BRIEF FOR APPELLANT

19-CF-797

ALONZO JESSIE ATKINS,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

APPEAL FROM
THE SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA – CRIMINAL DIVISION
2017 CF2 733

DISTRICT OF COLUMBIA COURT OF APPEALS

Adrian Madsen, Bar No. 1032987
Counsel for Appellant
8705 Colesville Road, Suite 334
Silver Spring, MD 20910
(202) 738-2051

D.C. App. R. 28 (a)(2)(A) Statement

Appellant Alonzo Jessie Atkins and Appellee the United States of America were parties in the trial court. Lauckland Nicholas, Esq. represented Mr. Atkins at trial. Adrian Madsen, Esq. represents Mr. Atkins in this appeal. Emile Thompson, Esq. represented the United States below. For this appeal, Elizabeth Trosman, Esq. represents the United States. There are no intervenors or amicus curiae. No other provisions of D.C. App. R. 28 (a)(2)(A) apply.

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1. Whether the admission as substantive evidence of testimonial statements made by non-testifying witness [redacted] that Mr. Atkins possessed a firearm constitutes plain error where the statements' admission violated the Confrontation Clause of the Sixth Amendment, where no eyewitness properly testified that Mr. Atkins possessed a firearm, where the prosecutor repeatedly argued the hearsay statements for their truth in closing, and where the trial court's limiting instructions improperly characterized the admissibility of [redacted] various out-of-court statements.
2. Whether the trial court erred in denying Mr. Atkins' request for a mistrial where the prosecutor improperly invited a government witness to comment on the veracity of another witness, repeatedly emphasized this improper testimony in closing, and improperly and repeatedly commented personally on the evidence in closing and rebuttal arguments.
3. Whether the failure to instruct the jury that unlawful possession of a firearm in violation of D.C. Code § 22-4503 (b)(1) required proof that Mr. Atkins knew of his prohibited status constitutes plain error in light of the Court's decision in *Rehaif v. United States*, 139 S. Ct. 2191 (2019).
4. Whether the trial court's sentence on count two, twenty-two months' incarceration for possession of an unregistered firearm in violation of D.C.

Code § 7-2502.01 (a), is an illegal sentence where the government did not provide notice of enhanced penalties for count two, as required by D.C. Code § 23-111.

STATEMENT OF THE CASE

On August 9, 2017, Alonzo Atkins ("Mr. Atkins") was indicted on two counts relating to an incident that occurred on January 13, 2017, Unlawful Possession of a Firearm ("UPF") in violation of D.C. Code § 22-4503 (Count One) and Possession of an Unregistered Firearm ("UF") in violation of D.C. Code § 7-2502.01 (a) (Count Two) (R. 56).[1] A jury trial began on November 14, 2018 and ended on November 19, 2019, all before the Honorable Steven Berk (R. 17). On November 19, 2018, a jury found Mr. Atkins guilty of Counts One and Two (R. 17). On August 19, 2019, the Honorable Judge Berk sentenced Mr. Atkins to eighty-four months incarceration on Count One, execution of sentence suspended as to all but thirty-six months, and twenty-two months incarceration on Count Two, execution of sentence suspended as to all, to run concurrent to one another, followed by one year of supervised probation (R. 107).[2]

[1] "R." refers to the record prepared by the clerk's office. "Tr." refers by date to the transcript of the proceedings, which were conducted in 2018 unless otherwise stated.

[2] In order to effectuate a split sentence, the trial court imposed three years of supervised release, all suspended in favor the aforementioned one year of supervised probation.

STATEMENT OF FACTS

In the early morning hours of January 13, 2017, someone shot Mr. Atkins in the foot in or near [redacted] in Washington DC (*passim*). Almost immediately thereafter, [redacted] called 911 to report a burglary and to request an ambulance because Mr. Atkins had been shot (11/15 Tr. 72, 15-17). [redacted] remained on the phone with the 911 operator until officers arrived, when she then spoke to officers who arrived on the scene within minutes of [redacted] initiating the call (11/14 Tr. 13, 6-10). [redacted] described the burglary and altercation that led to Mr. Atkins being shot. Medical personnel transported Mr. Atkins to the hospital, while officers remained on the scene with [redacted] (11/15 Tr. 80, 5-9, 20-23). A crime scene search officer processed and photographed parts of the scene (11/15 Tr. 45-67).

One to two hours later, detectives returned to [redacted] (11/15 Tr. 31, 13-18). Using deceptive tactics, the detectives told [redacted] that they had spoken to Mr. Atkins and that Mr. Atkins said he shot himself, which he had not said (11/19 Tr. 44, 3-12). In so doing, the detectives convinced [redacted] to say that Mr. Atkins had shot himself (11/19 Tr. 30, 13/20). [redacted] led officers to a gun in an alley somewhere behind [redacted] near a trash can (11/19 Tr. 31, 20-22). No blood was found on the gun (11/15 Tr. 49 2-6).

About six months before trial, the government filed enhancement papers with

respect to Count One (R. 66). The government did not file an information required by D.C. Code § 23-111 (if seeking enhanced penalties) at any time or otherwise raise the possibility of increased punishment upon conviction of Count Two based on a prior conviction (R. 66).

Prior to the beginning of testimony, the trial court ruled on the admissibility of three sets of statements made by [redacted]: (1) her call to 911, (2) her statements to officers immediately after the 911 call, and (3) her statements to detectives one to two hours after officers first arrived, finding the first two sets fell within the excited utterance exception (11/15 Tr. 5-6, 12-25, 1-6),[3] but that the third set was hearsay not within any exception, admissible only if [redacted] earlier statements were admitted and then admissible only for impeachment purposes (11/15 Tr. 8, 7-16). [redacted] did not testify at trial and neither party sought to admit exculpatory statements made by Mr. Atkins.

At trial, the government called Metropolitan Police Department (MPD) Detective [redacted] who, despite the trial court's earlier, unambiguous ruling, testified in the government's case that, after his return from the hospital where Mr. Atkins was receiving medical treatment, [redacted] led other officers "to the location of the weapon that was used." (11/15 Tr. 30 10-16) Counsel

[3] The government conceded the admissibility of at least the first set of statements and may have conceded the admissibility of the second set (11/15 Tr. 6, 18-25).

for Mr. Atkins did not renew his earlier hearsay objection or lodge a Confrontation Clause objection (*Id.*). MPD Detective [redacted] testified that [redacted] led him and another officer to a gun in an alley behind [redacted] (11/15 Tr. 39, 1-2), that some leaves and a sweater were found on or near the gun (11/15 Tr. 39, 8-10), and that [redacted] did not touch the gun or see anyone touch the gun while he was there (11/15 Tr. 40, 12-17).

The government also called [redacted], who identified himself as a forensic scientist with the District's Department of Forensic Sciences (DFS). The government did not notice or seek to qualify [redacted] as an expert witness (R. 42-55). In addition to testifying about photographs of evidence he took on the scene and at the DFS and the firearm recovered from the alley near [redacted] testified that he did not see blood on a sweater laying on top of the gun in the alley or on the gun itself (11/15 Tr. 49, 2-9). [redacted] also testified that a small metal fragment he recovered from inside [redacted] apartment "could possibly be a fragment from a shotgun shell" (11/15 Tr. 61, 19-23) and that a small piece of plastic or paper found in the same was "consistent with a shotgun shell wad, which is a component of a shotgun shell," and that "a wad is considered a part of a shotgun shell." (11/15 Tr. 58, 10-15; 61, 16-19)

[redacted] also testified for the government, testifying that he had responded to a report of a burglary and that his role after Mr. Atkins was

transported for medical treatment was primarily to make sure that no one tampered with the scene (11/15 Tr. 72, 15-19). Toward the end of his direct examination, the government asked [redacted], over objection, to comment on the veracity of another witness, asking whether it "bec[a]me apparent to [the officer] that it was not a burglary one." (11/15 Tr. 80, 16-17). Over objection, [redacted] also testified that "you tend to know when – actually, when something like burglary happened," that he knew that was not the case here, and that "the story was just not adding up to having someone" committing a burglary (11/15 Tr. 91, 10-17).[4]

After denying Mr. Atkins' request for a mistrial based on [redacted] commenting on the veracity of [redacted] statement to police that a burglary had occurred (11/15 Tr. 92, 7-23), both parties eventually called expert witnesses to discuss DNA; the government's expert, [redacted], testified, in short, that the DNA of four people was found on the gun, and about the relative odds of that mixture containing DNA from four unrelated people who were not Mr. Atkins versus the odds of that mixture containing DNA of three unrelated people and Mr. Atkins (11/15 Tr. 104, 3-9). On cross-examination, [redacted] discussed DNA transfer and secondary transfer and acknowledged that the gun officers recovered was not

[4] After Mr. Atkins objected, the trial court cut off [redacted]. Read in context, it is apparent that [redacted] would have finished the sentence in this vein. The trial court did not strike the officer's testimony, instead directing the government to "move on." (11/15 Tr. 91, 10-20).

tested for blood (11/15 Tr. 109, 8-14).

After the trial court denied a motion for judgment of acquittal, the defense, in accordance with the trial court's earlier ruling, put into evidence [redacted] 911 call (11/19 Tr. 4, 2-8). The defense then called [redacted], a forensic biology specialist, who was after some difficulty qualified as an expert (11/19 Tr. 12, 20-22). [redacted] testified, in short, about the process of interpreting DNA mixtures, contamination of samples, the transfer of DNA, and that Mr. Atkins' DNA could have been on the gun recovered as the result of a struggle or through transfer DNA (11/19 Tr. 24, 11-24). The trial court denied Mr. Atkins' renewed motion for a judgment of acquittal without explanation (11/19 Tr. 27, 15-20).

The government recalled [redacted] in rebuttal. Over Mr. Atkins' continuing objection, the government played [redacted] third set of statements, those made after detectives returned to the scene from the hospital (11/19 Tr. 30, 13-25). Again over Mr. Atkins' objection on hearsay grounds, [redacted] testified that [redacted] "took [redacted] to -- behind the apartment complex where she stated she hid the gun next to some trash cans." (11/19 Tr. 31, 14-22). Counsel for Mr. Atkins did not object on Confrontation Clause grounds or request an immediate limiting instruction (*Id.*). [redacted] admitted to lying to [redacted] about what Mr. Atkins had told him (11/19 Tr. 44, 3-12).

Prior to closing arguments, the trial court gave preliminary instructions. Critically, the trial court's instruction on prior inconsistent statements failed to adequately describe which of [redacted] statements were admissible for their truth and which were admissible for impeachment purposes, a fact compounded by the government's improper arguments in closing, the testimony the government improperly elicited during trial, and the trial court's failure to remedy its erroneous oral instructions with written instructions given to the jury (R. 86-87). Indeed, if followed, a reasonable juror may well have concluded that he or she *could not* consider the statements admitted substantively under the excited utterance exception but *could* consider [redacted] later statement, properly admissible only for impeachment purposes, for its truth. Specifically, the trial court instructed

> You have heard evidence that [redacted] made a statement on an earlier occasion and that this statement may be inconsistent with her testimony here at trial -- well, may be inconsistent with what you were told about her statements. It is for you to decide whether the witness made such a statement and whether, in fact, it was inconsistent with the assertions of her -- of her position here. If you find such an inconsistency, you may consider the earlier statement in judging the credibility of the witness. But you may not consider it as evidence that what was in the earlier statement was true. (11/19 Tr. 53-54, 23-25, 1-10).

The trial court's oral and written instructions did not require the jury to find that the government had proven that Mr. Atkins was aware of his prohibited status under D.C. Code § 22-4503 (b)(1) in order to convict Mr. Atkins of UPF (11/19 Tr. 87, 14-22; R. 91).

In its closing and rebuttal arguments, the government 1) repeated [redacted] earlier testimony about the identity of a metal fragment and a piece of plastic (11/19 Tr. 63, 13-15) argued [redacted] hearsay statements admissible only for impeachment for their truth, (11/19 Tr., 80, 18-20; 81, 23-25; 83, 17-19), and 3) repeatedly commented personally on the evidence (11/19 Tr., 78, 10-12; 79, 18-20; 80, 16-17; 81, 23-25; 83, 21-22).

After the jury found Mr. Atkins guilty, the trial court sentenced Mr. Atkins as described, *supra* (8/19/19 Tr.).

SUMMARY OF THE ARGUMENT

Prior to the beginning of testimony, the trial court unambiguously ruled that two sets of statements made by [redacted] were admissible as excited utterances. The trial court also ruled that a third set of statements in which [redacted] said that Mr. Atkins possessed a gun, were admissible only for impeachment purposes and only if Mr. Atkins introduced [redacted] earlier statements. No eyewitness testified at trial that Mr. Atkins possessed a firearm.

In what was hardly an overwhelming case for the government, in disregard of the trial court's ruling, the government argued the third set of statements for their truth. That is, the government elicited testimony that [redacted] told officers that Mr. Atkins possessed a firearm. The trial court did not give immediate limiting instructions and its final instructions failed to properly instruct the jury as to how it

should consider [redacted] statements. These errors amounted to a violation of the Confrontation Clause.

In addition to arguing facts not properly in evidence, the government repeatedly personally commented on the evidence, invited one witness to comment on the credibility of another witness, and improperly attempted to bolster the credibility of a government witness by saying he "had no reason to lie to you." These errors infected the trial, constituting plain error and requiring reversal.

The trial court did not instruct the jury that it needed to find beyond a reasonable doubt that Mr. Atkins had knowledge of his prohibited status, having been convicted of an offense punishable by more than one year of incarceration, in order to properly convict him of Unlawful Possession of a Firearm. In light of the Court's decision in *Rehaif*, this constitutes plain error, requiring reversal on Count One (UPF).

Finally, the trial court imposed an illegal sentence with respect to Count Two by imposing a sentence of twenty-two months incarceration for Mr. Atkins' conviction of Possession of an Unregistered Firearm without filing enhancement papers with respect to Count Two, as required by D.C. Code § 23-111. Should this court not reverse Mr. Atkins' UF conviction, the case must be remanded for resentencing.

ARGUMENT

I. THE ADMISSION OF HEARSAY DECLARANT [redacted]'S STATEMENTS THAT MR. ATKINS POSSESSED A FIREARM AS SUBSTANTIVE EVIDENCE VIOLATED THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT AND CONSTITUTES PLAIN ERROR WHERE NO EYEWITNESS PROPERLY TESTIFIED THAT MR. ATKINS POSSESSED A FIREARM, WHERE THE TRIAL COURT'S LIMITING INSTRUCTIONS IMPROPERLY CHARACTERIZED THE ADMISSIBILITY OF [redacted] OUT-OF-COURT STATEMENTS, AND WHERE THE PROSECUTOR REPEATEDLY ARGUED THE HEARSAY STATEMENTS FOR THEIR TRUTH DURING CLOSING ARGUMENTS.

a. Applicable Legal Principles and Standard of Review

As is axiomatic, hearsay is an out-of court of statement offered for the truth of the matter asserted therein, and is inadmissible unless within an exception. *Holmes v. United States*, 92 A.3d 328, 330 (D.C. 2014) (citing *Little v. United States*, 613 A.2d 880, 882 (D.C. 1992)). Hearsay is testimonial "when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Wills v. United States*, 147 A.3d 761, 767 (D.C. 2016). Absent the declarant witness testifying at trial or unavailability and a prior opportunity to cross-examine the declarant, the admission of testimonial hearsay against the accused violates his Sixth Amendment right to confront witnesses against him. *Id.* (citing *Hammon v. Indiana*, 547 U.S. 813, 822 (2006)).

A hearsay objection is insufficent to preserve a Confrontation Clause

objection. *Id.* (citing *Long v. United States*, 940 A.2d 87, 91 (D.C. 2007); *Marquez v. United States*, 903 A.2d 815, 817 (D.C. 2006)). Where an issue is raised for the first time on appeal, as here, this court will apply plain error review. To satisfy the plain error standard, Mr. Atkins "must show error that is plain, that affected his substantial rights, and that seriously affected the fairness, integrity, or public reputation of the judicial proceedings." *Id.* (citing *Guevara v. United States*, 77 A.3d 412, 418 (D.C. 2013)). Because Mr. Atkins satisfies all four prongs, his convictions must be reversed.

b. The Trial Court Erred in Allowing the Government to Elicit Testimony That [redacted] Told Police That Mr. Atkins Possessed a Gun and That the Weapon Recovered in an Alley was the Weapon Used to Shoot Mr. Atkins and in Allowing the Government to Argue Such Statements for Their Truth in Closing.

In assessing the testimonial nature of statements made when police respond to an emergency call for help, this court "objectively evaluate[s] the circumstances and the statements and actions of both the declarant and the interrogators, and…consider[s] these circumstances from the perspectives of both parties to the interrogation." *Id.* (citing *Michigan v. Bryant*, 562 U.S. 344, 359 (2011)).

In *Wills*, a domestic assault case, this court primarily relied on 1) the incident in question apparently being apparently over when officers arrived, 2) the presence of three officers, 3) the fact that the officers did not see any weapons, 4) that the complainant had no injuries, and 5) the declarant's matter of fact answers to officers

in concluding that the complainant's statement in response to an officer's question that her husband had gotten her keys by "snatching" them was testimonial. *Id.* at 767-772.

In this case, [redacted] made the statements in question—that Mr. Atkins had possessed a gun—at least an hour after alleged incident (11/15 Tr. 31, 13-18) while Mr. Atkins was hospitalized (11/15 Tr. 29, 23-25). Several officers were present (11/19 Tr. 29, 5-10), [redacted] was not injured and had already spoken to police about the incident (11/15 Tr. 37-38, 22-25, 1-2). Officers admitted wanting to "confront" [redacted] about what took place (11/15 Tr. 30, 10-12). All of these facts, including officers' stated goals, belief that no burglary had taken place (11/15 Tr. 90, 19-22), and use of deception demonstrate that the primary purpose of the questioning and statements was to establish past events potentially relevant to a later criminal prosecution, rendering the statements testimonial.

Although the trial court ruled that [redacted] statements indicating that Mr. Atkins had possessed the gun were only admissible for purposes of impeaching her earlier statements favorable to Mr. Atkins (11/15 Tr. 7-8), the government elicited testimony in its case-in-chief that [redacted] took officers "to the location of the weapon that was used." (11/15 Tr. 30, 13-16). The trial court did not intervene or provide a limiting instruction. When [redacted] testified in the government's rebuttal case that [redacted] "took [redacted] and

[redacted] to -- behind the apartment complex where she stated she hid the gun next to some trash cans," (11/19 Tr. 31, 14-22) the court again sat silent. The trial court's instructions to the jury, both before and after closing and in its written instructions, did nothing to eliminate confusion about which of [redacted] statements could be considered as substantive evidence and which could only be considered for purposes of impeachment, an issue compounded by the government's repeated references to [redacted] hearsay statements for their truth in its closing and rebuttal arguments (11/19 Tr., 80, 18-20; 81, 23-25; 83, 17-19).

Said another way, the trial court instructed the jury, both orally and in writing, that it *could not* consider [redacted] earlier statements for their truth. Where [redacted] did not testify at trial and, chronologically, her two earlier statements, a call to 911 and statements to officers immediately thereafter, were admissible as substantive evidence as excited utterances, this very likely left the jury with the incorrect impression about the purpose for which it could consider [redacted] statements. Written and oral instructions telling the jury that it could only consider the evidence in reaching a verdict and that evidence is the sworn testimony of witnesses (R. 81) further reinforced the erroneous impression that officers' statements about what [redacted] told them were admissible for the truth of [redacted] statement.

Under these circumstances, this amounted to the admission of [redacted]

[redacted] testimonial statements against Mr. Atkins. Where [redacted] did not testify and Mr. Atkins did not have an earlier opportunity to cross-examine her, this violated his Sixth Amendment right to confrontation.

c. The Error Was Plain.

An error is plain "when it is clear or obvious, rather than subject to reasonable dispute" under current law. *Wills*, 147 A.3d at 772. This court has made clear that nothing in its decisions in *Andrade v. United States*, 106 A.3d 386, 390 (D.C. 2015) and *Frye v. United States*, 86 A.3d 568 (D.C. 2014) have altered the Confrontation Clause landscape. The trial court itself seemed to recognize some confusion regarding its instruction (11/19 Tr. 90-91, 22-25, 1-12), though its efforts failed to adequately remedy the issue. To repeat, there was no ongoing emergency and officers expressly sought to establish facts potentially relevant to a later criminal prosecution in questioning [redacted], "confronting" her. [redacted] was alone with several officers, approximately an hour had passed since [redacted] first spoke to police, there was no evidence police were searching for anyone, and officers believed that [redacted] was not telling the truth.

This court has had occasion to consider the importance of distinguishing the use of a prior inconsistent statement for impeachment from statements admitted as substantive evidence. To highlight this important distinction, this court has held that immediately after a party has impeached its own witness with a prior unsworn

statement, the court should advise the jury that the prior statement is admissible only for impeachment and not as substantive evidence. *See, e.g. Lucas v. United States*, 436 A.2d 1282, 1284-85 (D.C. 1981); *Beale v. United States*, 465 A.2d, 796, 802-03 (D.C. 1983); *Stewart v. United States*, 490 A.2d 619, 625 (D.C. 1985). Failure to give such a limiting instruction may constitute plain error. *See Towles v. United States*, 428 A.2d 836, 842 (D.C. 1981) (finding plain error in failure to give cautionary instruction where government impeached its own witness with a prior inconsistent statement).

Under these circumstances, the trial court's failure to intervene, give immediate limiting instructions, or give final instructions that would effectuate its earlier ruling was plain error.

d. The Error Affected Mr. Atkins' Substantial Rights Where No Eyewitness Properly Testified That Mr. Atkins Possessed a Firearm, Where [redacted] Statements Were the Only Statements Directly Connecting Mr. Atkins to the Gun, and Where the Government Repeatedly Argued the Statements for Their Truth in Closing and in Rebuttal.

An error affects substantial rights where there is "a reasonable probability that the Confrontation Clause violation had a prejudicial effect on the outcome of his trial." *Wills*, 147 A.3d at 764 (quoting *Thomas v. United States*, 914 A.2d 1, 21–22 (D.C. 2006)). This case-by-case determination involves an evaluation of the strength of the government's case.

In *Thomas*, a drug prosecution, this court found the third prong satisfied where a DEA-7 report was admitted in violation of the Confrontation Clause, as the report "was the main, if indeed not the only, proof offered by the prosecution that the ziplocks distributed by appellant contained a measurable amount of a mixture containing cocaine—an essential element of the drug distribution offense with which appellant was charged." *Thomas*, 914 A.2d at 22. This court also found the third prong satisfied in *Drayton v. United States*, 877 A.2d 145, 148-49 (D.C. 2005) where officers based their testimony largely on the out-of-court testimonial statements of non-testifying witnesses. This court reached the same conclusion in *Wills* where the complainant's hearsay statement "was the main, if indeed not the only, proof offered by the prosecution…to establish that Mr. Wills took the property of another with intent to deprive the other of the property," essential elements of the offense. *Wills*, 147 A.3d at 774.

In the instant case, the government presented no witness, with the trial court's ruling properly applied, who testified that Mr. Atkins possessed a firearm. [redacted] statements admitted as substantive evidence indicated that there had been a burglary and that Mr. Atkins had been shot (which he had). Although [redacted] testified in essence that Mr. Atkins DNA was found on the gun, according to the testimony of the defense expert and [redacted], this could have occurred through a struggle over the gun (11/19 Tr. 24, 11-16; 11/15 Tr. 106, 11-15), a

possibility supported by [redacted] statements admitted as substantive evidence under the excited utterance exception to the rule against hearsay. No direct evidence connected Mr. Atkins to the gun recovered in an alley behind 1[redacted]. Thus, there is a reasonable probability that the Confrontation Clause violation—improper testimony about, argument regarding, and instructions concerning [redacted] third set of statements, those the trial court had ruled were admissible only for impeachment—had a prejudicial effect on the outcome of the trial. As in *Wills* and *Thomas*, the errors affected Mr. Atkins' substantial rights.

e. The Error Seriously Affected the Fairness of the Proceedings.

"When the first three parts of *Olano* are satisfied, an appellate court must then determine whether the forfeited error 'seriously affects the fairness, integrity or public reputation of judicial proceedings' before it may exercise its discretion to correct the error." *Thomas*, 914 A.2d at 22 (citing *Johnson v. United States*, 520 U.S. 461, 469-70 (1997)).

"In *Thomas v. United States* and *Otts v. United States*, this court held that a Confrontation Clause violation did not satisfy the fourth prong of the plain-error test when the trial court erroneously admitted a DEA chemist's report that a particular substance was cocaine and there was no reason whatsoever to believe that the chemist's report was unreliable." *Wills*, 147 A.2d at 776 (citing *Thomas*, 914 A.2d at 22–24; *Otts v. United States*, 952 A.2d 156, 162–63 (D.C. 2008)). This court

reached the opposite conclusion in *Wills*, where, "[w]ithout the complainant's testimonial statement, the evidence of attempted theft was meager, if not legally insufficient, and to allow a conviction to stand in such circumstances would seriously call into question the fairness and integrity of these proceedings." *Id.* (citing *United States v. Bruno*, 383 F.3d 65, 80-81 (2d Cir. 2004)) (internal quotation marks omitted). This court went on to say that the "unfairness of leaving the Confrontation Clause violation without a remedy is more pronounced still where the government's proof that Mr. Wills committed the offense of attempted theft consisted almost entirely of unconfronted out-of-court statements." *Id.* at 776-77.

Just as in *Wills*, evidence that Mr. Atkins possessed a firearm, an element of both offenses, consisted almost entirely of out-of-court statements that the trial court had already ruled were not admissible for their truth. The government's improper argument and the trial court's inadequate instructions further compounded the error, and to leave Mr. Atkins without a remedy for the Confrontation Clause violation would be equally unfair. Because testimony and argument regarding the complainant's hearsay statements that Mr. Atkins possessed a firearm amounted to a Confrontation Clause violation on the facts of this case and because this violation satisfies all four prongs of the plain error test, Mr. Atkins' convictions must be reversed.

II. THE TRIAL COURT ERRED IN DENYING MR. ATKINS' REQUEST FOR A MISTRIAL WHERE THE PROSECUTOR

IMPROPERLY INVITED A GOVERNMENT WITNESS TO COMMENT ON THE VERACITY OF ANOTHER WITNESS, REPEATEDLY EMPHASIZED THIS IMPROPER TESTIMONY IN CLOSING, AND IMPROPERLY AND REPEATEDLY COMMENTED PERSONALLY ON THE EVIDENCE IN CLOSING AND REBUTTAL ARGUMENTS.

a. Standard of Review, Applicable Legal Principles, and Relevant Facts

Asking one witness to "express a view or an opinion on the ultimate credibility of another witness' testimony" is improper. *Poteat v. United States*, 559 A.2d 334, 336 (D.C. 1989) (*Carter v. United States,* 475 A.2d 1118, 1126 (D.C.1984), *cert. denied,* 469 U.S. 1226 (1985)). So too is making such an argument in closing or rebuttal. *Id.* "What is prohibited is seeking to have one witness comment or opine on the credibility of a prior witness, however phrased." *McLeod v. United States*, 568 A.2d 1094, 1097 (D.C. 1990).

Likewise, "counsel may not express a personal opinion as to a witness's credibility or veracity. It is for the jury to decide whether a witness is truthful and an attorney may not inject personal evaluations and opinions as to a witness' veracity." *Diaz v. United States*, 716 A.2d 173, 179 (D.C. 1998) (quoting *Dyson v. United States*, 418 A.2d 127, 130 (D.C. 1980)). "Significantly, improper prosecutorial comments are looked upon with special disfavor when they appear in the rebuttal because at that point defense counsel has no opportunity to contest or clarify what

the prosecutor has said." *Id.* at 180 (quoting *Coreas v. United States*, 565 A.2d 594 (D.C. 1989)).

Where preserved, prosecutorial misconduct is first reviewed to determine whether the argument was improper. *Turner v. United States*, 26 A.3d 738, 742 (D.C. 2011) (citing *Finch v. United States*, 867 A.2d 222, 225 (D.C. 2005)). "If the argument was improper," the court then "determine[s] whether or not reversal is warranted, considering (1) the gravity of the improper comments; (2) their relationship to the issue of guilt; (3) the effect of any corrective action by the trial judge; and (4) the strength of the government's case. *Id.* (citing *Najafi v. United States,* 886 A.2d 103, 107 (D.C. 2005)). The court "may not affirm the convictions unless…satisfied that the appellant did not suffer 'substantial prejudice' from the prosecutor's improper comments." *Id.* (quoting *Finch*, 867 A.2d at 277).

If the issue is unpreserved, this court applies plain error review. The impact of errors is viewed cumulatively, rather than individually. *Coreas*, 565 A.2d at 596.

Mr. Atkins preserved objections to testimony elicited by the government over objection that sought to have [redacted], however phrased, comment on the credibility of a witness who made statements favorable to Mr. Atkins, [redacted] (11/15 Tr. 90, 19-22). That is, the jury heard that [redacted] called 911 to report a burglary. Rather than limiting its questioning to the officer's observations, the government sought a legal conclusion that directly undercut [redacted]

[redacted] credibility by asking the officer, "when you arrived at the scene, did it become apparent to you that it was not a burglary one?" The impropriety worsened when the officer testified "when you go to enough of those kinds of scenes, you tend to know when – actually, when something like burglary happened. There's no signs of forced entry. There's no sign of that here. The story was just not adding up to having someone–" (11/15 Tr. 91, 12-15). The government again emphasized this improper argument in closing (11/19 Tr. 59-60, 19-25, 1-4). That [redacted] did not physically testify at trial likely compounded the error.

In closing and rebuttal arguments, the prosecutor repeatedly commented personally on the evidence and emphasized his opinion that certain witnesses were and were not telling the truth, stating "I want you to really evaluate [redacted 911 call] because I want you to notice a few things as [sic] I noticed when I was listening to it in trial," (11/19 Tr. 78, 10-12) "[t]he only time she really gets panicked, ladies and gentlemen, on that phone call, when you listen to it – I wrote it down," (*Id.* at 79, 18-20) "this whole idea of a burglary is completely debunked," (*Id.* at 80, 16-17), "well I'm telling you how the DNA got there. He had the gun. [redacted] said he had the gun in his hand," (*Id.* at 81, 23-25) and "she [redacted] told them the truth." (*Id.* at 83, 19).[5] Conversely, when referring to a witness who testified

[5] Notably, many of these statements also ran afoul of the trial court's express ruling that [redacted] statements to officers made about an hour after their arrival, further exacerbating the error discussed in Part II, *supra*.

for the government at trial, the prosecutor argued that "he had no reason to lie to you" (11/19 Tr. 70, 8-9).

Arguing facts not in evidence similarly constitutes prosecutorial misconduct. *See, e.g.*, *Lewis v. United States*, 541 A.2d 145, 146-47 (D.C. 1988). Although the jury was likely misled about how it should evaluate [redacted] statements, all made out of court, by the trial court's confusing instructions on the issue, the prosecutor should have suffered from no such confusion in light of the trial court's clear ruling on the admissibility of [redacted] various statements (11/15 Tr. 6-8). The prosecutor's argument that [redacted] statements admissible only for impeachment were true both led to a Confrontation Clause violation, as discussed*, supra*, and led the prosecutor to argue facts not properly in evidence.

b. This Prosecutorial Misconduct Cumulatively Requires Reversal.

In *Portillo v. United States*, 62 A.3d 1243, 1257-58 (D.C. 2011) this court considered whether the trial court plainly erred in failing to *sua sponte* correct the prosecutor's characterization that the evidence supported the argument that a burglary was planned all along, finding that the prosecutor's arguments were reasonable inferences from the evidence based on a series of evasive and other actions by the defendant, including parking some distance away from the home later burglarized, turning off lights in the home, carrying a weapon, approaching a darkened home at 1:30 am, appellant's taking items from the home, and more. *Id.*

In *Coreas*, the appellant alleged that the government committed misconduct by, in short, arguing a theory of the case in rebuttal not developed in closing, arguing facts not in evidence and mischaracterizing evidence to support that theory, saying that the appellant had told untruths and "set up" defense witnesses to testify favorably to appellant, argued adverse inferences from appellant's confronting witnesses against him, and urged the jury to "send a message" with its verdict. *Coreas*, 565 A.2d at 603-04. This court found plain error and reversed, relying on 1) the serious nature of the misconduct, 2) the close relationship between the misconduct and the issue of guilt, 3) the lack of curative instructions, and 4) the weakness of the government's case. *Id.* at 605-06.

As in *Coreas*, the prosecutor in this case elicited testimony regarding and argued facts not properly in evidence—that [redacted] told officers Mr. Atkins possessed a gun (for the proposition that Mr. Atkins had possessed a gun). This ran directly contrary to the trial court's ruling. Additionally, as in *Coreas*, there was a close relationship between the government's improper arguments in closing; in addition to arguing [redacted] inculpatory statements for their truth, the government repeatedly commented personally on the evidence, saying that at least one witness "had no reason to lie," and explicitly arguing that an officer, in other words, could tell when a witness was telling the truth, and substituting his judgment for that of the jury. As discussed in Part I, *supra*, the court did not give limiting

instructions during trial, just as the court failed to do in *Coreas*. The trial court's final instructions in this case, as discussed, would have left a reasonable juror confused at best and with an understanding incorrect as a matter of law at worst regarding the purpose for which he or she could consider [redacted] statements. Moreover, as in *Coreas*, this was not a strong case for the government. No witness who testified at trial testified that Mr. Atkins possessed a firearm. The government's expert testified that the DNA recovered from the gun found in an alley contained a mixture of four people's DNA (11/15 Tr. 104, 3-9). An expert witness testified that Mr. Atkins' DNA could have gotten on the gun recovered during a struggle described by [redacted] in statements admitted for their truth (11/19 Tr. 24, 11-24). The government's theory that [redacted] placed the gun later recovered in an alley was undermined by the DNA found on the gun not including her as a contributor (11/15 Tr. 103, 16-23). No other physical evidence connected [redacted] to the gun, despite the government's argument that [redacted] had placed it there. But the court need not conclude that the jury would have reached a different conclusion in order to find that the trial court's plain errors affected Mr. Atkins' substantial rights, only that there is a reasonable probability of a different outcome without the errors. Given the prevalence and nature of the errors and the relative weakness of the government's case, these errors also seriously affected the fairness and integrity of the proceedings, requiring reversal on both counts.

III. THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY THAT UNLAWFUL POSSESSION OF A FIREARM IN VIOLATION OF D.C. CODE § 22-4503 (B)(1) REQUIRED PROOF THAT MR. ATKINS KNEW OF HIS PROHIBITED STATUS CONSTITUTES PLAIN ERROR IN LIGHT OF THE COURT'S DECISION IN *REHAIF*.

a. Applicable Legal Principles and Standard of Review.

Where a party fails to object at trial, this court will generally review for plain error. *See, e.g.*, *Malloy v. United States*, 186 A.3d 802, 814 (D.C. 2018) (quoting *Muir v. District of Columbia*, 129 A.3d 265, 273 (D.C. 2016)). "For reversal, there must be [1] error that is [2] plain (meaning 'clear' or 'obvious'), that [3] affects substantial rights, and that, if not corrected, [4] would result in a miscarriage of justice (meaning conviction of an innocent defendant) or otherwise would 'seriously affect the fairness, integrity or public reputation of judicial proceedings." *Id.* (quoting *United States v. Olano*, 507 U.S. 725, 732-36 (1993)) (internal punctuation omitted). "Plainness is assessed as of the time of appellate review regardless of the state of the law at the time of trial." *Rogers v. United States*, 222 A.3d 1046, 1050 (D.C. 2019) (quoting *Malloy*, 186 A.3d at 815); *accord Muir*, 129 A.3d at 267. An error affects substantial rights if there is a reasonable probability that it had a prejudicial effect on the outcome of the trial. *Wills*, 147 A.3d at 764. Finally, Mr. Atkins must show that the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Wills*, 147 A.3d at 767.

b. The Trial's Court Omission of an Essential Element Constitutes Plain Error, Requiring Reversal on Count One.

i. Failing to Instruct the Jury That It Must Find That Mr. Atkins Knew He Had Been Convicted of An Offense Punishable by More Than One Year Was Error.

The Supreme Court's decision in *Rehaif* makes clear that, where the status of the accused triggers a criminal firearm possession statute, the government must prove that the accused had, at a minimum, knowledge of his or her prohibited status. *Rehaif*, 139 S. Ct. at 2200. D.C. Code § 22-4503 mirrors the federal statute at issue in *Rehaif,* except that the DC statute is textually silent on the culpable mental state required. This court's decisions on strict liability statutes, however, indicate that the UPF statute must have a minimum *mens rea* of knowledge, which must be applied to all material elements of the statute. *See McNeely v. United States,* 874 A.2d 371, 388 (D.C. 2005) (reading *mens rea* into act regulating dangerous dogs); *Carrell v. United States*, 165 A.3d 314 (D.C. 2017) (en banc) (misdemeanor threats). Material elements, as defined by *Rehaif*, include both the possession element and the status element. Applying *Rehaif* to D.C. Code § 22-4503 requires that the government prove both that the accused had the prohibited status *and* that the accused knew of his or her prohibited status, here having been convicted on a offense punishable by more than one year in prison.

In order to prove that someone has violated the federal law prohibiting

people without immigration status from possessing firearms, the government must show both that the accused had knowledge that he possessed the gun and that he had knowledge that he was out of immigration status. *Rehaif,* 139 S. Ct. at 2194. Although *Rehaif* involved immigration status as the prohibited status, the statute in question, 18 U.S.C. § 922 (g) also criminalizes possession of a gun by someone who has been convicted of a felony. *Id.* at (g)(1). As such, the reasoning applies just as strongly to other status-based possessory gun offenses.

Prior to *Rehaif,* federal courts consistently held that the statute required only that the government prove that the accused had knowledge that he possessed the firearm, not knowledge that he was in the status that was prohibited from possessing a firearm. *See, e.g., United States v. Games-Perez,* 667 F.3d 1136, 1142 (10th Cir. 2012). The Supreme Court reversed based on long-settled principles of statutory interpretation that generally require criminal laws to have a culpable mental state in the absence of clear legislative intent to remove it. The Court noted that, "[w]e apply the presumption in favor of scienter even when Congress does not specify any scienter in the statutory text." *Rehaif,* 139 S. Ct. at 2195 (citing *Staples v. United States*, 511 U.S. 600, 605 (1994)). In applying scienter to a statute, the baseline assumption is that the *mens rea* requirement applies to all material elements. Material elements, according to the

Supreme Court, are those that "criminalize otherwise innocent conduct." *Id.* (citing *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994)).

The Supreme Court relied on two main rationales in reaching its decision in *Rehaif*: (1) that the statutory text requires applying knowledge to the status element; and (2) that principles of criminal law require it. “It is therefore the defendant's *status,* and not his conduct alone, that makes the difference. Without knowledge of that status, the defendant may well lack the intent needed to make his behavior wrongful." *Id.* at 1297 (emphasis in original). Finally, the Supreme Court noted that, although it has sometimes declined to read a culpable mental state into a statute when the offense is a purely regulatory or public welfare offense, it would not do so here, because the firearms provisions in question “carry a potential penalty of 10 years in prison that [the Court has] previously described as harsh.” *Id.*

As discussed below, D.C. Code § 22-4503 does not have the word knowingly in it. However, for reasons of statutory interpretation, including those used by the Supreme Court above, the UPF statute must be interpreted the same way as the analogous federal statute. This court has stated that the minimum level of scienter for a statute that is not a public welfare offense is knowledge. Further, both the Supreme Court and this court agree that the culpable mental state must apply to all material elements. *Rehaif* held that, in statutes such as 18

U.S.C. § 922 (g), both the status element and the possessory element are material elements.

Knowing that D.C. Code § 22-4503 (b)(1) must have a culpable mental state, and that the culpable mental state is knowledge, it is a straightforward application of *Rehaif* and *McNeely* to see that knowledge must apply to both the possessory element and the status element of the UPF statute. In *McNeely,* this court said that the government needed to prove that the person accused at least knew that the dog he owned was a pit bull, because he must have "knowledge of the facts that make the conduct illegal." *Id.* at 391. In *Rehaif,* the Supreme Court held that the knowledge that a person is in the status prohibited from possessing a firearm is what renders the otherwise innocent conduct illegal.

Because knowledge of the prohibited status—having been convicted of a crime punishable by more than one-year imprisonment—is the element that turns gun possession from legal to illegal, the court erred in failing to so instruct the jury.

ii. The Error is Plain Under Current Law.

An error is plain if it is "clear or, equivalently, obvious, not subject to reasonable dispute," a determination that is assessed "at the time of appellate review regardless of the state of the law at the time of trial." *Malloy*, 186 A.3d at 815 (internal citations omitted). This court has found error to be plain where the

instructions omitted an essential element. *Id.*; *Perry v. United States*, 36 A.3d 799, 818 (D.C. 2011).

For the reasons discussed in Part III (b)(i), *supra*, the court's instructional error is plain under current law.

iii. The Instructional Error Affected Mr. Atkins' Substantial Rights.

This court has also often found that the omission of an essential element from jury instructions affects an appellant's substantial rights. *Malloy*, 186 A.3d at 820 (*mens rea* element omitted from felony threats charge affected substantial rights); *Perry*, 36 A.3d at 821-22 (aiding and abetting instruction that allowed conviction without intent to inflict serious bodily injury affected substantial rights). The test for whether substantial rights are affected is whether there is a "reasonable probability of a different outcome if the jury had been properly instructed." *Id.* at 818. "In determining whether there is a reasonable probability, the question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worth of confidence. A reasonable probability of a different result is accordingly shown when the government's evidentiary suppression undermines confidence in the outcome of the trial." *Id.* at 819 (citing *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)) (internal quotation marks omitted).

iv. The Instructional Error Seriously Impacted the Fairness and Integrity of the Proceedings.

"An instruction which omits the *mens rea* element of the offense charged is of constitutional dimension." *Malloy*, 186 A.3d at 821 (citing *Wilson-Bey v. United States*, 903 A.2d 818, 822 (en banc)). "A constitutional error of a magnitude which goes to the essence of the crime charged seriously affects the fairness and integrity of the proceedings." *Id.* (citing *Perry*, 36 A.3d at 821-22) (internal punctuation omitted). Thus, in both *Perry* and *Malloy*, cases in which the jury heard evidence at least potentially bearing on the omitted elements, the intent to inflict serious bodily injury element in an aggravated assault case and the *mens rea* element in a threats case, respectively, this court nonetheless held that the omission of the elements in question seriously impacted the integrity of the proceedings and exercised its discretion to reverse the convictions in question.

In this case, the only evidence the jury heard regarding Mr. Atkins' prohibited status was a stipulation that he had been convicted of an offense punishable by more than one year of incarceration at the time of the offense (11/15 Tr. 117, 9-11; R. 91). Indeed, the court properly instructed the jury that it could not consider the fact of conviction for any purpose other than determining that Mr. Atkins had a qualifying conviction required to prove guilt under the charged offense. If the jury could find the omitted element satisfied simply by the existence of the conviction or other prohibited status, the omitted element would have no meaning.

"In circumstances where an essential element of the offense is thus contested and has not been found by the jury, wrongful conviction necessarily affects the integrity of this proceeding and impugns the public reputation of judicial proceedings in general." *Perry*, 36 A.3d at 822 (citing *Perez v. United States*, 968 A.2d 39, 96 (D.C. 2009)). Here, with even less evidence available to the jury regarding the omitted element than was present in *Malloy* and *Perry*, where this court nonetheless found plain error and exercised its discretion to reverse, allowing Mr. Atkins' UPF conviction on to stand would impugn the integrity of the proceedings, the integrity of which were impacted by the error. Accordingly, Mr. Atkins' conviction on Count One must be reversed.

IV. THE TRIAL COURT'S SENTENCE ON COUNT TWO, TWENTY-TWO MONTHS INCARCERATION FOR POSSESSION OF AN UNREGISTERED FIREARM IN VIOLATION OF D.C. CODE § 7-2502.01 (A), IS AN ILLEGAL SENTENCE WHERE THE GOVERNMENT DID NOT PROVIDE NOTICE OF POTENTIAL ENHANCED PENALTIES AS REQUIRED BY D.C. CODE § 23-111 (A).

After a trial that included the many errors described, *supra*, a jury found Mr. Atkins guilty of both charged offenses on November 19, 2018. After finding by clear and convincing evidence that Mr. Atkins did not pose a danger to the safety of any person or the community, as required by D.C. Code § 23-1325 (c), the Honorable Judge Berk released Mr. Atkins on personal recognizance pending sentencing. Following a series of continuances to allow Mr. Atkins, a single father, to arrange

for someone care for his daughter during his incarceration, the parties appeared for sentencing on August 18, 2019. When sentencing Mr. Atkins, the Honorable Judge Berk departed from the Voluntary Sentencing Guidelines on Count One, sentencing Mr. Atkins to, *inter alia*, eighty-four months incarceration, execution of sentence suspended as to all but thirty-six months. On Count Two, the trial court sentenced Mr. Atkins to twenty-two months incarceration, execution of sentence suspended as to all. Because the maximum authorized statutory penalty for possession of an unregistered firearm in violation of D.C. Code § 7-2502.01 (a) is twelve months incarceration, this is an illegal sentence. Should this court fail to reverse Mr. Atkins' conviction on Count Two, the case must be remanded for resentencing.

a. Absent the Government Properly Filing Enhancement Papers, The Maximum Statutory Penalty For Violating D.C. Code § 7-2502.01 (a) is One Year Incarceration.

D.C. Code § 7-2506 (a)(2)(A) provides, in relevant part,

> Except as provided in §§ 7-2502.05, 7-2502.08, 7-2507.02, 7-2508.07, and subchapter IX of this chapter, and § 7-2510.11 any person convicted of **a violation of any provision of this unit** shall be fined not more than the amount set forth in § 22-3571.01 **or imprisoned for not more than 1 year**, or both; except that… any person who is convicted a second time for possessing an unregistered firearm shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 5 years. (emphasis added).

Because sections 7-2502.01 and 7-2507 are part of Unit A of Chapter 25 of Title 7 of the D.C. Code, entitled "Firearms Control Regulations," and none of the

exceptions codified in § 7-2506 (a)(2)(A) apply, the maximum statutory penalty for violating § 7-2502.01 (a) is one year incarceration, absent the filing and applicability of enhancement papers.

b. The Government Did Not File Enhancement Papers With Respect to Count Two as Required By § 23-111 (A) in Order to Subject Mr. Atkins to Increased Penalties Provided for By D.C. Code § 7-2507.06 (a)(2)(A).

"No person who stands convicted of an offense under the laws of the District of Columbia shall be sentenced to increased punishment by reason of one or more previous convictions, unless prior to trial or before entry of a plea of guilty, the United States attorney…files an information…and serves a copy of such information on the person or counsel for the person, stating in writing the previous convictions to be relied upon." D.C. Code § 23-111 (a). Prior to trial means "before the process of impaneling the jury has begun." *Key v. United States*, 587 A.2d 1072, 1073 (D.C. 1991) (quoting *Willingham v. United States*, 467 A.2d 742, 744 (D.C. 1983)). Because of the liberty interests at stake, this court has "repeatedly mandated strict compliance with the procedures set forth in…§ 23–111." *Robinson v. United States*, 756 A.2d 448, 454 (D.C. 2000) (citing *Lucas v. United States,* 602 A.2d 1107, 1110 (D.C.1992)).

In the instant case, the court need not examine in detail when the government must give notice of potentially enhanced penalties, as the record reveals that the

government never provided such notice with respect to Count Two (possession of an unregistered firearm); not before, during or after trial. Though the government filed an information as to a previous conviction subjecting Mr. Atkins to an enhanced penalty upon conviction of Count One, Unlawful Possession of a Firearm in violation of D.C. Code § 22-4503 (b)(1) (R. 66), the government did not file an information with respect to Count Two, as required by D.C. Code § 23-111 (a). Accordingly, the trial court imposed an illegal sentence (twenty-two months incarceration) with respect to Count Two, ten months longer than the sentence permitted under D.C. Code § 7-2507.06 (a) for a violation of § 7-2502.01 (a).[6]

c. Should This Court Not Reverse Mr. Atkins' Conviction on Count Two, The Case Must Be Remanded For Resentencing.

Where this court finds a violation of D.C. Code § 23-111, the appropriate remedy is to remand the case for resentencing. *Id.* at 455; *Key*, 587 A.2d at 1075;

[6] The result is the same whether this court applies plain error review, because Mr. Atkins' trial counsel did not object to the imposition of this illegal sentence, or instead applies a harmless error analysis, as this court has done in many cases involving violations of D.C. Code § 23-111. *See, e.g.*, *Robinson*, 756 A.2d at 454 ("Even if we apply the plain error rule, as the government argues we should do, it is clear that the trial judge plainly erred in imposing an enhancement penalty when the government had not complied with the dictates of D.C. Code § 23–111, as interpreted in *Arnold* [*v. United States*, 443 A.2d 1318 (D.C. 1982)]. Moreover, in applying to this case either the plain error, or the harmless error rule usually applied to cases involving § 23–111…we are unable to conclude either that: (1) the error was not so clearly prejudicial to [Butler's] substantial rights as to jeopardize the very fairness and integrity of the trial…or that (2) the error was harmless under *Arnold, supra.*") (internal citations and punctuation omitted).

Erskines v. United States, 696 A.2d 1077, 1082 (D.C. 1997). Thus, if this court does not reverse Mr. Atkins' conviction on Count Two on other grounds, the appropriate remedy is to remand the case for resentencing.

CONCLUSION

Because the admission of testimonial hearsay against Mr. Atkins violated the Confrontation Clause and constitutes plain error, Mr. Atkins convictions on Counts One and Two must be reversed. The government's inviting one witness to opine on the credibility of another and giving a personal assessment of the evidence and credibility of witnesses similarly requires on both counts in what was not a strong case for the government. Because the trial court's instructions on Count One omitted a culpable mental state compelled by the Court's decision in *Rehaif* and this was plain error, Mr. Atkins' conviction on Count One must be reversed. Because the sentence imposed on Count Two is an illegal sentence, should this court not otherwise reverse Mr. Atkins conviction on Count Two, the case must be remanded for resentencing on Count Two.

Respectfully submitted,

Adrian E. Madsen, Esq.
Bar No. 1032987
Counsel for Appellant
8705 Colesville Road, Suite 334
Silver Spring, MD 20910
(202) 738-2051
madsen.adrian.eric@gmail.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief was served upon Elizabeth Trosman, Esq., via the D.C. Court of Appeals e-filing system, this 30th day of June, 2020.

/s/ Adrian Madsen