BRIEF FOR APPELLEE

DISTRICT OF COLUMBIA
COURT OF APPEALS

Nos. 19-CF-1026 & 23-CO-619

ANDRE BECTON, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

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

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Cr. No. 2016-CF1-17315

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I. Whether Becton has demonstrated that he received ineffective assistance of trial counsel based on counsel's failure to challenge the showing of probable cause in an affidavit accompanying the warrant to search his cell phone, where (1) the affidavit stated that Becton "provided" detectives with a photograph of evidentiary value during a pre-arrest interview, and it was both known to the warrant affiant at the time and uncontroverted at trial that Becton showed the detectives the photo on his cell phone; (2) trial counsel provided "excellent" representation and testified that he did not file a motion to suppress because, having reviewed the warrant materials and other discovery, he did not identify grounds to defeat the "good faith exception"; and (3) the government introduced only limited and "insignificant" evidence from Becton's cell phone at trial which, as the trial court found, was "overwhelmed" by the otherwise "incredibly strong" evidence of Becton's guilt.

II. Whether the trial court abused its discretion in excluding evidence of three domestic-violence incidents involving the decedent, where the court reasonably found that these unproven allegations involving dissimilar circumstances did not have probative value as first-aggressor propensity evidence, and any such probative value was substantially outweighed by the danger of misleading, confusing, and wasting the time of the jury.

COUNTERSTATEMENT OF THE CASE

Procedural History

On July 12, 2017, a grand jury charged appellant Andre Becton with first-degree premeditated murder while armed, D.C. Code §§ 22-2101, -4502, possession of a firearm during a crime of violence, D.C. Code § 22-4504(b), and unlawful possession of a firearm (prior felony conviction), D.C. Code § 22-4503(a)(1), (b)(1) (19-CF-1026 Record (R.) 106 (Indictment)).[1] The grand jury further charged that Becton committed these offenses while on pretrial release in a pending Superior Court criminal case (*id.*). The case proceeded to a jury trial before the Honorable Juliet J. McKenna from March 25 to April 4, 2019 (R.26-33 (Docket 26-33)). On April 4, the jury acquitted Becton of first-degree murder, but found him guilty of second-degree murder while armed as a lesser-included offense and the firearm charges (4/4/19 Transcript (Tr.) 9-10). On October 4, 2019, Judge McKenna sentenced Becton to a total of 25 years' imprisonment followed by five years of supervised release (10/4/19 Tr. 38). Becton timely appealed (R.1011 (Notice of Appeal)).

On October 19, 2022, Becton filed a D.C. Code § 23-110 motion alleging ineffective assistance of trial counsel, Public Defender Service (PDS) attorneys

[1] All citations to the Record on Appeal are to the PDF page numbers.

Jeffrey Stein, Esq., and Bernadette Armand, Esq., because they did not challenge a search warrant for Becton's cell phone (23-CO-619 Record (23R.) 113 (§ 23-110 Motion)). Following a hearing at which Stein testified, Judge McKenna found that Becton was not prejudiced by trial counsel's failure to file a suppression motion and denied Becton's ineffective-assistance claim (6/9/23 Tr. 83-84; Appendix (A.) 48 (Order)). Becton timely appealed that order (23R.226 (Notice of Appeal)).

The Trial

There was no dispute at trial that Becton shot and killed the decedent, Darnell Peoples (3/25/19 Tr. 281 (defense opening statement acknowledging that "Mr. Becton shot Darnell Peoples")). The government presented evidence that Peoples infuriated Becton by making rude comments about a group of dice players, including Becton, and that when Peoples tried to hug Becton to "squash" the dispute, Becton responded by pulling out a gun, counting down, and shooting Peoples twice (*id.* 268). The defense argued that Becton shot Peoples in self-defense; although Peoples was unarmed, he had PCP in his system, and the defense suggested that he was behaving aggressively towards Becton (*id.* 283). But Becton's self-defense theory was undermined by his own statements to detectives during a voluntary interview before his arrest in which he falsely denied shooting Peoples at all, and adamantly denied acting in self-defense (4/1/19 Tr. 170-71). The defense argued that Becton

said these things because he incorrectly believed "there's no such thing as self-defense" in D.C. (4/3/19 Tr. 123-24).

The Government's Evidence

Shortly before midnight on September 15, 2016, police officers responding to reports of a shooting in the 600 block of Mellon Street S.E. found Peoples covered in blood and "rolling around" on the ground "in excruciating pain" (3/26/19 Tr. 20-22). Peoples told the police that "Dre" from "Trenton Park" shot him because Peoples "was old," and then lost consciousness (*id.* 22). Peoples was transported to a hospital, where he was pronounced dead (*id.* 84-85, 205). He had been shot in the left thigh and neck; the second bullet pierced his jugular, causing massive bleeding (4/2/19 Tr. 36-37, 51-52). Police knew that Becton went by "Dre" and was from Trenton Park, a nearby neighborhood (3/26/19 Tr. 34-35).

Additionally, an eyewitness to the shooting came forward: Debra Moore, a friend of Peoples's, who had come to Mellon Street to buy drugs after finishing a shift at work (3/28/19 Tr. 25-26). Moore encountered Peoples, from whom she sometimes bought drugs, standing outside (*id.* 28-29). Moore thought Peoples was on drugs and "tripping" because he was "saying someone [was] about to kill him" (*id.* 29). But Peoples was not angry or violent; rather, he "was just joyful and loveable" (*id.* 34). Moore gave Peoples a five-dollar bill—later recovered from his body—to buy drugs for her (*id.* 43; 3/27/19 Tr. 88). Peoples approached a group of

"his buddies," and they "all started joking and laughing" (3/28/19 Tr. 43). Then Peoples and Moore walked up the street and saw a group of younger men shooting dice (*id.* 45-46).

Moore testified that Peoples "jokily" asked the dice players why they had their "behinds in the air" and if they were trying to "screw" (3/28/19 Tr. 46). One of the men—Becton—reacted angrily, "cursing" at Peoples and telling him to "get on away from here" (*id.* 46-47).[2] Peoples "slowly" approached Becton, saying, "You know I love you," and tried to give Becton a hug (*id.* 49). Moore, who was standing about 30 feet away, heard Becton begin a "countdown" and tell Peoples, "I'll give you till five" (*id.* 69, 75). As Peoples attempted to embrace Becton, Becton pushed Peoples's arms open, then reached into his own waistband and pulled out a gun (*id.* 49-50). Reacting as Becton reached for his gun, Peoples "grabbed" Becton, and the pair began "tussling" (*id.* 50-51). Then Becton "shot down once, pow," as if he "shot at the ground" (*id.* 51, 58). Moore ran, "heard [a] second shot," then heard Peoples saying, "he hit me, he hit me, he hit me" (*id.* 59). Peoples "had blood gushing out the side of his neck" (*id.* 71). Moore saw Becton get into the "back seat" of a "red car," and gave detectives the tag number when they interviewed her two days later

[2] Moore did not identify Becton at trial, but the defense did not dispute that the other man was Becton, and Becton's brief acknowledges that Moore was testifying about him (Opening Brief for Appellant 4-5, 18-19).

(*id.* 61; 4/1/19 Tr. 112, 116). Moore also provided the detectives with a description of Becton, including that he was wearing a long-sleeve t-shirt with "a little hoodie" and camouflage pattern on the side (3/28/19 Tr. 66-67).

The defense questioned Moore extensively about her substance-abuse and mental-health histories (3/28/19 Tr. 84-85, 124-52). Moore acknowledged that she was a recovering crack addict who had a temporary relapse in 2016 and was "regularly" smoking crack and getting drunk during the period when Peoples was killed (*id.* 84-85). Moore testified, however, that she "wasn't high the night of the shooting" because she had just gotten off work and had not yet obtained drugs (*id.* 88). Defense counsel impeached Moore with a written statement prepared by a defense investigator that she had signed, which stated that she had smoked crack and drank alcohol before going to Mellon Street (*id.* 82). Moore testified that she told the investigator she would "normally" do that, but she "didn't drink or smoke that night" because she only had five dollars to spend (*id.* 77, 82-83, 159-60). Moore explained that she was "[v]ery uncomfortable" when the defense investigator showed up at her door, but she let him in because she did not want him standing in the hallway of her apartment building talking about her being a witness to the shooting; the defense investigator did not testify at trial (*id.* 158-59). Moore also acknowledged that she had been diagnosed with several mental-health disorders, including schizophrenia, manic depression, and bipolar disorder, and that she had

experienced hallucinations in the past (*id.* 72-73, 124-25). But Moore testified that she was taking prescription medication when Peoples was killed and was not experiencing hallucinations during that period (*id.* 73, 125 ("Long as I take my medicine I have no problems.")).[3]

Todd Foreman, a "close" friend of Becton's from the Trenton Park neighborhood, testified that Foreman, Becton, and a third friend, Jamal Ellis, drove in Becton's red Mercedes Benz to Mellon Street on the night of September 15 (3/26/19 Tr. 126, 132-33). Foreman drove Becton's car because Becton did not have a driver's license; Becton sat in the backseat (*id.* 133-34). The friends had been "sipping wine that day" and Becton was "drunk" (*id.* 142). Foreman and Ellis sat in the parked car by the Mellon convenience store and smoked marijuana while Becton went to see friends on the block (*id.* 139-40, 147-48). At some point, Foreman heard a commotion outside, and then Becton returned to the car, sat in the backseat, and asked to go home (*id.* 148-51).

[3] On cross-examination, defense counsel sought to impeach Moore with notes from consultations with her health-care providers several months after the murder, suggesting that she had been "noncompliant" with her medication regimen in September 2016 (3/28/19 Tr. 142). Moore testified that she had not been taking the medication "constantly every day," but she "had medicine already buil[t] up" in her system and "it was working" (*id.* 140-47). When she testified at Becton's trial, Moore was taking her medication (*id.* 140).

On September 21, 2016, police searched the residence of Demetrius Foreman, Todd's brother and another friend of Becton's, and found a Smith & Wesson 9mm semi-automatic handgun (3/26/19 Tr. 126; 3/27/19 Tr. 143-44, 147). The parties stipulated that Becton possessed this gun on the night the murder, and that he later possessed the gun in Demetrius Foreman's presence (4/2/19 Tr. 68). A toolmarks expert opined that a cartridge casing recovered from the crime scene was consistent with having been fired from the gun (4/1/19 Tr. 65). The parties stipulated that Becton had previously been convicted of a crime punishable by imprisonment for a term exceeding one year (*id.* 69).

On September 22, 2016, police spotted Becton's Mercedes illegally parked near where Peoples had been killed (3/26/19 Tr. 200-01). As an officer ran the car's tags, Becton approached her and told her the car was his, but that he had "somebody else drive him around" (*id.* 202). Becton gave consent to search his car; nothing was recovered (*id.* 203). The officer was not aware that Becton's car was of interest in a homicide investigation (*id.* 203-04). The next day, however, investigators located Becton's car again, and it was towed and searched (3/27/19 Tr. 137-38; 4/1/19 Tr. 116-17). Detective Joshua Branson left his contact information for Becton, in response to which Becton called Branson and agreed to meet detectives at the police station (4/1/19 Tr. 118-19).

On October 3, 2016, Becton came to the station and Branson interviewed him with another detective present (4/1/19 Tr. 121-22; Government Exhibit (GX) 306 (video of 10/3/16 interview)). Becton was "cooperative" and "answered all of [their] questions" (*id.* 121). Becton denied shooting Peoples (*id.* 122). Branson told Becton that self-defense was a "God-given right" and that suspects had been exonerated when investigators learned they acted in self-defense (*id.* 125). Becton adamantly denied shooting Peoples in self-defense (*id.* 122 ("He said it was not self-defense. It wasn't him.")).

During the interview, Becton pulled out his cell phone and showed the detectives a photo of himself with a group of friends that he claimed was taken on the night of September 15 (4/1/19 Tr. 123-24; GX 306 at 17:39). Becton texted the photo to Detective Branson before the interview concluded (4/1/19 Tr. 124; GX 501 (text messages from Becton to Detective Branson)).

Becton was arrested on October 21, 2016 (4/1/19 Tr. 127). On cross-examination of Detective Branson, the defense elicited testimony that Becton had stated, during a post-arrest interview, that he did not "believe there is a self defense law in D.C." (*id.* 153).[4] On redirect, Branson testified that he told Becton that he had

[4] The government unsuccessfully objected to the admission of this self-serving hearsay (4/1/19 Tr. 141-42). The trial court gave a limiting instruction that Becton's statements during the interview were not being admitted "for the truth of what the (continued . . .)

been involved in at least three cases in which police had "exonerated people for killing people because they acted in self defense," but Becton continued denying that he shot Peoples in self-defense (*id.* 170-71).

Finally, pursuant to a warrant, a detective extracted data from Becton's iPhone after he was arrested (3/28/19 Tr. 192-93). A portion of the extraction report was admitted into evidence during the detective's testimony, but the detective did not testify about the contents of Becton's phone (*id.*; GX 505). During its closing argument, the government noted that the jury had not yet "had a chance to review" the portion of the extraction report in evidence but could do so during deliberations (4/3/19 Tr. 76). The government argued that several entries appeared to have been deleted from the call log and text messages stored on Becton's phone, including an outgoing call several minutes after the shooting and three text messages from the following morning (*id.* 71-72). The government also noted that Becton accessed websites for looking up active warrants on September 21 and 25, 2016 (*id.* 73, 75).

The Defense Evidence

Becton chose not to testify (4/2/19 Tr. 146-47). The defense elicited evidence that PCP was detected in Peoples's blood during his autopsy (*id.* 63-64). A defense

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defendant is saying"; rather, the jury "should consider these statements only to assess the defendant's state of mind" (4/3/19 Tr. 39).

expert toxicologist testified about research studies on the effects of PCP, including that PCP is "a great anesthetic," but that "people who are given it" may "bec[o]me very aggressive and violent and exhibit[] dissociative behavior" (*id.* 109-10). The toxicologist acknowledged, however, that the effects of PCP could differ among individuals, and that he had "no personal experience or training in working with humans under the influence of PCP" (*id.* 100, 118-20, 122).

The § 23-110 Proceedings

Becton's Motion

While Becton's direct appeal was pending, he filed a D.C. Code § 23-110 motion alleging ineffective assistance of trial counsel (23R.113 (23-110 Motion)). Becton claimed that trial counsel "performed deficiently in failing to file [a] suppression motion" challenging "Detective Branson's affidavit" to search Becton's iPhone (23R.121-22 (23-110 Motion 9-10)). According to Becton, "Detective Branson's affidavit did not even attempt to offer a basis to believe that Becton's phone had evidence of crime," and thus failed to establish probable cause to search it (*id.*). Becton argued, moreover, that "the affidavit was 'so lacking in indicia of probable cause as to render official belief in its existence unreasonable,'" precluding application of the good-faith exception to the exclusionary rule, and that "Becton's trial counsel performed deficiently in failing to file the suppression motion" because "the affidavit was deficient on its face" (23R.123-24 (23-110 Motion 10-11)). As to

prejudice, Becton alleged that "the government bolstered its case with scores of records" from his phone (23R.113 (23-110 Motion 1)).

Detective Branson's Affidavit

Becton's § 23-110 motion attached the affidavit and search warrant for his iPhone (A.1-7). The warrant, signed on November 22, 2016, by the Honorable Stephanie Duncan-Peters, authorized investigators to search Becton's iPhone and recover the "[c]ell phone number, call log, phone book, any video recordings, any audio recordings, any photographs, text messages and voice messages" (A.7). Detective Branson's six-page affidavit was signed by the detective and an Assistant United States Attorney and subscribed and sworn before Judge Duncan-Peters (A.6). The affidavit recounted in detail the investigation that led to Becton's arrest for Peoples's murder, including Peoples's dying declaration that "Dre from Trenton Park shot him" (A.1); Moore's statements to detectives about witnessing the person later identified as Becton shoot Peoples and then flee the scene in a red car, as well as Moore's description of the suspect as "a brown skin black male, about the decedent's height and weight (5'11", 210lbs), with facial hair, and short hair," "wearing a black long sleeve t-shirt that had a hood on it and had camouflage on the sides and . . . jeans" (A.2); and the discovery and seizure of Becton's car (A.3).

The affidavit described Becton's voluntary interview with detectives on October 3, 2016 (A.3-4). Becton "said that on the night of the murder he was on

Mellon Street gambling with several other people, but walked off when an altercation occurred," and that "he said he did not know the decedent, but he did see him that night and he appeared to be high" (A.4). Becton confirmed that he left Mellon Street in his Mercedes, and that he "got into the right rear passenger seat" (*id.*). Becton denied getting into an argument or fight with Peoples, feeling threatened, or shooting Peoples in self-defense; when detectives told Becton that Peoples told police that "Dre from Trenton Park" shot him, Becton "said, 'I ain't going for that one' and went on to say that his name is always mentioned and brought up when shootings occur in that neighborhood" (*id.*). Becton "scoffed" at a witness's "description that he was wearing all black" at the time of the shooting (*id.*). Becton "said that he was wearing a thin hooded shirt that was gray" and "provided investigators with a picture that was taken the night of the murder. In the picture, [Becton] is standing with several other men on Mellon Street and he is wearing a gray and black hooded shirt with stone washed jeans, which at first glance, could appear to be camouflage" (*id.*).

The affidavit also stated that Detective Branson "learned of a music video that was published on August 16, 2016," in which Becton "is observed holding a semi-automatic handgun" (A.3). When asked about the music video, Becton told an officer "that the guns in the video were props" (*id.*).

The affidavit described Becton's arrest, when he was found in possession of the iPhone (A.4). In a post-arrest interview, Becton "denied killing the decedent," but "admit[ted] to being armed with a gun the night of the murder as well as being armed with another gun a few days after the murder" (*id.*). Becton "also said that he was involved in a craps game that night and the decedent, who was high on PCP or possibly drunk, interrupted the craps game and [Becton] told the decedent to get away from the game" (*id.*).

Finally, Detective Branson's affidavit included a section describing his "training" in forensic searches of cell phones and other digital devices (A.5-6). The affidavit stated that "searching for and retrieving data from a cellular telephone can be even more complicated than searching a computer," and "may require a range of data analysis techniques" (A.5-6). Because "[c]riminals can mislabel or hide files and directories; encode communications to avoid using key words; attempt to delete files to evade detection; or take other steps designed to frustrate law enforcement searches for information," Detective Branson "request[ed] permission to use whatever data analysis techniques appear necessary to locate and retrieve the evidence described," including "scanning areas of the device's memory not allocated to listed files, or opening every file and scanning its contents briefly to determine whether it falls within the scope of the warrant" (A.6).

The Government's Opposition

In its opposition to Becton's § 23-110 motion, the government argued that a motion to suppress would not have been successful because the affidavit established probable cause to search Becton's cell phone (23R.178 (Opp.33)). In particular, "the application discussed a photograph and a video recording that were relevant to the investigation," and "made clear that associates of defendant were with him on the night of the murder, as well as an occasion approximately a month earlier when defendant was videotaped while holding a gun"; thus, it was "reasonable to infer that information relevant to the investigation would likely be contained within the specified types of content stored on the phone" (*id.*). The government also argued that the good-faith exception to the exclusionary rule applied because investigators reasonably relied on the search warrant issued by Judge Duncan-Peters (*id.*). Beyond the merits of a suppression motion, the government argued that trial counsel provided effective representation, successfully blocking the government from using "specific content recovered from [Becton's] phone (23R.179 (Opp.34)). As a result, the government "ultimately utilized only a small portion of the information" from Becton's phone, which "played a small role in the case" (23R.179-80 (Opp.34-35)). Given the overwhelming evidence against Becton, and the marginal role played by the cell phone evidence, Becton failed to show prejudice (23R.182 (Opp.37)).

The § 23-110 Hearing

The trial court held a hearing on Becton's ineffective assistance claim on June 9, 2023, at which Becton called Stein, his lead trial counsel, as a witness (6/9/23 Tr. 7-8). When asked why he did not file a motion to suppress the fruits of the cell-phone search, Stein testified that "when [he] reviewed the case and reviewed the warrant [he], at the time, did not see a total basis for challenging the warrant and excluding the fruits. So [he] did not." (*Id.*) Stein asserted that "there was no strategic advantage in not filing that motion"; rather, he explained, "[a]t the time [he] was processing the discovery in this case and assessing what motions to file, [he] did not identify as a live issue the belief that the warrant was still faulty, that it would not survive a good faith exception to the Fourth Amendment" (*id.* 26-27). After Stein testified, Becton acknowledged that Stein was "a very good" and "very experienced lawyer who was doing his best," and "in this case, did a lot of things very well, filed a lot of good motions" (*id.* 52). But Becton maintained that Stein was ineffective for failing to challenge Detective Branson's affidavit, because the "fundamental requirement of probable cause" was not met (*id.* 51).

At the conclusion of the hearing, Judge McKenna found that trial counsel had not provided ineffective as]sistance and denied Becton's § 23-110 motion (6/9/23 Tr. 73-84). The court first found that Becton had shown that "the motion to suppress the contents of his phone download would have been successful," because "[t]he

affidavit in support of the search warrant that was authorized by Judge Duncan-Peters is just utterly devoid of any facts that would support . . . a reasonable inference that some reasonable basis existed to believe that Mr. Becton's cell phone contained evidence of the crime," and thus lacked "the requisite nexus" between the crime and "what might be expected to be found on the phone" (*id.* 75). Although Becton had not made the argument, the court also observed that the warrant lacked "specificity or particularity" because it had no "restriction to date and time," and described this as "an additional basis upon which a motion to suppress may have been successful" (*id.* 77). The court found that it was "debatable" whether "the failure to file the motion to suppress rendered trial counsel's performance" deficient, because "counsel did an excellent job in representing Mr. Becton in this trial," which "was reflected in the jury's verdict, in that they declined to find him guilty on the lead charge" (*id.* 77-79). Moreover, "the court was simply bombarded with pretrial motions filed by defense counsel, many of which were actually successful," and counsel made "many oral motions," including ones "that actually successfully resulted in the government being precluded, notwithstanding the lack of a suppression motion . . . from introducing portions of the cell phone download including incriminating location data and some of the text messages and other internet searches" (*id.* 77-78). But the court nevertheless found that that "trial counsel's failure to file the suppression motion" was "a specific error" that "was

based upon a . . . misperception that there was not a colorable basis to move to suppress the phone's contents," and thus "f[e]ll below the objective standard of reasonableness" (*id.* 79).

The trial court found, however, that Becton failed to demonstrate prejudice (6/9/23 Tr. 80). The government's evidence at trial was "incredibly strong," including Peoples's dying declaration, Moore's eyewitness testimony—portions of which were "effectively attacked," but much of which was "in fact, corroborated by other witnesses, including witnesses who were friends or associates of Mr. Becton"—and "evidence that was observed and recovered from the scene, including ballistic evidence[,] . . . surveillance evidence[,] . . . evidence concerning the appearance of Mr. Becton's car on the scene, including a partial license plate of the vehicle, the autopsy findings and defendant's own statements to law enforcement" (*id.* 80-81). By contrast, "the cell phone evidence, which was itself limited by defense counsel's partially successful efforts to exclude portions of the download," was "of marginal relevance and was insignificant to the evidence that was introduced at trial as a whole" (*id.* 81). As for the evidence of "the deletions of four text messages and/or telephone calls close in time to the shooting of Mr. Peoples," the court found that it was "unpersuasive and marginally relevant, particularly in light of the overwhelming strong evidence against Mr. Becton" and "the fact that the government never introduced any evidence regarding who the defendant was

communicating with in those deleted communications" (*id.* 82). And as for the evidence that Becton searched websites "to ascertain where there was an outstanding warrant for [his] arrest," the court found that this evidence was "just as consistent with the defense theory of the case": Becton engaged in various "behaviors that show[ed] that he thought he was involved in something bad and was worried and scared" because "he was acting in self-defense when he shot Mr. Peoples, but was unaware of the availability or the scope or the applicability of such a legal defense to his actions" (*id.* 82-83). The court thus determined that "the phone records did not sufficiently prejudice" Becton as to create "a reasonable probability" of a different outcome (*id.* 83). The court also found no evidence to show that "the defense strategy" to pursue a self-defense theory "was defined or was dictated by the portions of the phone download that were ultimately admitted into evidence" (*id.* 83-84).

SUMMARY OF ARGUMENT

Becton has not shown that his trial counsel was constitutionally ineffective for failing to challenge the cell-phone search warrant that—according to Becton—did not establish probable cause to believe that any evidence would be found on his phone. First, trial counsel was not deficient. In finding otherwise, the trial court did not address the good-faith exception to the exclusionary rule, which applies when officers "act[] with the requisite objective reasonableness when relying on uncontroverted facts known to them but inadvertently not presented to the

magistrate." *United States v. McKenzie-Gude*, 671 F.3d 452, 460 (4th Cir. 2011). Here, the affidavit described Becton's voluntary interview with detectives and stated that Becton "provided investigators with a picture that was taken the night of the murder" (A.4). It was both known and uncontroverted that Becton showed the detectives a photo on his cell phone; the interview was videotaped and admitted in evidence, and the trial court acknowledged during a pretrial hearing that Becton "offer[ed] to show them photographs on his phone" (3/19/19 Tr. 67). Becton volunteered that there was relevant evidence stored in his phone, and investigators could reasonably rely on the warrant judge's probable-cause determination to search it. Trial counsel was not deficient in failing to file a meritless suppression motion.

Second, as to prejudice, the jury was presented with extremely limited evidence from Becton's phone—a call log with several entries that were deleted after the killing, and internet searches to see if Becton had open warrants—that the trial court correctly determined to be "of marginal relevance" and "insignificant" compared to the otherwise "incredibly strong" evidence of Becton's guilt. The trial court did not err in finding that Becton was not prejudiced and denying his ineffective-assistance claim on that basis.

The trial court did not abuse its discretion in precluding evidence of prior domestic-violence allegations against the decedent. The court reasonably determined that these unproven incidents were too attenuated from the

circumstances of this case to be probative of whether Peoples was the first aggressor, and any probative value was substantially outweighed by the danger of misleading and confusing the jury and wasting time with "mini trials" on the allegations.

ARGUMENT

I. The Trial Court Did Not Err in Denying Becton's Ineffective Assistance Claim.

A. Standard of Review and Applicable Legal Principles

To show ineffective assistance of counsel, a defendant "must show (1) that [counsel's] performance 'fell below an objective standard of reasonableness,' measured against 'prevailing professional norms,' and (2) 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Bellinger v. United States*, 294 A.3d 1094, 1103 (D.C. 2023) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 690, 694 (1984)). "Both prongs of *Strickland* are mixed questions of law and fact, so [this Court] accept[s] the trial court's findings of fact unless they lack evidentiary support in the record, and . . . review[s] the trial court's legal determinations de novo." *Id.*

A defendant's burden is "particularly demanding" when an ineffective-assistance claim is "based on counsel's failure to file a suppression motion." *Young v. United States*, 56 A.3d 1184, 1193 (D.C. 2012). "[T]he defendant must also prove

that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice." *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986). "Only those [defendants] who can prove under *Strickland* that they have been denied a fair trial by the gross incompetence of their attorneys will be . . . entitled to retrial without the challenged evidence." *Id.* at 382.

B. Discussion

The trial court denied Becton's ineffective assistance claim because he failed to show *Strickland* prejudice. That ruling was correct. As discussed below (at 32-38), Becton has not demonstrated a reasonable probability of a different outcome if the minimal and insignificant cell-phone evidence had been suppressed; the trial court may be affirmed on that basis alone. *See Strickland*, 466 U.S. at 697 ("[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies."). The government nevertheless addresses *Strickland*'s first prong because, contrary to the trial court's conclusion, a suppression motion would not have been successful and trial counsel did not perform deficiently. *See Randolph v. United States*, 882 A.2d 210, 218 (D.C. 2005) ("It is well settled that an appellate court may affirm a decision for reasons other than those given by the trial court.").

1. Becton's Claim Fails Because the Good-Faith Exception Precludes Suppression.

As an initial matter, Becton would not have been entitled to suppression of evidence derived from the search of his cell phone. Because a suppression motion would have lacked merit, Becton cannot show that trial counsel was ineffective for failing to file one. *See, e.g.*, *Young*, 56 A.3d at 1193. Even assuming the affidavit did not establish probable cause to search the phone, "the evidence was admissible under the good-faith exception to the exclusionary rule" because investigators "reasonably relied on [a] judicial officer's approval of" the warrant. *Abney v. United States*, 273 A.3d 852, 862 (D.C. 2022). *See generally United States v. Leon*, 468 U.S. 897 (1984).[5]

Application of the good-faith exception involves "the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization," and "[i]n making this determination, *all of the circumstances* . . . may be considered." *Leon*, 468 U.S. at 922 n.23 (emphasis added). "All of the circumstances" includes information "outside the four corners" of the affidavit, *United States v. McKenzie-Gude*, 671

[5] Because the good-faith exception precludes suppression *even if* the warrant was deficient, this Court "need not resolve" the antecedent question of the whether the affidavit established probable cause. *In re J.F.S.*, 300 A.3d 748, 758 (D.C. 2023). *See also Abney*, 273 A.3d at 864 ("We need not and do not express any view as to whether the affidavit actually did establish probable cause.").

F.3d 452, 459 (4th Cir. 2011); for example, "whether the warrant application had previously been rejected by a different magistrate," *Leon*, 468 U.S. at 922 n.23, or evidence that a detective "used the boilerplate language of a template and made no effort to tailor [its] scope to the facts." *Burns v. United States*, 235 A.3d 758, 775, 779 (D.C. 2020). Indeed, it is well established that, "in determining an officer's good faith, a court may properly look beyond the facts stated in the affidavit and consider uncontroverted facts known to the officers but inadvertently not disclosed to the magistrate." *McKenzie-Gude*, 671 F.3d at 459. *See also United States v. Thomas*, 908 F.3d 68, 73 (4th Cir. 2018); *United States v. Marion*, 238 F.3d 965, 969 (8th Cir. 2001) ("totality of the circumstances" includes "any information known to the officers but not presented to the issuing judge"); *United States v. Dickerson*, 975 F.2d 1245, 1250 (7th Cir. 1992) (similar).

Here, in describing Becton's voluntary pre-arrest interview on October 3, 2016, Detective Branson's affidavit stated that Becton "provided investigators with a picture that was taken the night of the murder," in which he was "standing with several other men on Mellon Street" and wearing clothing that was consistent with the description of the suspect given by Moore (A.2, 4). The warrant judge who reviewed the affidavit was entitled to draw "common-sense conclusions about human behavior," *Illinois v. Gates*, 462 U.S. 213, 231 (1983), and could reasonably infer that Becton displayed the photo—which had obvious evidentiary value—on

his cell phone. Moreover, Detective Branson could reasonably rely on the warrant judge's probable-cause finding, because the detective knew that Becton had shown detectives the photo on his cell phone and then texted the photo to Detective Branson during the interview. Those facts were both "known" and "uncontroverted." *McKenzie-Gude*, 671 F.3d at 459. The interview was videotaped, disclosed to the defense, and admitted into evidence (GX 306). Indeed, at a pretrial hearing, Judge McKenna remarked that Becton could be "seen on the video . . . offering to show [the detectives] photographs on his phone" (3/19/19 Tr. 66-67):

Detective Branson thus knew there was at least "a fair probability" that Becton's phone contained evidence of Peoples's murder—a photograph showing Becton dressed consistently with Moore's description of the murderer—because Becton had already shown him that it did. *Gates*, 462 U.S. at 238 (holding that probable cause to search exists where "there is a fair probability that contraband or evidence of a crime will be found in a particular place"). In retrospect, Detective Branson's affidavit should have stated explicitly that Becton showed them the photo from the night of the murder on his cell phone, rather than leaving it Judge Duncan-Peters to draw the (correct) inference. But the fact "[t]hat the affidavit could have been written more clearly provides no basis" for suppression. *United States v. Darosa*, 102 F.4th 228, 235 (4th Cir. 2024). Evidence should not be "suppressed even when obtained pursuant to a warrant supported by the affidavit of an officer, who, in fact, possesses probable cause." *Thomas*, 908 F.3d at 73 (internal quotation marks omitted). "[T]hat cost to the criminal justice system would come without offsetting benefits: When a warrant is invalidated only because an officer mistakenly omitted information necessary to establish probable cause, application of the exclusionary rule can have little, if any, deterrent effect." *Id.* At worst, Detective Branson made an error of "simple, isolated negligence," *Davis v. United States*, 564 U.S. 229, 238 (2011), in failing to specify in the affidavit an undisputed fact that he

knew to be true. Under those circumstances, suppression cannot "pay its way." *Id.*[6] The trial court thus erred when it ignored the good-faith exception and concluded that the cell phone evidence would have been suppressed.

The trial court also incorrectly failed to consider the good-faith exception when it found that the search warrant lacked "specificity or particularity" because it allowed investigators to search the phone "without restriction to date and time" (6/9/23 Tr. 76-77). "In the ordinary case, . . . it is the magistrate's responsibility . . . to issue a warrant comporting in form with the requirements of the Fourth Amendment," *Messerschmidt v. Millender*, 565 U.S. 535, 547 (2012) (cleaned up); the good-faith exception protects reasonable reliance on a warrant's legality unless "the warrant was 'so facially deficient—i.e., in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid.'" *Abney*, 273 A.3d at 862 (quoting *Leon*, 468 U.S. at 923)). This Court has twice rejected similar challenges to search warrants issued prior to its 2020 *Burns* decision, which provided guidance on particularity and

[6] In the proceedings below, the government claimed that the good-faith doctrine applied (23R.178 (Opp. 33)) but did not argue that it encompasses known and uncontroverted facts that were inadvertently omitted from the affidavit. "'Once a claim is properly presented,'" however, "'a party can make any argument in support of that claim; parties are not limited to the precise arguments made below.'" *West v. United States*, 710 A.2d 866, 868 n.3 (D.C. 1998) (quoting *Yee v. Escondido*, 503 U.S. 519, 534 (1992)).

overbreadth issues associated with cell phones. *See J.F.S.*, 300 A.3d at 758 ("This [C]ourt decided *Burns* [in 2020] after the warrant issued and the search was conducted in this case. So, whether or not the warrant in this case complies with the Fourth Amendment principles we explicated in *Burns*, pre-*Burns*, officers could reasonably have relied on the warrant that he had obtained."); *Abney*, 273 A.3d at 862 ("We assess the reasonableness of the officers' reliance in light of the law at the time of the warrant's issuance and execution."). The search warrant for Becton's phone was not obviously and facially deficient when it was issued in 2016. It authorized the recovery of several specific "categories of data," *Burns*, 235 A.3d at 770, where investigators could reasonably expect to find "range of relevant evidence" based on the information contained in the affidavit and known to officers. *Abney*, 273 A.3d at 867 (holding that, where police had probable cause to believe that defendant participated in a robbery and had communicated with a victim on his cell phone, investigators "could reasonably have believed that the warrant established probable cause to believe the cell phone seized from [defendant] contained 'a range of relevant evidence'"). *See also J.F.S.*, 300 A.3d at 758 (same where "officers had probable cause to believe that J.F.S. was involved in the murder," and affidavit "provided strong 'indicia of probable cause' to believe that the phone would contain evidence in a broad range of places").

Here, investigators had probable cause to believe that Becton murdered Peoples, and they knew—because Becton showed them—that his phone contained photographic evidence placing him at the scene of the crime with "several other men," potential witnesses that a search of the phone could help locate (A.4). The affidavit also established that Becton was involved in recording and "publish[ing]" a music video connecting him to the Trenton Park neighborhood and the possession of "a semi-automatic handgun" (A.3). As in *Abney* and *J.F.S.*, investigators could reasonably have believed that the warrant established probable cause to search the phone for a range of relevant data; the warrant was not so obviously and facially deficient that officers could not reasonably rely on its validity. As for the "restriction[s] to date and time" that Judge McKenna assumed would have been necessary (6/9/23 Tr. 76-77), this Court has already held that investigators could reasonably rely on warrants lacking such "temporal limitations" where the warrants were executed before *Burns*. *See J.F.S.*, 300 A.3d at 758-59; *Abney*, 273 A.3d at 865-67. Because the trial court overlooked the good-faith doctrine, it failed to consider these precedents.[7]

[7] That Judge McKenna erroneously would have granted a motion to suppress is not relevant in assessing whether Becton received ineffective assistance of counsel, because such claims do not "depend on the idiosyncrasies of the particular decisionmaker." *Strickland*, 466 U.S. at 694-95 ("In making the determination whether the specified errors resulted in the required prejudice, a court should presume . . . that the judge or jury acted according to law.").

Becton also briefly challenges the *execution* of the search warrant, arguing that investigators acted unreasonably in reviewing his internet search history because the warrant did not specifically authorize its recovery (Br. 34). Becton waived this challenge by failing to raise it below. In the trial court, Becton claimed only that trial counsel was ineffective in failing to challenge the validity of the warrant on probable cause grounds; he did not raise a distinct challenge to the reasonableness of the warrant's execution. *See United States v. Ramirez*, 523 U.S. 65, 71 (1998) ("The general touchstone of reasonableness which governs Fourth Amendment analysis governs the method of execution of the warrant." (citation omitted)). "[I]t is well-established that, normally, a claim that was not raised or passed on in the trial court will be spurned on appeal." *Sharps v. United States*, 246 A.3d 1141, 1159 (D.C. 2021).

In any event, Becton has not shown that a challenge to the reasonableness of the warrant's execution would have been successful. *See Young*, 56 A.3d at 1193 ("[I]t is the movant's burden to show that a Fourth Amendment claim would have been successful."). Detective Branson's affidavit explicitly sought permission to "use what data analysis techniques appear necessary," including "conduct[ing] more extensive searches, such as scanning areas of the device's memory not allocated to listed files, or opening every file and scanning its contents briefly to determine whether it falls within the scope of the warrant" (A.6). Moreover, it is well-settled

that officers conducting a lawful search may seize "incriminating evidence" in "plain view." *Bynum v. United States*, 386 A.2d 684, 687-88 (D.C. 1978). *See also Irving v. United States*, 673 A.2d 1284, 1287 (D.C. 1996). The evidentiary value of Becton's internet searches for active arrest warrants within a week of Peoples's murder would have been "immediately apparent to the police" conducting the search. *Bynum*, 386 A.2d at 687 (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 466 (1971)). Becton thus has not established that investigators executed the warrant unreasonably, let alone that suppression of the internet-search evidence would have been justified. *Cf. Hudson v. Michigan*, 547 U.S. 586, 591 (2006) (explaining that suppression "has always been our last resort, not our first impulse," and declining to apply exclusionary rule despite unreasonable execution of search warrant).

2. Trial Counsel's Performance Was Not Deficient.

Even if a motion to suppress the evidence found on his cell phone would have succeeded, Becton failed to establish that his counsel's performance was deficient. *Cf. Kimmelman*, 477 U.S. at 383-84 (meritorious Fourth Amendment claim is necessary but not sufficient condition to show ineffective assistance). "Judicial scrutiny of counsel's performance must be highly deferential": "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," and "every effort [must] be made to eliminate

the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689.

According to Judge McKenna, trial counsel "did an excellent job in representing" Becton and "simply bombarded [the court] with pretrial motions . . . , many of were actually successful" (6/9/23 Tr. 78). Even Becton's new counsel acknowledged that trial counsel "filed a lot of good motions" (*id.* 52). Moreover, this is not a case where trial counsel overlooked the possibility of filing a suppression motion. Stein specifically testified that he "reviewed the warrant" but "did not see a total basis for challenging the warrant and excluding the fruits" (*Id.* 9). Asked by the court to elaborate, Mr. Stein explained that, even if the warrant was "faulty," he did not believe that he could overcome the "good faith exception" (*id.* 26-27).

As discussed, Stein's assessment was correct: the good-faith exception applies. But even if good faith is a close call, a motion to suppress was not such an obvious winner that Mr. Stein's legal analysis "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. The Sixth Amendment "does not insure that defense counsel will recognize and raise every conceivable constitutional claim." *Engle v. Isaac*, 456 U.S. 107, 134 (1982). *See, e.g., United States v. Glover*, 872 F.3d 625, 633 (D.C. Cir. 2017) ("The inquiry for deficiency looks 'at the time of counsel's conduct and accordingly does not require counsel to propound vanguard

arguments to meet the bare minimum required by the Sixth Amendment"); *Basham v. United States*, 811 F.3d 1026, 1028-29 (8th Cir. 2016) (counsel was not deficient for failing to challenge warrantless search of cell phone two years prior to Supreme Court's decision in *Riley v. California*, although "the issue was percolating in the lower courts"). Here, "there is no evidence in the record that counsel w[was] ill-prepared or failed to research the law on this issue." *Glover*, 872 F.3d at 633. To the contrary, Stein "process[ed] the discovery" and "reviewed the warrant" while "assessing what motions to file," with an understanding of the relevant legal principles, including the "good faith exception" (6/9/23 Tr. 9, 26-27). Experienced counsel's informed legal judgment that there was not "a total basis for challenging the warrant and excluding the fruits" (*id.* 9) is entitled to "high[] deferen[ce]" without the "distorting effects of hindsight." *Strickland*, 466 U.S. at 689.

3. The Trial Court Correctly Found that Becton Was Not Prejudiced by the Admission of "Marginal" and "Limited" Evidence from His Cell Phone.

Becton also has not demonstrated "a reasonable probability that the verdict would have been different absent" the admission of evidence from his cell phone. *Kimmelman*, 477 U.S. at 375.

The trial court accurately described that evidence as "limited," "marginal," and "insignificant" (6/9/23 Tr. 80). It consisted of (1) internet searches for active

warrants on September 21 and 25, 2016 (4/3/19 Tr. 73, 75); and (2) the absence of records on Becton's phone of a call and three text messages with an unidentified number on the night of and morning after the murder, although T-Mobile subscriber records showed that the call and texts occurred (*id.* 71-72). Although Becton hyperbolically compares the latter evidence to the Watergate and Iran-Contra coverups (Br. 35-36), there was no direct evidence that Becton had deleted the call and texts, let alone when he might have done so. Nor was there any evidence that Becton's unidentified interlocutor was involved in Peoples's murder, or that the communications related to the murder. Although the government briefly suggested in closing that Becton "deleted" the records, and that "those deletions" supported his "consciousness of guilt" (4/3/19 Tr. 72, 91), the evidence for this was thin and dwarfed by other compelling evidence of consciousness of guilt—particularly Becton's repeated lies to detectives that he did not shoot Peoples, even when they asked him point blank whether he exercised self-defense.

Moreover, the case against Becton was—in the apt assessment of the judge who presided over his trail—"incredibly strong" and "overwhelming" (6/9/23 Tr. 80-82). *See Strickland*, 466 U.S. at 696 ("[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support."). Becton's self-defense claim was insubstantial. Peoples was unarmed and Becton shot him twice. Becton fired the second, fatal shot

downward through Peoples's neck and chest, although Peoples was taller than Becton (as Becton points out (Br. 38))—strongly suggesting that Peoples had already fallen to the ground as a result of Becton's first shot to his thigh before Becton finished him off. Becton was with his friends (3/26/19 Tr. 131-32 (Foreman); 3/28/19 Tr. 41, 45-46 (Moore)), none of whom reacted with alarm to Peoples's approach, and any of whom might have come to Becton's aid if Peoples had become hostile—which he did not. To the contrary, Moore testified clearly and consistently to the sequence of events: Peoples told Becton that he "love[d] him" and "went to hug him" (3/28/19 Tr. 49), but Becton "pulled out a gun"; Peoples reacted by "grabb[ing]" Becton to protect himself, and the pair "started tussling," until Becton "shot down, pow," into Peoples's leg (*id.* 50-53, 109). Becton himself adamantly denied to detectives that he shot Peoples in self-defense (4/1/19 Tr. 170-71). Moreover, even if Becton had perceived Peoples's approach as threatening—for which there was no evidence—that still would not have justified the use of deadly force against an unarmed man. *See, e.g., Bassil v. United States*, 147 A.3d 303 (D.C. 2016) (use of deadly force in self-defense justified only where there was honest and reasonable belief that defendant "was in imminent danger of serious bodily harm or death" and "needed to use deadly force to save herself from the danger"). As Judge McKenna aptly stated at sentencing, however, there was "no evidence" that Peoples

"posed any type of serious physical threat to Becton," and the jury's rejection of self-defense was "fully supported by the record" (10/4/19 Tr. 37-38).[8]

Potential prejudice must be assessed against "the totality of the evidence": while "[s]ome errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture," others "will have had an isolated, trivial effect." *Strickland*, 466 U.S. at 695-96. The phone evidence falls squarely on the latter end of the spectrum; it certainly did not "alter[] the entire evidentiary picture." Rather, as the trial court found, the phone evidence was "consistent with," and marginally bolstered, "the defense theory of the case that [Becton] was acting in self-defense when he shot Mr. Peoples, but was unaware of the availability . . . of such a legal defense to his actions" (6/9/23 Tr. 83). Becton does not dispute that the phone evidence "was not, in fact, inconsistent with the defense theory at trial" (Br. 35). Nor was that evidence "harder to explain than" his statements to police denying self-defense (*id.*) To the contrary, defense counsel

[8] Becton argues that the evidence of PCP in Peoples's blood supports his self-defense claim (Br. 38). But Becton's toxicology expert—who had no personal experience interacting with PCP users—acknowledged that the effects of PCP could differ among individuals (4/2/19 Tr. 100, 118-20, 122). There was no evidence that Peoples was "aggress[ive] and violen[t]" on the night he was killed (Br. 38); instead, Peoples was "joyful" and "joking with his buddies" (3/28/19 Tr. 34, 44). Moreover, the expert's glib opinion that PCP is "a great anesthetic" does not square with evidence that Peoples appeared to be "in excruciating pain" before he died (4/2/19 Tr. 109-10; 3/26/19 Tr. 20-22).

argued in closing that the phone evidence reinforced its explanation for why Becton lied to detectives about shooting Peoples: Becton "thought he was involved in something bad and was worried and scared" because "he didn't believe that self-defense was a lawful defense" and "he thought he might get charged with murder"; "[t]hat's why" Becton "said those things to the police" and "ran those searches for warrants" (4/3/19 Tr. 123). Becton's repeated and emphatic disavowal to detectives that he shot Peoples in self-defense was a far bigger obstacle to the defense theory at trial that, in fact, Becton shot Peoples in self-defense than the warrant searches and circumstantial evidence that Becton deleted several communications. Put another way, a jury otherwise prepared to accept the defense explanation for Becton's lies to the detectives would not reasonably change its mind based on "marginal" evidence from Becton's phone that was logically consistent with that explanation. *See Strickland*, 466 U.S. at 695 ("The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision.").

As he did at trial, Becton argues that Moore was an unreliable witness based on minor inconsistencies in her testimony, her mental health, and her substance abuse (Br. 37-41). But Moore testified that she was taking her medication and not experiencing hallucinations when Peoples was murdered (3/28/19 Tr. 73, 125). By her own forthright admission, she was not under the influence of crack or alcohol

because she had not yet procured any (*id.* 88). Although a defense investigator secured a statement from Moore injecting uncertainty on the latter point—itself a testament to defense counsel's thorough investigation and preparation—Moore stood by her testimony and the investigator did not testify (*id.* 158-59). Moore also apparently came across as a sympathetic witness; despite aggressive efforts to discredit her, defense counsel acknowledged in closing that Moore "was extremely pleasant and seemed to be trying really hard," and that the defense was "not claiming she hallucinated this whole incident at all" (4/3/19 Tr. 110, 112). Indeed, the fact that Moore was able to note and later recall Becton's license plate number, despite her friend having just been shot, showed that she was clearheaded at the time and corroborated her testimony.

Becton also overstates the extent to which the government relied on the phone evidence (Br. 35-36). The government did not devote any time during its case-in-chief to reviewing the phone records with witnesses, beyond moving them into evidence (4/3/19 Tr. 76). And it discussed them only briefly in closing. The government's closing argument covered approximately 44 pages of transcript and its rebuttal covered 12 pages (*id.* at 50-94, 137-49). The government mentioned evidence from Becton's phone extraction on only six pages of transcript for the closing and none for the rebuttal (*id.* at 71-73, 75-76, 91). Becton argues that "a prosecutor's emphasis on certain evidence" is "a highly relevant measure of the

prejudicial impact of that evidence" (Br. 36 (quoting *Porter v. United States*, 37 A.3d 251, 261 (D.C. 2012))). That principle cuts against him here, where the government did not even bring the potential deletions to the jury's attention until closing argument, and then only briefly. *Cf. Porter*, 37 A.3d at 260 (noting that government "emphasized [the disputed] evidence during opening, closing, and rebuttal arguments," and during the "direct testimony" of two key witnesses).[9]

II. The Trial Court Did Not Abuse Its Discretion in Precluding Evidence of Prior Domestic-Violence Allegations against the Decedent.

A. Additional Background

During pretrial discovery, the government disclosed information about three domestic-violence allegations against the decedent, Darnell Peoples (A.9-10). In February 2013, Peoples intervened in a confrontation between his wife, Cherie Peoples ("Cherie"), and the mother of his child, Ivory Gaskins (A.10). Cherie reported to police that Gaskins "showed up and punched" her, and that Peoples "responded by holding [Cherie] back and subsequently pushing [Cherie] forcefully against a brick wall," causing Cheri to bang her head (R.901-02 (Gov't Mot. 4-5)).

[9] Although Becton does not distinguish his convictions, he plainly cannot demonstrate prejudice as to his felon-in-possession conviction. Becton stipulated that he possessed a gun and had previously been convicted of a crime punishable by imprisonment for a term exceeding one year (4/2/19 Tr. 68-69).

Peoples was arrested and charged with assault, but the case was ultimately dismissed for want of prosecution (*id.*; A.10). In February 2015, Gaskins reported that Peoples came to her residence and argued about their child in common, "pin[ned] her" to the floor and "str[uck] her in the face," and then "fled" (A.10). Only Gaskins was interviewed by police, Peoples was not arrested, and no charges were brought against him (R.907 (Gov't Mot. 4)). In February 2016, Gaskins reported that she and Peoples "got into a verbal altercation over child support," Peoples "refused" to leave Gaskins's residence, "then began to choke" Gaskins," resulting in "a struggle" followed by Peoples's departure (A.9-10). As before, only Gaskins was interviewed, Peoples was not arrested, and no charges were brought (R.906-07 (Gov't Mot. 3-4)).

After learning that the defense had subpoenaed Cherie and Gaskins, the government filed a motion in limine to preclude "evidence of the decedent's alleged prior bad acts or reputation for violence" (R.904, 906 (Gov't Mot. 1, 3)). The government argued that the "three domestic incidents are dissimilar from the instant offense and do not establish that the decedent was the initial aggressor" (R.908 (Gov't Mot. 5)). After hearing argument, the trial court granted the government's motion (3/25/19 Tr. 240-46). The court "rel[ied] principally" on *Shepherd v. United States*, 144 A.3d 554 (D.C. 2016), and found that the three incidents "d[id] not meet the admissibility standard under Rule 403" (3/25/19 Tr. 243). In making its determination, the court first considered that none of the incidents "resulted in any

conviction" (*id.* 243-44). Regarding the February 2013 incident, the court "reviewed the Gerstein" and did not find "any conclusion to be drawn that Mr. Peoples initiated that altercation, escalated that altercation or would make it more likely than not that he was the initial aggressor in connection with his interaction with Mr. Becton" (*id.* 244); instead, what "the Gerstein establishe[d] is that this was initially a physical altercation between Gaskins and [Cherie] to which Mr. Peoples physically inserted himself" (*id.*). Moreover, the incident was "remote in time" (*id.*). The court also considered "the nature of the prior conduct and whether it b[ore] any sort of factual similarity to what's at issue here," and found that it did not; "all of those prior incidents were within the context of a domestic relationship," while Peoples and Becton "were basically not acquaintances other than by sight and name to one another" (*id.* 245). The court also found "no indication in these earlier incidents that Mr. Peoples was intoxicated or under the influence of PCP or any other illicit substances" (*id.*). After considering these factors, the court concluded that the domestic-violence allegations had "no probative value" and "would also be misleading and confusing to the jury," "run a substantial risk of having three to four little mini trials," and "would be unduly prejudicial in that the jury would just be left to speculate or conclude that as a result of Mr. Peoples being in a domestic violence relationship that it's more likely that he was the first aggressor here" (*id.* 245-46).

The government called Cherie to testify on the first day of trial as Peoples's next of kin (3/26/19 Tr. 58). Cherie testified that she had been married to Peoples for five years and had two children with him (*id.* 59-60). When asked why Peoples—whose first name was Darnell—went by the nickname "Kirk," Cherie responded, "Because he was silly. He was funny. He liked to make people laugh. He liked to make people smile." (*Id.* 59.) Cherie testified that she and Peoples had "separated previously" but "got back together" in the "last six months of his life," and that she spoke on the phone with and texted Peoples on the night that he was killed (*id.* 60-61). The prosecutor asked Cherie about Peoples's "demeanor" when she spoke to him on the phone, and Cherie replied, "He was okay. He was fine. He was happy. Laughing, giggling, joking like he normally do." (*Id.* 62.)

After Cherie's direct examination, defense counsel asserted that there had been "some links" to "the prior acts" because the government "put up this witness to establish their relationship, that they're together for all this time" and "paint[ed] a certain picture of their relationship" (3/26/19 Tr. 64-65). Defense counsel argued that Cherie's testimony had "open[ed] the door for us to get into the prior incident in which the police [were] called involving another women who was in the relationship" (*id.* 65). The trial court asked, "What purpose would that be admissible?", and defense counsel responded, "At this point, we're impeaching a picture [that the] witness created regarding her relationship" (*id.* 65). The trial court

denied the defense request to cross-examine Cherie about the February 2013 incident, but allowed the defense to question Cherie about Peoples's extramarital relationship with another woman at the time of his death (*id.* 65-67).

B. Applicable Legal Principles

"[A]n accused claiming self-defense in a homicide prosecution may attempt to show that the decedent was the aggressor by showing that the dead person was a bellicose and violent individual." *Shepherd v. United States*, 144 A.3d 554, 558 (D.C. 2016). "For this purpose, the accused may present evidence of prior acts of violence committed by the victim even if unknown to the accused." *Id.* (internal quotation marks omitted). This Court reviews the preclusion of such evidence for abuse of discretion. *Id.* at 559, 561. "Even if proof of prior acts of violence is arguably relevant and admissible, the trial court is entrusted with broad discretion to determine the substance, form and quantum of evidence which is to be presented to a jury, and may exclude the proffered evidence if its probative value is outweighed by the danger of undue prejudice." *Id.* at 559 (internal quotation marks omitted). "This [C]ourt has evaluated the following factors when balancing the probative value and prejudicial impact of first aggressor evidence: the form of proof (accusations or convictions), whether presenting it would waste trial time or confuse the issues, remoteness in time, the decedent's character in the interim, and the 'type' of violence evidence by the prior act." *Id.*

C. Discussion

Becton claims that the trial court abused its discretion in "barring [him] from introducing evidence of Peoples' prior assaults" (Br. 45-49). But the court's pretrial ruling precluding Becton from presenting this "first aggressor evidence" was a reasonable exercise of its discretion under *Shepherd*. The court reasonably determined that the majority of *Shepherd* factors weighed against Peoples: (1) the "form of proof" was "accusations," not "convictions," and only the February 2013 incident resulted in an arrest; (2) any defense effort to present this evidence "would waste trial time [and] confuse the issues," *id.*, risking several "mini trials" on the domestic-violence allegations against Peoples; and (3) the allegations were dissimilar, involving domestic violence and not involving PCP intoxication (3/25/19 Tr. 245). *See Shepherd*, 144 A.3d at 560 (endorsing "the sound principle that prior acts of violence have more probative value when they are similar in kind to the events on trial"). The court also considered that the February 2013 incident—the only one that resulted in arrest—was "comparatively remote in time" (3/26/19 Tr. 244). Here, as in *Shepherd*, "[g]iven the limited probative value of the first-aggressor evidence and the likelihood that it would confuse or prejudice the jury," 144 A.3d at 561, the trial court reasonably exercised its discretion in precluding Becton from presenting evidence of domestic-violence allegations against Peoples to show that

Peoples was the first aggressor in a confrontation between acquaintances on a public street.

Becton does not meaningfully contest the trial court's application of *Shepherd*; he argues, however, that he was "incorrectly barred" from countering Cherie's testimony "that Peoples was a nonviolent jokester" (Br. 45, 47). Cherie's testimony did not "open[] the door" to the domestic-violence allegations to rebut evidence that Peoples was a "peaceful" person (Br. 13, 30), because Cherie did not provide such evidence. Although Cherie stated that Peoples was "funny" and "liked to make people laugh," she never testified that he was peaceful or nonviolent (3/26/19 Tr. 59). There is no axiomatic contradiction between being a "joker" and having a propensity for violence—as anybody with glancing pop-culture familiarity would recognize. *Cf.* The Dark Knight (Warner Bros. Pictures 2008) (chronicling the rise of the Joker, who "just want[ed] to watch the world burn"). Moreover, defense counsel proffered to the trial court that cross-examination about the February 2013 incident was necessary to "impeach[] a picture" that Cherie's testimony had "created regarding her relationship" with Peoples at the time of his death (3/26/19 Tr. 65)—*not* to rebut any implication that Peoples was a peaceful person. Relying on counsel's proffer, the trial court reasonably precluded Becton from cross-examining Cherie about an incident that had occurred three and a half

years earlier, while allowing inquiry about Cherie's knowledge of Peoples's extramarital relationship at the time of the murder (*id.* 65-67).

Becton also suggests that he was entitled to present evidence of the domestic-violence allegations because "no other admitted evidence already" showed that Peoples was an "aggressive and violent" person (Br. 48). The trial court reasonably determined, however, that any "minimal" probative value was substantially outweighed by the danger of unfair prejudice from "inflammatory details" that bore "at most a tenuous link" to "the point in contention here," and the time-wasting potential of several mini-trials. *Shepherd*, 144 A.3d at 560-61. A defendant "does not have an unfettered right to offer testimony that is . . . otherwise inadmissible under standard rules of evidence, and well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by . . . unfair prejudice, confusion of the issues, or potential to mislead the jury." *Heath v. United States*, 26 A.3d 266, 275-76 (D.C. 2011) (cleaned up). That Becton could not produce other, more on-point propensity evidence against the man he killed does not excuse him from application of the ordinary rules of evidence and this Court's deferential standard of review. *See Shepherd*, 144 A.3d at 561 ("The concept of 'exercise of discretion' is a review-restraining one.").

Becton acknowledges that there was no evidence of PCP intoxication in connection with the domestic-violence allegations against Peoples, but argues that

this dissimilarity weighs in his favor because "PCP intoxication makes people more violent" (Br. 49). The *Shepherd* factors, however, reflect the commonsense inference that a decedent's prior violent act which occurred in circumstances "similar" to the fatal confrontation with a defendant—including whether the decedent was intoxicated on both occasions—is more probative propensity evidence than a prior act in "dissimilar circumstances." 144 A.3d at 559-60. Thus, in balancing the probative value of the domestic-violence allegations against the danger of unfair prejudice, the trial court reasonably assigned the allegations less probative weight because they did not involve PCP intoxication, which was a centerpiece of the defense theory.

Finally, "[e]ven if there were imperfections in the trial court's exercise of discretion," Becton "suffered no significant prejudice" and any error was harmless. *Shepherd*, 144 A.3d at 561. The principal issue at trial was whether Becton actually and reasonably believed that he needed to use deadly force to defend himself from an imminent threat of death or serious bodily harm when Peoples tried to make amends for his tasteless jokes and hug Becton. In confronting that issue, no reasonable juror would rely on murky and unproven domestic-violence allegations against the decedent. As already discussed, moreover, the evidence against Becton was overwhelming. Additionally, had Becton been allowed to cross-examine Cherie about the February 2013 incident, there was substantial danger that Cherie would

have described Peoples's actions as an attempt to prevent an altercation between Cherie and Gaskins—a plausible interpretation, as the trial court recognized (3/25/19 Tr. 244). That would have played directly into the hands of the government's theory that Peoples was trying to deescalate the situation when Becton shot him. As to the incidents involving only Gaskins, it is common for witnesses to recant domestic-violence allegations, *cf. Nixon v. United States*, 728 A.2d 582, 591-92 (D.C. 1999) (citing authority on the "recantation phenomenon of domestic violence"), and Gaskins's unsworn hearsay statements to police would not have been admissible for their underlying truth if Gaskins provided inconsistent testimony at trial. *See* D.C. § 14-102; *Brooks v. United States*, 448 A.2d 253, 259 (D.C. 1982). Becton also fails to consider that, had he successfully offered evidence to establish "the character of the deceased" for "bellicose[ity] and violen[ce]," *Shepherd*, 144 A.3d at 558, the government could have offered rebuttal evidence of Becton's own violent propensities. *See* Fed. R. Evid. 404(a)(2)(B)(ii) ("[A] defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecutor may . . . offer evidence of the defendant's same trait."). Becton was particularly vulnerable on this point: he had previously pled guilty and acknowledged shooting two men in the back as they "r[a]n away" from him following an altercation (23R.96 (2009 Proffer of Facts)). Evidence of those convictions would have been far more

probative of Becton's violent nature than the domestic-violence allegations were of Peoples's.[10]

[10] Any error was also surely harmless as to the felon-in-possession conviction based on Becton's stipulations (4/2/19 Tr. 68-69). Becton briefly argues that he suffered "cumulative" prejudice from "the two errors" (Br. 49-50), but the cumulative-error doctrine is inapposite here. *Cf. Smith v. United States*, 26 A.3d 248, 264 (D.C. 2011). Where a defendant cannot show *Strickland* prejudice based on counsel's deficiency—which would entitle him to a new trial—he has not received ineffective assistance and cannot establish a Sixth Amendment violation; therefore, there is no constitutional "error" to accumulate with any errors made by the trial court. *See Strickland*, 466 U.S. at 692 ("[A]ny deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.").

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have caused a copy of the foregoing to be served by electronic means, through the Court's EFS system, upon counsel for appellant, Gregory Lipper, Esq., glipper@lipperlaw.com, on this 27th day of February, 2025.

/s/
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