DISTRICT OF COLUMBIA COURT OF APPEALS

Appeal No. 23-CM-939

DWAYNE DAVIDSON,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

Appeal from the Superior Court of the
District of Columbia – Criminal Division
2023 CMD 1954

OPENING BRIEF FOR APPELLANT

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D.C. App. R. 28(a)(2)(A) Statement

Appellant Adrian Madsen and appellee the United States were the parties in the trial court. Adrian E. Madsen, Esq., represented Mr. Davidson in the Superior Court, as did (briefly) Nabeel Kibria, Esq.. Assistant United States Attorneys D. William Lawrence, Esq., Alexander Cook, Esq., Lernik Begian, Esq., Luke Albi, Esq., Christopher Gerace, Esq., Samuel Ison, Esq., Valerie Tsesarenko, Esq., and Katherine Toth, Esq., represented the United States in the Superior Court. Adrian E. Madsen, Esq. represents Mr. Davidson before this court. Assistant United States Attorney Chrisellen Kolb, Esq., represents the United States before this court. There are no interveners or amici curiae. No other provisions of D.C. App. R. 28(a)(2)(A) apply.

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ISSUES PRESENTED

1. Whether the trial court erred by admitting over objection testimony about what a non-testifying WMATA "technician" did—including downloading video footage—under the "business records" exception to the rule against hearsay.
2. Whether the admission of testimony from a WMATA supervisor about what a non-testifying WMATA "technician" did violated Mr. Davidson's Sixth Amendment right to confront witnesses against him where the supervisor did not witness the actions of the "technician" about which she testified.
3. Whether the trial court erred by admitting over objection and finding properly authenticated Washington Metropolitan Transit Authority ("WMATA") footage taken from a Metro train car where the video did not contain any date or time stamp, where the sponsoring witness testified that the "master copy" of the video would contain a date and timestamp, where the sponsoring witness did not personally witness the events depicted, where the sponsoring witness did not personally download or otherwise preserve the footage, and where the sponsoring witness testified that the only reason she believed the footage was recorded on a particular date at a particular time was because someone else told her that.
4. Whether the trial court erred by finding that actions creating a "substantial risk of unconsciousness" are sufficient to satisfy "likely to produce death or great

bodily injury by the use made of it" element of attempted possession of a prohibited weapon under D.C. Code §§ 22-4514(b), -1803.

5. Whether the evidence was sufficient to support a conviction for attempted PPW(b) where the trial court found that Mr. Davidson once kicked the complainant in the head, where was no evidence regarding the material of Mr. Davidson's footwear, where the government did not present testimony from any medical expert, where there was no evidence of any lasting effects from the kick, and where the trial court expressly declined to find that Mr. Davidson was the cause of the complainant's injuries because there was evidence that another man kicked the complainant.

6. Whether the trial court erred by concluding that the government disproved self-defense beyond a reasonable doubt, a conclusion the trial court rested on its finding that Mr. Davidson subjectively feared imminently bodily harm, but that his belief was objectively unreasonable, where the trial court found that two men were "snatching" Mr. Davidson "up," that the man Mr. Davidson was convicted of assaulting earlier "had his arms around Mr. Davidson, while [another man] [wa]s unfettered swinging at" Mr. Davidson, that "for much of the fight leading up to the incident at issue here for which Mr. Davidson is charged, Mr. Davidson was fighting against both Allen [] and Young []," the complainant, and where

approximately thirty seconds passed between the end of what the trial court characterized as a "fight," and the offending conduct, a kick.

STATEMENT OF THE CASE

Mr. Davidson was charged by information with one count of simple assault in violation of D.C. Code § 22-404 and one count of attempted possession of a prohibited weapon (shod foot) in violation of D.C. Code § 22-4514(b), -1803. R. 1.[1]

After rejecting a plea offer extended by the United States, Mr. Davidson proceeded at trial, beginning on October 24, 2023. At trial, the government presented three witnesses, Claribelisse Colon Colon, a Metro passenger who observed some but not all relevant events, Wanda Robinson, a digital evidence manager at WMATA, and Metro Transit Police Department ("MTPD") Officer John Ubiera. Neither Ms. Robinson nor Officer Ubiera personally witnessed the conduct the trial court found constituted the charged offenses. The government did not call as a witness Kevin Young, the complainant. Mr. Davidson was the sole defense witness.

On November 6, 2023, the trial court found Mr. Davidson guilty of both charged offenses, concluding, inter alia, that, although Mr. Davidson subjectively feared imminently bodily harm, the government had proven beyond a reasonable doubt that Mr. Davidson was not acting in self-defense because, the trial court

[1] "R." refers to the record on appeal. "Tr." refers to transcript by date of proceeding, all occurring in 2023.

concluded, that belief was objectively unreasonable, and that Mr. Davidson was—for the purposes of the offense conduct—the "aggressor," based on an thirty-five-second break in what the trial court characterized as a "fight," for a period "two-on-one" against Mr. Davidson. 11/6 Tr. 10-11, 18-19. The trial court sentenced Mr. Davidson to 60 days of incarceration, execution of sentence suspended as to all, in favor of one year of probation with special conditions. 11/6 Tr. 35; R. 13. This timely appeal followed. R. 14.

STATEMENT OF FACTS

On April 1, 2023, Mr. Davidson, along with then-co-defendant Alexis Allen,[2] was charged by information with one count of simple assault in violation of D.C. Code § 22-404 and one count of attempted possession of a prohibited weapon ("PPW") (shod foot) in violation of D.C. Code § 22-4514(b), -1803, based on events alleged to have occurred on March 31, 2023 against Kevin Young. R. 1. After arraignment,[3] Mr. Davidson's release,[4] and several status hearings,[5] Mr. Davidson rejected a plea offer, and the case was set for trial. 7/8 Tr.; 7/18 Tr.

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[2] A co-defendant, Alexis Allen, was also charged with the same offenses Superior Court case number 2023 CMD 1955, also against Kevin Young. Allen pled guilty pursuant to a plea agreement with the United States. 6/14 Tr. 12. Neither party called Mr. Allen as a witness at Mr. Davidson's trial.

[3] 4/1 Tr.

[4] R. 4.

[5] 5/9 Tr.; 5/18 Tr.; 6/14 Tr.; 7/18 Tr. Mr. Davidson briefly retained attorney Nabeel Kibria Esq., R. 9, whose somewhat unusual later motion for leave to withdraw as counsel the trial court granted. R. 10-11. In so doing, the trial court reappointed the

Claribelisse Colon Colon

On October 24, 2023, the parties appeared for a non-jury trial before the Honorable Deborah Israel. After the government's opening statement,[6] the United States first called Claribelisse Colon Colon ("Ms. Colon"). Ms. Colon testified that on March 31, 2023, while on a Metro train, "a fight ended up erupting… between three individuals," a "fight" Ms. Colon "didn't notice until [she] heard it." 10/24 Tr. 17 (9-15). While "sitting, like, three seats away from them," with her "back… towards… the three individuals," "speaking… was getting louder and louder" before Ms. Colon "heard noise, commotion, punching, movements, and people started getting up and moving." 10/24 Tr. 17 (16-24). After Ms. Colon "got up and moved[,] [a]t some point, [she] started recording." 10/24 Tr. 18 (2-3). Ms. Colon characterized what she recorded as "the fight," which she recorded on a cell phone "[j]ust right in front of where [she] was sitting at." 10/24 Tr. 18 (11-16).

When asked how "the fight" ended, Ms. Colon testified that "at some point they got separated," a man wearing blue "kind of crawled outside of the Metro," and that "the other gentleman was like, looking for [his] stuff, frantic, and hit the other

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undersigned to represent Mr. Davidson in the Superior Court, a request made by Mr. Davidson.

[6] After the government's opening statement suggested an issue of duplicity to Mr. Davidson, the government clarified that the alleged conduct that formed the basis of both charged offenses was alleged kicking, not punching the government referred to in its opening statement. 10/24 Tr. 14.

gentleman that was already down on the floor." 10/24 Tr. 19. Returning to the question posed, Ms. Colon testified that she was "not sure how exactly[;] [i]t just stopped." 10/24 Tr. 19 (7-8). At that time, Ms. Colon testified, "a gentleman in… gray was punching the gentleman in the green or yellow vest," who was "on the floor" and not punching back. 10/24 Tr. 19-20. The United States moved into evidence a thirty-six-second portion of the video Ms. Colon took on her phone, ultimately without objection. 10/24 Tr. 20-26; Gov't Ex. 1. After the events depicted in government exhibit 1, Ms. Colon provided the video to the police and was driven home by an officer. 10/24 Tr. 26-27.

On cross-examination, Ms. Colon agreed that there were events that occurred before "the fight" depicted in the video she recorded and that "the man in the blue was punching the man in the gray… while the man in the yellow was holding the man in the gray." 10/24 Tr. 28-29. After some confusion, Ms. Colon agreed that what was ultimately admitted without sound as defense exhibit 2 was the entire video she recorded and provided to police on March 31, 2023. 10/24 Tr. 35-43. Through Ms. Colon, Mr. Davidson moved into evidence as defense exhibit 3 a video in which Ms. Colon was visible, which Ms. Colon agreed, at minimum, showed "the man in the blue… kicking something" near "the man in the yellow." Ms. Colon did not know whether the man in the blue was "actually kicking the man in the yellow,"

because, while the man in the yellow was "right [t]here," in Ms. Colon's recollection, "the man in the gray [w]as also there." 10/24 Tr. 44-48.

On redirect examination, Ms. Colon testified that when "the man in the yellow" was "involved in the three that were fighting," he "he had his arms wrapped around the gentleman with the gray, but could not "say whether [the man in the yellow] was trying to pull [the gentleman with the gray] away or if he was holding on to him, but he wasn't letting go of him, and I don't know why." 10/24 Tr. 51. Ms. Colon also testified that "the other gentleman was -- just kept punching the guy in the gray, and the guy in the gray was trying to defend himself while the guy in the yellow was holding on to the guy in the gray." 10/24 Tr. 52.

MTPD Officer John Ubiera

The government next called MTPD Officer John Ubiera. 10/24 Tr. 55. Officer Ubiera testified that on March 31, 2023, at about 6:30 pm, he went to the Benning Road Metro Station for a report of a "fight aboard a train." 10/24 Tr. 57 (2-8). When he arrived at "the car where the fight was reported to be in," Officer Ubiera "saw the gentleman sitting to [his] left [in court] walking out of the train car,"[7] whom he "attempted to stop," but "could no longer" do so because he saw "two other individuals," one of whom "was assaulting the other." 10/24 Tr. 57 (11-25). Officer

[7] Officer Ubiera identified Mr. Davidson in court without objection as a person he arrested on March 31, 2023. 10/24 Tr. 59 (6-12).

Ubiera testified that the man he at first "attempted to stop," Mr. Davidson, was wearing gray, and that Officer Ubiera arrested three people that day; Mr. Davidson, a man "wearing an orange construction-type vest and a blue jacket," and a man "wearing… a yellow… construction-type vest." 10/24 Tr. 59-60. Officer Ubiera also testified that, in addition to wearing gray, Mr. Davidson was wearing "jeans and like, construction-style boots." 10/25 Tr. 68 (5-8). [8] Two people were "fighting" inside the train when Officer Ubiera arrived, wearing orange and blue and yellow, respectively. 10/24 Tr. 61. More specifically "one" of the two men in an orange vest and blue jacket and "yellow construction-type jacket," "was on the ground, and the other one… kept going from the door back to assaulting the person that was on the ground and back to the door." 10/25 Tr. 69 (15-24). Officers detained the person in the blue jacket and orange vest, who had been "actively assaulting someone" in Officer Ubiera's presence and Mr. Davidson, and other officers "went to attend to the person that was on the ground." 10/25 Tr. 70-71. Without objection, the government moved into evidence a photo taken "of the person who was in the yellow jacket," taken on the Metro platform. 10/25 Tr. 71-72. The person wearing yellow "went with the medics," and the man wearing blue and Mr. Davidson were taken to the Sixth District police station. 10/25 Tr. 73-74.

[8] Officer Ubiera's testimony was taken out of turn because the prosecutor had difficulty timely locating video it wished to use to impeach Officer Ubiera. 10/24 Tr. 61-71.

On cross-examination, Officer Ubiera agreed that when he arrived at the scene, the man in the blue jacket and orange vest was assaulting the man in yellow by repeatedly kicking him. 10/25 Tr. 75-76. Officer Ubiera testified that Mr. Davidson was taken to the hospital on March 31, 2023, and, after initially denying that this was the case and being confronted with a photograph of Mr. Davidson[9] and his own radio transmissions from March 31,[10] agreed that Mr. Davidson had a laceration on his forehead that day, which Officer Ubiera referred to as a "major laceration." 10/25 Tr. 76-84. Officer Ubiera did not see Mr. Davidson interact with either of the two other men arrested. 10/25 Tr. 77 (7-13). Officer Ubiera agreed that he did not handle what he described on direct examination as "construction-style boots," that he did not know the brand of what he believed to be boots, and did not know what the footwear was made of. 10/26 Tr. 5.

On redirect examination, Officer Ubiera testified that Mr. Davidson was not taken directly to the hospital from the Metro station. 10/26 Tr. 19 (6-8).

Wanda Robinson (WMATA)

The government next called Wanda Robinson, the manager of the "Digital Evidence Unit" at WMATA, who testified that she was the custodian of records for WMATA and that her duties included "[s]upervising a staff of both analysts and

[9] This photograph was admitted into evidence as defense exhibit 4.
[10] This radio run was identified as defense exhibit 5 but not moved into evidence.

trained technicians that recover, research, and preserve video evidence." 10/24 Tr. 76-77. Ms. Robinson testified that, in response to a subpoena, she "reviewed certain WMATA records," and identified what was then marked for identification as government exhibit 2 as "recording that was downloaded by one of my technicians regarding an incident." 10/24 Tr. 77-78 (12-3). Ms. Robinson also agreed that government exhibit 2 was "kept in the regular course of business," that it was "WMATA's regular course of business to record and save these videos," and that "this video [was] made at the time it was recorded or soon thereafter." 10/24 Tr. 78 (4-12). When Mr. Davidson objected on hearsay grounds, in response to a question about how government exhibit 2 was actually "obtained" and Ms. Robinson's testimony that a "[t]echnician actually went out, pulled it, reported it, brought it back, downloaded, and preserved it," the trial court overruled the objection at that time. 10/24 Tr. 78-79. Ms. Robinson testified that government exhibit 2 is kept "in a locked evidence room," and used for "safety and… other administrative investigations." 10/24 Tr. 80 (5-10).

When the United States then sought to move government exhibit 2 into evidence, Mr. Davidson objected on authentication grounds, arguing that the business records exception is an exception to the rule against hearsay, not a basis for authentication. 10/24 Tr. 80-81. The trial court overruled the objection. 10/24 Tr. 81-82. Finally (on direct examination), Ms. Robinson testified that "this video in

particular"; i.e., government exhibit 2; was "pulled" because "[w]e received a request to have it pulled and preserved." 10/24 Tr. 85 (5-8).

On cross-examination, Ms. Robinson testified that: 1) she was not present on the train car during the events depicted in defense exhibit 2, 2) she did not personally download the video that constituted government exhibit 2, 3) she was not present when anyone else downloaded the video, and 4) the way in which she knew that the person who did preserve the video that was government exhibit 2 was because that person told her so. 10/24 Tr. 86-88. Based on these facts, Mr. Davidson renewed his prior authentication and hearsay objections and additionally objected on Confrontation Clause grounds. 10/24 Tr. 88 (4-6). The court then sustained Mr. Davidson's hearsay and Confrontation objections. 10/24 Tr. 89-90. As the trial court observed, "a defendant can't ask questions of a file cabinet," and "[t]he fact that there is a business record doesn't address the Sixth Amendment at all." Rephrased another way, the trial court stated:

> I understand defense counsel to be saying, don't we have a confrontation clause problem here? We have the boss. We don't have the tech. I can't cross-examine the boss because the boss didn't do it. That's what we just established clearly in the evidence.

10/24 Tr. 91 (20-25).

During a lengthy colloquy, the trial court suggested that it was nonetheless still overruling Mr. Davidson's authentication objection, which Mr. Davidson

summarized as "the business record is an exception to the rule against hearsay[,]… not a basis for authentication." 10/24 Tr. 89-98. The court then recessed the trial until the following day to give it and the government an opportunity to research the issues involved. 10/24 Tr. 98.

Final Ruling Regarding Government Exhibit 2

The following day, the trial court heard argument from the parties regarding the hearsay and constitutional issues. The government argued that "the defense is making an argument that the act of pulling the videos for prosecution… requires confrontation," and citing *United States v. Clotaire*, 963 F.3d 1288, 1296 (11th Cir. 2020), argued that this was incorrect. 10/25 Tr. 5-7. Mr. Davidson reiterated that the hearsay statements in question were those "from the technician to Ms. Robinson about what [technician] did in pulling this video," and, citing *Carrington v. District of Columbia*, 77 A.3d 999 (D.C. 2013), and underscored that, as this court held in *Burns*,[11] "forensic evidence is not exempt from the requirements of the [C]onfrontation [C]lause." 10/25 Tr. 8-10.

> And so we heard testimony from Ms. Robinson that the only reason that this video was -- whatever the word we're going to use here -- was downloaded, collected, put into the form that it was, was in response to the subpoena.
>
> So the statement that the technician is making about the manner in which he did that, the primary purpose of that statement is to prosecute Mr. Davidson. This is not

[11] *Burns v. United States*, 235 A.3d 758 (D.C. 2020).

> something he was saying, oh, this is what I'm regularly doing in my job. This is, they got a subpoena in this case, and in response to that, certain things happened, and one of those statements is about what the technician claimed to have done.
>
> So just as in *Carrington,* where the defense was unable to cross-examine about how the evidence was handled before the testing, whether there were proper procedures employed, I can't do that with respect to the technician, again, as Your Honor pointed out, because the technician is not here. So the hearsay is the technician's statements about what he or she did.
>
> And for all those reasons, Your Honor, this needs to be excluded under the [C]onfrontation [C]lause in my view.

10/25 Tr. 11-12.

Relying on, inter alia, *Bynum v. United States*, the trial court, reversing its prior ruling, overruled Mr. Davidson's Confrontation objection, concluding that "the video footage from WMATA is not testimonial and [therefore] does not infringe on the defendant's rights under the confrontation clause." 10/25 Tr. 15-16.

> The WMATA videos are created in real time, in the ordinary course, as part of WMATA's administrative processes. Perhaps for safety reasons. I don't know, but I don't need to know. I only need to know WMATA does this on a regular basis. This isn't a video that they created.
>
> The only other question then really, with respect to that, would be is the fact that a subpoena was issued and that they acted in response to a subpoena, does that create a situation in which the materials are then converted to testimonial? This Court finds that it does not. Not all materials that are produced in response to a subpoena automatically become or ever were testimonial. The

> question is whether they are testimonial at the time they are created. The fact that someone is under a duty and an obligation to collect them and preserve them does not make preservation testimonial.
>
> The witness can be cross-examined in this case on the procedures, the policies, and the practices. In this Court's view, this case is closer to *Bynum* than it is to *Burns*. There are no lab tests. There's no testing of any kind. There's no evaluation to be done. There's no mental processes like there would be in an autopsy…

10/25 Tr. 17-18.

After Mr. Davidson drew the trial court's attention back to his hearsay objection[12]—"the statement[s] from the technician to Ms. Robinson"—the trial court found that such statements were "not hearsay, and [were] part of business records for the custodian of records, who the defendant has an opportunity to cross-examine, for the custodian of records to say here's the method, and here's what we do, and here's how we brought them." 10/25 Tr. 14-19.

Wanda Robinson (Resumed)

When Mr. Davidson resumed his cross-examination, Ms. Robinson agreed that there was no timestamp within the video indicating the date or time on which it was recorded, that the purpose of the Digital Evidence Unit is to "preserve or create… digital evidence," and that "the one purpose" of having cameras on Metro

[12] Mr. Davidson also requested that the trial court make special findings pursuant to Super. Ct. Crim. R. 23(c). 10/25 Tr. 21 (3-7).

trains, like those that recorded government exhibit 2, "is to create evidence." 10/25 Tr. 24-26. The trial court denied Mr. Davidson's renewed hearsay, Confrontation, and authentication objections. 10/25 Tr. 27 (1-17). For the first time, Ms. Robinson then suggested that government exhibit 2 differed from the video WMATA preserved in response to receiving a subpoena in this case, testifying that a "master" version, would have a date and timestamp absent from government exhibit 2. 10/25 Tr. 29. Upon further questioning, Ms. Robinson indicated that she meant that a sealed container, such as an evidence bag, in which a digital storage device would be stored, would have date and time information written on it, before testifying that in fact such "master videos" would "normally" contain a date and timestamp. 10/25 Tr. 30-31. When asked why she was unsure whether a "master" from which government exhibit 2 was created contained a date and timestamp, Ms. Robinson answered:

> So when things are transferred from one place to another, it depends on what medium, what tool, you're using. Our DVDs, when we download them from the actual point where it was initially stored, gives us a time frame. And the reason I say is because, when we play our videos back, it tells us how many frames and you know, time and things like that. So I would have to see the master to be able to say for sure. At this point, I cannot say.

10/25 Tr. 32 (12-20).

When Ms. Robinson again indicated that the "master" video from which government exhibit 2 was created would have a date and time stamp visible within the video itself, Mr. Davidson moved for production of that video pursuant to Rule

16, a request the trial court held in abeyance. 10/25 Tr. 33-35. Without testifying what process was followed in this case, Ms. Robinson testified that, to retrieve video from a bus or Metro train, an "analyst" or "technician" would take a laptop called a "Toughbook" to a "mechanical device" or "recorder" and "download" the footage, "which is a master, and place it in the evidence room." 10/25 Tr. 35-37. When asked about what quality control procedures were in place regarding extraction of video, Ms. Robinson first testified about general practices before confirming that she did not check a timestamp to confirm that the footage in question was recorded on March 31, 2023, something that could only be done using software used by WMATA, or watch anyone else do so. 10/25 at 37-41.

> [J]ust based on what you did yourself, that is, not speaking with a technician, not anything else, just based on what you did, the video footage that is depicted in Government's Exhibit 2, you don't know what day that was recorded on, right?
> A: Correct.
> Q: And you also don't know what time it was recorded on, correct?
> A: That is correct.

10/25 Tr. 41 (14-19).

Upon further questioning, Ms. Robinson agreed that the "only way in which, at the time [she] began testifying, [she] knew of the date and time of the video footage about which [she was] testifying [wa]s because of the subpoena [she] received." 10/25 Tr. 44-45 (22-2).

When asked about quality control procedures regarding "recorders" themselves, rather than WMATA's evidence room, Ms. Robinson agreed that "the only way in which it would be identified that there was a problem with the recorder itself would be a technician physically going to the recorder and discovering that" and that quality control procedures for software used by the recorders was not within the scope of her duties at WMATA. 10/25 Tr. 48-50.

On redirect examination, over objection, Ms. Robinson read the filename of government exhibit 2. 10/25 Tr. 51-52. Over Mr. Davidson's objection to lack of foundation, Ms. Robinson interpreted what the file name meant, opining that: 1) certain letters in the file name meant that the government exhibit 2 was a video-recorded event, and 2) certain numbers in the file name indicated the date and time of recording. 10/25 Tr. 52-55. The court then denied Mr. Davidson's motion for a judgment of acquittal after the government rested. 10/26 Tr. 28-29.[13]

Dwayne Davidson

Mr. Davidson then testified in his own defense. 10/26 Tr. 30. On March 31, 2023, Mr. Davidson saw two men that he knew, Alexis Allen, originally his co-defendant, and Kevin Young, the complainant in the case. 10/26 Tr. 31-32. Both were drinking beer and appeared "a little bit intoxicated." 10/26 Tr. 32-33. The three made their way to the Metro, with Mr. Davidson and Mr. Young intending to go on a double

[13] As discussed, Officer Ubiera's testimony was taken out of order. *See* note 8.

date with their respective girlfriends. 10/26 Tr. 34-35. After the three were on the train, Mr. Allen was being "confrontational… verbally and a lot of finger motions towards [Mr. Davidson's] face," and Mr. Young also did so on "certain occasions throughout the… ride." 10/26 Tr. 36. Concluding that it "wasn't a good idea" to go forward with the planned double-date, Mr. Davidson planned to get off the Metro at the Benning Road station and go home. 10/26 Tr. 36-37. When Mr. Allen almost bumped into Ms. Colon, Mr. Davidson pulled him out of the way so that Mr. Allen would not bump into her and so Mr. Allen would make it home. 10/26 Tr. 37-38.

Describing Mr. Allen's behavior in more detail, Mr. Davidson testified that Mr. Allen was insulting both Mr. Davidson and Mr. Young, making Mr. Davidson feel "like [he] was being threatened." 10/26 Tr. 39-40. Mr. Davidson attempted to mediate between Mr. Allen and Mr. Young. 10/26 Tr. 40. Shortly thereafter, Mr. Allen "grabbed" Mr. Davidson close to his neck. 10/26 Tr. 41. Mr. Davidson moved into evidence without objection defense exhibit 6, a six-second video recorded on a Metro train, in which Mr. Davidson identified Mr. Young as wearing a yellow vest, and both Mr. Allen and Mr. Young "snatching [him] up while [he] was sitting down," "ha[ving] their hands and -- hands on [him], restraining [him] from getting up, from moving, from doing anything," and making Mr. Davidson feel "violated," and like he was "being snatched around like… a wild animal." 10/26 Tr. 43-45. Mr. Davidson felt " very, very intimidated… because [he] couldn't move," and thought that "if [he]

was on the ground for longer, then possibly things could have went way worse for [him],” having “already sustained a wound from it.” 10/26 Tr. 46.

When the Metro train stopped, Mr. Davidson “get my stuff, but I was just so -- still paranoid that it was two people after me. Mr. Allen stopped touching Mr. Davidson for a time, but then touched him again, making him feel “more scared” and “more intimidated,” including because “nobody was helping him at all.” 10/26 Tr. 48-49. Mr. Davidson then moved into evidence as defense exhibit 7 another video clip from the Metro train, which Mr. Davidson testified showed him taking off his hoodie and Mr. Allen, wearing blue and orange, restraining him. 10/26 Tr. 49-53. When shown defense exhibit 2, a video recorded by Ms. Colon with her phone, Mr. Davidson testified that it showed Mr. Allen and Mr. Young “slamming [his] head against the Metro car door,” making Mr. Davidson feel “[h]elpless,” with “[o]ne person… holding [his] arms while another person in front of [him] [wa]s swinging on [him].” 10/26 Tr. 54-56. All of defense exhibit 2 was played for Mr. Davidson, who testified that at various points Mr. Allen was grabbing his legs and hitting him in the face, that he could not breathe, and more. 10/26 Tr. 57-62.

Mr. Davidson then described how he felt at the time government exhibit 1 was recorded, by which time his eye was swollen “from hits, blows, punches, and his head bleeding”— “that [he] ha[d] to get off this train quickly with finding his property” because “two men were attacking” him and he would “probably sustain

more injuries" if he did not. 10/26 Tr. 63. Mr. Davidson testified that, after finding his bag, he planned to get off the train, but thought Mr. Young, then "on the floor," "was getting ready to get back up." 10/26 Tr. 64-65.

On cross-examination, Mr. Davidson denied drinking alcohol on March 31. 10/26 Tr. 68. Mr. Allen "called [him] young and everything," and the conversation "start[ed] turning into an argument close to like around Stadium-Armory, Eastern Market." 10/26 Tr. 68-71. Mr. Davidson denied "pull[ing] Mr. Young across the train car and g[etting] on top of him" when shown a portion of government exhibit 2. 10/26 Tr. 73. Mr. Davidson testified that after Mr. Young punched him, he punched Mr. Young twice while Mr. Young was on the floor, disagreeing with the prosecutor about the number of times he did so. 10/26 Tr. 75-78.

On redirect examination, identified in government exhibit 2 a time at which Mr. Young was "grabbing [his] jacket." 10/26 Tr. 81-83. Mr. Davidson asked Mr. Young to let go; when he did not, Mr. Davidson "pulled him to kind of get him on the other side," after which time Mr. Allen "proceeded to start punching [Mr. Davidson] in [the] back of [his] head." 10/26 Tr. 82-83. Describing his mental state, Mr. Davidson stated:

> I'd just been intimidated. It's, like, I wasn't myself. I couldn't get out of my square. I couldn't do anything. Like, I just felt very -- I don't know --. I've been jumped before. So this right here, you know – I've been jumped by 15 people. So this one right here, it kind of hurt, because I couldn't move. With those 15 other people, I was able to

> run. But the Metro, it was -- it was closed; it was moving. So it was just a different feeling.

10/26 Tr. 83-84 (22-5).

The trial court then denied Mr. Davidson's renewed MJOA. 10/26 Tr. 87.

In closing, the government argued that government exhibit 1 showed Mr. Davidson wearing "big boots with a thick sole" and that Mr. Young was "on the ground" and "not moving" when Mr. Davidson "kick[ed] him in the face." 10/26 Tr. 91. The government also relied on government exhibit 2, the WMATA video admitted over Mr. Davidson's objections, arguing that for 34 seconds the "guy in yellow is on the ground the entire time," and that Mr. Davidson thus had nothing to be afraid of and that "as a matter of law, this cannot be self-defense." 10/26 Tr. 92-95. The government also argued that it had proven that Mr. Davidson was wearing "construction boots," and that "from this video and the photo of Mr. Young's injuries, that the shod foot did inflict great bodily harm." 10/26 Tr. 95-96.

Mr. Davidson argued that self-defense excused his conduct as to both charged offenses, emphasizing that "the question is whether Mr. Davidson, under the circumstances as they appeared to him at the time of the incident, actually believed he was in imminent danger of bodily harm and could reasonably hold that belief." 10/26 Tr. 97-98. Mr. Davidson highlighted the evidence demonstrating the two-on-one nature of the assault against him, with Messrs. Young and Allen holding and punching him and at times both punching him, something that went on for several

minutes, and Mr. Davidson's testimony that he was afraid and intimidated and, already injured, feared that something even worse might happen soon. 10/26 Tr. 98-100. Based on these facts, Mr. Davidson argued, the government failed to prove beyond a reasonable doubt that he was not acting in self-defense. 10/26 Tr. 100.

Addressing the charge of attempted PPW(b), Mr. Davidson explained that this court's "shod foot" PPW(b) cases "have focused on steel-toed boots or evidence of the actual serious injury that occurred." Where Officer Ubiera did not know the brand or material of Mr. Davidson's footwear and did not handle it, where there was no evidence of repeated kicks, where the only evidence of Mr. Young's injury was a photograph depicting two bumps, and where there was evidence that Mr. Allen kicked Mr. Young repeatedly (and thus could have been the cause of the lumps), the government failed to carry its burden regarding Count Two. 10/26 Tr. 100-105.

In rebuttal, the government argued that in order to invoke self-defense, "the defendant must be able to point to evidence that satisfies each and every element of self-defense," and that, in its view, Mr. Davidson failed to do so. 10/26 Tr. 107-08.

The Trial Court's Findings

The trial court found that on a Metro train on March 31, 2023, Messrs. Allen, Young, and Davidson "were all three very animated… [b]efore any fighting had begun," with "all three of the men… moving around the metro car, following each other, moving their bags around, and making aggressive hand gestures to each

other." 11/6 Tr. 8 (9-13). Government exhibit 2 corroborated Mr. Davidson's testimony that he pulled Mr. Allen back onto the train as he "was leaving the train prematurely before his stop." 11/6 Tr. 8 (18-24). Relying on government exhibit 2, the trial court found that for a period of approximately one minute and twenty seconds before what the trial court characterized as a "brawl" began, Mr. Davidson "appear[ed] erratic and aggressive," and that "the three men" could then "be seen moving about the train car aggressively yelling at each other." 11/6 Tr. 8-10.

The court credited Mr. Davidson's testimony that Messrs. Young and Allen were "snatching him up" and found that "for a short window of the fight, both Mr. Young and Mr. Allen were fighting Mr. Davidson together"; i.e., "[f]or this short period, it appears to be two-on-one with Young and Allen both fighting Mr. Davidson." 11/6 Tr. 10. Continuing to rely on government exhibit 2, the trial court found that the "fight between the individuals," which the court described as "quite violent, began at "approximately the 6-minute mark o[f]" government exhibit 2, and that,[14] "for much of the fight leading up to the incident at issue here for which Mr. Davidson is charged, Mr. Davidson was fighting against both Allen and Young." 11/6 Tr. 10-11. "However, in the end, Mr. Davidson clearly and decisively won the

[14] The trial court found that "the man described as wearing blue was Mr. Allen," "[t]he man described as wearing yellow was Mr. Young," and "the man described as wearing a gray sweatshirt covering a red T-shirt and also wearing work boots was Mr. Davidson." 11/6 Tr. 11-12.

fight," a finding the trial court rested on government exhibit 2, and its finding that Mr. Young "can be seen clearly falling to the ground where he remained and where he also appeared to be unconscious or semiconscious for many seconds" after Mr. Davidson "punche[d]" him "in the head." 11/6 Tr. 11.

Again relying on government exhibit 2, the court found that, rather than leaving, "after pacing back and forth at the end of the train, Mr. Davidson marched… back past the exit door and back to Mr. Young, who was still lying motionless and prone," where he then "kicked Mr. Young in the head with his boot." 11/6 Tr. 2.

Addressing defense exhibit 3, video footage taken from outside the train car, the trial court found that Mr. Allen kicked Mr. Young after Mr. Davidson left the train car, but that it "[was] not at all clear that Mr. Allen's kick was to Mr. Young's head[;] [r]ather, it appears that it would have been to his torso from the angle of the video." 11/6 Tr. (8-11). The court found Officer Ubiera and Ms. Robinson to be generally credible and relied on the latter's testimony to establish the date and time the video was recorded. 11/6 Tr. 14-15.

The court found Mr. Davidson's testimony that he "mediated" credible, but "incomplete insofar he was not passive as the confrontation was escalating," a finding the trial court based on events depicted in government exhibit 2. 11/6 Tr. 15 (19-22). Prior to the offense conduct, the trial court found that the "fight was over," characterizing Mr. Davidson's actions during the "full 35 seconds" Mr. Young was

on the floor as "[r]ather than leaving,.. pacing back and forth considering what he was going to do," a finding the court again based on government exhibit 2. 11/6 Tr. 16-17. During this time, the trial court found that, "contrary to Mr. Davidson's testimony,… Mr. Young, the man in yellow, was not moving at all," "was prone and appeared to be semiconscious," and that "[i]t wasn't until after Davidson's kick that Young tried to raise a hand in a reflex to protect himself." 11/6 Tr. 17.

Applying law to its findings, the trial court found that Mr. Davidson's subjective belief of imminent bodily harm was objectively unreasonable, and that the government had proven beyond a reasonable doubt that Mr. Davidson was not acting in self-defense when he kicked Mr. Young. 11/6 Tr. 17-19. "Moreover, after the fight was finished, the Court f[ound] that Davidson became the aggressor," and was "ineligible to claim self-defense in that one-way exchange." 11/6 Tr. 19 (7-13).

Addressing Count Two (attempted PPW(b)) separately, the court found, as relevant here, that Mr. Davidson "was wearing boots," that Mr. Davidson's "shoe was used as a dangerous weapon," and that "the injury caused to Mr. Young qualifies as a great bodily injury because it carries with it a substantial risk of unconsciousness." 11/6 Tr. 20.[15] The court did not find that Mr. Davidson caused

[15] The court reiterated this finding as "Mr. Davidson's actions carry[ing] with them great risk of unconsciousness…" 11/6 Tr. 21 (4-5).

any injuries to Mr. Young depicted in government exhibit 3. 11/6 Tr. 30. Accordingly, the trial court found Mr. Davidson guilty of both offenses.

Sentencing

The United States advocated for concurrent split sentences of 180 days' incarceration, execution of sentence suspended as to all but 90 days. 11/6 Tr. 24-27. When arguing for the sentence ultimately imposed by the trial court—60 days' incarceration, execution of sentence suspended as to all—Mr. Davidson observed that the trial court appeared to apply an incorrect legal standard to the charge of attempted PPW(b), that is finding that "likely to produce death or great bodily injury," where not based on a weapon that is dangerous per se, included conduct creating a "substantial risk" of unconsciousness. 11/6 Tr. 31. The trial court responded, "just to be clear in response, the Court isn't just saying it's substantial risk. If you kick somebody in the head, that's the most assured way to potentially render them unconscious that I can think of." 11/6 Tr. 31 (14-18).

Before imposing sentence, the trial court provided context:

> Having said that, I'm also really mindful of what I saw leading up to that. And while the Court has clearly ruled, for the reasons that I stated on the record earlier, that it's not self-defense, and I recognize the Government has characterized it as amped up. It does not come as a surprise to me that someone would be emotional and someone would be still full of adrenaline and still kind of breathing heavy and trying to bring themselves down, if you will, after having been in a fight with two other men.

> So while I don't see that as self-defense in any respect, I do think it impacts what happens with respect to and how the Court views the severity or kind of what happens with respect to this. And so I do think that I can consider that in sentencing, and I do. And I think it mitigates, in some way, some of Mr. Davidson's conduct. It doesn't mean he's not responsible for his conduct, from the Court's perspective, but it does mean I understand that he was emotional and that there was a lot going on, and he was coming off the heels of that three-man brawl. I'll call it that.

11/6 Tr. 34-35 (13-8).

This timely appeal followed. R. 14.

SUMMARY OF THE ARGUMENT

"An out-of-court statement offered in evidence to prove the truth of the matter asserted is hearsay whether the statement is quoted verbatim or conveyed only in substance; [and] whether it is relayed explicitly or merely implied." *Burns*, 235 A.3d at 786 (quoting *Young v. United States*, 63 A.3d 1033, 1044 (D.C. 2013)). Hearsay is inadmissible to prove the truth of the matter asserted in the statement unless within an exception or exclusion. *See, e.g.*, *Stancil v. United States*, 866 A.2d 789, 810 (D.C. 2005). The proponent of hearsay bears the burden of demonstrating which statements fall within which hearsay exceptions. *Gabramadhin v. United States*, 137 A.3d 178, 187 (D.C. 2016) (citing *Patton v. United States*, 633 A.2d 800, 806 (D.C. 1993) (per curiam)). The trial court erred by admitting over objection Wanda Robinson's testimony about what a non-testifying WMATA "technician" did to download or otherwise preserve a video and information the technician relayed

about the video—hearsay not within any exception—events Ms. Robinson did not personally observe and about which she confirmed she was only aware because the technician communicated such information to her. The trial court erred by admitting such hearsay under the "business records" exception, which applies not to such statements, but "to recorded hearsay where its proponent establishes: (1) 'the record was made in the regular course of business' (2) 'it was the regular course of the business to make such records,' (3) 'the record was made at the time of the act, transaction, occurrence, or event, or within a reasonable time thereafter,' and (4) 'the original maker has personal knowledge of the information in the record or received the information from someone with such personal knowledge and who is acting in the regular course of business.'" *Grimes v. United States*, 252 A.3d 901, 914 (D.C. 2021) (quoting *Dutch v. United States*, 997 A.2d 685, 688-89 (D.C. 2010)).

The admission of this inadmissible hearsay likewise violated Mr. Davidson's Sixth Amendment right to confront witnesses against him. Absent unavailability and the prior opportunity to cross-examine, the admission of testimonial hearsay violates the accused's Confrontation Clause right to confront witnesses against him. *Burns*, 235 A.3d at 785 (citing *Crawford*, 541 U.S. at 68-69). "[T]o be testimonial, a statement must have been made, primarily, for an evidentiary purpose,"—that is, it must be a 'declaration or affirmation made for the purpose of establishing or proving some fact' for use in the prosecution or investigation of a crime, or a statement made

under 'circumstances objectively indicating that' the declarant's 'primary purpose was to establish or prove past events potentially relevant to later criminal prosecution.'" *Grimes*, 252 A.3d at 909-10 (quoting *Crawford*, 541 U.S. at 51 & *Davis v. Washington*, 547 U.S. 813, 822 (2006)). Where the trial court permitted Ms. Robinson to relay statements of the non-testifying technician about the steps he took to procure video footage and information about that video footage—statements "made for the purpose of establishing or proving some fact for use in the prosecution" of Mr. Davidson—the admission of such statements violated Mr. Davidson's Sixth Amendment right to confront witnesses against him, an error the government cannot show was "harmless beyond a reasonable doubt."[16] *Burns*, 235 A.3d at 791 (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)).

The trial court likewise abused its discretion by admitting over objection government exhibit 2 because it was not properly authenticated for two reasons: 1) testimony on which the trial court relied to find the authentication requirement satisfied constituted inadmissible hearsay that also violated Mr. Davidson's rights under the Confrontation Clause, and 2) because the United States failed to show a "'reasonable possibility' that the evidence [wa]s 'what it purport[ed] to be,'"[17] where

[16] There was no showing that the technician was unavailable, and it is undisputed that Mr. Davidson did not have a prior opportunity to cross-examine the technician.
[17] *Johnson v. United States*, 290 A.3d 500, 510 (D.C. 2023) (quoting *Stewart v. United States*, 881 A.2d 1100, 1111 (D.C. 2005)).

no government witness personally observed events depicted in the exhibit, where the video admitted at trial did not contain any date or time stamp, where a testifying WMATA employee did not take steps out-of-court to verify that the footage was recorded on the date and time claimed, and where the sponsoring witness testified that the only reason she believed the footage was recorded on a particular date at a particular time was because someone else, a technician, told her that.

The trial court also erred by finding Mr. Davidson guilty of attempted PPW(b) under D.C. Code §§ 22-4515(b), -1803 under a theory that his conduct with a shod foot created a "substantial risk of unconsciousness," an incorrect legal standard. *See, e.g.*, *Jones v. United States*, 67 A.3d 547, 550 (D.C. 2013) ("We have previously defined 'great bodily injury' as 'bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental facility.'") (quoting *Stroman v. United States*, 878 A.2d 1241, 1245 (D.C. 2005)). Under correct legal principles, the evidence was insufficient to permit conviction of attempted PPW(b) where: 1) the trial court found that Mr. Davidson once kicked the complainant, 2) there was no evidence regarding the material of Mr. Davidson's footwear, 3) the government did not present testimony from any medical expert, 4) there was no evidence of any lasting effects from the kick, and 5) the trial

court did not find that Mr. Davidson was the cause of the complainant's injuries because there was evidence that Mr. Allen was kicking the complainant.

Finally, the trial court erred by concluding that the government proved beyond a reasonable doubt that Mr. Davidson was not acting in self-defense. First, the trial court erred by finding that Mr. Davidson's subjective fear of imminent bodily harm was objectively unreasonable where it found that two men were "snatching" Mr. Davidson "up," that the man Mr. Davidson was convicted of assaulting earlier "had his arms around Mr. Davidson, while [another man] [wa]s unfettered swinging at" Mr. Davidson, that "for much of the fight leading up to the incident at issue here for which Mr. Davidson is charged, Mr. Davidson was fighting against both Allen [] and Young []," the complainant, and where approximately thirty seconds passed between the end of "the fight," and the offending conduct, a kick.

ARGUMENT

I. THE TRIAL COURT ERRED BY FINDING THAT HEARSAY STATEMENTS OF A NON-TESTIFYING WMATA TECHNICIAN REGARDING ACTIONS HE TOOK TO PROCURE VIDEO ADMITTED AS GOVERNMENT EXHIBIT 2 FELL WITHIN THE BUSINESS RECORDS EXCEPTION.

a. Standard of Review.

"[T]he determination of whether a statement falls under an exception to the hearsay rule is a legal conclusion, which [this court] review[s] de novo." *Dutch*, 997 A.2d at 689 (citing *Brown v. United States*, 840 A.2d 82, 88 (D.C. 2004)). This court

reviews for abuse of discretion the decision to admit a hearsay statement. *See, e.g.*, *Odemns v. United States*, 901 A.2d 770, 776 (D.C. 2006).[18]

b. The Non-Testifying Technician's Hearsay Statements Did Not Fall Within the Business-Records Exception to the Rule Against Hearsay.

"An out-of-court statement offered in evidence to prove the truth of the matter asserted is hearsay whether the statement is quoted verbatim or conveyed only in substance; [and] whether it is relayed explicitly or merely implied." *Burns*, 235 A.3d at 786 (quoting *Young*, 63 A.3d at 1044). Hearsay is inadmissible to prove the truth of the matter asserted in the statement unless within an exception or exclusion. *See, e.g.*, *Stancil*, 866 A.2d at 810. The proponent of hearsay bears the burden of demonstrating which statements fall within which hearsay exceptions. *Gabramadhin*, 137 A.3d at 187 (citing *Patton*, 633 A.2d at 806).

At trial, Ms. Robinson, referring to video footage from which government exhibit 2 was created, testified that an unnamed, non-testifying WMATA "technician" "actually went out, pulled it, reported it, brought it back, downloaded, and preserved it." 10/24 Tr. 78 (13-17).[19] This testimony relayed several hearsay

[18] "[T]he underlying factual findings are reviewed under the 'clearly erroneous' standard." *Id.* In this case, there does not appear to be any dispute regarding the underlying factual findings.

[19] Acceding the to trial court overruling his repeated hearsay objections related to the technician, Mr. Davidson later inquired further about what information the technician conveyed to Ms. Robinson, leading to Ms. Robinson stating that she learned still additional information from the technician. 10/25 Tr. 28 (4-7) ("He

statements: 1) that a technician "went out" to obtain video footage, 2) that the technician "pulled" video footage, 3) that the technician "reported" pulling such video footage, 4) that the technician "brought [the video footage] back," 5) that the technician "downloaded" video footage, and 6) that the technician "preserved video footage." All such statements were offered for the truth of the matter asserted. Ms. Robinson repeatedly confirmed that she did not witness the technician perform any of these tasks, and that the only reason Ms. Robinson believed that the technician did so was because the technician told Ms. Robinson that he did so. 10/24 Tr. 86-88.

The trial court found such statements admissible under the business records exception—the only exception advanced by the government, the proponent of the hearsay—stating, in contradictory fashion,[20] "it's not hearsay, and it is part of business records for the custodian of records, who the defendant has an opportunity to cross-examine, for the custodian of records to say here's the method, and here's

communicated that he went out, downloaded the video, came back to the office, downloaded on the hard drive, and then made a master copy, placed it in our evidence storage room.").

[20] That is, if the trial court found that the statements were not hearsay, they would necessarily not fall within a hearsay exception. This suggests that by saying "it's not hearsay," the trial court instead meant that the statements, in its view, fell within a hearsay exception.

what we do, and here's how we brought them." 10/25 Tr. 21 (14-19). This was error.[21]

The business *records* exception has four elements, discussed *supra*, each of which must be shown by the proponent. This court need not examine such elements in detail, however, because a brief review of its cases and the plain meaning of "record" demonstrates that the technician's statements were not "records" within the meaning of the business records exception, but simply out-of-court statements, apparently not memorialized in any way, offered for the truth of the matter asserted—inadmissible hearsay. For example, in *Dutch* this court found no error in the admission under the business records exception of "transaction report documents" from a financial transaction processing company, created from electronically stored data. 997 A.2d at 689 ("[T]his court, along with other courts, has not treated data created and stored electronically any differently *from other data* for the purposes of the exception.") (emphasis added); *see also Grimes*, 252 A.3d at 913-915 (fingerprint cards); *Bynum v. United States*, 133 A.3d 983, 986 (D.C. 2016) (DMV records). Each of the elements of the exception confirm the same, requiring something of "the record," i.e., something that has been memorialized, whether electronically or on paper. *Dutch*, 997 A.2d at 689; *see also* Super. Ct. Civ. R. 43-I.

[21] As Mr. Davidson repeatedly explained below, but which appeared to nonetheless be a source of confusion, Mr. Davidson did not argue that the video admitted as government exhibit 2 was itself hearsay. 10/25 Tr. 8.

Moreover, even if the technician's statements somehow constituted "records" and on their face fell within the business records exception, which they do not, they would nonetheless be inadmissible, as the technician made the statements solely for the purpose of creating evidence, which Ms. Robinson confirmed,[22] and which would run afoul of the rule that "the business-records exception generally does not apply to records 'made in anticipation of litigation.'" *Grimes*, 252 A.3d at 914 (citing *Montgomery v. United States*, 517 A.2d 313, 316 (D.C. 1986)).

c. The Error Was Not Harmless.

"[T]he harm standard applicable to non-constitutional errors[][23]… demands reversal unless [this court] can say "with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the [convictions were] not substantially swayed by the error.'" *Waters v. United States*, 302 A.3d 522 (D.C. 2023) (quoting *Kotteakos v. United States*, 328 U.S. 750, 765, (1946)). Where the trial court relied on such statements to admit government exhibit 2, a video, then relied extensively on such video to find Mr. Davidson guilty and to disagree with some aspects of Mr. Davidson's testimony about which Mr. Davidson

[22] 10/24 Tr. 78-79 ("They pulled it, downloaded, and preserved it… THE COURT: How does she know it? How do you know? A: I had them -- assigned it to them."); 10/25 Tr. 25-26 ("Q: Sure. So you testified that you're the head of the digital evidence unit, and the digital evidence unit, that its function is to -- as it sounds like from the name, is to preserve or create evidence, digital evidence, right? A: Yes."

[23] As discussed, *infra*, the admission of government exhibit 2, which depended on this inadmissible, testimonial, hearsay, also constituted constitutional error.

testified, one cannot say that Mr. Davidson's convictions were not substantially swayed by the error. Accordingly, Mr. Davidson's convictions must be reversed.

II. THE ADMISSION OF TESTIMONIAL HEARSAY OF A NON-TESTIFYING WMATA TECHNICIAN VIOLATED MR. DAVIDSON'S SIXTH AMENDMENT RIGHT TO CONFRONT WITNESSES AGAINST HIM.

a. Standard of Review.

This court reviews de novo the question of whether a witness relayed testimonial hearsay in violation of the Confrontation Clause. *Burns*, 235 A.3d at 786.

b. The Technician's Statements Admitted at Trial Regarding The Manner in Which He Procured Video and Other Information About That Video Were Testimonial.

Absent unavailability and a prior opportunity to cross-examine the declarant, the admission of testimonial hearsay violates the accused's Sixth Amendment rights to confront witnesses against him. *Crawford*, 541 U.S. at 69. "To be 'testimonial,' a hearsay statement 'must have been made, primarily, for an evidentiary purpose,'" which "means that the statement 'must [have been either] 'a solemn declaration or affirmation made for the purpose of establishing or proving some fact' for use in the prosecution or investigation of a crime, or a statement made under 'circumstances objectively indicating that' the declarant's 'primary purpose was to establish or prove past events potentially relevant to later criminal prosecution.'" *Burns*, 235 A.3d at 788 (quoting *Young*, 63 A.3d at 1039-40). By contrast, "[a] statement made primarily for a different purpose, such as enlisting police assistance to 'meet an ongoing

emergency,' is not testimonial." *Id.* (quoting *Young*, 63 A.3d at 1040). "[F]orensic evidence is not exempt from the requirements of the Confrontation Clause." *Id.* at 785 (citing *Jenkins v. United States*, 75 A.3d 174, 180 (D.C. 2013)).

In this case, the statements of the non-testifying technician were made not to enable police assistance to meet any ongoing emergency—there was no ongoing emergency—but expressly for "an evidentiary purpose"—"to establish or prove past events potentially relevant to later criminal prosecution." 10/24 Tr. 77 (12-14) ("Q: Thank you. And in response to a subpoena, have you reviewed certain WMATA records? A: Yes, ma'am."); *id.* at 78 (13-17) ("Q: Okay. And how was Government's Exhibit 2 obtained? A: The technician actually went out, pulled it, reported it, brought it back, downloaded, and preserved it."); *id.* at 87-88 (25-3) ("Q: And the way in which you are aware that the person who did preserve that actually did that is because that person communicated that to you, correct? A: Correct."); 10/15 Tr. 25-26 (22-2) ("Q: Sure. So you testified that you're the head of the digital evidence unit, and the digital evidence unit, that its function is to -- as it sounds like from the name, is to preserve or create evidence, digital evidence, right? A: Yes.").

i. The Primary Purpose of the Technician's Statements "Was to Establish or Prove Past Events Potentially Relevant to Later Criminal Prosecution."

In a series of cases beginning with *Crawford*, the Supreme Court and this court have addressed whether statements made under certain circumstances are likely to

be testimonial. *See, e.g.*, *Davis v. Washington*, 547 U.S. 813 (2006) (statements during 911 call and to law enforcement at crime scene); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009) (affidavit reporting drug analysis); *Michigan v. Bryant*, 562 U.S. 344 (2011) (statements to enable police assistance meet ongoing emergency); *Bullcoming v. New Mexico*, 564 U.S. 647 (2011) (laboratory report in DWI prosecution); *Williams v. Illinois*, 567 U.S. 50 (2012) (facts relayed to expert about which expert is not competent to testify) (plurality); *Ohio v. Clark*, 576 U.S. 237 (2015) (statement of young child to teacher); *Hemphill v. New York*, 142 S. Ct. 681 (2022) (plea allocution); *Samia v. United States*, 143 S. Ct. 2004 (2023) (*Mirandized* confession of non-testifying co-defendant); *Callaham v. United States*, 268 A.3d 833, 846-47 (D.C. 2022) (properly authenticated video exhibits compiled by prosecutor); *Grimes*, 252 A.3d at 909-13 (fingerprint cards); *Burns*, 235 A.3d at 785-791 (autopsy report); *Carrington v. District of Columbia*, 77 A.3d 999 (D.C. 2013) (urinalysis results). Certain cases pose difficult questions about the primary purpose of a statement. This case does not.

Here, the technician made the hearsay statements for one purpose and one purpose alone—"to establish or prove past events potentially relevant to later criminal prosecution"—here the steps the technician purportedly took to obtain, preserve, and maintain the video from which government exhibit 2 was "copied" or produced, all done in response to WMATA receiving a subpoena from the United

States Attorney's Office, a subpoena issued in order to obtain evidence to prosecute Mr. Davidson. As in *Carrington*, where this court found error in the trial court allowing a testifying expert "to testify that [a urine sample] was sealed and that there were no spills or other possible contamination" despite the expert "not participat[ing] in the receipt and control of the sample," i.e., "he relayed… testimonial hearsay,"[24] the trial court erroneously permitted Ms. Robinson to testify about the procedures of obtaining and preserving the video, despite Ms. Robinson not permitting in these procedures; i.e., she relayed testimonial hearsay.

Accordingly, such statements were testimonial.

ii. Ms. Robinson Did Not Personally Observe Events Conveyed Through the Technician's Hearsay Statements.

In some cases, this court has concluded that where a testifying witness personally observes the actions of a second person, the observing witness may testify about what would otherwise be testimonial hearsay of the second person. For example, in *Lester v. United States*, 25 A.3d 867, 869 (D.C. 2011), this court found no Confrontation Clause violation where, although a clerk who perform the search on which a certificate of no record was based did not testify, the detective who requested that the search be performed, "waited while the clerk typed the information into the computer… personally saw the result of the computer search

[24] *Carrington*, 77 A.3d at 1004.

from where he was standing," and "was present when the clerk prepared the CNR form on a typewriter after running the search."

Ms. Robinson, by contrast, did not witness the technician perform any of the actions conveyed in the hearsay statements about the video, and believed that the technician performed such actions only because the technician told her that he did so.

> Q: You did not personally download this video. You were not the person who preserved it in the first instance, correct?
> A: Correct.
> Q: And you also were not physically present while the person who did preserve it did that, right?
> A: Correct.
> Q: And the way in which you are aware that the person who did preserve that actually did that is because that person communicated that to you, correct?
> A: Correct.

10/24 Tr. 87-88.

Accordingly, the exception discussed in *Lester* has no applicability here.

c. Mr. Davidson Did Not Have a Prior Opportunity to Cross-Examine the Technician, Nor Was There Any Showing That the Technician Was Unavailable.

If the accused has a prior opportunity to cross-examine a declarant whose testimonial hearsay is offered at trial, and the declarant is "unavailable" within the meaning of the Sixth Amendment, such testimonial hearsay may be admitted without offending the Sixth Amendment rights of the accused. *Crawford*, 541 U.S. at 68.

Here, there was no showing of unavailability, nor any argument that Mr. Davidson had a prior opportunity cross-examine the technician, the hearsay declarant. According, the admission of this testimonial hearsay through Ms. Robinson violated Mr. Davidson's Sixth Amendment right to confront witnesses against him.

d. The Government Cannot Show That the Error Was Harmless Beyond a Reasonable Doubt Where the Trial Court Relied Extensively on the Footage, the Foundation for Which Came From the Erroneously Admitted Hearsay, to Find Mr. Davidson Guilty.

"An error of constitutional magnitude in the trial court requires reversal of a criminal conviction on appeal unless the government establishes that the error was harmless beyond a reasonable doubt." *Burns*, 235 A.3d at 791 (citing *Chapman*, 386 U.S. at 24). Said another way, Mr. Davidson's "convictions therefore must be reversed unless they were 'surely unattributable'" to the erroneous admission of the technician's statements and the video the trial court admitted in reliance on those statements (government exhibit 2). *Id.* Where the trial court relied extensively on this video to convict Mr. Davidson,[25] the government cannot carry this burden. Accordingly, Mr. Davidson's convictions must be reversed.

III. THE TRIAL COURT ERRED BY ADMITTING OVER OBJECTION GOVERNMENT EXHIBIT 2 WHERE THE HEARSAY STATEMENTS ON WHICH THE TRIAL COURT

[25] *See, e.g.*, 11/6 Tr. 9 (2-3) ("At 4:33 of Government's Exhibit 2, Mr. Davidson could be clearly seen standing on the metro seats…"); *id* at 10 (3-4) ("From the 3:30 mark in the beginning of the fight until the 6 mark of Government's Exhibit 2…"); *id.* at 16 (3-5) ("Mr. Davidson can be seen behaving very erratically from the 3-minute mark to the 6-minute mark of Government's Exhibit 2.").

RELIED TO FIND THE VIDEO AUTHENTIC WERE INADMISSIBLE AND WHERE THE GOVERNMENT FAILED TO SHOW A REASONABLE POSSIBILITY THAT THE EVIDENCE WAS WHAT IT PURPORTED TO BE.

a. Standard of Review.

Authenticity is a component of relevance, and evidence must be relevant to be admissible. *Johnson*, 290 A.3d at 509. This court reviews a trial court's determination of relevance, including a ruling on authenticity, for abuse of discretion. *Id.* at 511.

b. The Foundation on Which the Trial Court Relied to Find the Video Authentic Was Inadmissible Hearsay.

"Authenticity — whether an item of evidence is genuinely what its proponent claims it is[—]… as a condition of admissibility merely requires the proponent of the evidence to show that a jury reasonably could find the evidence to be genuine by a preponderance of the evidence." *Id.* at 509-10. One method of authentication is for a "witness with personal knowledge" to "testify[] that the document is what the evidence proponent claims it to be," but this this is "not ... an exclusive requirement." *Id.* at 511. Instead, "authenticity 'may be established by the nature and contents of the writing combined with the location of its discovery.'" *Id.* (quoting *In re Slaughter*, 929 A.2d 433, 444 (D.C. 2007)). For example, "[e]vidence that 'identity verification is necessary to create' a social media record also may help to confirm its

authenticity," as may "tracing the pages and the accounts to the defendants' mailing and email addresses." *Id.*

While the standard for authenticity "is not a particularly stringent one," where the trial court relied on erroneously admitted hearsay to find government exhibit 2 authentic, this was error.

c. The Government Failed to Show a Reasonable Possibility That the Evidence Was What it Purported to Be Where No Government Witness Testified to Observing Events Depicted in the Exhibit, Where the Video Admitted at Trial Did Not Contain Any Date or Time Stamp, Where the Sponsoring Witness Did Not Take Steps Prior to Testifying to Verify That the Footage Was Recorded on the Date and Time Claimed, and Where the Sponsoring Witness Testified That the Only Reason She Believed the Footage Was Recorded on March 31Was Because Someone Else Told Her That.

Independent of erring by relying on inadmissible hearsay as the foundation for admitting government exhibit 2, the trial court erred in finding government exhibit 2 authentic for a second reason—the government failed to present evidence to permit a finding that the evidence was genuine by a preponderance of the evidence; i.e., that the evidence was what it purported to be. Unlike the cases this court cited approvingly in *Johnson* tying social media pages to a defendant through verification or by mailing or email address, remarkably little evidence suggested that the video was what it purported to be when the trial court admitted it. First, no government witness testified or was asked to testify about government exhibit 2; indeed, neither Officer Ubiera or Ms. Robinson witnessed such events. Second, the

video admitted as government exhibit 2 did not contain any date or timestamp. Third, while Ms. Robinson testified that one could use software to "check the encryption" and determine the date and time a video was recorded, Ms. Robinson testified that she did not do so or watch anyone else do so in this case. 10/25 Tr. 40-41. Fourth, there was substantial reason to question whether the video was genuine where Ms. Robinson testified that the footage WMATA preserved would contain a date and timestamp within the video, and the video admitted as government exhibit 2 did not. 10/25 Tr. 33. Fifth, Ms. Robinson testified based solely on what she did, she did not know when the footage admitted as government exhibit 2 was recorded. 10/25 Tr. 41. Sixth, Ms. Robinson testified that she did not know whether she reviewed any reports that would have verified the date and time on which the footage was recorded. 10/25 Tr. 42-43. Under these circumstances, there was insufficient foundation to permit a finding that the evidence was genuine by a preponderance of the evidence. To be sure, Ms. Robinson, after the footage had been admitted, testified that the file name of government exhibit 2 indicated a date and time of recording,[26] but where Ms. Robinson testified that she had limited responsibility regarding the software creating such a filename,[27] this testimony was insufficient to overcome the many substantial questions about the authenticity of government exhibit 2.

d. The Error Was Not Harmless.

[26] 10/25 Tr. 53-57.
[27] 10/25 Tr. 50.

As discussed in Part I, [28] where the trial court heavily relied on government exhibit 2 to find Mr. Davidson guilty, this error was not harmless under *Kotteakos*.

IV. THE EVIDENCE WAS INSUFFICIENT TO PERMIT CONVICTION OF ATTEMPTED PPW(b).

a. Standard of Review.

This court reviews de novo the sufficiency of the evidence to support a conviction. *See, e.g.*, *Jones v. United States*, 293 A.3d 395, 399 (D.C. 2023) (citing *Nero v. United States*, 73 A.3d 153, 157 (D.C. 2013)). "Viewing the evidence, as [it] must, in the light most favorable to sustaining the factfinder's verdict, [this court] will overturn a conviction on insufficient proof grounds only if there was no evidence' adduced at trial 'upon which a reasonable mind could find guilt beyond a reasonable doubt.'" *Augustin v. United States*, 240 A.3d 816, 823 (D.C. 2020). "Yet if" this court's "review of the sufficiency of the evidence is deferential, it is not 'toothless,'" and this court "ha[s] an obligation to take seriously the requirement that the evidence in a criminal prosecution must be strong enough that a [factfinder] behaving rationally really could find it persuasive beyond a reasonable doubt." *Id.* at 824. This court also reviews issues of statutory interpretation de novo. *Id.* at 821.

b. The Trial Court Erred by Finding That Using an Object in a Manner Creating a "Substantial Risk of Unconsciousness" is

[28] While harm from the erroneous admission of government exhibit 2 is also discussed in Part II, the standard for evaluating the harm from constitutional error differs.

Sufficient to Satisfy D.C. Code §§ 22-4514(b)'s Requirement That Evidence be "Likely to Produce Death or Great Bodily Injury By the Use Made of It."

Evidence sufficient to support a conviction for attempted PPW(b)[29] under requires proof that "beyond a reasonable doubt, that the defendant possessed [a dangerous] weapon with the specific intent to use it unlawfully." *Dorsey v. United States,* 902 A.2d 107, 111 (D.C. 2006) (quoting *Stroman*, 878 A.2d at 1245). "When the object used… is not a dangerous weapon per se, the prosecution must prove that the object 'is one which is likely to produce death or great bodily injury by the use made of it.'" *Id.* (quoting *Alfaro v. United States*, 859 A.2d 149, 161 (D.C. 2004)). Great bodily injury means "'bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental facility.'" *Jones*, 67 A.3d at 550 (quoting *Stroman*, 878 A.2d at 1245). Evidence creating a "substantial risk of extreme physical pain," for example, is insufficient; instead, an object must be "likely to cause" one of the enumerated categories. Where the trial court found that a "a substantial risk of unconsciousness," it applied an incorrect legal standard. Under the correct legal standard, the evidence was insufficient to support a conviction for attempted PPW(b).

c. The Evidence Was Insufficient to Establish That Mr. Davidson Kicking Mr. Young With His Shod Foot Was "Likely to Produce

[29] D.C. Code §§ 22-4514(b), -1803.

Death or Great Bodily Injury By the Use Made of It."

The evidence was insufficient to support a conviction for attempted PPW(b) for a second reason—the government failed to present evidence from which a reasonable trier of fact could find beyond a reasonable doubt that Mr. Davidson's shod foot was likely to produce death or great bodily injury by the use made of it, kicking Mr. Young once in or near his head.

When finding evidence sufficient to support convictions for attempted PPW(b) shod foot, this court have focused on one of three facts: 1) evidence of steel-toed boots, including by brand, 2) repeated kicks to the head or body, or 3) evidence of actual serious injury. *See Pringle v. United States*, 825 A.2d 924, 925 (D.C. 2003) (Timberland steel-toed boots); *Arthur v. United States*, 602 A.2d 174, 178 (D.C. 1992) ("Evidence of serious injury resulting from an assault with a certain object is very strong evidence of the dangerous character of that object."); *In re L.M.*, 5 A.3d 18, 20 (D.C. 2010) (repeated kicks to face causing bleeding lip and swollen eyes); *Medlin v. United States*, 207 F.2d 33 (D.C. Cir. 1953) (actual serious injuries); *Foreman v. United States*, 633 A.2d 792 (D.C. 1993) (kicked several times with steel-toed boots). In *Stroman*, by contrast, this court found the evidence insufficient where, despite "flat, rubber-soled flip flop sandals" causing injuries requiring fifteen stiches, "the government failed to present any evidence that the fifteen stitches resulted in visible or permanent scarring such that they would fit the 'protracted and

obvious disfigurement' component of… great bodily injury." 878 A.2d at 1245.

In this case, where there trial court found that Mr. Davidson once kicked Mr. Young in the head, rather than repeatedly, where there was no evidence regarding the material of Mr. Davidson's footwear, where the government did not present testimony from any medical expert, where there was no evidence of any lasting effects from the kick, where there was no evidence that Mr. Young required stitches, where Mr. Young did not testify, and where the trial court expressly declined to find that Mr. Davidson was the cause of any injuries because there was evidence that Mr. Allen was kicking the complainant, the evidence was insufficient to prove beyond a reasonable doubt that Mr. Davidson's shod foot was "likely to produce death or great bodily harm by the use made of it."

V. THE EVIDENCE WAS INSUFFICIENT TO PROVE BEYOND A REASONABLE DOUBT THAT MR. DAVIDSON DID NOT ACT IN SELF-DEFENSE WHEN KICKING MR. YOUNG.

a. Standard of Review.

This court likewise reviews claims that the government failed to present sufficient evidence that the accused was not acting in self-defense de novo. *Parker v. United States*, 155 A.3d 835, 842 (D.C. 2017).

b. The Trial Court Erred By Finding That the Government Proved Beyond a Reasonable Doubt That Mr. Davidson's Subjective Fear of Imminent Bodily Harm Was Objectively Unreasonable.

Every person is entitled to use a reasonable amount of force to defend himself if he actually and reasonably believes he is in imminent danger of bodily harm. *Id.* at 846. "[A]person acting in the heat of passion, ... does not necessarily lose [her] claim of self-defense by using greater force than would seem necessary to a calm mind. In the heat of passion, a person may actually and reasonably believe something that seems unreasonable to a calm mind." *Id.* (quoting Criminal Jury Instructions for the District of Columbia, No. 9.501.C). The trial court found that Mr. Davidson, who testified, subjectively feared bodily harm, but found this belief objectively unreasonable. Where the trial court found that two men were "snatching" Mr. Davidson "up," that the man Mr. Davidson was convicted of assaulting earlier "had his arms around Mr. Davidson, while [another man] [wa]s unfettered swinging at" Mr. Davidson, that "for much of the fight leading up to the incident at issue here for which Mr. Davidson is charged, Mr. Davidson was fighting against both Allen [] and Young []," the complainant, and where approximately thirty seconds passed between the end of what the trial court characterized as a "fight," and the offending conduct, a kick, the evidence was insufficient to prove beyond a reasonable doubt that Mr. Davidson was not acting in self-defense.

Conclusion

Because the evidence was insufficient to prove beyond a reasonable doubt that Mr. Davidson was not acting in self-defense, both of his convictions must be vacated.

Both because the trial court applied an incorrect legal standard and because the evidence was insufficient to support a finding that Mr. Davidson's shod foot was "likely to produce death or great bodily in the manner that it was used," Mr. Davidson's conviction for attempted PPW(b) must be vacated. Assuming, *arguendo*, that this court does not vacate Mr. Davidson's convictions on sufficiency grounds, Mr. Davidson's convictions must be reversed on both constitutional and non-constitutional grounds where the trial court erroneously permitted Ms. Robinson to relay testimonial hearsay in violation of Mr. Davidson's Sixth Amendment right to confront witnesses against him, erroneously found authentic WMATA video footage admitted as government exhibit 2, and erroneously admitted statements of a non-testifying WMATA technician under the business records exception to the rule against hearsay.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief was electronically served upon the United States Attorney's Office for the District of Columbia, this 24th day of April, 2024.

/s/ Adrian E. Madsen
Adrian E. Madsen

District of Columbia
Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (amended April 17, 2024), this certificate must be filed in all cases with briefs and motions 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. This form only needs to be filed once and should be filed under "Redaction Certification Form" on Ctrack.

If you are incarcerated, are not represented by an attorney (also called being "pro se"), and not able to redact your brief or motion, please initial the box below at "G" to certify you are unable to file a redacted brief or motion. Once Box "G" is checked, you do not need a file a separate motion to request leave to file an unredacted brief.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21, amended April 17, 2024, and Super. Ct. Crim. R. 49.1, and I will remove the following information from any subsequent briefs and motions filed in this case:

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

(1) An individual's social-security number
(2) Taxpayer-identification number
(3) Driver's license or non-driver's' license identification card number
(4) Birth date

(5) The name of an individual known to be a minor as defined under D.C. Code § 16-2301(3)
(6) Financial account numbers
(7) The party or nonparty making the filing shall include the following:

(a) the acronym "SS#" where the individual's social-security number would have been included;
(b) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
(c) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
(d) the year of the individual's birth;
(e) the minor's initials;
(f) the last four digits of the financial-account number; and
(g) the city and state of the home address.

B. Any information revealing the identity of an individual receiving mental health services and/or under evaluation for substance-use-disorder services. *See* DCCA Order No. M-274-21, May 2, 2023, para. No. 2.

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.

Initial here	**G. I certify that I am incarcerated, I am not represented by an attorney (also called being "pro se"), and I am not able to redact any filings. This form will be independently filed as record of this notice and the filing will be unavailable for viewing through online public access.**

Adrian E. Madsen, Esq.
Signature

23-CM-939
Case Number(s)

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