foyer stairs (*id*. at 21). The firearm found on the top of the passenger tire of the Infiniti and cartridge casing that was found in the chamber of the gun were entered into evidence (*id*. at 21-25). After the Infiniti was towed Mr. Iorio noticed a magazine on the ground and loose cartridges (*id*. at 26, 28-29). On cross-examination he confirmed the inside of Mr. Taylor's apartment was not searched for a weapon or processed by law enforcement for evidence (*id*. at 32).

Richard Wyant, an expert in firearm and tool mark examination testified the gun found in the Infiniti was a semiautomatic with a drum portion in the grip that could hold 50 bullets, and the gun had a cartridge casing stuck in the chamber that had not been manually ejected. Mr. Wyant concluded the cartridge cases he examined all came from the same Glock type gun (3/14/23 Tr. 16, 24, 31-40).

Deputy Medical Examiner Kimberly Golden performed the autopsy on Mr. Kelley on September 11, 2021, signed his autopsy report on December 1, 2021, and amended it in February, 2023 (Government Exhibits 700 and 700(A)) (3/15/23 Tr. 33-34, 38, 40, 42, 84, 100). Mr. Kelley was 5'8" tall and weighed 200 pounds (*id*. at 50). An eyeball examination for soot or stippling did not seem to indicate the

one shot that entered the left side of his back and exited the left side of his chest was fired from close range but a microscopic examination for soot or stippling was not performed (*id.* at 55-60, 64-66, 89-91, 96). Metallic bullet fragments were recovered from the wound (*id*. at 59, 62). The only other injury was a scraped elbow (*id*. at 67-68). Mr. Kelley's manner of death was classified as a homicide caused by a gunshot that caused severe internal injuries (*id*. at 69).

On cross-examination, Dr. Golden acknowledged that the absence of identifiable soot or stippling around the wound of a gunshot victim means . . . the exact range [of fire] is unable to be determined" (*id.* at 71-72). Although Dr. Golden concluded the gunfire was not within a few feet due to the absence of visible soot or stippling, she could not say how far away Mr. Kelley was from the gun (*id*. at 115). She admitted that in February, 2023, she supplemented her autopsy report that had already been reviewed by three other medical examiners to change the abrasion she saw on the body from left elbow to right elbow (*id.* at 73-77, 99). Dr. Golden could not speculate whether soot or stippling was wiped away from the wound by emergency medical services who provided treatment to Mr. Kelley on the scene (*id*. at 79). Although she concluded from her examination of the wounds that a bullet entered Mr. Kelley's back, she could not say the person who fired the gun walked up upon him from behind him and shot him or intended

to (*id.* at 87-88). Before autopsies are performed on any given day, morning meetings are held at the offices of the medical examiners to review "information that is gathered by the investigators" (*id*. at 109) specific to each case "that provides information about the circumstances surrounding death" (*id*.).

Government records showed Mr. Haltiwanger nor Mr. Kelley had a license or registration for a firearm in D.C. or Maryland (3/14/23 at 46-47, 51).

After the government rested, a motion for judgment of acquittal was lodged by the defense and denied by the trial court (3/13/23 Tr. 130-41).

Defense Evidence

Shaka Haltiwanger testified he was twenty-three years of age, raised by his grandmother and sister in the District of Columbia and had a high school diploma. He knew Vanessa Green and Keith Taylor (he called them "Ma V" and "Mr. Keith", respectively). He was introduced to them by his only other customer in that apartment building. They were drug users and he sold drugs to them on a regular basis. They would call him or vice-versa almost daily for months preceding the shooting to conduct their drug transactions (3/20/23 Tr. 23-25, 92-93, 96).

Mr. Haltiwanger told the jury he had a limp foot in 2021 and continued to have that impediment due to a spinal cord injury he suffered from a past gunshot wound and was still learning how to walk again (*id*. at 26). In 2021 and at trial his

mobility was limited, he was unable to "run or feel, like, my left foot" (*id*. at 27). [11] On September 10, 2021, he was "unbalanced, unstable, couldn't run. . . . My walker was actually in my trunk" (*id*.). That evening he went over to Mr. Taylor's apartment after he and Ms. Green called him to come over and sell them drugs. Afterwards it was late and Mr. Taylor gave him permission to stay and sleep in his living room (*id*. at 27-28). He eventually fell asleep on the couch and later was abruptly woken up by "somebody shaking me, kicking me and with a gun to my head" (3/20/23 Tr. 29). Disoriented and not comprehending or able to absorb what was going on, he tried to sit up and noticed a man he did not know, but learned later was named Anthony Kelley, had a walkie-talkie attached to his waist (*id.* at 26, 29). Mr. Haltiwanger testified the man attacking him was "reeking of alcohol, and he was just acting wild, uncontrollable, like out of control (*id.* at 31). "He's telling me to get my shit, get the fuck out before he shoot me" (*id*. at 29). Because of his limp foot, he had been sleeping with his left shoe on and right shoe off, when he tried to put on his right shoe Mr. Kelley kicked it away from him (*id.* at 29-30).

Mr. Taylor appeared, unsuccessfully tried to intervene and stop the assault while saying, "Stop, Cornell. Stop Cornell. Put the gun away, Cornell." (*Id.* at 30).

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[11] The court noted that during trial Mr. Haltiwanger made use of a cane to walk (3/15/23 Tr. 152). Mr. Haltiwanger testified that in 2021 anyone could see he was a physically "vulnerable" person, not a "threat", "harmless" (3/20/23 Tr. 98).

Mr. Haltiwanger told Mr. Kelley he was trying to leave like he wanted but he was kicking his shoe so it made no sense (*id*.). Mr. Kelley yelled at him again to get his stuff and leave before he killed him (*id.* at 32). Consistent with Mr. Taylor's testimony, he did not argue with the man, put his hands on him or try to defend himself in any way. Mr. Kelley dragged him to the apartment door with gun in one hand and one hand on him as he threw him out into the hallway. On the way out Mr. Haltiwanger was able to grab the book bag he had brought with him. In it was a gun he carried for protection having been shot three separate time by the time he was 22 years old. He testified he had no intention of using the gun, he was just trying to get away safely and make it out alive (*id.* at 28, 32-33, 50, 100-101).

Mr. Haltiwanger testified that after he was thrown out of the apartment he made it to the stairwell leading down to the first floor exit but heard Mr. Kelley coming for him again from behind and saying he was going to kill him. He steadily followed him down the steps "out of control" (3/20/23 Tr. 33). He did not look back as he made his way down the stairs but started to unzip his bag as he heard Mr. Kelley's voice "getting louder and louder" (*id*.). Mr. Haltiwanger told the jury he was "scared to death" (*id*. at 34) between the pursuit, constant threats to shoot him and "the more he talked, the madder he got" (*id.* at 102). After he unzipped the book bag he asked Mr. Kelley why he was still following him. Mr.

Kelley responded, ""Nigger, I'll drag your ass," and he grabbed me." (*id*. at 34). Mr. Haltiwanger took that to mean he was going to harm him, shoot and kill him (*id.*). Unable to run or walk away, substantially outweighed and to save his own life, Mr. Haltiwanger reached into his book bag for his gun, slightly turned to get away from Mr. Kelley's grasp around his waist, removed the gun from the bag and fired one shot, not really aiming. Mr. Haltiwanger's jacket, which had been tied around his waist, had come off when he was grabbed and it slipped to the floor. He identified the jacket found at the scene and its contents as his as well as the gun and magazine (*id*. at 35-37, 67, 50, 103-104, 114). [12]

After he fired he heard Mr. Kelley express physical pain. As he left the building seeking safety he passed Ms. Green on his way out, who he said looked "shocked" (*id.* at 38). Mr. Haltiwanger made his way to his Infiniti parked nearby but then realized the keys to that vehicle and his Volkswagen, also parked outside the building, were in his jacket that fell off him and still inside the building. He placed the gun on top of the front tire of the Infiniti, went behind a building, called someone and then left in a car that picked him up (*id.* at 39, 45-46, 59-60).

[12] Mr. Haltiwanger testified he weighed 134 pounds at the time and his gimp foot made it hard to walk much less be able to run (*id.* at 114). The autopsy report showed Mr. Kelly weighed much more at 200 pounds (3/15/23 Tr. 50).

Mr. Haltiwanger confirmed that he made calls to Mr. Taylor and Ms. Green from blocked outgoing numbers. He was calling in hopes he could find out how badly the man was hurt, who he was and why he tried to hurt him. He blocked his outgoing number thinking they might not pick up and might be upset with him after everything that happened. He testified none of his calls were meant as intimidation (*id*. at 39-40, 79-86). Mr. Haltiwanger testified he did not call police because he assumed "it wouldn't be long before they come get me. They knew who I were, so I knew that they were coming to get me. And plus, I was scared." (*Id*. at 41.). Mr. Haltiwanger explained and expanded upon evidence the government had presented of clips of recorded jail phone calls Mr. Haltiwanger had with his sister in October and November, 2021 that included discussion about his dissatisfaction with a former lawyer and information about a plea offer (3/15/23 Tr. 117-26; 3/20/23 Tr. 41-44).

After the defense rested Mr. Haltiwanger renewed his motion for judgment of acquittal and that was denied (3/20/23 Tr. 124-25).

OVERVIEW

Appellant was convicted of second degree murder while armed. He claimed self-defense in his shooting of the decedent, a stranger who undisputedly initiated contact with him by assaulting him while he slept. Appellant claims several errors

on appeal and the first is a jury selection issue. Defense counsel requested that a juror be struck for cause during voir dire after that juror made it a point to flag for the court an acute sensitivity to any graphic images. Responses to a few court questions indicated the juror could not say for sure he could put that sensitivity aside if chosen. The trial court denied the defense request to strike the juror for cause and appellant claims on appeal this was error: the juror sat as a deliberating juror in this graphic murder case that included screen images of the dead body, blood, gunshot wounds, and images and testimony to explain the autopsy report.

Appellant contends the trial court made erroneous evidentiary decisions over his objections: 1) the admission of irrelevant and prejudicial evidence of a legal retainer agreement that was found inside appellant's vehicle to show ownership or control even though appellant was willing to stipulate the vehicle was his and later testified to that, and 2) the admission of non-probative and prejudicial testimonial evidence from a "government employee" (Pretrial Services) that appellant missed his mandatory weekly call in for an unrelated matter after the shooting.

Appellant who was 23 years of age and had a high school diploma testified in this own behalf and his defense was self-defense. On appeal appellant asks this Court to reverse his convictions because over his objections, the government was permitted to cross-examine him on his knowledge of the laws of self-defense in the

District and then argue to the jury its inferences from that evidence to diminish appellant's credibility and in attempts to disprove he acted in self-defense. Appellant argues the evidence solicited and closing argument complained of was irrelevant to the issues at hand, confusing, a distraction, caused the defense of self-defense to look contrived and made up by counsel, prejudicial and resulted in burden shifting. Appellant separately argues the government failed to meet its burden to show sufficient evidence appellant did not act in self-defense, pointing out the strengths of the self-defense case and weaknesses in the government's case, which was not overwhelming, and took the jury over a day to deliberate.

ARGUMENT

I. The Trial Court Erred By Failing To Strike A Juror For Cause.

A trial court has broad but not unlimited discretion during voir dire to excuse a prospective juror for cause upon request. *(Phillip H.) Johnson* v. *United States,* 701 A.2d 1085, 1089 (D.C. 1997); *Barrows v. United States,* 15 A.3d 673, 682 (D.C. 2011) (a trial court has "broad discretion" over determinations whether to strike a juror for cause). The trial court should "dismiss a juror on the ground of inferable bias only after having received responses from the juror that permit an

inference that the juror in question would not be able to decide the matter objectively." *Doret v. United States*, 765 A.2d 47, 53 (D.C. 2000). A "cloud of bias" may remain "even after a juror states that it would agree to following court directions. *United States v. Edwards*, 34 F.4th 570, 579 586 (7th Cir. 2022).

Mr. Haltiwanger contends Juror 55, who was ultimately seated as a deliberating juror (3/7/23 Tr. 194), should have been stricken for cause as the defense requested and the trial court abused its discretion by erroneously keeping him. *Johnson, supra*. Juror 55 told the court he was concerned over the prospect of graphic evidence mentioned in the written queries to the jurors. He made it a point to respond by expressing a problem with, dislike and physical reaction (albeit less than fainting) toward seeing graphic images and blood, to the extreme of having a complete aversion to scary movies and a lack of ability to watch his own blood be drawn for a medical purpose. The court told the juror that since the case involved a shooting, there was a likelihood of graphic photographs (*id*. at 39-40).

The government inquired of Juror 55 and received less than firm responses:

> MR. JONES: Hi Sir. Do you think that your discomfort with seeing those types of things would distract you or prevent you from being able to hear the evidence in the case?
>
> JUROR: Honestly, I don't know.
>
> MR. JONES: Do you think it would affect you ability to consider the evidence impartially?

JUROR: I would hope not.

(*Id*. at 40).

Defense counsel asked to argue but the court deferred that to after other matters and the subject was revisited later in the day (*id.* at 40-42; 179-82). The prosecutor recalled that Juror 55 expressed a "general discomfort with graphic photos" and the court agreed (*id.* at 180). Defense counsel stated that the juror's response to whether he could be fair did not amount to a "firm" one (*id*. at 181). Already anticipating the graphic evidence the government would admit in their case, defense counsel added "the reality is that some of these pictures are going to be – at a minimum, will target the heart" (*id*.). The defense requested "out of an abundance of caution", that "he should be stricken for cause" (*id*. at 181). The court stated, "I don't characterize his answers as rising to the level of him not being able to be fair and impartial" (*id*. at 182).

Appellant disagrees with the trial court's assessment of what was before it. "I don't know" and "I would hope not" (3/7/23 Tr. 40) without more are less than certain responses to the limited inquiry made of the juror. *Johnson, supra* at 1089-91. "I don't know" shows a split between two minds or not enough information to make a decision on the part of Juror 55 and whether he could put aside he normal reactions to graphic material and not tune out and listen to the evidence in the case. "I would hope not" is a desire that something does not occur. Both answers are less

than affirmative responses that the juror could look at and absorb and analyze all the evidence objectively in the case. *Doret*, 765 A.2d 53. In addition, having presided over pretrial proceedings, the trial court was aware this was a shooting where the victim bled out on the scene so at a minimum it could anticipate there would be a lot of blood in photographs, this was a homicide and autopsy photographs would ordinarily be entered into evidence by the government alongside graphic testimony from the medical examiner.

Juror 55 went to the trouble of flagging for the court a specific uneasiness and discomfort to graphic images to the point where he "honestly" did not know if he would be distracted by such evidence, perhaps fall into usual mode of avoidance and tune out certain evidence altogether to protect his own emotions, like he does by never going to a scary movie and never looking when his blood is drawn (3/7/23 Tr. 40). There is also the concern that the juror would blame the defendant at trial and project upon him feelings of being repelled, uneasy and uncomfortable because no matter what, the evidence was going to be that Mr. Haltiwanger played a part in the shooting that created these uncomfortable images that would cause Juror 55 to recoil, as he indicated to the trial court he would even in much more simplistic scenarios the juror mentioned. This potential for bias should have prompted the trial court to strike this juror for cause.

The record indicates there was a plethora of graphic evidence entered into evidence. When the juror responded "I hope so" they could not have imagined the extent of the graphics they would ultimately experience in this case. First, jurors were forced to watch on a screen Officer Krycia's body-worn camera footage of him coming upon Mr. Kelley suffering from a gunshot wound and medics treating him on the scene, hopelessly (3/8/23 Tr. 64-67). Through that same officer the government introduced photographs of two different angles of the bullet wound to the victim's chest (*id*. at 75), photographs of Mr. Kelley's back with bullet hole (*id.* at 77), of blood on the scene in various area (*id*. at 79-80), photographs of victim and victim's stomach (*id.* at 74). Dr. Golden presented a detailed walk through with numerous pictures and accompanying testimony of every aspect of the autopsy she performed. Included was a photograph of the body bag with victim in it, his blood covering a white sheet in the body bag and even a gruesome picture of the deceased with an intubation tube still in his mouth (3/15/23 Tr. 43-66). The exhibits that show Mr. Kelley (uncovered), his wounds, blood on the scene and any other graphic evidence is succinctly summarized in the Exhibit Summary (R. 1188-97 (PDF)). The obviously graphic evidence is designated as Exhibit Nos. 401, 402, 403, 109, 110, 111, 129, 130, 131, 132, 147, 148, 149, 151, 156, 169, 170, 292, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311 (*id*.).

Perhaps the trial court, seasoned to graphic evidence, could not relate to "the scary movie guy" (3/7/23 Tr. 180) or a man expressing those concerns, as opposed to the seriousness of the concern the court may have otherwise had if a woman made it a point to raise similar sensitivities. In any event, between what Juror 55 shared, the brevity of the inquiry made and responses, and the defense request to strike for cause, the trial court abused its discretion in keeping this juror and Mr. Haltiwanger is entitled to a new trial as a result of the error.

II. The Trial Court Abused Its Discretion By Overruling Defense Objections To The Admission Of Non-Probative And Prejudicial Evidence That Mr. Haltiwanger Missed Mandatory Check-Ins With A Government Employee In Another Matter Shortly After The Offense Was Committed In This Case, And, Evidence Of A Legal Retainer Agreement For An Unrelated Matter That Was Found In The Infiniti.

Mr. Haltiwanger contends the trial court erred in admitting, over his objections, evidence he missed a routine call to check-in with a "government employee" (Pretrial Services) after the shooting to show consciousness of guilt and evidence there was a recently dated legal retainer agreement in the Infiniti with his and another's name on it in an unrelated legal matter. The appeals court will review a trial court's decision to admit or exclude evidence under the abuse of discretion standard. *Furr v. United States*, 157 A.3d 1245 (D.C. 2017). The trial court should exclude evidence if the **"**prejudicial effect of the proffered evidence outweighs its probative value." *Guzman v. United States*, 769 A.2d 785, 790 (D.C.

2001). *Kotteakos v. United States*, 328 U.S. 750 (1946) (error not harmless and reversal is required unless this Court can say with assurance that the judgment was not substantially swayed by the error.

Prior to trial the government filed a notice of intent to seek having admitted into evidence certain evidentiary items and the defense filed an Opposition. (R. 1031 (PDF) (Government's Notice); (R. 1127 (PDF) (Defendant's Opposition)). Two items on the government's wish list were admitted by the trial court over defense objections and are now the subject of appeal.

a. Evidence Of Failure To Comply With Unrelated Weekly Check-In.

Pretrial Services records show Mr. Haltiwanger was on supervision for possession of a firearm during a crime of violence and carrying a pistol without a license since March 26, 2021. As part of his supervision in this unrelated criminal matter he was to call in weekly to a court officer, was compliant until September 7, 2021, but failed to call in on September 14 or 21, 2021 (RS. 4-5 (PDF)). The government wanted to offer this evidence to show the number he used to call in on and his non-compliance after the shooting on September 10, 2021, as evidence of consciousness of guilt (3/3/23 Tr. 27, 32-33). The defense objected to evidence of non-compliance as more prejudicial than probative even if the testimony was sanitized as coming from a generic government employee rather than Pretrial

Services (*id*. at 28, 33). The trial court ruled the evidence was admissible (3/6/23 at 17-29). At trial the defense maintained its objections (3/13/23 Tr. 125-26). Ronetta Harris testified she was a "government employee", Mr. Haltiwanger was required to check in with her on a continuing weekly basis, he did between April and September 7, 2021, but failed to do so after that date (*id*. at 127-28).

This evidence was more prejudicial than probative and invited the jury to speculate who this "government employee" worked for that Mr. Haltiwanger was tied to call into every week for over 6 months. There could be many innocent or not so innocent but unrelated reasons he would stop calling in, including knowing he was in violation of his release by being in possession of a gun on September 20, 2021, and would be jailed for that, as opposed to the government's theory it showed a consciousness of guilt in the matter at hand and disproved self-defense. In fact, the trial court days later stated that a flight instruction for leaving the scene was inappropriate in this matter (3/15/23 Tr. 143-47) and perhaps could result in reversible error if given (and the defense agreed) because his flight might be connected to his thought "I've got an open gun case . . . [m]y pretrial conditions are going to be revoked" (*id*. at 147). The trial court reached back to the "government" employee testimony and sanitizing that (*id*. at 144-45). The court was concerned about a flight instruction and considered being on pretrial release in

another matter "a totally plausible reason as to why one would run away from a crime scene, and it's a reason that the jury has no idea about. And this is too much of a hot potato to put before them without them having a full picture to make a determination" (*id.* at 145). The trial court should have applied that same reasoning to avoid the erroneous decision not to exclude the testimony of the "government employee" of some ghost agency. It would not have been that hard for the jury to figure out this involved another criminal matter or wrongful conduct and especially in tandem with the other prejudicial evidence of a legal retainer agreement, *infra.* Evidence of other crimes and uncharged misconduct committed by a defendant is presumptively prejudicial and inadmissible. *Drew v. United States*, 118 U.S. App. D.C. 11, 331 F.2d 85 (1964); (*William*) *Johnson v. United States*, 683 A. 2d 1087, 1090 (D.C. 1996)

b. Evidence Of The Legal Retainer Agreement

Prior to trial the defense objected to the government's desire to show a legal retainer agreement between Mr. Haltiwanger and an attorney found among other things in the Infiniti (3/3/23 Tr. 34-48). The defense argued below and now on appeal the evidence was not probative and was highly prejudicial.

Rosemarie Schuster, a forensic scientist testified she processed and swabbed for DNA a silver Infiniti on September 29, 2021. Among other things she collected

was a leafy substance, scale, four cartridge casings, and a prescription receipt with the defendant's name on it (3/9/23 Tr. 129, 133, 138-47). The defense lodged objection again but based on its previous ruling the court allowed Ms. Schuster to testify she also found a written retainer agreement signed by the defendant and another individual to represent him in a legal matter and that the document was dated September 7, 2021, three days before Mr. Kelley was killed (*id.* at 148-49).

There was no probative value for the evidence that outweighed the substantial prejudice of informing the jury Mr. Haltiwanger, a drug dealer, had engaged an attorney in an unrelated matter three days before the matter. *Guzman, supra*. Clearly the legal retainer agreement was not to purchase a corporation. The evidence was not probative because 1) the defense offered to stipulate the Infiniti was Mr. Haltiwanger's and under his control; 2) there was already evidence of a prescription bottle in the Infiniti with his name on it; 3) keys and the paper title to the Infiniti were found in the jacket at the scene with his DNA; and 4) the government's DNA evidence would conclusively establish that Mr. Haltiwanger's DNA was on the steering wheel of the Infiniti (3/13/23 Tr. 42, 56-57). A prescription bottle is just as or more valuable than a copy of a retainer agreement, so the importance of the evidence to establish evidence or control was ameliorated by not only that but all the other evidence. Not knowing what the legal retainer

agreement was for made it more enticing for the jury to speculate upon in addition to his failing to fulfill a weekly call to a government employee, *supra*. The defense suggested that to make it more vanilla and less prejudicial the agreement should only be referred to as a contract and not a legal retainer agreement but the government convinced the trial court the fact it was a legal agreement made it that much more probative Mr. Haltiwanger had a presence in the Infiniti. The trial court erred in admitting this prejudicial evidence.

Reversal is appropriate because separately, and cumulatively, the evidence of the legal retainer agreement and his failure to meet his weekly long-term and continuing check-in with a government employee with a ghost agency could have substantially swayed the outcome in this case. *Kotteakos, supra.* Mr. Haltiwanger testified and his credibility was crucial to his defense. He had no impeachable convictions, which is likely why the government was so eager to bring in these items of evidence that suggested other illegalities or bad acts and a need to consult with counsel to diminish Mr. Haltiwanger's credibility.

III. The Trial Court Committed Reversible Error By Overruling Defense Objections To Cross-Examination Of This Testifying Defendant - - With A High School Diploma - - About His Knowledge Of The Laws Of Self-Defense In The District Of Columbia And Then By Allowing The Prosecutor To Argue Inferences Therefrom To The Jury In Closing Argument To Disprove He Acted In Self-Defense.

The trial court has broad discretion to impose reasonable limits on cross-examination based on concerns about, among other things, harassment, prejudice that is unfair, confusion of issues, the witness' safety, or interrogation that is repetitive or only marginally relevant. *Holmes v. South Carolina*, 547 U.S. 319, 326 (2006); *Grayson v. United States*, 745 A.2d 274 (D.C. 2000). A proposed line of questioning should be disallowed if the court concludes that its probative value is substantially outweighed by the danger of unfair prejudice. *Id.* These limitations apply equally to the testimony of defendants as to any other witness *See, e.g.*, (*Markus*) *Johnson v. United States*, 960 A.2d 281, 293-94 (D.C. 2008).

Mr. Haltiwanger, age twenty-three with a high school diploma testified in his own defense with no impeachable convictions. He admitted he sold drugs and carried a gun in his backpack he said was for protection. The governments evidence through Mr. Taylor showed the deadly altercation between he and Mr. Kelley who were strangers began when Mr. Kelley, who had a high blood alcohol level, unexpectedly made entry to his father's apartment, saw Mr. Haltiwanger sleeping in the living room, physically assaulted him, shoved him out of the apartment and shoved his father out of the way when he tried to stop the assault.

Mr. Haltiwanger defended he ultimately feared for his life. Mr. Taylor testified Mr. Haltiwanger allowed his son to throw him out and did nothing at all to

defend himself. Mr. Haltiwanger testified he eventually took his gun out of his backpack and shot in what he perceived was self-defense only after this stranger woke him with a gun to his head for no apparent reason, was physically assaulting him, threw him out and then relentlessly followed him down the stairs threatening to kill him and grabbed him again. During cross-examination, the prosecutor successfully convinced the trial court to allow him to question the witness on his knowledge of the law of self-defense, reasoning that because Mr. Haltiwanger testified he bought and carried a gun for self-defense after being previously shot at some unspecified time and seriously injured, his knowledge of the principles underlying a self-defense claim was relevant to explain all his actions in this case (3/20/23 Tr. 53). Defense counsel correctly pointed out that on direct examination he said he had obtained the gun "for protection" (*id.*) and objected to the line of questioning regarding his knowledge of the laws of self-defense, if any, as "irrelevant" (*id*.). The prosecutor responded, "his knowledge of the law of self-defense and whether he's allowed to defend himself legally goes to his state of mind" (*id*.). At trial and now on appeal, he argues that knowledge of the law at the time he got the gun, if any, lacked relevance and "[w]hat is relevant is the situation he was presented with on 2021 and the actions that he took" (*id*. at 54). *Travers v. United States*, 124 A.3d 634 (D.C. 2015) (any evidence of the defendant's

perceptions at the time he exercised self-defense and the reasonableness of his state of mind is relevant).

The court understood Mr. Haltiwanger was a "layperson" (*id*. at 55) to the law but overruled the defense objection because Mr. Haltiwanger testified after the shooting he attempted to call Mr. Taylor and Ms. Green from an outgoing blocked number to discern Mr. Kelley's condition and why he attacked him and blocked the number because he thought they might not answer the phone if they knew it was him if they were upset after what had happened (*id*. at 54-55). The court said his explanation was "wonky" because if he shot in self-defense "why wouldn't father pick up and talk to you" (*id.* at 54). The court's logic was off, because it was understandable to think Mr. Taylor might not want to be involved and talk to him after what happened no matter what the circumstances were underlying the event and Mr. Haltiwanger knew Mr. Taylor and Ms. Green had a close relationship.

The prosecutor first asked him where he got the gun, why he bought it. Mr. Haltiwanger testified he bought it from someone in the neighborhood and because after "third time I got shot, I was just, like, I need to be able to protect myself" (3/20/23 Tr. 56). The prosecutor then launched into questions about when he got the gun whether if he knew the law in the District allows someone who has been shot to defend themselves. Over objection, he had to answer if it was his testimony

he got the gun for self-defense, "but you had no idea that you could use it for self-defense?" (*Id*. at 56-57). When Mr. Haltiwanger clumsily responded he may have heard about a change in law but didn't know about it or if true (*id.* at 57) the prosecutor asked if when he got the gun he thought his only choices "were either committing murder or not using the gun in self-defense?" (*Id.*). After objection was lodged on the basis Mr. Haltiwanger was not a lawyer and the line of questioning was confusing, to which the court agreed, the prosecutor said he would move on rather than tweak his questions as the court suggested that might cause further confusion (*id*. at 58-59). The prosecutor then posed the question if he thought it would be bad for him if police found him with a gun and he responded that it might not be bad if he acted in self-defense (*id.* at 62). The prosecutor followed up by inquiring how he could know that, if he wasn't' sure "self-defense was a thing" (*id*. at 63). Mr. Haltiwanger again clumsily responded, "[I] educated myself more, and now I'm educated on that defense." (*Id.*). Mr. Haltiwanger seemed to have gotten the impression that he was supposed to know the particulars of the laws of self-defense in D.C. if his defense was self-defense.

He testified he was claiming self-defense because he believed it to be true:

> I was scared for my life. This guy is 200 pounds. I'm 134 pounds at the time. I couldn't walk. I couldn't even run. I still can't run to this day. I'm vulnerable. He's aggressive. He got a gun. He telling me to leave. I left.

> Then he come out still threatening me, and he grabbed me. What else am I going to -- what else there can I do? I'm desperate. Like, what else can I do?

(3/20/23 Tr. 114).

Over objection, in closing argument the prosecutor invited the jury to disbelieve Mr. Haltiwanger obtained the gun for self-defense in stating the gun was maybe intimidating but it was big and clunky, and if you could not stick a gun down your pants and had to conceal it in a backpack instead, it was "unsuitable for self-defense" not easy to "conceal and easily withdraw" (3/20/23 Tr. 201-03). The prosecutor told the jury that that given the government's evidence against him, there was no other defense than self-defense in this case to choose (*id.* at 205) and improperly invited the jury again not to find him not credible because:

> MR. KIMAK: This whole concept of he had never heard of self-defense - - he was very comfortable going out and arming himself with a gun. . . . you'll have to consider for yourself if you think it's reasonable that someone who purposefully seeks out a gun has absolutely no idea of what the law on self-defense is.

(*Id.* at 204).

This court has previously observed that "... where the defendant's credibility is a key issue and . . . an improper argument or instruction [that goes to credibility] will ordinarily require reversal." *Thomas v. United States*, 447 A.2d 52, 59 (D.C. 1982). Mr. Haltiwanger contends that these convoluted inquiries into his knowledge of the law of self-defense and the ying-yang 'damned if he knew the

law of self-defense (and contrived his actions) and damned if he didn't' (and could not form intent to defend) were prejudicial. The evidence solicited made evidence out of non-evidence, lacked probative value, was improper and confusing, caused the jury to focus on things other than his perceptions at the time of the shooting, was highly prejudicial and shifted the burden of proof. As in every self-defense case, the jury was instructed that it was not Mr. Haltiwanger's burden to prove he acted in self-defense; it was the government's burden to prove he did not. *Bynum v. United States,* 408 F.2d 1207 (D.C. Cir. 1968). The government shifted it burden by putting the burden on him know the law of self-defense and fall under it. Even if there was any legitimate probative value to probing Mr. Haltiwanger's understanding of the juxtaposition of his actions to his knowledge of the law, the probative value was not outweighed by unfair and substantial prejudice requiring reversal of his convictions and a remand for a new trial. *Kotteakos, supra*. Just because the jury was instructed it was the government's burden to disprove self-defense, in this situation, it still may have been clear through the defense objections getting overruled on the topic (and a relatively clean trial otherwise) that his understanding of the law, even as far back as when he purchased the gun, was relevant to the jury's analysis he mean to defend or kill.

Mr. Haltiwanger had a high school diploma and was represented by counsel. It is commonly known that strategy and defenses in a criminal matter are decided by counsel, not the defendant. As his counsel argued to the court in trying to convince the court nor to err, it was Mr. Haltiwanger's perception of events at the time of the shooting and how he acted in accordance with those perceptions was relevant for the jury to assess, and not his perception of the law or whether self-defense was a viable defense for him legally. It was the court's job to instruct the jury on the legal principles underlying a claim of self-defense. Nowhere in its instructions did the court address how defendant's knowledge of the law or lack thereof was to be assessed by the jury or tell the jury to ignore it.

Although there may be some situations where a defendant's knowledge of the legal principles underlying the laws of self-defense when they obtain a gun or otherwise may be relevant to or probative of facts in a case, this case was not one of them. For instance, if Mr. Haltiwanger had applied for or obtained a concealed carry permit to carry a firearm in the District and was claiming self-defense this line of questioning would have been relevant and more probative than prejudicial. To obtain a conceal carry permit an applicant must attend mandatory firearms

safety training that includes receiving 31 pages of information regarding D.C. specific laws and jury instructions pertaining to self-defense. [13]

What occurred was prejudicial because Mr. Haltiwanger's credibility was key to his defense. His testimony reads as forthright and was consistent with much of the government's evidence. On the other hand, it was different in some key respects. However, the government's evidence was not entirely overwhelming. Mr. Haltiwanger did not start the altercation, he did not defend himself immediately, he was at a disadvantage physically[14] and the key government witnesses were impeached and their credibility weakened. In the case of the only eye-witness to the shooting damaging testimony of Ms. Green that she saw him shoot Mr. Kelley in the back, he was able to impeach her and show without doubt that Ms. Green gave statements to more than one officer on the scene, never said Mr. Kelley was shot in the back and in fact told police she saw Mr. Haltiwanger turned around and then shoot indicating Mr. Kelley was behind him which was consistent with his

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13 https://mpdc.dc.gov/sites/default/files/dc/sites/mpdc/page_content/attachments/District%20Law%20Pertaining%20to%20Self%20Defense.pdf

14 The court found his physical limitations relevant to self-defense and why could not run away and being shot in past relevant to his state of mind and need for protection to carry a gun and that he could testify to his limitations without a doctor (3/20/23 Tr. 8-11).

version of events. Ms. Green admitted that the first time she ever reported Mr. Haltiwanger shot Mr. Kelley in the back was two weeks after the shooting in her grand jury testimony. The shocking twist was Ms. Green's daughter - - who had been dating Mr. Kelley when he was killed - - was arrested later in the same day he was shot for killing her ex-boyfriend in 2020 and her case was still pending at the time of Mr. Haltiwanger's trial. In the case of the Dr. Golden, the medical examiner's testimony that a review of her autopsy report showed she concluded the bullet entered the left side of the back and exited the front and could look at photographs and maintain those conclusions with some confidence, the defense was able to have that same witness acknowledge that she had to change her autopsy report because she mistakenly stated in it an abrasion was found on the arm of the decedent but reported the location of it on the wrong arm.

When the shoe was on the other foot, the government did not want legal concepts to be shared or explained to the jury by any other than the court. In a Motion In Limine filed before trial the government stated that even though jurors would be instructed on "beyond a reasonable doubt" and instructed statements of counsel are not evidence, it wanted the court to rule the parties could not argue to the jury the legal concept of reasonable doubt because that important legal term might be compromised by the defense and confuse the jury (R. 968-74 (PDF)).

Appellant argues the evidence solicited and closing argument complained of was irrelevant to the issues at hand, confusing, a distraction, caused the defense to look contrived and a product of lawyering, was more prejudicial than probative and resulted in burden shifting. This court cannot say that the jury was not substantially swayed by the errors and as a result, Mr. Haltiwanger is entitled to a new trial.

IV. The Government Failed To Meet Its Burden Of Proving Beyond A Reasonable Doubt That Appellant Did Not Act In Self-Defense.

"[O]nce raised, self-defense is an element . . . that must be disproved by the government beyond a reasonable doubt." *Davis v. United States*, 510 A.2d 1051 (D.C. 1986) (per curiam). That is, once the record shows "some evidence" of self-defense, *Kittle v. United States*, 65 A.3d 1144, 1158 (D.C. 2013), the Fifth Amendment to the U.S. Constitution requires the factfinder to presume that the defendant acted in self-defense unless and until the government overcomes that presumption by disproving self-defense beyond a reasonable doubt. *See In re Winship*, 397 U.S. 358, 363-64 (1970). Proof beyond a reasonable doubt is a "formidable" standard, *In re As.H.*, 851 A.2d 456, 459 (D.C. 2004); indeed, it is "the most exacting standard known to the law," *Davis v. United States*, 834 A.2d 861, 867 (D.C. 2003). The reasonable doubt standard "requires the factfinder 'to reach a subjective state of *near certitude*'". *Rivas v. United States*, 783 A.2d 125,

133 (D.C. 2001) (en banc) (citation omitted). The Court's review of sufficiency of evidence is *de novo*. *Russell v. United States*, 65 A.3d 1172, 1176 (D.C. 2013). To negate Mr. Haltiwanger's of self-defense, the government would have to disprove Mr. Haltiwanger believed he was in imminent danger of bodily harm, that he had no reasonable grounds for that belief, and that the deadly force used in this case was not reasonable, *Kittle,* 65 A.3d at 1158.

Mr. Kelley's mother, father and ex-wife testified he was known to drink alcohol excessively. Mr. Haltiwanger testified Mr. Kelley reeked of alcohol. Stephen Rasso, the deputy chief toxicologist for the D.C. Office of the Chief Medical Examiner testified that a toxicology analysis performed on Mr. Kelley as part of the autopsy showed a high blood alcohol level of .29 at time of death and as high as .35 at some point earlier (3/13/23 Tr. 94, 107-110, 115-16, 118). He agreed that high reading could impaired judgment, inhibitions lessened and a possible rise in belligerence and aggressive behavior (*id.* at 119). [15]

[15] During a discussion of jury instructions the court mentioned the numbers meant to it Mr. Kelley's blood alcohol level was "more than three times the legal limit in the District of Columbia, so he was not by any stretch of the imagination sober" (3/20/23 Tr. 135). In what the judge described as vast experience presiding over driving while intoxicated cases (*id.* at 135) she wondered "how in the world he [Mr. Kelley] drove that day without getting pulled over, because he was not clear-headed by any stretch of the imagination." (*Id*. at 136).

Unprovoked, Mr. Kelley cussed and screamed at him and was physically assaulting him. Mr. Haltiwanger did not know who this inebriated person was but saw Mr. Kelley be relentless and shove Mr. Taylor away when he tried to intervene and stop the assault. Mr. Haltiwanger testified when he woke up to the violent attack Mr. Kelley had a gun to his head, was cussing at him and telling him to leave and threatening to shoot him (3/20/23 Tr. 26-37). It was undisputed the autopsy weighed Mr. Kelley at 200 pounds and Mr. Haltiwanger was much lighter at 134 pounds and physically challenged. It was undisputed Mr. Haltiwanger did not fight Mr. Kelley and let him physically throw him out the apartment.

Mr. Taylor indicated that after his son shoved him out of the way when he tried to stop the assault, and after he physically threw Mr. Haltiwanger out of the apartment, his son followed Mr. Haltiwanger down the hallway toward the stairs (3/8/23 T. 137-38, 159-64, 176-81). It was undisputed that Mr. Haltiwanger was physically impeded with a gimp foot from a spinal cord injury. It was undisputed Mr. Haltiwanger was only 22 years old at the time and had been shot before on three occasions in his life. Mr. Haltiwanger testified that was why he felt he needed protection and carried a gun in his book bag. Mr. Haltiwanger testified he did not take his gun out of the bag until Mr. Kelley relentlessly pursued him down the stairs, threatened him and grabbed him, and he thought he was going to harm him

(3/20/23 Tr. 26-37). Ms. Pittman, the ear witness confirmed she heard the threat "I'll drag your ass" and then a gunshot a few seconds later (3/13/23 Tr. 135, 144).

Vanessa Green, the only purported eye-witness to the shooting acknowledged (3/9/23 Tr. 75-77) that body-worn camera video taken on the scene at 11:48:13 and played in court showed her telling police "the dude turned around and shot him" (*id.* at 77). This would indicate Mr. Kelley was behind Mr. Haltiwanger, consistent with Mr. Haltiwanger's testimony, and not in front of him where Mr. Haltiwanger could shoot him in the back. Ms. Green was also captured in video on the scene telling another officer she first heard a pop and after that she turned around and saw Mr. Kelley lying on the floor (*id.* at 77-78, 82-83*)*. In other words, she did not actually see the shooting. She acknowledged that on the scene she did not tell any officer Mr. Haltiwanger shot Mr. Kelley in the back and that the first time she said that was in her grand jury testimony two weeks after the shooting, and, that was after her daughter Tamika had been arrested later in the day that Mr. Kelley was shot, for a serious but unrelated felony in D.C. that carried a potential of significant jail time and he daughter's case was still pending by her trial testimony (*id.* at 84). Tamkia was arrested later that very same day Mr. Kelley was shot. Ms. Green acknowledged at trial it was "possible" her memory of what occurred was better when she was speaking to police on the scene than two weeks

later in her grand jury testimony which was also after the autopsy was performed (*id*. at 85-86, 88-89).

The medical examiner did testify that in her opinion Mr. Kelley was shot one time in the left side of his back and the bullet exited his chest on the same side. However, she admitted that in February, 2023, she supplemented her autopsy report that had already been reviewed by three other medical examiners to change the abrasion she saw on Mr. Kelley's body from left elbow to right elbow (3/15/23 Tr. 73-77, 99). Although she concluded from her examination of the wounds that a bullet entered Mr. Kelley's back, she could not say the person who fired the gun walked up upon him from behind him and shot him or intended (*id.* at 87-88).

Mr. Haltiwanger's self-defense claim was strong, after closing arguments the trial court made the statement "excellent closing arguments on both sides. The jury has its work cut out for them." (3/20/23 Tr. 251). The showing of his perception of imminent danger was strong, he had reasonable grounds for his perceptions and his actions were reasonable based on those perceptions. Mr. Haltiwanger was the victim of an unprovoked frightening violent physical attack by someone he did not know and had no idea why he was attacking him, he was physically impeded and could not walk well much less run away from Mr. Kelley. Mr. Kelley was inebriated, Mr. Haltiwanger could smell liquor on him, he was acting out of control

and his blood alcohol level was very high, he was acting relentless and pushed Mr. Taylor out of the way when he tried to stop him, an ear witness heard a threat stating "I'll drag your ass" before the gunshot, and the only eye-witness gave an account on the scene more consistent with Mr. Haltiwanger's story that Mr. Kelley was behind him and not in front of him when he shot. Mr. Haltiwanger claimed he saw. Mr. Kelley with a gun in the apartment, Mr. Kelley was making threats and after they were in the apartment he never really looked back at him again (3/20/23 Tr. 26-37). Police did not look in or process Mr. Taylor's apartment for evidence and Mr. Taylor did not see the attack when if first occurred, he heard it and it woke him up (3/15/23 Tr. 32). Even though Mr. Taylor stated he did not see Mr. Kelley with a gun, that did not mean he did not have one that Mr. Haltiwanger felt to his head.

The government's evidence was insufficient to defeat Mr. Haltiwanger's claim of self-defense and his convictions must be reversed.

CONCLUSION

For all the foregoing reasons and any other reasons this Court deems appropriate, Mr. Haltiwanger's case should be reversed and his convictions and sentences vacated or in the alternative the case should be remanded for a new trial.

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 electronic E-Filing system upon counsel for appellee Chrisellen R. Kolb, Chief, Appellate Division, U.S. Attorneys Office, this 13th day of December, 2024.

/s/: *Mindy Daniels*
Mindy Daniels