BRIEF FOR APPELLEE

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 23-CF-455

CLIFTON A. BROWNE, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

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

Cr. No. 2021-CF1-6943

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ISSUES PRESENTED

I. Did appellant Browne waive his claim that the trial court erred by allowing his prior convictions to be admitted for impeachment when he did not testify at trial, nor proffer that he would have testified but for the proposed impeachment?

II. Did the trial court correctly hold that a prior conviction for Maryland second-degree assault, which is punishable by up to ten years' imprisonment, can be used to impeach a witness under D.C. Code § 14-305(b)?

III. Was any error by the trial court harmless where Browne's decision not to testify did not influence the jury's verdict?

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BRIEF FOR APPELLEE

INTRODUCTION

The central issue in appellant Clifton A. Browne's trial was not whether Browne had beaten and killed the victim, Luther Brooks, in September 2021. Instead, the crux of Browne's defense was that he had acted in self-defense; Browne claimed that Brooks attacked him with a wooden stick when, with the landlady's permission, Browne tried to enter Brooks's rental apartment. Because self-defense turns, in part, on a defendant's subjective belief that he or she needed to use deadly force,

the parties filed pretrial motions litigating whether, if Brooks chose to take the stand, he could be impeached, under D.C. Code § 14-305(b), for credibility at trial with multiple Maryland convictions. The trial court agreed with the government that the convictions were admissible. Ultimately, Browne did not testify; his version of events came in through a recorded police interview in which he described his subjective belief that he needed to defend himself at the time of the fight. The jury acquitted Browne of second-degree murder but convicted him of voluntary manslaughter, and the trial court sentenced Browne to 11 years' incarceration.

In this appeal, Browne claims that the trial court erred by ruling that the Maryland convictions were admissible, and that he is due a new trial as a result. This Court should hold that Browne failed to preserve his claim when he declined to take the stand at his trial, never proffered that he would have testified but for the trial court's ruling, and has never explained what his testimony would have been nor how it would have led to his complete acquittal. Even if this Court entertains the claim, Browne is wrong. The plain language of § 14-305(b) required Browne's convictions to be admitted. And, even if it did not, any error was harmless; taking

the record as a whole, it is highly improbable that the jury's verdict was impacted by the trial court's decision.

Browne's conviction and sentence should be affirmed.

COUNTERSTATEMENT OF THE CASE

Browne was indicted on June 9, 2022, on one count of second-degree murder, in violation of D.C. Code § 22-2103, for the death of Brooks (Record on Appeal (R.) 12). A jury trial began before the Honorable Marisa Demeo on January 10, 2023, and the jury began to deliberate at the end of the day on January 12, 2023 (R.A. 12–16). On January 18, 2023, the jury acquitted appellant of second-degree murder, but convicted him of the lesser-included offense of voluntary manslaughter (1/18/23 Tr. 10). On May 12, 2023, the trial court sentenced Browne to 11 years' incarceration and five years' supervised release (R.35). Browne noted a timely appeal on May 25, 2023 (R. 33).

The Trial

The Government's Evidence

In fall 2021, 75-year-old Luther Brooks was the tenant of a basement unit in a house on Kalmia Road, NW, in Washington, D.C.

(1/10/23 Tr. 99, 145). A formerly homeless veteran, he had been renting the unit for about seven years (*id.* at 99, 146).

Valerie Mann owned the property, and she was looking to sell it (1/10/23 Tr. 145). She had given Brooks several months' notice that he would need to vacate the unit, but Mann felt that Brooks was "dragging his feet" in leaving (*id.* at 148, 156). In preparation for selling the house, one of Mann's friends, Pamela Jafari, suggested that Mann hire Browne, Jafari's nephew, to do some repairs (*id.* at 151).

On September 28, 2021, Mann picked up Browne at the Metro around 1:15 p.m. and took him to the property (1/10/23 Tr. 152). Mann told Browne that there was a tenant, Brooks, in the basement unit, so they would start work in the attic and work their way down to the basement (*id.* at 154). Browne suggested to Mann that Brooks might be trying to take advantage of her, and said he would talk to him "man to man" (*id.* at 156).

After Mann showed Browne around the house, he headed downstairs to take inventory in the laundry room, which was across from the basement apartment (1/10/23 Tr. 157–58). From upstairs, Mann heard a knock on Brooks's door, followed by talking, then "escalated loud

talking and cursing" (*id*. at 160). Mann heard Browne telling Brooks that he needed to leave the apartment (*id*. at 162). Mann looked down the stairwell and saw Browne kicking the door from the hallway, with Brooks cursing and shouting from inside the apartment (*id*. at 161). The kick cracked the bottom of the door (*id*. at 162).

Brooks then came out of his apartment with a "big stick," "maybe four, four-and-a-half feet" long (1/10/23 Tr. 161). He banged the stick into Browne's chest, causing Browne to fall backwards into the laundry room (*id*. at 163). Brooks then went back into the apartment (*id*. at 164).

Browne came out of the laundry room and ran into the apartment, screaming "[m]otherfucker, you hurt me, you hit me" (1/10/23 Tr. 164, 168). Mann ran after them; when she caught up with them, she saw Browne, who had "exploded in anger[,]" straddling Brooks and punching him repeatedly (*id*. at 169, 171).[1]

Mann finally pulled Browne off Brooks (1/10/23 Tr. 172). Brooks was talking incoherently and was unable to get up (*id*. at 173–74). While

[1] A neighbor heard Brooks screaming for help (1/11/23 Tr. 1.81). Another neighbor heard what sounded like two men fighting, and saw one of them swinging a large object like a two-by-four over his head (1/10/23 Tr. 111–12).

Mann called for an ambulance, Browne took Brooks outside for air (*id*. at 178). Mann saw Brooks fall backwards from a seated position and hit his head on the concrete (*id*. at 178, 180).

When the police came, Mann told police that Brooks had fallen down the stairs (1/10/23 Tr. 181). Browne told the police the same thing (*id*. at 49).

After paramedics left the scene, Browne attempted to clean up blood on the carpet in Brooks's apartment (1/10/23 Tr. 190). Two days later, a forensic crime scene analyst found suspected blood on the bookcase and carpet (*id*. at 79).

Brooks never regained consciousness (1/10/23 Tr. 104). His children decided to take him off life support on October 8, 2021, and he died later that day (*id*. at 105–06). The medical examiner testified that Brooks died of multiple blunt force injuries (1/11/23 Tr. 2.54).[2] These included "abrasions and contusions" to the head, neck, torso, and extremities, subdural and sub-arachnoid hemorrhage, and fractures to the skull,

[2] The transcript for January 11 is split into a morning session and an afternoon session. The morning session is cited "1/11/23 Tr 1.XX" and the afternoon session is cited "1/11/23 Tr. 2.XX."

facial bone, and ribs (*id*. at 2.54). She explained that Brooks's injuries would not have been accidental, as they were consistent with "blows that [we]re delivered . . . to different parts of the body to cause multiple injuries" (*id*. at 56).

Browne called the detectives investigating the case on October 12, 2021, and he agreed to give a recorded telephone interview that lasted for approximately 26 minutes (1/11/23 Tr. 1.95–96, Gov't Exh. 21). Browne claimed that he and Mann went down to the basement apartment, knocked on the door, and put the key in (Browne Int. Tr. 3).[3] He said that Brooks came out swinging a stick and struck him (*id.*). Brooks and Browne started fighting "all the way through the house" (*id.*). Browne admitted that he picked up and "slammed" Brooks (*id.*; *see also id*. at 16 ("I'm hitting [Brooks] with body shots, head shots, and everything. Boom! And dropped him."), 19 ("I just went berserk on him.")). Even though Mann tried to stop Browne, he "kept going beating

[3] Citations in this section are to the transcript of Browne's recorded telephone statement. The audio came in at trial as Government's Exhibit 21. We are moving to supplement the record with both a copy of the exhibit itself and the transcript; although the transcript was not used at trial we cite to it here for ease of reference.

[Brooks]" (*id*. at 19). Browne then "threw [Brooks] outside," and Brooks hit the wall (*id*. at 3). Browne explained that he was "in self-defense mode" after Brooks hit him with the stick (*id*. at 8). Browne said that Mann had not told him that she and Brooks were having any difficulties (*id*. at 9). He also said that Mann told him to tell the police that Brooks had fallen down the stairs (*id*.). Browne admitted that he wiped up the blood in the basement apartment (*id*. at 12).[4]

The Defense Evidence

The defense called Pamela Jafari, who is Browne's aunt and Valerie Mann's good friend (1/11/23 Tr. 2.73). Jafari said that Mann's relationship with Brooks deteriorated in 2021 as she was trying to sell the house, and it "became a back-and-forth situation." (*id*. at 2.81). Mann felt intimidated by Brooks (*id*. at 2.95).

[4] After Browne's arrest, he spoke with police again on December 6, 2021 (1/11/23 Tr. 1.105). The recorded audio from the interview was unintelligible (*id*.). A detective who was present testified that appellant's version of events was substantially the same in both the October 12 and December 6 interviews (*id*. at 1.109).

The Trial Court's Ruling on Browne's Prior Convictions

Prior to trial, both parties sought to litigate the admissibility of appellant's prior convictions for second-degree assault in Maryland (R.22 (Gov't's Memo); R.23 (Def's Mot.)).[5] The trial court denied Browne's motion at the end of the first day of trial (1/10/23 Tr. 235). The court gave its reasons on the record midway through the second day of trial (1/11/23 Tr. 2.4–18). As relevant here, it explained that

> The plain language of the statute is the Legislature intended that criminal offenses punishable in excess of one year under the law, under which a Defendant is convicted be used for impeachment purposes. The Legislature chose not to define impeachable offenses by name or by the categories of felony or misdemeanor. It also chose the language, quote, under the law under which he was convicted, close quote. Thus, requiring the Court to look at in this case what is the penalty in Maryland for the crime of second degree assault. The Maryland second degree assault crime is punishable by up to 10 years, and, therefore, shall be admitted for impeachment.

(*id*. at 15). The trial court also concluded that this was not an "absurd or plainly unjust" result (*id*. at 16).

[5] Appellant's most recent conviction occurred in 2012 (R.32 (Gov't's Sentencing Memo)).

SUMMARY OF ARGUMENT

Browne failed to preserve his claim that the trial court erred in ruling that his prior convictions for second-degree assault in Maryland could be used to impeach him. Accordingly, the claim should be treated as waived under this Court's decision in *Bailey v. United States*, 699 A.2d 392 (D.C. 1997). Although the issue is a purely legal one, the remaining *Bailey* factors weigh against Browne. Browne did not testify at trial; he did not proffer that he would have testified but for the trial court's ruling; and he did not proffer how his testimony would have differed from the recorded statement he gave to the police that was played at trial. Nor has he argued on appeal that his testimony would have been more likely to lead the jury to conclude that he acted in perfect self-defense. As a result, any harm to Browne from the ruling is purely speculative. Under these circumstances, Browne should not receive "the windfall of automatic reversal." *Luce v. United States*, 469 U.S. 38, 42 (1984).

Even if this Court were to consider the claim on its merits, however, it would fail. The trial court correctly applied the plain language of D.C. Code § 14-305(b)(1)(A), which requires the trial court to admit a prior conviction to attack a witness's credibility if the criminal offense "was

punishable by . . . imprisonment in excess of one year under the law under which he was convicted." Because Maryland second-degree assault is punishable by up to 10 years' imprisonment, Browne's convictions are admissible. That result is not unjust or absurd, and Browne's contrary arguments fail to overcome the plain meaning of the statute that Congress wrote and enacted.

In any event, even if the trial court erred, any error was harmless because it is highly improbable that the error contributed to the verdict. The jury acquitted Browne of second-degree murder but convicted him of voluntary manslaughter. Put another way, the jury evidently accepted that Browne acted in imperfect self-defense – i.e., he had an actual belief that he was in imminent danger and needed to use deadly force in order to save himself – but rejected his argument that he acted in complete self-defense – i.e., his belief was not objectively reasonable. Browne has not even asserted, much less demonstrated, that his trial testimony would have bolstered the *objective* reasonableness of his self-defense claim.

ARGUMENT

I. Browne Waived His Claim By Neither Testifying at Trial Nor Proffering That He Would Have Testified But For the Trial Court's Ruling.

This Court should hold that Browne waived his arguments about this impeachment evidence because he did not testify at trial, nor did he proffer that he would have testified but for the trial court's ruling on the prior convictions. Moreover, neither in the trial court nor on appeal has he proffered what his trial testimony would have been, or explained how it would have materially advanced his complete self-defense claim. This Court should decline to entertain his speculative argument.

A. Applicable Legal Principles

The Supreme Court has held that, in federal court, a defendant must testify to preserve a claim of improper impeachment with a prior conviction under Rule 609(a). *Luce v. United States*, 469 U.S. 38, 43 (1984). This rule is based on three key considerations: (1) the possible harm from such impeachment is "wholly speculative" if the defendant does not testify, (2) "a reviewing court cannot assume that the adverse ruling motivated a defendant's decision not to testify," and (3) allowing

defendants to preserve these claims without testifying would mean that "almost any error would result in the windfall of automatic reversal." *Id.* at 41–42. Justice Brennan concurred in *Luce*, explaining that it only addressed rulings that involved Rule 609(a) – impeachment with a prior conviction – and not other types of in limine rulings, including those "in which the determinative question turns on legal and not factual considerations." *Id.* at 44 (Brennan, J., concurring).

This Court "follow[s] the Supreme Court's holding in [*Luce*], subject to" Justice Brennan's concurrence. *Bailey v. United States*, 699 A.2d 392, 401 (D.C. 1997). In other words, this Court has not applied *Luce* as a hard-and-fast rule that a defendant must testify to preserve a claim of improper impeachment with a prior conviction under D.C.'s equivalent to Rule 609(a), D.C. Code § 14-305(b). *See Haley v. United States*, 799 A.2d 1201, 1208 (D.C. 2002) (defendant did not waive § 14-305 argument that presented "fundamentally a legal question"). So a pretrial in limine ruling may be ripe for review if it "turns solely upon a legal consideration on which the trial court has made a final ruling," and if the defendant's testimony "is not essential to preserve the purely legal issue for appellate review[.]" *Bailey*, 699 A.2d at 400 (quoting *Wilson v. United States*, 691

A.2d 1149, 1157 n.3 (D.C. 1997)). To make this determination, the Court examines (1) the speculative nature of the harm to the defendant, (2) whether the defendant would have testified, (3) whether the appellate court would be able to undertake a harmless-error analysis, and (4) whether the claim presents a purely legal issue. *See id*. at 401–02.

B. Browne Has Never Asserted that He Would Have Testified at Trial, So Any Harm to Him Is Speculative.

Three of the four *Bailey* factors point against Browne.[6] Unlike in *Haley*, Browne has not shown, and the record does not suggest, that he would have testified at trial. *See Haley*, 799 A.2d at 1208 (defendant did not waive his claim even though he did not testify "particularly because it was bolstered by the proffer that [defendant] would have testified but for the threat of impeachment"). To the contrary, at no point did Browne affirmatively state at trial that he would have testified but for the trial court's impeachment ruling – even when he affirmatively informed the court that he would not be taking the stand (*see* 1/11/23 Tr. 2.89–92 (Boyd inquiry)). He also did not represent that he would testify in his pretrial

[6] The government agrees that the application of D.C. Code § 14-305(b) is "fundamentally a legal question." *See Haley*, 799 A.2d at 1208.

motion (*see* R.23). "A reviewing court cannot assume that [an] adverse ruling motivated a defendant's decision not to testify." *See Luce*, 469 U.S. at 42.

Browne also has not proffered – either at trial or in this appeal – what testimony he would have offered at trial, or how his testimony would have been differed from his statements in his recorded police interview. And he has not explained how his hypothetical testimony would have advanced his defense at trial – complete self-defense. Because we do not know what his testimony would have contained or how it would have differed from his recorded police interview, any harm to him is highly speculative. *Cf. Bailey*, 699 A.2d at 401 (noting difficulty of conducting analysis "without knowing what [the defendant's] testimony would have been"). And it is also difficult to conduct a harmless-error review when the defendant has not explained (and the record does not reveal) how his testimony could have supported his trial defense.

Even if the Court were to speculate about what Browne would have testified to at trial, it is hard to see how Browne could have helped his cause by testifying because Browne did not need to testify to make out his self-defense theory. Complete self-defense permits an acquittal on a

homicide charge if a defendant shows (1) an actual belief both that he was in imminent danger of serious bodily harm or death and needed to use deadly force to save himself, and (2) that his belief was "objectively reasonable." *Bellamy v. United States*, 296 A.3d 909, 921 (D.C. 2023). Browne's perspective on the incident came in at trial through his recorded police interview. In that interview, Browne made statements that supported his self-defense claim. He described the victim coming out swinging a stick, striking Browne, and his subsequent snap into "self-defense mode" (*see* Browne Int. Tr. 3, 8). Browne relied on those statements in his closing arguments (*see* 1/12/23 Tr. 76 ("Mr. Browne went into self-defense mode. He said that."), 86 ("[H]is story [in the police interview] is what happened. He's not making [it] up.")). And the jury ended up crediting his *subjective* perspective by acquitting him of second-degree murder even as it convicted him of voluntary manslaughter. *See Bellamy*, 296 A.2d at 921 (imperfect self-defense requires defendant to show that his belief was "actually and honestly held"); *see also* R.33 (Browne's statement in his sentencing memo that "the jury arguably concluded that [Browne's] conduct amounted to imperfect self-defense").

When deciding whether to testify, then, Browne had to consider what could be gained from his testimony – and what could be lost. Not much could be gained; the most favorable version of events that he could tell had already been told to the jury through the police interview. But taking the stand would have carried serious risks even if his prior convictions were off the table. Browne might have testified inconsistently with his prior police statement, which would likely have undercut his credibility (or, at the very least, not boosted it). And it would have given the prosecution the opportunity to vigorously cross-examine Browne about the differences between his version of events and that of others who testified, including Valerie Mann. There was a real danger that, if Browne had taken the stand, the jury might have rejected his self-defense claim in its entirety, choosing to view Browne's actions as an enraged attack motivated by wounded pride rather than an honest but misguided attempt to defend himself. So it is not at all clear that fear of impeachment with his prior convictions was the motivating force behind his decision not to testify. *See Bailey*, 699 A.2d at 402 (noting other reasons the defendant may have decided not to testify).

Accordingly, Browne has not shown that he was going to testify, or even that he was likely to testify, and any harm to him is speculative at best. Under these circumstances, Browne failed to preserve his claim for appeal, and this Court should not award him with the "windfall" of a new trial. *See Luce*, 469 U.S. 38, 42.

II. The Trial Court Correctly Held That Browne Could Be Impeached With His Prior Convictions for Maryland Second-Degree Assault.

Even if Browne had preserved this claim, the trial court did not err in ruling that Browne's prior convictions for second-degree assault in Maryland could be used to impeach his credibility under D.C. Code § 14-305(b)(1) (1/11/23 Tr. 2.15). Maryland second-degree assault is a crime punishable by more than one year in prison, so it could be used to impeach Browne. D.C. Code § 14-305(b)(1)(A). Browne's attempts to attack the plain, unambiguous meaning of the statute are not persuasive.

A. Standard of Review and Applicable Legal Principles.

This Court reviews issues of statutory interpretation de novo. *Porter v. United States*, 769 A.2d 143, 148 (D.C. 2001). "In interpreting a statute, we begin with its text." *Coleman v. United States*, 202 A.3d 1127,

1139 (D.C. 2019). While "[t]he goal of statutory interpretation is to give effect to the purpose of the legislature," the "best evidence of that purpose is always the text of the statute itself." *Cass v. District of Columbia*, 829 A.2d 480, 486 (D.C. 2003); *see also Sharps v. United States*, 246 A.3d 1141, 1149 (D.C. 2021) ("the intent of the lawmaker is to be found in the language that it has used" (cleaned up)). Courts apply the plain meaning of a statute "when the language is unambiguous and does not produce an absurd result." *McNeely v. United States*, 874 A.2d 371, 387 (D.C. 2005).

B. Browne's Convictions Were Admissible for Impeachment.

Under D.C. law, the trial court must allow a party to impeach a witness's credibility with evidence that the witness has been convicted of a criminal offense, if the criminal offense "(A) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, or (B) involved dishonesty or false statement (regardless of punishment)." D.C. Code § 14-305(b)(1).

The plain meaning of § 14-305(b)(1) is unambiguous, and Browne does not argue otherwise. There are two types of convictions that can be used for impeachment: convictions that were punishable by more than

one year in prison under the statute of conviction, and convictions that involved dishonesty or a false statement. This rule adopts "the weight of traditional authority" as to what crimes can be used for impeachment: "felonies generally, without regard to the nature of the particular offense, and of *crimen falsi* without regard to the grade of the offense." *See* Fed. R. Evid. 609, 1972 advisory committee notes ("This is the view accepted by Congress in the 1970 amendment of § 14-305 of the District of Columbia Code, P.L. 91-358, 84 Stat. 473."). Like the corresponding Federal Rule of Evidence, § 14-305(b)(1) defines a felony using "the congressional measurement of felony (subject to imprisonment in excess of one year) rather than adopting state definitions which vary considerably." *Id*.

With this understanding, Browne's convictions could be used for impeachment under § 14-305(b)(1). Under Maryland law, a second-degree assault conviction carries a penalty of up to 10 years' imprisonment. Md. Code § 3-203(b). In other words, Browne's convictions were "punishable by . . . imprisonment in excess of one year under the law under which [Browne] was convicted." D.C. Code § 14-305(b)(1).

Thus, these convictions would have been admissible to impeach Browne if he had testified, as the trial court concluded (1/11/23 Tr. 2.15).

C. Browne's Attempts to Overcome the Plain Meaning of the Statute Are Unpersuasive.

Browne argues that this straightforward application of the statute is "absurd and plainly unjust" because (1) the equivalent (simple) assault conviction in D.C. is not punishable by more than one year in prison and hence not impeachable, and (2) Maryland law does not permit a witness to be impeached by a second-degree assault conviction, in part because Maryland classifies second-degree assault as a misdemeanor (Appellant's Br. at 14–16). He also argues that the legislative history shows that Congress did not intend this result (*id.* at 16). These arguments are not persuasive.

Browne's first argument asks the Court to create a complex test that is at odds with the statutory text. The statute is unambiguous: all that matters is whether a conviction is punishable by more than one year's imprisonment "under the law under which [the witness] was convicted." D.C. Code § 14-305(b)(1). The text does not authorize or encourage a thorough analysis for out-of-the-District convictions along

the lines that Browne suggests, where the trial court would need to determine:

1. the equivalent offense under D.C. law,
2. whether a conviction under the equivalent D.C. offense would be admissible for impeachment under D.C. law, and
3. whether the conviction is admissible for impeachment under the other jurisdiction's impeachment laws.

This simply is not the statute that Congress wrote. And rewriting the statute is not necessary to avoid an unjust or absurd result because it is not unjust or absurd that a conviction in one jurisdiction could be treated differently in another jurisdiction. *See United States v. Edmonds*, 524 F.2d 62, 64–65 (D.C. Cir. 1975) (admitting conviction to impeach defendant's credibility even though "the ruling on [the conviction's] admissibility could have been entirely opposite" if the conviction had happened in D.C. rather than North Carolina). After all, Browne's second-degree assault convictions, even if not admissible in Maryland state court, would likely be admissible in *federal* court in Maryland. *See* Fed. R. Evid. 609(a)(1).[7]

[7] Rule 609(a)(1) permits a criminal defendant to be impeached with a prior conviction "for a crime that, in the convicting jurisdiction, was punishable . . . by imprisonment for more than one year," if "the probative value of the evidence outweighs its prejudicial effect to the defendant." *See* Fed. R. Evid. 609(a)(1)(B).

Because Browne has not shown that the statute produces an absurd result, the Court should end its inquiry there. *See Hargrove v. District of Columbia*, 5 A.2d 632, 634 (D.C. 2010) ("if the plain meaning of statutory language is clear and unambiguous and will not produce an absurd result, we will look no further" (internal quotations omitted)); *see also McGirt v. Oklahoma*, 140 S. Ct. 2452, 2469 (2020) ("There is no need to consult extratextual sources when the meaning of a statute's terms is clear. Nor may extratextual sources overcome those terms.").

Even if the Court delved deeper, legislative history would not get Browne past the unambiguous text of the statute. True, the relevant House Report described the intent of the statute as excluding from impeachment offenses that are "primarily those of passion and short temper, such as assault." H.R. Rep. No. 91-907, 91st Cong., 2d Sess. 62 (1970) ("House Report"); *see Durant v. United States*, 292 A.2d 157, 160 (D.C. 1972) ("the sponsors of the legislation clearly intended that the offenses to be excluded are primarily those resulting from passion and short temper"). But the House Report also stated that impeachment should be allowed by "proof of any prior felony conviction." House Report at 61. At the time of the House Report, Congress defined a "felony" as any

crime punishable by more than one year in prison. *See* 18 U.S.C. 1, *repealed by* P.L. 98-473, 98 Stat. 2027 (Oct. 12, 1984). So the relevant House Report was, at most, ambiguous, as it did not resolve whether Maryland second-degree assault should be admissible for impeachment (because it is a felony, i.e., punishable by more than one year in prison) or inadmissible (because it is an offense of "passion and short temper"). Because the legislative history is "ambiguous and conflicting," it cannot "control the customary meaning" of the statute. *See Peoples Drug Stores, Inc. v. District of Columbia*, 470 A.2d 751, 755 (D.C. 1983) (declining to rely on ambiguous legislative history to look beyond the plain meaning of a statute).

III. Any Error Was Harmless Because the Error Did Not Influence The Verdict.

Even if the Court chose to entertain this claim and concluded that the trial court erred, Browne would not be due a new trial because the error almost certainly had no effect on the verdict. As explained earlier, Browne's testimony could only go to his *subjective* belief that he needed to use deadly force to defend himself, a belief already amply supported by other evidence in the record and ultimately accepted by the jury. There

is no reasonable likelihood – and Browne has not even attempted to offer one – that Browne's own trial testimony would have helped him show that his belief was *objectively* reasonable, i.e., that it was actually necessary for him to use the deadly force he did against the elderly victim. Accordingly, the jury's conviction on the lesser-included offense of voluntary manslaughter was not affected by Browne's decision not to testify.

A. Standard of Review

As with other rulings concerning the admission of impeachment evidence, the trial court's ruling here should be reviewed (assuming it is reviewable at all) for non-constitutional harmless error. *See Bennett v. United States*, 763 A.2d 1117, 1125 (D.C. 2000) (erroneous exclusion of impeachment evidence reviewed for non-constitutional error only).[8]

[8] We note that even the erroneous admission of other-crimes evidence against a defendant is reviewed for non-constitutional harmlessness, *see, e.g., Murphy v. United States*, 572 A.2d 435, 439 (D.C. 1990), so it is difficult to see why the erroneous admission of mere impeachment evidence would be reviewed more stringently. Even if this Court were to apply constitutional harmless-error analysis, however, for the reasons discussed in text any possible error was harmless beyond a reasonable doubt. *See Williams v. United States*, 858 A.2d 978, 981 (D.C. 2004) (constitutional harmless-error standard requires reviewing court to determine whether the government has shown beyond a reasonable

(continued . . .)

Error is harmless if the reviewing court can say, "with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgement was not substantially swayed by the error." *Kotteakos v. United States*. 328 U.S. 750, 765 (1946); *Wonson v. United States*, 144 A.3d 1 (D.C. 2016).[9] The focus is "on the likely impact of the alleged error on the jury's verdict." *Settles v. United States*, 615 A.2d 1105, 1109 (D.C. 1992). If "the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand." *Smith v. United States*, 26 A.3d 248, 264 (D.C.2011) (quoting *Kotteakos*, 328 U.S. at 764).

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doubt that "the error complained of did not contribute to the verdict obtained." (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)).

[9] Browne suggests that harmless-error review is inappropriate because "deprivation of the right to testify is a structural error" (Appellant's Br. 12). But the trial court's ruling did not *deprive* Browne of his right to take the stand even if it marginally increased the burden of doing so. Accordingly, this Court has not held that an erroneous decision to admit a defendant's prior conviction for impeachment is a denial of the right to testify, and it – like the Supreme Court – generally applies a harmless-error standard in such cases. *See Luce*, 469 U.S. at 43 (Brennan, J., concurring) (discussing "the required harmless-error determination"); *Bailey*, 699 A.2d at 402 (the question is "whether the error was prejudicial or harmless").

B. Browne's Decision Not to Testify Did Not Influence the Verdict.

Although the limited record presented by Browne here makes harmless-error analysis difficult – a reason weighing against this Court's entertaining the claim at all, *see Bailey*, 699 A.2d at 402 – what evidence there is strongly suggests that any error by the trial court could not have influenced the jury's verdict. Even assuming Browne would have testified at trial had he not been subject to impeachment with the prior convictions, there is no reasonable likelihood that his testimony would have changed the jury's verdict in his favor.

This conclusion flows logically and inexorably from Browne's theory of the case and the jury's actual verdict. Browne did not really dispute that he beat and killed the victim; rather, he claimed that he acted in self-defense. As discussed earlier and as relevant here, D.C. law recognizes two forms of self-defense. Complete self-defense permits an acquittal on a homicide charge if a defendant shows (1) an actual belief both that he was in imminent danger of serious bodily harm or death and needed to use deadly force to save himself, and (2) that his belief was "objectively reasonable." *Bellamy*, 296 A.3d at 921. Imperfect self-defense, on the other hand, reduces a murder charge to voluntary

manslaughter; the first prong is the same as for complete self-defense, but for the second prong defendant needs to show only that his belief was "actually and honestly held" rather than objectively reasonable. *Id*.

As discussed in Section I supra, the jury's verdict here logically rested on the second prong of self-defense. By acquitting Browne of second-degree murder but convicting him of voluntary manslaughter, it evidently concluded that Browne believed that he needed to use deadly force to save himself, but that his belief was merely "actually and honestly held" rather than objectively reasonable. In other words, the jury rejected complete self-defense but accepted imperfect self-defense. Browne argued as much in his sentencing memo (*see* R.33 ("the jury arguably concluded that [Browne's] conduct amounted to imperfect self-defense")). And, as also noted above, the best evidence in support of this result at trial came from Browne's own statements to the police during his 26-minute recorded interview (*see* Browne Int. Tr. 8 (Browne's explanation that he was "in self-defense mode" after the victim hit him with a stick)).

In light of that factual background, it is hard to see how Browne's putative testimony could have advanced his defense with the jury. The

jury already concluded, based on what it heard from Browne and other witnesses at trial, that Browne sincerely believed that he was in danger of serious bodily harm or death and that he needed to use deadly force to save himself. So the only way Browne could have gotten from imperfect self-defense to complete self-defense would have been to convince the jury that his belief was objectively reasonable. It is very difficult to see how Browne's own, self-serving testimony could have provided the missing link between his subjective belief that he needed to use deadly force and a determination that such force was objectively reasonable against the elderly victim. An objective-reasonableness test asks what the "typical reasonable person" would have understood given the facts in front of them. *Cf. Brown v. United States*, 983 A.2d 1023, 1027 (D.C. 2009) (Fourth Amendment objective-reasonableness test). Given that Browne's own subjective view of the situation had already been introduced at trial through his phone interview with detectives, it is hard to see what, if anything, Browne could have testified to that would have convinced the jury that, objectively, his belief was correct. Browne, for his part, has

never explained how his testimony could have provided this missing link.[10]

The jury also heard substantial evidence that would lead it to believe that Browne's belief that he needed to use deadly force was not reasonable. Mann testified that Browne had been kicking the door to Brooks's apartment, hard enough to crack the bottom of the door, before Brooks ever emerged with the wooden stick (*see* 1/10/23 Tr. 161–62). By the end of their encounter, Browne was straddling a prone Brooks, punching him repeatedly, having "exploded in anger" (*see* 1/10/23 Tr. 169–71). Browne himself described his own behavior as going "berserk" on Brooks, and he told the police that he kept beating Brooks even after Mann tried to stop him (*see* Browne Int. Tr. 19). A neighbor heard Brooks screaming for help (*see* 1/11/23 Tr. 1.81). The violent attack caused Brooks, a 75-year-old man, to suffer such severe injuries that he slipped

[10] In addition, Browne has never proffered any way in which his trial testimony would have differed from his statements in the October 12 police interview, so it is wholly speculative that he would have offered anything new for the jury to consider at all. And, even if he had testified differently at trial, he would have been subject to cross-examination on any discrepancies between his stories (unlike what actually happened at trial, where his police interview came in without cross-examination).

into a coma and died (*see generally* 1/11/23 Tr. 2.54–56). In light of all this evidence, it is unlikely that anything Browne could have said would have changed the jury's mind. *See, e.g.*, *Riddick v. United States*, 995 A.2d 212, 220 (D.C. 2010) (no harmless error where "the government's case was strong and undermined appellant's account of what occurred").

CONCLUSION

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

Respectfully submitted,

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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;
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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.

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23-CF-455
Case Number(s)

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Date

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have caused a copy of the foregoing to be served by electronic means, through the Court's EFS system, upon counsel for appellant, Sean R. Day, Esq., sean@dayincourt.net, on this 11th day of March, 2024.

/s/
PETER F. ANDREWS
Assistant United States Attorney