BRIEF FOR APPELLEE

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 23-CF-723

STEFAN FARMER, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

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

Cr. No. 2021-CF3-2178

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II. Whether the trial court committed reversible error by declining to give a self-defense instruction in its final charge to the jury, where the evidence did not support such an instruction, and where, in any event, the court instructed the jury on self-defense in response to a jury note, rendering any error harmless.

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COUNTERSTATEMENT OF THE CASE

By indictment filed on October 20, 2021, appellant Stefan Farmer was charged with assault with intent to kill while armed ("AWIKWA"), in violation of D.C. Code §§ 22-401, -4502; aggravated assault while armed ("AAWA"), in violation of D.C. Code §§ 22-404.01, -4502; assault with a dangerous weapon ("ADW"), in violation of D.C. Code § 22-402; assault with significant bodily injury ("AWSBI"), in violation of D.C. Code §§ 22-404(a)(2), -4502; four counts of possession of a firearm during a crime of violence or dangerous offense ("PFCOV"), in violation of D.C. Code § 22-4504(b); unlawful possession of a firearm, in

violation of D.C. Code § 22-4503(a)(1) and (b)(1); carrying a pistol without a license ("CPWL"), in violation of D.C. Code § 22-4504(a)(2); possession of an unregistered firearm ("UF"), in violation of D.C. Code § 7-2502.01(a); and unlawful possession of ammunition ("UA"), in violation of D.C. Code § 7-2506.01(a)(3) (R. (Record) 107-09 (Indictment)).[1]

From February 27 to March 7, 2023, Farmer was tried by jury before the Honorable Anthony C. Epstein (R. 32-38 (Docket)). The jury acquitted Farmer of AWIKWA and the related PFCOV charge, but found him guilty of the remaining charges (R. 399-402 (Verdict Form)). On August 22, 2023, the trial court sentenced Farmer to consecutive sentences of imprisonment of 144 months for AAWA and 60 months for PFCOV, followed by five years of supervised release (8/22/23 Tr. 24).[2]

Pretrial Proceedings

On March 29, 2022, Farmer filed a notice of intent to raise a not-guilty-by-reason-of-insanity ("NGRI") defense (R. 127 (NGRI Notice)). On April 6, 2022, the Honorable Robert D. Okun ordered a criminal responsibility examination (R. 129 (Order)).

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[1] Record citations are to the PDF page numbers. "Tr." refers to the transcript of the proceedings in the trial court. "App. Br." refers to appellant's brief.

[2] The trial court did not sentence Farmer on the remaining counts of conviction because it recognized that the assault counts would merge with AAWA and the related PFCOV counts would separately merge into one count (8/22/23 Tr. 3-4).

Dr. Teresa Grant with the D.C. Department of Behavioral Health ("DBH") conducted the examination and issued a report on August 4, 2022 (R. 158 (Criminal Responsibility Evaluation)). According to Dr. Grant, Farmer "reported that he was diagnosed with bipolar disorder/schizophrenia in his 40s" (*id.* at 4). Farmer had "experienced psychiatric issues" while incarcerated at Pocahontas State Penitentiary in 2016 (*id.*). Subsequently, he was admitted to Prince George's Hospital Center in 2019 and 2021 for "psychiatric decompensation" (*id.*). In March 2021, just weeks after the charged shooting in this case, he was treated at Laurel Medical Center and diagnosed with major depressive disorder and schizophrenia (*id.* at 10-11). That same month, he spent five days at Franklin Square Hospital, where his diagnosis on discharge was "Schizoaffective Disorder and Cannabis Use Disorder" (*id.* at 11). Days later, he was treated at Prince George's County Hospital Center and discharged with a diagnosis of bipolar disorder (*id.* at 12). Farmer also had a long history of abusing substances, including marijuana, cocaine, and PCP (*id.* at 10-13). Based on her personal examination of Farmer and a review of his records, Dr. Grant was "unable to form a definitive opinion as to whether at the time of the incident . . . [Farmer] was significantly compromised by a bonafide [sic] mental condition or defect" (*id.* at 14). Among other reasons, Dr. Grant noted: (1) there was "no way to determine if he was actually under the influence of a narcotic around the time of the offense"; and (2) although his "medical records from the three hospital admissions

diagnosed him with a mental condition, . . . [h]is admissions were relatively brief (a few days)[,] it appears that his symptoms quickly abated[,] . . . [and] records from each hospitalization . . . noted that [Farmer] acknowledged that he was using illicit substances" (*id.* at 14).

Dr. Grant further stated, "based on the data reviewed, it . . . appears highly unlikely that Mr. Farmer's behaviors were not significantly compromised by the presence of a mental disease or defect" (R. 158 (Criminal Responsibility Evaluation at 15)). In support of this conclusion, Dr. Grant noted 14 factors, including, inter alia, that:

> 1) There is no evidence of a mental condition prior to age 40.
>
> 2) Mr. Farmer is quite high functioning. He was gainfully employed and wrote a book . . . which is being sold on Amazon.
>
> 3) Mr. Farmer has an extensive criminal history.
>
> 4) Mr. Farmer was not forthcoming with the evaluator about his substance use. He admitted to using illicit substances during his hospital admissions in 2021, which occurred within two weeks after the instant offense. . . .
>
> 5) Family expressed that the defendant has a history of abusing illicit substance with significant changes in his behavior with the onset of psychosis and aggressive behaviors. (*Id.*)

Dr. Grant further explained that Farmer's behavior before, during, and after the offense appeared to be "goal directed" (*id.*).[3] Dr. Grant concluded by stating:

> In summary, the data provided and reviewed does not provide sufficient evidence for the evaluator to form a more definitive opinion as to whether Mr. Farmer actually suffered from a qualifying mental disease or defect that significantly compromised his capacity to make choices, capacity for delay, capacity to avoid apprehension, and other indicators of behavioral control due to a variety of factors noted above. However, there are indicators that he appreciated the wrongfulness of his actions. Despite his self-report to the evaluator, Mr. Farmer appears to have a history of abusing illicit narcotics in the community. Unfortunately, the records reviewed and collateral data does not provide a clear path as to whether the defendant's presentation was the result of what appears to be consistent abuse of illicit narcotics as noted in the records that contributed towards substance induced psychosis or a bonafide [sic] mental defect. (*Id.*)

On September 13, 2022, the government requested permission to have its own expert, Dr. Travis Flower, examine Farmer and review his medical records (R. 174 (Mot. to Permit Govt. Expert to Examine Def.)). On October 11, 2022, the trial court granted the government's motion (R. 209 (Order)).

On October 12, 2022, Farmer moved to bifurcate the guilt and insanity phases of his trial (R. 214 (Mot. to Bifurcate)). Farmer represented that he would "present

[3] Dr. Grant noted, inter alia, that Farmer "engaged in goal directed discussions with the [victim] prior to the alleged assault," "chased the victim around the truck," "reported that he felt threatened by the victim's behaviors[ ] . . . [and] shot the victim to scare him," "asked a friend to remove the clip from the gun," and "sent a message to the victim via Facebook Messenger that he was sorry for his actions (wrongfulness prong)" (R. 172).

the testimony of Dr. Stephen Lally, who evaluated Mr. Farmer, reviewed records and information provided by the government regarding the facts of the case and found, just as DBH Dr. Grant did, that Mr. Farmer's behavior was significantly compromised by the presence of a mental disease or defect and therefore lacked criminal responsibility" (R. 216). In opposition to Farmer's motion, the government noted that Dr. Grant made no such finding, and argued that Farmer's single, conclusory sentence proffering Dr. Lally's testimony was insufficient to make a prima facie showing of an insanity defense (R. 220 (Govt. Opp. at 6-8)).

At a hearing on October 28, 2022, Judge Okun and the parties discussed the motion to bifurcate. Defense counsel acknowledged that Dr. Grant's report was less than clear, and explained that Dr. Lally had not yet issued a report (10/28/22 Tr. 8-9). Nevertheless, counsel represented that "Dr. Lally concluded that at the time of the criminal conduct[,] as a result of mental illness or defect, Mr. Farmer lacked substantial capacity to recognize the wrongfulness of his act or to conform his conduct to the requirements of the law" (*id.* at 8). The government requested that Farmer provide a copy of Dr. Lally's forthcoming report as soon as possible (*id.* at 12-13). The court granted the motion to bifurcate based on defense counsel's representations, "subject to reconsideration depending on what Dr. Lally says in his report" (*id.* at 15). The court ordered the parties to file their expert notices by January 17, 2023 (*id.* at 17-18).

[redacted]

On January 30, 2023, the government filed a motion to compel the defense to provide Dr. Lally's report and any materials he relied upon in forming his opinions

[redacted]

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(R. 255 (Mot. to Compel)). The government argued that Farmer's notice failed to comply with Rules 16 and 12.2 because it merely recited the legal standard and lacked "any summary that describe[d] Dr. Lally's opinions, the bases and reasons for those opinions, or his qualifications" (R. 260). Absent adequate notice, the government argued, Dr. Lally's testimony should be excluded (*id.*).

On February 2, 2023, Farmer filed an opposition to the government's motion and a supplemental notice (R. 274 (Def. Opp. and Supp. Not.)). Farmer contended that his original notice sufficiently summarized Dr. Lally's opinion. Nevertheless, Farmer supplemented the original notice with a copy of Dr. Lally's curriculum vitae and a list of the materials he relied upon in forming his opinion, including court documents and criminal history information; mental health records; videos, photos, and other evidence in the case; and interviews of Farmer, his mother, and his sister (R. 276-278). Farmer further highlighted the following points from Dr. Grant's report as "bases and reasons for the opinion[ ] . . . that Mr. Farmer's behavior was significantly compromised by the presence of a mental disease or defect":

> • Mr. Farmer's medical records from the three hospital admissions diagnosed him with a mental condition, e.g. Major Depression, Bipolar Disorder, and Schizoaffective Disorder. . . . These hospitalizations occurred within two weeks after the instant offense (DBH report at 14);
>
> • Based upon the Wander Utah Rating Scale, it appeared Mr. Farmer meets the criteria for bipolar disorder unspecified. In the diagnostic area of the assessment, it was noted: client meets criteria for DSM 5 - Bipolar Disorder (RIMS medical records. See DBH report at 13);

> • Mr. Farmer reportedly experienced psychotic symptoms at [Pocahontas Correctional Facility] and the facility did not provide him with adequate psychiatric treatment (DBH report at 14);
>
> • Mr. Farmer has been diagnosed with Severe Mood Disorder with Psychotic Features. His medication regimen consists of Seroquel and Benadryl (DBH report at 13);
>
> • Mr. Farmer was admitted to PG Hospital Center on the psychiatric ward on November 19, 20[1]9 and discharged November 22, 2019 with a diagnosis of Major Depression. He was prescribed Seroquel (DBH report at 14);
>
> • Mr. Farmer is described as a 48 year old male with a longstanding history of Schizoaffective Disorder [he was] . . . escorted to Laurel Hospital by his mother due to poor sleep, agitation, and hallucinating, [and] was later found to be hallucinating, paranoid, delusional with no insight and impaired judgment (DBH report at 11). (R. 279.)

At a status hearing on February 3, 2023, Judge Okun indicated that the case would be certified to Judge Epstein for trial (2/3/23 Tr. 3). Judge Okun stated that he and Judge Epstein both had questions about Dr. Grant's report, particularly her statement, "It appears highly unlikely that Mr. Farmer's behaviors were not significantly compromised . . . by the presence of a mental disease or defect" (*id.* at 5). Judge Okun noted that this statement was inconsistent with the rest of her report and suggested that the court or the parties reach out to her to clarify her conclusion (*id.* at 5-7). The government asked the court to rule on its motion to compel disclosure of Dr. Lally's report (*id.* at 10). Defense counsel responded, "Doctor La[l]ly has not generated a report and Rule 16 requires that there be a summary and the basis for the opinion be stated and I provided that notice. It does not require . . .

a report to be generated." (*Id.* at 10.) Judge Okun indicated that he would not require the defense to provide a report prior to the trial-readiness hearing before Judge Epstein, but he did advise the parties to be prepared to discuss the issue (*id.* at 11).

At the trial-readiness hearing on February 16, 2023, Judge Epstein read aloud an email from Dr. Grant clarifying her position:

> I . . . apologize for the confusion, but when writing criminal responsibility reports with my old eyes, LOL, it can at times be difficult to catch everything and spell check would not have caught this. What I meant to state in my statement is it appears highly unlikely that Mr. Farmer's behaviors were significantly compromised by the presence of a mental disease or defect. (2/16/23 Tr. 5.)

Judge Epstein noted that this clarification was not "surprising" because it was "clear from her original report that she did not opine that it's more likely than not that Mr. Farmer is not legally responsible for his actions" (*id.* at 9-10). Specifically, the court noted that "on page 15 of her report, Dr. Grant list[ed] 14 factors that [we]re inconsistent with an insanity defense," including "Farmer's own account of the shooting" (*id.* at 10). Indeed, the court observed, "nowhere in the report did Dr. Grant explain the basis for an opinion that Mr. Farmer did not have the capacity required for an insanity defense" (*id.*).

Defense counsel stated that she no longer sought to call Dr. Grant as a witness, but that she still intended to call Dr. Lally (2/16/23 Tr. 6-7). Counsel asserted that the notice she provided was "adequate," and reiterated that Rule 16 did not require a written report (*id.* at 7).

The court agreed that a written report was not required, but noted that nonetheless, "by some method, the defense must provide not only a summary of the opinion, but also . . . reasonable detail about the basis and reasons for the expert's opinions so that the government's ability to prepare for trial and cross examine the witness is not hindered" (2/16/23 Tr. 8). Relying on *Miller v. United States*, 115 A.3d 564 (D.C. 2015), and *Ferguson v. United States*, 866 A.2d 54 (D.C. 2005), the court observed that "th[is] requirement is intended to minimize surprise that often results from unexpected expert testimony[,] [r]educe the need for continuances[,] and provide the opponent with a fair opportunity to test the merit of the expert's opinion through focused cross examination" (*id*.).

The court ruled that "the notice provided concerning Dr. Lally did not comply with Rule 16" (2/16/23 Tr. 8-9). The court explained: "To the extent that the defense relies on Dr. Grant's report to explain the basis and reasons for Dr. Lally's opinion, that doesn't work because we have established that her report was misread to express th[e] opinion . . . [that] a mental disease took away Mr. Farmer's capacity to conform his conduct to the requirements of the law or to recognize the wrongfulness of his conduct" (*id.* at 9). The court noted that Farmer "ha[d] not explained how Dr. Lally reconcile[d] his opinion with Mr. Farmer's own explanation of his actions and the 13 other factors discussed in Dr. Grant's report that indicate that Mr. Farmer did

appreciate the wrongfulness of his actions and could conform his conduct to the requirements of the law" (*id.* at 11).

As to the two reasons for Dr. Lally's opinion highlighted in the defense's expert notice – (1) that Farmer "ha[d] been diagnosed with bipolar disorder, Schizoaffective disorder and major depression among other things," and (2) that there was "no way to determine whether Mr. Farmer was actually under the influence of a narcotic around the time of the offense" – the court found that "[n]either . . . suffice[d] to meet the defense's obligation under Rule 16" (2/16/23 Tr. 11). Regarding the first reason, the court noted that the defense had not identified any "scientific basis" for the proposition that a person with those diagnoses is "legally insane," and in fact, Dr. Grant had acknowledged the diagnoses but still concluded that she could not "form a definitive opinion about whether Mr. Farmer was legally responsible for his conduct" (*id.* at 11-12). Regarding the second reason, the court found that "[t]he inability to determine whether Mr. Farmer was under the influence of drugs at that time undercuts the insanity defense" because an "[in]capacity to comply with the law or underst[an]d right and wrong that is due to drug use and not to a mental illness does not support an insanity defense" (*id.* at 12-13). Because Farmer had not provided "reasonable detail about the basis of and reasons for Dr. Lally's opinion" on these points, he failed to comply with his Rule 16 obligations (*id.* at 13).

The trial court then turned to the question of the appropriate remedy (2/16/23 Tr. 13). Among the factors it considered were (1) "the reasons for the nondisclosure," (2) "the impact of the nondisclosure o[n] the trial," and (3) "the impact of a particular sanction [o]n the proper administration of justice in general" (*id.*). The court found that the defense had offered "no good reason for its failure to provide reasonable detail about the specifics of Dr. Lally's opinion" (*id.*). Furthermore, "the record d[id] not establish that Dr. Lally's testimony would have been sufficient to carry Mr. Farmer's burden of proof on the insanity defense," particularly given that his proffered opinion was inconsistent with that of Dr. Grant (*id.* at 14). Lastly, the court concluded that "[a]nother continuance w[ould] not solve the current Rule 16 problem," and that in fact, it would "harm the administration of justice," because trial had already been postponed once, trial slots on the Felony I calendar were "a scarce commodity," and the scheduled trial date of February 27 would have to go unfilled, a result that was undesirable given the number of detained defendants who were awaiting trial (*id.* at 15). Because excluding Dr. Lally's testimony would not be "disproportionate to the end that . . . Rule 16 is intended to promote," the court ruled that Dr. Lally would not be permitted to testify (*id.*).

In light of this ruling, Farmer decided to forego an insanity defense (2/16/23 Tr. 15-16).

The Trial

The Government's Evidence

Andre Sturdivant and Farmer were lifelong friends who grew up together (2/28/23 Tr. 45). Sturdivant and Farmer would hang out in the 4400 block of Gault Place, Northeast (*id.*). On February 25, 2021, Sturdivant went to the block to see friends after work (*id.* at 47). Sturdivant saw Farmer, and the two began to talk (*id.* at 47-48). Farmer asked Sturdivant for two dollars (*id.* at 48). When Sturdivant said he did not have any money, Farmer told him that he (Farmer) had given his last two dollars to Sturdivant's son (*id.*). Sturdivant joked with Farmer, "that was your dumb. You shouldn't have g[iven] him your money." (*Id.*) Upset with Sturdivant, Farmer, who was sitting in his car, reached down, pulled out a gun, and pointed it at Sturdivant (*id.*). Farmer tried to open the car door, but Sturdivant kicked it shut, backed up, and ran to the other side of the car with his hands up (*id.* at 48, 54). Farmer got out of the car, followed Sturdivant to the other side, and started shooting (*id.* at 48). As he did so, another friend, Wayne McDaniels, intervened and pushed Farmer away (*id.* at 50).[5] "[F]leeing for [his] life," Sturdivant ran behind a nearby

[5] A Ring camera at a house across the street captured the shooting (3/1/23 Tr. 117). The video, admitted as Government's Exhibit 15, showed Sturdivant and Farmer arguing outside the car, and then Farmer shooting at Sturdivant as Sturdivant walked away (Govt. Ex. 15). The video also showed McDaniels yelling at Farmer to "stop" and pushing him away (2/28/23 Tr. 49-50, 121). The exhibit admitted at trial was less than clear because it was a video that a detective had taken with his cell phone (continued . . .)

house (*id.* at 51).[6] He had suffered gunshot wounds to the right knee and left hand (2/28/23 Tr. 21, 55).[7] Meanwhile, Farmer fled the scene in his car (Govt. Ex. 15).

Officer Susan Henson was on patrol in the 4300 block of Hayes Street, when she heard the gunshots (3/1/23 Tr. 57-58). She canvassed the area and, within a minute, encountered Sturdivant, who was "bleeding really, really badly," on the corner of 44th Street and Gault Place (*id.* at 60, 63-64, 71-72). Henson rendered first aid until EMS arrived (*id.* at 62-63).[8] Three cartridge casings were recovered from the crime scene (2/28/23 Tr. 211).

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of the original video which was shown to him on the homeowner's cell phone (3/1/23 Tr. 122). The police and the prosecution made efforts to obtain the original video but were unsuccessful (*id.* at 122-123, 160-161). The lead detective testified that the original video, which was clearer than the one admitted at trial, did not show Sturdivant holding a gun during the confrontation (*id.* at 124, 127, 189). The government will move separately to supplement the record on appeal with the video admitted at trial.

[6] A blood trail ran from the scene of the shooting, along the sidewalk, and into the yard of 4400 Gault Place (3/1/23 Tr. 21-22, 28-31, 116, 118). "[N]umerous officers" searched the yard and the area around the blood trail and did not find any evidence of a gun (*id.* at 121, 126).

[7] McDaniels's brother, Tyrone Phillips, heard the gunshots and two-to-three minutes later saw Sturdivant limping down the street (2/28/23 Tr. 128-130). Phillips had seen Farmer about an hour before the shooting (*id.* at 132). Farmer seemed "[a] little off"; "he was moving around, sweating, doing jumping jacks[,] . . . [and] ran around the block" (*id.*). McDaniels also noted that Farmer was "stressed" and "wasn't himself" (*id.* at 163). McDaniels, however, denied seeing Farmer with a gun (*id.* at 174).

[8] Sturdivant did not tell Henson who had shot him or that he had gone into the backyard of 4400 Gault Place after the shooting (3/1/23 Tr. 80).

When initially asked about the shooting, Sturdivant denied knowing who had shot him (2/28/23 Tr. 57, 114, 116). However, when the police told him three days later that they knew what had happened,[9] Sturdivant identified Farmer as his assailant (2/28/23 Tr. 57-58; 3/1/23 Tr. 115, 132). Sturdivant denied possessing a gun, pointing a gun at Farmer, or hiding one after the shooting (2/28/23 Tr. 62, 105, 111).[10] McDaniels and Phillips also denied seeing Sturdivant with a gun (*id.* at 130, 150, 164, 166).

Hours after the shooting, around 4:30 a.m., Farmer crashed into a concrete barrier in Maryland, five-to-six miles from the D.C. border (3/1/23 Tr. 138, 191-193). Farmer had been driving the same Saturn Vue that he drove away from the scene of the shooting (*id.* at 138, 195). The car, which had previously had a decal on the driver-side door, no longer had the decal, only residue in its place (3/1/23 Tr. 154-155).[11] A .380 semiautomatic firearm was found on the front passenger

[9] Sturdivant's sister, Shiffen Brown, told the lead detective that Sturdivant knew that Farmer was the shooter (3/1/23 Tr. 130-131).

[10] Sturdivant was impeached with prior convictions for possession of PCP, attempted distribution of a controlled substance, unlawful possession of a firearm by a convicted felon, and robbery (2/28/23 Tr. 58). Additionally, when Sturdivant testified in the grand jury in this case, he had a pending case in which he had pled guilty to possession with intent to distribute a controlled substance (*id.* at 58-59). After he testified in the grand jury, that case was dismissed (*id.*).

[11] The Ring video showed the decal on the car door at the time of the shooting (Govt. Ex. 15), and a photograph taken by a license-plate reader earlier that month also showed the decal (3/1/23 Tr. 135-137).

floorboard (3/2/23 Tr. 17). There were four .380 cartridges loaded in the magazine (*id.* at 24). Analysis of a DNA sample taken from the magazine of the gun showed an extremely high likelihood that Farmer's DNA was present (*id.* at 48). Moreover, the shell casings found at the scene were of the same caliber as the cartridges recovered from the magazine, and "were consistent with having been fired by" the gun found in Farmer's car (*id.* at 48-49).

Three days after the shooting, Farmer sent Sturdivant a Facebook message that read, "Apologies for the inconvenience. . . Love you like a brother cause u r to me. We gotta help each other equally cause in a bit all we r goin to have is each other. . . Sorry. . . Love u much[.]" (Govt Ex. 17; 2/28/23 Tr. 59-61.)

The Defense Evidence

Officer Ryan Nosner testified that he noted two distinct blood trails at the crime scene – one that went along the sidewalk and into the yard of the house at the corner of the block, and another that went to the corner of 44th Street and Gault Place, where the police had encountered Sturdivant (3/6/23 Tr. 32-34). Nosner searched the backyard and around the property and examined the roof in search of a gun or other evidence (*id.* at 37, 39, 45-46). Nosner thought that the victim might have tossed a gun behind the house, but he never found one (*id.* at 56, 58).

SUMMARY OF ARGUMENT

The trial court correctly found that Farmer's inadequate expert notice failed to satisfy his disclosure obligations under Rule 16. Farmer failed to provide a written summary of Dr. Lally's opinion, and the bases and reasons for that opinion, as required. Instead, Farmer offered only undetailed, conclusory statements about the proffered opinion and erroneously relied on a report by another expert that was unsupportive of the proffered testimony. The trial court acted well within its discretion to exclude the testimony given that (1) Farmer failed to provide a valid reason for the nondisclosure, (2) the nondisclosure would have seriously impaired the government's ability to prepare for trial or cross-examination of the expert, and (3) the proper administration of justice counseled against a continuance.

The trial court also did not err in declining to give a self-defense instruction in its final charge to the jury. There was no evidence to support such an instruction. To the contrary, the evidence showed that Farmer was the aggressor. In any event, the trial court ultimately delivered the requested instruction in response to a jury note, rendering any error harmless.

ARGUMENT

I. The Trial Court Did Not Err in Excluding Dr. Lally's Testimony.

Farmer claims that the trial court erred in concluding that his Rule 16 notice of Dr. Lally's testimony was insufficient, and that the court further abused its discretion by excluding the testimony rather than granting a continuance (App. Br. 16-27). These claims are meritless.

A. Standard of Review and Applicable Legal Principles

At the time of Farmer's trial, if a defendant had requested disclosure of the government's expert witnesses, and the government complied with that request, or if the defendant had given notice under Rule 12.2(b) of an intent to present expert testimony on the defendant's mental condition, Rule 16(b)(1)(C) of the D.C. Superior Court Rules of Criminal Procedure required the defendant to disclose, at the government's request, "a written summary of testimony of any expert witness that the defendant intend[ed] to use as evidence at trial." Super. Ct. Crim. R. 16(b)(1)(C); *see also Ferguson v. United States*, 866 A.2d 54, 63 (D.C. 2005). To satisfy this requirement, the defendant was obligated to "describe the witnesses'

opinions, the bases and reasons for those opinions, and the witnesses' qualifications." Super. Ct. Crim. R. 16(b)(1)(C).[12]

The purpose of this disclosure rule is "'to minimize surprise that often results from unexpected expert testimony, [to] reduce the need for continuances, and to provide the opponent with a fair opportunity to test the merits of the expert's testimony through focused cross-examination." *Ferguson*, 866 A.2d at 63 (quoting Fed. R. Crim. P. Advisory Committee's notes regarding 1993 amendments to comparable Fed. R. Crim. P. 16). An expert disclosure is inadequate where it merely includes "a list of topics that fails to summarize the expert's expected testimony, fails to describe the expert's actual opinions, and fails to describe the bases for those opinions." *Murphy–Bey v. United States*, 982 A.2d 682, 688 (D.C. 2009).

"'[A] party's compliance with . . . Rule 16 disclosure requirements is a question of law,'" which this Court reviews de novo. *See Miller*, 115 A.3d at 566 (quoting *Murphy–Bey*, 982 A.2d at 688-689). "If a defendant violates Rule 16, the

[12] In August 2023, the Superior Court amended Rule 16 and "incorporate[d] the 2022 amendments to Federal Rule of Criminal Procedure 16 regarding the parties' obligations to disclose information about expert testimony." D.C. Super. Ct. Crim. R. 16 (Editor's Notes, Cmt. to 2023 Amendments). The 2022 amendments to the federal rule "delete[d] the phrase 'written summary' and substitute[d] specific requirements that [inter alia] the parties provide 'a complete statement' of the witness's opinions." Fed. R. Crim. P. 16 (Advisory Committee Notes, 2022 amendments). This was done "[t]o ensure that parties receive adequate information about the content of the witness's testimony and potential impeachment." *Id.*

trial court has discretion to impose sanctions, including exclusion of evidence not disclosed, and [this Court] review[s] the decision to do so for abuse of discretion." *Id.* "Where there has been a failure to make proper disclosure under Rule 16, among the factors which the trial court must consider and weigh are: (1) the reasons for the nondisclosure; (2) the impact of the nondisclosure on the trial of the particular case; and (3) the impact of a particular sanction on the proper administration of justice in general." *Murphy-Bey*, 982 A.2d at 689 (internal quotations omitted).

B. Discussion

1. Farmer's Expert Notice Was Insufficient.

The trial court did not err in determining that Farmer's notice regarding Dr. Lally's testimony was insufficient to satisfy his disclosure burden under Rule 16. Neither Farmer's initial one-page notice nor his supplemental notice adequately described Dr. Lally's opinions or the bases and reasons for those opinions. [redacted]

[redacted][13]

Farmer's supplemental notice added little to his initial notice. Aside from listing an array of materials that Dr. Lally relied upon and reiterating Farmer's psychiatric diagnoses, the notice provided no explanation or further elaboration about Dr. Lally's opinion that Farmer's behavior during the offense was significantly compromised by the presence of a mental disease or defect (R. 277-280). Indeed, the notice merely referred back to Dr. Grant's report (*id.*).

As the trial court correctly noted, however, Dr. Grant "did not opine . . . that on February 25, 2021, a mental disease took away Mr. Farmer's capacity to conform his conduct to the requirements of the law or to recognize the wrongfulness of his conduct" (2/16/23 Tr. 9). In fact, with the exception of the lone sentence Farmer highlights ("based on the data reviewed, it . . . appears highly unlikely that Mr.

[13] Farmer contends that his initial notice was "substantially the same as" the government's expert notice in that both notices summarized the proffered expert opinion, explained the bases and reasons for that opinion, and attached "any available report" (App. Br. 19-20). But, as discussed infra, Dr. Grant's report did not support Dr. Lally's proffered testimony, and as Farmer acknowledges, Dr. Lally had not yet issued his own report. [redacted]

Farmer's behaviors were not significantly compromised by the presence of a mental disease or defect" (R. 158)), which Dr. Grant clarified contained a typographical error, nothing in Dr. Grant's report supported the opinion that Farmer claimed Dr. Lally would espouse. To the contrary, Dr. Grant repeatedly indicated that she could not form an opinion that Farmer's conduct was compromised by his mental condition (*see*, *e.g.*, R. 171: "I am unable to form a definitive opinion as to whether at the time of the incident . . . the defendant was significantly compromised by a bonafide [sic] mental condition or defect"; R. 172: "In summary, the data provided and reviewed does not provide sufficient evidence for the evaluator to form a more definitive opinion as to whether Mr. Farmer actually suffered from a qualifying mental disease or defect that significantly compromised his capacity to make choices, capacity for delay, capacity to avoid apprehension, and other indicators of behavioral control . . . .") Moreover, she described in detail the myriad "indicators that he appreciated the wrongfulness of his actions," including his "goal directed" behavior before, during, and after the offense and his apology to Sturdivant days after the shooting, which Dr. Grant aptly noted went to the "wrongfulness prong" of the NGRI standard (R. 172). Because of Farmer's extensive history of substance abuse, Dr. Grant concluded that it was unclear "whether [his] presentation was the result of what appears to be consistent abuse of illicit narcotics . . . that contributed towards substance induced psychosis or a bonafide [sic] mental defect" (*id.*). Her report thus provided no

support for [redacted] a fact that Farmer implicitly recognized when he withdrew his request to present Dr. Grant's testimony (2/16/23 Tr. 5-6).

To the extent Farmer suggests that the one sentence in Dr. Grant's report with the double negative could be read to support such an opinion (App. Br. 21), he ignores the report's lengthy discussion, and Dr. Grant's subsequent clarification, to the contrary.[14] Indeed, Dr. Lally's belated report makes clear that his opinion was not consistent with Dr. Grant's opinion on the ultimate issue: whereas Dr. Grant stated that it was "highly unlikely that Mr. Farmer's behaviors were significantly compromised by the presence of a mental disease or defect" (2/16/23 Tr. 5), Dr.

[14] Farmer also mischaracterizes Judge Okun's interpretation of Dr. Grant's report (App. Br. 21-22). He did not note, as Farmer claims (at 22), that an interpretation reading out the double negative was supported by Farmer's "documented significant history of mental health treatment and diagnoses"; that was defense counsel's assertion (10/28/22 Tr. 9). Instead, Judge Okun noted that Dr. Grant's report went "in both directions" and seemed "more equivocal" (*id.* at 9, 14). Nevertheless, he ruled that Farmer's proffer of an NGRI defense was sufficient to support bifurcation of the proceedings, "subject to reconsideration depending on what Dr. Lally says in his report" (*id.* at 15). Subsequently, when it appeared that Dr. Lally's report was not forthcoming, Judge Okun expressed concern that the disputed sentence was "inconsistent" with the rest of Dr. Grant's report (2/3/23 Tr. 5).

Lally opined that "actions that occurred on the day of the instant offense were at least partially influenced by the presence of [Farmer's] psychiatric condition" (App. Mot. Supp. ("Forensic Report")). Thus, Farmer's reliance on Dr. Grant's report to explain the bases and reasons for Dr. Lally's opinion was at best misleading, and in no way allowed the government to adequately prepare for cross-examination. *See Murphy-Bey*, 982 A.2d at 689 (upholding trial court's finding of Rule 16 violation, where defendant's insufficient expert notice "hindered the government's ability to prepare for trial or cross-examine [expert]").

This Court's opinions in *Miller*, 115 A.3d at 564, *Murphy-Bey*, 982 A.2d at 682, and *Ferguson*, 866 A.2d at 54, are instructive. In *Miller*, a misdemeanor child sexual abuse case, the defendant proffered that an expert would testify that "if a child of the complainant's age reported forced penetration in the manner that the complainant has previously described, this [activity, if it occurred] would increase the likelihood of penetration injury." 115 A.3d at 567 (brackets in original). This Court deemed the notice insufficient under Rule 16 because it did "not communicate the substance of what [the expert's] opinion would be concerning the actual likelihood of penetration injury in [the victim's] case, where she reported her assault two years after it allegedly occurred," and therefore did "not give the government sufficient notice of [the expert's] actual opinions, such that they could prepare for her testimony." *Id.*

In *Murphy-Bey*, an aggravated assault case where the defendant claimed self-defense against an allegedly intoxicated victim, the defendant's initial notice explained that he would call a doctor to "testify either by providing information or by rendering an opinion about . . . the effects of crack cocaine and psychiatric drugs [and] marijuana on the human mind, the combination of their use, the length of time of their effects[,] as well as the long and short-term effects of their use." 982 A.2d at 687 (brackets in original). In a supplemental notice, the defendant specified that "[the expert] will be able to offer an opinion that while under the influence of the illegal drug crack cocaine and coupled with the psychotic schizophrenic drugs, a person would be frantic, nonsensical, agitated, overly hyper, and in a state of mania." *Id*. This Court held that the disclosures were inadequate because the original proffer was merely "a list of topics that fail[ed] to summarize the expert's expected testimony, fail[ed] to describe the expert's actual opinions, and fail[ed] to describe the bases for those opinions," and the "second letter did not rectify this problem." *Id.* at 688. While the second letter "c[ame] closer to summarizing [the expert's] expected testimony and her opinions, . . . it clearly still d[id] not provide the bases and reasons for those opinions, nor any details of them, and therefore hindered the government's ability to prepare for trial or cross-examin[ation]." *Id.* at 689.

Similarly, in *Ferguson*, the government's initial expert notice briefly stated "that the government planned 'to introduce the medical records of the surviving

victim, . . . and may call a treating physician to discuss those records,'" and a supplemental letter only identified the treating physician and "indicat[ed] that he would 'testify regarding the severity of [the victim's] wounds and the medical care he received in the hospital.'" 866 A.2d at 58. This Court held that the disclosure was insufficient:

> Although the letter "specified the subject areas of [the doctor's] proposed testimony, it did not comply with Rule 16(a)(1)(E) because it could not be interpreted, even remotely, as a 'written summary' of the testimony the doctor would give at trial. Nor did that letter "describe [the doctor's] opinions," let alone "the bases and the reasons for those opinions," as Rule 16(a)(1)(E) requires.

Id. at 64.

As in *Miller*, *Murphy-Bey*, and *Ferguson*, here too the defense's notice failed to sufficiently summarize the proposed expert's opinion and the bases and reasons for that opinion, such that the government could adequately "test the merits of the expert's testimony through focused cross-examination." *Ferguson*, 866 A.2d at 63. The trial court properly recognized that Farmer's conclusory proffer, unsupported by Dr. Grant's report, lacked the necessary detail to satisfy the defense's burden under Rule 16.

2. The Trial Court Did Not Abuse its Discretion in Excluding the Proffered Testimony.

This Court has emphasized that "[t]he reciprocal nature of [Rule 16's disclosure] rule must be respected, and neither side should be permitted to hold back

on the disclosure of the information without consequences." *Murphy-Bey*, 982 A.2d at 689. Here, the trial court properly weighed the pertinent factors – "(1) the reasons for the nondisclosure; (2) the impact of the nondisclosure on the trial of the particular case; and (3) the impact of a particular sanction on the proper administration of justice," *see Miller*, 115 A.3d at 568 - and correctly concluded that exclusion of the testimony was warranted.

First, the court correctly found that the defense "offered no good reason for its failure to provide reasonable detail about the specifics of Dr. Lally's opinion" (2/16/23 Tr. 13). Farmer first mentioned Dr. Lally's expected testimony in his October 12, 2022, motion to bifurcate the guilt and insanity phases of his trial (R. 214 (Mot. to Bifurcate)). At a hearing on October 28, 2022, defense counsel acknowledged that Dr. Grant's report lacked clarity, and explained that Dr. Lally had not yet issued a report (10/28/22 Tr. 8-9). The court nonetheless gave Farmer nearly three months to provide Rule 16 notice (*id.* at 17-18). During a February 3, 2023, hearing before Judge Okun, the court again expressed concern that Dr. Grant's statement, "it . . . appears highly unlikely that Mr. Farmer's behaviors were not significantly compromised by the presence of a mental disease or defect," was "inconsistent" with the rest of her report, which discussed numerous factors "weigh[ing] against that conclusion" (2/3/23 Tr. 5). By the time Judge Epstein ruled on the government's motion to compel on February 16, 2023, over four months had

passed since Farmer's initial proffer of Dr. Lally's testimony. During that time, Farmer failed to explain Dr. Lally's opinion in any meaningful detail or to reconcile his expected testimony with Dr. Grant's contrary findings. *See Miller*, 115 A.3d 564, 568 (upholding trial court's decision to exclude expert testimony where "defendant proffered no good reason for being unspecific in predicting [expert's] testimony").

Farmer argues that the trial court placed undue weight on Dr. Grant's "eleventh hour correction" of her report and unfairly suggested that Farmer should have known about the discrepancy (App. Br. 25-26). But, as the court noted (2/3/23 Tr. 5), a careful reading of the entire report makes clear that the double negative at issue could not logically be read to support a finding that Farmer's conduct was significantly compromised by a mental disease or defect. Indeed, the fact that this statement is followed by a list of 14 factors supporting the opposite conclusion seriously undermines Farmer's assertion that he reasonably relied on the report in his disclosures regarding Dr. Lally.

Second, as to the impact of the nondisclosure on the trial, the court rightly observed that the inadequate notice would have left the government "in the dark about the basis and reasons [for] Dr. Lally's opinion," and therefore ill-prepared to challenge his testimony (2/16/23 Tr. 15). *See Murphy-Bey*, 982 A.2d at 689 (exclusion of expert testimony was appropriate where Rule 16 "violation would have had a substantial impact on the trial[,] . . . leaving the government unable to prepare

adequately for trial without a proper summary of [expert's] proposed testimony, her opinions, and the bases for them").

Finally, as to the impact of the sanction on the proper administration of justice, the court properly considered the effect a continuance would have on the already strained docket of the Superior Court, and especially on cases of detained defendants who had been waiting for trial dates. Further, as the court aptly found, "the record d[id] not establish that Dr. Lally's testimony would have been sufficient to carry Mr. Farmer's burden of proof on the insanity defense" (*id.* at 14). This is particularly true given the contrary opinions of Drs. Grant and Flower and [redacted][15] Indeed, as the court noted, "Dr. Grant identified substantial evidence that Mr. Farmer did have the capacity to conform his conduct to the requirements of the law and to recognize the wrongfulness of his conduct" (2/16/23 Tr. 14). That evidence included Farmer's "goal directed" conduct before, during, and after the shooting and his apology to Sturdivant days later. In light of this evidence, it is highly unlikely

[15] Notably, while Dr. Lally later opined that Farmer's actions "were at least partially influenced by the presence of his psychiatric condition," he stopped short of stating that Farmer lacked the substantial capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law due to mental disease or defect (App. Mot. Supp. ("Forensic Report")).

that Dr. Lally's testimony would have resulted in a different outcome. *See Miller*, 115 A.3d at 569 (exclusion of expert was not abuse of discretion where evidence against defendant was strong and expert's testimony "likely would not have had a meaningful impact on the outcome of the trial").[16]

II. The Trial Court Did Not Abuse its Discretion by Declining to Include a Self-Defense Instruction in its Final Instructions to the Jury.

Farmer argues that "the trial court erred in failing to provide the jury with instructions on self-defense until after they requested them in their deliberations" (App. Br. 28). Because there was no evidence of self-defense, there was no error, and because, in any event, the court eventually gave the requested instructions in response to a jury note shortly after deliberations started, any error was harmless.

A. Additional Background

The defense opened on the theory that Farmer shot Sturdivant in self-defense (2/27/23 Tr. 135-137). In support of this theory, defense counsel questioned the

[16] Farmer claims that "because release of Dr. Lally's report was imminent, the proper administration of justice favored issuing a continuance until that time instead of exclusion" (App. Br. 27). But nothing in the record suggests that Dr. Lally's report was imminent. At the February 16, 2023, trial-readiness hearing, defense counsel confirmed that Dr. Lally had not written a report (2/16/23 Tr. 7). Counsel did not suggest that a report would be issued imminently, nor did she request a continuance to obtain a written report. It is noteworthy that the report Dr. Lally ultimately submitted was dated August 5, 2023, nearly six months after the trial (App. Mot. Supp. ("Forensic Report")).

government's witnesses about whether they saw Sturdivant with a gun and, in the defense case, suggested that he could have hidden a gun in the yard he entered immediately after the shooting (*see*, *e.g.*, 2/28/23 Tr. 105, 150, 166-170; 3/1/23 Tr. 177; 3/6/23 Tr. 37-39, 45-46).

During a discussion about the trial court's proposed jury instructions, the government objected to the self-defense instruction because "there ha[d] been no evidence of self-defense" (3/2/23 Tr. 58). The prosecutor noted that defense counsel's "opening statement, [her] questions, her incredulity as to the answers from the witnesses [we]re not evidence in the case" (*id.*).

Defense counsel argued that the Ring video showed (1) Farmer wave Sturdivant away, (2) Sturdivant raise his right arm when the two were on opposite sides of the car, and (3) Sturdivant reach into his waistband when Farmer confronted him on the same side of the car (3/2/23 Tr. 53, 59-60). Counsel acknowledged that "you can't tell what's in his hand" when Sturdivant raised his right arm, and that it was also "hard to see" when Sturdivant allegedly reached for his waistband (*id.* at 60, 64, 69-70). Counsel speculated that "he could either be raising his hand with the gun in his hand . . . when he's raising his arm and pointing at Mr. Farmer or also when he's reaching into his waistband thereafter" (*id.* at 60-61). Although "you can't tell whether or not he has a gun in [his hand]," counsel argued, "you can't say that he's not [holding a gun]" (*id.* at 70). Counsel further suggested that the jury might

conclude that Sturdivant went into the yard on the corner to stash a gun (*id.* at 72-73).

The court noted that it did not see Sturdivant reaching for his waistband and also did not see anything in Sturdivant's raised hand (3/2/23 Tr. 61, 64, 69-70). The court found it telling that McDaniels did not go toward Sturdivant but instead was "worried about what Mr. Farmer [wa]s going to do," and indeed, McDaniels and Phillips both testified that they did not see Sturdivant with a gun (*id.* at 66-68). The court thus concluded that the evidence did not "support[ ] a nonspeculative inference that Mr. Sturdivant was holding something in his hand when he . . . pointed towards Mr. Farmer" (*id.* at 72). In any event, the court indicated that it would take the matter under consideration (*id.* at 75).

In a written order issued on March 3, 2023, the trial court ruled that it would not give a self-defense instruction (R. 338 (Order)). "Viewing the evidence in the light most favorable to Mr. Farmer," the court concluded that "there [wa]s no evidence on the record that, under the circumstances as they appeared to him at the time of the incident, Mr. Farmer could reasonably believe that he was in imminent danger of death or serious bodily harm from which he could save himself only by firing his handgun at Mr. Sturdivant" (*id.* at 2). The court explained that there was "no direct or circumstantial evidence that Mr. Sturdivant had a gun," and reiterated that the "grainy video does not show an object identifiable as a gun in Mr.

Sturdivant's hand or waistband or anywhere on his person, and indeed one cannot see in the video any object in Mr. Sturdivant's hand" (*id.* at 3). Moreover, the court stated, "it would be sheer speculation on the jury's part to think that Mr. Sturdivant may have had a gun based on any of his arm movements" (*id.*). Although the video showed that Sturdivant moved his right arm immediately before Farmer fired the first shot, Sturdivant was already walking away when he made this motion, and the video "d[id] not show, or support a reasonable inference, that Mr. Sturdivant reached into his right waistband" (*id.* at 3-4).[17]

The court further found that the self-defense instruction was inappropriate because Farmer was the aggressor: "The fact that Mr. Farmer got his gun before he got out of his vehicle and before any allegedly threatening or provocative action by Mr. Sturdivant indicate[d] that Mr. Farmer escalated the encounter and armed himself for reasons unrelated to self-defense" (*id.* at 5). Moreover, there was no evidence that after Farmer got out of the car, Sturdivant "move[d] toward him aggressively or otherwise; rather, he backed away while facing Mr. Farmer" (*id.*).

[17] The court also found that any inference that Sturdivant stashed a gun in the yard after the shooting "would be speculative for at least three reasons": (1) the evidence showed only that Sturdivant entered the yard to get away from Farmer, who drove off in Sturdivant's direction; (2) "multiple police officers conducted a reasonably thorough search of the property and did not find a gun"; and (3) Sturdivant would have had a "limited opportunity" (no more than a minute) to limp down the street and find a place to stash a gun before Officer Henson encountered him on the sidewalk (R. 343).

Because "Mr. Farmer began shooting at Mr. Sturdivant *after* Mr. Sturdivant started walking away[,] . . . Mr. Farmer's use of deadly force could not be justified in the circumstances" (*id.* at 4-5 (emphasis in original)).[18]

Despite the fact that the jury was not instructed on self-defense in the final charge before closing arguments, as the court observed, "[m]ost of [Farmer's] closing argument was on self-defense" (3/6/23 Tr. 167). Defense counsel repeatedly asserted that Sturdivant had a gun during the confrontation with Farmer and stashed it in the yard he entered after he was shot (3/6/23 Tr. 113-119, 132-135).

On March 6, 2023, at 1:39 p.m., the jury was excused for lunch and to begin deliberations thereafter (3/6/23 Tr. 153). At 3:10 p.m., the jury sent a note asking, "With respect to charge 4.101, what is the definition of voluntary? If the defendant acted in self-defense, would that mean he acted involuntarily?" (R. 388; 3/6/23 Tr. 154.) At 3:29 p.m., the jury sent a second note, asking, "Is there a jury instruction or definition of self-defense?" (R. 387; 3/6/23 Tr. 155).

[18] Farmer filed a written motion for reconsideration, which the trial court denied (3/6/23 Tr. 3). Nevertheless, "based on the opening statements" and the anticipated closing arguments, the court recognized that self-defense was the "elephant in the room" and that the jury might wonder whether "self-defense [was] in the case or not" (*id.* at 9). The court proposed instructing the jury that self-defense was "not available as a matter of law," but both parties objected to any such instruction (*id.* at 8-12).

Defense counsel requested that the court instruct the jury on self-defense (3/6/23 Tr. 159). Although the government maintained that there was still no factual basis for such an instruction, it agreed that a self-defense instruction would be an appropriate response; however, it also requested that the court deliver the "first aggressor" instruction (*id.* at 160-162). Defense counsel objected to the "first aggressor" instruction and moved for a mistrial, asserting that Farmer could not "get a fair trial where . . . self-defense, which was his defense and should have been instructed originally, is now some afterthought" (*id.* at 166-167).

The trial court overruled the objection, denied the motion for a mistrial, and the next morning gave extensive instructions on self-defense, including the "first aggressor" instruction (3/7/23 Tr. 7-11).[19] Following these instructions, the court permitted the parties to make additional closing arguments (3/7/23 Tr. 11-36). Less than an hour later, the jury returned its verdict, convicting Farmer of all but the AWIK and related PFCOV charges (*id.* at 38-41; R. 398-402 (Verdict Form)).

[19] The "first aggressor" instruction read:

> One who knowingly and unnecessarily places himself in a position in conscious disregard of a substantial risk that his presence will provoke a violent confrontation cannot claim self-defense. If you find that Mr. Farmer was the aggressor or provoked imminent danger of bodily harm upon himself, he cannot rely upon the right of self-defense to justify his use of force. (3/7/23 Tr. 10.)

B. Standard of Review and Legal Principles

A defendant is entitled to a jury instruction on any theory that could negate guilt of the crime charged, as long as there is some evidence, however weak, to support the instruction. *Higgenbottom v. United States*, 923 A.2d 891, 899 (D.C. 2007). When a self-defense instruction is requested, the trial court must decide as a matter of law whether there is sufficient evidence from the prosecution, the defense, or both, to support the instruction. *See Hernandez v. United States*, 853 A.2d 202, 205 & n.4 (D.C. 2004). The evidence is considered in the light most favorable to the defendant. *Id.* at 205. However, "[t]he evidence to support the trial court's giving a self-defense instruction is insufficient if the jury is required to cross the bounds of permissible inference and enter the forbidden territory of conjecture and speculation." *Jones v. United States*, 999 A.2d 917, 922 (D.C. 2010) (internal quotation marks and citations omitted).,

"To be entitled to a self-defense instruction, the evidence must show that '(1) there was an actual or apparent threat to the defendant; (2) the threat was unlawful and immediate; (3) the defendant honestly and reasonably believed that he was in imminent danger of death or serious bodily harm; and (4) the defendant's response was necessary to save himself from danger.'" *Binion v. United States*, 319 A.3d 953, 968 (D.C. 2024) (citation omitted). A defendant may not use any greater force than he actually and reasonably believes to be necessary under the circumstances to save

his life or avert serious bodily harm. *Gay v. United States*, 12 A.3d 643, 648 (D.C. 2011). Nor may a defendant claim self-defense "if the defendant was the aggressor, or if s/he provoked the conflict upon himself/herself." *Rorie v. United States*, 882 A.2d 763, 772 (D.C. 2005) (internal quotation marks and citation omitted).

The trial court's failure to give a defense-theory instruction that is supported by evidence is reversible error unless the error is harmless. *Higgenbottom*, 923 A.2d at 899. "To find an instructional error harmless, [the Court] must be satisfied with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error." *Id*. (internal quotation marks omitted).

C. Discussion

The trial court did not abuse its discretion by initially refusing to instruct the jury on self-defense. As the court correctly noted, there was no evidence to support a reasonable belief that Farmer was in "imminent danger of death or serious bodily harm from which he could save himself only by firing his handgun at Mr. Sturdivant" (R. 339). Contrary to defense counsel's insinuation throughout the trial, there was no evidence that Sturdivant had a gun on the day in question. Not a single witness testified that Sturdivant had a gun, no gun was found despite an exhaustive search of the blood trail and the yard in which Sturdivant hid, and nothing in the Ring video supported an inference that Sturdivant was armed. *See Dorsey v. United States*, 935

A.2d 288, 292 (D.C. 2007) (defendant was not entitled to self-defense instruction where, inter alia, victim was not armed, had uttered no threats, and did not obtain control of a weapon); *Edwards v. United States*, 721 A.2d 938, 942 (D.C. 1998) ("conclud[ing] that, as a matter of law, [defendant] was not entitled to a self-defense instruction," where defendant fired two shots at victim who "did not hold any weapon"; "[e]ven . . . allow[ing] for a possible jury inference that [victim's] reaching for [defendant's] legs was a threatening lunge, absent a weapon, this could not reasonably be considered a threat of imminent death or serious bodily harm"); *Harper v. United States*, 608 A.2d 152, 155 (D.C. 1992) (trial court properly refused to give self-defense instruction, where, despite defendant's testimony that victim lunged at her, "there was no evidence of a weapon in [victim's] hands . . . and no evidence that [victim] had touched appellant").

As defense counsel conceded below (3/2/23 Tr. 60, 64, 69-70), the video did not show anything in Sturdivant's right hand when he raised it before Farmer shot him, nor did it clearly show Sturdivant make any gesture towards his waistband.[20]

[20] The court noted that Sturdivant's arm movements were "ambiguous" at best, and "simply appear[ed] to be gesticulation during an argument" (R. 340-341). In any event, even if Sturdivant had reached for his waistband, absent evidence that he brandished or displayed a gun, a self-defense instruction still would not have been warranted. *See Binion*, 319 A.3d at 968 (trial court did not err in declining to instruct on self-defense where, "[e]ven if [defendant] established that [victim] had the gun in the alley, he presented no evidence that [victim] ever took out the gun, much less so in such a way that could justify a self-defense instruction"). Shooting at Sturdivant

(continued . . .)

Indeed, the video showed Sturdivant back away as Farmer angrily confronted him, and he turned and walked away before Farmer started shooting (Govt. Ex. 15). The trial court thus correctly found that "it would be sheer speculation on the jury's part to think that Mr. Sturdivant may have had a gun based on any of his arm movements" (R. 340). *See Henry v. United States*, 94 A.3d 752, 757 (D.C. 2014) (trial court "may decline to give the requested instruction if application of the instruction would require the jury to rely on purely speculative inferences"); *Kittle v. United States*, 65 A.3d 1144, 1160 (D.C. 2013) ("self-defense instruction 'would have invited the jury to engage in speculation and a trial court is not required to instruct the jury on a defense theory that indulges or encourages speculation about events or beliefs not supported by testimony'").

"Not only was there no evidence that [Sturdivant] was armed; there also was no evidence that either [a witness] or appellant perceived that [Sturdivant] was armed." *See Henry*, 94 A.3d at 759. As the trial court noted, "[n]othing in Mr. Farmer's body language or in the audio suggest[ed] that he reacted to any arm movement as if Mr. Sturdivant had just pointed a gun at him; the video d[id] not

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three times merely because he moved his hand toward his waistband would clearly be excessive. *See Edwards*, 721 A.2d at 942 (defendant used excessive force and therefore was not entitled to self-defense instruction, where he shot unarmed victim twice); *Harper*, 608 A.2d at 155 ("[T]he trial judge may not give a self-defense instruction where the defendant, as a matter of law, has used excessive force.").

show any change in Mr. Farmer's actions or tone toward Mr. Sturdivant after Mr. Sturdivant made any gestures with his arm" (R. 340). Furthermore, nothing in the "surrounding circumstances" suggested that Sturdivant posed an imminent threat of death or serious bodily injury, or that Farmer reasonably believed that to be the case; there was no evidence of prior conflict between the two friends and no evidence that Sturdivant was known to carry a gun or to engage in threatening or assaultive conduct. *See Henry*, 94 A.3d at 759 (upholding trial court's refusal to give self-defense instruction where there was no evidence that victim was armed, and "surrounding circumstances" did not show that defendant reasonably believed that victim "was about to start shooting him"; notwithstanding prior dispute, defendant testified he was not "deathly afraid" of victim). Moreover, Farmer's conduct after the shooting - apologizing to Sturdivant for "the inconvenience" (Govt. Ex. 17) - belies any notion that Farmer reasonably and sincerely believed that his life was in danger. *See Kittle*, 65 A.3d at 1159 (defendant's actions after striking victim "undermine[d] the possibility that [he] acted in self-defense").

Farmer's reliance (at 30-31) on *Hernandez*, 853 A.2d at 202, and *Reid v. United States*, 581 A.2d 359 (D.C. 1990), is misplaced. In *Hernandez*, there was evidence that half an hour after the charged stabbing, the defendant "returned home with injuries to his neck that appeared to his mother as if someone had grabbed him around the neck and choked him, leaving his neck scratched and bruised; and he had

debris in his hair and on his back suggesting that he had been lying on his back." 853 A.2d at 205. Furthermore, a doctor opined that the victim's wounds "could have been inflicted by someone lying on the ground and stabbing upwards." *Id.* at 206. Because this evidence "fairly raised the issue" of whether the defendant had stabbed the victim in self-defense during the course of a struggle, the trial court erred by not giving a self-defense instruction. *Id.*

In *Reid*, police responded to a radio run that "two men and a woman were fighting with knives." 581 A.2d at 361. Upon arrival, an officer observed the defendant "facing four or five other people with a knife in his right hand in a very threatening manner with a look like he was arguing with them." *Id.* When asked "what he was doing with the knife," the defendant responded, "I'm going to show these motherfuckers they don't be fucking with me. I'll fuck them up." *Id.* At trial, one of the men in the group admitted that he had a knife and testified that he and the defendant were "playing with knives." *Id.* at 362. On appeal, this Court held that the evidence was sufficient to support a self-defense instruction. *Id.* at 367.

Unlike in *Hernandez*, there was no evidence here that Farmer had been attacked or had suffered injuries during the confrontation with the victim. And unlike in *Reid*, there was no evidence that Farmer had been surrounded by others with weapons and or made any statement indicating his fear that he would have to protect himself.

To the contrary, the evidence showed that Farmer was the aggressor. While seated in his car, Farmer reached down, retrieved a gun, and pointed it at Sturdivant (2/28/23 Tr. 48). When Sturdivant tried to close the car door, Farmer got out of the car and continued to menacingly shout at Sturdivant as Sturdivant backed away and retreated to the other side of the car (2/28/23 Tr. 48, 54; Govt. Ex. 15). When Sturdivant then turned his back to Farmer and began to walk away, Farmer shot at him three times, stopping only because McDaniels pushed him away (*id.*). As the trial court noted, "[t]he fact that Mr. Farmer got his gun before he got out of his vehicle and before any allegedly threatening or provocative action by Mr. Sturdivant indicates that Mr. Farmer escalated the encounter and armed himself for reasons unrelated to self-defense" (R. 342). Further, given that Sturdivant was walking away when Farmer started shooting, "[n]o reasonable jury could conclude that, at that point in the encounter, Mr. Farmer might reasonably have believed that Mr. Sturdivant posed an imminent threat to him of death or serious bodily injury" (R. 341). Under these circumstances, the trial court rightly declined to instruct the jury on self-defense. *See Martin v. United States*, 452 A.2d 360, 363 (D.C. 1982) ("It is fundamental that when one is the aggressor in an altercation, he cannot rely upon the right of self-defense to justify his first use of force.").

Farmer claims that the trial court "invaded the province of the jury" by "rel[ying] upon its own view of the evidence" (App. Br. 31). Specifically, Farmer

takes issue with the court's assessment of his theory that Sturdivant hid a gun in the yard after the shooting, asserting that "it was the right of the jury, and not the court, to weigh [the evidence]" (*id.* at 31-32). But the court was required to assess the evidence as a threshold matter to determine if there was any support for a self-defense instruction, *see Henry*, 94 A.3d at 757 ("trial court must decide as a matter of law whether there is sufficient evidence to support a requested instruction"), and the court properly recognized that it was to view the evidence in the light most favorable to Farmer (R. 339 (quoting *Hernandez*, 853 A.2d at 205). Even viewing the evidence in that light, the trial court correctly found that "[t]here [wa]s no direct or circumstantial evidence that Mr. Sturdivant had a gun" (R. 340). Farmer has not shown that this finding was clearly erroneous.

Even assuming arguendo that the trial court erred, any error was harmless because the court gave extensive instructions on self-defense in response to the jury notes shortly after the jury began deliberating.[21] Farmer argues that these instructions were prejudicial because they included the "first aggressor" instruction (App. Br.

[21] Farmer contends that the jury notes provided "[f]urther evidence that self-defense instructions were warranted" (App. Br. 32). As the trial court observed, it was "hardly surprising" that the jury had asked about self-defense given that this theory was a running theme in defense counsel's opening statement and closing argument (3/6/23 Tr. 167-168). Of course, counsel's arguments to the jury are not evidence, and as we have explained supra, neither the testimony nor the video evidence supported a self-defense theory.

33). As discussed supra, there was ample evidence that Farmer was the aggressor. *See Tyler v. United States*, 975 A.2d 848, 858 (D.C. 2009) (upholding trial court's decision to give "first aggressor" instruction, where it had evidentiary support and "was consistent with the fundamental legal principles pertaining to 'the first aggressor' or provocation"). The court's instructions thus "properly inform[ed] the jury of the applicable legal principles involved." *See Higgenbottom*, 923 A.2d at 899 (citations omitted).

In addition to providing the requested self-defense instructions, the trial court also gave counsel additional time to present argument specifically on self-defense. Farmer has not explained why the self-defense instructions and supplemental closing argument were insufficient to mitigate any prejudice that arose during the brief period of deliberations before the jury was reinstructed. Because the trial court's response to the jury notes thoroughly remedied any possible error in failing to initially instruct on self-defense, the alleged error was harmless. *Cf. Jackson v. United States*, 645 A.2d 1099, 1105 (D.C. 1994) (failure to give "false appearances" instruction was harmless error where instructions taken as a whole, together with reinstructions, conveyed the legal principle).

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have caused a copy of the foregoing to be served by electronic means, through the Court's EFS system, upon counsel for appellant, Stefan Farmer, Esq., rearnest@theearnestlawfirm.com, on this 15th day of November, 2024.

/s/
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