23-CF-0455

IN THE
DISTRICT OF COLUMBIA
COURT OF APPEALS

CLIFTON A. BROWNE
Appellant

v.

UNITED STATES
Appellee

ON APPEAL FROM
THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

Case No. 2021-CF1-006943

REPLY BRIEF OF APPELLANT

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ARGUMENT

The trial court erred in ruling that Maryland second degree assault convictions can be used for impeachment.

A. The trial court erred.

The government does not believe it is absurd or plainly unjust to allow Maryland convictions for "simple" assault to be used for impeachment where (1) courts in the District and Maryland agree that such convictions have no logical impeachment value; (2) the convictions cannot be used for impeachment in a Maryland court; (3) in the Superior Court, use of convictions for the same conduct depends solely on which side of Eastern Avenue the conduct occurred; and (4) the legislative history reveals that Congress did not intend for the crime of basic assault to be used for impeachment.

To argue that the outcome is not plainly absurd or unjust, the government ends up referring to second degree assault in Maryland, a misdemeanor,[1] as a felony (Govt. Br. at 24). That the government resorts to categorizing a misdemeanor as a felony proves the conclusion is absurd

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[1] "[A] person who violates subsection (a) of this section is guilty of the misdemeanor of assault in the second degree [.]" Ann. Code of Md., Crim. Law § 3-203.

and unjust.

The government discusses Federal Rule of Evidence 609 for comparison. While the federal rule relies upon the one-year penalty for categorization,[2] it contains a due process failsafe that is lacking here,[3] that "the probative value of the evidence [must] outweigh[] its prejudicial effect to that defendant," a requirement that the convictions here would surely fail.

The government claims that Mr. Browne's argument would force trial judges to find the equivalent D.C. law and consider whether the equivalent D.C. law could be used for impeachment. That is not the case as it would only apply to rare instances where (1) the foreign state categorizes the crime as a misdemeanor, (2) the foreign state imposes a penalty of more than one year, and (3) the crime is not logically impeachable. Right now this court only needs to decide the rule for one such crime known to fit these criteria and which commonly affects trials in the District: second degree assault in Maryland.

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[2] "[R]eference is made to the congressional measurement of felony (subject to imprisonment in excess of one year) rather than adopting state definitions which vary considerably[.]" Advisory Committee Note.

[3] *Dorman v. United States*, 491 A.2d 455, 458 (D.C. 1984) (*en banc*).

B. The question was preserved for review.

The government argues that Mr. Browne must proffer on appeal what his testimony would have been (Govt. Br. at 12), without elaborating on how that can happen in an appeal on the record. *Newell-Brinkley v. Walton*, 84 A.3d 53, 61 (D.C. 2014) ("We are a court of review, not of first view.")[4]

The government places a burden on Mr. Browne to "explain how [his testimony] would have materially advanced his complete self-defense claim" (Govt. Br. at 12). As the government knows, it demands the impossible. That is why, if Mr. Browne was effectively deprived of his fundamental right to testify in his own defense, it must be deemed the equivalent of a structural error requiring reversal.

In *Arthur v. United States*, 986 A.2d 398 (D.C. 2009), during an inquiry about the defendant's right to testify, the trial judge made

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[4] Rule 10(c) addresses material omitted from the record, not adding new material to the record. *Rayner v. Yale Steam Laundry Condo. Ass'n*, 289 A.3d 387, 396 n.9 (D.C. 2023) ("Supplementing the record would require further findings of fact, which is the function of the trial court, not this court. … Accordingly, we deny [the] motion to supplement the record and rely only on those facts that were presented to the trial court, whose decisions we review on appeal.")

comments that were unduly coercive and the defendant then decided not to testify. This court recognized that the right to testify is "'even more fundamental to a personal defense than the right of self-representation.'" *Id.* at 414 (quoting *Rock v. Arkansas*, 483 U.S. 44, 52, 107 S. Ct. 2704 (1987)). This court wrote,

> [F]rom the virtual impossibility of assessing the important 'dignity interests' at the core of the defendant's right 'to become an active participant in the proceeding that affects his life and liberty and to inject his own action, voice and personality into the process,' it is only the most extraordinary of trials in which a denial of the defendant's right to testify can be said to be harmless beyond a reasonable doubt.'

Arthur, 986 A.2d at 416. In *Arthur* the court wrote favorably of the conclusion that deprivation of the right to testify should be deemed a structural error or the equivalent and reversible *per se*, though the court decided it was not necessary in the case to make such a holding. This court recently agreed with the reasoning in *Arthur* in *Graves v. United States*, 245 A.3d 963, 972-73 (D.C. 2021), concluding that *at a minimum*, the government must prove "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."

Mr. Browne's telephone interview with the police, without the assistance of counsel, without the opportunity for rehabilitation or

explanation, and without the opportunity for the jury to observe Mr. Browne, was not a substitute for Mr. Browne's trial testimony.

At the heart of the question is whether anything happened between the trial court's ruling on the motion in limine and the time when Mr. Browne would have testified. *Haley v. United States*, 799 A.2d 1201, 1208 (D.C. 2002); *Wilson v. United States*, 691 A.2d 1157, 1158 n.3 (D.C. 1997). It is notable that during the inquiry about Mr. Browne's decision, the trial court reiterated that if Mr. Browne chose to testify, the jury would hear about the prior convictions. Those four prior convictions were of the same nature (assault/physical violence) as the one for which he was on trial and likely would have made an impression on the jury.

Mr. Browne's position is consistent with *Bailey v. United States*, 699 A.2d 392 (D.C. 1997), and other decisions. Regarding the four considerations set forth in *Bailey*, the government agrees that one of them has been met; *i.e.*, that the trial court's decision was a legal question (Govt. Br. at 14 n.6).

Regarding whether the harm is speculative, the test here is whether the ruling was subject to change as the case unfolded, such that events between the ruling and the time to testify may have changed the court's

ruling, the government's intention to use the prior convictions, or the defendant's desire to testify. *Id.* at 399 (quoting *Luce v. United States*, 469 U.S. 38, 41, 105 S. Ct. 460 (1984)). No such changes occurred in this case.

On the issue of whether Mr. Browne would have otherwise testified, the four convictions were of the same nature as the charges for which Mr. Browne was on trial and the admission of those prior convictions would necessarily dictate his decision. The government urges a requirement that a defendant proffer that he would testify but for the trial court's ruling. This would require a mere ritual that is untestable for veracity and therefore meaningless.

On the last factor stated in *Bailey*, this court is unable to perform a harmless-error analysis. Therefore, the convictions must be reversed

CONCLUSION

For these reasons, the conviction should be reversed and the case remanded for a new trial.

SIGNATURE OF COUNSEL

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Reply Brief** has been served

electronically, by the Appellate E-Filing System, upon:

Chrisellen R. Kolb, Esquire, Chief of the Appellate Division, Office of the United States Attorney, at USADC.DCCAFilings@usdoj.gov

and by email to Peter F. Andrews, Assistant United States Attorney, at Peter.Andrews@usdoj.gov

this **1st** day of **April 2024.**

/s/ Sean R Day
Sean R. Day

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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(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.

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/s/ Sean R Day
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23-CF-0455
Case Number(s)

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