BRIEF FOR APPELLEE

DISTRICT OF COLUMBIA
COURT OF APPEALS

Nos. 21-CM-693; 25-CO-043

WINSTON WALKER, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

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

Cr. No. 2019-CMD-10473

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ISSUES PRESENTED

I. Whether there was sufficient evidence to disprove Walker's self-defense claim where he initiated the conflict by touching the first victim on the buttocks and then, when the second victim approached to defend the first, punched the second victim in the nose while the second victim was on the ground in a chokehold.

II. Whether the motion court correctly concluded that Walker's trial counsel did not render ineffective assistance by failing to object to alleged hearsay where the statements were (1) non-hearsay commands, (2) admissible to prove the effect on the listener, not the truth of the matter asserted, and (3) bore on the declarant's state of mind, and where there was no reasonable probability that Walker would have been acquitted had the statements been excluded.

III. Whether the trial court committed plain error by admitting alleged hearsay where the statements were (1) non-hearsay commands, (2) admissible to prove the effect on the listener, not the truth of the matter asserted, and (3) bore on the declarant's state of mind.

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COUNTERSTATEMENT OF THE CASE

On August 10, 2019, Winston Walker was charged by information with one count of simple assault, in violation of D.C. Code § 22-404, based on his conduct involving Codara Bracy, and one count of misdemeanor sexual abuse, in violation of D.C. Code § 22-3066, based on his conduct involving Taylor Blankney (Record on Appeal (R1.) 12 (Information p.

1)).[1]

After a bench trial on February 6 and March 3, 2020, before the Honorable Jonathan Pittman, Walker was convicted of two counts of simple assault; one count for his conduct against Bracy, and one count as a lesser-include offense for his conduct against Blankney (R1.51 (Judgment); 3/3/20 Transcript (Tr.) 65-66). On September 21, 2021, the court sentenced Walker to a total of 30 days' incarceration, suspended, and six months' unsupervised probation (R1.51 (Judgment); 09/21/21 Tr. 12). Walker timely noticed his appeal (R1.53 (Notice of Appeal)).

On February 27, 2022, Walker filed a counseled motion pursuant to D.C. Code § 23-110 alleging, among other claims, ineffective assistance of trial counsel (R2.15-17 (Motion (Mot.) pp. 1-13)). On April 22, 2022, Walker amended the motion, raising an additional ground of ineffective assistance of counsel—failure to object to allegedly inadmissible hearsay (R2.157-70 (Mot. pp. 1-14)). The government opposed (R2.192-210 (Opposition (Opp.) pp. 1-19)). The motion court held a hearing on

[1] "R1.[ ]" refers to the paginated PDF of the record in Appeal No. 21-CM-693. "R2.[ ]" refers to the paginated PDF of the record in Appeal No. 25-CO-043.

Walker's § 23-110 motion on April 8, 2024 (4/8/24 Tr. 1). On January 13, 2025, the Honorable Michael K. O'Keefe denied Walker's motion in a written order (R2.219-32 (Order pp. 1-12)). Walker timely appealed that order on January 14, 2025 (R2.231 (Notice of Appeal)). This Court consolidated the appeals (see Docket 2019-CMD-10473).

The Trial

The Government's Evidence

On the evening of August 10, 2023, Codara Bracy was out with his cousin, Taylor Blankney, and some friends to celebrate a friend's birthday (2/6/20 Tr. 16-17). Bracy lived in Brooklyn and Blankney lived in North Carolina, and each travelled to Washington, D.C., for the celebration (*id*. at 16-18). That night, the group went to dinner and then to a nightclub near the 1200 block of Connecticut Avenue, NW (*id*. at 19, 38).

When the group left the nightclub, they went to get pizza nearby and to wait for an Uber to take them back to their hotel (2/6/20 Tr. 20). Bracy consumed approximately four drinks that night and reported his level of intoxication as a six out of ten (*id*. at 19-20). The other members of the group waited on the sidewalk while Bracy walked onto the road to

locate the group's Uber (*id.* at 22-23). Bracy then heard Blankney yelling, "move, no, this is my pizza" (*id.* at 24). He saw Blankney "going back and forth" with Walker about the boxes of pizza she was holding (*id.* at 23-24). Blankney "insisted . . . this is my box, I bought this pizza, and no, you can't have any" (*id.* at 24). Bracy had never seen Walker before this interaction (*id.* at 27).

Walker then moved closer to Blankney "and reached out and touched her" (2/6/20 Tr. 24-25). Specifically, Walker's "arm and hand went below [Blankney's] waistline touching her butt" (*id.* at 25). Walker put his "right hand on [Blankney's] . . . right butt cheek" (*id.*). Blankney yelled "[d]on't touch me" and "[m]oved away" from Walker (*id.* at 26). Blankney also yelled "move away" and "used profanity"—she was "[e]xtremely upset" and Bracy could "see and hear [her] frustration" (*id.*).

At that point, Bracy "got involved" (2/6/20 Tr. 26). He "approached" Walker, "said something" to him, and "made a comment about not touching" Blankney (*id.* at 26-27). In response, Walker "continued to insist that he can touch or do what he wanted to do and touch whom he wanted to" (*id.*). Bracy "became defensive, defending [his] cousin" (*id.* at 27). He said to Walker, "you cannot do that," while "us[ing] profanity"

and "defending [Blankney] in that moment because she was highly upset" (*id.*). Walker continued "to say that he can touch whom he wanted to" (*id.* at 28). Bracy "became immediately frustrated" and the men "got close" (*id.*).

As the men were "arguing, going back and forth"—with Walker "insist[ing] that he wanted to touch who he wanted to," and Bracy "insist[ing] that he couldn't do that"—someone "came from behind [Bracy] and pulled [him] down" (2/6/20 Tr. 28).[2] Up to that point, neither Bracy nor Walker had "made any physical attempts at touching each other" (*id.* at 30). While Bracy was on the ground, he "was hit more than once" (*id.* at 28). Although Bracy was "guarding [his] face" and "protecting [himself] from getting hit," Walker hit him in the nose, causing it to bleed (*id.* at 29, 31).[3]

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[2] Walker testified at his § 23-110 motion hearing that the other individual involved in the physical altercation was his nephew, Aaron Welsh (3/22/24 Tr. 25, 27).

[3] Bracy ultimately needed surgery on his nose to fix a deviated septum (2/6/20 Tr. 36-37).

One of the women in the group pulled Walker off Bracy, ripping his shirt in the process, and the groups separated (2/6/20 Tr. 32, 35). After the groups dispersed, police approached and spoke to Walker, Bracy, and others on the scene (*id.* at 35, 44). During the police interviews, another female in the group (not Blankney) vomited (*id.* at 34-35). Walker had no visible injuries, nor did he complain about any injuries (*id.* at 44-45).

The Defense's Evidence

Rico Winston, Walker's friend, testified that he and Walker went to the Rosebar nightclub on August 10, 2019, for approximately one-and-a-half hours (3/3/20 Tr. 19-21). Winston had more than three drinks at the nightclub and did not see Walker drinking (*id.* at 27, 29).

When Winston and Walker left the nightclub at closing time, they encountered a "young lady" on a bench vomiting (3/3/20 Tr. 20). She was in a group with "maybe three other girls and one guy"; nevertheless, Walker approached to help her (*id.* at 21-24). Winston denied seeing Walker touch the girl or hearing a girl say, "get off of me" (*id.* at 26). The male friend in the group came over and shouted at Walker, and he and Walker "kept going back and forth arguing" (*id.* at 22-24). The shouting escalated into "shoving and stuff," and "wrestling" on the floor, but

Winston did not see any punches thrown (*id*. at 24, 33). He was unaware that the male friend was injured and did not recall Walker being injured (*id*. at 34).

Winston initially testified that he did not know who started the physical fight (3/3/20 Tr. 24-25, 32). Then, after reviewing body-worn camera footage of his statement to police, he changed his testimony and said the male friend hit Walker first (*id*. at 38-39). Winston denied that anyone other than Walker and the male friend were involved in the fight (*id*. at 28).

Colleen McGraw—Walker's former colleague who was not present during the offense—described Walker as calm and supportive (3/3/20 Tr. 7-8). She had not seen Walker in more than 15 years, though they remained in contact online, and she had never seen Walker under the influence of alcohol (*id*. at 8, 15-16). In her opinion, the physically and sexually assaultive behavior Walker was charged with was inconsistent with his character (*id*. at 12).

The Trial Court's Findings

The trial court found Walker guilty of simple assault for hitting Bracy and of simple assault (as a lesser-included offense of misdemeanor sexual abuse) for touching Blankney on the buttocks (3/3/20 Tr. 64-66).

In reaching this conclusion, the trial court found Bracy's testimony "credible" (3/3/20 Tr. 61).[4] The court noted that Bracy "testified as to what he saw," including Walker touching Blankney and Blankney "yelling loudly" at Walker (*id*. at 62).[5] Bracy "began yelling loudly" at Walker and got into a "verbal altercation" with him, and then "was pulled down by somebody" other than Walker (*id*.). Walker "then punched [Bracy] in the face breaking his nose" (*id*.). The court "f[ou]nd all of that to be credible" (*id*.).

The trial court rejected the defense's argument that there "was a misunderstanding" and that there was "at least some evidence that Mr.

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[4] The trial court found that the police testimony in the government's case and the character witness's testimony in Walker's case were "not particularly helpful" because Bracy's injuries were undisputed and the character witness had not "personally spent time with [Walker since] 2005" (3/3/20 Tr. 61-62).

[5] The trial court mistakenly referred to Bracy as "Mr. Blankney," but context makes clear he was discussing Bracy's testimony (3/3/20 Tr. 62).

[Bracy] was the aggressor" (3/3/20 Tr. 62). The court expressly did not credit Winston's testimony "that Mr. [Bracy] was the aggressor" because Winston had testified on direct examination "that he could not see who assaulted whom first" (*id.*). Winston changed his testimony only after he "was shown the video of the body-worn camera of his statement to the police" (*id.*). But Winston had not "testified on direct that he didn't remember what happened," and the court found Winston's testimony that he "remember[ed] it differently" after seeing the video of his statement to be "not credible" (*id.* at 63).

The court reviewed the elements of misdemeanor sexual abuse and found that the first two—"engaging in sexual contact" and that Walker "knew or should've known that he lacked permission or consent"—were "readily met" by "eyewitness testimony" that the court "credit[ed] beyond a reasonable doubt" (3/3/20 Tr. 64). Bracy saw Walker touch Blankney's buttocks and she "reacted very negatively": she "jumped back, yelled, 'Don't touch me,' and continued to yell" at Walker (*id.*). However, the court found that the third element—whether Walker intended to "abuse or humiliate or arouse or gratify his own or another person's sexual desire"—was not met because Walker's intent was "not entirely clear" (*id.*

at 64). Accordingly, the court acquitted Walker of misdemeanor sexual abuse and convicted him of the "lesser included offense" of simple assault (*id*. at 64-65).

As to the simple assault charge involving Bracy, the court reviewed the elements and found that there was "no question" that Walker "used force to injure" Bracy (3/3/20 Tr. 65). The court found that Walker "punched [Bracy] in the face and broke his nose" and there was "no evidence that this was accidental" (*id*.). Rejecting Walker's self-defense claim, the court explained that "the sole evidence of self-defense" was Winston's "ultimate[]" testimony "that, oh, yes, he remembered that he saw Mr. [Bracy] initiate the attack" (*id*.). The court reiterated that it "d[id]n't credit Mr. Winston's testimony that Mr. [Bracy] was the aggressor" (*id*. at 66). And "even if [Bracy] had started the altercation," it was "not clear . . . that [Walker's] use of force . . . would have been reasonable under the circumstances" because Bracy "did not present a threat" (*id*.). The court, however, did not resolve this point because it "credit[ed] Mr. [Bracy's] testimony, which was he was pushed to the ground and then the defendant punched him" (*id*.).

The D.C. Code § 23-110 Motion

On October 7, 2021, Walker filed a notice of appeal of his conviction (R1.53 (Notice of Appeal)). Before Walker filed his brief on appeal, on February 27, 2022, he filed a § 23-110 motion in D.C. Superior Court arguing that his convictions should be vacated because he did not voluntarily waive his right to testify, and he received ineffective assistance of counsel (R2.15-27 (Mot. pp. 1-13). He argued trial counsel was ineffective for (1) advising him not to testify; (2) failing to introduce and impeach Bracy with exculpatory evidence; and (3) failing to adequately prepare Winston to testify (*id.*).

On April 21, 2022, Walker filed a motion seeking to stay his appeal pending the resolution of his § 23-110 motion (R.193 (Opp. p. 2, n.1)). The next day, he filed his amended § 23-110 motion (R2.168 (Mot. p. 12)). This Court held Walker's stay motion in abeyance (see Docket 21-CM-0693).

In his amended § 23-110 motion, Walker raised the same claims as his original motion and, as relevant here, a new claim that trial counsel provided ineffective assistance by failing to object to Blankney's out-of-court statements he alleged were inadmissible hearsay (R2.168-69 (Mot.

pp. 12-13)). Walker argued the statements were hearsay because they were "offered to prove, either implicitly or explicitly, that Ms. Blankney did not consent to being touched by Mr. Walker" (R2.168 (Mot. p. 12)). Without Blankney's statements, Walker reasoned, there was no evidence about her lack of consent, and the court "relied heavily" on her statements to convict him (R2.169 (Mot. p. 13)).

The government opposed on November 24, 2023, and contended that Walker had demonstrated neither deficient performance nor prejudice (R2.208-09 (Opp. pp. 17-18)). The government explained that Blankney's statements were admissible as non-hearsay both (1) to show the effect on Walker (that he knew he did not have consent to touch Blankney) and the effect on Bracy (that Blankney had been assaulted and needed help) and (2) under the state of mind hearsay exception (*id.*). Thus, trial counsel did not perform deficiently because any objection would have been overruled. The government also contended that Walker could not show prejudice because there was no reasonable probability of a different result even if the alleged hearsay had been excluded (R2.209 (Opp. p. 18)).

The § 23-110 Hearing

Both Walker and his trial counsel testified at the § 23-110 hearing (3/22/24 Tr. 3; 4/8/24 Tr. 17). The testimony and arguments focused on Walker's decision not to testify at trial and trial counsel's decision not to impeach Bracy with allegedly exculpatory evidence (3/22/24 Tr. 6-7, 9-12, 26-27; 4/8/24 Tr. 7-12, 15, 21-27, 42-44, 51-71 (closing arguments)).

The Motion Court's Order

The motion court denied Walker's § 23-110 motion. As relevant here, the court found that Walker could not establish that his trial counsel performed deficiently by failing to object to Blankney's statements, and that Walker was not prejudiced by any deficient performance (R2.228-29 (Order pp. 10-11). The court likened this case to *Brown v. United States*, where this Court held that "failure to object to alleged hearsay was not deficient because trial counsel reasonably assumed the statements would be admissible under a hearsay exception." (R2.229 (Order p. 11) (citing *(Rodney) Brown v. United States*, 934 A.2d 930, 944 (D.C. 2007)). Here, the motion court explained, Blankney's statements were admissible as "either non-hearsay to show the effect . . . on the listener or under the state of mind hearsay exception" (R2.229

(Order p. 11)). Thus, Walker's counsel did not perform deficiently by failing to object to the admissible statements (*id.*).

Walker also could not demonstrate prejudice, the motion court found, because "[e]ven if the statements were hearsay," their admission did not affect the trial's outcome (R2.229 (Order p. 11)). In finding Walker guilty, the trial court "indicated . . . that Mr. Brac[y]'s testimony that he had witnessed the offensive touching and saw Ms. Blankney's negative physical reaction to Mr. Walker's actions were compelling pieces of testimony that [it] considered" (*id.*). There was thus no "reasonable probability of that the mere exclusion of hearsay statements would have resulted in Mr. Walker's acquittal" (*id.*).

SUMMARY OF ARGUMENT

The government presented sufficient evidence to disprove Walker's self-defense claim and convict him of simple assault where Bracy testified that Walker punched him in the nose after he had been pulled down to the ground and was shielding his face to avoid the blows. The evidence established that Walker was the initial aggressor when he touched Blankney on the buttocks, and thus could not claim self-defense. And even if Walker somehow retained a right to claim self-defense when

Bracy approached him in defense of Blankney, there was sufficient evidence for the trial court to conclude that Walker was not acting in self-defense when he punched Bracy after Bracy had been pulled to the ground from behind by another individual.

The trial court did not abuse its discretion by denying Walker's D.C. Code § 23-110 motion alleging ineffective assistance of counsel for failing to object to admitting Blankney's statements because each was admissible either as non-hearsay or under the state of mind hearsay exception. Counsel did not perform deficiently by failing to make a meritless objection. Additionally, Walker did not establish that there was a reasonable possibility that he would have been acquitted of the charges related to Blankney but for admitting the statements, and therefore he cannot establish prejudice.

The trial court did not commit plain error by admitting Blankney's statements that she yelled "don't touch me" at Walker because the statements were commands, and thus non-hearsay, and further were not admitted for the truth of the matter asserted, but to prove why Bracy came to her aid and why Walker should have known that he did not have permission to touch a stranger's buttocks. Alternatively, the trial court

properly admitted the statements to show Blankney's state of mind, which was indisputably at issue at trial.

ARGUMENT

I. The Evidence was Sufficient to Support the Trial Court's Finding that Walker Assaulted Bracy and Did Not Act in Self-Defense.

In challenging the sufficiency of the evidence to sustain his conviction for simple assault against Bracy, Walker argues only that there was insufficient evidence to negate his self-defense claim (Opening Brief for Appellant Winston Walker (Br.) 16-20). This argument is without merit.

A. Standard of Review and Applicable Legal Principles.

In reviewing a claim of insufficient evidence, this Court "must deem the proof of guilt sufficient if, 'after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the charged offense beyond a reasonable doubt.'" *Smith v. United States*, 899 A.2d 119, 121 (D.C. 2006) (quoting *Rivas v. United States*, 783 A.2d 125, 134 (D.C. 2001) (en banc)). In a bench trial, the trial court is empowered to weigh the evidence, make

credibility determinations, and draw reasonable inferences of fact. *Nowlin v. United States*, 782 A.2d 288, 291 (D.C. 2001). "The trial court's findings in a bench trial will not be overturned unless they are 'plainly wrong' or 'without evidence to support [them].'" *Id.* (quoting *Mihas v. United States*, 618 A.2d 197, 200 (D.C. 1992)); *see* D.C. Code § 17-305(a) ("When the case was tried without a jury . . . the judgment may not be set aside except for errors of law unless it appears that the judgment is plainly wrong or without evidence to support it."). The evidence need not compel a finding of guilt or negate all inferences of innocence. *Collins v. United States*, 73 A.3d 974, 985 (D.C. 2013). Rather, this Court will reverse only where "there has been no evidence produced from which guilt can be reasonably inferred." *Joiner-Die v. United States*, 899 A.2d 762, 764 (D.C. 2006).

To prove assault, the government must show that there was "(1) an act on the part of the defendant; (2) the apparent present ability to injure the victim at the time the act is committed; and (3) the intent to perform the act which constitutes the assault at the time the defendant commits the act." *Vines v. United States*, 70 A.3d 1170, 1179 (D.C. 2013). "To invoke the defense of non-deadly self-defense, there must be evidence

that the defendant reasonably believed that harm was imminent." *Belt v. United States*, 149 A.3d 1048, 1058 (D.C. 2016) (cleaned up). "Moreover, a defendant cannot claim self-defense if the defendant was the aggressor." *Id.* (cleaned up). "Where a defendant has presented any evidence that []he acted in self-defense, the government bears the burden of proving beyond a reasonable doubt that the defendant did not act in self-defense." *Dawkins v. United States*, 189 A.3d 223, 231 (D.C. 2018) (cleaned up).

B. Discussion

There was sufficient evidence at trial to establish that Walker was not acting in self-defense when he assaulted Bracy. Bracy, whom the trial court credited, testified that he approached Walker only after Walker had touched Blankney on the buttocks, and that he was "defending [Blankney] in that moment because she was highly upset" (2/6/20 Tr. 27). Bracy and Walker were "arguing, going back and forth" and had "got[ten] close," but had not touched one another or made any attempt to do so, when an unidentified third person pulled Bracy to the ground from behind (*id.* at 28-30). At that point, Bracy began getting hit, and while he was "guarding [his] face" and "protecting [himself] from getting hit,"

Walker hit him in the nose, causing it to bleed (*id.* at 29, 31). After the altercation, Bracy had a broken, bloody nose, and Walker had no injuries (*id.* at 36-37, 44-45). The trial court also expressly did not credit Winston, who provided the only evidence that Bracy, not Walker, threw the first punch (3/3/20 Tr. 62-63, 66). Accordingly, the evidence was sufficient to establish that Walker could not claim self-defense because he was the first aggressor both as to Blankney and as to Bracy. *See Belt*, 149 A.3d at 1058 (evidence sufficient to negate self-defense where it was disputed who started the fight because "in the light most favorable to the government and deferring to the [factfinder's] right to determine the credibility of the witnesses, the evidence here was sufficient to negate appellant's self-defense claim and establish that she was the first aggressor"); *Tyler v. United States*, 975 A.2d 848, 858 (D.C. 2009) ("a defendant cannot claim self-defense if the defendant was the aggressor").

Walker's argument (at 17-18) that his use of force was justified because Bracy "provoked the physical conflict" by "using profanity" is meritless for two independent reasons. First, it was Walker who initially provoked the conflict when he assaulted Blankney by touching her on the buttocks. Bracy responded by "defending [his] cousin" from Walker, who

claimed "he can touch whom he wanted to" (2/6/20 Tr. 27-28). Given the threat posted to Blankney by Walker—who had just touched her in an intimate area and who loudly and repeatedly insisted that he had the right to do so—any aggressive actions taken by Bracy were appropriate in defense of a third party. *See Lee v. United States*, 61 A.3d 655, 657-58 (D.C. 2013) (discussing "[t]he right to defend a third person"). Walker was thus the first aggressor and lost his right to claim self-defense when he assaulted Blankney.

Second, even if Walker had a right to self-defense when Bracy approached him, Bracy did not take any actions sufficient to give rise to an objectively reasonable belief that Walker needed to defend himself by punching Bracy after Bracy had been taken to the ground by a third party. *See Rorie v. United States*, 882 A.2d 763, 771 (D.C. 2005) (government may disprove self-defense by negating "objective reasonableness"). Bracy's testimony established only that the men "got close" and were "arguing, going back and forth"; he made clear that the men had not touched one another or made any attempt to do so (2/6/20 Tr. 28-30). But mere words, no matter how insulting or abusive, do not constitute aggression. *See High v. United States*, 972 A.2d 829, 836 n.5

(D.C. 2009) ("Gaither's words to High could not have amounted to adequate provocation because, as we have long held, '[m]ere words standing alone, no matter how insulting, offensive, or abusive, are not adequate provocation.'") (quoting *Nicholson v. United States*, 368 A.2d 561, 565 (D.C. 1977)); *Boyd v. United States*, 732 A.2d 854, 855 (D.C. 1999) ("mere words, no matter how abusive, insulting, vexatious, or threatening . . . will not justify an assault") (quotation marks omitted); *West v. United States*, 499 A.2d 860, 864-65 (D.C. 1985) (explaining that, even if the victim's statement could be "construed as a responsive threat," words are not adequate provocation).

Walker nonetheless claims that he had the right to punch Bracy in self-defense because Bracy was "yelling alcohol-fueled profanity at him, late at night, getting close to him, [and] confronting him face-to-face with nothing between them," and that he had no "duty to retreat from Mr. Bracy's threatening language and physical intimidation" (Br. at 17). This assertion fails for a variety of reasons. First, as noted above, words alone cannot justify an assault in response. Second, "this jurisdiction's rule is that 'if one has reason to believe that he will be attacked, in a manner which threatens him with bodily injury, he must avoid the attack if it is

possible to do so.'" *Andrews v. United States*, 125 A.3d 316, 322 (D.C. 2015) (quoting *Tyler v. United States*, 975 A.2d 848, 858 (D.C. 2009)). But Walker did nothing to avoid the confrontation with Bracy; instead, he argued with Bracy, insisting (inaccurately) that he had the right to touch Blankney. Third, and perhaps most importantly, Walker did not punch Bracy when the men were standing close and arguing, at the time that Bracy was (allegedly) a threat; instead, he punched Bracy only after a third party had tackled Bracy to the ground from behind and Bracy was being hit and protecting himself. At that time, as the trial court found, Bracy "did not present a threat to [Walker]," and thus it was not objectively reasonable for Walker to use force against Bracy.

In sum, there was sufficient evidence for the trial court to reject Walker's self-defense claim. *See Belt*, 149 A.3d at 1058; *Douglas v. United States*, 859 A.2d 641, 642 (D.C. 2004) (affirming conviction where "it [wa]s plain enough that [the trial judge] credited the testimony of the complainant that [defendant] was the aggressor").

II. The Motion Court Did Not Abuse its Discretion by Denying Walker's D.C. Code § 23-110 Motion.

Walker urges (at 20-24) that the motion court improperly denied his § 23-110 motion because his trial counsel failed to object to allegedly "inadmissible hearsay." His claim lacks merit.

A. Applicable Legal Principles and Standard of Review.

This Court reviews the denial of a § 23-110 motion for abuse of discretion. *Rivera v. United States*, 941 A.2d 434, 441 (D.C. 2008). In conducting that review, this Court assesses the trial court's findings of fact for clear error and determinations on questions of law de novo. *Jenkins v. United States*, 870 A.2d 27, 33-34 (D.C. 2005).

To establish ineffective assistance of counsel, a defendant must meet a two-prong standard. *See Strickland v. Washington,* 466 U.S. 668, (1984). First, the defendant must show that his trial counsel committed errors "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. Second, the defendant must prove prejudice "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.*

In evaluating counsel's performance, the reviewing court "must indulge a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance." *Strickland,* 466 U.S. at 689 (citation omitted); *accord Hill v. United States,* 4890 A.2d 1078, 1080 (D.C. 1985), *cert. denied,* 476 U.S. 1119 (1986). "Trial tactical decisions generally do not result in a finding of ineffective assistance of counsel." *Zanders v. United States,* 678 A.2d 556, 569 (D.C. 1996). Likewise, strategic choices will not be second-guessed because "[m]any alternative tactics are available to defense attorneys and their actions are often the products of strategic choices made on the basis of their subjective assessment of the circumstances existing at trial." *Id.* (quoting *Carter v. United States,* 475 A.2d 1118, 1123 (D.C. 1984)). "Mere errors of judgment and tactics as disclosed by hindsight do not, by themselves, constitute ineffectiveness." *Lane v. United States,* 737 A.2d 541, 549 (D.C. 1999) (quoting *Curry v. United States,* 498 A.2d 534, 540 (D.C. 1985)).

On the prejudice prong, the defendant must show that "but for counsel's unprofessional errors, there is a reasonable probability that the result of the proceedings would have been different." *Strickland,* 466 U.S. at 694. This Court "need not address both prongs of the *Strickland* test if

the defendant does not meet the burden of one or the other showing." *(Rodney) Brown v. United States*, 934 A.2d 930, 943 (D.C. 2007) (citing *Strickland,* 466 U.S. at 697).

B. Discussion.

It was not an abuse of discretion for the motion court to find that Walker had not demonstrated deficient performance or actual prejudice with respect to counsel's failure to object to Blankney's statements, which were admissible either as non-hearsay or under the state of mind hearsay exception. *See United States v. Islam*, 932 F.3d 957, 964 (D.C. Cir. 2019) ("The failure to raise a meritless objection is not deficient performance."); *(Rodney) Brown*, 934 A.2d at 944 (finding no deficient performance where "counsel may have prudently assumed that Payne's statement, made immediately after he was shot, would be admitted as an excited utterance or present sense impression").

At trial, Bracy testified that he heard Blankney yelling, "move, no, this is my pizza" (2/6/20 Tr. 24). He then saw Blankney "going back and forth" with Walker about the boxes of pizza she was holding (*id.* at 23-24). Blankney "insisted . . . this is my box, I bought this pizza, and no, you can't have any" (*id.* at 24). After Walker touched Blankney on the

buttocks, Blankney yelled "[d]on't touch me" and "[m]oved away" from Walker (*id.* at 26). Blankney also yelled "move away" and "used profanity"—she was "[e]xtremely upset" and Bracy could "see and hear [her] frustration" (*id.*).

According to Walker, Blankney's statements "[d]on't touch me" and "move away" were "plainly hearsay," the admission of which prejudiced him (Br. at 20-21). Not so. As an initial matter, Blankney's statements were commands, which are not hearsay because they are not assertions of fact. *See United States v. White*, 639 F.3d 331, 337 (7th Cir. 2011) ("a command is not hearsay because it is not an assertion of fact"); *United States v. Kivanc*, 714 F.3d 782, 793 (4th Cir. 2013) ("providing directions from one individual to another do[es] not constitute hearsay"); *United States v. Diaz*, 670 F.3d 332, 346 (1st Cir. 2012) ("Out-of-court statements providing directions from one individual to another do not constitute hearsay."); *United States v. Thomas*, 451 F.3d 543, 548 (8th Cir. 2006) ("commands generally are not intended as assertions, and therefore cannot constitute hearsay"); *United States v. Bellomo*, 176 F.3d 580, 586 (2d Cir. 1999) ("Statements offered as evidence of commands . . . rather than for the truth of the matter asserted therein, are not hearsay.").

There is nothing that can be true or false about Blankney's statements "[d]on't touch me" and "move away," and thus they cannot have been offered for their truth. *See United States v. Rodriguez-Lopez*, 565 F.3d 312, 314-15 (6th Cir. 2009) ("[I]f the statements were questions or commands, they could not . . . be offered for their truth because they would not be assertive speech at all. They would not assert a proposition that could be true or false."). They were thus admissible as non-hearsay.

Second, even if Blankney's statements could theoretically be admitted for their truth, each was admissible as non-hearsay and the motion court appropriately concluded that counsel was not ineffective for failing to object. First, "[i]t is fundamental that an out-of-court statement is not hearsay if it is offered for a purpose other than to prove the truth of the matter asserted." *Perritt v. United States,* 640 A.2d 702, 704 (D.C. 1994). "[T]his court has routinely recognized out-of-court statements as non-hearsay when they are used to show the effect on the listener and not to prove their truth." *In re Dixon*, 853 A.2d 708, 712 (D.C. 2004) (citation omitted) (admitting "testimony not to prove that appellant violated the [order], but to show that he was aware of its existence and its requirements"); *Mercer v. United States*, 864 A.2d 110, 118 (D.C. 2004)

(holding statement to witness to tell third party that appellant "wants him," was admissible because "it was not offered for the truth of the matter asserted" (that the particular statement was made), "but rather to show why [the third party] went outside (presumably because [someone] asked him to come out).").

Here, Blankney's statements were not offered for their truth, but to show their effect on Bracy and Walker. When Walker touched Blankney's buttocks, Bracy testified that he saw her reaction and she "screamed or yelled," "don't touch me" (2/6/20 Tr. 25-26). Based on Blankney's reaction, Bracy approached her to help and engaged in a verbal altercation with Walker so that Walker would cease his conduct. Blankney's statements "don't touch me" and "move away" were thus admissible to show their effect on Bracy—the reason he approached Walker and began yelling at him. Likewise, Blankney's statements informed Walker that he did not have her permission or consent to touch her again. They were thus admissible to show their effect on Walker—the reason he argued with Bracy and insisted that he could touch whomever he wanted. Thus, each statement was admissible for a non-hearsay purpose and counsel's

failure to make a meritless objection does not establish deficient performance. *Islam*, 932 F.3d at 964; *(Rodney) Brown*, 934 A.2d at 944.

Walker argues (at 22) that the statements could not have been admitted prove their effect on him because the statements were made after he touched Blankney's buttocks and "there was no other listener upon whom the statements needed to have any effect." This argument ignores that the statements were admissible to prove their effect on Bracy and to explain how the altercation between him and Walker began. Moreover, the statements were admissible to prove their effect on Walker because the statements were indisputably probative as circumstantial evidence that Walker knew or should have known that Blankney did not consent to the touching. Indeed, Blankney's immediate, strong reaction supported the unsurprising conclusion that she did not consent to a stranger touching her buttocks after she declined his request to take her pizza. They were admissible to show their effect on Walker, who never denied touching Blankney, but instead claimed that he could touch whomever he wanted.

And even if Blankney's statements were somehow only admissible for their truth, each was admissible to prove Blankney's state of mind.

The state of mind exception to the hearsay rule "permits the use of hearsay statements for the limited purpose of showing the state of mind of the declarant" if the declarant's state of mind is at issue in the trial. *Jones v. United States*, 17 A.3d 628, 632 (D.C. 2011) (quoting *Evans–Reid v. District of Columbia,* 930 A.2d 930, 944 (D.C. 2007)).

It is undisputed that Blankney's state of mind was at issue in this case. The government was required to prove that Blankney did not consent to Walker touching her to prove misdemeanor sexual abuse, or that she was offended by the touching to prove simple assault (the lesser included offense of which Walker was convicted). *See Nkop v. United States*, 945 A.2d 617, 619–20 (D.C. 2008) (third element of misdemeanor sexual abuse is that the defendant "knew or should have known that he or she did not have the complainant's permission to engage in the sexual act or sexual contact") (internal citation and quotation marks omitted); *Perez Hernandez v. United States*, 286 A.3d 990, 992, 1004 (D.C. 2022) (third element of offensive touching assault is "that the touching offended the other person") (footnote omitted). Walker acknowledges as much on appeal by positing (at 24-25) that he would have been acquitted of the

charges involving Blankney without her statements because there would have been no other evidence of her state of mind.[6]

Walker speculates (at 21-22) that even if the statements were admitted to prove Blankney's state of mind, the trial court must have improperly "considered the statements for their truth" because the statements are "essentially a declaration that the defendant was not permitted to touch" Blankney. As discussed above (at 26-27), there is no "truth" to the statements "don't touch me" and "move away." And even if there were, the state of mind hearsay exception is just that: an exception that allows certain out-of-court statements to be admitted for their truth. *See* Fed. R. Evid. 803(3); *United States v. (Lester) Brown*, 122 F.4th 290, 296 (8th Cir. 2024) ("Under this exception, hearsay is admissible when the declarant makes a statement regarding his or her current mental or physical condition, sensation, emotion, thought, or plan."). The trial court

[6] The statements at issue were also admissible as excited utterances. *See generally (Martin) Brown v. United States*, 27 A.3d 127, 131 (D.C. 2011) (an excited utterance is "a spontaneous declaration, not only tending to explain the act or occurrence with which it is connected but also indicating a spontaneous utterance of a thought while under the influence of that act or occurrence, with no opportunity for premeditation or deliberation") (internal quotation marks omitted).

was thus permitted to consider Blankney's statements as evidence that she did not consent to be touched by Walker.

Separately, the motion court did not abuse its discretion in finding that Walker had not shown that there was no reasonable possibility that the outcome of his trial would have been different had Blankney's statements been excluded (R2.229 (Order p. 11)). Contrary to Walker's assertion (at 23) that the "trial court cited no other evidence of the lack of permission but Ms. Blankney's statements," as the motion court explained, the trial court relied on Bracy's testimony about what he saw, including Blankney yelling at Walker and moving away from him right after he touched her buttocks. Even without Blankney's statements "don't touch me" and "move away," the evidence was overwhelming that Blankney found Walker's touch on her buttocks to be offensive, not "equivocal" as Walker contends (Br. at 25). Bracy saw Blankney move away from Walker after he touched her and yell at him using profanity, and he could see and hear that Blankney was frustrated and extremely upset (2/6/20 Tr. 25-26). Bracy's response—approaching Walker to defend Blankney and arguing with Walker about Walker's claimed right to touch whomever he wanted—was additional evidence that Bracy knew in real

time that Walker's touch had offended Blankney. Given this evidence, the motion court correctly found no reasonable probability of a different result had the trial court excluded Blankney's alleged hearsay statements.

III. The Trial Court Did Not Commit Plain Error By Admitting Blankney's Statements.

Walker contends (at 25-28) that admitting Blankney's statements was plain error because the statements were inadmissible hearsay, and their admission was not harmless. This claim is meritless.

A. Applicable Legal Principles and Standard of Review.

The decision to admit or exclude evidence is committed to the sound discretion of the trial court and will not be disturbed absent a showing of an abuse of discretion. *Dade v. United States*, 663 A.2d 547, 552 (D.C. 1995) (citations omitted). But where a party does not object to the challenged evidence at trial, a claim that admitting such evidence was incorrect is reviewed for plain error. *See* Super. Ct. Crim. R. 52(b); *Lowery v. United States*, 3 A.3d 1169, 1172 (D.C. 2010).

B. Discussion.

Walker did not object to Bracy's testimony about Blankney's statements (2/6/20 Tr. 24-26), so this claim is unpreserved and subject to plain-error review. *See* Super. Ct. Crim. R. 52(b); *Lowery*, 3 A.3d at 1172. "Under the test for plain error, [Walker] first must show (1) error, (2) that is plain, and (3) that affected [his] substantial rights. Even if all three of these conditions are met, this [C]ourt will not reverse unless (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Lowery*, 3 A.3d at 1173 (cleaned up).

Here, Walker has not shown error, much less plain error, in the admission of Bracy's testimony about Blankney's statements (2/6/20 Tr. 24-26). As explained above (at 26-31), these statements were commands, which are not hearsay, and were further admissible either as non-hearsay to show their effect on the listener or under the state of mind hearsay exception. And even if the statements somehow should have been excluded, they were not so obviously hearsay that it was plain error for the trial court not to sua sponte exclude them. Finally, for the same reason that Walker cannot show prejudice for ineffective-assistance purposes, he cannot establish that the admission of Blankney's

statements affected his substantial rights for plain-error purposes. Thus, the court did not plainly err by admitting Blankney's statements.

Walker posits (at 27) that the government could not prove simple assault without Blankney's statements because "[t]he remaining evidence, essentially that [she] 'jumped back,' is too equivocal" without the "context that the hearsay provided" to prove that he "*knew* (or should have known) that he lacked consent." This argument is meritless where the statements were admissible either as non-hearsay commands or to prove the effect on the listener, or under the hearsay exception to prove Blankney's state of mind. Further, there is no reasonable probability that the court would have reached a different verdict without the statements where Bracy's testimony that he observed Walker touch Blankney's buttocks and her immediate, strong negative reaction squarely established that Blankney did not consent to Walker touching her.

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, Richard P. Goldberg, Esq., richard.goldberg@goldberglawdc.com, on this 29th day of September, 2025.

/s/
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