FILED
United States Court of Appeals
Tenth Circuit

August 31, 2023

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DIAMOND LEVI BRITT,

Defendant - Appellant.

No. 22-7012

Appeal from the United States District Court
for the Eastern District of Oklahoma
(D.C. No. 6:20-CR-00070-JFH-1)

Grant R. Smith, Assistant Federal Public Defender (Virginia L. Grady, Federal Public Defender, with him on the briefs), Office of the Federal Public Defender for the District of Colorado, Denver, Colorado, appearing for Appellant.

Linda A. Epperley, Assistant United States Attorney (Christopher J. Wilson, United States Attorney, and Kyle J. Essley, Special Assistant United States Attorney, with her on the brief), Office of the United States Attorney for the Eastern District of Oklahoma, Muskogee, Oklahoma, appearing for Appellee.

Before **BACHARACH**, **KELLY**, and **BRISCOE**, Circuit Judges.

BRISCOE, Circuit Judge.

Defendant Diamond Levi Britt was convicted in the United States District Court for the Eastern District of Oklahoma of Murder in the First Degree in Indian

Country, in violation of 18 U.S.C. §§ 1111(a), 1151, and 1153, and sentenced to a term of life imprisonment. Britt now appeals, arguing, in pertinent part, that the district court committed reversible error by refusing his counsel's request to instruct the jury on the theory of imperfect self-defense. Exercising jurisdiction pursuant to 28 U.S.C. § 1291, we agree with Britt that the district court erred in this regard. Consequently, we remand the case to the district court with directions to vacate the judgment and conduct a new trial.

I

Factual history

Britt, who is an Indian and an enrolled member of the Muscogee (Creek) Nation, was born on November 4, 1994, in Tulsa, Oklahoma. At the time of Britt's birth, Britt's mother was fifteen years old and Britt's father, Gary Britt (hereinafter Gary), was twenty-seven years old. Britt lived with his mother from birth until approximately age three, when he was removed from her care due to child neglect and ongoing substance abuse issues. Britt then lived with Gary for several months until he was removed from his care due to similar neglect and substance abuse issues. At approximately age four, Britt began living with his maternal aunt, Tracy Stack. Mrs. Stack and her husband became Britt's legal guardians and raised him as their son.

When Britt was approximately fifteen years old, he began rebelling and thought that he would be better off if he lived with Gary. Shortly before he turned

sixteen, Britt began living with Gary and remained there for about two years before returning to live with Mrs. Stack and her husband.

As a young adult, Britt lived on and off for several months at a time with Gary and his wife, Judy Britt-Putman (hereinafter Judy), at their house in rural Henryetta, Oklahoma. According to Judy, Britt and Gary had many verbal arguments, often relating to Britt's failure to apply for jobs and the amount of time he spent playing video games. Britt would sometimes get mad as a result of those arguments, and would respond by moving out of the house and living temporarily with other relatives.

Between 2016 and 2019, a period of time when he lived on and off with Gary, Britt allegedly told at least two family members that he wanted to harm Gary. According to Britt's cousin Andrew Britt, when Britt drank he would talk about wanting to fight or hit his father and break something on him. On one occasion in 2019, Britt visited his paternal grandmother, Cilla Litsey, and told her he was angry at Gary because Gary was having him do some yard work. Britt told Litsey that he had been walking around all over town in order to "clear his head." ROA, Vol. II at 249. Britt then allegedly said to Litsey, "I'm going to kill him." *Id*. at 250.

On Friday, September 13, 2019, Gary, Judy, Litsey, and Gary's aunt traveled to Louisiana for a weekend trip. Britt agreed to watch Gary and Judy's house and care for their cats and dogs while they were gone.

During the course of the ensuing weekend, Britt spent most of his time drinking alcohol, either alone or with his half-brother, Brandon Britt (hereinafter

Brandon). By Britt's own admission, he "pretty much went to bed drinking and woke up drinking" the entire weekend. *Id*. at 388. On the early afternoon of Monday, September 16, 2019, Brandon and his girlfriend visited Britt at the house. The three drove to the town of Henryetta to purchase food and alcohol, and then returned to the house where they proceeded to drink alcohol and listen to music for three to four hours. According to Brandon, they purchased a liter-sized bottle of liquor and, between the three of them, finished the majority of the bottle that afternoon. At around 6 p.m. that day, Brandon and his girlfriend left the house, leaving Britt alone.

Approximately an hour later, Gary and Judy returned home from their trip. Gary and Judy first encountered Britt outside of the house. According to Judy, Britt was wearing only underwear, his behavior seemed strange, and he had a smirk on his face.

The details of what happened next are disputed. We begin with Judy's version of events. According to Judy, she and Gary entered the house and observed that the interior of the house was, in Judy's words, "destroyed," with dog food and cat litter scattered everywhere on the floor. *Id*. at 118. According to Judy, it looked as if someone "had thrown a fit and just gone [through] and knocked things down and threw stuff everywhere." *Id*. Although Gary had asked Britt to drink only beer at the house, Judy observed "liquor bottles everywhere." *Id*. Gary asked Britt, "what the hell?," but Britt "wouldn't answer" initially. *Id*. at 119. Soon thereafter, however, Gary and Britt "started arguing and getting loud." *Id*. Britt grabbed a katana, a short, black sword that Judy had given to Gary in 2015. Gary told Britt "he better go put

[the katana] up," and Britt "went in the spare room and put it down." *Id*. Gary told Britt that he needed to leave the house, and Judy purportedly told Britt to "pack his stuff." *Id*. Judy then "walked out the [front] door" and "went and sat on the hill next to [the] house." *Id*. at 120. According to Judy, she "was trying to figure out who [she] could call to come get [Britt]." *Id*. at 121.

Britt, for his part, alleges that Judy never entered the house at all prior to the incident that occurred between him and Gary. According to Britt, he was outside of the house when Gary and Judy came home, and he went inside the house to try and apologize to Gary for letting him down for failing to take proper care of the house. Britt alleges that after he entered the house, he and Gary began to argue, and he "couldn't get a word in edgewise because [Gary] was already on top of insults." *Id*. at 390. Britt stated that he was afraid of Gary because Gary would "beat the retard out of [him], and, occasionally, . . . would actually threaten [his] life." *Id*. at 392. According to Britt, he made his way from one end of the living room to the other while staying at a distance from Gary, and his intention was to walk to his room to allow things to calm down. Britt stated that Gary immediately followed him into his room and was standing just inside the door next to a dresser. Britt then tried to leave his room, but Gary, who was approximately six feet two inches tall and weighed over three-hundred pounds, grabbed him around his torso and pinned him against the dresser. Britt yelled at Gary to get off of him and attempted to wrest free from Gary's grasp. According to Britt, he stated to Gary, "Get off me, bitch," and Gary responded by saying "he was going to show him what a bitch was." *Id*. Britt then

allegedly pushed free from Gary, stepped back, and grabbed the katana, which was sitting on the dresser. *Id*. at 393–94. Britt then allegedly said to Gary, "I love you, dad, I fucking love you," and then "swung [the katana] twice and . . . left [the room] because I could." *Id*. at 394, 395. Britt heard Gary start to yell when he swung the katana, but allegedly did not look at his father while he was swinging the katana or afterwards. After he swung the katana, Britt jumped around Gary and left the house. Britt, still wearing only a pair of underwear, ran down the driveway with the katana in his hand and continued walking away from the house. According to Britt, he had no idea how badly Gary was injured and he had not intended to harm Gary that evening.

Although Britt and Gary were the only ones present in the house at the time of the incident, it is undisputed that Gary used his cellphone to call 911 at some point prior to Britt swinging the katana at him. On the recording of the call, the 911 dispatcher can be heard answering Gary's call, but there is no response from Gary. Instead, during the first nearly two minutes of the call, Britt and Gary can be heard arguing with each other and then what sounds like a brief scuffle ensues. Britt can then be heard saying, "Get the fuck out of here, I'll do it." Aple. Br. at 6 (describing call). Gary responds, "You won't do shit." *Id*. Britt then states, "I'll cut you. I'll cut you." *Id*. at 6–7. More inaudible words are exchanged between the two men. Britt states, "What? What? What? What?" *Id*. at 7. It is not entirely clear what happens on the call after that, but it appears to be the sound of Britt swinging at Gary with the katana. Gary can be heard yelling, "Get the fuck out of here." *Id*. at 7.

During the latter portions of the call, a man, presumably Gary, can be heard yelling for help numerous times.

Judy, who was sitting on a hill beside the house, heard yelling from inside the house. She then heard Britt's voice yelling from outside the house. Judy got up and walked towards the house. As she was about halfway up the front steps of the house, she could hear Gary trying to yell for help. She entered the front door of the house and observed Gary lying next to a wall in the front room right across from the front door. There was a lot of blood on the floor and, according to Judy, Gary's left arm appeared to be "almost severed." *Id*. Judy was able to use a nightgown as a tourniquet on Gary's left arm. After doing so, Judy called 911. Gary was taken first to a local hospital, and then was life-flighted to a hospital in Tulsa. Gary ultimately suffered organ failure and died on September 25, 2019.

The deputy chief medical examiner for the State of Oklahoma performed an autopsy on Gary's body. The medical examiner identified seven areas on Gary's body that sustained sharp force injuries. Those included his right forehead, the back of his head, his right thumb, his right forearm, his left forearm, and his right thigh near the knee. The medical examiner concluded that the probable cause of death was complications from multiple sharp force injuries.

Law enforcement officers arrested Britt shortly after the incident on September 16, 2019. At the time of his arrest, Britt was still carrying the katana, which had blood on it.

Procedural history

On August 26, 2020, the government filed a criminal complaint charging Britt with one count of Murder in the First Degree in Indian Country, in violation of 18 U.S.C. §§ 1111(a), 1151, and 1153.[1] ROA, Vol. I at 14. Shortly thereafter, a federal grand jury indicted Britt on the same charge.

Britt moved for a competency determination, and the government joined in Britt's request. The district court ordered that Britt undergo a psychiatric evaluation to determine if he was competent to stand trial. Following the completion of that evaluation, the magistrate judge conducted a video competency hearing and found Britt "mentally competent to understand the proceedings against him and to assist in his defense." *Id*. at 36.

The case proceeded to a jury trial on July 13, 2021. The evidence concluded at the end of the second day of trial. On the third day, the parties gave their closing statements and the district court instructed the jury. After deliberating, the jury found Britt guilty of first degree murder as alleged in the indictment.

On March 30, 2022, the district court sentenced Britt to a term of life imprisonment and entered final judgment in the case. Britt has since filed a timely notice of appeal.

[1] Britt was initially charged with second-degree murder in Oklahoma state court. But, after the Supreme Court's decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), the state charges were dropped.

II

Britt argues on appeal, in pertinent part, that the district court committed reversible error by failing to instruct the jury on the theory of imperfect self-defense. For the reasons that follow, we agree with Britt.

a) Standard of review

We review for abuse of discretion a district court's refusal to give requested jury instructions. *Valdez v. McDonald*, 66 F.4th 796, 828 (10th Cir. 2023). "[A] defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." *Mathews v. United States*, 485 U.S. 58, 63 (1988); *see United States v. Beckstrom*, 647 F.3d 1012, 1016 (10th Cir. 2011) ("A criminal defendant is entitled to an instruction on his theory of defense provided that theory is supported by some evidence and the law.") (citation omitted). "For the purposes of determining the sufficiency of the evidence, we accept the testimony most favorable to the defendant." *United States v. Toledo*, 739 F.3d 562, 567 (10th Cir. 2014). This includes "giv[ing] full credence to the defendant's testimony." *Id*. (internal brackets and citation omitted). And "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*. at 568.

b) Applicable law regarding self-defense and imperfect self-defense

"A person may resort to self-defense if he reasonably believes that he is in imminent danger of death or great bodily harm, thus necessitating an in-kind

response." *Toledo*, 739 F.3d at 567. "Self-defense only requires the defendant's reasonable belief that deadly force was necessary, not that he exercise a duty to retreat or recognize the unavailability of reasonable alternatives." *Id*. at 568. "The burden of production to warrant a self-defense instruction is not onerous." *Id*. (internal quotation marks and citation omitted).

Closely related to self-defense, which we sometimes refer to as perfect self-defense, is the defense of imperfect self-defense. "[I]n both the perfect and imperfect self-defense contexts, the defendant must possess the subjective belief that deadly force was necessary to prevent death or great bodily harm." *United States v. Craine*, 995 F.3d 1139, 1156 (10th Cir. 2021). "[T]he 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. If the defendant subjectively believed that the use of deadly force was necessary to prevent death or great bodily harm to himself or others *and* his belief was objectively reasonable, he has a complete defense and "is entitled to a self-defense acquittal." *Craine*, 995 F.3d at 1156 (citations omitted). If, however, the defendant subjectively believed that the use of deadly force was necessary to prevent death or great bodily harm to himself or others, but his belief was not objectively reasonable, i.e., "if the factfinder concludes the defendant was criminally negligent in his belief," he is not entitled to a complete acquittal, but rather "is guilty

of involuntary manslaughter."[2] *Id*. (internal quotation marks and citation omitted). Thus, in summary, both perfect and imperfect self-defense require the defendant to "possess the subjective belief that deadly force was necessary to prevent death or great bodily harm, but only in the perfect self-defense context must the defendant's subjective belief also be objectively reasonable." *Id*.

c) Relevant procedural history

Prior to trial, Britt's counsel submitted a set of proposed jury instructions. One of those instructions, titled "THEORY OF DEFENSES," stated:

> Diamond Levi Britt is entitled to jury instructions on his theory of his defenses in the case. You are advised that Diamond Levi Britt raises three separate defenses to the charge contained in the Indictment. You should understand Diamond Levi Britt's defense position, so the issues raised during trial concerning the theory of defenses are squarely before you as the trier of facts.
>
> 1. To the charge of murder in the first degree, Diamond Levi Britt asserts the defense of self-defense, *which also includes the theory of an imperfect self-defense*.
> 2. To the required element of malice or malice aforethought in the charge of murder in the first degree, Diamond Levi Britt asserts the defense of a sudden quarrel/heat of passion.
> 3. To the required specific intent element of premeditation in the charge of murder in the first degree, Diamond Levi Britt asserts the defense of voluntary intoxication.
>
> The application of these defenses will be explained within these instructions.

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[2] The theory of imperfect defense "'operate[s] to negate [the] malice' element while admitting that an unlawful killing occurred." *United States v. Bellinger*, 652 F. App'x 143, 153 (4th Cir. 2016) (quoting *Burch v. Corcoran*, 273 F.3d 577, 587 n.10 (4th Cir. 2001)); *see Stephens v. Tilton*, 240 F. App'x 754, 756 n.2 (9th Cir. 2007) (imperfect self-defense instruction). In other words, "[a] defendant who proves an imperfect self-defense does not have the requisite mens rea to be guilty of [first]-degree murder." *United States v. Milk*, 447 F.3d 593, 599 (8th Cir. 2006); *see United States v. Serawop*, 410 F.3d 656, 664 (10th Cir. 2005) ("malice specifically requires committing the wrongful act without justification, excuse, or mitigation").

ROA, Vol. I at 169 (emphasis added).

Britt's set of proposed instructions also included separate instructions on "SELF-DEFENSE" and "IMPERFECT SELF-DEFENSE." *Id*. at 171–72. The proposed "IMPERFECT SELF-DEFENSE" instruction stated as follows:

> Diamond Levi Britt has been charged with first degree murder and has raised the defense of self-defense. If you find that the government has disproved the theory of self-defense beyond a reasonable doubt, you should continue to consider the alternative defense of imperfect self-defense.
>
> It is not required that the defendant be in actual danger or great bodily injury. If he honestly and reasonably believes that he is in apparent imminent danger, that his life is about to be taken or that there is a danger of serious bodily harm, that is sufficient.
>
> You are reminded that the burden of proof remains at all times on the government thus, before you may convict, you must find beyond a reasonable doubt that the government has satisfied its burden that the defendant did not act in self-defense. Therefore, if you have a reasonable doubt whether or not the defendant acted in self-defense, your verdict as to murder and the lesser included offenses of voluntary and involuntary manslaughter must be not guilty.

Id. at 172.

The government filed a motion in limine to preclude the issuance of some of Britt's proposed jury instructions. In particular, the government argued that the jury should not be instructed on self-defense or imperfect self-defense.

On the morning of the third day of trial, the district court held an instruction conference. At the outset of the conference, the district court asked the parties if they had any objections to the district court's proposed instructions. Those instructions,

as discussed below, included an instruction on self-defense. Notably, the government did not object to the district court's self-defense instruction.

The district court then turned to Britt's set of proposed instructions and overruled Britt's proposed Theory of Defenses instruction on the ground that the court's own instructions "encompass[ed] all of the points that are trying to be made in this Theory of Defenses instruction." *Id*., Vol. II at 450.

As for Britt's proposed instruction on imperfect self-defense, the district court stated that it found the instruction "to be confusing." *Id*. The following colloquy then ensued between the district court and Britt's counsel regarding that instruction:

> The Court: I think it would not help the jury at all. I think it would tend to add confusion, and it doesn't really explain—I think the point that is trying to be made—I think the point that is trying to be made is encompassed within the self-defense instruction that the Court has proposed.
>
> Do you have any additional comments to make on this one, sir?
>
> * * *
>
> Britt's counsel: I found the Tenth Circuit's case to be somewhat confusing in that regard, but it is the law because that's how they've ruled. I would encourage the Court, if my instruction is confusing, to at least address that case with an instruction that the Court finds less confusing, because I found the case to be difficult to try to decipher and make an instruction that would adequately address that issue, but it also is a critical issue to my client, I believe, in this case.
>
> The Court: And I agree. I mean, the self-defense instruction is going to be given. I think that's what's important. I would note that the cases that you cited here, the district court did give this imperfect self-defense instruction. I find it to be entirely confusing. The Court—I would also note the Tenth Circuit passed on that and really reviewed it only for plain error. So I'm not really persuaded that it's an important instruction. I don't think it adds anything. The only thing I think it

> would add would be confusion. So for that reason, I'm going to overrule your request for the Defense—Imperfect Defense instruction and grant the defendant an exception to that.
>
> Britt's counsel: But I think the essence of that imperfect self-defense instruction was that the defendant did not have to be in actual danger at the time, and it was his perceived danger and they gave the instruction, which is somewhat different than the standard self-defense instruction.
>
> The Court: All right. Thank you, sir. The Court will overrule your request, but note that for the record.

Id. at 450–52.[3]

At the conclusion of the evidence, the district court gave the jury instructions regarding the charge of first degree murder in Indian Country, as well as instructions on the lesser included offenses of second degree murder and voluntary manslaughter. The district court also instructed the jury on the defenses of voluntary intoxication and self-defense. The self-defense instruction stated:

> The Defendant has offered evidence that he was acting in self-defense. A person is entitled to defend himself against the immediate use of unlawful force. But the right to use force in such a defense is limited to using only as much force as reasonably appears to be necessary under the circumstances.
>
> A person may use force which is intended or likely to cause death or great bodily harm only if he reasonably believes that force is necessary to prevent death or great bodily harm to himself.

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[3] The Tenth Circuit case that Britt's counsel and the district court referred to, and were apparently confused about, is *United States v. Visinaiz*, 428 F.3d 1300 (10th Cir. 2005), which Britt's counsel cited in support of his proposed imperfect self-defense instruction along with *Toledo*. *See* ROA, Vol. I at 172. In *Visinaiz*, the defendant challenged the district court's instructions, including instructions on self-defense and imperfect self-defense, for the first time on appeal, and, consequently, this court reviewed those instructions only for plain error. 428 F.3d at 1308–11.

> To find the Defendant guilty of the crime charged in the Indictment or a lesser included offense, you must be convinced that the Government has proven beyond a reasonable doubt either:
>
> the Defendant did not act in self-defense; *or*
>
> it was not reasonable for the Defendant to think that the force he used was necessary to defend himself against an immediate threat.

Id., Vol. I at 324 (emphasis in original).

d) Analysis

Britt argues that the district court abused its discretion by refusing his counsel's request for an imperfect self-defense instruction. Aplt. Br. at 22. He argues in support that, "[a]s this Court held in *Toledo*, the self-defense analysis largely, if not completely, controls the analysis for imperfect self-defense." *Id*. at 23. He notes that "the district court found that the evidence was sufficient to warrant a self-defense instruction" and, by doing so, necessarily concluded that "there was sufficient evidence for a jury to find that [Britt] reasonably feared that [his father] might kill him or cause him great bodily harm." *Id*. Britt in turn argues that "[a]s *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." *Id*. at 23–24. "After all," Britt argues, "the only difference between the two theories is the 'reasonableness' of the defendant's belief." *Id*. at 24. "Thus," he argues, "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." *Id*. In sum, Britt argues that, "[g]iven that the district court found that a self-defense instruction was warranted, it was error for the court to deny [his] request for an imperfect self-defense instruction." *Id*.

The government argues in response that "Britt's proposed instruction" regarding imperfect self-defense "was flawed, with even defense counsel conceding the instruction was confusing," and, in any event, "[t]here 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." Aple. Br. at 26–27.

As an initial matter, we conclude that Britt's proffered imperfect self-defense instruction was legally incorrect and that the district court did not abuse its discretion by refusing to include it among the actual jury instructions. Britt's proffered instruction stated, in relevant part: "It is not required that the defendant be in actual danger or great bodily injury. If he honestly and reasonably believes that he is in apparent imminent danger, that his life is about to be taken or that there is a danger of serious bodily harm, that is sufficient." ROA, Vol. I at 172. As the government correctly notes, this language "g[ets] it exactly backwards" by "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.'" Aple. Br. at 27–28 (quoting Britt's proffered instruction). As we have explained, our case law makes clear that, for imperfect self-defense to prevail, a jury must instead find that Britt "subjective[ly] belie[ved] that deadly force was necessary to prevent death or great

bodily harm," but that his subjective belief in that regard was not "objectively reasonable." *Craine*, 995 F.3d at 1156.

Although the government also argues that it was not the function of the district court to correct the flaws in the proffered instruction or to otherwise provide an instruction that correctly stated the law regarding imperfect self-defense, the fact of the matter is that Britt's counsel conceded that the proffered instruction was confusing and in turn asked the district court to give the jury a less confusing and legally correct instruction on imperfect self-defense. Specifically, Britt's counsel stated to the district court: "I would encourage the Court, if my instruction is confusing, to at least address that case with an instruction that the Court finds less confusing, because I found the case to be difficult to try to decipher and make an instruction that would adequately address that issue, but it also is a critical issue to my client, I believe, in this case." ROA, Vol. II at 451. The district court responded by stating, in pertinent part, that "the self-defense instruction is going to be given" and "I think that's what's important." *Id*. The district court further stated that it found the imperfect self-defense instruction at issue in *Visinaiz* "to be entirely confusing," that the Tenth Circuit "reviewed [that instruction] only for plain error," and that it was "not really persuaded that" an imperfect self-defense instruction was "an important instruction." *Id*. Britt's counsel argued in response: "But I think the essence of that imperfect self-defense instruction was that the defendant did not have to be in actual danger at the time, and it was his perceived danger and they gave the instruction, which is somewhat different than the standard self-defense instruction."

Id. at 452. The district court stated: "The Court will overrule your request, but note that for the record." *Id*. This colloquy makes clear that Britt's counsel was asking the district court to instruct the jury on imperfect self-defense, even if the district court rejected the proffered instruction as confusing or improperly worded.

It is beyond dispute that the instructions actually given by the district court to the jury in this case did not address at all Britt's proposed theory of imperfect self-defense. Although the self-defense instruction given by the district court asked the jury to consider whether Britt "did [or did] not act in self-defense" and whether "it was [or was not] reasonable for [Britt] to think that the force he used was necessary to defend himself against an immediate threat," the verdict form did not require the jury to make specific findings on either of these issues. *Id*., Vol. I at 324. Therefore, the critical question we must answer is whether the district court erred by refusing to instruct the jury on Britt's proposed theory of imperfect self-defense. Key to that question is whether the evidence presented at trial was "sufficient for a reasonable jury to find in [Britt's] favor" on that defense. *Toledo*, 739 F.3d at 567.

The government argues that "[t]here was not sufficient evidence . . . 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." Aple. Br. at 29. According to the government, "[o]n the night of the attack, Gary and Britt were engaged in a typical father-and-son disagreement just as they had 'many times before,'" and that "[t]he only difference this time was Britt's behavior." *Id*. (quoting Judy Britt's

testimony, ROA, Vol. II at 120). The government also notes that "Britt suffered no injuries whatsoever from his interactions with Gary that night." *Id*.

The government, however, ignores entirely Britt's own testimony at trial and the applicable law regarding a defendant's testimony at trial. As we have held, "when deciding whether the evidence supports a particular jury instruction, a court must give full credence to the defendant's testimony," and "accept the testimony most favorable to the defendant." *Toledo*, 739 F.3d at 567 (internal quotation marks and citation omitted). Here, Britt testified that Gary began insulting him as soon as he walked into the house and then, when Britt attempted to get away by walking to his room, Gary immediately followed him into that room. Britt in turn testified that he was scared of Gary and wanted to escape from his room because Gary had threatened him many times before. According to Britt's testimony, Gary grabbed him around his torso and then used his significant body weight to pin Britt against the dresser when he attempted to leave the room. Britt testified that he "slipped up" and said "Get off me, bitch," to Gary, and that Gary responded by saying "[h]e was going to show me what a bitch was." ROA, Vol. II at 393. Britt testified that although he was able to pull away from Gary's grasp, he "knew that [Gary] was coming back at [him]," and that he believed he "was either going to be able to escape or [he] wasn't going to make it out of there." *Id*. at 394. And it was that belief, Britt testified, that led him to grab the katana, swing it twice at Gary, and then escape the room.

Giving full credence to Britt's testimony and accepting all of the other testimony at trial in the light most favorable to him,[4] as the district court presumably did in deciding that a self-defense instruction was warranted,[5] we conclude that there was sufficient evidence to support Britt's requested imperfect self-defense instruction. In other words, we conclude that Britt was entitled to have the jury decide whether he subjectively believed that he faced an imminent risk of death or great bodily harm from his father and, if he did, whether such belief was objectively reasonable (self-defense) or unreasonable (imperfect self-defense). We therefore necessarily conclude that the district court abused its discretion by denying Britt's counsel's request for an imperfect self-defense instruction. Notably, the district court made no attempt to assess the sufficiency of the evidence to support such an instruction, and instead, as we interpret the district court's comments in response to Britt's counsel's request, denied the request simply on the grounds that an instruction on imperfect self-defense was unnecessary.

[4] This includes, for example, Britt's biological mother's testimony that she made a report of Gary abusing him when he was four years old, and the other testimony indicating that Gary had a reputation as a bully and engaged in domestic violence with girlfriends and wives.

[5] Neither the government nor the dissent take issue with the district court's conclusion that the evidence presented at trial was sufficient to warrant a self-defense instruction. That failure is fatal to their arguments, because if the evidence was sufficient to allow the jury to reasonably find that Britt acted in self-defense, then the evidence was necessarily sufficient to allow the jury to reasonably find that Britt subjectively believed that he faced an imminent risk of death or great bodily harm from his father.

Because the district court erred by refusing to instruct the jury regarding imperfect self-defense, we must "apply the harmless error rule, asking whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *United States v. Kahn*, 58 F.4th 1308, 1317–18 (10th Cir. 2023) (internal quotation marks and citation omitted). "It is well-established that the burden of proving harmless error is on the government." *Id*. at 1318 (internal quotation marks omitted).

The government argues that "any instructional error was harmless beyond a reasonable doubt." Aple. Br. at 34–35. According to the government, "this was not a close case" because, "[a]side 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." *Id*. at 34. The government also notes that "[t]he jury rejected several lesser-included offenses and returned a verdict minutes after being released to deliberate." *Id*.

We reject the government's arguments. To begin with, the jury's decision not to convict Britt of the lesser-included offenses on which the district court actually instructed them tells us nothing about what the jury would have done if instructed by the district court on the theory of imperfect self-defense. Likewise, the relative speed of the jury's verdict provides us with no information to assess how the jury would have responded if properly instructed on the theory of imperfect self-defense. And, because the verdict form utilized by the district court did not ask the jury to make any

specific findings regarding Britt's theory of self-defense, we do not know the precise reason why the jury rejected that defense.

As for the strength of the evidence presented at trial, we agree that the government's case against Britt was strong. But we cannot say that it was entirely one-sided. Only two people were present inside the house immediately prior to, and when, Britt struck Gary with the katana. At trial, Britt testified and offered his version of what led to him using the katana to injure Gary. The jury could have accepted or rejected some or all of that testimony. *See United States v. Yazzie*, 188 F.3d 1178, 1185 (10th Cir. 1999) ("in determining whether to instruct on a lesser offense, the court must take into account the possibility that the jury might . . . make findings different from the version set forth in anyone's testimony" (internal quotation marks and brackets omitted)). For example, the jury could have found credible Britt's testimony that he subjectively believed that his life was in danger from Gary, but that Britt's subjective belief in that regard was not objectively reasonable. The jury could also, for example, have found credible Britt's testimony that he swung the katana at Gary in response to his subjective sense of danger, but rejected as not credible Britt's testimony that he only swung the katana twice at Gary. *See Brown*, 287 F.3d at 974 ("the defendant is entitled to the [lesser included offense] instruction even if the evidence supporting it is weak and depends on an inference of a state of facts that is ascertained by believing defendant as to part of his testimony and prosecution witnesses on the other points in dispute" (internal quotation marks omitted)).

Indeed, the only way we could determine that the district court's error was harmless beyond a reasonable doubt is if we concluded, as a matter of law, that no reasonable juror could find that Britt did not subjectively believe that he was in imminent danger of death or great bodily harm from Gary. But such a determination would be directly contrary to the district court's ruling at trial. By instructing the jury on Britt's theory of self-defense, the district court necessarily concluded as a matter of law that reasonable jurors could find that Britt had this subjective belief because it instructed them on his theory of self-defense. Notably, the government did not object to the district court's self-defense instruction, nor does it argue on appeal that the district court erred in instructing the jury on self-defense. All of which, we conclude, undercuts its current arguments that the evidence was insufficient to warrant an imperfect self-defense instruction and that the district court's failure to instruct the jury on imperfect self-defense was harmless beyond a reasonable doubt.

In the end, having determined that the district court abused its discretion in refusing to instruct the jury on imperfect self-defense as requested by defense counsel, and in turn having determined that this error was not harmless beyond a reasonable doubt, we conclude that the case must be remanded to the district court with directions to vacate the judgment and conduct a new trial.[6]

[6] Because we are ordering the judgment to be vacated, we find it unnecessary to address the other issue raised by Britt on appeal, which concerns the district court's refusal to admit at trial evidence of specific instances of violent conduct by Gary.

e) The dissent

As we read the dissent, it essentially offers two bases for rejecting Britt's argument that the district court erred by refusing his counsel's request for an imperfect self-defense instruction. As we shall proceed to explain, however, both of these bases lack merit.

First, the dissent asserts that "Britt never made an adequate proffer." Dissent at 1. More specifically, the dissent appears to be suggesting that because "Britt's proposed instruction was legally incorrect," the district court had no "responsibility to formulate a correct imperfect self-defense instruction." *Id.* at 1. We disagree. As we have explained, Britt's counsel conceded at the instruction conference that his proposed instruction on imperfect self-defense was flawed, but he then proceeded to ask the district court to instruct the jury, consistent with Tenth Circuit law, on the theory of imperfect self-defense. We are aware of no case law, and the dissent has cited none, that would permit a district court to summarily reject Britt's counsel's request under these circumstances. To the contrary, the Supreme Court has held, as we previously noted in outlining the applicable standard of review, that "a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." *Mathews*, 485 U.S. at 63. We therefore conclude that where, as here, defense counsel specifically requests an instruction on a legally viable defense that is supported by the evidence presented at trial, a district court is obligated to formulate and then tender to the jury such an instruction.

Second, the dissent asserts, in reliance on a newly-published Tenth Circuit case, i.e., *United States v. Sago*, — F.4th —, 2023 WL 4696258 (10th Cir. 2023), that the district court did not err in denying Britt's request for an instruction on imperfect self-defense because "no instruction was tendered" by Britt "on the lesser-included offense of involuntary manslaughter."[7] Dissent at 2. As we shall explain, however, the procedural posture of *Sago* and the arguments asserted by the defendant in *Sago* were entirely different from the case at hand. Consequently, *Sago* cannot reasonably be interpreted as imposing any specific procedural requirements that apply to the circumstances presented in the case at hand.

The defendant in *Sago*, Kyle Sago, was convicted by a jury on one count of first-degree murder in Indian country, two counts of possession of ammunition by a convicted felon, and one count of causing death by using a firearm in commission of a crime of violence. Sago appealed, arguing "that the [district] court plainly erred in instructing the jury on first- and second-degree murder without informing it that it could convict him of one of those offenses only if it found that he was not acting in the sincere (even if unreasonable) belief that the use of deadly force was necessary." 2023 WL 4696258 at *4. In other words, Sago argued on appeal that the district court plainly erred by failing to instruct the jury on the affirmative defense of

[7] The dissent also asserts that, because Britt did not tender an involuntary manslaughter instruction below and does not "address the lack of an involuntary manslaughter instruction being given on appeal," that "our review would be for plain error." Dissent at 2. This assertion, however, wholly ignores the actual issue raised on appeal by Britt, and instead attempts to replace it with an issue that the dissent mistakenly believes was created by the holding in *Sago*.

imperfect self-defense, even though Sago never requested such an instruction at trial. *Id*. at *1. Notably, Sago's specific position was that "when there is evidence of mitigation, the defendant is entitled to an instruction on the advantages to him of the mitigating circumstances (that is, acquittal of first- and second-degree murder) without an accompanying instruction on the possible negative consequences (conviction of the lesser-included offense of involuntary manslaughter)."[8] *Id*. at *6.

Not surprisingly, this court rejected Sago's position. In doing so, this court concluded that "it would be intolerable to instruct a jury that a mitigation affirmative

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[8] The dissent asserts that Britt, like Sago, "suggest[ed]" in the district court "that a mitigating defense instruction could be given without informing the jury that the defendant could still be guilty of a lesser offense." Dissent at 3. In support, the dissent cites to one page from Britt's trial brief. ROA, Vol. I at 144. In that trial brief, Britt argued that "the evidence at trial w[ould] establish the issue of whether [he] was acting in self defense or an 'imperfect self defense.'" *Id*. at 143. In connection with that argument, Britt cited to this court's decisions in *Toledo* and *Visinaiz*. And, in two passages that the dissent is apparently relying on, Britt quoted legally erroneous language from his proffered imperfect self-defense instruction that stated, in part: "Therefore, if you have a reasonable doubt whether or not the defendant acted in self-defense, your verdict as to murder and the lesser included offenses of voluntary and involuntary manslaughter must be not guilty." *Id*. at 144.

It is simply not reasonable, in our view, to infer from this quoted language that Britt was suggesting he could be acquitted if the jury found that he acted in imperfect self-defense. To begin with, these passages refer to "self-defense" and not "imperfect self-defense." Further, the passages refer to "the lesser included offenses of voluntary and *involuntary manslaughter*." *Id*. (emphasis added). Thus, if anything, the references to involuntary manslaughter, particularly when considered in light of Britt's proposed "HEIRARCHY [sic] OF HOMICIDE" instruction, which discussed the distinctions between "homicide offenses" including first degree murder, second degree murder, voluntary manslaughter, and involuntary manslaughter, suggest that Britt knew, consistent with this court's statements in *Toledo*, that a successful imperfect self-defense argument would result in his conviction for involuntary manslaughter. 739 F.3d at 569 (noting that if the defendant was "criminally negligent" in his "belief that deadly force was necessary to prevent death or great bodily harm," "then he is guilty of involuntary manslaughter").

defense (such as imperfect self-defense) would establish innocence of the charged offense while failing to instruct the jury that the mitigating circumstances only reduce culpability to that of a lesser-included offense." *Id*. "Doing so," this court stated, "could not possibly advance the cause of justice." *Id*.

The case at hand differs in at least two important respects from *Sago*. First, unlike the defendant in *Sago*, Britt properly preserved his arguments by timely asking the district court to instruct the jury on the affirmative defense of imperfect self-defense. Second, unlike the defendant in *Sago*, Britt is not asserting that he was entitled to an instruction on imperfect self-defense "without an accompanying instruction on the possible negative consequences (conviction of the lesser-included offense of involuntary manslaughter)."[9] *Id*. Instead, Britt argues *only* that the district court erred in denying his timely request for an instruction on imperfect self-defense.

Finally, to the extent the dissent is suggesting that *Sago* should be read as imposing a new procedural requirement that a defendant who requests an imperfect self-defense instruction must also simultaneously request an involuntary manslaughter instruction, we reject that suggestion. To begin with, nothing in *Sago* plainly imposes such a requirement. Nor could it, given that the defendant in *Sago* never timely requested an imperfect self-defense instruction and, thus, the sole focus

[9] We are not, as the dissent suggests, "impl[ying] that a request for an instruction on imperfect self-defense requires the district court to *sua sponte* instruct on involuntary manslaughter." Dissent at 2. Instead, given the procedural posture of this case and the arguments presented by the parties in this appeal, our sole focus is on whether the evidence presented at trial was sufficient to warrant an instruction on imperfect self-defense.

in *Sago* was on whether the district court had a duty to *sua sponte* instruct the jury on imperfect self-defense. Moreover, the record in this case makes quite clear that the district court itself did not perceive nor impose any such procedural requirement. Instead, as we have discussed, the district court rejected Britt's request for an imperfect self-defense instruction on an entirely different ground. Likewise, the government in this case has never argued that Britt failed to request an involuntary manslaughter instruction or, in turn, that any such failure permitted the district court to reject Britt's request for an imperfect self-defense instruction.

III

The case is REMANDED to the district court with directions to VACATE the judgment and conduct a new trial. The government's motion to maintain sealing of trial exhibits is GRANTED.

No. 22-7012, United States v. Diamond Levi Britt

KELLY, Circuit Judge, dissenting.

The court holds that the district court committed reversible error by failing to instruct on imperfect self-defense. Mr. Britt never made an adequate proffer, let alone tendered an involuntary manslaughter instruction, nor does he request one on appeal. The district court's incorrect evidentiary rulings were harmless error. Thus, I respectfully dissent and would affirm the judgment.

I.

Imperfect self-defense is a defense to malice aforethought murder. It requires a subjective belief on the part of a defendant that deadly force was necessary, although the belief is not objectively reasonable. United States v. Milk, 447 F.3d 593, 599 (8th Cir. 2006). The defense reduces murder to manslaughter. Id. As a defense to malice aforethought murder, the government has the burden to show that the defendant did not act in self-defense, i.e., did not have a subjective belief that deadly force was necessary. Cf. United States v. Woods, 59 F. App'x 319, 325 (10th Cir. 2003).

Relying upon a general statement in Mathews v. United States, 485 U.S. 58, 63 (1988), the court declares that a defendant is entitled to any instruction supported by the evidence. No one disputes that a defendant is entitled to an instruction on inconsistent defenses, but this does not obviate the requirement that a defendant seeking an instruction must request one and object "to any portion of the instructions or a failure to give a requested instruction." Fed. R. Crim. P. 30(a) & (d). Moreover, Rule 30(d) provides

"[f]ailure to object in accordance with this rule precludes appellate review, except as permitted under Rule 52(b)."

The court recognizes that Mr. Britt's proposed instruction was legally incorrect and that the district court did not abuse its discretion in rejecting it. Yet, the court still finds an abuse of discretion, holding that the district court had a responsibility to formulate a correct imperfect self-defense instruction. But that is only part of the problem as no instruction was tendered on the lesser-included offense of involuntary manslaughter. I R. 146–179. Nor does Mr. Britt address the lack of an involuntary manslaughter instruction being given on appeal, so our review would be for plain error.[1] See Aplt. Br. at 15–19; Aplt. Reply Br. at 18 (sole mention of the term manslaughter).

To the extent that the court implies that a request for an instruction on imperfect self-defense requires the district court to sua sponte instruct on involuntary manslaughter, Ct. Op. at 27, our recent caselaw suggests exactly the opposite. "[A] defendant is not entitled to a lesser-included-offense instruction unless the instruction has been requested at trial." United States v. Sago, 74 F.4th 1152, 1161 (10th Cir. 2023). In Sago, the

[1] Although the government conceded abuse-of-discretion review, we "are not bound by the government's concessions or stipulations on questions of law when reviewing alleged errors by the district court on appeal." United States v. Walker, 74 F.4th 1163, 1184 (10th Cir. 2023). The court points out that the district court did not refuse to give the instruction on the grounds that a lesser-included offense instruction was missing, nor did the government object on these grounds. Ct. Op. at 27. But on plain error review, the defendant has the burden to address, let alone demonstrate, plain error. United States v. Thompson, 518 F.3d 832, 866 (10th Cir. 2008). The failure to do so should result in rejection of such a claim. United States v. Leffler, 942 F.3d 1192, 1199–1200 (10th Cir. 2019).

defendant argued that a lesser included offense instruction could be given in the absence of his request. Our court rejected that principle. Id. The court attempts to distinguish Sago on the basis that Mr. Britt made a deficient request for imperfect self-defense, whereas Mr. Sago made no imperfect self-defense proffer whatsoever. Ct. Op. at 26–27. But the court overlooks two critical deficiencies in both cases: the suggestion that a mitigating defense instruction could be given without informing the jury that the defendant could still be guilty of a lesser offense, 1 R. 144, and the lack of a request for "the relevant lesser-included-offense instruction for involuntary manslaughter." Sago, 74 F.4th at 1154. The purpose of a proper request is to put both the court and government on notice of the defendant's intended theory. United States v. Anderson, 201 F.3d 1145, 1149 (9th Cir. 2000) ("The district court must be fully aware of the objecting party's position." (quoting United States v. Williams, 990 F.2d 507, 511 (9th Cir. 1993))).

At the charging conference, the court considered Mr. Britt's proposed hierarchy of homicide instruction and found it unworkable because, while it contained general descriptions of the offenses, it did not contain the elements. II R. 449. At best, the hierarchy of homicide instruction appears intended as an overview. Although Mr. Britt submitted proposed instructions on first- and second-degree murder and voluntary manslaughter, I R. 167–68, 174–75, 178–79, he did not propose an instruction on involuntary manslaughter. Indeed, the special verdict form proposed by Mr. Britt addresses only first-degree murder, voluntary manslaughter, and second-degree murder. Id. 180–81. And that is how the district court instructed.

After hearing objections from counsel, the district court (in an effort to ensure that nothing was missed) went through the instructions and took objections, one by one, II R. 456–60, and no objection was made to the lack of an involuntary manslaughter instruction. United States v. Walker, 74 F.4th 1163, 1187 (10th Cir. 2023) (finding "the alleged error is at most subject to plain error review[,]" where defendants raised no objection when the district court "asked if there were any objections to its proposed jury instructions, reviewing the instructions line by line."). As the court observes, if a defendant acts in imperfect self-defense, he is not entitled to an acquittal, but would be guilty of involuntary manslaughter. Ct. Op. at 10–11.

In this circuit, imperfect self-defense is not the end of the matter. A lesser-included offense should be requested (if that is what the defendant intends). See Sago, 74 F.4th at 1154; United States v. Toledo, 739 F.3d 562, 568–69 (10th Cir. 2014). Indeed, we have recently held "it would be intolerable to instruct a jury that a mitigation affirmative defense (such as imperfect self-defense) would establish innocence of the charged offense while failing to instruct the jury that the mitigating circumstances only reduce culpability to that of a lesser-included offense." Sago, 74 F.4th at 1160.

Prior to trial, counsel submitted a trial brief and proposed instructions concerning the hierarchy of homicide and imperfect self-defense. I R. 143–144; 166; 172, relying on Toledo, 739 F.3d at 568. The tendered imperfect self-defense instruction was incorrect by: (1) focusing on the defendant's objective (rather than subjective) belief of apparent danger requiring the use of deadly force, (2) omitting that such subjective belief be

objectively unreasonable, (3) not clearly indicating what offenses that imperfect self-defense applied to, and (4) stating that a successful defense results in acquittal of the charged offense and both voluntary and involuntary manslaughter. Id. 172; cf. Sago, 74 F.4th at 1160 (observing no appeals court had endorsed an instruction "in which the jury is informed that a mitigating affirmative defense is ground for acquittal of the charged offense but is not informed that the defendant could still be guilty of the lesser-included offense resulting from the mitigation"). Even on appeal, counsel cites no readily available instruction on imperfect self-defense that the court should have used,[2] let alone precisely what the charge should have been.

Although one definition of the offense of involuntary manslaughter was included in the defense's proposed hierarchy of homicide instruction, as the district court noted, it did not contain the elements. I R. 166; II R. 449. Moreover, the connection between that proposed definition — which appears to allude to criminal negligence — and the theory of imperfect self-defense asserted on appeal, is not at all clear. See Milk, 447 F.3d at 599 (describing the two paths to prove imperfect self-defense: evidence the defendant possessed an "unreasonabl[e] but tru[e] belie[f] that deadly force was necessary to defend himself" or that he "inadvertently caused the victim's death while defending himself in a criminally negligent manner"; relying on United States v. Brown, 287 F.3d 965, 975 (10th Cir. 2002) for the second formulation).

[2] The Tenth Circuit pattern jury instructions do not contain one. Tenth Cir. Crim. Pattern Jury Instructions (2021). I am not aware of any other circuit to have issued one.

And one can imagine tactical reasons not to advance such a theory, e.g., if the defense believed the case for self-defense was particularly strong, or if, as is apparent here, the defense intended to argue Mr. Britt acted on sudden provocation. I R. 140–43; 180–81; see Sago, 74 F.4th at 1162 (recognizing that "instructing on a questionable affirmative defense . . . [could] distract the jury from focusing on what defense counsel thinks is the best argument (in this case, that the killing was not premeditated)"); United States v. Smith, 521 F.2d 374, 377 (10th Cir. 1975) (defendant charged with first-degree murder and convicted of voluntary manslaughter; "The theory of appellant's case was self-defense, and the trial court properly instructed the jury that such a defense is a complete defense. The crime of involuntary manslaughter is inconsistent with the theory of self-defense."). In this case, over objection from the government to both perfect and imperfect self-defense instructions, I R. 187–94, the jury was instructed on defendant's requested heat of passion and self-defense theories. Id. 319, 321, 324.

The bottom line is our precedent does not require the trial court to craft multiple, viable instructions without explicit guidance from counsel. Cf. United States v. Nacchio, 519 F.3d 1140, 1157 (10th Cir. 2008), vacated in part on rehearing, 555 F.3d 1234 (10th Cir. 2009) (en banc) ("[W]ith respect to the refusal of the district court to issue . . . instructions, we are limited to those actually requested by a party."). The court nonetheless concludes error based on an unpreserved theory. In addition to diverging from our caselaw, the court's opinion exceeds our scope of review and interferes with the role of the advocates.

II.

The district court declined to admit specific acts of Gary's alleged prior violent conduct, ruling that while reputation and opinion testimony was admissible to prove character, specific instances of conduct were prohibited by Rules 404 or 405. See II R. 141–42, 290, 370. At the time of trial, it was unsettled in this circuit whether evidence pertaining to a victim's violent character in a self-defense case could be introduced in the form of specific acts via Rule 404(b). See United States v. Talamante, 981 F.2d 1153, 1157 (10th Cir. 1992). But as we have since made clear, under Rule 404(b), specific instances of the victim's past violent character, when known to the defendant, may be introduced to prove the defendant's state of mind. United States v. Armajo, 38 F.4th 80, 84 (10th Cir. 2022). Though specific-acts evidence is not per se excludable, whether any evidence sought to be introduced would meet the other requirements for admissibility is another matter.

Despite the evidentiary error, on this record, reversal would still not be warranted because any error in excluding the evidence was harmless beyond a reasonable doubt; in other words, it did not substantially influence the outcome of the trial. See United States v. Roach, 896 F.3d 1185, 1194–95 (10th Cir. 2018). The defense attempted to introduce evidence concerning Gary's tendency toward violence in domestic relationships. II R. 140–41. To that end, the jury heard Gary's wife Judy Britt's testimony that Gary had a "big temper," id. 143, Mr. Britt's mother's testimony that Gary was known to be "a bully," id. 373, and that Gary had been "domestically violent to everyone" he had been

with. Id. In other words, the point got across. To the extent that further evidence of Gary's historical acts of abuse could have been probative of Mr. Britt's state of mind on the night in question, it is not apparent how the instances the defense sought to introduce — uncertain events known to Mr. Britt's aunt and an altercation between Gary and an ex-wife from 5 years prior — would have much bearing.[3] See Armajo, 38 F.4th at 84–85. More to the point, Mr. Britt himself testified that he was "scared" of his father, Gary had threatened him previously, and "shot at" him on one occasion. II R. 392, 398. On this record, further evidence regarding specific instances would have added little to the evidence admitted. Thus, I would conclude that the error did not contribute to the verdict obtained.

For these reasons, I would affirm the district court's judgment.

[3] The court also limited the examination of Mr. Britt's mother Aaron Haggard to her knowledge of Gary's general reputation and excluded testimony about Ms. Haggard's alleged receipt of police reports detailing Gary's abuse of Levi at the age of four. II R. 369–70. Given the statements were offered for their truth, and no applicable hearsay exception is apparent, the testimony would otherwise have been inadmissible. See United States v. Tony, 948 F.3d 1259, 1263 (10th Cir. 2020) (recognizing that affirmance is warranted if, as a matter of law, it would have been an abuse of discretion to admit the evidence).