

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 22-7012

UNITED STATES OF AMERICA,
Plaintiff/Appellee,

v.

DIAMOND LEVI BRITT,
Defendant/Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA
THE HONORABLE JOHN F. HEIL III, U.S. DISTRICT JUDGE
CASE No. CR-20-00070-JFH

BRIEF OF PLAINTIFF/APPELLEE

ORAL ARGUMENT IS NOT REQUESTED

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PRIOR OR RELATED APPEALS

There are no prior or related appeals.

STATEMENT OF JURISDICTION

In his brief, Defendant Diamond Levi Britt accurately describes this Court's jurisdiction over his appeal.¹ (*Def. Brf.* 1).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred in refusing to admit evidence of specific acts of abuse against domestic partners by murder victim, Gary Britt, when (a) the defendant, Diamond Levi Britt, Gary's son, failed to make an offer of proof that he had personal knowledge of the specific acts and that the evidence fell within a hearsay exception, and (b) Britt was still able to introduce evidence of specific acts of violence by Gary against Britt, as well as other information concerning Gary's propensity for violence.
2. Whether the district court abused its discretion (and if so, whether the error was harmless) by denying Britt's request for an imperfect self-defense instruction, when (a) Britt's proposed instruction was incorrect, and (b) aside from Britt's self-serving testimony, every piece of evidence, including Britt's statements before and after the murder, contradicted a claim of imperfect self-defense.

¹ References to the record on appeal ("ROA") will be made as follows:
Volume I – Pleadings: by document title, followed by page numbers where the cited material appears in the consecutively paginated record, e.g., "Vol. I, *Motion*, ROA at 10."

Trial Transcript: References to the trial transcript, which appears in Volume II of the record on appeal at pages 67 to 509, will be to the transcript page (rather than the page in Volume II of the record), e.g., as "Tr. 2."

Defendant/Appellant's brief will be referenced as "*Def. Brf.*"

STATEMENT OF THE CASE

A. A Jury Finds Britt Guilty for the First-Degree Murder of His Father, Gary

Defendant Diamond Levi Britt was charged with first-degree murder in Indian Country for killing his father, Gary Britt, with a katana sword in September 2019. (Vol. I, ROA 22); *see* 18 U.S.C. §§ 1111(a), 1151, 1153.² A three-day trial was held. After only about forty-five minutes of deliberation, a jury found Britt guilty of the charge, concluding Britt killed Gary with malice aforethought and premeditation. (Vol. I, ROA 288, 330). The jury’s verdict was based on the following evidence presented at trial.

1. Britt tells family members he wants to kill Gary

Britt spent most of his childhood living with his aunt and uncle. Gary played little role in raising Britt. (Tr. 57, 289, 295). When Britt was fifteen years old, he moved in with Gary and lived with Gary for the next two years. (Tr. 58, 296-97).

Gary recognized “he hadn’t been the best dad” to Britt. (Tr. 49-50). Gary “wanted to do better” and “make a future” with Britt. (*Id.*). So, in early 2015, when Britt was approximately twenty years old, Gary started to interact with Britt more often. (Tr. 49-50, 181; Tr. 286).

² A katana is “a single-edged sword that is the longer of a pair worn by the Japanese samurai.” MERRIAM-WEBSTER.COM DICTIONARY, <https://www.merriam-webster.com/dictionary/katana> (last visited Jan. 4, 2023).

From 2016 to the time of Gary's death, Britt had a consistent pattern of living with his father, Gary, "quite often." (Tr. 50-51, 58, 218). Britt would stay with Gary and Gary's wife, Judy, at the couple's house, often for a few months. (Tr. 50). Then, Britt would move in with another relative or friend for a couple of months, before returning to Gary and Judy's home and starting the process over again - residing with Gary and Judy for two to three months and then leaving. (Tr. 50-51; *see, e.g.*, Tr. 180, 218, 297-98).

Britt usually decided to leave Gary and Judy's home and live elsewhere when he and Gary started "squabbling" about Britt playing video games "all night" and "want[ing] to sleep all day." (Tr. 50-51, 343). Gary encouraged Britt to "get his GED and put in applications" for employment. (Tr. 50-51). At some point in Britt's stay, their bickering would be "almost constant," both Britt and Gary would be mad, and Britt would move out only to return a few months later. (Tr. 50-51, 58).

Although Britt and Gary were "decent" with one another, Britt told others he disliked Gary and wanted to hurt and kill Gary. (Tr. 172-73, 188, 220). On several occasions from 2016 to 2019, Britt informed his cousin that he wanted to fight Gary, hit Gary, and/or break Gary's bones. (Tr. 217-21). Britt made similar comments to his half-brother. (Tr. 188-89). Sometime around 2017 or 2018, Britt stated he wished Gary was dead and that he "wanted to kill him." (Tr. 219-21).

In summer 2019, Britt reiterated his intent to murder Gary. While visiting his

grandmother (Gary's mother) Britt explained he was angry with Gary because Gary was making him do yard work. (Tr. 167-68, 170-71, 173). Britt again announced that he was "going to kill" Gary. (*Id.*).

2. Britt attacks Gary with a katana sword

Gary and Judy owned two swords. One was a trophy and ornamental only. The other was a black katana sword. (Tr. 35-37, 59-60). Neither sword was displayed openly in the house. Gary, instead, had the swords hidden away in a location unknown to Judy. (Tr. 37, 75-76). There were no other weapons present in Gary and Judy's home. (Tr. 35-37, 59-60).

In August 2019, Britt returned to Gary and Judy's house to live with them. (Tr. 189, 297). At that time, Britt was twenty-four years old.

On September 13, 2019, Gary and Judy left for vacation to Louisiana. The trip was intended to be a celebration of Gary's 52nd birthday and Gary and Judy's anniversary. (Tr. 31-32). They would return on September 16th. (Tr. 33-34).

Britt did not want to go on the trip, so he stayed at the couple's house. (Tr. 66). He was aware Gary and Judy would return on September 16th. During their absence, he was to watch over the house and care for the dogs and cats. (Tr. 34-35, 66).

On September 15, 2019, Britt's half-brother, Brandon, drove Britt to get food and two cans of beer. (Tr. 194). The next afternoon, September 16, Britt and Brandon were at Gary and Judy's house for several hours. (Tr. 182-83, 194-96).

They picked up food and a bottle of liquor, returned to the house, and drank most of that bottle. (Tr. 183, 195).

While he was at the house on September 16, Brandon never saw the katana sword. According to Brandon, when he left around 6 p.m., aside from some empty bottles of alcohol, the house appeared as it always did with “nothing out of place.” (Tr. 185, 195).

A short time later, a little after 7 p.m. on September 16, 2019, Gary and Judy returned from vacation. As they arrived home, Britt stepped out of the house wearing only his underwear. That was normal for Britt; he often wore just underwear when Judy was not present the house. (Tr. 39, 118). Judy noticed that Britt was acting “[s]trange” and “quiet,” and that he had “a smirk on his face.” (Tr. 38).

The three of them then entered the house together—the house was a disaster. Some time between when Brandon had left the home and when Gary and Judy arrived, the house had been “destroyed.” (Tr. 38-39). A bed had been “pulled down” and patio chairs had been thrown off the deck. (Tr. 38-39, 187). “There was dog food everywhere, cat litter everywhere.” (Tr. 39, 186-87). It was “like somebody had thrown a fit and just gone threw [sic] and knocked things down and threw stuff everywhere.” (Tr. 39).

Gary and Judy were understandably upset. (Tr. 40). They both instructed Britt to pack his stuff and leave. (Tr. 39-40). When Gary asked Britt what happened,

Britt did not answer and just remained quiet. (Tr. 39-40, 71-72).

Within five minutes of Gary and Judy entering the house, Britt retrieved the katana sword. (Tr. 39). Judy was not sure where Britt found the sword. Gary told Britt to put the sword away. (Tr. 39-41). Britt put the sword in his bedroom. (*Id.*).

A few minutes later, Britt and Gary started arguing with each other, as they had “many times before.” (Tr. 41). Although that was “the norm” for them, Judy was tired from vacation and fed up. She exited the residence, walked to a nearby hill, and attempted to contact a relative to transport Britt elsewhere. (Tr. 41-42). With Judy gone, Britt and Gary continued bickering.

At 7:53 p.m., local law enforcement received a 911 call from Gary’s cellphone. (Tr. 230-31; Gov. Tr. Ex. 40). The call was recorded and played at trial. (Gov. Tr. Ex. 4).³

On the recording, Gary and Britt are heard arguing. At one point, Britt explains that he tried to “pick up . . . paper” around the house and that Gary should appreciate his efforts. Gary interrupts Britt, and Britt roars “Shut the fuck up.” (*Id.* 0:00-1:40). What sounds like a brief scuffle ensues. (*Id.* 1:40-45).

The scuffle ends and Britt picks up the sword saying, “Get the fuck out of here, I’ll do it.” Gary answers, “You won’t do shit.” Britt warns, “I’ll cut you. I’ll

³ The government intends to supplement the record on appeal with all the admitted Government’s Trial Exhibits (except for the katana sword, exhibit 2) and will file a motion to that effect in due course. Counsel for Appellant has no objection.

cut you.” They exchange more words. Gary yells inaudibly. Britt responds “What? What? What? What?” (*Id.* 1:46-2:14).

Britt attacks. He strikes the first blow, and Gary cries “Ow!”

Britt shrieks ferally as he repeatedly hacks Gary with the sword. Gary yells “Get the fuck out of here!” Britt continues wailing and slashing Gary. Gary, his body tearing open in response to Britt’s blows, begins howling. Finally, roughly twenty seconds after Britt first cut Gary, the attack ends, and Britt leaves the home. (*Id.* 2:15-35).

Gary, in shock and short of breath, laboriously drags himself out of Britt’s room, where the attack occurred, and starts to scream for help. In the first two minutes after the attack, Gary bawls for assistance roughly ten times. (*Id.* 2:35-7:44).

From where she was situated on the hill, Judy was unable to hear what was occurring in the home. Judy stayed on the hill for approximately fifteen minutes and then reentered the residence. (Tr. 42-43). Inside, Judy walked into a nightmare.

Blood was everywhere, on the floor, on the door, on the walls, on the furniture. (Tr. 43-44, 92, 135-37; Gov. Tr. Ex. 12-23). Gary was laying on the living room floor in a pool of his own blood. A trail of blood behind him signaled Gary had dragged his body from Britt’s room into the living room. (Tr. 44, 92, 135). His left arm was “almost severed.” (Tr. 43-46). Judy, a nurse, attempted to tourniquet Gary’s arm, but she kept “slipping and almost falling” in sheets of blood. (Tr. 33,

43-46, 91). She called 911 and informed the dispatcher that Britt had attacked his father with a sword, crying “it’s really bad, please come. Hurry. He’s going to lose his whole arm.” (Gov. Tr. Ex. 5).

Emergency medical responders arrived at the home. One of the responders testified at trial, describing the horror inside and stating that he has never encountered a scene like what he saw on the night of September 16, 2019. (Tr. 93). Gary’s left arm had been cut from “the top of his arm, all the way through the bone,” and “the only thing that was holding it on was just a little bit of skin from the back of his elbow.” (Tr. 91-92). Gary’s right leg had a substantial gash above the knee, and there were wounds to his head, including where the skin on the back of his head, “from the top of his head to his neck,” had been “filleted.” (Tr. 91-93).

Responders did everything they could to staunch Gary’s bleeding. (Tr. 91-94). They transported him to a local hospital, where he was life-flighted to Tulsa. (Tr. 46, 94-95).

3. Britt admits he wanted to kill Gary, premeditated prior to attacking Gary, and did not act in self-defense

After attacking Gary on September 16, 2019, Britt left the house and walked down a nearby road, where members of law enforcement located him, observed him swinging the sword, and placed him in custody. (Tr. 85). Gary’s blood was visible on the sword’s blade. (Tr. 99).

Britt spontaneously announced to the officers “Is he dead? Let me go, I’ll go

back and kill him. I hope he's dead.” (Tr. 85-86, 99). At that point, officers advised Britt of his *Miranda* rights. He was reminded of these rights multiple times throughout the evening. (Tr. 86, 99, 145; Gov. Tr. Ex. 61, at 0:54-1:07, 28:56-29:31).

Three officers testified at trial and described Britt as “amped up” on adrenaline that night. (Tr. 87, 158-59). Two officers also thought Britt may be under the influence of an intoxicant, but Britt told the officers he was not drunk, though he was intoxicated, and he had not consumed “that much” alcohol that day. Britt gave the officers no reason to think that he was unable to understand what was happening or respond coherently. (Tr. 99, 118-23, 125, 148; Gov. Tr. Ex. 61, at 1:04-58; Gov. Tr. Ex. 62, at 5:10-6:00). In an abundance of caution, the officers largely did not question Britt that night. (Tr. 145).

Even without questioning from law enforcement, however, Britt essentially confessed to malice aforethought and premeditation.

Britt initially was placed in an officer's squad car. Next, he was transported to an interview room at the sheriff's department. An audio recorder captured Britt's time in the vehicle and a video camera recorded Britt's time in the interview room. Both recordings were played for the jury in their entirety. (Gov. Tr. Ex. 61, 62).

While being recorded, Britt made numerous statements, most unsolicited, about his attack on his father. In general, Britt said that his father had been “a

disrespectful little bitch,” who did not think Britt would cut him, and that Britt “proved him wrong.” (Tr. 100). Britt mentioned he had wanted to be left alone to take a nap and smoke a cigarette, but his father had been getting on his nerves and would not leave him alone. (*See, e.g.*, Gov. Tr. Ex. 61, at 6:52-9:46, 31:20-32:38; Gov. Tr. Ex. 62, at 15:00-44, 16:06-32, 18:52-19:15, 23:48-52). Britt repeatedly referenced killing his father, wanting to kill Gary earlier that night, and wishing he had made the blade sharper. (*See, e.g.*, Gov. Tr. Ex. 62, at 2:53-3:26, 13:34-48, 15:00-44, 21:00-22:35, 28:00-47). *Five times*, Britt spontaneously brought up the topic of premeditation. (Gov. Tr. Ex. 62, at 12:45-13:00, 18:52-19:15, 23:29-41, 28:22-47, 31:50-32:23).

Further, Britt told the officers he was not protecting himself when he attacked his father. Britt said his father “ha[d]n’t c[o]me after” him “in a long time and was “scared of [Britt] physically.” (Tr. 102-03). Indeed, although Britt referenced the scuffle that is heard on the audio recording, he admitted he had pushed Gary down prior to grabbing the sword. (Gov. Tr. Ex. 61, at 30:30-41; Tr. 139).

Britt also reenacted the attack on his father. (Tr. 100, 106-07). Britt recalled Gary remarked Britt would not cut him with the sword, and that Gary asked “What are you gonna do with that” just before Britt attacked. (Tr. 106-07). Britt also chopped downward, suggesting Gary was in a down position when the attack occurred. (*See, e.g.*, Gov. Tr. Ex. 62, at 3:00-15, 13:07-20, 18:26-44). Britt

replicated his blows to Gary's body and depicted Gary screaming, before Britt performed more blows to Gary, indicating that Gary cried out when Britt first cut him, at which point, Britt cut Gary again.

Here is a sampling of Defendant's statements in the aftermath of the attack. Unless otherwise indicated, Britt made the following statements spontaneously, without any questioning from law enforcement⁴:

- *Reenacting the attack*

- "What are you gonna do with that? [cutting noise] [screaming] [cutting noise] [screaming]." (Gov. Tr. Ex. 61, at 8:59-9:48).
- "[Screaming, screaming] [cutting noise] [screaming] Die, bitch. Quit fucking making so much fucking noise." (Gov. Tr. Ex. 61, at 22:08-20).
- "What are you gonna do with that? [cutting noise]. Oh, God damn. This mother fucker is kinda dull. I'll do it again. [cutting noise] [screaming]. Fuck him." (Gov. Tr. Ex. 62, at 3:00-15; *id.* 1:48-2:10, 6:48-7:12, 8:50-9:21, 12:19-35, 13:07-20, 16:07-31, 18:26-44, 33:25-42).

- *On his desire to kill Gary*

- "Father or not. You want to act like you're some big, bad son of a bitch and you want to treat me like I'm a sorry sack of shit, I might fucking kill you. (Gov. Tr. Ex. 61, at 8:07-53).
- "That stupid bitch. He better fucking die." (Gov. Tr. Ex. 61, at 12:30-40).
- Bitch, my problem is you. You might die. Or you might straighten the fuck up and behave for a fucking minute. God damn pitiful sack of shit. I am a caring person; I give a fuck about everything, even the little full

⁴ The transcriptions included in this brief are unofficial and should not be considered verbatim, despite the government's best efforts to transcribe the recordings accurately.

of life. I give a fuck. You—I'll probably try to kill you again. (Gov. Tr. Ex. 62, at 21:00-42).

- *On his premeditation*

- “I fucking hate that sorry sack of shit, piece of fucking excuse of a man. He’s going to be like, ‘Oh it was premeditated, oh it was premeditated.’ No, that was in the heat of the moment, God damn’t. I wanted to fucking kill him in the moment.” (Gov. Tr. Ex. 62, at 31:50-32:23).
- “That faggot probably wants to call it premeditated. God damn’t. I think about stabbing you every day. Is that meditated?” (Gov. Tr. Ex. 62, at 18:52-19:15).
- “Can’t even call it premeditated; if it was premeditated, he would be dead. I guaran-fucking-tee it, son.” (Gov. Tr. Ex. 62, at 23:29-41).
- “Hey daddy, did you know that if you did assault him with it a second time, that would be premeditated.” (Gov. Tr. Ex. 62, at 12:45-13:00).
- “I wouldn’t have said, ‘what are you gonna do with that.’ I might’ve told you to put that away. ‘What are you gonna do with that’ [cutting noise] [cutting noise] [screaming noise]. Bitch. I’ll do it again. Make it premeditated this time.” (Gov. Tr. Ex. 62, at 28:22-47).

- *On whether he acted in self-defense*

- After an officer asked whether Gary tried “to get [Britt] or anything,” Britt answered “Oh no. Not here recently, no sir. He’s afraid of me.” (Gov. Tr. Ex. 61, at 6:52-7:31; Tr. 121-22).
 - When talking with an officer about what happened, Britt said “I shoved him down and grabbed the sword. He’s like ‘what are you gonna do with that.’ Smack. Smack. And that’s it.” (Gov. Tr. Ex. 61, at 30:30-41; Tr. 139).
4. Nine days later, Gary dies as a result of his injuries, and Britt tells law enforcement he has no regrets and thinks he and Gary are even

Gary received blood and underwent multiple surgeries to suture and clean his wounds and to reattach nerves, tendons, and bodily tissue. (Tr. 47, 246-47, 258-60).

Ultimately, his organs were unable to cope with the massive amounts of blood his body lost due to the attack, and Gary was placed on life support. (Tr. 47, 247-48). Judy elected to take Gary off the supporting implements, and Gary died on September 25, 2019. (Tr. 47).

That same day, a law enforcement officer interviewed Britt. Britt remembered striking Gary at least twice, once on his right side and once on his left side. (Tr. 322). Britt did not mention acting out of fear when he slashed Gary with a sword. Instead, Britt told the investigator he did not regret cutting Gary, he did not “feel bad,” and he and Gary “were even.” (Tr. 322-24).

The deputy chief medical examiner for the State of Oklahoma and his team performed an autopsy on Gary’s body. (Tr. 235, 245-46). The examiner noted multiple blunt-force injuries to Gary’s face, both arms, and his left leg. (Tr. 249). The examiner also observed several significant injuries—all associated with incised wounds that required sutures (sometimes internal), broken bones, and/or slashed tendons (Tr. 246-47, 249-52, 262-63; Gov. Tr. Ex. 41)—including, but not limited to:

Right leg: A “deep” incised wound to Gary’s right thigh measured 20.0 cm in length and gaped up to 0.9 cm; the cut was approximately 8 inches deep, cutting Gary’s quadriceps tendon and exposing Gary’s knee joint. (Tr. 252, 261-62; Gov. Tr. Ex. 59).

Left arm: An incised wound to Gary’s left forearm measured 8.5 inches long. As a result of the cut, Gary’s arm was a “near amputation, near loss.” Gary

suffered a broken left ulna and radius and his left ulnar nerve had been cut. (Tr. 251, 258-61; Gov. Tr. Ex. 54-58)

Right arm: An incised wound to Gary’s right forearm measured about 1.5 inches. (Tr. 256-57; Gov. Tr. Ex. 49-50).

Right thumb: There was a fracture to Gary’s right thumb because of an incised wound that cut through the skin and musculature; the wound measured approximately two inches in length. (Tr. 251, 257-58; Gov. Tr. Ex. 51-53)

Front of head: An incised wound to Gary’s forehead measured roughly one inch in length. The wound was so deep, that there was a “defect” to Gary’s skull, where the sword “actually hit the skull and left a mark.” (Tr. 253-55; Gov. Tr. Ex. 42-43, 45).

Back of head (two wounds): Gary had two incised wounds to the back of his head. The largest of the wounds was 8.5 inches in length; the cut from the sword “passed through the scalp,” leaving a “flap-like” piece of tissue and removing that “part of the scalp from the skull.” (Tr. 255-56; Gov. Tr. Ex. 46-48)

Based on the examiner’s knowledge and experience, Gary’s injuries were consistent with the conclusion Gary sustained the injuries when he was “down.” (Tr. 263). The examiner concluded the cause of Gary’s death was complications of multiple sharp-force injuries, and that the manner of Gary’s death was homicide. (Tr. 263-65).

B. Britt Claims on the Witness Stand, for the First Time, That He Acted in Self-Defense

At trial, Britt, for the first time, claimed he acted in self-defense when he slashed Gary repetitively with the katana sword.

To establish his self-defense claim, Britt asked his mother and aunt, both of whom testified on his behalf, as well as Judy and Gary’s mother, about Gary’s

reputation for violence and abuse of domestic partners. (Tr. 61-64, 175, 292-94, 299). Britt also sought to introduce testimony concerning purported specific instances in which Gary had been violent with past domestic partners. The district court precluded Britt from presenting such testimony. (*See, e.g.*, Tr. 61-63, 175-76, 210-12, 290-91).

Britt testified on his behalf. He discussed his relationship with Gary, stating he was afraid of Gary, Gary had threatened him countless times, and Gary had once shot a gun at him. (Tr. 312-13, 319-20).

Britt described the night of the attack. Britt recalled being drunk most of the weekend while Gary and Judy were out of town and said he was drunk when the couple arrived home. (*E.g.*, Tr. 308-09). He was so out of it, he said, when Gary and Judy returned, it took him some time to understand his “surroundings and what was going on,” and he was not able to remember much of that night. (Tr. 310; *see, e.g.*, Tr. 310-11, 324-25, 327-29, 331-32 (Britt unable to remember certain details)).

But, conveniently, Britt was able to describe, in extreme detail, the moments leading up to the attack. Britt said he had left the house in a “less than satisfactory” condition and Gary was upset. (Tr. 310). According to Britt, he entered the house and went to his bedroom, and Gary followed him. Gary would not let Britt leave the room and was insulting Britt. (Tr. 311). Britt wanted to escape because Gary had “threatened [him] many times before, and [Britt] is scared of him.” (Tr. 313). Britt

twice tried to exit the room, and Gary grabbed Britt, preventing him from leaving. (Tr. 313-14). After Britt “pushed [himself] off of [Gary] and stepped back, [Britt] grabbed the sword.” (Tr. 314). Britt believed Gary was coming back at him, so he “just swung [the sword] twice and then left because [he] could.” (Tr. 315-16). Britt testified that he was sorry for what happened and that he did not intend to hurt his father that night. (Tr. 318-19).

On cross-examination, Britt acknowledged that all his statements in September 2019 contradicted his claim of self-defense, and that he had never previously mentioned being afraid of Gary - not before the attack, not the night of the attack, and not when he was interviewed by law enforcement nine days after the attack. (Tr. 321-23). Britt admitted he was not apologetic in his earlier statements about attacking Gary. (Tr. 323). Britt defended his earlier statements to family members prior to the attack and on the night of the attack, claiming he did not make or remember making such comments, or that he was only “trying to sound tough.” (E.g., Tr. 323, 329-31, 356). Britt confessed he could not “remember drunk ramblings from two years go,” but he “remember[ed] exactly what happened between [him] and [his] father in the room that night.” (Tr. 331).

Prior to trial, Britt submitted proposed jury instructions for self-defense and imperfect self-defense. (Vol. I, ROA 171-72). His imperfect self-defense instruction was incorrect as a matter of law because the proposed instruction used

an objective, rather than subjective, standard. (*Id.*). In a pre-trial filing, the government objected by arguing neither defense was justified. (Vol. I, ROA 192-94). At the charging conference, the district court refused to issue an imperfect self-defense instruction, but agreed to advise the jury on self-defense. (Tr. 371-73; Vol. I, ROA 324).

The jury rejected all of Britt's arguments. In addition to his claim of self-defense, Britt disputed whether the evidence proved malice aforethought and premeditation; suggested Gary's death was caused by Gary's significant preexisting health problems; claimed he was too intoxicated to form the necessary intent; and contended he acted in the heat of passion. (*See* Tr. 21-29, 417-28; Vol. I, ROA 317-24). In minutes, the jury returned a verdict finding Britt guilty of first-degree murder.

Britt was later sentenced to life imprisonment. (Vol. I, ROA 338).

SUMMARY OF THE ARGUMENT

This Court should affirm Britt's conviction for first-degree murder. On appeal, Britt presents two argument, neither of which call for reversal.

First, the district court did not err when it denied Britt's requests to present evidence of specific instances of Gary's purported violent conduct with prior domestic partners. While the court's legal analysis was without the guidance later provided by *United States v. Armajo*, 38 F.4th 80, 84 (10th Cir. 2022), even under

Armajo, the court's ultimate decision to reject Britt's evidence was correct. Britt failed to make an offer of proof establishing the admissibility of his evidence. He never: (1) specifically described what his proposed evidence entailed; (2) showed he was personally aware of the incidents about which witnesses would testify; or (3) identified an exception to the hearsay rule sufficient to render his proffered testimony admissible.

Further, any error by the court had no effect on the jury's verdict. The evidence Britt desired to present had little probative value. The evidence related to events occurring years, even decades, prior to his attack on Gary. None of the proposed evidence concerned Gary's conduct with Britt. Moreover, Britt was allowed to introduce evidence about specific incidents of Gary's violence. He testified about Gary threatening his life and presented testimony about Gary being a bully who abused all his domestic partners.

Second, the district court did not abuse its discretion by declining to issue an imperfect self-defense instruction. Britt was not entitled to such an instruction since his proposed instruction misstated the law. Regardless, the evidence did not support the instruction and, similarly, any error was harmless beyond a reasonable doubt. Britt admitted he was not afraid of his father. He repeatedly gashed his unarmed father with a sword - nearly slicing his arm off. By his own admission, Britt did not act out of fear, but attacked his father because Gary was being disrespectful and

would not let leave Britt alone.

ARGUMENT AND AUTHORITIES

I. THIS COURT SHOULD AFFIRM THE DISTRICT COURT'S EXCLUSION OF EVIDENCE CONCERNING SPECIFIC INCIDENTS OF GARY'S ALLEGED ABUSE OF PAST DOMESTIC PARTNERS

A. Standard of Review

Typically, this Court reviews a district court's decision to exclude evidence for abuse of discretion. *United States v. Crockett*, 435 F.3d 1305, 1311 (10th Cir. 2006). Even if the evidence was excluded erroneously, this Court will affirm the verdict so long as the error was harmless, meaning the error neither had a substantial influence on the outcome nor leaves this Court in grave doubt as to whether it had such effect. *United States v. Roach*, 896 F.3d 1185, 1194-95 (10th Cir. 2018); *United States v. Farag*, 41 F. App'x 338, 344 (10th Cir. 2002) (unpublished).

Where the proponent of the excluded evidence failed to make an adequate offer of proof, however, this Court will "reverse only in instances of plain error." *United States v. Adams*, 271 F.3d 1236, 1241 (10th Cir. 2001). In those circumstances, reversal is necessary only if (1) the court committed error, (2) the error is clear at the time of appeal, (3) the error affected the defendant's substantial rights, and (4) this Court concludes the error seriously impacts the fairness, integrity, or public reputation of judicial proceedings. *United States v. Harry*, 816 F.3d 1268, 1282-83 (10th Cir. 2016); *Farag*, 41 F. App'x at 344.

B. Britt Failed to Show Evidence of Specific Incidences of Gary’s Violent Conduct Against Domestic Partners Was Admissible, and the Omission of the Evidence Had No Influence on the Jury’s Verdict

Regardless of which standard of review applies, the outcome should be the same: This Court should affirm the district court’s exclusion of the specific instances of domestic violence allegedly perpetrated by Gary against his past romantic partners. (*See Def. Br. Att. B*). Britt failed to preserve this issue for appeal because he never made an offer of proof showing that the evidence was, in fact, admissible. Never did Britt establish he knew of the specific instances of Gary’s conduct that he sought to introduce at trial. Without such proof, the district court had no choice but to bar the evidence. Further, exclusion of the evidence had no impact on the jury’s verdict. The evidence concerned events that occurred years, sometimes decades, prior to 2019, and Britt was able to introduce substantial evidence concerning Gary’s purported violent behavior, including specific instances of that behavior.

Pursuant to Federal Rule of Evidence 404(b), both parties now agree, a defendant claiming self-defense may introduce “specific instances of a victim’s violent conduct” to prove the defendant’s state of mind. *United States v. Armajo*, 38 F.4th 80, 84 (10th Cir. 2022) (citing *United States v. Bordeaux*, 570 F.3d 1041, 1049 (8th Cir. 2009)); *United States v. Gregg*, 451 F.3d 930, 935 (8th Cir. 2006). The district court did not have the benefit of *Armajo* at trial and stated to the parties that specific instances of Gary’s conduct were largely inadmissible. (*See, e.g.*, Tr. 61-

63, 175-76, 210-12, 290-91).

The Rule 404(b) analysis in *Armajo* is arguably dicta because this Court held the evidence was properly excluded under Rule 403. But even under *Armajo*, exclusion here does not “demonstrate[s] error” or merit reversal. (*Def. Br.* 18). A victim’s specific acts of violence are admissible only if the defendant establishes personal knowledge of the victim’s “prior violent conduct at the time of the conduct underlying the offense charged.” *Gregg*, 451 F.3d at 935; *Armajo*, 38 F.4th at 84. When a district court refuses to admit such evidence, Federal Rule of Evidence 103(a)(2) requires that the defendant make an offer of proof describing the evidence and what it tends to show and identifying the grounds for admitting the evidence. *See, e.g., Adams*, 271 F.3d at 1241. An offer of proof “is inadequate when it lacks the specificity necessary to determine whether the evidence would be admissible.” *Harry*, 816 F.3d at 1283. In the context of a victim’s specific instances of past violent conduct, therefore, the offer of proof must include information regarding the defendant’s knowledge of such instances. *Gregg*, 451 F.3d at 935-36 (upholding district court’s ruling excluding evidence of specific instances of the victim’s prior conduct because the defendant’s offer of proof said nothing as to the defendant’s knowledge); *see, e.g., Bordeaux*, 570 F.3d at 1049-50 (similar).

Here, Britt never requested to present an offer of proof and never made an offer of proof, let alone one demonstrating how, at the time he attacked Gary with a

sword, he was aware of Gary's supposed prior abuse of his past domestic partners. Britt did not specifically describe what the proposed testimony would be, and not once did Britt claim that he had personal knowledge of such events. (*See Def. Br.*, Att. B; Tr. 61-62, 290, 299-300).

Without evidence showing that Britt knew of Gary's past violent conduct, it cannot be said that the district court, in rejecting Britt's evidence, erred, plainly or otherwise, or that it abused its discretion. Gary's prior acts had no bearing on Britt's state of mind at the time he hacked Gary repeatedly with a sword if Britt "himself was unaware of the facts." *Bordeaux*, 570 F.3d at 1050; *see, e.g., United States v. Greene*, 239 F. App'x 431, 443-44 (10th Cir. 2007) (unpublished) (holding that offer of proof was inadequate to show relevancy of certain financial assessments to defendant's state of mind, when the offer did not indicate defendant knew of the assessments); *United States v. Rodriguez-Velez*, 597 F.3d 32, 42 (1st Cir. 2010) (precluding defendant from questioning witnesses about his infidelity because there was no evidence the witnesses "were aware of it"); *United States v. Logan*, 49 F.3d 352, 358 (8th Cir. 1995) (concluding, because the defendant "did not make an offer of proof that [a] [telephone] conversation took place or of its threatening nature," evidence about the conversation was irrelevant to whether the defendant believed a co-conspirator "would retaliate against him if he attempted to withdraw from the conspiracy").

Britt's non-existent offers of proof were inadequate for another reason. His proffered evidence was impermissible hearsay, and Britt, since he did not complete an offer of proof, never articulated an exception to the hearsay rule. *See, e.g., United States v. McCowan*, 471 F.2d 361, 363 (10th Cir. 1972) (affirming exclusion of evidence on similar ground). For example, Britt tried to get Judy Britt to testify about a domestic situation from 2014 during which Gary allegedly threw a rock at a woman's vehicle. (Tr. 63-65). But Judy had no relationship with Gary at that time and thus was not present when the incident occurred. Any testimony from Judy about those events would be founded on second-hand knowledge. (Tr. 49, 65). The same goes for the testimony of Britt's mother concerning police reports from when Britt was four years old (approximately 1998) and of Britt's aunt about Gary's abuse of domestic partners—neither Britt's mother nor his aunt personally observed the alleged abuse to which they intended to testify. (*See* Tr. 290, 299).

Because Britt presented no offer of proof, he failed to show Gary's purported abuse of domestic partners was admissible. “[S]o neither of the first two requirements of plain-error review is satisfied,” and the district court did not abuse its discretion. *Harry*, 816 F.3d at 1283; *see Crockett*, 435 F.3d at 1312 (“When a defendant has not made a timely and sufficient offer of proof of the substance of the evidence, we are hindered in applying the plain error test.”).

The absence of an offer of proof also renders it “impossible” to determine

whether exclusion of the evidence prejudiced Britt. *Harry*, 816 F.3d at 1283. And on this record, any error by the district court was harmless and had no influence on the jury's verdict.

As an initial matter, the probative value of Britt's evidence was marginal at best. His evidence concerned purported violent acts that occurred years, or decades, prior to September 2019. (Tr. 61, 63-64, 211, 288, 290 (discussing events from approximately 1986, 1998, 2004, and 2014)); see *United States v. Beltran-Garcia*, 338 F. App'x 765, 771-72 (10th Cir. 2009) (unpublished) (noting that the "remoteness in time affected the probative nature of the evidence"). The evidence, furthermore, was unrelated to Gary's behavior with Britt; instead, the evidence went to Gary's relationships with past domestic partners. The purported "assaults appear not to have troubled [Britt] overly much, as he continued to live and socialize with [Gary] during the years that followed." *Armajo*, 38 F.4th at 85. For the same reasons and as the district court recognized, the admission of this evidence raised "serious concerns" of unfair prejudice, confusing the jury, and harassing the victim. (Tr. 211-12, 287-88, 291, 293); see *Armajo*, 38 F.4th at 85-86.

Additionally, Britt himself was permitted to testify about Gary's violence toward him. Britt told the jury Gary had "threatened [him] many times before," "threaten[ed] [his] life," and he was afraid of Gary. (Tr. 313). Britt also described an incident when Gary supposedly shot a firearm at Britt four years prior to trial.

(Tr. 319).

Britt, likewise, was able to question witnesses about Gary's reputation for domestic violence and violence more generally. Britt's counsel effectively elicited, among other things, the following information about Gary's reputation:

- Gary "did have a big temper." (Tr. 64).
- "In my opinion, he was very violent. He was known as a bully." (Tr. 294).
- Gary "was domestically violent to everyone that I know he was with." (*Id.*).
- "I knew that he was violent with the women he lived with." (Tr. 299).
- "I know that he was violent, and I thought that pretty much was common knowledge, everyone knew that." (*Id.*).
- "He was violent. I knew of many incidences of him being violent." (*Id.*).⁵

Additional, "cumulative[]" testimony about a couple of specific violent acts Gary may have perpetrated against domestic partners would have added little to the substantial evidence Britt was allowed to present to the jury regarding Gary's violent tendencies. *United States v. Tapaha*, 891 F.3d 900, 907-08 (10th Cir. 2018). And as discussed below, Britt's self-defense claim was exceptionally weak and the excluded testimony "could not have assisted his self-defense claim significantly."

⁵ In addition, according to Britt's appellate counsel, Britt was able to introduce evidence that Gary "plied" Britt's mother with methamphetamine and "raped" her. (*Def. Br.* 3). The United States is compelled to respond to this unsupported accusation. Britt's mother never testified to being drugged or raped. (Tr. 287). Britt's hyperbole is the exact reason the district court rejected Britt's evidence—Britt's goal was simply to "besmirch" Gary. (*Id.*).

United States v. Talamante, 981 F.2d 1153, 1157 (10th Cir. 1992); *Tapaha*, 891 F.3d at 907-08; (*see infra* Argument, Section II.B).

In short, even without the benefit of *Armajo*, the district court did not err by excluding evidence of Gary’s specific incidences of violent conduct to domestic partners. Britt never established through an offer of proof the evidence was admissible. And, regardless, the omission of the evidence was harmless and did not prejudice Britt, since the evidence had limited probative value and given the other evidence of Gary’s violence that Britt was permitted to introduce. Reversal is not necessary, and Britt’s argument on this ground should be rejected.

II. THE DISTRICT COURT APPROPRIATELY REFUSED TO TENDER BRITT’S IMPERFECT SELF-DEFENSE INSTRUCTION

A. Review Is for Abuse of Discretion

The parties agree that this Court reviews the district court’s decision declining to issue his proposed imperfect self-defense instruction for abuse of discretion. (*Def. Br.* 20); *United States v. Crockett*, 435 F.3d 1305, 1314 (10th Cir. 2006).

B. Britt’s Proposed Instruction Was Incorrect, and Either There Was Insufficient Evidence to Support the Instruction or Any Error in Rejecting the Instruction Was Harmless

The district court properly refused to instruct the jury on imperfect self-defense. Britt’s proposed instruction was flawed, with even defense counsel conceding the instruction was confusing. There was not enough evidence to support the instruction, let alone sufficient evidence to cast doubt on the outcome of the case

in the absence of the instruction.

A defendant is entitled to a jury instruction on a defense if: (a) the instruction is a correct statement of the law, and (b) sufficient evidence has been presented to support the jury's finding in the defendant's favor on the theory. *E.g.*, *United States v. Urbano*, 563 F.3d 1150, 1155-56 (10th Cir. 2009); *United States v. Quarrell*, 310 F.3d 664, 676 (10th Cir. 2002); *United States v. Cryar*, 232 F.3d 1318, 1324 (10th Cir. 2000). When an error occurs, reversal is not needed if the error was harmless beyond a reasonable doubt, in that it did not have a substantial influence on the verdict and does not leave one in grave doubt as to whether it had such effect. *United States v. Meisel*, 875 F.3d 983, 1003-05 (10th Cir. 2017); *United States v. Russell*, 798 F. App'x 198, 203-04 (10th Cir. 2019) (unpublished).

Britt's proposed instruction was an incorrect statement of the law. The doctrine of imperfect self-defense operates to reduce a murder to involuntary manslaughter when the defendant is criminally negligent in acting in self-defense. *United States v. Toledo*, 739 F.3d 562, 568-69 (10th Cir. 2014). Said another way, where the defendant unreasonably believed that deadly force was necessary to prevent death or great bodily harm and acts in self-defense, killing another, then the proper conviction is for involuntary manslaughter. *Id.* Britt's proposed instruction got it exactly backwards, employing an objective standard and requiring the jury to find Britt "honestly and reasonably believe[d] he [was] "in apparent imminent

danger, that his life [was] about to be taken or that there [was] a danger of serious bodily harm.” (Vol. I, ROA 172).

Britt concedes that the instruction “erroneously switched ‘unreasonable’ with ‘reasonable.’” (*Def. Br.* 20-22). Nonetheless, he claims the court should have known to issue a correct imperfect self-defense instruction. (*Id.*).

Britt is wrong. It is hornbook law that “[i]f a proffered request is in any respect incorrect, the denial of such a request is not error.” *United States v. Kelly*, 349 F.2d 720, 759-60 (2d Cir. 1965) (citing cases). For it “is not the function of the trial judge to put lengthy, confusing, or inaccurate requests for instructions through a winnowing or sifting process in an endeavor to select what is good and reject what is bad.” *Id.*; *e.g.*, *United States v. Billingsley*, 474 F.2d 63, 65 (6th Cir. 1973); *Stewart v. United States*, 395 F.2d 484, 490-91 (8th Cir. 1968).

Yet, that is what Britt expected the district court to do for him. Mistakenly flipping the subjective standard for an objective one rendered the instruction legally incorrect, redundant, and, as both Britt’s counsel and the court concurred, “confusing.” (Tr. 371-73). Because Britt’s imperfect self-defense instruction misstated the standard, the district court did not have to issue such an instruction. *See, e.g.*, *United States v. Joseph*, 709 F.3d 1082, 1096-97 (11th Cir. 2013) (affirming district court’s decision to decline to issue a subjective instruction for an objective standard); *United States v. Hurwitz*, 459 F.3d 463, 480 (4th Cir. 2006)

(similar); *United States v. Purpera*, 844 F. App'x 614, 626-27 (4th Cir. 2021) (per curiam) (unpublished) (similar).

The instruction would have made no difference here. There was not sufficient evidence for the proffered instruction because Britt did not, at the time he assaulted his father with a sword, hold a subjective belief that he was in danger of death or great bodily harm. For the same reasons, any error in failing to issue the instruction was harmless. Regardless of the analytical route this Court takes, therefore, on this record, the verdict should be affirmed.

On the night of the attack, Gary and Britt were engaged in a typical father-and-son disagreement just as they had “many times before.” (Tr. 41). The only difference this time was Britt’s behavior. (*See* Tr. 38).

Britt suffered no injuries whatsoever from his interactions with Gary that night. (Tr. 143; Gov. Tr. Ex. 62, at 0:18-25, 3:45-4:00 (Britt and an officer explained the scratches on Britt’s body were from events transpiring as Britt was being taken into custody)). Gary, in contrast, had one arm hanging by a thread, a broken thumb, a knee joint that was exposed, a dent in his skull, and a flap of skin dangling from the back of his head. (Tr. 246-61; Gov. Tr. Ex. 41-60).

Upon his parents returning home, Britt immediately retrieved the sword—the only dangerous weapon in the house. (Tr. 35-37, 59-60). He then placed the sword in his room. As Britt and Gary argued, Britt did not leave the house or go into the

kitchen or stay in the living room or choose any of the several “safer options available to him.” *United States v. Craine*, 995 F.3d 1139, 1157 (10th Cir. 10th Cir. 2021). Instead, he chose to return to the bedroom, the place where he had put the sword.

Britt, with Gary unarmed, then used that sword to go on a rampage against Gary which left Gary gasping in pools of his own blood and screaming for help. *See United States v. Walters*, 775 F. App’x 25, 28 (2d Cir. 2019) (unpublished); (Gov. Tr. Ex. 12-23).

It was not Britt’s fear of Gary that initiated the attack. Rather, after Britt threatened to “cut” Gary, Gary doubted that Britt would use the sword and asked Britt “What are you going to do with that?” That comment, according to Britt, was what immediately preceded the attack. (*E.g.*, Gov. Tr. Ex. 61, at 8:59-9:48, 30:30-41; Gov. Tr. Ex. 62, at 3:00-15).

Britt landed the first blow, and Gary responded “Ow!” Britt could have stopped there, but, instead, he kept going, striking Gary in his left arm, his right arm, his forehead, the back of his head, his thumb, and in the right leg. As indicated by Britt’s reenactments, Britt continued to slash at Gary even after Gary screamed in response. (*E.g.*, Gov. Tr. Ex. 61, at 3:59-4:16 (“[cutting noise] He’s like [screaming noise]. So I did it again.”), 8:59-9:46, 22:08-20; Gov. Tr. Ex. 62, at 1:48-2:10, 3:00-15; 6:48-7:12, 8:50-9:21, 12:19-35, 13:07-20, 16:07-31, 18:26-44, 33:25-42).

Britt “could not have reasonably [delivered] the subsequent [blows] in self-defense” while Gary was cowering on the floor and blood was spilling on the floor. *See United States v. Wooten*, 696 F. App’x 337, 339 (10th Cir. 2017) (in the context of a shooting).

Granted, Gary was bigger than Britt. (*Def. Br.* 23). But Gary was also much older and had debilitating physical problems. Gary “was disabled.” (Tr. 65). He had a “bad back, bad knees.” (*Id.*). He “hadn’t worked in ten years.” (*Id.*). Gary also suffered from numerous medical issues, including chronic, “end-stage” liver disease (cirrhosis), coronary artery disease, hypertensive cardiovascular disease, an enlarged heart, an enlarged spleen, hypertension, and Hepatitis C viral infection. (Tr. 25, 247, 264, 268-74).

Contrary to Britt’s brief, the evidence at trial never indicated Gary “sold drugs,” used drugs, raped anyone, or that he “would violently strike” Britt.” (Br. 3, 23). Britt’s appellate counsel apparently pulled these allegations from the presentence investigation report - material that never went before the jury. (*See, e.g., Def. Br.* 3-4, 10 (citing the report repetitively)).

Rather, the record shows Gary desired to be a better father for his son, to build a better relationship with his son, and for his son to do better in his life. (Tr. 49-51). Witnesses testified that Gary had never been violent with Britt or his other son. (Tr. 40, 58, 172-73, 180, 188). Only one witness was able to recall Gary even raising

his voice at Britt, and that witness could recall only one example of that occurring. (Tr. 173-74).

Gary's size and demeanor, moreover, meant nothing to Britt the night of the attack. According to Britt's description of events, before he even grabbed the sword, he pushed Gary down to the ground. Britt then seized the sword and delivered numerous deadly blows all over Gary's body. (Gov. Tr. Ex. 61, at 30:30-41).

The evidence at trial established Britt was looming over Gary, Britt had overpowered Gary to the ground, and Britt could not have been in fear of imminent deadly harm at that moment. The deputy chief medical examiner for the State of Oklahoma testified that Gary's injuries were consistent with Gary sustaining those injuries "while in a down positioning." (Tr. 263). The injuries to Gary's head showed that—if Gary had been standing, it would have been impossible for Britt to fillet the back of Gary's head or leave a mark at the crown of Gary's skull. (Tr. 91-93, Tr. 253-56). Britt's reenactments of the attack—in which Britt strikes downward, over and over again—further establish that Gary was beneath Britt at the time of the attack. (See, e.g., Gov. Tr. Ex. 62, at 3:00-15, 13:07-20, 18:26-44). It "defies logic" for Britt to contend that he was deathly afraid of Gary when Gary was injured and defenseless on the ground. *Pagliaccetti v. Kerestes*, 581 F. App'x 134, 137 (3d Cir. 2014) (unpublished) (affirming as harmless error failure to instruct on imperfect self-defense because defendant "did not unreasonably believe deadly force

was necessary”); *Walters*, 775 F. App’x at 28.

Perhaps most importantly, Britt’s statements and conduct before and immediately after he attacked Gary establish that he was not deathly afraid of Gary when he hacked Gary with a sword. *See Craine*, 995 F.3d at 1157. Prior to the attack, Britt told family members that he wanted to hurt and kill Gary. (Tr. 171, 188, 220-21). Britt’s pattern of voluntarily electing to live with Gary casts further doubt on his purported fear of Gary. *See Armajo*, 38 F.4th at 85.

On the night of the attack, Britt gave no indication that he was in fear of his father. In fact, Britt explained that it was his father who was afraid of him. (Gov. Tr. Ex. 61, at 6:54-7:31; Tr. 121-22).

Far from saying his decision to attack Gary was out of fear, Britt rationalized his actions based on Gary’s “big shot” attitude, Gary disrespecting him, and Gary interrogating him and not leaving him alone. (Gov. Tr. Ex. 61, at 1:04-58, 6:12-7:31, 8:59-9:46, 30:30-56, 31:40-32:36; Gov. Tr. Ex. 62, at 15:00-44, 16:06-32, 18:52-19:15, 23:48-52). These comments demonstrate Britt’s “conduct . . . was premeditated” and not driven “by a belief that he needed to use deadly force to protect himself [or] others from serious, imminent harm.” *Craine*, 995 F.3d at 1157.

Britt admitted as much. Britt commented he “thought about stabbing [Gary] every day, is that premeditated.” (Gov. Tr. Ex. 62, at 18:52-19:15). Britt shouted that he “wanted to fucking kill [Gary] in the moment.” (Gov. Tr. Ex. 62,

at 31:50-32:23). He exclaimed that Gary “better fucking die,” and that he would try to kill Gary again if necessary. (*E.g.*, Gov. Tr. Ex. 61, at 12:30-40; Gov. Tr. Ex. 62, at 21:00-42).

When being interviewed on the day of his father’s death, Britt never mentioned “anything about being afraid of [his] father.” (Tr. 322-23). To the contrary, on the day his father died, with the benefit of nine days of reflection since the sword attack, Britt told law enforcement he had no regrets about attacking his father with a sword and that he now felt he and Gary “were even.” (Tr. 322-24).

Even when testifying, Britt never explicitly stated he was afraid of Gary at the moment of the attack or believed Gary was about to inflict imminent, serious harm on him. *See Toledo*, 739 F.3d at 568-69. Britt only testified generally about his supposed fear of Gary and claimed Gary would not let him leave the room. (Tr. 312-13).

Put bluntly, this was not a close case. The jury rejected several lesser-included offenses and returned a verdict minutes after being released to deliberate. Aside from Britt’s self-serving testimony, every piece of evidence contradicted Britt’s claim he was deathly afraid of Gary or acted in self-defense. Britt’s own comments to law enforcement in September 2019 ran counter to his testimony. So, the record, even when viewed in Britt’s favor, did not support an imperfect self-defense instruction. Regardless, on this record, any instructional error was harmless beyond

a reasonable doubt.

CONCLUSION

A criminal defendant is entitled to a fair trial, and that is what Britt received here. *See Lutwak v. United States*, 344 U.S. 604, 619 (1953). Based upon the foregoing, the United States urges this Court to affirm the jury's verdicts and Britt's conviction for first-degree murder.

STATEMENT REGARDING ORAL ARGUMENT

The United States has no objection to Britt's request for oral argument, but does not believe argument to be necessary in this clearcut matter.

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This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). According to MS Word 2016, this brief contains 8,797 words, excluding those parts of the brief exempted by Fed. R. App. P. 32(f).

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I hereby certify that on January 6, 2023, I electronically transmitted the attached documents to the Clerk of Court using the CM/ECF System for filing. I further certify that this brief was sent via the CM/ECF system for filing to counsel for Appellant at:

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/s/ Kyle J. Essley