Appeal No. 23-CM-782

DISTRICT OF COLUMBIA COURT OF APPEALS

DEJA AKERS,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee

Appeal from the Superior Court of the District of Columbia
Criminal Division

BRIEF FOR APPELLANT

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DISCLOSURE STATEMENT

At trial CJA attorney Santia McLaurin represented Deja Akers, and Assistant United States Attorney Alexis Dunlap represented the government. On appeal CJA attorney Russell Bikoff represents Ms. Akers.

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ISSUE PRESENTED

Whether this Court should reverse Appellant's conviction of attempted cruelty to children in the second degree, on a theory of "maltreatment," where the government's evidence showed only a two to three minute disciplinary session between Appellant-mother and her 5 year-old son, albeit with curse words and yelling from the mother and crying from the child, but without any evidence, expert or otherwise, of immediate or lasting psychological harm; and, where the mother's stated justifications for discipline were the need to correct her son, who had obscenely misbehaved at pre-K and tried to steal school toys, and to protect him in the years ahead as he grew up from well-known dangers to African-American teens and young adults?

STATEMENT OF THE CASE

On April 20, 2023, the government charged Deja Akers in D.C. Superior Court, in case 2023 DVM 00405, with two count of Attempted Second Degree Cruelty to Children under 22 D.C. Code sections 1101 (b) and 1803, a misdemeanor. On September 12, 2023, Ms. Akers went to trial before the Honorable Jennifer Anderson, an Associate Judge of the D.C. Superior Court. On September 18, at the end of the trial, Judge Anderson found Ms. Akers not guilty of the second count but convicted her on the first count of attempted cruelty to children. She sentenced Akers to 120 days in jail, with all time suspended, and to one year of supervised probation. Ms. Akers timely appeals from that judgment.

STATEMENT OF FACTS

The Evidence

The Government's Case

Valencia Smith, a cousin of Ms. Akers, recorded a telephone conversation she had with Akers apparently on March 14th. According to the witness, while she recorded Akers, the latter was forcing her five-year-old son, T.A.,[1] to engage in exercises for about five minutes as a disciplinary measure for the son's

[1] Although the transcript contains the boy's name, this brief will use the initials T.A. to safeguard his privacy.

misbehavior in school. (TRI: 11-23)[2] After this incident, Ms. Smith reported Akers to D.C.'s Child Protective Services, because Akers had reported her to the same agency. (TRI: 24)

Antonio Avery, a resident of Temple Hills, Maryland, with convictions for theft, burglary, and a sex offense, was the father of Ms. Akers's son, T.A., who was born in October 2017 and lived mostly with Ms. Akers. They met each other in 2017 as coworkers at MGM at National Harbor and entered a relationship, although they never lived together (TRI: 33-36). Avery finally met his son in April 2021 when he was released from a Maryland prison. T.A. mostly lived with Ms. Akers during the week and saw Avery on weekends. (TRI: 37)

In March 2023 T.A. was in pre-K at the Rise Rocketship Academy in Southeast and was moving back and forth between the homes of his parents. When he lived with his mother he was on Gainesville St., Southeast, in the District. At that time T.A. had "issues" at the aftercare program at the school. On March 9, 2023, Avery visited Ms. Akers's apartment to drop off T.A. at Akers's home. Avery let T.A. know "he was in trouble" for something he had done at school. While inside the apartment, Avery secretly made a recording from his cell phone to preserve Ms. Akers's "excessive" discipline of T.A. After Avery brought T.A. to

[2] Citations are to the transcript of the trial conducted on September 12 (testimony), September 14 (closings), and September 18 (court's findings and verdict), 2023, and indicated by TRI, TRII, and TRIII, respectively.

the door of the apartment, T.A. went inside his bedroom to change his clothes, while Avery stood by the doorway to the living room and the dining room table. (TR1: 37- 41, 51-52, 56).

Ms. Akers said that she was getting ready to discipline T.A. but did not say what she would do. Avery started his secret phone recording because "whipping was too excessive" and "I just wanted to see the duration of. . . her beating him." Avery saw Ms. Akers hitting T.A. on the legs "over and over again," although the witness admitted that no beating was shown on the video he had made. (TRI: 59) Akers was using "some little keychain thing with the Redskins thing like I have -- what they call a lanyard or whatever."

The government introduced the recording (video and audio) from Avery's cell phone into evidence as Government Exhibit 3 (TRI: 46) and played segments of it in court about six times during its direct examination of Avery.[3] Avery testified that he did not notice any injuries on his son, but the next day he saw lanyard marks on the side of T.A.'s legs and possibly a bruise on his ankle caused by the keychain. A few days later Avery and his wife [evidently another person, unnamed] brought T.A. to a hospital for a checkup. (TRI: 41-50, 60, 91-92)

[3] The prosecutor told the court that the video ran 13 minutes, but she would play only the "relevant portions." Defense counsel asked the court to admit the entire video, and the court did so, saying, "That's fine. I can watch the whole thing in my chambers." (TRI: 48-49)

After Ms. Akers finished punishing T.A., she and Avery talked "about [T.A.] getting in trouble multiple times that week in school and in aftercare." [4] (TRI: 52) Before leaving the apartment Avery heard Ms. Akers tell T.A., "you're getting your ass whipped in the morning." Avery responded, "no more" and told T.A. that he would come to get him in the morning. Avery did not take T.A. away from Ms. Akers's apartment that night. He admitted that he had been in a custody battle over T.A. with Ms. Akers since 2021. He also explained that Ms. Akers "uses profanity and vulgar—her—that's just a part of her. It's like English to her." (TRI: 61-62, 89-90)

Metropolitan Police Department Detective **Eric Kunimoto** was with the Youth and Family Services division of the department and led the investigation of

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[4] The nature of T.A.'s misbehavior is made clear on the recording Avery made, Government Exhibit 3. Ms. Akers mentions T.A. "wanting to show your ass" (Time mark 00:33), then asks him, "You need somebody to sit with you [at school]? (00:35, 00:41), and asks T.A., "Do you know how to listen?" (00:50). She says, "I'm tired of this shit. You've been doing this for months." (1:00) Akers then tells T.A. not to have the teacher, principal, or guidance counselor at school phone her (1:42). Referring again to school, she instructs T.A. to keep his clothes on (1:59), keep his hands to himself (1:56), and not touch "shit" that doesn't belong to him (2:10). <u>At 8:57 on the tape Ms. Akers tells Avery that T.A. "pulled his pants down and showed his actual ass in class."</u> Ms. Akers also tells Avery (at 10:00) that T.A. is "defiant," explaining that when she told him to take out his homework a few minutes earlier he did nothing.

Undersigned counsel's impression of the video in evidence is that Ms. Akers raised her voice, used profanity, and may have struck T.A. with the lanyard over the first two minutes of the video (from 00:00 to 02:00), and then continued to raise her voice for one minute when T.A. failed to comply with her demand that he take his homework out of his book bag (2:00 to 3:00). However, she never got angry or lost control of her emotions as she switched from disciplining her son to talking to Avery about the son's behavioral problems and the issues between them as parents over how to discipline T.A. (6:42 to 13:24). As the most powerful and instructive evidence in this case, the video does not show that Ms. Akers's conduct met the legal standard for criminal cruelty to children, as we argue *infra*.

Ms. Akers. He met on separate occasions with both Mr. Avery and Ms. Akers. The latter meeting, on March 27, 2023, was at Ms. Akers's apartment and the detective recorded his interview with her. At the interview, the detective first learned of the custody battle between Ms. Akers and Mr. Avery over T.A. The court admitted government exhibit 4, which is the audio and video of the interview.[5] (TRI: 97-106)

The detective acknowledged that Ms. Akers was cordial and spoke willingly. Akers told the detective that she "spanked" T.A. to discipline him, and that she does "more yelling than anything." She said that she does not hit T.A. with a belt or extension cord; rather she uses an open hand and she hit him around four or five

[5] At the conclusion of the detective's testimony, there was some question among the parties and the court whether the court was admitting "clips" of this interview or the entire audio of Government Exhibit 4. The court made clear that it was admitting the entire audio of this interview into evidence (TRI: 116), just as it had done with Government Exhibit 3, the video that Mr. Avery made with his cell phone.

The interview with Ms. Akers (audio only) has Ms. Akers telling the detective about T.A.'s behavioral problems at school and after-care with stealing, lying, and not sitting still, requiring that a counselor sit with him (23:10 to 24:00). She also notes the incident where T.A. pulled down his pants and told a teacher to "kiss his ass." This caused Ms. Akers to be summoned to the school from work to pick up her son, led to discussions with Mr. Avery (who told her that T.A. "needed his ass whooped"), and the parents' agreement that T.A. needed discipline, because he was "spinning out of control." (24:05 to 24:50) Mr. Avery, T.A.'s father, does not do any disciplinary role at all (29:07-). Ms. Akers also mentioned her concern about T.A.'s "mean mugging" and her fear that when he grew older that could be a "serious problem" if he did that to a police officer (31:20-, 32:11-). Ms. Akers related her long-term fears that one day her son would be "gunned down or incarcerated" and then she as a parent would be blamed. Thus, she tried to teach T.A. about sanctions like jail for older people who do not follow the rules. She wants to prevent T.A. going to prison like his father or to a jail "holding cell" as she had once. (33:50-, 35:17-, 35:30-, 35:37-) Finally, she was concerned that her own mother, who was homeless, was attempting to gain custody of T.A. so that the mother could receive "free housing and food" and could continue to avoid working (37:35-).

times. (TRI: 109) Akers also explained that she raised her voice with T.A. because "she feels like T.A. can't hear her because he is yelling as well." "She has to yell and scream. . . over him to get her point across, to get him to understand." Acres told the detective that T.A. practices "mean mugging" of her and is sometimes defiant. (TRI: 112-13)

Ms. Akers was concerned to "check [T.A.] and discipline him" because "problems like that, if they go unchecked in adulthood, it could become a serious problem." She told the detective that "she feared that he would get arrested or gunned down by a police officer if [he] mean mugged them[.]" Akers conceded that she needed to improve her tone and words. She also explained that she does not constantly yell at T.A.. "That's not her only disciplinary style and sometimes she tries to talk to him and explain things to him." (TRI: 114)

The Defense Case

Aakari Carter was a close friend of Ms. Akers and was living in the apartment with her from late January or early February for a period that included the March 14 incident. She knew and observed T.A. for about one month "before he was taken away." (TRI: 124-25, 136-37) She found the child to be "smart, outgoing, intelligent, funny, a teacher. He likes to teach a lot. He's also a little troubled. He gets into some trouble in school and stuff like that." (TRI: 125) During that time she observed Ms. Akers discipline T.A.: "She puts him in the

corner, she takes away his toys, no TV, timeouts, she's open hands, you know, pop him on the butt sometimes," although not forcefully. Ms. Akers also yells, but "she hasn't whooped [T.A.] in front of me, physically." (TRI: 129-30)

Jakela Barnes, another close friend of Ms. Akers, picked up T.A. at school each day, because her daughter attended school and after-care with T.A. T.A. often spent the night at Barnes's home. On the night of March 18, which Barnes remembered because it was the birthday of a friend, she bathed T.A. at her home, as she normally did when he stayed over, and saw no bruises or marks on him. (TRI: 145-51) Barnes was sure that she picked up T.A. on March 9 (a Thursday), but not on March 10, because she was working that day and had her sister pick up both children. (TRI: 152) Finally, this witness testified that Ms. Akers only uses curse words when she is angry. (TRI: 198)

Quiana Johnson-Fleming was the principal of the Appletree Institute at Rocketship Rise school, which T.A. had attended the school year prior to trial as a four-year-old in pre-K. She saw T.A. and the other students at the beginning and end of each day and when she visited classes. In the morning T.A. "would come in with a toy figure in the morning time, and he would give me a hug and then we would send him off to the cafeteria to meet with his other peers." (TRI: 182) Ms. Johnson-Fleming was aware of T.A.'s "stealing that he would be called out for at times in the classroom." (TRI: 162-63) However, T.A.'s behavior never got so

extreme that the classroom teacher sent him to the principal's office to see her. (TRI: 183) During March 2023 she never saw any signs from T.A. that he was the victim of child abuse, which she had been trained to detect. This includes physical, mental, and emotional abuse. Although she was not certified to diagnose such abuse, Ms. Johnson-Fleming certainly knew how to "look out for signs." (TRI: 175-76, 177-78, 184)

Djakarta Overton was T.A.'s teacher in the 2022 to 2023 school year, which included the month at issue of March 2023. T.A. was a good student, and was smart and respectful, but could be emotional. "I mean, sometimes he would just come in and his mood would be off. Like, he'll just be kind of mopey, a little bit sad." (TRI: 188-89). When asked to explain why T.A. was "mopey," the court sustained the prosecutor's hearsay objection. (TRI: 189)

T.A. occasionally stole toys from "centers" and placed them in his pocket; then a teacher would take the toy away from him. (TRI: 187-90, 196) Ms. Overton was trained to recognize abuse, including such signs as "clothes and things messed up," hunger, bruises, or marks, and "telling crazy stories or not wanting to go home." T.A. had no bruises or marks and did not exhibit any of these other signs of abuse. (TRI: 191) Nor did T.A. miss a lot of school. Rather, he was always present and active, and "very helpful in the classroom." He never

appeared fearful of going home, and "sometimes he would actually say he's ready to go home." (TRI: 192)

Ms. Overton on occasion observed Ms. Akers together with T.A., which were "good interactions . . . like a regular mother and child interaction." "I've seen her praise him for doing good things in the classroom[.]" "[I]f he's doing things that's bad, she lets him know . . . that's not the right thing to do." She never saw Akers berate or curse at T.A., nor discipline or place her hands on T.A., and she never saw any bruises on him. (TRI: 193, 195, 197)

Closing Arguments of the Government and Defense

In her closing the prosecutor acknowledged that "[T.A.] we know got in trouble at school." Regarding the March 9 events, she argued that the evidence showed that Ms. Akers had "smacked" T.A. several times with a lanyard. Also, Akers "told [T.A.'s] father that she wasn't going to leave any physical damages [sic]; she was going to leave severe mental damages. And she said that twice." (TRII: 4) The prosecutor then focused on the government's theory of "maltreatment" encompassing "mental and psychological harm" that was caused by Ms. Akers berating the child. (TRII: 7-8) Discussing Mr. Avery's cellphone video made on March 9, the prosecutor argued, "She's already disciplined him for what happened earlier in school. I'm going to whoop your ass again in the morning, to a 5-year-old child." *Id.*

The prosecutor then argued that a defense witness, T.A.'s teacher, Ms. Overton, had testified that T.A. was "sad and mopey" during March. This proved, according to her, that Ms. Akers's "intent" to cause psychological damage was "already taking effect" because of the change in T.A.'s "mental well-being while he's at school."[6] (TRII: 9, 11) She argued that Ms. Akers's conduct was not justified or reasonable, but excessive. Also, that Akers engaged in a pattern, five days apart, of berating her child, and putting him down. (TRII: 12, 14) She concluded by arguing that, "testimony aside," "the best evidence in this case are those two videos [sic]. Once of them is the video [i.e. March 9, Mr. Avery]; one of them is just audio [i.e. March 14, phone conversation]." She emphasized, "That's the best evidence as to what happened on those two instances." (TRII: 13)

During defense counsel's closing, the prosecutor narrowed the government's theory of the case when she told the judge that for the March 9 incident, the government was only arguing maltreatment, "not grave risk of bodily injury based on the hitting." (TRII: 21) The "maltreatment" came from the way Ms. Akers spoke to T.A. The prosecutor, repeating, made it clear that she was <u>not asking</u> the

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[6] Notably, during the Defense Attorney's closing, the judge agreed with counsel that the government did not connect the two March incidents to the teacher's testimony about T.A. appearing "sad" in March, because the defense counsel's question asking if the witness knew "why he was mopey" was disallowed upon the prosecutor's objection as hearsay. (TRII: 19-20) Counsel returned to this point later in her closing, arguing that the government did not produce "one shred of evidence that [T.A.] suffered any mental or psychological injury or harm" because of the March 9 incident. (TRII: 26-27)

judge to find "to the extent I believe that [Ms. Akers] hit him on the legs with a lanyard that that would be attempted second-degree cruelty." *Id.*

Defense counsel referred to the detective's interview with Ms. Akers and the audio recording he made of it. "[S]he expressed why she had to discipline [T.A.] that day." The boy "pulled down his pants . . . and he told the teacher at the school to kiss his butt." (TRII: 26) Counsel argued that Ms. Akers needed to discipline T.A. for that obscene act. She concluded by noting that T.A. was in trouble twice over a five-day period at school: First, for pulling his pants down, and the second time for stealing. (TRII: 34)

During the government's rebuttal, the judge said that she had admitted only part of Government Exhibit 3, the Avery video of the March 9 incident ("the one little snippet").[7] (TRII: 38)

The Trial Court's Findings of Fact and Conclusions of Law

Judge Anderson began her remarks by noting that there was "not a lot of dispute about what happened here" because of the "tape recording" [referring to March 14] and Mr. Avery's video recording [for March 9]. (TRIII: 3-4) The judge agreed with defense counsel that the Avery video did not show Ms. Akers hitting

[7] As noted above in note 3, this was not accurate. During Mr. Avery's testimony the court admitted the entirety of Government Exhibit 3, Avery's video recording. (TRI: 46, 48-49) Far from "a snippet" being admitted and played, the Government on its direct examination of Avery played different parts of the video six times (TRI: 46-50), and defense counsel on cross examination played parts of the video at least twice (TRI: 54, 58).

T.A., but she could "hear the hits" on the video and concluded that Akers "clearly was hitting him with the lanyard." *Id.* She noted, however, that the government was "not relying on the hitting with the lanyard" to prove its case for March 9. The judge agreed with the government, observing "that would be considered parental discipline," since the hits were on T.A.'s legs and with only a lanyard, and therefore like "some of the other things that the Court of Appeals has kind of okayed." (TRIII: 5)

Turning to the March 14 incident of Ms. Akers putting T.A. through a set of physical exercises, the court first found that defense witness Carter (who was living in Ms. Akers's apartment with her and T.A. in March) was "not overly credible" on the March 14 incident, because some of her testimony was at odds with the recorded phone call [made by government witness Valencia Smith]. (TRIII: 9)

The court then summarized the legal elements that the government needed to prove for both counts of attempted cruelty to children in the second degree. *Id.* The court defined and summarized the privilege of parental discipline, correctly stating that the government was required to disprove that defense beyond a reasonable doubt. (TRIII: 9-11) For the March 14 incident, the court concluded that despite "the improper language that the defendant used . . . [which was] [t]otally inappropriate, totally not great parenting," and based on "the cases" that

the court reviewed, the government's proof fell short. (TRIII: 10-11) Therefore, the court acquitted Ms. Akers on the second count.

Turning to the first count, concerning March 9,[8] Judge Anderson noted that the government was "relying really on . . . a combination of things," including disciplining T.A., cursing at him, and "just constantly berating the child." (TRIII: 11) The court observed, "The child is hysterical. And so all day long, terrible parenting. Terrible, terrible parenting." *Id.* Asking rhetorically whether this conduct amounted to a crime, the court observed that the government was arguing that Ms. Akers engaged in "maltreatment" of T.A. under the statute. The court then observed that this term, according to the Court of Appeals case *Alfaro*, encompassed more than "the infliction of physical pain." (TRIII: 11-12)

Focusing on whether Ms. Akers engaged in "maltreatment," the court noted that it had "the advantage of the videotape" [made by Mr. Avery]. The court could hear Ms. Akers's "tone of voice," even "word for word," and "the child's reaction." (TRIII: 12) Ms. Akers "berates the child, berates him kind of nonstop," noting that T.A. was only five years old. *Id.* Also noting defense witnesses who testified that Ms. Akers curses in her ordinary communications, the judge

[8] The court erroneously referred to the date as March 23, an incorrect date that she had used several times earlier in her findings and decision. Previously, when the court misstated the March 14 incident as "March 23," the prosecutor corrected her. (TRIII: 4-5, 11)

dismissed them, saying "as if somehow that's okay, to speak to a five-year-old child like that." *Id.*

Turning to testimony from Ms. Overton, the teacher who described Ms. Akers's disciplinary interactions with T.A. as appropriate, the court commented, "So that says to me that Ms. Akers knows how to behave when she's out in public and doesn't use this kind of berating language that she used when she had just [T.A.] in the apartment by [himself]." (TRIII: 13) The judge observed that Ms. Akers's language was "by any definition, like, incredibly excessive," considering the child's age of five. *Id.*

Reaching its conclusion, the court remarked, "But most importantly, there are two things that are really significant in the court's decision." The first was Ms. Akers's comment to Mr. Avery when "she says, 'He ain't going to have physical damage.' So it's very deliberate that she only hit him on his legs. . . . '[H]e's going to have severe mental damage,' which says to me that that was her intent and that she knew that's what she was doing." (TRIII: 13) The second item that the court considered "very significant" was when Ms. Akers tells T.A., "I'm going to whip your ass again in the morning." The judge says, "So she's already disciplined him. She's already spoken to him in this really horrific way, and then she threatens him for no good reason for the next morning, which would leave a little child, like, five in terror." *Id.*

The court concluded that "this level of verbal abuse rises to the level of mistreatment." It was not justified by parental discipline. Ms. Akers was "very deliberate" and "intentional," speaking to her "child in this horrible manner for the specific purpose" of inflicting "severe mental damage." In addition, threatening T.A. "with getting whooped the next day" when he had already been punished. (TRIII: 14) Finding that the parental discipline was "excessive" and "not reasonable," especially considering the age and "hysteria of the child," the court found Ms. Akers guilty of attempted cruelty to children in the second degree. *Id.*

ARGUMENT

GIVEN THE BREVITY AND MILDNESS OF MS. AKERS'S PUNISHMENT OF T.A. ON MARCH 9, WITH EVIDENCE THAT AKERS'S PURPOSE WAS TO CORRECT T.A.'S GROSS MISBEHAVIOR AT SCHOOL, AND THE ABSENCE OF PROOF THAT T.A. SUFFERED PSYCHOLOGICAL OR MENTAL DAMAGE, THERE IS INSUFFICIENT EVIDENCE TO DISPROVE AKERS'S RELIANCE ON THE PRIVILEGE OF PARENTAL DISCIPLINE AND TO SUSTAIN HER CONVICTION FOR ATTEMPTED CRUELTY TO CHILDREN IN THE SECOND DEGREE.

Judge Anderson's conviction of Ms. Akers on the single count of attempted cruelty to children in the second degree relating to the March 9 incident was based on her conclusion that Ms. Akers's tone and content of language amounted to "maltreatment" proscribed by D.C. Code section 22-1101 (b). The court also concluded that Ms. Akers could not benefit from the common law privilege of

parental discipline, because Akers's conduct was excessive and unreasonable. Both conclusions are unsupported by the evidence and are legally wrong. This Court should overturn Ms. Akers's conviction.

Trial counsel for Ms. Akers preserved the "full range of challenges" to the sufficiency of the evidence by entering a general plea of not guilty and through her motions for a judgment of acquittal. (TRI: 116-22; TRII: 4) *See Carrell v. United States,* 165 A.3d 314, 326 (D.C. 2017, *en banc*). This Court's review of sufficiency claims is *de novo. Hughes v. United States,* 150 A.3d 289, 305 (D.C. 2016). A sufficiency challenge encompasses challenges to the requisite elements of the crime. *See, e.g., Sutton v. United States,* 988 A.2d 478, 482 (D.C. 2010). "This Court . . . reviews de novo the elements of the crime which the prosecution must prove and against which sufficiency of the evidence is assessed." *Id.* In a review for sufficiency of the evidence this Court considers the evidence in the light most favorable to the government, and draws all inferences in favor of the prosecution, provided they are supported under any view of the evidence. *See, e.g., Vines v. United States,* 70 A.3d 1170 (D.C. 2013).

D.C. Code § 17-305(a) (2001) provides that after a judge trial, this Court "may review both as to the facts and the law, but 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." *See also Florence v. United States,* 906 A.2d 889,

893 (D.C. 2006). In general, this Court gives deference to the fact finder's credibility determination, weighing of the evidence, and drawing of justifiable inferences of fact. *See, e.g., Fadero v. United States*, 9 A.3d 1239, 1244 (D.C. 2013). Factual findings are binding on the Court of Appeals unless they are clearly erroneous, plainly wrong, or without factual support. *See Contreras v. United States*, 121 A.3d 1271, 1277 (D.C. 2015). The Court will not reverse the fact finder's credibility determinations unless they are clearly erroneous. *See, e.g., Leander v. United States*, 6 A.3d 672, 675 (D.C. 2013).

D.C. Code section 22-1101 (b) defines the crime of cruelty to children in the second degree, punishable as a felony by up to ten years in prison, as to "intentionally, knowingly, or recklessly" "maltreat a child or [engage] in conduct which causes a grave risk of bodily injury to a child." Charging this crime as an attempt under D.C. Code section 22-1803 converts the felony into a misdemeanor, punishable by a fine and imprisonment up to 180 days. In Ms. Akers's case, after the government disclaimed its theory that Ms. Akers engaged in conduct on March 9 that caused a grave risk of bodily injury to her five-year-old son T.A., the government relied only upon the clause of the statute that proscribes intentional, knowing, or reckless "maltreatment." (TRII: 21) The trial court assented to this and proceeded solely on the maltreatment theory, finding Ms. Akers guilty under that clause of the statute only. (TRIII: 11-12)

Under the District's law, just as a person charged with assault may assert a common law privilege of parental discipline, so may a person charged with the crime of cruelty to children under D.C. Code §22-1101 also raise this privilege as a defense. *See, e.g.*, *Florence, supra,* 906 A.2d at 893; *Newby v. United States*, 797 A.2d 1233, 1241-42 (D.C. 2002). "The defense is established where the defendant uses reasonable force for the purpose of exercising parental discipline." *Florence* at 893. The District's standard jury instructions describe how the parental discipline defense places the burden on the government to negate it beyond a reasonable doubt:

> The parent of a minor child is justified in using a reasonable amount of force upon the child for the purpose of safeguarding or promoting the child's welfare, including the prevention or punishment of his/her misconduct. Thus, the parent may punish the child for wrongdoing and not be guilty of second degree cruelty to children (1) if the punishment is inflicted out of a genuine effort to correct the child, and (2) if the punishment thus inflicted is not excessive in view of all the circumstances, including the child's age, health, mental and emotional development, alleged misconduct on this and earlier occasions, the kind of punishment used, the nature and location of the injuries inflicted, and any other evidence that you deem relevant. To be justified, the force must have been used for the purpose of exercising parental discipline and must be reasonable. [Name of defendant] is not required to prove that his/her conduct was a justifiable exercise of reasonable parental discipline. Rather, the government must prove beyond a reasonable doubt that the defendant's conduct was not so justified.

D.C. Criminal Jury Instructions, 2013, Release 11, Instruction 04-120-04-12.

To emphasize, the government must prove that the defendant's use of force against the child either was not for the purpose of parental discipline or that the

amount of force was not reasonable. In reviewing Ms. Akers's case, therefore, this Court should consider whether the facts are such "that a reasonable fact finder could conclude that the government rebutted appellant's parental discipline defense by proving beyond a reasonable doubt that the use of force was not used in a reasonable manner for disciplinary purposes." *Powell v. United States,* 916 A.2d 890, 894 (D.C. 2006).

Importantly for Ms. Akers's case, this Court, in holding that simple assault is not a lesser included offense of attempted cruelty to children in the second degree, concluded that the cruelty statute encompasses beyond a physical assault "an attempt to inflict mental or emotional pain or suffering upon a child, if sufficiently extreme or unreasonable." *Alfaro v. United States,* 859 A.2d 149, 153-54 (D.C. 2004) (emphasis added). The words of the child statute use "cruelty," which the court indicated "is not limited to the infliction of physical pain." *Id.* at 157. "The humiliation of another human being, reducing him or her to tears, is 'cruel . . . . To lock a small child in a room in the dark for a week is cruel[.]" *Id.* (emphasis added) The Court then turned to the meaning of "maltreat" from the statute, saying that it "cannot reasonably be read as embracing only physical maltreatment." *Id.* "To suggest that prolonged psychological torment of a child is not 'maltreatment' is to distort the meaning of the term." *Id.* (emphasis added) *Alfaro* made clear that the "maltreat" clause stands apart from the "conduct which

causes a grave risk of bodily injury to a child" clause, and that "each of the two prohibitions in § 901(b)(1) stands on its own and is independent of the other prohibition." *Id.* at 158.[9]

Also, the Court remarked how unlikely it is that Congress, in enacting the cruelty statute, "should be supposed to have excluded the deliberate and cruel infliction of serious mental or emotional suffering[.]" *Id.* (emphasis added) In commenting on a case from Louisiana,[10] the Court agreed that "the infliction of psychological harm" can fall within a cruelty statute, "but the harm must be serious and 'unjustifiable' rather than mild or trivial." *Id.* at 159 (emphasis added) In discussing a case from Georgia,[11] the Court observed that legislatures and courts alike "view the excessive infliction of psychological or emotional suffering as falling" within statutes proscribing cruelty to children. *Id.* (emphasis added) The *Alfaro* Court concluded its dismissal of that appellant's argument that simple assault merged into the cruelty to children statute by restating its finding that the "attempted second-degree cruelty to children statute . . . prohibits attempts to inflict unnecessary or unreasonable mental pain and suffering or psychological harm" on children. *Id.* at 160 (emphasis added)

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[9] The Court noted that in 2001 this section was recodified (i.e. renumbered) as § 22-1101. *Id.* at 156

[10] *State v. Barr,* 354 So.2d 1344 (La. 1978).

[11] *Murray v. State,* 135 Ga.App.264, 217 S.E.2d 293 (1975).

To sum up *Alfaro*, which is the only decision of the D.C. Court of Appeals (found by undersigned counsel) that addresses the nature of non-physical harm in the District's cruelty to children statute, the Court made clear that the statute encompasses such harm. Just as clearly, the Court defined limits before such harm could fall within the criminal prohibitions of that statute. The harm (note that the Court also uses "torment" and "suffering") needs to be extreme or unreasonable, like locking a child in a closet for a week; it must be prolonged or serious and 'unjustifiable' rather than mild or trivial; it must be excessive; and it must be unnecessary or unreasonable.

Given these limiting terms, it was legal error for the trial court in Ms. Akers's case to conclude that Akers's punishment of T.A. met the standards established in *Alfaro* for inflicting mental or emotional harm (or torment or suffering) that is prohibited by the cruelty statute. The two to three minutes of cursing and yelling, while directing demands and questions to T.A., were not at all prolonged, nor were they serious, excessive, extreme, unjustifiable, or unreasonable under the controlling precedent of *Alfaro*. Moreover, the multi-factor analysis required by this Court's other cases (not dealing with non-physical harm) supports our argument, developed further below, that Ms. Akers's conduct was not proscribed by the statute.

These cases define the contours of both the crime of cruelty to children and the defense of parental discipline. A defendant raising the parental discipline privilege does not thereby impose a requirement on the government to prove an additional element of malice on the part of the defendant to rebut that defense. *See Newby, supra,*797 A.2d at 1243-45. The *Newby* Court looked at the common law of Maryland to further add substance to the District's precedents. It found that in both jurisdictions, as in others, "the government could 'defeat' the parental discipline defense by proving either that the parent did not have a genuine disciplinary purpose or that the force used was immoderate of unreasonable." The "reasonable force" standard "appears to be the common law rule in the majority of jurisdictions." *Id.* at 1243.

In one case applying the reasonable force standard, this Court reversed a conviction for simple assault, finding reasonable doubt as a matter of law, "because of the lack of severity of the disciplinary force and absence of any evidence as to psychological trauma, or physical injury[.]" *See Longus v. United States,* 935 A.2d 1108 (D.C. 2007). The Court noted that in a parental discipline case, "slight evidence is not sufficient evidence; a mere modicum cannot rationally support a conviction beyond a reasonable double." *Id.* at 1111, *quoting Powell, supra,* 916 A.2d at 894 (internal quotations omitted). *Longus* advised that trial courts, to determine whether the use of force was reasonable, consider "the child's

age, health, mental and emotional state, and the child's past and present conduct. Exposure to a substantial risk of significant physical injury or significant pain may also be relevant[.]" *Id.* at 1112-13; *accord Powell*, *supra,* 916 A.2d at 893. In *Powell* also, this Court reversed a conviction for simple assault, finding the evidence insufficient to disprove the parental discipline defense beyond a reasonable doubt.

In *Florence, supra*, 906 A.2d 889, this Court again reversed convictions for assault and attempted second degree cruelty children, where the trial court misapplied the parental discipline privilege. There, the Court found that the record failed to support the trial judge's assertions that there was "no indication" and "no testimony" that the appellant was acting to discipline her child. *Id.* at 894. The Court said that a trial court "cannot second-guess a parent's choice of discipline, as long as not excessive, if it is used 'in the exercise of domestic authority by way of punishing or disciplining the child—for the betterment of the child or promotion of the child's welfare—and not [ ] a gratuitous attack.'" *Id.* (internal citations omitted) It held that the trial judge erred in finding that the appellant's anger at her child negated her disciplinary intent. The Court observed that uncontrolled anger could be evidence of lack of disciplinary purpose or unreasonable use of force but found that "[A]ppellant could simultaneously be angry and be acting lawfully, with

the intent to discipline. What the law requires of parents is the use of reasonable force for a disciplinary purpose, not saintliness." *Id.* at 895.

This Court has also affirmed convictions for assault and cruelty to children where the trial court has rejected the parental discipline privilege. In *Contreras, supra*, 121 A.3d 1271, this Court considered itself bound by the trial court's "credibility determination" that the appellant "acted out of a desire to be 'hurtful' rather than to correct her daughter's misbehavior." *Id.* at 1277. The *Contreras* Court distinguished its earlier decision in *Florence* by noting, first, that in *Contreras* the trial court did not incorrectly state that there was no evidence to support the defense of parental discipline. Second, in the case before it the trial judge did not wrongly conclude that the presence of anger in the parent automatically negated a purpose to impose discipline. Third, "and most critically," the trial judge "explicitly discredited Ms. Contreras's claim of a disciplinary purpose and gave specific reasons for making that credibility determination." *Id.* at 1277-78. The Court was unable to conclude that the trial judge had been "plainly wrong" in rejecting the defense and convicting appellant of assault. *Id.*

In *Dorsey v. United States*, 902 A.2d 107 (D.C. 2006), this Court upheld convictions of assault and attempted second degree cruelty to children, finding the evidence sufficient to establish that the appellant had recklessly engaged in conduct that caused a grave risk of bodily injury to his child, when he struck the

child with a belt in the face near an eye. The Court also upheld the trial judge's finding that rejected the parental privilege because the appellant had used excessive, unreasonable force. *Id.* at 112-13. Since there was sufficient evidence to sustain a conviction for the completed offense of cruelty to children, "there is also sufficient evidence to support a conviction of attempted cruelty to children," because "every completed criminal offense necessarily includes an attempt to commit that offense[.]" *Id.* at 113 and n. 3.

In *Lee v. United States*, 831 A.2d 378 (D.C. 2003), this Court upheld a conviction for assault and attempted cruelty to children, and rejected the parental privilege defense, approving the trial court's determination that the appellant's corporal punishment "was not reasonable under the circumstances." *Id.* at 381. The Court held that cruelty to children is a general intent crime, and the government was not required to prove that the appellant "intended to create a grave risk of bodily injury." *Id.* at 382.

Finally, in *Jones v. United States*, 813 A.2d 220 (D.C. 2002), this Court upheld a jury conviction of first- and second-degree cruelty to children under the statute, D.C. Code §22-1101 (a) and (b). It held that "malice" was not an element of the crime under either subsection, distinguishing earlier cases that had been superseded by the 1994 amended version of the statute. *Id.* at 224. Further, the Court reaffirmed its holding in *Newby, supra*, 797 A.2d at 1245, that neither was

the government required to prove "malice" to rebut an appellant's assertion of the parental privilege defense. *Id.*

Applying all these principles to Ms. Akers's case compels the conclusion that the trial court erred both in finding that she maltreated her son by inflicting mental or emotional torment and rejecting her defense of parental privilege. As noted earlier, the gravamen of the government's case was a two-to-three-minute excerpt from the videotape made by the child's father, Mr. Avery, that revealed Ms. Akers, with a loud voice and using profanity, issuing instructions and raising questions to T.A. about his behavior at school, while apparently striking him several times with a lanyard on his legs. The trial court found that Ms. Akers intentionally inflicted upon her son mental or emotional pain or suffering. Given the brevity and relative mildness of the chastisement, however, this did not rise to the level of cruelty or maltreatment, as those terms are defined in *Alfaro.*

The District Jury Instructions and cases cited above also compel an inquiry into a set of factors and the circumstances. This leads to the conclusion that Ms. Akers properly disciplined T.A. with both a corrective purpose and reasonable use of mild force, consisting of her loud voice and some profane words, in addition to some striking with the lanyard. T.A. presented a problem to his mother as a five-year-old intelligent and helpful student at his pre-K class; however, one who engaged in gross misbehavior that evidently included pulling down his pants to

reveal his buttocks and even saying to the teacher or after-care supervisor, "Kiss my ass." He also was engaging in "theft" by pocketing small toys in the classroom that did not belong to him. His mother, Ms. Akers, had to respond to his misbehavior.

The video (audio) tape reveals that in a firm voice, but in control of her emotions and not in anger, Ms. Akers told her son to keep his clothes on, keep his hands to himself, and not touch items ("shit") that do not belong to him. She told him not to have the teachers, principal, or guidance counselor call her again. Referring to T.A. "wanting to show [his] ass," she asked if he needs somebody to sit with him [at school]. She finished by asking T.A., "Do you know how to listen?" and saying with exasperation, "You've been doing this for months" and finally, "I'm tired of this shit." (*See supra* p. 5, note 4) The duration of the chastisement was only two to three minutes.

Just as a parent who expresses anger (which Ms. Akers did not) does not automatically foreclose a disciplinary purpose, according to Court of Appeals precedent, so Ms. Akers's loudness and profanity does not negate the conclusion that her intervention had a corrective purpose. As Ms. Akers explained to the detective, she was loud so that T.A. could hear her over his crying. As for profanity, T.A.'s father (Mr. Avery) testified that she used profanity in everyday

speech and a friend, Jakela Barnes, said Akers used profanity when angry, flaws that Ms. Akers acknowledged to the detective.

Moreover, as she told the detective at the interview at her home, she also possessed a long-term motive for her discipline: To prevent her son from "mean mugging" others when he grew older, especially police officers, because this behavior in a young African American male could place his life in danger, as Ms. Akers feared.

Further, this brief encounter between mother and son produced neither short- nor long-term negative effects. T.A.'s classroom teacher could see no signs of abuse and no changes in T.A.'s mood or affect that anyone at the trial attempted to tie to this incident. Nor did the government offer any expert testimony by a childhood expert in the field of psychiatry or psychology who had examined T.A.; there was no expert testimony at all.

The trial judge placed excessive weight on what she labelled "berating" and the profanity. This over-emphasis is perhaps more a product of the judge's own cultural and social predispositions, which should have played no role in determining whether Ms. Akers had engaged in proscribed criminal activity. As this Court reminded us in *Florence*, a trial court "cannot second-guess a parent's choice of discipline, as long as not excessive, if it is used 'in the exercise of domestic authority by way of punishing or disciplining the child—for the

betterment of the child or promotion of the child's welfare—and not [ ] a gratuitous attack.'" *Florence*, *supra,* 906 A.2d at 894.

The trial court here also pointed to two other factors that it termed "really significant." First, the court adverted to Ms. Akers's alleged statement that her intention was to cause "mental damage" to her son. At the 4:25 mark on Government Exhibit 3, Mr. Avery tells Ms. Akers that she should leave no physical damage on T.A.. Akers responds that he is not going to have physical damage. He is going to have "a severe mental damage." Then both parents turn T.A. around to inspect the back of his legs. The focus in this part of the conversation was on any possible marks that the lanyard may have left on T.A.'s legs. The limited lashing and verbal chastisement was already finished. When Avery mentioned "physical damage," Ms. Akers automatically responded with the appositional "mental damage." This is vastly different from her admitting that her goal in this entire project was to inflict mental damage, which would be a most improbable goal for any mother. Finally, as shown above, for the infliction of mental, emotional, or psychological harm to rise to "maltreatment" under the statute, it needs to be far more extensive, serious, and longer lasting than anything Ms. Akers did to T.A. that day—notwithstanding any offhand comment she made after the fact.

Second, the trial court thought it also "really significant" that Ms. Akers supposedly told her son that she would "whip your ass again in the morning" in the words of the court. (TRIII: 13) Again, the Avery video/ audio recording shows how far this finding is from reality. At the 3:50 mark on the recording, the parents are discussing the need for Mr. Avery to stop by in the morning to pick up T.A., and they agree on 8 a.m. Avery then says to T.A., "When you wake up in the morning—" as Ms. Akers cuts him off and says (sotto voce), "You're getting your ass whipped again." Mr. Avery responds, "No, no. Do not hit him again. That's enough." It is not even clear that T.A. heard his mother's remark. Even if he did, he may not have taken it as a true indication that she planned to resume "whipping" or another form of discipline in the morning. Further, T.A.'s father immediately addressed the issue, making clear to Ms. Akers and T.A. that there would be no further "hitting."

As the recording indicates, Mr. Avery and Ms. Akers were arguing over Avery's unwillingness or inability to share disciplinary duties with T.A.'s mother. Ms. Akers was clearly frustrated, and thus her remark about another whipping in the morning seems directed more to Avery than to T.A. She also made it spontaneously and in an off-hand manner, much like the first remark. In any event, without a shred of evidence showing what effect, if any, this comment had on T.A.,

the trial judge's decision to give it weight toward proving any element of the criminal charge or rebutting the parental privilege is insupportable.

In sum, the evidence in the record is insufficient to establish the government's theory that Ms. Akers committed attempted cruelty to children in the second degree by means of maltreatment. The evidence is also insufficient to disprove beyond a reasonable doubt Ms. Akers's defense of the parental discipline privilege. The evidence fails to show, to the standard of proof required by the criminal law, either that correction and discipline were not the main motivation for Ms. Akers or that the measures Ms. Akers used were excessive and unreasonable.

CONCLUSION

For all the foregoing reasons, Appellant Deja Akers respectfully asks this Honorable Court to reverse her conviction on one count of attempted second degree cruelty to children.

Respectfully submitted,

/S/

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CERTIFICATE OF SERVICE

I certify that on December 5, 2023, I caused this Court's e-filing system to send a copy of the foregoing *Brief and Appendix for Appellant* in the case of *Deja Akers v. United States,* Appeal Nos. 23-CM-782 to the United *States* Attorney's email box and/ or the email box of AUSA Chrisellen Kolb, Esq., Chief of the Appellate Division.

/S/

_____

Russell A. Bikoff

District of Columbia
Court of Appeals

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Pursuant to Administrative Order No. M-274-21 (amended May 2, 2023), this certificate must be filed in conjunction with all briefs submitted in all criminal cases designated with a "CF" (criminal felony), "CM" (criminal misdemeanor), "CT" (criminal traffic), and "CO" (criminal other) docketing number. Please note that although briefs with above designations must comply with the requirements of this redaction certificate, criminal sub-case types involving child sex abuse, cruelty to children, domestic violence, sexual abuse, and misdemeanor sexual abuse will not be available for viewing online.

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A. All information listed in Super. Ct. Crim. R. 49.1(a) has been removed, including:

(1) An individual's social-security number
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(6) Financial account numbers

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(d) the year of the individual's birth;
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B. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

C. All pre-sentence reports (PSRs); these reports were filed as separate documents and not attached to the brief as an appendix.

D. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

E. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

F. Any other information required by law to be kept confidential or protected from public disclosure.

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Case Number(s)

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Name

12/5/2023
Date

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