A22-0611

STATE OF MINNESOTA

IN SUPREME COURT

STATE OF MINNESOTA

Appellant,

v.

STEPHANIE LOUISE CLARK

Respondent.

RESPONDENT STEPHANIE LOUISE CLARK'S RESPONSE BRIEF

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STATEMENT OF THE ISSUES

1. **Partway through jury deliberations, the district court redefined "imminent" in the self-defense jury instructions to require that harm must "occur immediately." Did the district court's supplemental jury instruction materially misstate the law of self-defense and fail to tailor the instructions to the particular circumstances of intimate partner violence?**

   Ruling Below: After consulting with the parties, and over Ms. Clark's objection, the district court provided the jury with a supplemental instruction redefining "imminent." (Resp.Add.017–018.) Ms. Clark raised the jury instruction issue on appeal, and the court of appeals reversed her conviction in a unanimous decision. (App.Add.002.)

   Most apposite authorities:

   State v. Johnson, 719 N.W.2d 619 (Minn. 2006)
   State v. Hennum, 441 N.W.2d 793 (Minn. 1989)
   State v. Boyce, 170 N.W.2d 104 (Minn. 1969)
   State v. Hundley, 693 P.2d 475 (Kan. 1985)
   Minn. Stat. § 609.065

2. **A conviction must be vacated unless an instructional error is harmless beyond a reasonable doubt. Was the instructional error harmless because Ms. Clark's use of force was unreasonable as a matter of law?**

   Ruling Below: After consulting with the parties, and over Ms. Clark's objection, the district court provided the jury with a supplemental instruction redefining "imminent." (Resp.Add.017–018.) Ms. Clark raised the jury instruction issue on appeal, and the court of appeals reversed her conviction in a unanimous decision. (App.Add.002.)

   Most apposite authorities:

   State v. Koppi, 798 N.W.2d 358 (Minn. 2011)
   State v. Glowacki, 630 N.W.2d 392 (Minn. 2001)
   State v. Hodges, 716 P.2d 563 (Kan. 1986)

INTRODUCTION

Stephanie Clark is a victim of undisputed intimate partner violence. She was convicted of murdering her abuser. Her conviction rests on an erroneous jury instruction that the State no longer defends before this Court. This Court should reverse Ms. Clark's conviction and remand for a new trial because the instructional error was not harmless. Rather, the instructional error decided the case.

Partway through jury deliberations, the district court redefined "*imminent*" harm in the self-defense jury instruction to require that "harm will occur *immediately*." This erroneous re-definition of the term "imminent" stripped the jury of its ability to fully consider the history of intimate partner violence that Ms. Clark had experienced at the hands of DonJuan Butler when determining whether Ms. Clark had a reasonable fear of imminent death or great bodily harm. The violence included Mr. Butler holding a gun to Ms. Clark's head the day of the shooting and threatening to break Ms. Clark's ribs later that evening when her five-year-old son went to bed.

The court of appeals correctly held that the "district court materially misstated the law of self-defense by defining 'imminent' as 'immediately' and by failing to tailor the instruction to the unique circumstances of the case." *State v. Clark*, No. A22-0611, 2023 WL 2637490, at *1 (Minn. Ct. App. Mar. 27, 2023); (Appellant's Addendum at 2 [hereinafter "App.Add."]).[1] The court of appeals recognized that conflating the

[1] Ms. Clark includes parallel citations to both the reported version of the court of appeals decision and the slip opinion contained in the State's Addendum.

temporal concepts of "imminent" and "immediate" was prejudicial error in a criminal case involving self-defense by a victim of intimate partner violence. This is because redefining "imminent" to require immediate harm "places undue emphasis on the immediate action of the deceased" and "obliterates the nature of the buildup of terror and fear which [is] systemically created over a long period of time" in victims of intimate partner violence. *Clark*, 2023 WL 2637490, at *3 (quoting *State v. Hundley*, 693 P.2d 475, 479 (Kan. 1985)); (App.Add.8).

The State no longer defends the immediate-harm instruction that it successfully sought from the district court. Instead, the State asks this Court to "provide factors to guide judges as they fashion an instruction that will correctly instruct a jury how to consider the effect of intimate partner violence on the choice of a particular defendant to defend him or herself (or others) with deadly force." (Appellant State of Minnesota's Br. at 22 (Sept. 25, 2023) [hereinafter "Appellant Br."].) The State nonetheless seeks to uphold Ms. Clark's conviction, twisting both the record and overlooking crucial facts in its effort to obtain a reversal of the court of appeals' unanimous decision.

The district court's supplemental jury instruction was prejudicially erroneous. Ms. Clark should not have been required to "await a blatant, deadly assault before she [could] act in defense," nor should other victims of intimate partner violence that find themselves needing to act in self-defense. *State v. Gallegos*, 719 P.2d 1268, 1271 (N.M. Ct. App. 1986) (internal quotation marks omitted), *overruled in part on other*

grounds by State v. Alberico, 116 N.M. 156 (N.M. 1993). Such a requirement would "not only ignore unpleasant reality, but would amount to sentencing" victims like Ms. Clark "to 'murder by installment.'" *Id.* (quoting Loraine Eber, *The Battered Wife's Dilemma: To Kill or Be Killed*, 32 Hastings L.J. 895, 928 (1981)). This Court should affirm the court of appeals' well-reasoned decision, which ensures that Ms. Clark and other victims of intimate partner violence have the same quality of right to act in self-defense as someone who is threatened with harm by a stranger on the street.

STATEMENT OF THE CASE AND THE FACTS

A. Ms. Clark meets Mr. Butler and quickly becomes a victim of intimate partner violence.

In the words of the court of appeals, "the facts of th[is] case are tragic." *Clark*, 2023 WL 2637490, at *3; (App.Add.7). Ms. Clark is a victim of undisputed intimate partner violence. (*See, e.g.*, VII T.120[2]; Appellant Br. at 5.) An expert witness provided trial testimony about the various forms of abuse that perpetrators of intimate partner violence inflict on their victims. (*See* VII T.19–20; *see also* Respondent's Supplemental Addendum at 019 [hereinafter "Resp.Add."].) Nearly all were present here.

Ms. Clark met Mr. Butler, who also went by the name "Duke," on an online dating website in May 2019. (III T.69; VI T.55.) The two connected immediately. Mr. Butler was six-feet tall and "handsome." (VI T.56; Ex. 345.) Mr. Butler told

[2] "T" refers to the trial transcript of the jury trial held on October 6–14, 2021. The citation format is "[Volume] T.[Page Number]."

Ms. Clark that he had recently been released from prison and was living with his aunt. (VI T.56.) He reported not having much space to himself at his aunt's house, and said that "he wasn't comfortable" there. (VI T.57.) Ms. Clark empathized with Mr. Butler's housing situation and, a few weeks later, Mr. Butler moved himself into Clark's condo unit in a fourplex. (*Id.*; *see also* III T.7; VI T.154.) At first, the relationship was good. (VI T.58.) But Ms. Clark slowly and incrementally became a victim of intimate partner violence. Ms. Clark explained at trial that "the way it happened, you know, it's like I really didn't notice, and then it just became normal so quickly." (VI T.85.)

Mr. Butler used various tactics to abuse Ms. Clark. One of these tactics was economic abuse. (*See* Resp.Add.019.) Mr. Butler made Ms. Clark change to a lower-paying job because there were "too many men" at her place of employment. (VI T.54, 79.) Ms. Clark switched from working in construction, making good and quickly-raising pay at around $18/hour, to working in a call center, making up to only $14/hour. (VI T.54, 64, 79, 82.) Mr. Butler did not have a job, but he controlled the money in the household, including Ms. Clark's. Ms. Clark would cash her checks and give the money to Mr. Butler, who "was in control of it all." (VI T.82–84.)

Mr. Butler used emotional abuse to exert control over Ms. Clark. (*See* Resp.Add.019.) Mr. Butler called Ms. Clark names, like "fat bitch." (VI T.87.) Mr. Butler established rules that he expected Ms. Clark to follow. (VI T.101–102 ("Q. How'd you keep all the rules straight? A. It was really hard. They're constantly changing. You can't really keep them straight. It's – I don't know. I tried.").) Some of these rules

operated to keep Ms. Clark in close and constant contact with Mr. Butler. Ms. Clark was not "allowed to leave unless he said [she] could" and, even when she left the house, she "had to stay in contact with him either through text or phone calls." (VI T.63.)

Mr. Butler isolated Ms. Clark from her loved ones. Before meeting Mr. Butler, Ms. Clark's mom would "come over regularly." (VI T.61.) But after Mr. Butler moved in, Ms. Clark's mom "never" came over. (VI T.37–38, 61.) In fact, Ms. Clark was not allowed to have *any* visitors in the home she owned—not even family. (VI T.61.) Ms. Clark also stopped spending time with her family outside her home. She no longer had dinners with her parents, something that she and her son used to do nearly daily. (VI T.35, 61.) She limited contact with her son's father, Brandon Carlisle-Maynard, Sr. The two co-parents went from speaking multiple times each week to talking occasionally and only while Ms. Clark was on speaker phone. (VI T.42–44, 52–53, 55.) When the two co-parents did see each other, it was a quick in-and-out with "no talking." (VI T.42.) Mr. Butler even prohibited Ms. Clark from attending a birthday party that Carlisle-Maynard threw for his and Ms. Clark's son a few weeks before the shooting. (VI T.104.)

Ms. Clark's loved ones noticed changes in Ms. Clark's behavior and, as the State acknowledges in its brief, corroborated Ms. Clark's testimony regarding the abuse. (*See* Appellant Br. at 5–6.) Ms. Clark's parents observed that their daughter would always be in phone contact with Mr. Butler when she was around them. (VI T.37.) Her

parents saw Ms. Clark sometimes "wince in pain," including the day of the shooting. (VI T.15, 35.) One of Ms. Clark's male friends even showed up at Ms. Clark's parents' house, because Ms. Clark "hadn't been returning his calls and he was concerned." (VI T.62.) When Mr. Butler found out, he made Ms. Clark delete that friend's contact information from her phone. (*Id.*)

Intimidation was yet another way that Mr. Butler maintained power and control over Ms. Clark. (*See* Resp.Add.019.) Mr. Butler ensured that the condo was full of firearms. In late May or early June 2019, Mr. Butler first moved in with Ms. Clark. (VI T.57.) When Mr. Butler moved in, Ms. Clark owned a single hunting firearm that she kept at her parents' house. (VI T.26–27, 94–95.) By January 2020, Mr. Butler had made Ms. Clark retrieve that firearm from her parents' house and buy six more firearms, meaning that Ms. Clark went from having zero firearms in her home to having seven. (VI T.65, 94.)[3] Mr. Butler had rules about where the guns had to be in

[3] The new firearms were as follows. First, a Smith & Wesson .22 revolver, which was Mr. Butler's and purchased around November 2019. (VI T.65.) Second and third, two model S333 Thunderstruck .22 revolvers (".22 Thunderstruck(s)"), purchased in the new year. (*Id*.; *see also* III T.181.) One was Mr. Butler's. The other was for Ms. Clark to always carry on her person. (VI T.119, 163.) Fourth, a Charter Arms .38 Special caliber revolver (".38 Charter Arms"), which Mr. Butler made Ms. Clark keep under her pillow at night. (III T.181; VI T.68, 180.) Fifth, a Taurus Raging Judge ("Raging Judge") revolver, which was Mr. Butler's favorite gun. (VI T.66.) The Raging Judge was "very large" and purchased in early January 2020. (IV T.101.) And finally, a Smith & Wesson Governor ("Governor"), because Mr. Butler wanted Ms. Clark "to have something similar to his Raging Judge." (VI T.66.) Ms. Clark had to keep the Governor in her bedroom "side table in the bottom drawer out with the box open, fully loaded." (VI T.66–67.)

the house, including a requirement that both he and Ms. Clark sleep with a gun under their pillow. (VI T.68–70.) Mr. Butler required that all the guns be fully loaded at all times, and that Ms. Clark always carry a gun if she "was to leave the house." (VI T.68–69, 71, 98.) When he was upset, Mr. Butler would pace with his Raging Judge, the largest gun in the house. (VI T.85–86, 81–92; *see also* Ex. 151 (photo of Raging Judge).) He paced between the kitchen and the bedroom, down the short, main hallway in the condo. (VI T.87–88, 106; *see also* Resp.Add.041 (photograph of hallway); V T.132.)

And finally, Mr. Butler physically abused Ms. Clark and threatened harm. The physical abuse began around July 2019. (VI T.88.) At first, Mr. Butler, who was significantly taller than Ms. Clark, would push Ms. Clark around and kick her. (VI T.77; *see also* VII T.70–71 (closing argument discussing size differences between Clark and Butler).) Over time, Mr. Butler's violent behavior escalated. When Ms. Clark did not follow Mr. Butler's ever-changing rules, Mr. Butler would "[p]unish[]" her. (VI T.75.) A nearly daily punishment in the new year was sending Ms. Clark to the "kneeling spot," a specific place in the living room where Mr. Butler would make Ms. Clark kneel with her face toward the glass door. (VI T.75–76; *see also* Ex. 356 (picture of kneeling spot).) There, Mr. Butler slapped the back of Ms. Clark's head. (VI T.76.) He pushed her face into the glass door. (*Id.*) One time when Ms. Clark was in the kneeling spot, Mr. Butler held a gun to the back of her head, and she heard him pull the trigger back. (VI T.78.) Mr. Butler also threatened Ms. Clark's family. (VI T.100.) He told Ms. Clark that he would "shoot up [her] home, [her] parents' home" if she left him. (VI T.101.)

The evidence of Mr. Butler's aggressive behavior extended beyond bruises on Ms. Clark's body. A week or two before the shooting, Ms. Clark failed to answer a phone call from Mr. Butler within one ring—as was expected of her—because she was helping her son in the bathroom. (VI T.72.) Mr. Butler was furious when he came home. Ms. Clark testified that he "started yelling, pushing me around, kicking me, slapped me upside the back of the head." (VI T.73.) Mr. Butler unsuccessfully tried to break Ms. Clark's phone by throwing it against the wall. When that was unsuccessful, Mr. Butler made Ms. Clark smash *her own* phone with a hammer. (VI T.72.) Crime-scene investigators saw and photographed the smashed phone in the condo the day of the shooting. (Resp.Add.050; V T.59; Ex. 28.) Mr. Butler also broke cabinetry. Two days before the shooting, he smashed a hole in the bathroom cabinet when Ms. Clark was at work. (Resp.Add.043; Exs. 61, 327–29 (pictures of damage); V T. 80; VI T.108.) And the day before the shooting, Mr. Butler smashed a hole in a kitchen cupboard, angrily believing that Ms. Clark was hiding money. (Resp.Add.040; III T.219; V T.80, VI T.109; Ex. 330 (picture of damage).) This physical damage was likewise documented by crime-scene investigators. (Exs. 61, 327–29; Ex. 330.)

Ms. Clark never spoke back to Mr. Butler or questioned his rules. (VI T.87.) Ms. Clark never told anyone about Mr. Butler's abuse. (VI T.14, 85.) Ms. Clark never thought of leaving Mr. Butler. (VI T.85). He was "very loving." (*Id.*) She believed that they "could help each other." (*Id.*) And it would not have been "safe" to run away. (VI T.100.)

B. Fearing for her and her son's lives, Ms. Clark shoots Mr. Butler.

Mr. Butler's rage intensified the week before the shooting, with Mr. Butler pushing, kicking, and slapping Ms. Clark nearly daily. (VI T.107–08.) The abuse came to a head on March 5, 2020.

March 5 started like any other day. Ms. Clark went to work at the call center. Mr. Butler picked her up at 3:30 PM. (VI T.110.) Then, at Mr. Butler's suggestion, Ms. Clark went into a gas station convenience store to pick up some Swishers. (VI T.110–11.) Mr. Butler waited in the car, unnecessarily parking at the diesel fuel pump so that he could watch Ms. Clark while she was in the store. (VI T.112, 114.) That is when Mr. Butler became enraged. Ms. Clark gave a male standing next to her in the checkout line a few one-word responses to questions that he had asked. (VI T.111.) This broke one of Mr. Butler's rules—Ms. Clark had spoken to another man. (*Id.*)

Mr. Butler became furious and accused Ms. Clark of giving out her phone number. (VI T.111–12.) The punishment began right when they got home. Mr. Butler pushed Ms. Clark into a wall. (VI T.116.) Mr. Butler called Ms. Clark names, including whore, bitch, and slut. (*Id.*) Mr. Butler made Ms. Clark kneel in the kneeling spot, and he punched her in the back. (VI T.116–117.) The first time that Ms. Clark knelt in the kneeling spot, Mr. Butler held a gun to the back of her head. (VI T.117, 150.) Mr. Butler made Ms. Clark sit in a chair and hit her in the chest. (VI T.118.) These beatings were different from the past physical abuse because instead of slapping and shoving

Ms. Clark, Mr. Butler was "using his fists, and he's making contact hard, like he was in a fight." (VI T.119.)

Around 5:00 PM, Ms. Clark left to pick up her son from her parents' nearby house. (VI T.120, 172.) Ms. Clark believed that was the end of the physical abuse because Mr. Butler had never before abused her in front of her five-year-old son. Ms. Clark thought that "he'd be calm" when she returned with her son because, as she testified, "he had me go get my son" and "[h]e doesn't do that unless it's over." (VI T.121.)

As soon as Ms. Clark returned with her son, however, she realized that this night was different. When Ms. Clark and her young son walked in the door, Mr. Butler did not acknowledge Ms. Clark's son, as he always did. (VI T.122.) Ms. Clark was "scared," and put her "son in the shower right away to get him out of the situation." (VI T.122–23.) When Ms. Clark came back from getting her son in the shower, Mr. Butler made her return to the kneeling spot and began punching her with a closed fist. (VI T.123–24.) He threatened her, saying: "Wait for tonight. Wait for him to go to bed. I'm going to break your ribs." (Resp.Add.006.)

Ms. Clark eventually got her son out of the shower. She went into the kitchen to make her son a sandwich. (VI T.125.) Mr. Butler started pacing "really fast." (VI T.126.) This was also different—Mr. Butler did not usually pace in front of Ms. Clark's son. (VI T. 88, 92.) Ms. Clark's son sat at the dining room table, eating a peanut butter and jelly sandwich. (VI T.127; *see also* Ex. 343 (picture of partially eaten

sandwich).) Mr. Butler threw a basketball at Ms. Clark's face when she was in the kitchen, in front of her son. (Resp.Add.005.) Mr. Butler continued pacing up and down the hallway, sometimes quietly and sometimes shouting at Ms. Clark. (VI T. 126–28.)

Ms. Clark was terrified. Mr. Butler was engaging in his threatening and abusive behavior when her young son was around, although he usually kept "everything away from him." (Resp.Add.005.) He had promised to break her ribs that night, and Mr. Butler always "follow[ed] through with his threats as best" as he could. (Resp.Add.006.) Ms. Clark provided the following trial testimony about what was going through her head shortly before the shooting:

> Q. What did you think he was going to do at that point?
>
> A. I thought he was gonna beat me to death.
>
> Q. Were you worried about your son?
>
> A. Yes.
>
> . . . .
>
> A. I remember feeling terrified. I remember feeling like I wasn't gonna wake up. I remember being scared for my son.

(Resp.Add.006-007.)Mr. Butler continued to pace back and forth between the kitchen area, where Ms. Clark's son was eating dinner, and a nearby bedroom that housed multiple loaded firearms. (VI T. 126–28.) Ms. Clark sat down in a chair and felt her .22 Thunderstruck, which had fallen out of her pocket earlier that evening when she had raised her knees to protect herself from some of Mr. Butler's blows. (*See* Resp.Add.039; Ex. 78.) Ms. Clark grabbed the .22 Thunderstruck and approached

Mr. Butler in the hallway. She remembers Mr. Butler turning around to face her and "just remember[s] pulling the trigger." (Resp.Add.007.)

The details of the remainder of the shooting are largely unknown due to Ms. Clark's fragmented memory.[4] Mr. Butler backed up and turned around. (*Id.*) He went into the back bedroom, which contained at least four loaded firearms. (Resp.Add.039, 047; *see also* VII T.127 (closing argument that State had "no reason to doubt that [the fourth] gun was in the box" pictured by Butler).) The State conceded at oral argument below that we will never know "whether [Mr. Butler] was going for" one of the many firearms in that bedroom. (Oral Arg. Audio at 22:55–23:01, *available at* https://www.mncourts.gov/CourtOfAppeals/OralArgumentRecordings/ArgumentDetail.aspx?rec=2366.) There is one bullet hole in the wall to the lefthand side of the bed. (V T. 28; *see also* Resp.Add.042 (picture of bedroom); Ex. 88 (photo of bullet hole).) Ms. Clark recalls Mr. Butler sliding over the bed to the righthand side, heading toward where the Governor would have been stored. (VI T.132.) Then, although Ms. Clark has no recollection of doing so, she grabbed and fired a medium-caliber revolver that was usually on her side of the bed, the .38 Charter Arms. (VI T.132–33, 179–80.) One of the five medium-caliber shots hit Mr. Butler in the head and was "immediately incapacitating." (V T.217–18.)

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[4] Expert witness Dr. Mary Kenning testified about the brain's inability to encode and later recall events that occur during periods of significant trauma. (VI T.190–91.)

The next thing that Ms. Clark remembers is Mr. Butler saying, "I'm dead." (VI T.133.) She then recalls dropping the gun in her hand, grabbing her son, and fleeing the condo. (*Id.*) Mr. Butler died from multiple gunshot wounds before law enforcement arrived. (III T.123; V T.188.). According to the autopsy, Mr. Butler was shot with the .22 Thunderstruck in his left torso, right-hand shoulder, and middle lower back. (V T.200–04; *see also* Ex. 205.) Mr. Butler was shot with the .38 Charter Arms in his left arm and head. (V T.199, 207–08; *see also* Ex. 205.) There are other wounds, including to Mr. Butler's thumb, for which the medical examiner did not state whether they were caused by small- or medium-caliber bullets. (*See* Ex. 205.) Many of Mr. Butler's wounds were only skin deep or to soft tissue, including all the shots with the .22 Thunderstruck. But he sustained one lethal gunshot wound to the right side of his head. (V T.217; *see also* Ex. 205.)

C. The initial investigation and Ms. Clark's police statement.

When Ms. Clark fled the condo with her son, she immediately ran to her neighbor's condo unit across the hallway. The neighbor called 911, and law enforcement quickly arrived on the scene. (III T.145; Ex. 203.) Ms. Clark complied with all law enforcement requests, exiting the fourplex with her arms up. (III T.28, 87.) Officers found Mr. Butler in the back bedroom, between the wall and Ms. Clark's side of the bed. (III T.20; *see also, e.g.*, Resp.Add.042; Ex. 51.) His right foot was up on the bed. (III T.20.) Law enforcement quickly learned that Mr. Butler had been hitting Ms. Clark. (III T.84 ("[I]t was updated to the female had shot the

boyfriend and that the boyfriend had been punching her.").) Ms. Clark's son told a neighbor: "Mom got hurt. She was hurt." (VII T.33.)

Officers failed to find all the loaded firearms in the condo during their search of the crime scene. Officers found the two guns used in the shooting—the .22 Thunderstruck and .38 Charter Arms—on a chaise lounge in the living room. (III T.220; V T.141; *see also* Resp.Add.039 (crime scene sketch); Ex. 79.) Officers found three other guns in the back bedroom. Two were on Mr. Butler's bedside table (the second .22 Thunderstruck and the .22 Smith & Wesson revolver) and Mr. Butler's Raging Judge was on the bed. (Resp.Add.039; III T.222, 227–28; V T.141–42; Ex. 54; Ex. 83.) What officers did not "notice," in their words, was the closest gun to Mr. Butler's body. (V T.171.) Pictures taken by a crime-scene investigator show a blue-and-white Smith & Wesson box containing the Governor on the floor near Mr. Butler. (*See* Resp.Add.049; Exs. 311, 322A, 322B; *see also* Exs. 316, 317, 359, 360, 361 (pictures of Governor box).) The Governor box is among items that appear to have come out a pulled-out drawer that is chipped in the back left-hand corner, as though the drawer were forcefully removed from the dresser. (*See* Exs. 319, 321-D, 322B, 323, 367, 368, 369.)[5] The four guns in the bedroom were fully loaded, including the

[5] Crime-scene investigator Bonnie Sarazin attempted to explain the failure to locate the Governor because it would have required stepping over Mr. Butler and possibly contaminating or jeopardizing evidence. (III T. 235.) Of course, at some point while crime-scene investigators were still on the scene, the medical examiner

Raging Judge on the bed and the Smith & Wesson Governor on the floor near Mr. Butler. (V T.53, 56.)

As some investigators searched the condo, others interacted with Ms. Clark. Ms. Clark reported some injuries although, as she would throughout the night, she minimized Mr. Butler's abuse. Ms. Clark met with EMTs and mentioned back pain from being punched. (III T.127.) She was then arrested and transported to the Maple Grove police station. (III T.98–99; IV T.97.) There, Ms. Clark told lead detective Melissa Parker that her back hurt and that she was "in extreme pain." (IV T.111.) Detective Parker and another officer took only six pictures of the nascent bruising on Ms. Clark's body. (III T.102, 194; *see also* Resp.Add.036–038; Exs. 3–5, 8, 10-11.) The officer photographing Ms. Clark did not check Ms. Clark's entire back or sides of her body for injuries. (III T. 201–05; IV T.146–47.)[6] Detective Parker wrote in her report that Ms. Clark had "[a] single bruise on [her] left side." (IV T.150.) But even the few photographs taken by law enforcement show more than one bruise *and* bruising forming on Ms. Clark's right side. (V T.11; *see also* Resp.Add.036–038.)[7]

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removed Mr. Butler's body. (*Id.*) The Smith & Wesson box still remained visible. (Resp.Add.047)

[6] Officers could have thoroughly searched and photographed Ms. Clark's entire body because they received a search warrant that authorized removing Ms. Clark's clothing and photographing her. (IV T.105–06.)

[7] In the week after the shooting, Ms. Clark's bruising worsened. On March 12, 2020, Detective Parker took pictures of the more-fully-formed bruising on Ms. Clark's body. (IV T.112–13; *see also* Resp.Add.045–046, 048; Exs. 198–199, 209–

Detective Parker took Ms. Clark's videorecorded statement at 1:00 AM the morning of March 6. (Ex. 202; Ex. 202-A; *see also* Resp.Add.020.)[8] The interview lasted nearly an hour. In the video, which is one of the most important pieces of evidence in the case, Ms. Clark appears curled up in chair and is wrapped in a blanket. (*See generally* Ex. 202.) Ms. Clark does not remember most of the interview. (VI T. 88.)

During the interview, Ms. Clark told Detective Parker about the Smith & Wesson Governor revolver that was located near Mr. Butler's body. (V T.37.) Ms. Clark said "there's a Governor over there [by Ms. Clark's wall-side dresser] too" and that it "was in the box." (Resp.Add.029.) But Detective Parker never followed up with the crime-scene investigators still on the scene to ensure that they located and collected the Governor, and they did not do so. (V T.49–50.)

Ms. Clark also recounted, but significantly minimized, Mr. Butler's abuse. Detective Parker herself acknowledged at trial that Ms. Clark was "hesitant at some points" to talk about the abuse. (V T.75–76.) Ms. Clark avoided directly answering questions. For example, Detective Parker asked if Mr. Butler's anger "would progressively get, has gotten worse?" (Ex. 202-A at 6.) Ms. Clark responded by saying

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303, 307–310.) Ms. Clark had at least four different areas of bruising up the whole right side of her torso. (IV T.114; *see also, e.g.*, Exs. 307, 309.) Bruising was also visible on Ms. Clark's left side and front left torso. (IV T.114; *see also, e.g.*, Resp.Add.048; Ex. 302–303, 308.)

[8] Resp.Add.020-Resp.Add.035 are excerpts from Ex. 202-A, a transcript of Exhibit 202, the video recording of the interview.

that "[i]t got better at one point for a while," but she did not address whether the abuse then got worse again. (*Id.*) Detective Parker said, "he never threatened you with a gun, never said he was going to kill you, right?" (Resp.Add.034.) Ms. Clark responded, "Not *today*, no," but did not address whether he made such a threat on other days. (*Id.* (emphasis added).) At another point, Detective Parker asked for confirmation that there was only "one time [Mr. Butler] would have taken a gun and pointed it at" Ms. Clark before March 5, the day of the shooting. (Resp.Add.034–035.) Ms. Clark responded by saying "[t]hat was the one time he had it in single action"—meaning, with the hammer cocked back—"pointed at me, yeah." (*Id.*)[9] Detective Parker did not ask if Mr. Butler ever pointed a gun at Ms. Clark without the hammer cocked back and ready to fire. Time and again, Ms. Clark did not fully answer the investigators' questions about Mr. Butler's abuse, and investigators did not ask logical follow-up questions that should have been triggered by Ms. Clark's incomplete responses.

Ms. Clark provided an account of the day of the shooting during the 1:00 AM interview, which was largely consistent with Ms. Clark's trial testimony:

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[9] The State asserts that Ms. Clark said that "D.B. held a gun to her head on one occasion." (Appellant Br. at 5.) Actually, Ms. Clark said that Mr. Butler held a gun to her head one time "in *single action*." (Resp.Add.035 (emphasis added).) Ms. Clark did not say that was the only time Mr. Butler ever held a gun to her.

- Mr. Butler thought that Ms. Clark "was talking to someone" at the convenience store and "got mad." (Resp.Add.022.).) He accused Ms. Clarking of giving the man her phone number. *(*Ex. 202-A at 9.)

- Mr. Butler beat Ms. Clark before she went to pick up her son and while her son was in the shower. (Resp.Add.022–023.) He hit her with a fist. (Resp.Add.024.) He hit her when she was sitting in a chair. (*Id.*) Mr. Butler also threw a basketball at Ms. Clark's face. (*Id.*)

- Mr. Butler told Ms. Clark to "just wait" until her son went to sleep and said that he was "going to break some ribs tonight." (Resp.Add.022.)

- It was unusual for Mr. Butler to beat Ms. Clark in front of her son: "He tries to keep, you know, he always tries to keep it away from him." (Resp.Add.026.)

- Ms. Clark was concerned for her son: "I just kept thinking about if he was going to do something to me, nothing going to stop him from doing something to him." (Ex. 202-A at 11.)

- Ms. Clark was scared: "I don't want him to hit me. I don't want him to do anything to my son. I don't want my son to see any of it. Or hearing anything." (Resp.Add.027.)

- Ms. Clark grabbed the .22 Thunderstruck and followed Mr. Butler. She explained: "He turned and I just shot. I don't. I just kept shooting. He tried jumping over the bed and I just kept shooting." (*Id.*)

- Mr. Butler had a gun in his hands "at one point" that night when he was pacing but had "put it down" when Ms. Clark shot him. (Resp.Add.026.)

- Ms. Clark did not remember grabbing the second gun. (Resp.Add.032; Ex. 202-A at 12.) The .38 Charter Arms was probably on the bed and is usually "on the side table or under [Ms. Clark's] pillow." (Resp.Add.028.)

Despite the State's suggestion otherwise, Ms. Clark *never* said that she shot the .38 Charter Arms while Mr. Butler was immobilized on the floor. (*See* Appellant Br. at 8.)

She was clear that she did not remember grabbing or firing the second firearm. (Ex. 202-A at 12.)

Detective Parker tried to get Ms. Clark to admit that there was a different motive—perhaps anger—for the shooting. Ms. Clark stood firm that she acted out of fear. All told, Clark said that she was "scared" nine times during the interview, including when repeatedly pressed by Detective Parker to suggest another motive.[10] Ms. Clark was "afraid it wouldn't end." (Resp. Add.032.)

D. The jury convicts Ms. Clark of murder after the district court issues a supplemental definition of the term "imminent."

Less than 24 hours after the shooting, and before the bruising on Ms. Clark's body had fully formed, Detective Parker referred murder charges against Ms. Clark for prosecution. The State charged Ms. Clark with second-degree murder with intent – not premeditated, in violation of Minn. Stat. § 609.19.1(1). (Complaint, Index #1 (Mar. 6, 2020).)

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[10] Resp.Add.024 ("Q. What was the reason for shooting him? A. I was scared."); *id.* ("Q. Did you mean to kill him? A. No. (INAUDIBLE) I was just scared. I don't remember."); *id.* (Q. I mean there had to be some anger in there, right? I mean. A. I was scared. That was it. I was scared."); Resp.Add.030 (Q. Why do you think you shot him? A. I'm scared. I was scared."); Resp.Add.032 ("A. So what did you mean by you just wanted him to stop talking? A. I don't know. I was, I was scared. He always does what he's gonna say he's gonna do."); *id.* ("A. Did you mean for him to die? A. No. I don't know why. I don't know. I was scared and I just didn't want him hitting me. I was afraid it wouldn't end.").

The sole issue in dispute at trial was whether Ms. Clark acted in self-defense, having a reasonable fear of imminent death *or* great bodily harm at the time she shot Mr. Butler. Ms. Clark testified in her defense, describing the abuse she suffered at Mr. Butler's hands and hear fears for her and her son's safety the day of the shooting. (*See generally* VI T.50–183.) Ms. Clark also presented the testimony of two expert witnesses—Ms. Melissa Scaia and Dr. Mary Kenning. Ms. Scaia provided expert testimony on battered women's syndrome.[11] She explained that perpetrators of intimate partner violence use a variety of tactics to maintain power and control over their victims, including isolation, controlling finances, coercion and threats, and intimidation. (VII T.20–24.) Ms. Scaia answered some of the common questions thrown at victims and repeatedly raised by the State at trial—why not tell someone about the abuse, or leave? Ms. Scaia testified that it is "really common" for abuse victims "to minimize their own abuse" or not tell others about the abuse. (VII T.20, 25.) Ms. Scaia also explained that victims may not leave their abusers out of "fear" or because they believe that the abuser will not let them leave. (VII T.24.)

[11] The "psychological impact of repeated intimate partner violence" has historically been referred to "as battered spouse syndrome." *See Porter v. State*, 166 A.3d 1044, 1054 (Md. 2017) (citing Lenore E.A. Walker, *Battered Women Syndrome and Self-Defense*, 6 Notre Dame J.L. Ethics & Pub. Pol'y 321, 327 (1992)); *see also People v. Becerrada*, 393 P.3d 114, 124 (Cal. 2017) (stating that "'intimate partner violence' . . . used to be called 'battered women's syndrome'").

A second expert witness, Dr. Mary Kenning, testified about post-traumatic-stress disorder and acute-stress disorder, and the impact that these trauma-related diagnoses have on memory. (VI T.186–87.) Dr. Kenning's testimony provided an explanation for why Ms. Clark did not recall firing the second firearm. Dr. Kenning explained that, in times of trauma, the mind can fail to encode what is happening. (VI T.191.) When the brain fails to encode an event, a memory of the event cannot be retrieved and recalled later. (*Id.*) People experiencing trauma may therefore be completely incapable of recalling details from the trauma-related event, despite their strong desire to remember what happened. (*Id.*)

Following the close of testimony and after deliberating for a few hours, the jury asked a question regarding the law of self-defense: "What is the definition, (legal) . . . imminent?" (Resp.Add.013.) The original instruction said: "[t]he defendant may use all force and means she reasonably believes necessary and that would appear to a reasonable person in similar circumstances to be necessary to prevent death or great bodily harm that appears to be imminent." (VII T.39.) The original instruction did not further define "imminent." But the jury was given the standard instruction of "Definition of Words"—if the Court did not "define[] a word or phrase, [the jury] should apply the common, ordinary meaning of that word or phrase." (VII T.41.)

The parties disagreed as to how to respond to the jury's question. The State suggested that the district court define "imminent" harm as requiring harm that will "occur immediately," invoking one of the model jury instructions for criminal sexual

conduct. (Resp.Add.014.) Ms. Clark's counsel requested that the jury be directed to the "Definition of Words" jury instruction and argued that the State's proposed "immediate" definition "is narrowing" the availability of self-defense. (Resp.Add.017.)

The district court adopted the State's proposal over Ms. Clark's objection. The court answered the jury's question as follows: "To fear imminent great bodily harm or death means that the person must fear that such harm will occur *immediately*." (Resp.Add.018 (emphasis added).) The jury returned a guilty verdict shortly after receiving this supplemental instruction. (VIII T.8.) The district court later sentenced Ms. Clark to 306 months' imprisonment, the presumptive sentence, denying Ms. Clark's request for a downward sentencing departure. (S.43.)[12]

E. The court of appeals reverses in a unanimous, nonprecedential decision.

Ms. Clark appealed and challenged the district court's supplemental jury instruction.[13] In a unanimous, nonprecedential opinion, the court of appeals agreed with Ms. Clark that the district court "incorrectly instructed the jury that 'imminent' means that 'such harm will occur immediately.'" *Clark*, 2023 WL 2637490, at *3; (App.Add.6). The court further concluded that the "supplemental instruction, which

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[12] "S" refers to the transcript of the February 7, 2022 sentencing.

[13] Ms. Clark also challenged the admission of testimony from a conceal-and-carry course instructor and the district court's denial of Ms. Clark's request to present testimony at sentencing to support her request for a downward departure. Because the court of appeals reversed on the jury-instruction issue, it did not reach these two issues. *Clark*, 2023 WL 2637490, at *4 n.1; (App.Add.10).

was given at a critical stage of the jury deliberations, placed a thumb on the scale for the prosecution" and was not harmless beyond a reasonable doubt. *Clark*, 2023 WL 2637490, at *4; (App.Add.10).

The court of appeals reached its decision by applying general legal principles from this Court's cases and analyzing persuasive-out-of-state authority. With respect to this Court's caselaw, the court of appeals noted that although this Court has not defined the term "imminent," this Court has been clear that district courts must use "analytic precision" when instructing juries on self-defense in criminal cases. *Clark*, 2023 WL 2637490, at *3 (quoting *State v. Hare*, 575 N.W.2d 828, 833 (Minn. 1998)); (App.Add.6). This analytic precision must be tailored to the unique facts of each case, specifically, "the character of the danger to be apprehended and the available alternatives" to using force in self-defense. *Clark*, 2023 WL 2637490, at *3 (quoting *State v. Boyce*, 170 N.W.2d 104, 113 (Minn. 1969)); (App.Add.7). The district court violated these principles by failing to give an instruction for which the temporal component of the self-defense instruction was "guided by the unique facts" of Ms. Clark's case—facts that included Mr. Butler's "escalating and violent abuse against Clark." *Clark*, 2023 WL 2637490, at *3; (App.Add.7).

The court of appeals also favorably analyzed the Supreme Court of Kansas' decision in *State v. Hundley*, 693. P.2d 475 (Kan. 1985), an analogous criminal case involving self-defense and intimate partner violence. The court of appeals agreed with the *Hundley* court's holding that instructing juries on an "immediate" instead of

"imminent" harm standard is reversible error in the unique context of a criminal case involving intimate partner violence and self-defense. *Clark*, 2023 WL 2637490, at *3; App.Add.8. As the *Hundley* Court put it, the term immediate "place[s] undue emphasis on the immediate action of the deceased," and "*obliterates the nature of the buildup of terror and fear which had been systemically created over a long period of time*" in victims of intimate partner violence. *Clark*, 2023 WL 2637490, at *3 (emphasis added) (quoting *Hundley*, 693 P.2d at 479); (App.Add.8).

Applying Minnesota law, and in agreement with the *Hundley* court's analysis in a factually analogous case, the court of appeals concluded that the district court's supplemental instruction was prejudicially erroneous. A properly instructed jury "could have found that Clark was in imminent danger of great bodily harm, even if such danger was not immediate," given Mr. Butler's "violent actions against Clark." *Clark*, 2023 WL 2637490, at *4; (App.Add.9). These violent actions included, on the day of the shooting, Mr. Butler holding a loaded firearm to Ms. Clark's head, punching Ms. Clark with a closed fist, and threatening Ms. Clark by saying, "Wait for tonight. Wait for [your son] to go to bed. I'm going to be break your ribs." *Clark*, 2023 WL 2637490, at *1 (alternation in original); (App.Add.3).

ARGUMENT

The district court issued an erroneous supplemental jury instruction that misstated Minnesota law and was highly prejudicial in this case involving undisputed intimate partner violence. Minnesota has an imminence standard for acting in self-

defense, and the concept of imminence is temporally broader than immediacy. These temporal differences are of paramount importance in cases of self-defense by a victim of intimate partner violence, and the State is no longer arguing otherwise on appeal. The State's sole basis for requesting reversal—that any error was harmless because Ms. Clark's use of force became unreasonable as a matter of law partway through the shooting—would require this Court to ignore facts that cut against the State and resolve other factual disputes in the *State's* favor, neither of which is appropriate on harmless error review.

The supplemental jury instruction was legally erroneous. It profoundly prejudiced Ms. Clark. This Court should affirm the court of appeals decision vacating Ms. Clark's conviction and remanding for trial.

I. The district court's supplemental jury instruction erroneously adopted an immediate-harm standard for acting in self-defense.

District courts have broad discretion in selecting jury instructions. *State v. Lampkin*, 994 N.W.2d 280, 285 (Minn. 2023). But that discretion is not limitless. A district court abuses its discretion by providing jurors with instructions that "confuse, mislead, or materially misstate the law." *State v. Vang*, 774 N.W.2d 566, 581 (Minn. 2009); *see also State v. Koppi*, 798 N.W.2d 358, 362 (Minn. 2011) (holding that language in a model jury instruction materially misstated the law). When determining whether "a jury instruction correctly states the law," this Court analyzes "the criminal statute *and* the case law under it." *Lampkin*, 994 N.W.2d at 286 (alteration in original) (internal quotation marks omitted). The general principle that jury instructions must

correctly state the law is particularly important in cases involving self-defense. District courts "must use analytic precision" when instructing jurors on self-defense, *Hare*, 575 N.W.2d at 833 (internal quotation marks omitted), for self-defense is "very specific to the person apprehending fear and the very particular circumstances causing fear," *State v. Bjork*, 610 N.W.2d 632, 636–37 (Minn. 2000) (quotation omitted).

The district court violated these fundamental principles by issuing a jury instruction that was not tailored to the particular circumstances of Ms. Clark's case and the danger posed by intimate partner violence. The State is no longer arguing otherwise. Rather, the State simply asks for guidance on how juries should be instructed in future cases involving intimate partner violence and self-defense.

A. Minnesota has adopted an imminent-harm standard for acting in self-defense.

The jury instructions at issue in this case concern the use of force in self-defense. An individual "may act in self-defense if he or she reasonably believes that force is necessary and uses only the level of force reasonably necessary to prevent the bodily harm feared." *State v. Devens*, 852 N.W.2d 255, 258 (Minn. 2014). Once a defendant meets his or her burden to produce evidence to support a claim of self-defense, "the State bears the burden to disprove" one or more elements of self-defense beyond a reasonable doubt. *Id.*; *see also State v. Harvey*, 277 N.W.2d 344, 345 (Minn. 1979) ("Clearly once the defendant has raised the issue of justification [self-

defense] the burden is on the state to prove beyond a reasonable doubt the absence of justification.").

Minnesota has long tied the right to act in self-defense to the temporal concept of imminence. Even before statehood, the territory of Minnesota defined "justifiable homicide" in part as "a reasonable ground to apprehend a design to . . . do some great personal injury" and "*imminent danger* of such design being accomplished." Rev. Stat. of Territory of Minn., Chapter 100, § 5 (1851) (emphasis added). The term "imminent" remained in Minnesota's justifiable-homicide statute until 1963, when the language changed to its modern form with the enactment of Minnesota's Criminal Code of 1963. *Compare* Minn. Stat. § 619.29 (1961), *with* Criminal Code of 1963, H.F. 449, Ch. 753, Art. 1, § 609.065 (1963). Lethal force may be used in relevant part today "when necessary in resisting or preventing an offense which the actor reasonably believes exposes the actor or another to great bodily harm or death." Minn. Stat. § 609.065; *see also* Minn. Stat. § 609.06 (standards for use of non-lethal force).

Although the term "imminent" is no longer part of the statutory definition of self-defense, the temporal concept remains a firmly rooted component of the law of self-defense in this State. The Advisory Committee acknowledged the 1963 language change, but also clarified that the revised language still "expresses present Minnesota law." Minn. Stat. § 609.065, 1963 Advisory Committee Comment; *see also State v. Johnson*, 152 N.W.2d 529, 532 (Minn. 1967) (per curiam). And the imminence standard is present in justifiable-homicide statutes and in Minnesota Supreme Court

cases dating back to the 1800s. *See, e.g.*, *State v. Spaulding*, 25 N.W. 793, 796 (Minn. 1885) ("[I]n no event would he be justified in killing the officer . . . unless it should appear to be necessary in order to protect himself from great and *imminent* personal injury . . . ." (emphasis added)).

This Court has adopted the following four-element test for analyzing the availability of the use of lethal force under Section 609.065:

> (1) the absence of aggression or provocation on the part of the defendant; (2) the defendant's actual and honest belief that he or she was in imminent danger of death or great bodily harm; (3) the existence of reasonable grounds for that belief; and (4) the absence of a reasonable possibility of retreat to avoid the danger.

State v. Johnson, 719 N.W.2d 619, 629 (Minn. 2006) (quotation omitted)[14]; *see also Wynkoop v. Carpenter*, 574 N.W.2d 422, 425 (Minn. 1998) ("Once this court has construed a statute, that interpretation is as much a part of the statutory text as if it had been written into the statute originally."). The second self-defense element contains the temporal requirement for whether the use of force in self-defense is "necessary." *See* Minn. Stat. § 609.065. This second element "is subjective and depends upon a defendant's state of mind." *Johnson*, 719 N.W.2d at 630.

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[14] The fourth element of self-defense does not apply to this case. Ms. Clark was in her home when the shooting occurred, and "there is no duty to retreat in one's own home." *Johnson*, 719 N.W.2d at 629; *see also Devens*, 852 N.W.2d at 258 ("[T]he law presumes that there is somewhere safer to go—home.").

All four self-defense elements are specific to the person who is in fear and the particular circumstances causing that fear. *Bjork*, 610 N.W.2d at 636–37. That is particularly the case with respect to whether an individual reasonably fears imminent harm. Whether the use of lethal force appears "necessary to avert the danger of death or grievous bodily harm" is a fact-dependent inquiry. *Boyce*, 170 N.W.2d at 113. That fact-dependent inquiry "turns on the character of the danger to be apprehended and the available alternatives" to using lethal force. *Id.* Tragically, one of the dangers that far too many people (especially women) face in Minnesota and across the world is death or serious harm at the hands of an intimate partner, which leads to the issues presented by this case.

B. The plain meaning of "imminent" differs meaningfully from the meaning of "immediate."

Despite the longstanding use of the term "imminent" in Minnesota statutory law and this Court's decisions, the district court redefined "imminent" in the midst of jury deliberations to require that "such harm *will occur immediately*." (Resp.Add.018 (emphasis added).) This supplemental instruction materially misstated the law. *Clark*, 2023 WL 2637490, at *3; (App.Add.7–8).

This Court's analysis of the instructional error can begin and end with the plain meaning of the two competing terms. The plain meaning of "imminent" is broader temporally than that of "immediate." The American Heritage Dictionary defines "imminent" as "[a]bout to occur; impending." Am. Heritage Dictionary 879 (5th ed. 2011). By contrast, the American Heritage Dictionary defines "immediate" as

"[o]ccurring at once; happening without delay." *Id.* at 878. Other dictionaries similarly temporally differentiate "imminent" and "immediate." For example, Webster's Third New International Dictionary defines "immediate" as "acting or being without the intervention of another object, cause, or agency," whereas "imminent" is defined as "ready to take place; near at hand" or "hanging threateningly over one's head; menacingly near." Webster's Third New Int'l Dictionary 1129–30 (2002). As the Supreme Court of Kansas recognized after analyzing these definitions, the "time limitations in the use of the word 'immediate' are much stricter than those with the use of the word 'imminent.'" *Hundley*, 693 P.2d at 478. Or, on the flip side, "the term imminent describes a broader time frame than immediate." *State v. Hernandez*, 861 P.2d 814, 820 (Kan. 1993).

One notable outlier to these definitions is Black's Law Dictionary, which presently defines "imminent danger" as "[a]n immediate, real threat to one's safety that justifies the use of force in self-defense." Black's Law Dictionary at 493 (11th ed. 2019). The State is not asking this Court to adopt the Black's Law Dictionary definition. But even if were, the current Black's Law Dictionary definition of "imminent" cannot be squared with the plain and differing meanings of imminent and immediate. In fact, earlier versions of Black's Law Dictionary *differentiated* imminent from immediate. *See* Black's Law Dictionary at 676 (5th ed. 1979) (defining "imminent" as "[n]ear at hand; *mediate rather than immediate*; close rather than touching" (emphasis added)).

Consistent with the plain meaning of the term imminent, this Court has recognized that there is a right to self-defense even if harm reasonably appears imminent but not immediate. In *State v. Harvey*, the defendant fired a gun thirteen times at someone whom he believed was going to rob his brother. 277 N.W.2d at 345. The decedent—who was unknown to the defendant—"appeared . . . to have a gun *in his pocket*." *Id.* (emphasis added). The decedent did not appear to be holding or pointing the gun at the time that the defendant first fired. *Id.* Nonetheless, this Court vacated the defendant's conviction and held that the State had not "sustained its burden" to overcome the defendant's "defense of justification." *Id.* at 345–36. In *Harvey*, the threat was not (and could not have been) immediate—the decedent had not pulled out or pointed his firearm. In the words of Webster's dictionary, there was not an *immediate* threat of harm because there would still need to be the "intervention of another object, cause, or agency" before the defendant's brother would be killed or seriously harmed from the decedent drawing and firing a weapon. *See* Webster's Third New Int'l Dictionary at 1129–30. But the threat of harm was *imminent*—it was "menacingly near." *See id.* If "imminent" and "immediate" were truly interchangeable, then this Court's decision in *Harvey* could not stand.[15]

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[15] This Court has held that it was not error to use immediate in lieu of imminent in a civil jury instruction. *Peterson v. Lang*, 58 N.W.2d 609, 613 (Minn. 1953). *Peterson* arose in a materially different context related to car collisions and right of ways and should not serve as a guide in a criminal self-defense case, especially one involving intimate partner violence. *See id.*; (*see also* Reply Brief of Appellant at 7–9

Further bolstering the differences between the imminent- and immediate-harm standards is that other States have made different temporal choices. The vast majority of states, like Minnesota, have adopted an imminent-harm standard, either via statute or caselaw. *See, e.g.*, Cal. Penal Code § 197(3); *Commonwealth v. Pike*, 701 N.E.2d 951, 955 (Mass. 1998). The Model Penal Code, by contrast, has an immediate-harm standard. Model Penal Code § 3:04. There are a small number of State legislatures that have followed the Model Penal Code's lead and codified the immediate-harm standard. *See, e.g.*, Ariz. Rev. Stat. § 13-404(A); Del. Code Ann. tit. 11. § 464(a); Haw. Rev. Stat. Ann. § 703-304(1); Neb. Rev. Stat. Ann. § 28-1409(1); N.J. Stat. Ann. 2C:3-4. Finally, at least one state requires "immediate *or* imminent" harm for purposes of imperfect self-defense and recognizes the "temporal distinction" between the two standards. *Porter v. State*, 166 A.3d 1044, 1059 (Md. 2017) (emphasis added) (concluding that imminent and immediate "each carry their own meaning"). Notably, there are measurable differences in the trial rights of victims of intimate partner violence between the immediate- and imminent-harm states. One empirical study found that "[a] battered woman defendant in an 'imminent' jurisdiction is more likely than her counterpart in an 'immediate' jurisdiction to get a jury instruction specifically on the relevance of the decedent's past violence." Holly

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(Dec. 9, 2022)). The State is no longer arguing that the rule in *Peterson* should apply in this criminal-case context.

Maguigan, *Battered Women and Self Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. Penn. L. Rev. 379, 415 (1991).

Finally, to the extent that there is any ambiguity with respect to whether Section 609.065 incorporates an imminent or immediate temporal component for acting in self-defense, that ambiguity should tip in favor of defendants like Ms. Clark. The rule of lenity "requires a court to construe an ambiguous criminal statute in favor of the defendant." *State v. Thonesavanh*, 904 N.W.2d 432, 440 (Minn. 2017). It "vindicates the fundamental principle that no citizen should be held accountable for violation of a statute whose commands are uncertain." *Id.* (quoting *United States v. Santos*, 553 U.S. 507, 514 (2008)). Ms. Clark believes that this case can be resolved as a matter of plain language. But to the extent that the Court disagrees, Section 609.065 should be read under the rule of lenity to incorporate the temporally broader concept of imminence rather than immediacy.

The court of appeals correctly concluded that the district court erred "by making a blunt instruction to the jury that 'imminent' means 'immediate.'" *Clark*, 2023 WL 2637490, at *4; (App.Add.9). The State no longer argues otherwise. If the Minnesota Legislature wanted to codify the Model Penal Code's "immediate" standard—and its resulting measurable impacts on the availability of self-defense to victims of intimate partner violence—it was fully capable of doing so in 1963 or any time since. But the Legislature has not made that textual change, instead incorporating the term "imminent" into other statutes, including a statute defining

"domestic abuse" for purposes of obtaining an order for protection. *See* Minn. Stat. § 518B.01, subd. 2(a)(2). In the absence of such legislative action, however, this Court should not permit an ad hoc change to the law by narrowing the definition of imminent through judicial interpretation.

C. The temporal difference between "imminent" and "immediate" is particularly important in cases involving intimate partner violence.

Although the use of the term immediate in lieu of imminent would be erroneous in any self-defense case, the error is particularly problematic in a case such as this, where there is intimate partner violence.

This Court has held that a history of abuse and battering like Ms. Clark's bears directly on the "reasonableness" of a person's "fear that she was in imminent peril of death or serious bodily injury." *State v. Hennum*, 441 N.W.2d 793, 798 (Minn. 1989), *overruled in part on other grounds by State v. Glowacki*, 630 N.W.2d 393 (Minn. 2001). In other words, the fact that an individual acting in self-defense was victimized by a partner is a relevant "particular circumstance[] causing fear." *See Bjork*, 610 N.W.2d at 636–37 (quotation omitted). The issue is then whether the district court's immediate-harm instruction was appropriately tailored to the relevant, particular circumstances of intimate partner violence. It was not.

In a national context, this Court does not write on a blank slate when it comes to the issue of whether it is error to use an immediate-harm standard in a case involving self-defense by a victim of intimate partner violence. The Supreme Court of

Kansas answered that question affirmatively in *State v. Hundley*, 693 P.2d 475 (Kan. 1985); *see also Clark*, 2023 WL 2637490, at *3 ("We are impressed by the Kansas Supreme Court's recognition of the unique nature of domestic abuse as it relates to a claim of self-defense."); (App.Add.8). In *Hundley*, a female victim of intimate partner violence shot her abuser-husband in the back and killed him. 693 P.2d at 462. The jury convicted the defendant-wife after being instructed that she must have been threatened with the "*immediate* use of unlawful force" to act in self-defense. *Id.* at 464 (quoting jury instruction). The Supreme Court of Kansas reversed, holding that the trial court erred by using the term "immediate" instead of "imminent." After discussing the unique dynamics of intimate partner violence and self-defense, the *Hundley* court explained why instructing the jury on an immediate-harm standard was problematic:

> [T]he use of the word "immediate" in the instruction on self-defense places undue emphasis on the immediate action of the deceased, and *obliterates the nature of the buildup of terror and fear which had been systematically created over a long period of time*. "Imminent" describes the situation more accurately.

Id. at 467–68 (emphasis added). In line with *Hundley*, the Supreme Court of Washington has held that it is reversible error to instruct a jury to focus on the abuser-decedent's threats and behavior "*immediately* before" a victim-defendant acts in self-defense. *State v. Wanrow*, 559 P.2d 548, 555–57 (Wash. 1977) (emphasis added).

The *Hundley* court's analysis fairly accounts for the unique dangers facing—and alternatives to force available for—victims of intimate partner violence. *See Boyce*, 170 N.W.2d at 113. For those abused by a partner, "if there is no escape or sense of safety, then the next attack, which could be fatal or cause serious bodily harm, is imminent." *Bechtel v. State*, 840 P.2d 1, 12 (Okla. Crim. App. 1992); *see also Robinson v. State*, 417 S.E.2d 88, 91 (S.C. 1992) (explaining that "battered women can experience a heightened sense of imminent danger" even when "[their] batterer is not physically abusing" them); Victoria Mather, *The Skeleton in the Closet: The Battered Woman Syndrome, Self-Defense, and Expert Testimony*, 39 Mercer L. Rev. 545, 567–68 (1988) (arguing that a "lull in the attack" should not preclude a victim's self-defense claim). The *Bechtel* court explained in a nuanced fashion how harm could appear imminent to a victim of intimate partner violence, even if the victim was not starting down the barrel of a gun:

> "The battered woman *learns to recognize the small signs that precede periods of escalated violence*. She learns to distinguish subtle changes in tone of voice, facial expression, and levels of danger. *She is in a position to know*, perhaps with greater certainty than someone attacked by a stranger, *that the batterer's threat is real and will be acted upon*."
>
> Thus, according to the author, an abused woman *may kill her mate during the period of threat that precedes a violent incident*, right before the violence escalates to the more dangerous levels of an acute battering episode. Or, she may take action against him *during a lull in an assaultive incident,* or after it has culminated, in an effort to prevent a recurrence of the violence. And so, the issue is not whether the danger was in fact imminent, but whether, given the circumstances as she perceived them, the defendant's *belief was reasonable that the danger was imminent*.

Id. at 12 (first five emphases added) (footnote omitted) (quoting Elizabeth Bochnak, *Women's Self-defense Cases: Theory and Practice* (1981)). Another state appellate court put it more bluntly: "To require the battered person to await a blatant, deadly assault before she can act in defense of herself would not only ignore unpleasant reality, but would amount to sentencing her to 'murder by installment.'" *State v. Gallegos*, 719 P.2d 1268, 1271 (N.M. Ct. App. 1986) (quoting Loraine Eber, *The Battered Wife's Dilemma: To Kill or Be Killed*, 32 Hastings L.J. 895, 928 (1981)), *overruled in part on other grounds by State v. Alberico*, 116 N.M. 156 (N.M. 1993).

The court of appeals correctly concluded that the district court's supplemental instruction was not tailored to the particular circumstances of the intimate partner violence at issue in this case. *Clark*, 2023 WL 2637490, at *3; (App.Add.7–8). Consistent with *Hundley*, the appellate court recognized that, "[g]iven D.B.'s violent against Clark, the jury could have found that Clark was in imminent danger of great bodily harm, even if such danger was not immediate." *Clark*, 2023 WL 2637490, at *4; (App.Add.9). The district court accordingly "misstated the law by making a blunt instruction to the jury that 'imminent' means 'immediate.'" *Id.*

This Court should affirm the court of appeals' well-reasoned analysis and keep Minnesota law aligned with Kansas on this precise issue. Minnesota's "imminent" standard provides greater latitude for the specific facts of a case to impact whether self-defense is necessary. An "immediate" standard, by contrast, artificially constrains the temporal element for acting in self-defense and defeats any analysis of otherwise

relevant facts under established Minnesota law, particularly in cases of self-defense by a victim of intimate partner violence. The district court's jury instruction materially misstated that law and failed to tailor the instruction to the unique facts of Ms. Clark's case.

D. The State's request for further "guidance" on the application of self-defense to cases of intimate partner violence is both unnecessary and potentially perilous.

Rather than defending the instruction that it requested below, the State asks this Court to forge out a new, multi-factor test that was neither requested nor analyzed below. (*See* Appellant Br. at 23.) The Court should not do so, for both procedural and substantive reasons.

As the State acknowledges, its request was not presented and adjudicated below. For that reason it should not be considered by this Court in the first instance. *See Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988) (explaining that a reviewing court should consider "only those issues that the record shows were presented and considered" below).[16] The State requested, and received, the "blunt" supplemental instruction that it wanted, namely, that imminence required immediate harm in a

[16] The State suggests that its request has been "forfeited," citing *State v. Torgerson*, 995 N.W.2d 164 (Minn. 2023). (Appellant Br. at 23.) Unlike *Torgerson*, however, the State was not silent below—it requested and received a different instruction. In these circumstances, the State's argument should be deemed waived and unreviewable, not merely forfeited. *See United State v. Olano,* 507 U.S. 725, 733 (1993) (distinguishing "waiver" and "forfeiture"); *see also State v. Goodloe*, 718 N.W.2d 413, 422 n.6 (Minn. 2006) (favorably citing *Olano*).

case involving intimate partner violence. *Clark*, 2023 WL 2637490, at *4; (App.Add.9). The State stood by that instruction at the court of appeals. Neither a district court nor intermediate appellate court has considered the State's latest request. This Court of last resort should not be the first to consider a novel and previously untested proposed jury instruction.

Trying to get around this waiver, the State asks the Court to reach its proposed multi-factor test under the Court's supervisory powers. The State asserts that Minnesota "[n]eeds [g]uidance" on how factfinders should be instructed on self-defense for victims of intimate partner violence. (Appellant Br. at 13.) But the State never explains why such guidance is necessary. The law of Minnesota is already well-established—an individual may act in self-defense when death or great bodily harm reasonably appears imminent. *Johnson*, 719 N.W.2d at 629. And whether harm appears imminent turns on the unique facts of each case, specifically, "the character of the danger to be apprehended and the available alternatives" to using force. *Boyce*, 170 N.W.2d at 113. No further guidance is necessary. Juries are capable of applying these high-level principles to the unique facts of each case, including facts involving intimate partner violence.

Not only is the State's position waived and unnecessary, but also the guidance that the State professes to seek may be more problematic than helpful for victims like Ms. Clark. The State lays out a laundry list of potential factors on which juries could be instructed, such as the extent and length of the abuse, whether the couple still

resides together, and whether the partners share children. (*See* Appellant Br. at 20.) The State provides no evidence or argument regarding whether these are distinctions with a difference when it comes to the lethality of intimate partner violence. Minnesotans, especially women, far too often find themselves victimized by a partner. According to one study, "[o]ne in every three women in Minnesota will experience violence, rape, or stalking by an intimate partner in their lifetime, a shocking reality." *State v. Tapper*, 993 N.W.2d 432, 447 (Minn. 2023) (Chutich, J., dissenting). A significant number of homicide victims in Minnesota each year are individuals killed by intimate partners. *Id.* at 447 & n.8 (observing that "almost one-fourth of all murders in Minnesota were attributable to domestic violence" in 2017). The State has put forward no evidence or argument that homicides are more or less likely depending on the answer to the proposed factors that the State lays out. It is far more likely that in future cases involving self-defense by a victim of intimate partner violence, whether there is a need to act in self-defense will be "very specific to the person apprehending fear and the very particular circumstances causing fear," as this Court has recognized for decades. *Bjork*, 610 N.W.2d at 636–37 (quotation omitted).

A multi-factor test for juries also may result in more evidentiary hurdles for victims such as Ms. Clark than exist for defendants claiming self-defense who have not been so victimized. Would there need to be threshold judicial showings on all the potential factors before the self-defense claim reaches a jury? Would victims need to present evidence to the jury on all the various criteria in each case? Would all factors

be listed in all cases? Victims already risk objections to the admissibility of expert testimony on intimate partner violence. *See, e.g.*, *State v. Hanks*, 817 N.W.2d 663, 668–69 (Minn. 2012) (affirming exclusion of expert testimony on battered women's syndrome). In this very case, the State *opposed* Ms. Scaia's expert testimony in its entirety, arguing that the "testimony would be irrelevant because the Defendant has failed to a [sic] sufficient offer of proof to show that the relationship she and the Victim had was one that would give rise to [battered women's syndrome]." (Mem. in Support of State's Motion in Limine at 4, Index No. 29 (Aug. 13, 2021).) Yet at trial, the State conceded that Ms. Clark was abused. (VII T.120.) And on appeal, the State acknowledges the Ms. Clark was abused and even agrees that the "trial court correctly allowed expert testimony about the characteristics and practical effects of intimate partner violence." (Appellant Br. at 24.) The district court fortunately denied the State's motion to exclude the expert-witness testimony here, but trial courts have wide latitude when it comes to the admission of such evidence and other courts, of course, have excluded evidence of battered women's syndrome in cases where there has been a troubling history of violence and abuse. *See Hanks*, 817 N.W.2d at 666. Ms. Clark is concerned that a more specific and multi-factor test may lead to more evidentiary hurdles for victims such as Ms. Clark presenting their cases to a jury, evidentiary hurdles that do not exist for other types of defendants claiming self-defense.

There is a reason for the principles of waiver and forfeiture, and that is that the just development of the law is most often served by adversarial testing of issues at each level of a court before the issue is resolved by the State's highest court. That principle applies firmly here. The State's request for "guidance" beyond that necessary to resolve Ms. Clark's case should be denied.

II. The instructional error was not harmless beyond a reasonable doubt.

An erroneous jury instruction requires a new trial unless the error was "harmless beyond a reasonable doubt." *Koppi*, 798 N.W.2d at 365. An instructional error is not harmless if it may be prejudiced the defendant by impacting the jury's verdict. *Id. at* 366; *see also Hare*, 575 N.W.2d at 834 (stating instructional errors are harmless when "the record fails to support the argument that the giving of the potentially misleading instruction prejudiced defendant"). The erroneous instruction was not harmless beyond a reasonable doubt, whether the focus is on Ms. Clark's decision to fire the first or the second firearm.

A. The State does not dispute that Ms. Clark was justified in firing the initial firearm in self-defense.

Because self-defense is both a case-critical and fact-dependent inquiry, this Court has emphasized that trial courts "must use analytic precision" when instructing jurors on self-defense. *Hare*, 575 N.W.2d at 833 (internal quotation marks omitted). This Court has accordingly vacated multiple convictions in cases concerning self-defense instructional errors, including on plain error review of unobjected to instructions. *See, e.g.*, *State v. Malaski*, 330 N.W.2d 447, 453 (Minn. 1983); *State v.*

McGrath, 138 N.W. 310, 325 (Minn. 1912); *State v. McPherson*, 131 N.W. 645, 646 (Minn. 1911); *State v. Grear*, 10 N.W. 472, 473 (Minn. 1881). As in other cases where a self-defense instructional error was found to be prejudicial, the "sole question" at Ms. Clark's trial "was whether it was justifiable" homicide. *McPherson*, 131 N.W. at 645. And on that question, the court of appeals correctly determined that a properly instructed jury could have found in Ms. Clark's favor. Not even the State argues otherwise when it comes to Ms. Clark's initial use of a firearm in self-defense. (*See* Appellant Br. at 24 (agreeing that Ms. Clark's fear of death or great bodily harm "appears to have been genuine and reasonable" given Mr. Butler's controlling behavior and the escalating physical abuse).)

Many indicia of imminent harm at the hands of an abuser were present here when Ms. Clark first decided to use force in self-defense. Mr. Butler was significantly larger than Ms. Clark. *See People v. Evans*, 631 N.E.2d 281, 288 (Ill. App. Ct. 1994) (considering "difference between the physical attributes and apparent strengths of the attacker and the woman"). He had been beating Ms. Clark all evening; pacing in anger, sometimes with a gun in his hand; held a gun to her head; and had promised to break her ribs that night. (*See supra*, Statement of Facts Section B.) Ms. Clark believed that Mr. Butler was capable of murder. He had boasted to Ms. Clark about his violent

past, including a murder. (VI T.90.)[17] Ms. Clark did not feel that she could leave. Mr. Butler had stopped her from leaving the house before and had threatened to "shoot up" her and her parents' nearby homes if she ever left him. (VI T.101.) Her fears were not unfounded—"the time of most danger for the woman is when she attempts to leave; women are often killed when, and because, they attempt to escape." Richard A. Rosen*, On Self-Defense, Imminence, and Women Who Kill Their Batterers*, 71 N.C. Law. Rev. 371, 395 (1993). Properly instructed, the jury could have concluded that Ms. Clark did not need to "await a blatant, deadly assault" from her abuser before acting in self-defense. *See, e.g.*, *Gallegos*, 719 P.2d at 1271.

The prejudice from the erroneous instruction is particularly acute because the district court issued the instruction as a stand-alone supplemental instruction at a "critical stage of the jury deliberations." *State v. Petrich*, 494 N.W.2d 298, 300 (Minn. Ct. App. 1992). There can be little doubt that an instruction given hours into deliberation receives "distorted importance." *Cf. United States v. Bayer*, 331 U.S. 532, 538 (1947). The fact that the instruction was supplemental, and stand-alone, further increases the substantial likelihood that the instructional error effected the jury's verdict. Or, as the court of appeals put it, the instruction, "given at a critical stage of the jury deliberations, placed a thumb on the scale for the prosecution." *Clark*,

[17] Mr. Butler also had a conviction for felony domestic assault of which Ms. Clark was unaware. (I T.27.)

2023 WL 2637490, at *4; (App.Add.10). The instructional error was not harmless beyond a reasonable doubt, and not even the State argues otherwise with respect to Ms. Clark's initial use of force.

B. A properly instructed jury could conclude that Ms. Clark's decision to fire the second firearm was reasonable.

The State's sole argument for reversal is that, at a minimum, Ms. Clark's use of force in firing the *second* firearm (the .38 Charter Arms) was unreasonable as a matter of law. (Appellant Br. at 26.) The State's argument relies on a fundamentally flawed and disputed reading of the record that should not be adopted in the present procedural posture.

Before reviewing the record, it is worth emphasizing that the State's sole argument for reversal is a question of reasonableness. The reasonableness of whether there appears to be an imminent harm is a quintessential jury question. *State v. Glowacki*, 630 N.W.2d 392, 403 (Minn. 2001). Only in rare cases where the facts are both undisputed and decisive may the issue of reasonableness be decided as a matter of law. *Id.* In weighing this quintessential jury question, courts have observed that the use of lethal force may be reasonable even if the decedent is unarmed. *Evans*, 631 N.E.2d at 290–91 ("[T]he law does not require that the aggressor be armed in order that the use of a deadly weapon to stop the attack be justified as self-defense."). And the use of lethal force may be reasonable even if, in cases involving intimate partner violence, the decedent-abuser is "lying down at the time of the shooting and . . . not advancing on the defendant." *See State v. Hodges*, 716 P.2d 563, 571

(Kan. 1986) (concluding that it was reversible error to instruct on "immediate" harm in this factual scenario).

The State argues that Ms. Clark's decision to fire the .38 Charter Arms was unreasonable because Mr. Butler was "lying on the floor between the bed and bedroom wall" when Ms. Clark fired. (Appellant Br. at 26.) But the State has not argued that lying down, or being unarmed, would negate the threat that Mr. Butler posed, especially when he was within arm's reach of the Smith & Wesson Governor. The State instead appears to suggest that Mr. Butler was immobile at the timing of the shooting. The problem with this argument is that the record shows the opposite or, at the very least, creates a fact question for the jury, making this case materially different from *State v. Glowacki. See* 630 N.W.2d at 392 (concluding that force was unreasonable "even if the jury accepted [the defendant's] version of events").

The first firearm did not immediately immobilize Mr. Butler. Ms. Clark first fired a .22-caliber bullet, which is a "small caliber" bullet. (V T.207.) According to the medical examiner, all the shots from the .22 were survivable and "literally . . . skin-deep." (V T.207, 218; *see also* Resp.Add.002 (describing "various soft tissue wounds"); V T.205 (stating that .22 shots to back resulted in "no significant injury").) That means that, according to the State's own trial witness, Mr. Butler was still mobile, moving to and around the bedroom (where there were four loaded guns), when Ms. Clark grabbed the .38 Charter Arms. Ms. Clark testified that all this was happening in

"an instant." (Resp.Add.011.) These critical facts are missing from the State's argument.

The bullet wounds from the .38 Charter Arms further demonstrate that Mr. Butler was still a mobile threat when Ms. Clark fired the second firearm. The medical examiner identified bullet wounds from the .38-caliber-firearm in various parts of Mr. Butler's body, including at least his upper left arm traveling upward (wound Q), his left forearm traveling downward (wounds R and S), and the top right portion of his head traveling downward (wound A). (V T.207n-08, 210–11; *see also* Ex. 205.) The State makes much of Ms. Clark's statements that she recalled standing "above" Mr. Butler during the shooting. (*See* Appellant Br. at 10.) But that was *after* she shot him and he said "I'm dead," *not before* Ms. Clark fired a single bullet from the .38 Charter Arms. (Resp.Add.008.) And if Ms. Clark was truly standing over an immobile Mr. Butler when she fired the second firearm, then all the bullet wounds from the .38 Charter Arms would have been around the same place on his body and moving the same direction, neither of which is true here.

There is no evidence that Mr. Butler was immobile when Ms. Clark fired the second firearm. To the contrary, the evidence suggests he was very much mobile and attempting to grab the Smith & Wesson Governor on the far side of their bed. Given the "seriousness of the instructional error and the conflicting nature of the evidence," the instructional error was not harmless beyond a reasonable doubt. *Koppi*, 798 N.W.2d at 364. A properly instructed jury could have concluded that, if Ms. Clark

did not incapacitate Mr. Butler before leaving that bedroom, Ms. Clark would have had a reasonable basis for believing that Mr. Butler would come after and kill or seriously harm both her and her son before she reached safety.

CONCLUSION

Ms. Clark respectfully requests that this Court affirm the court of appeals' decision so that she may have a new trial with a properly instructed jury. If the Court reverses the court of appeals, then Ms. Clark requests that this case be remanded to the court of appeals for consideration of the two outstanding issues that Ms. Clark raised on appeal.

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CERTIFICATE OF COMPLIANCE

This brief complies with the word limitations of Minn. R. Civ. App. P. 132.01, subds. 3(a). The brief was prepared with proportional font, using Microsoft Word in Office 365, which reports that the brief contains 13,244 words.

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