Case No. 23-4117

In the United States Court of Appeals
for the Tenth Circuit

United States of America,
Plaintiff-Appellee,

v.

Perry Maryboy,
Defendant-Appellant.

On Appeal from the United States District Court
for the District of Utah (Southern Region)
The Honorable David Nuffer, District Judge
D.C. Case No. 4:18-cr-00119-DN-1

Appellant's Reply Brief

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October 9, 2024

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I. The district court reversibly erred in admitting Agent Olson's testimony in violation of Rule 704(b).

Rule 704(b) provides that "an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone." Fed. R. Evid. 704(b). Thus, an expert cannot "expressly draw the conclusion" that a defendant "acted with the necessary mens rea." *United States v. Wood*, 207 F.3d 1222, 1236 (10th Cir. 2000). Mr. Maryboy was charged with, and ultimately convicted of, second-degree murder, which can be committed with a mens rea of extreme recklessness. Agent Olson testified that Mr. Maryboy's conduct was the "ultimate expression of recklessness." In doing so, he plainly violated Rule 704(b).

The government sets forth three basic counterarguments: (1) Mr. Maryboy waived this issue, (2) there was no plain error, and (3) there was no prejudice. Each is meritless.

A. Mr. Maryboy did not waive the evidentiary error he claims on appeal.

The government's main argument is that Mr. Maryboy waived this evidentiary claim in closing because counsel conceded Mr. Maryboy's conduct was reckless and abandoned his only defense to which recklessness was relevant, namely that he intended to fire a warning shot. Defense counsel did no such thing—indeed, in one fell swoop counsel affirmatively argued *both* these points: "they were warning shots,

not reckless." R. vol. 4 at 1804. Thus, he plainly did not concede that Mr. Maryboy's conduct was reckless nor abandon the misfired-warning-shot defense. Even if he had, it would not have waived the Rule 704(b) error.

1. Trial counsel did not concede Mr. Maryboy's behavior was reckless.

In support of its claim (at 25) that trial counsel waived the Rule 704(b) issue by "repeatedly label[ing] Maryboy's behavior as reckless," the government sets out six quotations from defense counsel's closing argument.

In half of the quotes, counsel doesn't even use the term "reckless." Nor does counsel even imply that he considers the conduct reckless. For example, speaking from Mr. Maryboy's perspective, counsel said, "I wasn't thinking about what the rules of safety were. I was thinking about my life." R. vol. 4 at 1816. This is not a concession that Mr. Maryboy was reckless. Rather, defense counsel is suggesting that, in the heat of the moment when someone believes their life is in danger, it is *reasonable* not to stop and think about the basic rules of gun safety.

In the other three examples, though counsel does at least use the word "reckless," he is either arguing that *Mr. Montowine* was the reckless one, or he attributes the label of "reckless" to the government. First, the government quotes counsel asking rhetorically, "How did the reckless activity in this case begin?" In context, counsel is arguing that Mr. Maryboy was *not* the reckless one—Mr. Montowine was. *See* R. vol. 4 at 1816-17 ("Did it start with Mr. Maryboy . . . ? . . .

No."). That is more evident in the next example: "But the cause of the recklessness in this case, from soup to nuts, was Antonio Montowine's and [Ms. Green's] doing." Gov't Br. 25 (quoting R. vol. 4 at 1819). Clearly, counsel is saying Mr. Montowine and Ms. Green were reckless, not Mr. Maryboy. And in the final example, counsel does not himself label Mr. Maryboy's behavior as reckless, but expressly states that the government is calling his behavior reckless: "*what he says* is reckless behavior." Gov't Br. 25 (quoting R. vol. 4 at 1821).

Thus, defense counsel did not concede that Mr. Maryboy's conduct was reckless. On the contrary, he expressly stated that Mr. Maryboy was "not reckless." R. vol. 4 at 1804.

2. Counsel did not abandon Mr. Maryboy's defense that he misfired a warning shot.

Next, the government argues that Mr. Maryboy waived the Rule 704(b) issue by "discard[ing] Maryboy's account of the shooting." Gov't Br. 25. Again, however, the government is grossly exaggerating what defense counsel actually did.

At trial, Ms. Green testified that Mr. Montowine was standing next to and facing the van, and as he started to turn back toward Mr. Maryboy he was shot in the head. The forensic evidence the government presented confirmed that the bullet struck Mr. Montowine in the back right side of the head and that his body fell near the van, corroborating Ms. Green's account. Mr. Maryboy, however, testified to his recollection that he and Mr. Montowine were still standing across the truck bed from

each other when Mr. Maryboy tried to fire a second warning shot that inadvertently hit Mr. Montowine.

During closing argument, defense counsel admitted that Mr. Montowine died near the van from a shot to the back of the head. R. vol. 4 at 1801, 1806, 1815. But that's as far as counsel's deviation from Mr. Maryboy's testimony went. Contrary to the government's representation, it was not a wholesale abandonment of Mr. Maryboy's defense that he meant to fire a warning shot. Indeed, defense counsel repeatedly told the jury that Mr. Maryboy intended to fire a warning shot, consistent with his testimony as well as Ms. Green's initial statements to police. *See id.* at 1801 ("I was attempting to shoot over his head."); *id.* 1802 ("'I fired it as a warning shot twice.' And it's not just him saying that, it's Rebecca Green."); *id.* at 1804 ("[B]oth he and Ms. Green said they were warning shots, not reckless."); *id.* at 1806-07.

In claiming otherwise, the government assumes (at 26) that Mr. Montowine being near the van is somehow irreconcilable with the misfired-warning-shot defense; and therefore, by conceding that Mr. Montowine died near the van, defense counsel was necessarily abandoning the theory. But the government doesn't explain why it thinks they're incompatible. Certainly Mr. Maryboy could have intended to fire a warning shot regardless of whether Mr. Montowine had been across the truck bed, as Mr. Maryboy testified, or six to eight feet away near the van, as defense counsel argued (or anywhere else for that matter). Mr. Montowine's position hardly bears, if at

all, on Mr. Maryboy's intent. At the very least, it's not dispositive, as the government assumes.

Accordingly, defense counsel neither expressly nor implicitly abandoned Mr. Maryboy's defense that he inadvertently shot Mr. Montowine. Indeed, he endorsed it.

3. Even if defense counsel had conceded recklessness or abandoned it as a defense, that would not have waived the Rule 704(b) evidentiary error.

Assuming for the sake of argument that defense counsel's closing argument conceded that Mr. Maryboy's conduct was reckless and abandoned the misfired-warning-shot defense, that still would not have constituted a waiver of the Rule 704(b) issue on appeal.

"Waiver is the intentional relinquishment or abandonment of a known right." *United States v. Cruz-Rodriguez*, 570 F.3d 1179, 1183 (10th Cir. 2009). "Waiver occurs when a party deliberately considers an issue and makes an intentional decision to forgo it." *Id.* "Moreover, the waiver doctrine has been applied in situations of invited error." *Id.* This Court "typically find[s] waiver in cases where a party has invited the error that it now seeks to challenge, or where a party attempts to reassert an argument that it previously raised and abandoned below." *Id.* (quoting *United States v. Zubia-Torres*, 550 F.3d 1202, 1205 (10th Cir. 2008).

Under this familiar standard, Mr. Maryboy did not waive his claim that Agent Olson's testimony violated Rule 704(b). He certainly did not induce the ruling such that it was invited error. Moreover, if counsel had conceded recklessness and

abandoned his misfired-warning-shot theory, that would say nothing of whether Agent Olson's prior testimony was admissible notwithstanding Rule 704(b). Rather, counsel would simply have been adapting his trial strategy to the district court's erroneous ruling admitting the testimony.

Tellingly, the government cites no authority finding a waiver under similar circumstances. There is none, because counsel's alleged closing argument was in no way an intentional abandonment of the evidentiary error claimed on appeal.

B. The testimony plainly violated Rule 704(b).

On the merits, the government argues that Agent Olson did not violate Rule 704(b) with respect to second-degree murder because "the required mental state for second-degree murder is not recklessness but malice aforethought." Gov't Br. 32. That is, according to the government, extreme recklessness is only *evidence* of malice, not an alternative mens rea. Thus, the government concludes, "Agent Olson's use of 'reckless' could not speak to the ultimate issue of Maryboy's mental state." *Id.* This is a nonstarter. Even if the government's premise were correct,[1] its conclusion is squarely addressed and foreclosed by *Wood*.

[1] The only authority the government cites is out-of-circuit dicta. *See Janis v. United States*, 73 F.4th 628, 632 n.4 (8th Cir. 2023). This Court, on the other hand, has described extreme recklessness as akin to an alternative culpable mental state or means of satisfying the element of malice: "Malice, as defined for purposes of second degree murder, requires either: (1) general intent to kill, or (2) intent to do serious bodily injury; (3) *depraved heart recklessness*, or (4) a killing in the commission of a felony that is not among those specifically listed in the first degree murder statute." *United States v. Visinaiz*, 428 F.3d 1300, 1307 (10th Cir. 2005).

As explained in the opening brief, *Wood* held that an expert's testimony violated Rule 704(b) even though it was "not cast in precisely the same terminology as the statute, case law, or instruction." 207 F.3d at 1236. It was enough that the testimony recited the "critical components" of the requisite mens rea. *Id.* There, the relevant "mens rea for involuntary manslaughter [was] 'without due care and circumspection' or 'gross negligence.'" *Id.* (citations omitted). The expert's testimony did not use those terms at all. Rather, the expert testified that the defendant's "actions were 'reckless' because they were 'fraught with the perils of causing death.'" *Id.* However, the jury was instructed that the mens rea "is met if the defendant's actions demonstrate a 'reckless . . . disregard for human life.'" *Id.* (citation omitted). Because the expert's testimony included "the critical components" of the mens rea instruction, it violated Rule 704(b).

The same is true here. The rule is violated even though Agent Olson didn't testify that Mr. Maryboy's behavior constituted "malice aforethought." At a minimum, his testimony that Mr. Maryboy's conduct was the ultimate expression of recklessness recited the critical components of the mens rea instructions, namely that it involves "reckless[ness] . . . that is extreme in nature." R. vol. 22 at 223. *Wood* was the central focus of Mr. Maryboy's argument on this issue, and it squarely controls here. Yet the government failed to address, let alone distinguish, it.

Next, the government argues (at 32) that Agent Olson's testimony that Mr. Maryboy's conduct was "the ultimate expression of recklessness" wasn't clearly

improper because it could have been interpreted in one of three arguably permissible ways: (1) it could have been about the possibility of taking a human life generally, as opposed to Mr. Maryboy's specific conduct; (2) he could have meant it was the best example of regular recklessness; or (3) he might have been using recklessness in the "colloquial" sense. Each of these interpretations is a stretch on its face. In context, they are plainly incorrect and do not cast doubt on the import of what Agent Olson was clearly saying—that Mr. Maryboy's conduct was extremely reckless.

In the lead up to Agent Olson's challenged testimony, the government had just walked him through the hypothetical scenario that exactly matches Ms. Green's account, even referring him to the diagram she made of the incident. R. vol. 4 at 1540. The government's "final question" for Agent Olson was, "That scenario that we just went through. How reckless was that act?" *Id.* Agent Olson responded, "Any time that you handle a weapon in an unsafe manner it could take another human life. And so to me that's the ultimate expression of reckless." *Id.* at 1541.

First, it is clear Agent Olson was talking about Mr. Maryboy's specific conduct, not any general act that could take a life. He was specifically asked about the scenario they just went over and the recklessness of *that act*. He responded that it—i.e., the act he was asked about—was the ultimate expression of recklessness because it could take another human life.

Second, Agent Olson was clearly talking about the degree of recklessness. Not only is that the most natural reading of the phrase "ultimate expression of reckless,"

but it's also what he was specifically asked: "*How reckless* was that act?" If Agent Olson had meant that it was just ordinary recklessness he would have said as much. It is far more likely he meant that such conduct was extremely reckless, which is how the parties and jury understood his testimony below. Indeed, during closing the government expressly referred the jury to Agent Olson's testimony in support of its argument that Mr. Maryboy was extremely reckless for purposes of second-degree murder. It would not have done so if his testimony was that Mr. Maryboy's conduct was *not* extremely reckless and was in fact the perfect example of ordinary negligence, consistent with the lesser included offense of involuntary manslaughter.

Finally, the government is clearly incorrect that Agent Olson was using recklessness in the "colloquial" sense. In support, the government relies on the fact that he said "grossly negligent reckless" and failed to discuss whether Mr. Maryboy "consciously disregarded a known risk," as the legal definition of recklessness requires. Gov't Br. at 32. But the fact that he conflated the varying degrees of negligence/recklessness and failed to adequately support the basis of his opinion does not mean he meant them in a non-legal sense. More importantly, there's no way the jury understood him to be using these critical legal terms in a non-legal sense. After all, he was the government expert who was specifically asked to opine on "how reckless" Mr. Maryboy's conduct was. And again, in closing, the government specifically referred the jury to Agent Olson's testimony in support of its argument that Mr. Maryboy's conduct was extremely reckless.

Accordingly, both the parties and jury clearly understood Agent Olson to be offering an opinion that Mr. Maryboy's conduct was extremely reckless. It's the only plausible interpretation of his testimony.

Finally, the government argues that Agent Olson's testimony was permissible because he did not "expressly state the final conclusion or inference as to a defendant's actual mental state." Gov't Br. at 33 (quoting *United States v. Schneider*, 704 F.3d 1287, 1294 (10th Cir. 2013)). That's because, according to the government, the jury still had to make the "additional inference" that Mr. Maryboy was "subjectively aware" that his conduct "created a substantial risk," as the legal definition of recklessness requires. The government is mistaken.

To be sure, recklessness does require that that a defendant be subjectively aware of the risk of harm, and Agent Olson did not testify as to Mr. Maryboy's subjective knowledge. But that's just a subsidiary finding Agent Olson failed to make in support of his final conclusion that Mr. Maryboy—or a hypothetical defendant in the exact same circumstances—acted with extreme recklessness. It's that ultimate conclusion that Rule 704(b) prohibits. The rule doesn't permit final conclusions on a defendant's mental state so long as they're conclusory. Just the opposite. An expert can offer opinions on the subsidiary issues, so long as it leaves the final determination to the jury. Agent Olson's testimony that Mr. Maryboy's conduct was extremely reckless plainly violated Rule 704(b), regardless of whether he expressly made the subsidiary finding that Mr. Maryboy was subjectively aware of the risk of harm.

The government's reliance (at 35) on *United States v. Goodman*, 633 F.3d 963, 970 (10th Cir. 2011), is misplaced. There, the expert testified that a hypothetical robber's actions that mirrored the charged robberies was inconsistent with the behavior of someone with PTSD. *Id.* This was permissible because whether the defendant suffered from PTSD was not the final conclusion as to whether he had "the mental state of condition constituting an element of the offense." *Id.* "The jury still needed to make an additional inferential step to determine whether or not [the defendant] was legally insane." *Id.*

Unlike in *Goodman*, Agent Olson testified as to the final conclusion that Mr. Maryboy acted with extreme recklessness. There was no additional inferential step for the jury to make to find that Mr. Maryboy acted with the requisite mens rea—Agent Olson took the final step for them. Indeed, the *Goodman* court distinguished its case from those where "the party posing the hypothetical situations attempted to bring forth expert opinion as to the very mental state at issue in the case—the defendant's mens rea when he committed the crime." *Id.* That's exactly what happened here, and it is the quintessential violation of Rule 704(b).

The government's attempts to distinguish *Wood* and *Diaz v. United States*, 144 S. Ct. 1727 (2024), also fail. First, the government claims (at 36) that in *Wood* this Court "implicitly" found that the expert's opinion that the defendant acted "recklessly" was irrelevant to the charge of second-degree murder. Here, however, Agent Olson didn't just testify that Mr. Maryboy's conduct was reckless, he said it was "the ultimate

expression of recklessness." The *Wood* court did not find, implicitly or otherwise, that such testimony is irrelevant to second-degree murder. As already discussed, it plainly isn't.

The government's cursory discussion of *Diaz* is even more unavailing. The government says *Diaz* reaffirmed that only testimony that "the defendant did or did not have a mental state" violates Rule 704(b). And it references its earlier argument that "Agent Olson's testimony here arguably wasn't even 'testimony about mental-state ultimate issues in the abstract' . . . as it did not discuss malice aforethought." Gov't Br. 37.

Of course, Mr. Maryboy relied on *Diaz* for the principle that when an expert testifies that anyone in the defendant's shoes acted with the requisite mens rea, they are necessarily testifying that the defendant has the mens rea in violation of Rule 704(b). That's what Agent Olson did here—he definitively opined that a person who acted as Mr. Maryboy did was extremely reckless. Unlike in *Diaz*, he did not qualify his opinion by saying *most* people in that situation would be extremely reckless. Thus, his testimony violated Rule 704(b). The government does not even attempt to rebut this point.

Accordingly, none of the government's arguments undermine the plainness of the district court's error in admitting Agent Olson's testimony.

C. The error was prejudicial.

As explained in the opening brief (at 24-28), there is a reasonable probability that, but for Agent Olson's testimony, at least one juror would have had reasonable doubt that Mr. Maryboy was guilty of second-degree murder, as opposed to involuntary manslaughter. That's because (1) it bore directly on the only disputed element at trial, i.e., malice; (2) jurors are more likely to give significant weight to experts, especially law enforcement; (3) the government specifically referred to the testimony in closing; and (4) there is only a slight difference between the mens reas for second-degree murder and involuntary manslaughter. None of the government's opposing arguments undermine Mr. Maryboy's showing of prejudice.

The government's first argument that the error was harmless (at 27) largely depends on the same mischaracterization of the record it presented in its waiver argument. It asserts that Agent Olson's impermissible testimony was harmless given that defense counsel conceded recklessness and abandoned any theory to which it might have been relevant. As already explained, defense counsel did neither. Indeed, in closing, counsel expressly argued that "they were warning shots, not reckless." R. vol. 1804.

Next, the government attempts to minimize the significance of the testimony by claiming (at 27) it was just "a sliver" of Agent Olson's testimony and the government's presentation of evidence overall, and it was "never mentioned again." However, the government overlooks that Agent Olson's impermissible opinion was

the closing statement of its case-in-chief—the last topic addressed by its final witness. Due to the "recency effect," this testimony was likely to be given greater weight by the jury. *See United States v. Starks*, 34 F.4th 1142, 1165 n.7 (10th Cir. 2022). Moreover, while the government claims this testimony was "never mentioned again," the government expressly referred the jury to Agent Olson's testimony in support of its argument that Mr. Maryboy acted with extreme recklessness.

The government also claims (at 27-28) there was overwhelming evidence that Mr. Maryboy *intentionally killed* Mr. Montowine, as opposed to acted with extreme recklessness. Again, however, the government relies almost exclusively on the fact that the evidence showed Mr. Montowine was shot in the back, right side of the head and died near the van. And again the government fails to articulate why this supports a mens rea of intent as opposed to extreme recklessness. It doesn't. Mr. Maryboy just as easily could have misfired a warning shot, or otherwise unintentionally killed Mr. Montowine, as he was standing near the van. Thus, while there was overwhelming evidence that Mr. Montowine was near the van when he was killed, that does not equate to overwhelming evidence that Mr. Maryboy intentionally murdered Mr. Montowine. Nor does it establish there is no reasonable probability any juror relied on Agent Olson's testimony to find Mr. Maryboy guilty of extreme-recklessness murder.

Finally, the government (at 28-30) disputes Mr. Maryboy's characterization that its primary theory was extreme recklessness as opposed to specific intent. For the

reasons outlined in his opening brief (at 27), Mr. Maryboy stands by that characterization. In any event, the government concedes (at 29-30) that it did in fact argue to the jury that it should convict Mr. Maryboy of second-degree murder on an extreme-recklessness theory based on Agent Olson's testimony. This alone indicates there's a reasonable probability one juror did exactly that. Accordingly, the erroneous admission of Agent Olson's testimony was prejudicial.

II. The failure to instruct the jury that the government had to disprove imperfect self-defense beyond a reasonable doubt was plainly erroneous.

Before trial, the parties proposed a standalone instruction on imperfect self-defense, which included that it was the government's burden to disprove it beyond a reasonable doubt. In the district court's revised instructions, the elements of imperfect self-defense were incorporated into the involuntary manslaughter instruction, and the government's burden was omitted. Mr. Maryboy failed to object to this omission. On appeal, Mr. Maryboy's claim is that the district court's failure to instruct the jury on the government's burden was plain error. Indeed, this Court has already held as much. *United States v. Lofton*, 776 F.2d 918 (10th Cir. 1985).

Either the government genuinely misunderstood Mr. Maryboy's claim and inexplicably overlooked a critical part of the instructions, or its argument as to error is nothing but classic attack on a straw man. That is, the government reframes the issue as whether the district court plainly erred in failing to sua sponte instruct on imperfect self-defense when the defendant has not requested it. But as Mr. Maryboy clearly

demonstrated in his opening brief, he *did* request an imperfect self-defense instruction, and the jury *was* instructed on the elements of imperfect self-defense—the error was in omitting the government's *burden* to disprove it.

Having failed to address the issue presented, the government doesn't dispute that (1) it has the burden to disprove imperfect self-defense beyond a reasonable doubt, and (2) a district court plainly errs in failing to instruct the jury on the government's burden when imperfect self-defense is raised. Accordingly, the government has effectively conceded that Mr. Maryboy meets the first two prongs of the plain error test.

The government's harmlessness argument, though actually responsive to Mr. Maryboy's brief, fails to undermine the reasonable probability that the jury would not have convicted Mr. Maryboy of second-degree murder had it been properly instructed. Accordingly, the district court reversibly erred.

A. Mr. Maryboy did request, and receive, an instruction on imperfect self-defense.

According to the government, the "first hurdle Maryboy faces is that, when it comes to affirmative defenses, 'an instruction on the defense is not required if not requested by the defendant.' And Maryboy did not request it here." Gov't Br. 38 (quoting *United States v. Sago*, 74 F.4th 1152, 1160 (10th Cir. 2023)). The government admits that parties jointly proposed instructions "did initially include imperfect self-

defense." *Id.* But it claims "the court's revised instructions did not." *Id.* This is simply not true.

As Mr. Maryboy explained in significant detail in his opening brief (at 11-13), through the parties' joint submission, Mr. Maryboy requested a standalone instruction on imperfect self-defense. The proposed instruction also instructed the jury that in order to "convict the defendant of second degree murder," the government must prove "beyond a reasonable doubt that the defendant did not act in imperfect self-defense." R. vol. 1 at 192.

In an effort to consolidate and streamline the instructions, the district court proposed 5 new instructions to replace 18 of the jointly proposed instructions, including the imperfect self-defense instruction. R. vol. 2 at 259. In the district court's revised instructions, the elements of imperfect self-defense were incorporated into the involuntary manslaughter instruction. It stated, "A person may commit involuntary manslaughter if he acts in self-defense, but it was not reasonable for him to think that the force used was necessary to defend himself against an immediate threat." *Id.* at 266.

Thus, Mr. Maryboy *did request* an imperfect self-defense instruction, and the district court's revised instructions *did include* one. Despite Mr. Maryboy having clearly laid this out in the opening brief, the government inexplicably failed to address it, instead merely asserting without any explanation that it didn't happen.

To be sure, the instruction the district court gave did not expressly refer to it as "imperfect self-defense." But it is indisputable that's what the instruction was. It perfectly tracks this Court's precedent defining imperfect self-defense: "the defendant subjectively believed that the use of deadly force was necessary to prevent death or great bodily harm to himself or others, but his belief was not objectively reasonable." *United States v. Britt*, 79 F.4th 1280, 1287 (10th Cir. 2023). A defendant who acts in imperfect self-defense "is guilty of involuntary manslaughter." *Id.* Thus, the district court's instruction that the defendant is guilty of "involuntary manslaughter if he acts in self-defense, but it was not reasonable for him to think that the force used was necessary to defend himself against an immediate threat," is as a matter of law an imperfect-self-defense instruction, one that was given at Mr. Maryboy's request.

Accordingly, the government's claim that Mr. Maryboy failed to request an imperfect self-defense instruction, which "alone dooms his claim," is wrong.

B. Mr. Maryboy was clearly entitled to an imperfect self-defense instruction.

Next, the government argues that, even if he had requested an imperfect self-defense instruction, it is not clear he would have been entitled to it. Of course, as previously explained, Mr. Maryboy did request and receive an imperfect-self-defense instruction. Thus, the government's argument is largely beside the point. However, because it informs the prejudice analysis, Mr. Maryboy will address it.

A "defendant is entitled to an instruction on any recognized defense for which there is evidence sufficient for a reasonable jury to find in his favor." *United States v. Toledo*, 739 F.3d 562, 567 (10th Cir. 2014). "For the purposes of determining the sufficiency of the evidence, [the court] accept[s] the testimony most favorable to the defendant." *Id.* And it "must give full credence to the defendant's testimony." *Britt*, 79 F.4th at 1291. Moreover, "the defendant is entitled to the instruction even if the evidence supporting it is weak and 'depends on an inference of a state of facts that is ascertained by believing defendant as to part of his testimony and prosecution witnesses on the other points in dispute.'" *United States v. Brown*, 287 F.3d 965, 974 (10th Cir. 2002). Under this standard, Mr. Maryboy was plainly entitled to an instruction.

The government argues (at 41-42) that the evidence was insufficient to support imperfect self-defense because, while Mr. Maryboy testified that he feared for his life, he never expressly stated that he believed that deadly force was necessary. He didn't have to. Where there is evidence that the defendant committed the offense because they feared for their life, the jury can reasonably infer that they believed the force used was necessary. Indeed, this Court has repeatedly held that a defendant is entitled to an instruction based on their testimony that they feared for their life, without any explicit testimony that they thought the use of force was necessary. *See United States v. Britt*, 79 F.4th 1280, 1291 (10th Cir. 2023); *United States v. Toledo*, 739 F.3d 562, 567 (10th Cir. 2014).

In *Toledo*, the defendant testified that "he feared [the victim] would grab or choke him when [he] rushed at him with his raised hands. [He] consistently testified that he feared [the victim] and his actions were solely intended to defend himself." *Id.* This Court reasoned that "[i]f [the defendant's] testimony was credited, the jury could reasonably have concluded that [he] believed that deadly force was necessary to prevent [the victim] from causing him great bodily harm." *Id.*

The same is true here. Mr. Maryboy repeatedly testified that he was scared he was going to die, R. vol. 1624, that he was afraid Mr. Montowine was going to shoot him, *id.* at 1630, and that he believed he was defending himself, *id.* at 1702. Thus, viewing the evidence in light most favorable to Mr. Maryboy, a reasonable juror could find that he believed the force he used was necessary, thus acting in imperfect self-defense.

Next, the government argues that Mr. Maryboy was not entitled to an imperfect self-defense instruction because he testified he did not intend to shoot Mr. Montowine. According to the government, self-defense "requires an intentional act," and thus "claims of accident and self-defense are often 'mutually exclusive.'" Gov't Br. 42 (quoting *Francis v. Miller*, 557 F.3d 894 (8th Cir. 2009); *People v. Curtis*, 37 Cal. Rptr. 2d 304, 317 (Cal App. 4th 1994)).

However, there clearly was an intentional act here—Mr. Maryboy intentionally fired the gun. With one exception—a Georgia state case—the authorities the government relies on are inapposite because they involve accidental discharges.

Moreover, this Court's precedent expressly permits a defendant to pursue and have the jury instructed on self-defense even where, as here, the defendant testifies the use of deadly force was an accident. *See United States v. Begay*, 833 F.2d 900, 901 (10th Cir. 1987). In *Begay*, the defendant's testimony closely parallels Mr. Maryboy's. He testified that he "didn't mean to kill him. I just meant for him to back off. I didn't think I stabbed him that hard. I thought he, that he would back off as soon as, you know, he saw the knife." *Id.* at 902. "I took it out and I poked him . . . . I just pulled it forward and he ran into it because he was coming at me . . . ." *Id.* When asked whether he "kn[e]w at the time that you poked [the victim], that the knife had actually gone in—that you'd stabbed him with it?" the defendant answered, "No." *Id.*

In light of this testimony, this Court held that the district correctly instructed the jury on both self-defense and the lesser included offense of negligent manslaughter because these theories were not inconsistent under the circumstances. As this Court explained, "If the defendant attempts to use nondeadly force, but does so in a criminally negligent manner and death results, then both [negligent] involuntary manslaughter and self-defense instructions would be warranted, particularly if there is any disputed fact issue concerning the quantum of danger reasonably perceived by the defendant." *Id.* at 901. That's exactly the case here. Mr. Maryboy's testimony supported theories of both accident and self-defense. Accordingly, he was entitled to pursue and have the jury instructed on both.

Finally, the government also argues (at 43-45) that the evidence was insufficient to support an imperfect-self-defense instruction because Mr. Maryboy's self-serving statements were contradicted by the undisputed forensic evidence, and his account was discredited by his own counsel. In support, the government relies exclusively on out-of-circuit precedent. *See, e.g.*, *United States v. Woody*, 55 F.3d 1257, 1271 (7th Cir. 1995); *United States v. Crow Ghost*, 79 F.4th 927, 938 (8th Cir. 2023). However, these cases conflict with this Court's standard described above which requires the court to view the evidence in the light most favorable to the defendant, giving full credence to the defendant's testimony. Thus, as explained above, this Court's case law clearly supports that Mr. Maryboy was entitled to an instruction on imperfect self-defense based on his testimony that he feared for his life, was afraid he was going to die, and believed he was acting in self-defense. Indeed, that's why Mr. Maryboy in fact got an instruction on imperfect self-defense as well as self-defense.

C. There is a reasonable probability the jury would have convicted Mr. Maryboy of involuntary manslaughter had it considered imperfect self-defense.

As explained in the opening brief (at 38-39), in light of the erroneous instructions, the jury was not asked to decide whether Mr. Maryboy subjectively believed he was acting in self-defense, let alone whether the government disproved it beyond a reasonable doubt. Thus, this Court's task is determine in the first instance whether there is a reasonable probability that even one juror would have a reasonable doubt that the government carried its burden to prove Mr. Maryboy did not

subjectively believe his use of force was necessary to prevent serious bodily injury. This "reasonable probability" is less than preponderance of the evidence. *United States v. Benford*, 875 F.3d 1007, 1017 (10th Cir. 2017). Moreover, because this is a constitutional error, this Court applies the plain error standard "less rigidly." *Id.* at 1016; *see Lofton*, 776 F.2d at 922.

In its response, the government repeatedly claims (at 50-51) that Mr. Maryboy failed to identify any "evidentiary support" for an imperfect self-defense instruction and failed to "conjure any argument that he subjectively believed" he needed to use force to prevent serious bodily harm. That's simply not true.

Mr. Maryboy's opening brief (at 39-40) cited plenty of evidence from which a jury could find that Mr. Maryboy subjectively feared for his life and believed his use of force was necessary. Most importantly, Mr. Maryboy repeatedly testified that Mr. Montowine was the aggressor, that he feared for his life, and that he was acting in self-defense. Whether the government likes it or not, Mr. Maryboy's testimony is evidence—indeed, it is the only direct evidence of his subjective belief. The opening brief also pointed to other objective circumstantial evidence supporting that Mr. Maryboy had reason to be afraid—he was vulnerable in light of his age, health problems, and isolation in a remote, desolate area; and he was approached out of nowhere by a much larger, younger man whose BAC was .237, nearly triple the legal driving limit. In light of this evidence, the jury, who is in the best position to

determine credibility, could credit Mr. Maryboy's testimony and easily find that he subjectively feared for his life and believed his use of force was necessary.

In claiming that Mr. Maryboy has not conjured any explanation for why he subjectively believed the use of force was necessary, the government seems to be expecting and requiring a *reasonable* explanation. But the whole point of imperfect self-defense is that the defendant's belief is *unreasonable*. On appeal, Mr. Maryboy is not claiming that his belief was reasonable, only that he in fact held it, and that there is a reasonable probability a juror would have credited his testimony on that point. Given that credibility determinations are the province of the jury, this Court should be hard pressed to find there's no reasonable probability any juror would have done so.

The government's affirmative argument relies heavily on *Sago*, 74 F.4th 1152, but that case is materially distinguishable. There, after shooting the victim once from the car, the defendant got out and shot the victim three additional times in the back as he attempted to run away, killing him. That is significantly more probative of intent than the single shot at issue here. More importantly, the jury found the defendant guilty of premeditated first-degree murder. A "rational jury that believed the defendant had formed a plan to kill with reflection and consideration amounting to deliberation, could not also have believed" an imperfect self-defense. *Id.* at 1163 (quoting *United States v. Frady*, 456 U.S. 152, 172, 174 (1982) (cleaned up)). Accordingly, *Sago* found no reasonable probability of a different outcome had the jury been instructed on imperfect self-defense. Here, however, the jury's verdict sheds no

light on whether it found Mr. Maryboy credible nor does it foreclose the possibility it would have found the government failed to carry its burden to disprove imperfect self-defense.

Finally, the government criticizes Mr. Maryboy's argument that it is unlikely he would have intentionally killed Mr. Montowine if he wasn't subjectively in fear, and therefore the most rational inference to draw is that he was: "Maryboy takes a *res ipsa loquitor* approach: the fact that he shot and killed Montowine is proof that he acted in self-defense! Otherwise, why would he have shot Montowine?!" Gov't Br. at 50. While the government needlessly makes light of the issue, the question "why would he have shot Montowine?" is an eminently reasonable and important one. It's called motive, and typically a person has one when they commit intentional murder. Mr. Maryboy presented evidence that his motive for the shooting was that he subjectively feared for his life and believed he was acting in self-defense. The government, on the other hand, has never articulated a different motive. So until it does offer an alternative theory as to why Mr. Maryboy—a 50-year-old man with serious health problems and no criminal history; who was minding his own business on the side of the road; who was heading home to his wife from his work as an electrician—intentionally murdered a stranger who politely asked him to move along, then yes, the most reasonable inference to draw is that he was subjectively in fear for his life and thought the use of force was necessary.

At the very least, there is a reasonable probability that one juror would find the government failed to prove otherwise beyond a reasonable doubt. Accordingly, the instructional error was prejudicial.

Conclusion

This Court should vacate Mr. Maryboy's convictions and remand for further proceedings.

Respectfully submitted,

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Certificate of Compliance

As required by Fed. R. App. P. 32(g)(1), I certify that this brief is proportionally spaced and contains 6,443 words. I relied on my word processor to obtain the court, and the information is true and correct to the best of my knowledge.

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