BRIEF FOR APPELLEE

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 23-CM-939

DWAYNE DAVIDSON, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

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

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Cr. No. 2023-CMD-1954

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II. Whether the trial court erred by relying on an ostensible hearsay statement in the context of a records custodian laying the foundation for admitting a business record, when the D.C. Code, Superior Court rules, and this Court's precedents permit trial courts to rely on hearsay in determining the admissibility of this type of evidence.

III. Whether an ostensibly testimonial hearsay statement violates the Confrontation Clause in the context of a records custodian laying the evidentiary foundation for admitting a business record, when the Supreme Court has recognized that the foundation for a business record can be laid by out-of-court statements without implicating a defendant's Sixth Amendment right to confrontation.

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independent, non-hearsay basis for the witness to reasonably infer that same information.

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VI. Whether there was sufficient evidence to disprove Davidson's self-defense claim when he kicked the victim in the face with his boot after the victim had been laying prone and largely motionless on the floor for over 30 seconds.

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COUNTERSTATEMENT OF THE CASE

On April 1, 2023, appellant Dwayne Davidson was charged by information with one count of (simple) assault, in violation of D.C. Code § 22–404, and one count of attempted possession of a prohibited weapon (shod foot) (PPW), in violation of D.C. Code §§ 4514(b), 1803 (Record on Appeal (R.) 1). Following a three-day bench trial before the Honorable Deborah J. Israel, the court found Davidson guilty of both offenses on

November 6, 2023 (11/6/23 Transcript (Tr.) 21). That same day, the trial court sentenced Davidson to 60 days' incarceration for both counts to run concurrently, the execution of which the court suspended in its entirety in favor of one year of supervised probation (R. 13; 11/6/23 Tr. 35). Davidson filed a timely notice of appeal the next day (R. 14).

The Trial

The Government's Evidence

Just before 6:30 p.m. on March 31, 2023, Davidson approached Kevin Young as he lay prone and largely motionless on the floor of a Metro train car stopped at Benning Road Station and used his boot to kick Young in the face (see 10/24/23 Tr. 19–20, 57; Government Exhibit (Gov. Exh.) 2 at 8:42–9:15; Gov. Exh. 1 at 0:20–0:24; see also n.2, infra).[1]

[1] The government exhibits referenced in this brief are attached to the government's motion to supplement the record, filed on July 22, 2024. Government Exhibit 1, cellphone footage capturing Davidson's kick to Young's head, was admitted into evidence without objection (11/24/23 Tr. 20– 26; Gov. Exh. 1). Exhibit 2, Metro surveillance footage of the inside of the train car also capturing the assault, was admitted into evidence over Davidson's objection as a business record through WMATA records custodian Wanda Robinson (10/24/23 Tr. 76–82, 86–99; 10/25/23 Tr. 4–20; Gov. Exh. 2).

Davidson and Young were riding the eastbound Blue Line Metro train (see 10/24/23 Tr. 27). On the ride, Davidson, Young, and another man on the train car, Alexis Allen, began arguing, which escalated into a physical altercation that lasted several minutes (10/24/23 Tr. 17–20, 27–28; see Exh. 2 at 0:00–8:53).[2] At certain points during the altercation, Davidson was fighting both Young and Allen at the same time (10/24/23 Tr. 27–28, 51–52). Other passengers on the train attempted unsuccessfully to separate the men (*id.* at 18–19).

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[2] An eyewitness, Claribelisse Cologne, identified the three combatants as a man in a gray sweatshirt, a man wearing yellow, and a man wearing blue (10/24/23 Tr. 18–20, 43–44). She explained that the man wearing the gray sweatshirt was the person who kicked the man wearing the yellow vest in the face as he lay on the floor (*id.* at 18–20). Cologne recorded portions of the fight on her cellphone, which also captured Davidson's kick to Young's head following the fight (*id.* at 16–18; see Exh. 1). Cologne's description of the assault, the perpetrator, and the victim was corroborated by the video evidence introduced at trial (see Gov. Exh. 1 at 0:06–0:24; Gov. Exh. 2 at 8:42–9:15). Metropolitan Transit Police Department (MTPD) Officer John Ubierra, the arresting officer, identified Davidson in court and stated that he was wearing a gray sweatshirt at the time of arrest (10/25/23 Tr. 67–68). He described the other arrestees as a man wearing a yellow vest and a man wearing an orange vest with a blue jacket (*id.* at 69). In the defense case-in-chief, Davidson identified himself as the man wearing a gray sweatshirt, Young as the man wearing a yellow vest, and Allen as the man wearing blue with an orange vest in Metro surveillance video of the train car (10/26/23 Tr. 42, 47–48, 74). The trial court described the three men consistent with that evidence in its findings of fact (11/6/23 Tr. 11–12).

Toward the end of the fight, Davidson punched and shoved Young with enough force to knock Young to the floor of the Metro train (see Gov. Exh. 2 at 8:30–8:35). After Young hit the floor, Davidson continued to punch Young's upper body multiple times (10/24/23 Tr. 19–20; see Gov. Exh. 2 at 8:30–8:42). Young then lay largely motionless on the floor for over 30 seconds (see Exh. 2 at 8:42–9:15; Exh. 1 at 0:06–0:24). Davidson gathered his belongings, walked over to the prone Young, and then used his boot to kick the front of Young's face (10/24/23 Tr. 19–20; see Exh. 2 at 8:42–9:15; Exh. 1 at 0:20–0:24). Davidson then exited the train at Benning Road Station (10/24/23 Tr. 43–44, 57; Exh. 2 at 9:15–9:23; Exh. 1 at 0:24–0:29).

Metro Transit Police Department (MTPD) Officer John Ubierra responded to Benning Road Station for a report of a fight on the Metro (10/24/23 Tr. 56–57). He arrived just as Davidson was leaving the train (*id.* at 57–59; see 10/25/23 Tr. 67–68, 75).[3] Officer Ubierra arrested Davidson, Young, and Allen (10/24/23 Tr. 58–60). He observed that in addition to a gray sweatshirt, Davidson was wearing "construction-style

[3] After Davidson exited the train, Officer Ubierra also saw Allen on the train kicking Young (10/24/23 Tr. 57; 10/25/23 Tr. 68–70, 75–76).

boots" on his feet (10/25/23 Tr. 68). He explained that, at the time of arrest, Young was suffering from head injuries, including swelling and lacerations to his face, and that he had to be transported to the hospital for emergency medical attention (10/25/23 Tr. 71–74; see Exh. 3).[4]

The Defense Evidence

Davidson testified in his own defense. He explained that he, Young, and Allen were colleagues (10/26/23 Tr. 31). The three men left work together to take the Metro to a social function (*id.* at 34). Young and Allen were already intoxicated before getting on the Metro (*id.* at 32–33); Davidson claimed he had not been drinking (*id.* at 67). Davidson explained that, while the men were riding the Metro, they had a "conversation" that developed into a "verbal" dispute that eventually escalated into a "physical" fight (*id.* at 70–72). Davidson claimed that the verbal spat was mostly between Allen and Young and that he was

[4] Government Exhibit 3, which was admitted into evidence without objection, was a photograph of Young's face taken after the assault that shows two large swollen welts on his forehead and blood stains on his shirt (10/25/23 Tr. 71–72; Gov. Exh. 3). On cross-examination, Davidson elicited that Officer Ubierra had reported that all three men had lacerations (10/25/23 Tr. 77–78, 83–84). Davidson was also eventually transported to the hospital with a head injury after he was booked at the police station (*id.*; 10/26/23 Tr. 18–19).

working to "mediat[e]" and "calm" them down (*id.* at 38–40, 67–69). At a certain point, Allen called Davidson "young" and used the word "b*tch" (*id.* at 35–39, 68–69). This upset Davidson, who "wanted [his] respect" (*id.* at 68). Davidson felt "threatened" by the interaction and planned to exit the train at Benning Road Station to go home (*id.* at 36–37, 39–40, 81–82).

According to Davidson, before he could exit the train, Allen and Young "grabbed" and "snatch[ed]" him and began striking him, punching him, and holding him so that he felt like he could not breathe (10/26/23 Tr. 41, 43–44, 47, 54, 56, 58–60, 63–64, 82–83). Davidson felt "discombobulated" from the attack and sustained a cut on his eyebrow that required a Band-Aid at the hospital (*id.* at 62, 83). He feared he would get seriously injured, and felt "violated," "helpless," and like a "laughingstock" (*id.* at 45–48, 56, 58–60, 84). Claiming self-defense, Davidson acknowledged that he engaged in the fight and punched Young in the face and then continued punching Young twice while Young lay on the ground (*id.* at 74–77). Davidson claimed he then walked away while Young remained on the floor (*id.* at 65, 79–80).

When the train arrived at Benning Road Station, Davidson lost track of where Allen was and saw Young on the floor (10/26/23 Tr. 65–66). Before exiting the train and kicking Young in the head, Davidson claimed that he was "paranoid" that the absent Allen and prone Young were "after" him and that Young might get up and injure him because he would be "angry" at Davidson for punching him in the face (*id.* at 46, 63–66; see *id.* at 80–81; Exh. 2 at 9:14–9:17).

The Trial Court's Findings of Fact and Verdict

In finding Davidson guilty of both simple assault and attempted PPW (shod foot), the trial court found each of the government witnesses—Cologne, Robinson, and Officer Ubierra—credible (11/6/23 Tr. 12, 14–15). The trial court did not fully credit Davidson's testimony (*id.* at 15). In particular, the trial court noted that while Davidson claimed he wanted to leave the train as quickly as possible, he "went out of his way to walk back across the train to kick [Young] in the face and head" (*id.* at 16)

The trial court found that Davidson, Young, and Allen were all engaged in a verbal altercation that turned physical (11/6/23 Tr. 8–10). During portions of the physical fight, Allen and Young fought Davidson together, including Young holding Davidson while Allen swung at him

(*id.* at 10–11). Davidson, though, eventually "punch[ed]" Young "in the head with a right hook," which "knock[ed Young] to the ground" (*id.* at 11). Young "remained" on the ground and appeared to be "unconscious or semiconscious for many seconds" and was "not moving for some time" (*id.* at 11–12). At this point, the "fight was over" (*id.* at 16). Yet Davidson "marched" over to the "prone" and "semiconscious" Young, and "kicked" him "in the head with his boot," even though Young had been laying "motionless on the ground for at least a full 35 seconds" at that point (*id.* at 12, 16–17).[5] Based on the video footage, Davidson was "clearly" wearing "boots" (*id.* at 17). Young suffered "head injuries" that required paramedics to "transport him to the hospital" for treatment (*id.* at 14).

Based on these facts, the trial court found that the government had met its burden to prove simple assault because Davidson "injured" Young by "kicking him in the face and head," Davidson "intended to use" that force against Young, and "had the ability to injure" Young at the time

[5] The trial court acknowledged that the evidence demonstrated that Allen later went back into the train also to kick Young, but ultimately determined that it was "not at all clear" that Allen kicked Young in the head, as it "appears" that the kick "would have been to [Young's] torso" (11/6/23 Tr. 13–14).

(11/6/23 Tr. 17–18). The trial court further found that government disproved beyond a reasonable doubt Davidson's self-defense claim (*id.* at 18–19). It was not "reasonable" for Davidson to have "imminent fear" of bodily injury because "35 seconds" passed while Young was "motionless" and "on the ground" before Davidson kicked Young (*id.*) The trial court further found that, at the point of the kick, Davidson "could have left" but instead "became the aggressor" (*id.* at 19). The court also found that the government had proved attempted PPW beyond a reasonable doubt because Davidson was "wearing boots" and attempted to unlawfully use them as a "dangerous weapon" because his "kick" with those boots created a "substantial risk of unconsciousness" (*id.* at 19–21).

SUMMARY OF ARGUMENT

First, Davidson waived his claim that the trial court erred by admitting Robinson's statement that a WMATA technician preserved surveillance footage of the incident. Though he claims that this testimony relayed inadmissible hearsay based on a conversation Robinson had with the technician, Davidson elicited from Robinson on cross-examination the contents of that conversation in far greater detail than what was offered on direct examination.

Second, even assuming Davidson did not waive that claim, the trial court did not err by admitting the limited testimony that Davidson challenges as inadmissible hearsay. That testimony was offered by a records custodian as part of the foundation for admitting the Metro surveillance footage as a business record. Trial courts may consider hearsay when making preliminary determinations on the admissibility of evidence, including under the business-records rule. That principle has been recognized by this Court and has been explicitly adopted in the statutory scheme for admitting business records enacted by the D.C. Council. And, in any event, Robinson's challenged testimony about the technician's actions preserving the surveillance footage neither relayed nor was exclusively premised on inadmissible hearsay. The evidence supported that Robinson had an independent, non-hearsay basis on which she could reasonably infer that the technician completed the tasks that she assigned to him.

Third, Robinson's limited testimony on the technician's actions did not violate the Confrontation Clause. Whether the Confrontation Clause applies in the context of foundational evidence to admit a business record is unsettled in this jurisdiction. But this Court has recognized federal

authority holding that it does not apply. And the federal Circuit courts that have considered this issue have held that it does not. That position also reflects the Supreme Court's recognition that the foundation for business records may be laid by out-of-court statements in sworn certificates without violating the Confrontation Clause.

Fourth, the evidence at trial was sufficient to support Davidson's convictions. Davidson used his boot to kick Young in the face, which sent Young to the hospital with a head injury. Young struggled to get up following the assault. This was sufficient to show that Davidson took a substantial step toward using his boot in a manner that was likely to result in a serious bodily injury, including unconsciousness and extreme physical pain. Indeed, as illustrated by homicide cases that have come before this Court from decedents being kicked in the head with shod feet, Robinson used his boot in a way likely to result in a substantial risk of death. Moreover, the evidence disproved Davidson's self-defense claim beyond a reasonable doubt. Davidson kicked Young in the face after Young had been laying prone on the floor for over 30 seconds. Any subjective fear of imminent bodily harm Davidson harbored was unreasonable, and thus Davidson could not perfect a self-defense claim.

ARGUMENT

I. Davidson Waived His Hearsay and Confrontation Clause Claims by Eliciting on Cross-Examination the Same Evidence He Challenges.

Davidson claims (Appellant's Brief (Br.) 31–45) that the trial court erred by admitting hearsay in violation of the rule against hearsay and his Confrontation Clause rights. The limited testimony that he challenges is Robinson's statement that one of her supervisees downloaded and preserved the Metro surveillance footage admitted as Exhibit 2 after she assigned those tasks to him (*id.* at 32–33 (citing 10/24/23 Tr. 78)). Davidson elicited not only that exact same testimony on cross-examination but developed it in far more detail by asking Robinson to expand upon her conversation with her supervisee. Having done so, he cannot claim error on appeal.

A. Additional Background

The government sought to admit Exhibit 2—Metro surveillance footage capturing Davidson kicking Young in the head as Young lay defenseless on the ground—through Wanda Robinson, a Washington Metropolitan Area Transit Authority (WMATA) records custodian

(10/24/23 Tr. 76–82). Robinson introduced herself as the manager of WMATA's Digital Evidence Unit supervising the preservation of video evidence in the Metro transit system (*id.* at 76–77). She testified that WMATA records and stores surveillance footage from its transit system in the regular course of business to ensure safety on the system and to assist with administrative inquiries (*id.* at 78, 80). She explained that WMATA's surveillance system creates video files soon after its camera record events (*id.* at 78). She recognized Exhibit 2 as surveillance footage recorded by WMATA in the regular course of business that was collected by a technician in response to a government subpoena (*id.* at 77–78).[6] And she confirmed that Exhibit 2 was kept in a locked evidence room after it was collected (*id.* at 80).

Robinson also testified that she assigned the tasks of retrieving and preserving the relevant surveillance footage to a technician, and that it was the "technician [who] actually went out, pulled it, reported it,

[6] Davidson did not object when Robinson testified that she recognized Exhibit 2 as "a recording that was downloaded by one of my technicians regarding an incident" (10/24/23 Tr. 77–78).

brought it back, downloaded[it], and preserved it" (10/24/23 Tr. 78–79).[7] Davidson raised a hearsay objection, positing that he "assum[ed] the way in which the witness kn[ew] that is that the technician informed the witness" (*id.*). After Robinson stated that she knew this information because she assigned those tasks to the technician and had the ability to track his activity, the trial court overruled the objection (*id.* at 79).

After laying this foundation, the government sought to admit Exhibit 2 as a WMATA business record (10/24/23 Tr. 80). Davidson objected that the foundation was insufficient to authenticate Exhibit 2 as a business record because Robinson lacked "personal knowledge" of the incident "depicted in the video" (*id.* at 80–81). The trial court admitted Exhibit 2 and overruled Davidson's objection, explaining that it went to the weight of the evidence and not its admissibility (*id.* at 81–82).

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[7] That statement is the limited testimony that Davidson challenges on appeal (Br. 32–33). Davidson does not, and cannot, claim error from testimony he decided to elicit from Robinson on cross-examination. *See Lewis v. United States*, 930 A.2d 1003, 1010 (D.C. 2007); *see also Ohler v. United States*, 529 U.S. 753, 755 (2000) ("Generally, a party introducing evidence cannot complain on appeal that the evidence was erroneously admitted"). And, as Davidson acknowledges (Br. 34 n.21), the surveillance video contained in Exhibit 2 admitted as a WMATA business records does not transmit any hearsay.

On cross-examination, Davidson elicited from Robinson that she did not personally download the video and was not present when the technician first preserved the footage (10/24/23 Tr. 87). He asked Robinson whether she was "aware" of the video's preservation because the technician "communicated that" to her, which Robinson confirmed (*id.* at 87–88). Davidson renewed his hearsay objection, raised a Confrontation Clause objection to the foundation for the admission of the video, and asked the court to reverse its decision to admit Exhibit 2 (*id.* at 88–89). The trial court again rejected Davidson's hearsay and foundation objections and held the Confrontation Clause objection in abeyance (*id.* at 89–96) before recessing.

After reconvening trial, the court overruled the Confrontation Clause objection, finding that Robinson's testimony laying the foundation for Exhibit 2 did not relay testimonial hearsay in violation of the Confrontation Clause (10/25/23 Tr. 14–20). The statement from the technician, as the trial court elaborated, explained WMATA's "method" for preserving its records as was relevant to the foundation for admitting evidence under the business-records rule (*id.* at 20–21).

Seeking to expand upon Robinson's conversation with the technician, Davidson asked her "what, if anything, did the technician . . . tell you about the way in which he [preserved the video]?" (10/25/23 Tr. 27–28). Robinson responded that the technician "communicated that he went out, downloaded the video, came back to the office, downloaded on the hard drive, and then made a master copy, [and] placed it in our evidence storage room" (*id.*). Davidson inquired whether the technician "communicate[d] more words than . . . I went out, and I downloaded the video?" (*id.* at 28–29). Robinson confirmed that this was "the gist of the conversation" (*id.* at 29).

On cross-examination, Robinson testified in detail about WMATA's (1) general procedures for downloading and preserving surveillance video (10/25/23 Tr. 35–38), and (2) quality control system for ensuring that the correct footage is preserved (*id.* at 37–43, 47–50). And on re-direct examination, Robinson explained that WMATA's computer system automatically generates filenames for its videos corresponding to the date and time of the recorded footage (10/25/23 Tr. 52–61). Based on the filename for Exhibit 2, Robinson identified it as surveillance footage capturing events from March 31, 2023, around 6:20 (*id.* at 52–55, 64).

B. Davidson Waived His Claim by Choosing to Elicit the Testimony That He Now Challenges.

This Court need not even decide whether the trial court erred in admitting Robinson's testimony that a technician preserved the surveillance footage contained in Exhibit 2. That is because Davidson waived his claim by eliciting the contents of the technician's conversation with Robinson on cross-examination and exploring it in far more detail than the limited testimony Robinson offered on direct examination.

Even assuming that Robinson's testimony on direct examination was improper, the defense cannot turn "improperly elicit[ed] evidence" to "its own advantage" and then on appeal "'be heard to complain of the prejudice [the evidence] allegedly caused.'" *Hood v. United States*, 268 A.3d 1241, 1250 (D.C. 2022) (quoting *Mack v. United States*, 570 A.2d 777, 778 n.1 (D.C. 1990)). By making the tactical decision to elicit detailed testimony from Robinson about the content of her conversation with the technician—perhaps to undercut the weight of the evidence by suggesting it was inaccurate[8]—Davidson cannot now challenge the trial

[8] To the extent Davidson might argue that he elicited this testimony at trial to further develop his objection, the appropriate method to address (continued . . .)

court's decision to admit Robinson's testimony or the related surveillance footage on appeal: "[H]aving participated for tactical reasons in the significant compounding of the problem, he cannot now be heard to complain of the prejudice it allegedly caused." *Mack*, 570 A.2d at 778 n.1 ("[The defendant] cannot have his cake and eat it too."); *see Hood*, 268 A.3d at 1250.

II. The Limited Testimony Davidson Challenges Was Admissible to Lay the Foundation for Exhibit 2 as a Business Record.

Even assuming that he did not waive it, Davidson's claim (Br. 31–36) that Robinson's testimony relayed inadmissible hearsay when she explained that the technician "went out, pulled [the surveillance footage], reported it, brought it back, downloaded[it], and preserved it" (10/24/23 Tr. 78) is meritless.

When reviewing a trial court's evidentiary decision for abuse of discretion, this Court first determines whether the trial court based its challenged discretionary ruling on applying correct legal principles to a

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that concern would have been requesting a separate hearing to voir dire the witness instead of developing that testimony at trial. *See United States v. Brooks*, 449 F.2d 1077, 1082–83 (D.C. Cir. 1971) (citation omitted).

correct understanding of the nature of the evidence. *Jones v. United States*, 263 A.3d 445, 454 (D.C. 2021) (citation omitted). Second, even if the trial court did err, this Court will not reverse for abuse of discretion "unless the impact of that error requires reversal." *Id.* (cleaned up); *see (James) Johnson v. United States*, 398 A.2d 354, 366 (D.C. 1979) (even if the trial court's erred in exercising it discretion, the error must be of sufficient "magnitude" and "prejudice" to merit reversal).

Davidson cannot even meet the first prong by demonstrating that the trial court erred. His claim fails on three levels in that regard.

First, consistent with federal court practice under Fed. R. Evid. 104, trial judges may "consider hearsay and other inadmissible evidence in ruling on questions of admissibility." *Jenkins v. United States*, 80 A.3d 978, 990–92 & n.17 (D.C. 2013); *accord Roberson v. United States*, 961 A.2d 1092, 1096 & n.11 (D.C. 2008).[9] Thus, as here, hearsay is admissible

[9] As this Court observed in *Jenkins*, Fed. R. Evid. 104 "accurately states the rule of evidence we generally follow." 80 A.3d at 990–92 & n.17; *see* Fed. R. Evid. 104(a) ("The court must decide any preliminary question about whether . . . evidence is admissible[, and i]n so deciding, the court is not bound by evidence rules, except those on privilege."). This Court has only departed from that federal practice in one limited context: judges cannot rely solely on the content of a statement to determine whether it qualifies for admission under the hearsay exception for

(continued . . .)

to lay the foundation for admitting a piece of evidence as a business record. *See In re Int'l Mgmt. Assocs., LLC*, 781 F.3d 1262, 1268–69 (11th Cir. 2015); *United States v. Franco*, 874 F.2d 1136, 1139 (7th Cir. 1989).[10]

That principle is hardly controversial. Indeed, in both this jurisdiction and federal courts, parties may lay the foundation for a business record based *entirely* on hearsay: a written declaration by a custodian or other qualified witness will suffice. D.C. Code § 14–508(b); Super. Ct. Civ. R. 43–I(a)(4) (incorporated by reference in D.C. Super. Ct. Crim. R. 57(a)); *see* Fed. R. Evid. 902(11).

Any ruling by this Court precluding judges from considering hearsay to establish the admissibility of a business record would mark a stark departure from this long-standing practice for establishing the

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statements of co-conspirators. *Butler v. United States*, 481 A.2d 431, 439–41 (D.C. 1984). This Court has since recognized that *Butler*'s "carve[-]out" to the practice under Fed. R. Evid. 104 is a "narrow exception" that has not been "expanded to govern rulings on the admissibility of evidence in any other context" and there is "no reason to think [that this Court] intended the exception to apply more broadly." *Jenkins*, 80 A.3d at 995–96.

[10] This authority contradicts Davidson's arguments (Br. 33–35) that the trial court could not consider this testimony as part of the foundation for the admitting a business records. As the trial court correctly recognized (10/25/23 Tr. 21), it could consider this testimony for that purpose.

admissibility of business records and similar categories of evidence. *See, e.g.*, *Giles v. District of Columbia*, 548 A.2d 48, 54 (D.C. 1988) (recognizing in analogous context that foundation for admitting a chemistry record under what is now D.C. Code § 48–905.06 may be laid by affidavit and without live "testimonial foundation"). It would render a dead-letter the system for admitting business records recently established by the D.C. Council. D.C. Code § 14–508. It would in effect require live testimony not just from the custodian of records: every single employee who spoke to the custodian or wrote something she happened to read related to the handling or preservation of the record would likely have to testify. *Cf. Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 311 n.1 (2009) ("[W]e do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case."). And it would set this jurisdiction apart from the federal and state practice in almost every other jurisdiction, despite efforts by this Court and the D.C. Council to align with those practices.[11]

[11] *See Grimes v. United States*, 252 A.3d 901, 914–15 (D.C. 2021) (citing to both Fed. R. Evid. 803(6) and federal precedents in discussing (continued . . .)

In short, what Davidson proposes would swallow the business-records rule whole.[12]

Second, and relatedly, even if Davidson were correct that Robinson lacked any personal knowledge of the technician's actions independent of her conversation with the technician, she was still competent to testify about WMATA's preservation efforts. When laying the foundation for a business record, the sponsoring witness's knowledge of the handling of the record may rely on hearsay. *In re Int'l Mgmt. Assocs., LLC*, 781 F.3d

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admissibility of a business record); Commentary, D.C. Super. Ct. R. 43–I (noting that the Rule was amended in 2017 to make it "more consistent with federal practice"); D.C. Council, Cmte. Rept. on Bill. B24–0925 (Oct. 11, 2022), at 3, available at https://lims.dccouncil.gov/downloads/LIMS/49999/Committee_Report/B24-0925-Committee_Report1.pdf (noting that the process of admitting business records based on certifications is practiced in federal courts and 39 state jurisdictions).

[12] To the extent that Davidson might argue that this limited testimony could not be elicited before the trier-of-fact, that does not appear to have support in the case law and is, in any event, a distinction without a difference in this case tried before a judge. In a bench trial, judges are presumed to disregard inadmissible evidence in rendering a verdict. *Singletary v. United States*, 519 A.2d 701, 702 (D.C.1987); *accord Cook v. United States*, 828 A.2d 194, 196 n.2 (D.C. 2003). And, indeed, the trial court did not reference the technician's actions procuring the WMATA footage even a single time in its findings of fact. Accordingly, any error allowing that testimony in this bench trial was harmless and not reversible error. *Cook*, 828 A.2d at 196 n.2; *Singletary*, 519 A.2d at 702 (based on this "presumption . . . we could not possibly find reversible error here, even ... assum[ing error]") (citations omitted).

at 1268. As the Eleventh Circuit explained in considering this exact issue, there was no error admitting a business record even though the custodian's "testimony establishing the foundation for the business records exception was based on hearsay" and he lacked "personal knowledge" of the business's "recordkeeping practices other than what he gleaned from his interview with one of [the company's] principals." *Id.* (citing Fed. R. Evid. 104 for the proposition that the court could "consider that [testimony] . . . when determining whether the underlying documents were admissible under the business records exception").

Third, regardless of the non-applicability of the rule against hearsay, there was a sufficient basis in the record to conclude that Robinson had an independent, non-hearsay basis for her testimony. Davidson does not argue that the challenged testimony itself contained an out-of-court statement. Rather, he argues (Br. 32–33) that it relayed hearsay because he claims the only basis for Robinson's knowledge of the technician's actions was her conversation with the technician. While Robinson acknowledged on cross-examination that she knew of the technician's actions from her conversation with him (10/24/23 Tr. 87–88),

the record also supports a separate, non-hearsay basis for that knowledge.

Whether a witness has personal knowledge to support her testimony is a matter of conditional relevancy. The court need only be satisfied by a preponderance of the evidence that there is a sufficient basis for the witness's knowledge. *See Sims v. United States*, 213 A.3d 1260, 1267 (D.C. 2019); *Simmons v. United States*, 945 A.2d 1183, 1188–89 (D.C. 2008) (explaining that sufficient support in the record for personal knowledge may be established circumstantially).[13] A witness's "personal knowledge includes inferences . . . so long as they are grounded

[13] *See Callaham v. United States*, 268 A.3d 833, 848 n.19 (D.C. 2022) (recognizing that this Court has endorsed the personal knowledge requirement contained in Fed. R. Evid. 602 for lay witnesses) (citation omitted); *see also Strong v. Valdez Fine Foods*, 724 F.3d 1042, 1045 (9th Cir. 2013) (stating that the threshold for establishing personal knowledge is "minimal") (cleaned up); *Joy Mfg. Co. v. Sola Basic Indus., Inc.*, 697 F.2d 104, 111 n.23 (3d Cir. 1982) (explaining that personal knowledge is a subset of conditional relevancy to be determined by the judge) (citations omitted); *cf. New England Env't Techs. Corp. v. Am. Safety Risk Retention Grp., Inc.*, 810 F. Supp. 2d 390, 396 (D. Mass. 2011) ("Evidence is inadmissible if the Court, in its discretion, determines the witness could not have actually perceived or observed that which he testified to.") (cleaned up).

in personal observations and experience." *Harrison v. United States*, 76 A.3d 826, 841 n.19 (D.C. 2013) (cleaned up).

When the trial court asked Robinson how she knew the technician completed the tasks to preserve the surveillance footage, Robinson explained that she assigned those tasks to him and that she was able to track his activity (10/24/23 Tr. 79). And, as a result of that assignment, she was able to locate the footage in WMATA's locked evidence room (*id.* at 80). She also detailed from her own knowledge the general process for collecting and preserving this type of evidence (see 10/25/23 Tr. 35–38).

Logically, the reasonable inference a supervisor can draw from assigning a task to a supervisee and then receiving the expected result is that the supervisee followed the general process for accomplishing that task. That logical conclusion combined with Robinson's knowledge of WMATA's standard preservation procedures and the location of this particular footage in the WMATA evidence room is sufficient to show that Robinson could reasonably infer the subject of her testimony: that the assigned technician preserved this footage and accomplished that by following standard procedure. *See Harrison*, 76 A.3d at 841 n.19. That the technician separately confirmed that information does not diminish

this independent basis for her knowledge nor does it transform her testimony into inadmissible hearsay. *Cf. United States v. Davis*, 596 F.3d 852, 856 (D.C. Cir. 2010) (endorsing trial court's evaluation of whether witness had a basis for personal knowledge independent of hearsay).

III. The Limited Testimony Davidson Challenges Did Not Violate His Confrontation Rights.

Challenging the same testimony, Davidson claims (Br. 36–41) that the trial court erred by admitting it in violation of his Confrontation Clause rights. Here, too, Davidson fails to establish any error.

The Confrontation Clause of the Sixth Amendment generally precludes the government from offering at a criminal trial testimonial hearsay against the defendant from a non-testifying witness who is not subject to cross-examination. *Crawford v. Washington*, 541 U.S. 36, 50–54 (2004). This Court reviews de novo whether the trial court erred by admitting testimonial hearsay in violation of the Sixth Amendment. *Burns v. United States*, 235 A.3d 758, 786 (D.C. 2020).

Davidson's arguments here again fail on three levels.

First, it is not clear that the Confrontation Clause applies in the context of a court's preliminary determination on the admissibility of

evidence. This Court has recognized that this is an unsettled issue in this jurisdiction, but has acknowledged federal authority holding that the Confrontation Clause does not apply in this context. *Roberson*, 961 A.2d at 1096 & n.13 (citing *United States v. Morgan*, 505 F.3d 332 (5th Cir. 2007)). Indeed, in addressing the exact issue presented here, the Fifth Circuit in *Morgan* explicitly held that "*Crawford* does not apply to the foundational evidence authenticating business records in preliminary determinations of the admissibility of evidence." *Morgan*, 505 F.3d at 339; *accord United States v. Bedoy*, 827 F.3d 495, 511 (5th Cir. 2016) (characterizing *Morgan* as holding that "*Crawford*'s strictures do not govern the preliminary determination of the admissibility of evidence under Federal Rule of Evidence 104(a)"). This Court should answer the question left open by *Roberson* and adopt *Morgan*'s holding.

Second, even if the Confrontation Clause applies generally in the context of preliminary determinations on the admissibility of evidence, the clear weight of authority holds that it does not reach statements or testimony laying the foundation for admitting a business record. That limitation has been acknowledged by the vast majority of federal Circuit

courts.[14] And it finds support in the Supreme Court's *Melendez-Diaz* opinion, which recognized that a "clerk could by affidavit *authenticate* or provide a copy of an otherwise admissible record" from its office without violating the Confrontation Clause. 557 U.S. at 322–23 (contrasting this certification with "*creat*[*ing*] a record for the sole purpose of providing evidence against a defendant") (emphases in original).[15]

As outlined above, if this Court departed from that authority and held that the Confrontation Clause precludes the government from

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[14] *See, e.g.*, *United States v. Clotaire*, 963 F.3d 1288, 1296 (11th Cir. 2020); *United States v. Denton*, 944 F.3d 170, 183–84 & n.6 (4th Cir. 2019); *United States v. (Bert) Johnson*, 688 F.3d 494, 504–05 (8th Cir. 2012); *United States v. Anekwu*, 695 F.3d 967, 976–77 (9th Cir. 2012); *United States v. Yeley-Davis*, 632 F.3d 673, 680–81 (10th Cir. 2011); *United States v. Schwartz*, 2009 WL 532796, at *3 (3d Cir. Mar. 4, 2009) (unpublished opinion); *United States v. Adefehinti*, 510 F.3d 319, 327–28 (D.C. Cir. 2007); *Morgan*, 505 F.3d at 339; *United States v. Ellis*, 460 F.3d 920, 927 (7th Cir. 2006); *see also United States v. Farrad*, 895 F.3d 859, 877 n.11 (6th Cir. 2018) (resting its holding on other grounds but noting some of the authority above and positing that appellant would be "unlikely" to succeed on a claim that certificates laying the foundation for business records violated the Confrontation Clause).

[15] The expansive definition of testimonial hearsay advanced by Davidson (Br. 36–39) would encompass these custodian certificates, which purport to establish facts about the creation and preservation of business records for use in a trial against a defendant. To find that these types of certificates violate the Confrontation Clause would be fundamentally incompatible with the Supreme Court's express recognition in *Melendez-Diaz* that such certificates do not violate *Crawford*. 557 U.S. at 322–23.

laying the foundation for a business record using hearsay, including a custodial certificate, it would effectively destroy the business-records rule and D.C. Code § 14–508.

Third, the Confrontation Clause only applies to testimonial hearsay statements. *Smith v. Arizona*, 144 S. Ct. 1785, 1792 (2024). As discussed above, Davidson has not established that the limited testimony he challenges contained inadmissible hearsay at all because there was a sufficient non-hearsay basis for Robinson's knowledge of the technician's actions.[16]

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[16] Even if the limited testimony that Davidson challenges were hearsay, it is not clear that it is testimonial. As the Supreme Court instructs, whether a statement is testimonial turns on its "primary purpose." *Smith*, 144 S. Ct. at 1792 (citation omitted). To be sure, statements from non-testifying witnesses related to the *creation* of evidence are testimonial because they are "made for the purpose of establishing or proving some fact" against a criminal defendant at trial. *Crawford*, 541 U.S. at 51 (cleaned up); *see, e.g.*, *Bullcoming v. New Mexico*, 564 U.S. 647, 659–68 (2011) (plurality opinion) (analyst report that blood sample was safely maintained and that standard laboratory protocols were followed in handling and testing the evidence is testimonial); *Melendez-Diaz*, 557 U.S. at 310–24 (chemist's report that he tested and confirmed substance was cocaine is testimonial); *id.* at 323 n.8 (noting distinction between statements relaying "facts regarding defendants' guilt or innocence" and those that do not purport to do so) (cleaned up); *Tabaka v. District of Columbia*, 976 A.2d 173, 175–76 (D.C. 2009) (clerk's creation of a

(continued . . .)

IV. Any Error in Admitting the Limited Testimony That Davidson Challenges Was Harmless Beyond a Reasonable Doubt.

Even if the limited testimony that Davidson challenges were admitted in violation of the rule against hearsay or the Confrontation Clause, any error was harmless beyond a reasonable doubt.

Davidson does not—and cannot—argue that the technician's statements to Robinson about the administrative tasks he completed had

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certificate attesting that she searched for and could not locate a given record is testimonial).

Here, however, the "primary purpose" of the non-testifying technician's statement was not to create evidence against Davidson—the footage had already been created. Rather, the statement merely confirmed to his supervisor that he had completed administrative tasks she assigned to him. In this context, an analogy can be drawn to the Supreme Court's rationale excluding most business records from the definition of testimonial hearsay: the statements' primary purpose relates to the "administration of an entity's affairs," and not "establishing or proving some fact at trial." *Melendez-Diaz*, 557 U.S. at 324; *see also Smith*, 144 S. Ct. at 1802 (noting that to be testimonial, the "primary purpose" of the statement "must have a focus on court," and suggesting that certain statements made in the administrative context to "facilitate internal review and quality control" might not qualify as testimonial) (cleaned up); *United States v. Seregin*, 568 Fed. App'x 711, 718 (11th Cir. 2014) (unpublished opinion) (a "custody receipt is not testimonial because its primary purpose is to document the seizure, identify the items seized, and the chain of custody of seized items") (citation omitted); *United States v. (Bert) Johnson*, 688 F.3d at 505 ("notations on [a] lab report . . . indicating when [a technician] checked [evidence] samples into and out of the lab" not testimonial) (cleaned up).

any impact at all in directly establishing that Davidson assaulted Young or attempted to possess a prohibited weapon. Rather, Davidson exclusively rests his claim on the far broader argument (Br. 35–36, 41–45) that it was the trial court's admission of Exhibit 2 that swayed the verdict. That claim therefore hinges on the role played by the limited testimony Davidson challenges vis-à-vis the foundation for admitting Exhibit 2.

But in the context of the whole record related to Exhibit 2, the limited testimony Davidson challenges hardly contributed to the foundation for its qualification as a business record. Moreover, other evidence, including the other video footage of the assault, and the substance of the surveillance footage itself left no doubt that Exhibit 2 was authentic footage capturing Davidson brutally stomping on Young's head. And any error was entirely obviated by Davidson's decision to not just elicit the same testimony on cross-examination but to expand upon it. For those reasons, any error admitting that testimony did not affect the basis for admitting Exhibit 2 and was harmless beyond a reasonable doubt.

A. Standard of Review and Applicable Legal Principles

For preserved claims, reversal based on evidence admitted in constitutional error is appropriate if the Court is satisfied beyond a reasonable doubt that "the error complained of did not contribute to the verdict obtained." *Williams v. United States*, 858 A.2d 978, 981 (D.C. 2004) (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)). For non-constitutional claims, evidentiary errors are harmless and not grounds for reversal if the Court can "say with fair assurance" that the error did not "substantially sway the jury's verdict." *Jones*, 263 A.3d at 460 (citing *Kotteakos v. United States*, 328 U.S. 750, 765 (1946)).

An evidentiary error may be "harmless" "beyond a reasonable doubt" when "properly admitted evidence . . . overwhelm[s]" the error and renders the "prejudicial effect" of the court's use of the improperly admitted evidence "insignificant by comparison." *Hagans v. United States*, 96 A.3d 1, 18 (D.C. 2014) (cleaned up). Factors that bear on the harmlessness of a constitutional error include the strength of the government's other evidence, whether it "material[ly]" affected a "critical" issue, whether it was at all "cumulative" of other evidence, and the extent to which the government "emphasized the erroneously

admitted evidence in its presentation of the case." *Id.* (cleaned up). Ultimately, reversal is not appropriate unless there is a "reasonable possibility the improper use at trial of the [improperly admitted evidence] contributed to [the defendant's] conviction[ ]." *Id.* at 22 (citation omitted).

To lay the foundation for the admissibility of a business record, the sponsoring party need only show that: (1) the record was "made at or near the time by—or from information transmitted by—someone with knowledge," (2) the record was "kept in the course of a regularly conducted activity" of an organization, and (3) "making the record was a regular practice of that activity." D.C. Super. Ct. Civ. R. 43–I(a)(1)–(3); *see Grimes v. United States*, 252 A.3d 901, 914 (D.C. 2021).[17] Additionally, the trial court must be satisfied that the opposing party has "not show[n] that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness." Super. Ct. Civ. R. 43–

[17] If the business record contains hearsay and the party is seeking to admit it through the exception to the rule against hearsay for records of regularly recorded activity, the party must also show that the "original maker" of the hearsay statement "has personal knowledge of the information in the record or received the information from someone with such personal knowledge and who is acting in the regular course of business." *Grimes*, 252 A.3d at 914 (citation omitted); *see Clyburn v. District of Columbia*, 741 A.2d 395, 397–98 (D.C. 1999).

I(a)(5); *see* D.C. Code § 14–508(d). Once these criteria are satisfied, the record "shall be deemed authentic without further testimony as evidence." D.C. Code § 14–508(b).[18]

This foundation can be laid by a records custodian or another qualified witness, either through live testimony or by certification. D.C. Code § 14–508(b); Super. Ct. Civ. R. 43–I(a)(4). But that witness need not have created the record, nor does he need to have knowledge of the record's contents or its accuracy. *See Dutch v. United States*, 997 A.2d 685, 689–91 (D.C. 2010); *Meaders v. United States*, 519 A.2d 1248, 1255–56 (D.C. 1986) (citations omitted). There is also no requirement that the sponsoring witness be involved in any way in the creation or retrieval of the record. *See id*. Rather, it is sufficient that the witness knows about the business's record-keeping system and can identify the record as one produced from that system. *See id.* This mirrors the federal practice under Fed. R. Evid. 803(6), which this Court has recognized to be an

[18] This rule of automatic authentication in the context of admitting business records by certification logically applies with equal force when a party elects to have the custodian provide the same foundation through live testimony.

analogous business-records rule. *See, e.g.*, *Dutch*, 997 A.2d at 689; *Meaders*, 519 A.2d at 1255–56.[19]

Laying the foundation for the admissibility of evidence is a low bar: the sponsoring party need only satisfy the judge that there is a "reasonable possibility" that the evidence is "what it purports to be." *(Carlos) Johnson v. United States*, 290 A.3d 500, 510 (D.C. 2023) (noting that this is not a "stringent" standard) (cleaned up).[20] This threshold "merely requires" the proponent "to show that a jury reasonably could

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[19] *See, e.g.*, *In re Int'l Mgmt. Assocs., LLC*, 781 F.3d at 1268 (Under Fed. R. Evid. 803(6), the "testifying witness does not need firsthand knowledge of the contents of the records, of their authors, or even of their preparation"; all that is required is "[s]omeone who is knowledgeable about the procedures used to create the alleged business records" being admitted.) (collecting cases); *Thanongsinh v. Bd. of Educ.*, 462 F.3d 762, 777 (7th Cir. 2006) ("[T]he custodian need not be the individual who personally gather[ed]" the record nor "have individual knowledge of the particular corporate records"; she "need only be familiar with the company's recordkeeping practices.") (cleaned up); 5 Weinstein's Federal Evidence § 803.08 (2024) ("The witness need not have personal knowledge of the actual creation of the documents or have personally assembled the records.").

[20] Beyond the rule of automatic authentication for business records contained in D.C. Code § 14–508(b), evidence generally may also be authenticated circumstantially, including when its "nature and contents combined with the location of its discovery" supports a "reasonable possibility" that the "evidence relates to the crime charged." *(Carlos) Johnson*, 290 A.3d at 510–11 (citations omitted); *see Dutch*, 997 A.2d at 691 (citations omitted).

find the evidence to be genuine by a preponderance of the evidence." *Id.* (citation omitted). Once that low bar is cleared, the opposing party may challenge the "reliability" of the evidence, "minimize its importance," or argue its "meaning," but "these and similar other challenges go to the *weight* of the evidence — not to its *admissibility*." *Id.* (cleaned up) (emphasis in original). A trial court's "[d]ecision[ ] to admit or exclude evidence" is "highly discretionary" and is overturned on appeal "only upon a showing of grave abuse." *Id.* at 511 (citation omitted).

B. Admission of the Challenged Testimony Did Not Contribute Either to the Trial Court's Admission of Exhibit 2 or Verdict.

The limited testimony that Davidson challenges on appeal had a minimal impact, if at all, on the trial court's decision to admit Exhibit 2. To start, that testimony did not directly support any of the foundational criteria for admitting Exhibit 2 as a business record. *Cf. Grimes*, 252 A.3d at 914; D.C. Super. Ct. Civ. R. 43–I(a)(1)–(3). Wholly apart from the challenged testimony, the government laid the foundation that: (1) Robinson was a qualified witness from her role supervising preservation of WMATA video evidence (10/24/23 Tr. 76–77); (2) WMATA creates records of surveillance video footage in its transit system in the

regular course of business for safety and administrative purposes (*id.* at 78, 80); [21] (3) WMATA's surveillance system creates these records of footage almost contemporaneously with the camera recording (*id.* at 78); and (4) Robinson recognized Exhibit 2 as surveillance footage recorded by WMATA in the regular course of business that was preserved in response to a government subpoena and kept in a locked evidence room (*id.* at 77–78, 80). That testimony alone was sufficient to establish that there was a "reasonable possibility" that Exhibit 2 was a WMATA business record and to authenticate it under the business-records rule. Super. Ct. Civ. R. 43–I(a)(1)–(3); *see* D.C. Code § 14–508(b). And, based on this foundation, the trial court appropriately exercised its discretion

[21] Any suggestion by Davidson (*e.g.*, Br. 35) that the trial court abused its discretion by admitting Exhibit 2 as a business record because it was created in anticipation of litigation is baseless. The testimony at trial and this Court's cases support the opposite conclusion. Robinson testified multiple times that this footage was created in the normal course of business, including in direct response to a question posed by the judge (10/24/23 78, 80; 10/25/23 Tr. 27). Moreover, contrary to the notion that WMATA surveillance footage is created in anticipation of criminal litigation, this Court has recognized that the "installation and maintenance by WMATA of a video recording device, the purpose of which was to ensure the safety of its bus passengers, was not a governmental function which would make WMATA a member of the prosecution team." *Myers v. United States*, 15 A.3d 688, 692 (D.C. 2011) (cleaned up).

to admit Exhibit 2 into evidence as an authenticated WMATA business record (10/24/23 Tr. 81–82).

Beyond this foundational testimony, the authenticity and reliability of Exhibit 2 were powerfully established by other evidence. Robinson testified extensively about the operation of WMATA's surveillance cameras, its process for collecting and preserving footage, and its quality control measures (10/25/23 Tr. 35–50). She also explained that the computer-generated file name of Exhibit 2 indicated that it captured events from March 31, 2023, at 6:20 p.m. (10/25/23 Tr. 52–64). And any lingering doubt about the authenticity, reliability, or relevance of Exhibit 2 would be extinguished by its contents. *See (Carlos) Johnson*, 290 A.3d at 510–11. The surveillance footage showed a fight between Davidson, Young, and Allen, which ended with Davidson kicking Young's face with his shod foot as Young lay defenseless on the floor of the Metro train (Exh. 2). That footage matched Cologne's firsthand account of the assault (10/24/23 Tr. 19–20). And it precisely replicated events captured by Cologne on her cellphone (Exh. 1), albeit from a different angle. The record in no way suggests that the trial court's decision to admit or weigh this obviously probative evidence was at all swayed by the limited

testimony Davidson challenges.[22] Indeed, that the trial court did not even reference the challenged testimony a single time when admitting Exhibit 2 into evidence or rendering its verdict underscores its inconsequence to the trial. *See Hagans*, 96 A.3d at 18–22.

Finally, even if the challenged testimony played some role in establishing the admissibility or reliability of Exhibit 2, the evidence Davidson himself elicited from Robinson on cross-examination rendered that testimony insignificant. As described above, the testimony Davidson elicited on cross-examination provided far more detail about the substance of Robinson's conversation with the technician than did her

[22] Davidson argues (Br. 43–44) that the government did not sufficiently authenticate Exhibit 2 in large part because Robinson did not have personal knowledge of the events captured in the footage. That argument overlooks the rule of automatic authentication for business records. *See* D.C. Code § 14–508(b). And it ignores that the sponsoring witness for a business record need not be knowledgeable about its contents to authenticate it as a business record. *See Dutch*, 997 A.2d at 689–91; *Meaders*, 519 A.2d at 1255–56; *see also* n.19, supra. Moreover, the fact that the contents of Exhibit 2 so closely matched other evidence in the record, combined with Robinson's testimony about the footage having been stored in the locked evidence room further established Exhibit 2's authenticity. *See (Carlos) Johnson*, 290 A.3d at 510–11. As the trial court correctly recognized, the arguments that Davidson advances on appeal go to the weight and not the admissibility of Exhibit 2 (10/24/23 Tr. 81–82).

testimony on direct examination (10/25/23 Tr. 27–29). Thus, to the extent that the technician's actions played any role in the trial court's evaluation of how much weight it should place on Exhibit 2, it was Robinson's testimony on cross-examination that far more powerfully and directly established what steps the technician took to preserve the evidence. And, by comparison, that testimony rendered the challenged direct-examination testimony not only cumulative but entirely trivial. *See Hagans*, 96 A.3d at 20 (evidentiary error harmless beyond a reasonable doubt when challenged evidence compared to entire record "added nothing of consequence" and was "cumulative at best").

In light of the overwhelming other evidence establishing the admissibility and reliability of Exhibit 2 and the insignificant and cumulative nature of the limited testimony that Davidson challenges, there is "no reasonable possibility" that any error materially contributed to the trial court's discretionary decision to admit Exhibit 2 or to convict Davidson. *Hagans*, 96 A.3d at 22. Any error in admitting that testimony was thus harmless beyond a reasonable doubt.

V. There Was Sufficient Evidence to Prove Attempted PPW From Davidson Kicking Young in the Face with a Boot-Clad Foot and to Disprove Davidson's Claim of Self-Defense.

Davidson finally claims (Br. 45–49) that there was insufficient evidence to (1) prove PPW (shod foot), and (2) disprove his claim of self-defense. Both arguments are meritless.

A. Standard of Review and Applicable Legal Principles

On sufficiency-of-the-evidence review, this Court will not reverse a conviction if "*any* rational trier of fact could have found the essential elements charged beyond a reasonable doubt." *Bassil v. United States*, 147 A.3d 303, 307 (D.C. 2016) (cleaned up) (emphasis in original). It is thus appellant's "heavy burden" to show that there was "no evidence upon which a reasonable mind could find guilt beyond a reasonable doubt." *(James) Dorsey v. United States*, 154 A.3d 106, 112 (D.C. 2017) (citation omitted). In making that determination, this Court views the record "in the light most favorable to the government, drawing all reasonable inferences in the government's favor, and giving deference to the [fact-finder]'s right to determine credibility and weight." *Bruce v. United States*, 305 A.3d 381, 392 (D.C. 2023) (citation omitted). It also

considers all evidence admitted at trial, including any "improperly admitted" evidence. *Smith v. United States*, 283 A.3d 88, 99 (D.C. 2022) (citations omitted).

To prove attempted PPW, "the government must prove, beyond a reasonable doubt, that the defendant possessed a dangerous weapon with the specific intent to use it unlawfully," *(Deon) Dorsey v. United States*, 902 A.2d 107, 111 (D.C. 2006) (cleaned up), and completed an "act toward its commission that goes beyond mere preparation," *Stroman v. United States*, 878 A.2d 1241, 1245 (D.C. 2005) (citation omitted). "When the object used . . . is not a dangerous weapon per se [under D.C. Code § 22–4514(a)], the prosecution must prove that the object is one which is likely to produce death or great bodily injury by the use made of it." *(Deon) Dorsey*, 902 A.2d at 111 (cleaned up). The term "great bodily injury" is equivalent to "serious bodily injury," including a "substantial risk . . . of death," "unconsciousness," and "extreme physical pain." *In re D.T.*, 977 A.2d 346, 356 (D.C. 2009) (cleaned up).

To convict a defendant of an attempted-battery assault, the government must prove beyond a reasonable doubt three elements: (1) an intentional "act" by the defendant, "which need not result in injury";

(2) the defendant's "apparent present ability to injure the victim at the time the act is committed"; and (3) the defendant's "intent to perform the act which constitutes the assault at the time the act is committed." *Perez Hernandez v. United States*, 286 A.3d 990, 997 (D.C. 2022) (en banc) (cleaned up).

A defendant is entitled to claim self-defense if he has an actual and reasonable belief that he is "in imminent danger of bodily harm." *Parker v. United States*, 155 A.3d 835, 845 (D.C. 2017) (citation omitted). After raising a prima facie claim of self-defense, the government bears the burden to disprove that defense beyond a reasonable doubt. *See Jackson v. United States*, 210 A.3d 800, 808 (D.C. 2019). This Court reviews a trial court's factual findings rejecting a claim of self-defense for clear error and its legal conclusions de novo. *Ewell v. United States*, 72 A.3d 127, 130 (D.C. 2013).

B. There Was Sufficient Evidence to Prove Attempted PPW.

Davidson argues (Br. 45–48) that the trial court erred by finding that a "substantial risk of unconsciousness" was sufficient to satisfy "great bodily injury" to support an attempted PPW conviction and that

there was no evidence of great bodily injury from Davidson kicking Young in the face with his boot. His argument is meritless.

Although evidence proving that a victim suffered a "substantial risk of unconsciousness" is not sufficient to demonstrate "great bodily injury" to support a completed PPW conviction, *see Scott v. United States*, 954 A.2d 1037, 1046 (D.C. 2008), Davidson was convicted of *attempted* PPW. For that inchoate offense, the government need not prove that Young suffered great bodily injury, such as unconsciousness. *See Covington v. United States*, 278 A.3d 90, 98 n.3 (D.C. 2022). Rather, the evidence need only show that Davidson took a substantial step beyond preparation towards using his boot in a manner *likely to cause* great bodily injury, which includes a "substantial risk of death," as well as "unconsciousness" and "extreme physical pain." *Stroman*, 878 A.2d at 1245.

Viewed in the light most favorable to upholding the verdict, the evidence and reasonable inferences that may be drawn from the evidence are sufficient to meet that standard. As the trial court noted, Davidson's violent, boot-clad kick to Young's face "carried with it a substantial risk of unconsciousness," which is logically no different from Davidson using his boot in a manner likely to cause unconsciousness (11/6/23 Tr. 20).

Indeed, as the trial court recognized, the resulting head injury from the kick left Young largely unable to move following Davidson's kick (*id.*; see Exh. 2 at 9:14–10:00). And, as the trial court found, the "head injuries" that Young suffered required "paramedics to transport him to the hospital" for emergency medical treatment (11/6/23 Tr. 14; see Exh. 3). The reasonable inferences from the evidence established that Davidson used his boot in a manner *likely to cause* unconsciousness or extreme physical pain. *In re L.M.*, 5 A.3d 18, 20 (D.C. 2010) ("A kick to the face aims at a part of the body particularly vulnerable to injury from the blow, and when done with a shoe of any kind it compounds the danger of serious bodily harm.").[23]

But beyond that, the trial court reasoned that Davidson used his boot in such a violent manner that it carried "even greater risk of

[23] *See also Pringle v. United States*, 825 A.2d 924, 925 & n.1 (D.C. 2003) (evidence that the defendant used a "Timberland boot" to kick victim in the "buttocks" that caused "some bruising" was sufficient to sustain conviction pursuant to a guilty plea for assault with a dangerous weapon because a boot "has intrinsically greater potential to cause serious injury than do, say, the tennis shoes" that have been found to be dangerous weapons) (citation omitted); *Arthur v. United States*, 602 A.2d 174, 178–79 (D.C. 1992) (tennis shoes used to stomp on victim's head sufficient evidence of shod foot as dangerous weapon).

something very significantly more severe" (11/6/23 Tr. 20–21). Indeed, the homicide cases that have come before this Court demonstrate that shod-foot kicks to someone's head can and *do* cause far worse: death. *See, e.g.*, *(Akande) Johnson v. United States*, 980 A.2d 1174, 1180 (D.C. 2009) (homicide case involving death by blunt force trauma caused by two shod foot kicks to the head). Based on this record, Davidson cannot show that there was "no evidence" to support an attempted PPW conviction. *(James) Dorsey*, 154 A.3d at 112.

Likewise, the evidence sufficiently supported the trial court's rejection of Davidson's self-defense claim. As the trial court found, any fear of imminent harm from Young that Davidson may have subjectively harbored was objectively unreasonable by the time he kicked Young in head (11/6/23 Tr. 18). By that point, the fight was "over" and Young had spent over 30 seconds laying prone on the floor (*id.* at 18–19; see Exh. 2 at 8:32–9:15). As this Court has recognized, a defendant gratuitously attacking the victim after a fight has ended is sufficient to defeat a self-defense claim. *Stroman*, 878 A.2d at 1244. The conclusion that Young posed no reasonable immediate threat to Davidson is even stronger here because beyond the fight being over, Young, the person supposedly posing

the threat to Davidson, had been on the ground nearly motionless for over half-a-minute by the time Davidson kicked him in the face. Based on this record, Davidson cannot demonstrate that there was "no evidence" upon which a rational finder-of-fact could reject his self-defense claim. *(James) Dorsey*, 154 A.3d at 112.

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, Adrian Madsen, Esq., on this 22nd day of July, 2024.

/s/
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