CASE NO. 22-7012
IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,	)
	)
Plaintiff-Appellee,	)
	)
v.	)
	)
DIAMOND LEVI BRITT,	)
	)
Defendant-Appellant.	)

On Appeal from the United States District Court
for the District of Oklahoma (Muskogee)
The Honorable, United States District Court Judge John F. Heil, III
D.C. No. 6:20-cr-00070-JFH-1

APPELLANT'S OPENING BRIEF

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Oral argument is requested.

PDF format attachments included with digital submission

September 22, 2022

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

PRIOR OR RELATED APPEALS

There are no prior or related appeals.

JURISDICTION

The district court had jurisdiction over this federal criminal case under 18 U.S.C. § 3231 and it entered judgment on March 30, 2022. Vol. I at 337.[1] The notice of appeal was filed the same day. *Id.* at 331. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

This appeal contains two issues. First, Diamond Levi Britt argued at trial that he killed his father in self-defense. In an attempt to support this defense theory, he sought to introduce evidence of specific instances of his father's violent behavior. The district court excluded this evidence after ruling that, as a matter of law, Fed. R. Evid. 404(b) never permits the admission of specific act evidence. In light of this Court's recent decision in *United States v. Armajo*, did the district court misinterpret the Federal Rules of Evidence?

Second, Levi asked the district court to provide the jury with an imperfect self-defense instruction. Imperfect self-defense applies when a defendant sincerely but unreasonably believes that they are in danger of death or great bodily harm. While the

[1] Record citations are to volume number and the page number at the bottom right corner of the page.

district court found that there was sufficient evidence to support a self-defense instruction (i.e., sufficient evidence that the defendant sincerely and reasonably feared death or great bodily harm), it refused to instruct on imperfect self-defense. Did the district court abuse its discretion by denying Levi's request for an imperfect self-defense instruction?

STATEMENT OF THE CASE

Diamond Levi Britt was convicted of first-degree murder for the death of his father, Gary Britt.[2] Levi killed Gary in the course of a violent argument during which Gary had Levi cornered in a small room of Gary's house. Levi maintained that he was afraid of Gary on the night in question and killed him out of fear. As Levi's state of mind is relevant to this appeal, some background on Levi's upbringing and relationship with Gary is necessary for a full understanding of the issues presented herein.

I. Gary Britt impregnated a 14-year-old girl who gave birth to Diamond Levi Britt.

Gary Britt was 27 years old and crashing on his co-worker's couch when he met his co-worker's daughter, Aaron Kay Haggard. Vol. II at 365; *see id.* at 94 (noting Gary's birthday). She was 14 years old at the time. *Id.* at 365.

[2] Diamond Levi Britt goes by the name Levi. Because he and Gary Britt share a surname, this brief generally refers to them as Levi and Gary.

Gary plied the young girl with methamphetamine and started a "relationship" with her. *Id.* at 366. Gary raped the girl and impregnated her. *Id.* As a result, Gary and Ms. Haggard were kicked out of the home. *Id.*

In the fall of 1994, Ms. Haggard turned 15 and gave birth to Diamond Levi Britt. *Id.* at 365. A year and a half later, Gary left Ms. Haggard and Levi. *Id.* at 367. In Gary's absence, Ms. Haggard struggled to raise her young son. *Id.* at 368. She battled a drug addiction and was too young to get a job. *Id.*; Vol. III at 66. Eventually, the Department of Human Services (DHS) intervened and placed Levi in Gary's control. Vol. III at 66. Levi lived with Gary for only a few months. *Id.* Once Gary's drug use became a problem, DHS intervened again. *Id.* So, at the age of three, Levi was placed in the care of his maternal aunt and uncle. *Id.*

For a while, Levi's aunt and uncle offered a stable home. *Id.* But, as Levi grew, his uncle began to abuse him. *Id.* On multiple occasions, he would violently strike Levi leaving visible bruising. *Id.* To protect himself, Levi ran away to stay with his grandmother, and, at times, with Gary. *Id.*

But Gary's home did not provide the refuge that Levi sought. *Id.* Gary sold drugs out of his house and was mentally unstable. *Id.* Gary had an explosive personality. *Id.* Levi, now a teenager, bore witness to Gary's fits of rage and saw Gary physically abuse others. *Id.*

Levi, too, struggled with mental health issues. He was haunted by hallucinations and saw dark figures and shadows that left him afraid. *Id.* at 68. Levi was not treated for this condition and was left searching for an explanation for the apparitions. *Id.*

In 2016, Gary married Judy Britt.[3] *Id.* at 66. Levi and Judy got along and Levi began spending more time at the couple's home. *Id.*; Vol. II at 128-29. Levi even felt safe around his father when Judy was there. Vol. III at 66. But, when Judy would leave, Levi continued to fear his father. *See* Vol. II at 392.

II. Levi killed Gary during a fight.

In the fall of 2019, Judy and Gary decided to see the televangelist Jimmy Swaggart in Baton Rouge, LA. Vol. II at 133. The couple asked Levi to housesit and take care of the one dozen dogs and cats that lived on the property. *Id.* at 113, 387. Levi agreed to help. *Id.*

On Friday, September 13, 2019, the couple left on their trip. After Gary and Judy left, Levi began drinking and continued to drink through the weekend. *Id.* at 387. Occasionally, Levi's half-brother, Brandon Britt, would stop by and drive Levi into town for food and more alcohol. *Id.* at 261, 387-88.

On Monday afternoon, Brandon and his girlfriend came by the house, picked up Levi, and drove into town for alcohol. *Id.* at 261. The trio then went back to the home

[3] Gary and Judy had been married before but they were both young, and, according to Judy, divorced after a year because Gary "wasn't through partying yet." Vol. II at 140.

and spent the rest of the afternoon drinking and listening to music. *Id.* Brandon and Levi drank most of a liter bottle of 99-proof banana flavored liquor. *Id.* at 262. As evening approached, Brandon and his girlfriend left the house. *Id.* at 263. They left Levi behind, reclining in a chair, seemingly on the verge of passing out from being drunk. *Id.* at 278-79.

Not long after Brandon and his girlfriend left, Gary and Judy returned home. *Id.* at 111, 263. They found Levi awake but clad only in his underwear. *Id.* at 117. Liquor bottles cluttered the floor and cat litter was strewn across the living room. *Id.* at 118. Adding to the mess, several pieces of patio furniture had been tossed off the back porch and were scattered across the yard. *Id.* at 266.

Gary immediately began yelling at Levi about the condition of the home. Vol. II at 119, 390. In the face of Gary's anger, Levi remained silent at first but eventually began yelling back. *Id.* Judy left the house to avoid the confrontation. *Id.* at 120. With Judy gone, there was no eye-witness to the events that followed other than Levi and Gary. The following narrative is primarily based on Levi's trial testimony and the recording of a 911 call that Gary made while the fight was ongoing.

As the fight escalated, Levi retreated to a spare bedroom in the home. *Id.* at 391. The room was small – 7' by 10' – and cramped with furniture. *Id.* at 500. Gary, who was 6' 2" and weighed almost 300 lbs., followed Levi into the room. *Id.* at 253. For comparison, Levi was 5' 9" and, at the time, weighed between 180 and 200 lbs. *Id.* at

228. Gary stood between Levi and the door. *Id.* at 391-92. Levi was scared of Gary and wanted to escape from the room. *Id.*

At some point, Gary called 911 on his cell phone but never spoke to the dispatcher. (Gov't Exhibit 4).[4] Nevertheless, the dispatcher stayed on the line and the call's recording captures the two men shouting at each other and then engaging in what sounds like a physical struggle. *Id.* at 1:30-2:00. The call also captures Levi screaming at his dad to leave the room, and Levi, speaking in increasingly distressed tones, telling his dad that he loves him and that he does not want to hurt him. *Id.* at 1:40-2:11.

As the fight reached a fever pitch, Levi feared what his father would do. Vol. II at 393. As Levi attempted to flee the room, Gary grabbed him around the waist. *Id.* Levi wrested free from Gary's grasp and grabbed a sword that was sitting on a nearby dresser. *Id.* at 393-94. Fearing that he would not make it out of the room, Levi slashed at Gary cutting him several times. *Id.* at 394-95. Levi then ran around Gary and fled the house. *Id.* at 395. As Levi fled, he continued to look back toward the home afraid that Gary was still in pursuit. *Id.* at 396.

Judy soon returned home and found Gary bleeding from his wounds with his arm nearly severed. *Id.* at 122. She called 911. *Id.* at 123. As law enforcement was

[4] Gov't Exhibit 4 was inadvertently not included on designation of record. Counsel will move to supplement the record with a hard copy of this audio recording after filing this brief. The same is true for Gov't Exhibits 61 and 62 which are cited below.

responding to the call, they spotted Levi on a county road near the home. *Id.* at 164. Levi was still clad in his underwear and he was still carrying the sword. *Id.* He was arrested without incident. *Id.* at 167.

Once in their custody, the officers observed that Levi was in an altered mental state and was sweating profusely. *Id.* at 167. One officer thought that Levi appeared overly "amped up," while another believed that he was intoxicated or "on something." *Id.* at 39, 196. Levi later testified at trial that he believed he was having a mental breakdown. *Id.* at 397. Whatever the source, Levi's behavior was truly bizarre.[5]

Handcuffed in the back of the police car, Levi oscillated between paroxysms of anger (Gov't Exhibit 61 at 19:18, 22:18, 26:21) and violent, remorseful sobbing (*Id.* at 32:43). When placed alone in the interrogation room at the police department, Levi spoke in altered tones about his own mental instability (Gov't Exhibit at 8:46, 9:50, 14:59, 22:40, 25:19, 30:14), repeatedly hit himself in the face (*Id.* at 19:25, 19:57, 28:56, 35:40), and mimicked swinging a sword (*Id.* at 2:03, 3:06, 7:08). Levi also perseverated on a comment someone, presumably Gary, made about assaulting him. *Id.* at 3:18.

On September 25, 2019, Gary died as a result of the wounds sustained during his fight with Levi. Vol. II at 126, 324.

[5] BOP medical providers are trying to determine whether Levi suffers from paranoid schizophrenia.

III. A jury found Levi guilty of first-degree murder.

Levi was charged with second-degree murder in Oklahoma. Vol. III at 53. But, following the Supreme Court's decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), the state charges were dropped, and Levi was charged in federal court with first-degree murder. *Id.* at 35. After a three-day trial, a federal jury found Levi guilty of the charged offense. Vol. I at 330. Levi was sentenced to life imprisonment. *Id.* at 338.

At trial, the district court made two rulings that form the basis of this appeal. The first concerned the exclusion of evidence and the second involved a jury instruction. Both of these rulings are explained in full detail below.

IV. During trial, the judge prohibited Levi from introducing specific instances of Gary's violent behavior.

One of Levi's defenses at trial was that he cut Gary out of fear for his own safety. To that end, defense counsel attempted to introduce testimony concerning specific instances of Gary's violent behavior to prove Levi's state of mind at the time of the incident. The judge excluded the evidence on the belief that, as a matter of law, evidence of specific violent acts is never admissible under Fed. R. Evid. 404(b).

Counsel first attempted to introduce this evidence during the cross-examination of Judy Britt. Vol. II at 140. During Judy's cross-examination, defense counsel asked whether there was any domestic violence in the couple's marriage. *Id.* The government objected and the judge called a bench conference. *Id.*

Outside the presence of the jury, defense counsel informed the court that he had reason to believe that Gary was previously violent toward Judy and that Gary was violent "with every person that he's ever lived with." *Id.* The court sustained the government's objection and excluded any mention of specific instances of Gary's violence. According to the court, Rule 404(b) only permitted testimony about a general reputation for violence. *Id.* at 141-42. ("You can get to evidence of character trait that might tend to go to what you're trying to do, but you can't ask about specific instances.").

Having been so admonished, defense counsel resorted to asking Judy about Gary's general reputation. *Id.* at 143. Judy responded that Gary had a "big temper." *Id.* When Judy attempted to elaborate on what she meant by this—pointing to a specific instance of domestic abuse five years before Gary's death—she was met by a government objection, which the court sustained with no discussion. *Id.*

This pattern repeated itself several times throughout Levi's trial as witnesses would begin discussing specific instances of Gary's violence only to have the court deem the testimony inadmissible. For example, Tracy Stack, Levi's aunt, stated that she knew of many incidents of Gary being violent, but the court prohibited her from saying what those incidents entailed. *Id.* at 378. And, Ms. Haggard, Levi's mother, was prepared to talk about the fact that she received police reports of Gary abusing Levi. *Id.* at 369. But the court ruled that such testimony was prohibited and called a recess so that

counsel could speak with Ms. Haggard and make clear that she was not going "to harpoon this case and the victim based upon very specific instances [of violence] which she apparently has the intent to do." *Id.* at 370.

Finally, before Levi's testimony, defense counsel made one last effort to present evidence of Gary's violent behavior. Before calling Levi to the stand, counsel asked to introduce a state court judgment entered against Gary for a domestic violence conviction. *Id.* at 289. The rough details of the incident were that Gary abused an ex-wife by breaking her arm with a rock. Counsel maintained that Levi knew of this incident. *Id.* at 143, 290; Vol. I at 134-35 (proposed exhibit); Vol. III at 67. To that end, counsel stated that the evidence was relevant and admissible as it spoke to Levi's "state of mind" on the night he stabbed Gary and "what [Levi] was concerned about in that room on that night." Vol. II at 290. In other words, the evidence was being admitted for the purpose of proving Levi's defense.

The court quickly denied the request. In line with its previous evidentiary rulings, the court stated that Levi could testify about Gary's character trait for violence but it was not going to allow Levi "to get into specific instances of conduct which are not allowed by 404 or 405 and that would include that referenced judgement and sentence." *Id.* at 289 ("[M]y ruling on that would be very similar as my statements earlier in the case."). In the district court's view, testimony about specific instances of violence was

"simply not appropriate" under the Federal Rules of Evidence regardless of the intended purpose. *Id.* at 290.

V. The district court refused to instruct the jury on the theory of imperfect self-defense.

Before trial, defense counsel proposed a set of jury instructions which included an instruction titled "theory of defenses." Vol. I at 169. This proposed instruction made clear that Levi wanted to assert defenses based on the theories of self-defense and imperfect self-defense. *Id.* ("Diamond Levi Britt asserts the defense of self-defense, which also includes the theory of an imperfect self-defense.").

Under Tenth Circuit law, "the distinguishing factor between perfect and imperfect self-defense [is] the reasonableness of the defendant's belief that deadly force was necessary to prevent death or great bodily harm." *United States v. Toledo*, 739 F.3d 562, 569 (10th Cir. 2014). But defense counsel failed to fully appreciate this distinction in the proposed imperfect self-defense instruction.

While counsel properly cited to *Toledo* as supporting authority for the imperfect self-defense instruction, the proposed instruction incorrectly stated that the defense applied if Levi "honestly and *reasonably* believe[d] that he [was] in apparent imminent danger, that his life is about to be taken or that there is a danger of serious bodily harm." Vol. I at 172 (emphasis added). The instruction should have stated that the defense applied if Levi "honestly but *unreasonably*" believed that the requisite conditions existed.

The government, however, attempted to clear up defense counsel's confusion. In its written objections to Levi's proposed jury instructions, the government noted that the theory of imperfect self-defense applies when a "defendant *unreasonably* but truly believed that deadly force was necessary to defend himself." Vol. I at 193 (emphasis added). The government also cited to *Toledo* as support for this proposition. *Id.* (also citing *United States v. Milk*, 447 F.3d 593, 599 (8th Cir. 2006)). But the government argued that an imperfect self-defense instruction was not warranted as there was insufficient evidence to support it or a self-defense instruction. Vol. I at 194.

During the jury instruction conference, the court expressed confusion with the proposed imperfect self-defense instruction. Vol. II at 450. The court stated that the proposed instruction "doesn't really explain" what imperfect self-defense is and appeared to overlap with the proposed self-defense instruction. *Id.*

Despite the government's efforts to clarify the matter in its written objections, defense counsel stated that he too remained confused about the difference between self-defense and imperfect self-defense. *Id.* at 450-51. But counsel argued that the confusion was best addressed by reading the cited Tenth Circuit decisions and crafting an imperfect self-defense instruction which was less confusing and which would adequately address the issue. *Id.* at 451. Defense counsel stressed that an imperfect self-defense instruction was "a critical issue" to Levi. *Id.*

The court denied the request. *Id.* The court stated that the "important thing" was the self-defense instruction and noted that a self-defense instruction would be given. *Id.* The court stated that it found the relevant Tenth Circuit caselaw confusing and said that after reading the relevant cases, it "was not really persuaded that [imperfect self-defense] was an important instruction." *Id.* Accordingly, the court declined to give an imperfect self-defense instruction. *Id.*

The government, which had already demonstrated a correct understanding of the difference between the two theories, did not say anything during this discussion. *See id.* at 450-51. At the end of the jury instruction conference, counsel formally objected to the court's decision not to instruct on the theory of imperfect self-defense. Vol. II at 459-60.

SUMMARY OF THE ARGUMENT

This appeal contains two issues. First, this Court recently held in *United States v. Armajo* that under Fed. R. Evid. 404(b) "specific instances of a victim's violent conduct, when known to the defendant, may be admitted to prove the defendant's state of mind in a self-defense case." 38 F.4th 80, 84 (10th Cir. 2022). Here, the district court, albeit without the benefit of *Armajo*, held that specific instances of the victim's violent conduct were never admissible under Fed. R. Evid. 404(b). Vol. II at 290 ("It's simply not appropriate."). Levi receives the benefit of *Armajo*, and *Armajo* demands a finding

that the district court misinterpreted the Federal Rules of Evidence. For this reason alone, reversal is warranted.

The second issue concerns Levi's request for an imperfect self-defense instruction. The "distinguishing factor between perfect and imperfect self-defense" is "the reasonableness of the defendant's belief that deadly force was necessary to prevent death or great bodily harm." *Toledo*, 739 F.3d at 569. Self-defense applies when there is a sincere and *reasonable* belief that deadly force is necessary. Imperfect self-defense applies when there is a sincere but *unreasonable* belief that deadly force is necessary.

The district court agreed that a self-defense instruction was warranted. In other words, the court determined that there was sufficient evidence for a jury to find that Levi sincerely and reasonably believed that deadly force was necessary. But the court denied Levi's request for an imperfect self-defense instruction.

As this Court observed in *Toledo*, when there is sufficient evidence to warrant a self-defense instruction it normally follows that an imperfect self-defense instruction should also be given. *Toledo*, 739 F.3d at 569. Accordingly, reversal is also warranted as the district court abused its discretion by denying Levi's request to instruct the jury on imperfect self-defense.

ARGUMENT

I. The district court reversibly erred by excluding evidence of Gary's specific violent behavior.

Levi's first claim on appeal is that the district court committed reversible error when it ruled, as a matter of law, that Fed. R. Evid. 404(b) bars the admission of specific bad act evidence. As this Court has recently held, such evidence is admissible if it is being admitted to prove a defendant's state of mind in a self-defense case. Accordingly, the district court misinterpreted the Federal Rules of Evidence and reversal is warranted.

A. The issue was properly preserved and is subject to de novo review.

This Court reviews a district court's "legal interpretations of the Federal Rules of Evidence *de novo*." *United States v. Griffin*, 389 F.3d 1100, 1103 (10th Cir. 2004). Here, Levi's defense counsel attempted on numerous occasions to introduce specific instances of Gary's violent behavior. Most notably, before Levi's testimony, counsel asked the court to admit such evidence and argued that it was necessary to prove Levi's "state of mind" and "what he was concerned about in that room on that night." Vol. II at 290. The court, however, deemed the evidence inadmissible and held that "specific instances of conduct . . . are not allowed by [Fed. R. Evid.] 404 or 405," stressing that such evidence is "simply not appropriate." *Id.* On de novo review, this Court should deem the district court's interpretation of the Federal Rules of Evidence legally erroneous.

B. *Armajo* controls this case.

At the time of Levi's trial, it was an open question in this circuit whether Rule 404(b) permitted the use of other-acts evidence to prove a defendant's state of mind in a self-defense case. *Armajo*, 38 F.4th at 84 ("Although we have previously declined to decide whether Rule 404(b) permits the use of other-act evidence in this manner . . . we see no reason to avoid the question here."). But the question is now resolved, and Levi receives the benefit of any favorable developments in the law that occur while his case is pending on direct appeal. *Henderson v. United States,* 568 U.S. 266, 271 (2013) (citing *Thorpe v. Housing Authority of Durham*, 393 U.S. 268, 281 (1969)).

This Court recently held that Rule 404(b) *does* permit the introduction of specific bad acts evidence to prove a "defendant's state of mind in a self-defense case." *Armajo*, 38 F.4th at 84. As this Court observed in *Armajo*, Fed. R. Evid. 404(b)(1) prohibits "[e]vidence of any other crime, wrong, or act" when introduced "to show that on a particular occasion the person acted in accordance with the character." *Id.* But, the rule provides that such evidence "may be admissible for another purpose, such as proving motive, opportunity, intent preparation, plan, knowledge, identity, absence of mistake, or lack of accident." *Id.*

Importantly, the enumerated purposes are "illustrative, not exhaustive." *Id.* Thus, the rule only excludes bad acts evidence when it is being admitting to "prove only propensity." *Id.* Such evidence, however, may be admissible if offered for another

purpose. Specifically, and dispositive here, *Armajo* expressly held that "specific instances of a victim's violent conduct, when known to the defendant, may be admitted to prove the defendant's state of mind in a self-defense case." *Id.*

This Court's position is in accord with every other circuit that has addressed the issue. *See*, *e.g.*, *United States v. Bordeaux*, 570 F.3d 1041, 1049 (8th Cir. 2009) ("[E]vidence of prior bad acts of the victim are admissible under Rule 404(b) to establish the defendant's state of mind and the reasonableness of the defendant's use of force."); *United States v. Smith*, 230 F.3d 300, 308 (7th Cir. 2000) (holding that, so long as the victim's bad acts are known to the defendant, they are relevant to his perception of the victim's dangerousness and are admissible under Rule 404(b)); *United States v. Saenz*, 179 F.3d 686, 688 (9th Cir. 1999) ("Rule 404(b) does not apply when a defendant seeks to introduce evidence that he knew of a victim's other acts to show the defendant's state of mind."). As a leading treatise explains, proof of "specific acts of violence towards others that were known to the defendant" is relevant to show that "the defendant had good reason to be wary or afraid, which in turn bears on the reasonableness of his response to the situation." 1 Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 4:25 (4th ed. 2021).

The district court's interpretation of the Federal Rules of Evidence was erroneous. The district court interpreted Rule 404(b) to exclude all other-acts evidence. The court made clear that, in its view, it did not matter whether the intended purpose

was to prove a defendant's state of mind in a self-defense case. Vol. II at 290, *see also id.* at 255 (stating that specific act evidence with not permissible for "any other family members or any other witness"); *id.* at 366 ("It's entirely . . . improper to start offering specific evidence of other bad acts or crimes. It's not appropriate for any witness to do that to another witness."). In the court's view, evidence of specific violent conduct was "simply not appropriate" under Rule 404(b). *Id.* at 290. As *Armajo* makes clear, the district court erred in its interpretation of the rules when it held that Rule 404(b) categorically prohibited the admission of Gary's prior violent conduct.

Given that *Armajo* demonstrates error, the only potentially outstanding question is whether the error was harmless. As Levi's claimed error is sourced in the district court's interpretation of the Federal Rules of Evidence, this Court will employ the "nonconstitutional harmless error standard." *United States v. Jefferson*, 925 F.2d 1242, 1255 (10th Cir. 1991). Under this standard, this Court will find harm if the "error either had a 'substantial influence' on the outcome at trial" or if this Court is left in "'grave doubt' as to whether it had such effect." *United States v. Moncayo*, 440 F. App'x 647, 656 (10th Cir. 2011) (quoting *Jefferson*, 925 F.2d at 1255). Importantly, the government bears the burden of proving harmlessness. *United States v. Blechman*, 657 F.3d 1052, 1067 (10th Cir. 2011).

Here, the government cannot carry its burden to demonstrate harmlessness. By misinterpreting the Federal Rules of Evidence, the district court barred Levi from

providing evidence supporting his claim of self-defense. To be sure, the court did allow general reputation testimony which included that Gary was known to have a "big temper" and that he was a "bully." Vol. II at 143, 373. But such testimony is evasive and forces speculation. After all, one could interpret such testimony to mean that Gary was known to yell and scream over petty annoyances or that he belittled those weaker than him. It does not give concrete reasons why Levi would believe that he was in danger of great bodily harm or death.

By contrast, the excluded testimony does provide such concrete reasons. A jury is more likely to understand Levi's claimed fear if they are allowed to hear that Levi was aware that Gary had broken a girlfriend's arm with a rock, or that Gary had abused Levi in the past. Such evidence is undoubtedly more forceful and real than testimony that Gary was generally a bully. Had the jury been permitted to hear and consider specific instance of Gary's violent behavior, it would have influenced the outcome of the trial vis-à-vis Levi's claim of self-defense.

Given that *Armajo* establishes error, and that the government cannot carry its burden to demonstrate harmlessness, Levi respectfully requests that this Court vacate his convictions and remand for a new trial. *Cf. United States v. Tony*, 948 F.3d 1259 (10th Cir. 2020) (remanding for new trial following district court's erroneous evidentiary ruling).

II. The district court reversibly erred by failing to instruct the jury on the theory of imperfect self-defense.

The district court found that there was sufficient evidence to warrant a self-defense instruction. Vol. II at 451. But the court refused to instruct the jury on the theory of imperfect self-defense. *Id.* Levi's second claim on appeal is that this constitutes reversible error. When the evidence justifies a self-defense instruction, it naturally follows that an imperfect self-defense instruction should be given if it is requested.

A. The issue was preserved and abuse-of-discretion review applies.

This Court reviews "properly preserved claims of instructional error . . . for an abuse of discretion." *United States v. Benvie*, 18 F.4th 665, 669 (10th Cir. 2021). In order to properly preserve an instructional error claim, a party needs to make an "objection to the court's action and [state] the grounds for that objection." *Id.* (noting that "a party is not required to use any particular language or even wait until the court issues its ruling."). Determining whether an issue is properly preserved focusses on whether "the district court was adequately alerted to the issue." *United States v. Harrison*, 743 F.3d 760, 763 (10th Cir. 2014).

Here, the district court was adequately alerted to the issue. In the proposed theory of defenses instruction, Levi clearly stated that he wished to claim self-defense as well as imperfect self-defense. Vol. I at 169. To be sure, counsel erroneously switched "unreasonable" with "reasonable" in the proposed definition of imperfect self-defense

but that should not alter the applicable standard of review. *Id.* at 172. This is so for two reasons.

First, any confusion that counsel created by the flawed instruction was directly addressed by the government in its written objections. As the government's filing correctly states, the difference between self-defense and imperfect self-defense is the reasonableness of the defendant's belief. *Id.* at 193. As the government expressly informed the court, imperfect self-defense applies when a "defendant unreasonably but truly believed that deadly force was necessary to defend himself." *Id.* The court was adequately informed of the difference between the two theories.

Second, once counsel recognized that the district court was not going to give the proposed instruction, counsel abandoned the proposed instruction and requested that the court look to the applicable caselaw and provide an instruction that correctly addressed the issue. Vol. II at 452. Importantly, the key case that counsel appeared to be referencing, and which was cited as an authority in the proposed instruction, was this Court's decision in *Toledo*. Vol. I at 172. *Toledo* clearly explains the difference between the theories of self-defense and imperfect self-defense. *Toledo*, 739 F.3d at 569. By abandoning the proposed instruction and by pointing the district court to *Toledo*, defense counsel adequately alerted the district court to the issue.

Levi made clear that he wanted the court to instruct the jury on the theory of imperfect self-defense. The government laid out the difference between self-defense

and imperfect self-defense, and defense counsel provided the district court with the controlling authority on the issue. When the district court ruled that it was not going to instruct the jury on imperfect self-defense, defense counsel made a formal objection to this decision. Vol. II at 459-60. The district court was adequately alerted to the issue and, thus, the issue is preserved.

B. The district court abused its discretion by refusing to give an imperfect self-defense instruction.

While a district court maintains discretion over jury instructions, this discretion has firm limits. Relevant here, a court has no discretion to reject an instruction "on any recognized defense for which there is evidence sufficient for a reasonable jury to find in [the defendant's] favor." *Toledo*, 739 F.3d at 567 (citing *United States v. Harris*, 695 F.3d 1125, 1136 (10th Cir. 2012)). When determining whether there is sufficient evidence to warrant a defense instruction, this Court "accept[s] the testimony most favorable to the defendant" and "must give full credence to [the] defendant's testimony." *Id.* (citing *Harris*, 695 F.3d at 1136; *United States v. Benally*, 146 F.3d 1232, 1236 n.4 (10th Cir. 1998)). Even "though a defendant's testimony may be contradicted to some degree by other evidence or even by his prior statements, a defendant is entitled to an instruction if the evidence viewed in his favor could support the defense." *Id.* (citing *United States v. Brown*, 287 F.3d 965, 976-77 (10th Cir. 2002)). As to self-defense, and by extension imperfect self-defense, "the burden of production to warrant a[n] . . . instruction is 'not

onerous.'" *Toledo*, 739 F.3d at 568 (citing *United States v. Scout*, 112 F.3d 955, 960 (8th Cir. 1997)).

As this Court held in *Toledo*, the self-defense analysis largely, if not completely, controls the analysis for imperfect self-defense. Here, the district court found that the evidence was sufficient to warrant a self-defense instruction. Vol. II at 476. In other words, there was sufficient evidence for a jury to find that Levi reasonably feared that Gary might kill him or cause him great bodily harm.

The district court's finding stands on a solid evidentiary footing. Gary had a reputation for violence. *Id.* at 143. His violent temperament was on full display when he saw the state of the house upon returning home. *Id.* at 391-92. He lashed out at Levi, and the verbal altercation eventually turned physical. *Id.*

Gary, at 300 pounds, was physically intimidating. *Id.* at 253. He blocked Levi's only exit out of the small, cramped room. *Id.* at 392-93. Levi testified that he was scared of Gary and that he believed he might not make it out of the room. *Id.* at 392, 394. This fear continued even once Levi fled the house as he continued to look over his shoulder, afraid that Gary was still in pursuit. *Id.* at 396. Taking this evidence as true, which is a must, there is undoubtedly an evidentiary basis to support a jury finding that Levi acted in self-defense.

As *Toledo* recognizes, if the evidence is sufficient to warrant a self-defense instruction, it naturally follows that an imperfect self-defense instruction, if requested,

should also be given. *Toledo*, 739 F.3d at 569. The analysis for the two is "inextricably intertwined." *Id.* After all, the only difference between the two theories is the "reasonableness" of the defendant's belief. *Id.* at 568-69. Thus, if there is sufficient evidence for a jury to find that a defendant reasonably feared death or great bodily harm, it should normally follow that there is sufficient evidence for a jury to find that a defendant unreasonably feared death or great bodily harm. As a leading criminal-law treatise notes, "whenever the facts would entitle the defendant to an instruction on self-defense," it is "generally" the case that a jury could also find imperfect self-defense. Wayne R. LaFave, 2 Substantive Criminal Law 15.3(a) (3d ed. 2018); *see also id.* at n.10 (citing the observation in *Roach v. State*, 749 A.2d 787 (Md. 2000), that it is "hard to imagine" a situation where evidence allowed for a finding of self-defense, but not imperfect self-defense). Given that the district court found that a self-defense instruction was warranted, it was error for the court to deny Levi's request for an imperfect self-defense instruction.

Moreover, the evidence here is similar to other cases where this Court has found reversible error in a district court's refusal to instruct the jury on imperfect self-defense. For example, in *Toledo* this Court said that an imperfect self-defense instruction was warranted when there was little more than the defendant's testimony that he feared the victim and that the victim, who was known to have a violent temper when drinking, rushed the defendant with raised hands. *Toledo*, 739 F.3d at 567 (stating that an

imperfect self-defense instruction was warranted even if the evidence supporting the instruction is "weak and contradicted.").

For another example, in *Brown* this Court held that there was sufficient evidence to warrant an imperfect self-defense instruction when the victim outweighed the defendant by 90 pounds. *Brown*, 287 F.3d at 977. The victim and the defendant "had previous problems," and the defendant testified that he only swung a knife at the victim because he was scared and had been attacked first. *Id.* (noting that "the instruction must be given if there is *any evidence* to support it." (emphasis added)).

The circumstances of this case are sufficiently similar to those where this Court has found reversible error. Gary physically outmatched Levi. Vol. II at 253. Gary and Levi were engaged in a violent confrontation. Gary had Levi cornered in a small, cramped room. *Id.* at 391-93. The situation was volatile, and Levi testified—testimony that must be accepted as true—that he was scared of Gary and what Gary would do. *Id.* at 392-94. Faced with this evidence, there is a sufficient basis for a jury to find that Levi sincerely but unreasonably believed that he had to act in self-defense to avoid death or great bodily harm.

As there was sufficient evidence to support an imperfect self-defense instruction, the district court reversibly erred by so failing to instruct the jury. Thus, for this independent reason, Levi respectfully requests that this Court vacate his conviction and remand for a new trial.

CONCLUSION

For either of the two independent reasons argued above, Levi respectfully requests that this Court vacate his conviction and remand for further proceedings.

STATEMENT REGARDING ORAL ARGUMENT

Counsel requests oral argument because he believes it would significantly assist in the decision of this case.

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 6324 words. I relied on my word processor to obtain the count, and the information is true and correct to the best of my knowledge.

/s/ Grant R. Smith
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