BRIEF FOR APPELLEE

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 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

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ISSUES PRESENTED

I. Whether the trial court plainly erred resulting in a Sixth Amendment violation when, in the government's rebuttal case, the trial court admitted statements made by a non-testifying witness for the limited, non-hearsay purpose of impeaching the witness' earlier out-of-court statements that were introduced as excited utterances by appellant during his case, where the trial court instructed the jury that the statements were not to be considered for their truth.

II. Whether reversal is required based upon alleged prosecutorial impropriety, where the questions and comments with which appellant takes issue were neither improper nor substantially prejudicial to appellant.

III. Whether the trial court plainly erred when it gave the jury the standard Redbook jury instruction enumerating the elements of unlawful possession of a firearm, and did not include in its instruction that the jury must find appellant knew of his status as an individual previously convicted for a crime punishable by 12-months' incarceration, where this Court has never recognized knowledge-of-status as an element of an unlawful possession of a firearm charge, and it is neither plain nor

obvious that the Supreme Court's recent decision in *Rehaif v. United States*, 139 S. Ct. 2191 (2019), interpreting the federal felon-in-possession statute, should be applied to recognize such an element under the District's differently worded statute, and where the record shows no legitimate dispute could be raised regarding appellant's knowledge of his prior conviction.

IV. Resentencing on appellant's conviction for possession of an unregistered firearm is appropriate where the trial court's sentence exceeded the statutory maximum in the absence of the government filing an information pursuant to D.C. Code § 23-111(a) before trial.

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APPEAL FROM THE SUPERIOR COURT
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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

On August 9, 2017, appellant was indicted for unlawful possession of a firearm (crime of violence) ("FIP") (D.C. Code § 22-4503(a)(1), (b)(2)) and possession of an unregistered firearm ("UF") (D.C. Code § 7-2502.01(a)) (R.8).[1] Following a jury trial before the Honorable Steven N.

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[1] "R." refers to the record on appeal. "Tr." refers to the trial and sentencing hearing transcripts. "App. Br." refers to appellant's brief. "MSR" refers to the government's motion to supplement the record.

Berk in November 2018, the jury found appellant guilty of both counts (R.A at 8, 16-18). On August 19, 2019, the court sentenced appellant to 84 months' incarceration and three years' supervised release on the FIP count, suspending all but 36 months' incarceration in favor of one year of supervised probation (R.27). With respect to the UF charge, the court imposed a 22-month sentence that was suspended in favor of a one-year period of supervised probation, and ran the sentence and probation concurrently with the FIP charge (*id.*). On September 1, 2019, appellant timely noted an appeal (R.28).

The Trial

The Government's Evidence

In the early morning on January 13, 2017, Metropolitan Police Department ("MPD") Officer [redacted] and his partner, Officer [redacted], went to Apartment 2 at 1641 V Street, S.E., in response to a call about a burglary (11/15/18 Tr. 72-75). When they arrived, appellant's girlfriend, [redacted], let the officers into the building and the apartment was unlocked (*id.* at 75). Appellant and appellant's six-year-old daughter were in the apartment (*id.*). Appellant was lying on the couch in the living room "complaining of pain to his right foot, which was

wrapped, from an apparent gunshot wound" (*id.* at 75, 77). There was also a black sock with a reddish-brown stain (suspected to be blood) lying in the living room (*id.* at 59-60).

In the back bedroom there was a redish-brown, blood stain around a defect in the floor (11/15/18 Tr. 54-57, 81). Inside the defect there was a small metal fragment that could have been a projectile from a shotgun shell (*id.* at 60-61). Additionally, further inside the bedroom there was a small piece of plastic "consistent with a shotgun shell wad, which is a component of a shotgun shell" (*id.* at 58, 61).

Officer [redacted] observed multiple movable electronics in the living room, including a television, a stereo, an Xbox or other video game system, and multiple cellular phones (11/15/18 Tr. 77-78). He felt that the "story was not adding up" and, based on the fact there were no usual signs of forced entry and "nothing . . . appeared to be missing," concluded no burglary had occurred (*id.* at 91).

MPD Detective [redacted] arrived while paramedics were treating appellant, and spoke with appellant's girlfriend (11/15/18 Tr. 28-29). When appellant was taken to the hospital, Detective [redacted] followed to speak with him (*id.* at 29-31). Detective [redacted] then returned to the

apartment and confronted appellant's girlfriend, who then led officers to a 10mm shotgun that was wrapped in a sweatshirt and covered with leaves in an alley behind the apartment (*id.* at 30-32, 38-40).[2]

The shotgun and sweater were recovered by a forensic scientist (8/15/18 Tr. 48-51). There was a spent shotgun shell inside the chamber of the shotgun (*id.* at 52-53). DNA testing detected a mixture of DNA from four contributors on the shotgun (*id.* at 103). The testing was inconclusive with respect to whether appellant's girlfriend was a potential contributor to the mixture (*id.*). Appellant, however, was included as a potential contributor, and "the mixture of the DNA profile obtained from . . . the shotgun [wa]s at least 6.25 trillion times more likely if it originated from

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[2] The government took care in its case-in-chief not to elicit the substance of [redacted]'s statements to Detective [redacted] after his return from the hospital. *See, e.g*, 11/15/18 Tr. 30 ("Without telling us the substance of the conversation, what happened after you talked to her?"); *id.* at 36 (confirming that body-worn camera footage showing [redacted]'s actions did not contain any audio). This was in keeping with the government's explicit recognition, *see infra* pg. 17, that [redacted]'s statements would become admissible only to impeach her earlier, contrary statements made on a 911 call if appellant chose to admit the earlier statements. Nevertheless, on cross-examination of Detective [redacted], appellant elicited that, when Detective [redacted] asked [redacted] where the gun was located, she told him that she had taken the gun outside and placed it behind the apartment building's trash cans (11/15/18 Tr. 32).

[appellant] and three unknown, unrelated individuals than if it originated from four unknown, unrelated individuals" (*id.* at 103-04). The "quant value"—which shows how much DNA is present—indicated that it was unlikely that the DNA had come from bodily fluid such as saliva, blood, or semen (*id.* at 113). On cross-examination, the government's DNA expert confirmed that, if an individual touched a gun during a struggle over it, there is a possibility his DNA would be found on that gun (*id.* at 106).

The parties stipulated that "[o]n or about January 13th, 2017, [appellant] . . . did not possess a valid registration certification as required by law in the District of Columbia to possess a firearm" and that "prior to January 13, 2017, [appellant] . . . had been convicted of a crime punishable by imprisonment for a term exceeding one year" (11/15/18 Tr. 116-17).

The Defense Evidence

Appellant played for the jury a recording of the 911 call [redacted] made on January 13, 2017 (11/19/18 Tr. 3-4).[3] On the call, [redacted] said

[3] Appellant did not formally admit the recording as a numbered exhibit,

that appellant had been shot in the foot when someone came into her home and tried to take food and other things from the apartment (MSR Ex. 1). [redacted] was not sure what type of gun was used, and said that the robber took the gun with him when he left in an unknown direction (*id.*).

Appellant presented testimony from [redacted], who the court qualified as an expert in forensic biology (11/19/18 Tr. 4-5, 12).[4] [redacted] testified that, given the increased sensitivity of DNA testing, scientists are "starting to detect DNA that's just in the environment" (*id.* at 22-23). He confirmed that a DNA profile could be detected from blood even if that blood were not visible to the naked eye, and that it is possible for an individual's DNA to be on a gun if he had touched it during a struggle over the gun (*id.* at 23-24). He also noted that DNA testing can

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however, he introduced the contents of the recording into evidence by playing it at the beginning of his defense case (11/19/18 Tr. 3-4). A copy of the 911 recording is attached as Exhibit 1 to the government's motion to supplement the record.

[4] During voir dire, [redacted] admitted that, on two occasions in New York, he had previously failed to be qualified as an expert based on concerns regarding his employment history, the veracity of educational qualifications listed on his resume, and the misleading nature of information posted on his website (11/19/18 Tr. 6-12).

show the likelihood or certainty that DNA came from a particular person, but cannot reveal "how that DNA gets there or when it got there" (*id.* at 24).

The Government's Rebuttal Evidence

In rebuttal, the government recalled Detective [redacted]. [redacted] explained that on the night of the shooting, he spoke with [redacted] when he returned from the hospital (11/19/18 Tr. 29). That conversation was recorded by Officer [redacted]'s body-worn camera (*id.*).[5] Detective [redacted] asked [redacted] if she wanted to tell him the truth about what happened, noting that—just as he had told appellant—it was not a big deal because it was an accident (Gov't Ex. 99 at 0:00-:20). [redacted] told Detective [redacted], "We were arguing" (*id.* at 0:20-30). Pausing for a moment, [redacted] then admitted, "He picked up the gun" (*id.* at 0:30-0:38). When Detective [redacted] repeated [redacted]'s statement to her, she responded "he had it" (*id.* at 0:38-41). In response to additional questions, [redacted] confirmed that the gun accidentally went off (*id.* at 0:41-50).

[5] The government introduced a copy of an audio recording of the discussion captured by Officer [redacted]'s body-worn camera as Government's Exhibit 99 (11/19/18 Tr. 29-30).

When asked what appellant did with the gun, [redacted] stated, "hid it," and admitted that she knew where it was hidden (*id.* at 1:10-28). [redacted] then took detectives to the location where the shotgun was recovered (11/19/18 Tr. 31, 34).

On cross-examination, Detective [redacted] admitted that he used "deceptive tactics" when he spoke with [redacted], telling her that appellant admitted to shooting himself when, in fact, that was not true (11/19/18 Tr. 43-44).

SUMMARY OF ARGUMENT

The trial court did not plainly err when it permitted the government to introduce [redacted]'s statement to Detective [redacted] to impeach [redacted]'s earlier statements in her 911 call that appellant introduced during his case. Because [redacted]'s statement was introduced for a legitimate non-hearsay purpose, its admission did not violate the Sixth Amendment. Further, even if the trial court's limiting instruction did not effectively restrict the jury from considering the statement for its truth, appellant waived any argument on this basis when he assented to the language used by the trial court in its instruction. Moreover, it is neither plain nor obvious that the trial court's instruction was ineffective and, in

any event, any error did not affect appellant's substantial rights and reversal is not warranted.

Neither is reversal warranted based upon the questions and comments appellant alleges constituted prosecutorial misconduct. Both the prosecutor's questioning of Officer [redacted], as well as his comments in closing and rebuttal argument were proper. Moreover, none of the allegedly improper comments were significant enough, in the context of the parties' closings and in light of the trial court's instructions to the jury, to substantially prejudice appellant.

The trial court did not plainly err when it instructed the jury on the elements of FIP. Although the trial court did not instruct the jury that it must find that appellant knew of his status as an individual previously convicted of a crime punishable by 12-months' imprisonment, it is neither plain nor obvious under current law that appellant's knowledge of his felon-status is a necessary element of FIP. Additionally, given the textual differences between the District's FIP statute and the federal statute recently interpreted in *Rehaif v. United States*, 139 S. Ct. 2191 (2019), that decision's applicability to the District's statute is neither plain nor obvious and reversal is not warranted. Moreover, given the record

evidence that there is no legitimate dispute regarding appellant's knowledge of his felon-status, reversal is not warranted because any error would not affect the fairness, integrity, or public reputation of the judicial proceedings.

Finally, the government does not oppose appellant's request to remand for resentencing on appellant's UF conviction given that, absent the government's pre-trial filing of enhancement papers, the trial court's sentence on this count exceeded the statutorily allowable maximum.

ARGUMENT

I. The Trial Court Did Not Plainly Err When It Admitted [redacted]'s Subsequent Statements to Police to Impeach Statements Made in Her 911 Call.

A. Additional Background

Before trial, the parties raised with the trial court a dispute about the admissibility of statements that appellant and [redacted] made to the police (R.18; R.19; 11/14/18 Tr. 3-18). Appellant noted that [redacted]'s whereabouts were unknown, and that she was therefore not available as a witness (11/14/18 Tr. 6). Nevertheless, appellant sought to introduce, as excited utterances, a recording of [redacted]'s 911 call, as

well as statements she made to the police when they first responded to the apartment (*id.* at 5-7).

The government disputed that [redacted]'s statements to responding officers were excited utterances, and opposed their admission (11/14/18 Tr. 11-12). The government also initially opposed admission of the 911 call, but eventually conceded that it was an excited utterance (*id.* at 11, 15). The government maintained, however, that if appellant introduced the 911 call, the government would then be entitled to impeach the credibility of [redacted]'s statements therein by introducing [redacted]'s subsequent, contradictory statements to the police in rebuttal (*id.* at 8-11; see also 11/15/18 Tr. 7-8 (citing Fed. R. Evid. 806)). Appellant opposed admission of these subsequent statements without specifying a basis for his objection (11/14/18 Tr. 10; 11/15/18 Tr. 8-10).

After reviewing recordings of the various statements at issue, the trial court found that [redacted]'s statements on the 911 call and to responding officers were admissible as excited utterances (11/14/18 Tr. 17-18; 11/15/18 Tr. 5-7). With respect to appellant's statements to officers at the hospital, the trial court found that the statements "[we]re not admissible. They are hearsay." (11/15/18 Tr. 6.)

The trial court also found that [redacted]'s subsequent, contradictory statements to police would be "admitted only for impeachment purposes" (11/15/18 Tr. 8). In particular, the trial court noted:

> [T]he statement can only be brought in to impeach Miss [redacted] or the video of Miss [redacted], if you will, because there is a distinct flipping of her position. And the Government has the ability to impeach using that statement. (11/15/18 Tr. 9.)

At trial, appellant introduced [redacted]'s 911 call at the beginning of the defense case (11/19/18 Tr. 3-4). Relying on the trial court's earlier ruling, the government introduced [redacted]'s contrary statements to Detective [redacted] in rebuttal (*id.* at 27-30). Following this testimony, the government proposed that the trial court instruct the jury on prior inconsistent statements (*id.* at 39). Appellant did not object (*id.* at 39-40).

At the close of evidence, the trial court gave the following instruction:

> The law treats prior inconsistent statements differently depending on the nature of the statements and the circumstances in which they were made. I will now explain how you should evaluate those statements.
>
> 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. (11/19/18 Tr. 53-54.)

After the jury was excused to deliberate, the trial court noted, sua sponte, that with respect to the instruction on prior inconsistent statements, "the standard instruction doesn't read very well because [redacted] didn't actually make a statement at trial" (11/19/18 Tr. 90). The trial court therefore proposed to provide the jurors the following modified instruction in the written copy of instructions:

> You've heard evidence that [redacted] made a statement on an earlier occasion and that this statement may be inconsistent with statements referred to here at trial. It is for you to decide whether the witness made such a statement and whether in fact it was inconsistent with the witness' prior position. 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 said in the earlier statement was true.

(R.20 at 9; 11/19/18 Tr. 90-91). Both parties consented to providing the jury with the court's edited instruction in writing (11/19/18 Tr. 91).

B. Standard of Review and Applicable Legal Principles

Appellant challenges the admission of [redacted]'s statements to police on constitutional grounds for the first time on appeal (see 11/14/18 Tr. 10; 11/15/18 Tr. 8-10). As appellant concedes, this Court reviews his claim for plain error (App. Br. 13). *See Marquez v. United States*, 903 A.2d 815, 817 (D.C. 2006). "On a plain error review, an appellant must show that the objectionable action was (1) error, (2) that is plain, (3) that affects substantial rights, and (4) that seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.*

The Confrontation Clause of the Sixth Amendment provides that in all criminal prosecutions, "the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. In *Crawford v. Washington*, 541 U.S. 36 (2004), the Supreme Court analyzed the historical roots of this provision and held that the Confrontation Clause bars admission of "testimonial" statements of a witness who does not appear at trial unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. *Id.* at 53-54, 59, 68. A statement is testimonial if it is made for the primary purpose of creating a "substitute for live testimony" at a later

criminal trial. *Jenkins v. United States*, 75 A.3d 174, 189, 191 (D.C. 2013). The Court in *Crawford* also noted that the Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." *Crawford*, 541 U.S. at 59 n.9 (citing *Tennessee v. Street*, 471 U.S. 409, 414 (1985)); *see also Wilson v. United States*, 995 A.2d 174, 182 (D.C. 2010) (recognizing that "[a] crucial aspect of *Crawford* is that it only covers hearsay, i.e., out-of-court statements offered in evidence to prove the truth of the matter asserted" and that "the Confrontation Clause does not bar the admission of out-of-court statements admitted for a purpose other than to establish the truth of the matter asserted").

C. Discussion

The admission of [redacted]'s statements to the police contradicting what she reported in her 911 call did not violate the Confrontation Clause because they were introduced for a non-hearsay purpose. *See Crawford*, 541 U.S. at 59 n.9*; see also Street,* 471 U. S. at 414 (third-party admission offered for non-hearsay purpose of proving what happened when defendant himself confessed "raises no Confrontation Clause concerns"); *Wilson*, 995 A.2d at 182.

The statement [redacted] made to Detective [redacted] that was elicited by the government in rebuttal[6] was not offered for its truth, but for the non-hearsay purpose of impeaching the credibility of the statements she had made in her previously admitted 911 call (11/15/18 Tr. 8-9; see also 11/14/18 Tr. 9-11). *See Burgess v. United States*, 786 A.2d 561, 570 (D.C. 2001) ("If a statement is not offered to prove the truth of the matter asserted, it is not hearsay."); *see Smith v. United States*, 26 A.3d 248, 260 (D.C. 2011) (citing Fed. R. Evid. 806 for proposition that an out-of-court declarant's credibility may be attacked by any evidence that would be deemed admissible if declarant had testified as a witness, and noting that "[a]n impeachment witness, by definition, includes one who will testify that the adversary's witness has made a prior inconsistent statement, and is therefore less worthy of belief than if she had testified consistently") (citing *Gamble v. United States*, 901 A.2d 159, 171-72 (D.C. 2006)). Indeed, the government repeatedly acknowledged that

[6] As discussed above, despite the fact appellant elicited certain of [redacted]'s statements to Detective [redacted] during cross-examination in the government's case-in-chief, the government did not elicit any such statements until rebuttal, in response to appellant's introduction of [redacted]'s 911 call as an excited utterance in his defense case. *See supra* note 2 & pg. 12.

[redacted]'s statements to the police would only be admissible in rebuttal if appellant introduced her earlier statement on the 911 call (11/14/18 Tr. 9 ("I think the Government wouldn't be able to bring that in until [appellant] elicited this excited utterance. And the way the jury could . . . weigh the credibility of the excited utterance to see if it's true or not."); 11/15/18 Tr. 8 ("So defense would have to – when they play the 911 call, we would then, in rebuttal, put in that statement, Your Honor.")). Moreover, the trial court twice instructed the jury, once orally and once in writing, that it was to consider the evidence of [redacted]'s inconsistent statement to police "in judging the credibility of the witness" but not for its truth (11/19/18 Tr. 53-54; R.20 at 9).

Appellant's concedes (App. Br. at 14) that the trial court admitted [redacted]'s statements to the police solely for the limited purpose of impeaching her earlier statements in the 911 call. Nevertheless, appellant attempts to resurrect his Confrontation Clause claim by alleging (App. Br. at 14-16) that actions taken by the prosecutor, combined with the limiting instruction given by the trial court, resulted in functionally allowing the jury to consider [redacted]'s statements for their truth. These arguments are unavailing.

First, there was nothing improper about the government eliciting testimony about [redacted]'s physical conduct when she led officers to where the shotgun was hidden. The detectives' testimony related their own eyewitness account of events, did not convey any out-of-court statements that would be inadmissible hearsay, and no limiting instruction would have been appropriate. *See Holmes v. United States*, 92 A.3d 328, 331 (D.C. 2014) ("When [detective] testified about what he saw on the screen of the store's surveillance camera, he was not reporting any other person's out-of-court statement. Thus his testimony was not hearsay.").

Nor did the government's closing arguments (which are discussed in more detail in Section II.B.1.c below) result in expanding the permissible uses the jury could make of [redacted]'s statement to Detective [redacted]. Appellant takes snippets of the prosecutor's comments out of context to argue that the government argued [redacted]'s statements to [redacted] for their truth (App. Br. at 15). Although the government's theory of the case required it to argue that the substance of [redacted]'s statements that appellant had the gun when he shot himself was true, the government repeatedly tied its argument back to

the evidence other than [redacted]'s statement to Detective [redacted] while urging the jury to use [redacted]'s statement to assess the veracity of her statements on the 911 call (see 11/19/18 Tr. 61 ("[redacted] just opened up and told a completely different story than what she said on the 911 call. And we just heard the instruction about a prior inconsistent statement and that you're able to use that to determine the veracity – the truth of that earlier statement."); *id.* at 64 ("And so how does the Government prove possession? Well, you take that prior inconsistent statement and you compare it against this burglary story – it just doesn't make sense."); *id.* ("*[T]he evidence* points towards fact that the second story that Miss [redacted] gave on the scene to be more likely. . . The defendant had the gun, which is how his DNA got on the gun.") (emphasis added); *id.* at 65 ("[W]e know that the defendant possessed the gun because his DNA was on it. And his DNA is on it because he had it in his hand when he shot himself."); *id.* at 80 ("This whole idea of this burglary is completely debunked. There's no evidence to support it. And I'm not asking you to believe [redacted]'s statement to Detective [redacted] because the statement was made. No. I'm asking you to believe it because of the facts that support it and the facts that don't support the 911 call."); *id.* at

83 ("And she told them the truth. *And the evidence that's with it* supports that.") (emphasis added).

Even if this Court adopted appellant's characterization of the government's closing argument as urging the jury to consider [redacted]'s statements for their truth, however, the jury is presumed to follow the law as instructed by the trial court even where it conflicts with a lawyer's argument advanced in closing. *See McCoy v. United States*, 760 A.2d 164, 185-86 (D.C. 2000). Here, the trial court instructed the jury on the proper use of [redacted]'s statement, and also explained that (1) the court's function was "to instruct [the jury] on the law that applies in this case," (2) the jury's duty was "to accept the law as [the trial court] instruct[ed]" and "decide the facts based on the evidence presented in court and according to the legal principles that [the court] instruct[ed the jury] about," (3) that "[t]he statements and arguments of the lawyers are not evidence," and (4) [redacted]'s prior inconsistent statement could not be considered for its truth (11/15/18 Tr. 12-15; 11/19/18 Tr. 45-46, 53-54; R.20 at 9).

Appellant's argument must then rest on his assertion (App. Br. at 15) that the trial court erroneously instructed the jury on the use it could

make of [redacted]'s statements in the 911 call and her subsequent statements to the police. As an initial matter, appellant assented to the trial court's proposal to modify, in the written jury instructions, the standard limiting instruction for prior inconsistent statements in order to make it more applicable to the actual evidence presented at trial (11/19/18 Tr. 91). Accordingly, appellant invited the instructional error of which he now complains, thus waiving his right to challenge it on appeal. *See, e.g.*, *United States v. Frank*, 599 F.3d 1221, 1240 (11th Cir. 2010) ("[W]hen a party agrees with a court's proposed instructions, the doctrine of invited error applies, meaning that review is waived even if plain error would result.").

Even if his challenge were not waived, appellant's argument must fail because he interprets the trial court's limiting instruction by "selecting and comparing separate phrases for literal content" rather than viewing it in its full context and in light of the evidence presented to the jury. *See Carter v. United States*, 475 A.2d 1118, 1124 (D.C. 1984) (rejecting argument that jury instruction improperly instructed on self-defense where, "[w]hen examined in isolation, the portion of the challenged instruction appears to impose a duty to retreat" but,

nevertheless, "when viewed in its entirety, the instruction correctly informed the jury regarding the law of self-defense in this jurisdiction").

When read in context, the trial court's limiting instruction distinguished between evidence that [redacted] made (1) a "statement on an earlier occasion" that was potentially inconsistent with (2) statements made by [redacted] that appellant elicited in the defense case (11/19/18 Tr. 53-54; R.20 at 9). The jury was instructed that the "statement on an earlier occasion" could not be considered for its truth (11/19/18 Tr. 53-54; R.20 at 9). Given the evidence at trial, the jury would have understood that the "statement on an earlier occasion" that was subject to the limiting instruction was [redacted]'s statement to Detective [redacted] when he returned from the hospital. This is because [redacted]'s statement to Detective [redacted] was the only one that was inconsistent with her other "statements" and "prior position" introduced at trial—those recorded in her 911 call.[7] Viewed in context, the trial court's instruction correctly

[7] In its closing argument, the government reinforced to the jury that the statement it could not consider for its truth was the statement [redacted] made to Detective [redacted] when he returned from the hospital:

> [W]e heard what happened when [Detective [redacted]] came back and talked to Miss [redacted].

limited the jury's consideration of [redacted]'s statement Detective [redacted].

Moreover, any error arising from the failure of the trial court's instruction to adequately explain to the jury that it could not consider [redacted]'s later statement to Detective [redacted] for its truth was neither plain nor obvious. Not only did the trial court seek to specifically tailor the limiting instruction to account for the specific evidence presented in appellant's case, defense counsel raised no issues with the language. *See*

> He said he told Miss [redacted] he knew what happened, that the defendant shot himself in the foot. So just tell me the truth.
>
> And what did Miss [redacted] do? She just opened up and told a completely different story than what she said on the 911 call.
>
> And we just heard the instruction about a prior inconsistent statement and that you're able to use that to determine the veracity – the truth of that earlier statement. And so we'll talk more about that subsequent inconsistent statement a little later. (11/19/18 Tr. 61.)

See also (11/19/18 Tr. 64 (identifying [redacted]'s statement to [redacted] as the relevant "prior inconsistent statement": "And so how does the Government prove possession? Well, you take that prior inconsistent statement and you compare it against this burglary story – it just doesn't make sense.").

Anderson v. United States, 857 A.2d 451, 459-60 (D.C. 2004) (questioning how alleged error arising from admission of evidence prior to government satisfaction of its proffer could be obvious to trial court where "that fact did not occur to defense counsel").[8]

Even if this Court finds that the trial court's limiting instruction constituted error that was plain, such error did not affect appellant's substantial rights. The government's proof of his possession of the shotgun did not rely materially upon [redacted]'s statement to Detective [redacted]. Rather, the government established its theory of the case, that appellant possessed the shotgun when he shot himself in the foot, through the physical evidence presented at trial—including the shotgun debris found in the bedroom, the injury to appellant's foot, and appellant's DNA on the shotgun—as well as the inconsistency of the physical evidence with the report of a burglary, and [redacted]'s conduct

[8] In arguing that the trial court's error was plain, appellant cites (App. Br. at 17) cases finding error where a trial court failed to give an immediate limiting instruction upon the introduction of prior inconsistent statements by a party to impeach its own witness. As appellant's brief notes, these cases address a very specific situation not present here—where a party is surprised and must impeach its own witness with a prior inconsistent statement.

demonstrating her knowledge of where the shotgun was. Although [redacted]'s statement, if considered for its truth, corroborated this other evidence, it was not a focus of or central to the government's proof, contrasting it with those cases cited by appellant (see App. Br. at 18).

Finally, even if this Court finds that appellant has made the three required showings to establish plain error, this Court should decline to exercise its discretion to reverse his conviction as the error did not seriously affect the fairness, integrity, or public reputation of the judicial proceeding. During cross-examination of Detective [redacted] in the government's case-in-chief, appellant elicited that [redacted] told him that she physically touched the gun when she took it outside and hid it (11/15/18 Tr. 32). Then, in closing, appellant argued that the inconsistency between [redacted]'s statement and the DNA evidence showed that the government's case did not make sense (11/19/18 Tr. 73-74 ("Also, how come – if Miss [redacted] took the gun and put it in the dumpster, how is it that her . . . DNA is not on the gun? It's inconclusive. Mr. Atkins' was. But hers is inconclusive. That just doesn't make sense, ladies and gentlemen."). Because he affirmatively elicited [redacted]'s statements to the detective and then used this evidence to "bolster his

theory of the case," appellant should be deemed to have waived his confrontation right with respect to [redacted]'s statements to Detective [redacted]. *See United States v. Cooper*, 243 F.3d 411, 416 (7th Cir. 2001) (defendant waives confrontation rights where he strategically uses the evidence to bolster his theory of case); *see also Mack v. United States*, 570 A.2d 777, 778 n.1 (D.C. 1990) (appellant may not complain of prejudice brought about by improper admission of evidence where he participates in the violation for tactical reasons). Moreover, appellant chose to introduce [redacted]'s 911 call knowing that it would open the door to admission of [redacted]'s statements to Detective [redacted] in rebuttal. Then, appellant affirmatively approved of the trial court's limiting instruction (which he now alleges was deficient) and stood silent as the prosecutor used the statements in an allegedly improper manner in closing. Given that appellant's conduct at trial significantly compounded any alleged error, "he cannot now be heard to complain of the prejudice it allegedly caused." *Mack*, 570 A.2d at 778 n.1.[9]

[9] Absent a valid Sixth Amendment objection to admission of [redacted]'s statements to Detective [redacted], the trial court could have admitted them for their truth as statements against her penal interest. *See Lamuer v. United States*, 409 A.2d 190, 199 (D.C. 1979) (adopting Fed. R. Evid.

II. Reversal is Not Warranted Based on Appellant's Allegations of Prosecutorial Impropriety.

A. Standard of Review and Applicable Legal Principles

In assessing allegations of prosecutorial impropriety, this Court first determines whether the challenged remarks were improper. *McGrier v. United States*, 597 A.2d 36, 41 (D.C. 1991). If so, this Court, viewing the remarks in context, considers: (1) the gravity of the impropriety, (2) its 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.* Where a defendant has preserved his objection,

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804(b)(3) and creating hearsay exception where (1) declarant is unavailable, (2) hearsay statement is against the penal interest of the declarant, and (3) corroborating circumstances indicate the trustworthiness of the statement). First, [redacted], who had previously been subpoenaed for earlier trial dates but whose presence on the day of trial was unknown (11/14/18 Tr. 6), was unavailable to the parties. Second, [redacted]'s statements to Detective [redacted]—which contradicted her prior account of the night's events to the 911 dispatcher and responding officers—exposed her to criminal liability for making a prior false report to the police (11/15/18 Tr. 8-9 (trial court describes [redacted]'s later statements as "a blatant sort of flip-over"); see also 8/18/17 Tr. 2-7 (discussing need to resolve potential Fifth Amendment issues with [redacted] prior to trial)). Finally, both the physical evidence and [redacted]'s conduct revealing her knowledge of where the gun was hidden corroborated her statement to Detective [redacted] and indicated that it, rather than her earlier report, was trustworthy.

this Court "will affirm absent substantial prejudice, i.e., whether [it] can say 'with fair assurance, after all that has happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error.'" *Peoples v. United States*, 640 A.2d 1047, 1056 (D.C. 1994) (quoting *Kotteakos v. United States*, 328 U.S. 750, 765 (1946)). However, where a defendant has not preserved his objection, this Court will reverse the conviction only if the impropriety "so clearly prejudiced [his] substantial rights as to jeopardize the fairness and integrity of [the] trial." *Dixon v. United States*, 565 A.2d 72, 75 (D.C. 1989) (citing *Watts v. United States*, 362 A.2d 706, 709 (D.C. 1976) (en banc)). Reversal for plain error in cases of alleged prosecutorial impropriety should be confined to "particularly egregious" situations, when "a miscarriage of justice would otherwise result." *United States v. Young*, 470 U.S. 1, 15 (1985).

B. Discussion

1. The Prosecutor's Comments Were Proper.

Appellant alleges (App. Br. at 22-24) three distinct instances of prosecutorial impropriety: (1) eliciting testimony from Officer [redacted] regarding [redacted]'s credibility, which testimony the prosecutor then

relied upon in closing, (2) personally commenting on the evidence and arguing his own opinion in closing, and (3) arguing [redacted]'s statements to police for their truth in closing.[10] As discussed below, none of these statements were improper, and reversal is not warranted.

a. Officer [redacted]'s Testimony

On direct examination, Officer [redacted] stated that he and his partner went to the apartment at 1641 V Street in response to "a call for a burglary" (11/15/18 Tr. 72). He also testified to his observations of the state of the apartment when he arrived (*id.* at 73-78). On cross-examination, appellant elicited that Officer [redacted] had been informed there had been a call for a "burglary one" by his dispatcher (*id.* at 83).

On redirect, the government asked Officer [redacted] whether "[w]hen [he] arrived at the scene . . . it bec[a]me apparent to [him] that it was not a burglary one" (11/15/18 Tr. 90). The trial court overruled appellant's objection that the question called for speculation, and permitted Officer

[10] Appellant incorrectly alleges that the government vouched for the credibility of one of its witnesses by stating that the witness "had no reason to lie to you" (App. Br. 23-24 (citing 11/19/18 Tr. 70)). In fact, this argument was made during the closing argument of *appellant's* counsel and could not constitute prosecutorial impropriety.

[redacted] to answer (*id.*). Officer [redacted] confirmed that he had come to believe no burglary had occurred, and the prosecutor asked him to explain the basis for his belief "[w]ithout going into any statements" (*id.* at 91). The trial court overruled appellant's general objection, and Officer [redacted] testified that:

> The story that was being told at the time; the scene, in terms of nothing was missing – appeared to be missing; the general – when you go to enough of those kinds of scenes, you tend to know when – actually, when something like burlary happened. There's signs of forced entry. There's no sign of that here. (*Id.* at 91.)

When Officer [redacted] again began to state, "[t]he story just was not adding up to having someone –," appellant objected and the trial court instructed the prosecutor to "move on" (*id.*).

Appellant improperly characterizes the prosecutor's question to Officer [redacted] regarding the basis for his belief as a request for the officer to comment on [redacted]'s credibility (see App. Br. at 22). This characterization, however, is not borne out by the record. At no time did the prosecutor ask Officer [redacted] to comment on [redacted] or any other witness' veracity. Rather, the prosecutor's questions were designed to elicit from Officer [redacted] his perception of the crime scene that he encountered based on his experience as an officer. Given the officer's

familiarity with burglary scenes, such testimony was admissible and the prosecutor's question seeking to elicit it was not improper. *See Gee v. United States*, 54 A.3d 1249, 1260-62 (D.C. 2012) (lay opinion testimony from officer witness and victim regarding conclusions drawn from state of evidence was permissible because helpful to the jury).

Moreover, when Officer [redacted]'s answer began to veer toward an assessment of the veracity of individuals on the scene, the trial court interrupted the officer and asked him to move on. Finally, in closing, the government did not argue that the jury should disbelieve [redacted] because Officer [redacted] did not believe her. Rather, the prosecutor used Officer [redacted]'s observations of the apartment and the scene to cast doubt on the veracity of the statements made by [redacted] on the 911 call. This was proper argument based on the Officer [redacted]'s testimony and did not constitute error. *See Irick v. United States*, 565 A.2d 26, 35-36 (D.C. 1989) ("Characterization of defense testimony as incredible is permissible . . . when it is a logical inference from the evidence, and not merely the prosecutor's personal opinion as to [witness'] veracity") (internal quotation marks omitted).

b. Reasonable Inferences to Be Drawn from the Evidence

For the first time on appeal, appellant argues (App. Br. at 23) that certain of the prosecutor's comments in closing, to which he did not object at trial, inappropriately "commented personally on the evidence and emphasized his opinion that certain witnesses were not telling the truth." Appellant's argument takes each of the allegedly improper statements out of their proper context within the prosecutor's argument. Rather than expressing his personal opinion for the jury's consideration, the prosecutor repeatedly tied his arguments back to the evidence admitted at trial that supported the reasonable inferences that he urged upon the jury. Because the prosecutor's comments, when viewed in context, were permissible argument "commenting on the evidence" rather than "expressing a personal opinion," they were not improper and the trial court did not err by failing to address them. *See Irick*, 565 A.2d at 35-36.

First, appellant takes issue with comments made by the prosecutor that described what he heard on the 911 call that appellant introduced into evidence (App. Br. at 23). These were reasonable comments on the evidence that was introduced at trial, and were made in response to appellant's own arguments in closing.

In his closing, appellant explicitly questioned:

> So what opportunity would Miss [redacted] have had to have taken the gun from Apartment Number 2 to the dumpster?
>
> The officers never left. . . .
>
> So I submit to you, ladies and gentleman – I ask you, what opportunity that Miss [redacted] would have had to have taken the gun and dumped it into the dumpster? (11/19/18 Tr. 73-74.)

In its rebuttal argument, the government responded to appellant's open question:

> Ladies and gentleman, the defense seems to rest on this idea that the 911 call is something you can't make up. He kept saying, ["]You can't make this up. Listen to it.["] Well, yeah, I do want you to listen to it.
>
> And I want you to really evaluate it because I want you to notice a few things as I noticed when I was listening to it in trial.
>
> One, she's breathing heavily, right, during the beginning – I think the first two minutes of it. But she's not – her voice is smooth, but she's breathing heavily. Why? Maybe she's walking outside hiding the gun while she's on the phone with police.
>
> . . .
>
> The only time she really gets panicked, ladies and gentleman, on that phone call, when you listen to it – I wrote it down. I think it's the eight minute and nine second marked. She gets panicked. And that's because she says, ["]The police are here but not the ambulance.["] Why? Because she knows, ["]Oh, the

police are here. We just told the story about some burglary, but there's no burglary.["] (11/19/18 Tr. 78-79.)

The prosecutor's comments did not improperly inject his personal opinions for the jury's consideration. Rather, the comments simply described a piece of evidence that the prosecutor actively encouraged the jury to examine, and provided an argument regarding reasonable inferences the jury could draw regarding what [redacted] may have been thinking or doing during the course of that recording based on its contents. Such arguments are entirely permissible when based upon admitted evidence and reasonable inferences that may be drawn therefrom. *See Irick*, 565 A.2d at 37.

Similarly, each of the other "personal comments" appellant asserts were improper (App. Br. at 23) were, in fact, permissible arguments that the prosecutor tied back to evidence supporting the reasonable inference he urged the jury to draw. (See 11/19/18 Tr. 80 (arguing that "[t]his whole idea of this burglary is completely debunked" based, not on [redacted]'s statements to police, but the fact that "there's nothing taken. There's no forced entry. But there is a bullet hole in the defendant's foot. What burglar is going to shoot somebody in the foot? It goes straight into the ground. There is the weapon found with his DNA on it."); *id.* at 83 ("And

she told them the truth. *And the evidence that's with it supports that*. I'll go over it one last time. There's no evidence of any break-in. There's nothing taken. Officers, when they got there, they had to knock on the door. There wasn't a burglary at this apartment. No. The defendant just shot himself in the foot.") (emphasis added)).

c. Closing and Rebuttal Arguments

As discussed above, the record does not support appellant's assertion (App. Br. at 15, 23-24) that the government improperly argued [redacted]'s statement to Detective [redacted] for its truth in closing and rebuttal. Rather, the government argued its theory of the case (which was consistent with [redacted]'s statement to Detective [redacted] that appellant possessed the shotgun when he accidentally shot himself) by continually referencing the physical evidence that supported finding appellant's possession of the shotgun, rather than [redacted]'s statement that he did (see, e.g., 11/19/18 Tr. 65 ("[W]e know that the defendant possessed the gun because his DNA was on it.")). When the prosecutor first addressed [redacted]'s statement to Detective [redacted], he noted that the importance of her statement arose from the fact that it was "a completely different story than what she said on the 911 call" (11/19/18

Tr. 61; see also *id.* at 64 ("And so how does the Government prove possession? Well, you take that prior inconsistent statement and you compare it against this burglary story – it just doesn't make sense. . . . The evidence points towards [the] fact that the second story that Miss [redacted] gave on the scene to be more likely. . . . The defendant had the gun, which is how his DNA got on the gun."). Further, in rebuttal, the prosecutor was careful to note that he was "not asking [the jury] to believe [[redacted]'s] statement [to Detective [redacted]] just because the statement was made," but rather to believe the fact that appellant possessed the gun and shot himself in the foot "because of the facts that support it and the facts that don't support that 911 call" (11/19/18 Tr. 80; see also *id.* at 83 ("And she told them the truth. *And the evidence that's with it supports that.*" (emphasis added)). Therefore, the government's closing arguments used [redacted]'s statement to Detective [redacted] to raise doubt as to the veracity of her statements on the 911 call, and then marshalled the physical evidence and observations of the police officers on scene to support the jury's finding that appellant possessed the gun when he shot himself.

2. Even if the Comments Were Improper, Reversal is Not Warranted.

Even if this Court finds that any of prosecutor's comments were improper, they were not so prejudicial as to draw any objection from appellant. Nor, as discussed above, was Officer [redacted]'s testimony a direct attack on anyone's credibility; it related his impression of the crime scene based on his experience as an officer. Additionally, any potential prejudice would have been ameliorated by the trial judge's explicit instructions that "the statements and arguments of the lawyers are not evidence," that the jury's "own memory of the evidence . . . should control during [the] deliberations," and that [redacted]'s prior inconsistent statement could not be considered for its truth (11/14/18 Tr. 12-15; 11/19/18 Tr. 45-46, 53-54; R.20 at 9). Therefore, in light of the strong evidence that appellant possessed the gun—including appellant's DNA on the gun as well as strong evidence (such as [redacted]'s knowledge of the shotgun's location) debunking [redacted]'s initial allegations of a robbery—the prosecutor's comments would not have substantially

swayed the jury's judgment or jeopardized the fairness or integrity of the trial necessitating reversal.[11] *See Irick*, 565 A.2d at 32, 37-38.

III. The Trial Court Did Not Plainly Err When It Instructed the Jury on the Elements of the FIP Charge.

A. Additional Background

During its final instructions, the trial court, without objection by appellant, instructed the jury on the elements of the two charged offenses (11/19/18 Tr. 86-88). With respect to the FIP count, the trial court instructed:

> The elements of the offense of unlawful possession of a firearm by a person previously convicted of a crime punishable by imprisonment for a term exceeding one year, each of which the Government must prove beyond a reasonable doubt, are that: One, [appellant] possessed a firearm; two, he did so voluntarily and on purpose and not by mistake or accident; and, three, at the time [appellant] possessed the firearm, he had been convicted of a crime punishable by imprisonment for a term exceeding one year.

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[11] Appellant's citation to *Coreas v. United States*, 565 A.2d 594 (D.C. 1989), is inapposite given that the nature, number, and egregiousness of the prosecutions improper arguments in rebuttal—which were found to advance a previously unarticulated theory of the case that was unsupported by the record evidence and prompted a delayed motion for mistrial—were significantly more prejudicial than those alleged by appellant. *See id.* at 599-606.

> A stipulation that [appellant] had been convicted for a term exceeding one year was admitted only for the purpose of proving the last element of this charge. You are not to consider that stipulation for any other purpose except as I have instructed you. You are not to speculate or guess as to what the conviction was for. You are not to consider the stipulation for determining whether it is more likely or not that [appellant] was in possession of the firearm that is charged in this case. Rather you may only consider the stipulation of the prior conviction in determining whether the Government has met its burden of establishing the specific element of the offense. (*Id.* at 87-88.)

This instruction adopted nearly verbatim the standard Redbook jury instruction for the offense. *See* Criminal Jury Instructions for the District of Columbia (the "Redbook"), No. 6.511 (5th ed. rev. 2019).

B. Standard of Review

As appellant concedes, he did not object to the trial court's jury instruction on the elements necessary to sustain a conviction under D.C. Code § 22-4503(b)(1), and review of his challenge is subject to plain error review (App. Br. 27). "An error is plain when it is clear or obvious, rather than subject to reasonable dispute under current law," *Wills v. United States*, 147 A.3d 761, 772 (D.C. 2016) (internal quotation marks omitted). To find that an error is plain requires "a determination of whether the claimed error was clearly at odds with established and settled law." *Wheeler v. United States*, 930 A.2d 232, 245 (D.C. 2007). Plainness is

assessed "at the time of appellate review, not the state of the law at the time of trial." *Wills*, 147 A.3d at 772.

C. Discussion

Appellant urges this Court (App. Br. at 28-31) to adopt a novel interpretation of D.C. Code § 22-4503 that requires the government to prove, as an essential element of a FIP prosecution, that a defendant knew of his status as an individual who had been convicted of a crime punishable by more than one-year of imprisonment. Appellant argues that this Court should apply the Supreme Court's recent decision in *Rehaif v. United States*, 139 S. Ct. 2191 (2019)—a decision interpreting a federal statute that differs from § 22-4503 in significant ways—to find that § 22-4503 incorporates a scienter requirement that this Court has not recognized in its decisions enumerating the elements required for a FIP conviction. Because it is far from clear that the Supreme Court's decision in *Rehaif* applies to D.C.'s FIP statute, and because appellant's interpretation is inconsistent with this Court's prior decisions addressing § 22-4503, this Court need not address appellant's novel statutory interpretation. Rather, appellant's claim fails because it is "subject to reasonable dispute" under current law, and any error in the instruction

was not "clearly at odds with established and settled law" and therefore not plain. *See Wills*, 147 A.3d at 772; *Wheeler*, 930 A.2d at 245.

Contrary to appellant's assertion, it is not clear that the Supreme Court's reasoning in *Rehaif* applies to § 22-4503. Rather, the District's FIP statute textually differs from the federal statute interpreted in *Rehaif*. *See State v. Fikes*, 597 S.W.3d 330 (Mo. Ct. App. 2019) (declining to apply *Rehaif* to require a knowledge-of-status element for state-law felon-in-possession offense based on differing statutory language).[12]

In *Rehaif*, the Supreme Court interpreted the federal felon-in-possession statute, which expressly applies to anyone who "knowingly violates" 18 U.S.C. § 922(g)—a provision that contains both a possession and a status element. *See* 18 U.S.C. §§ 922(g), 924(a)(2); *Rehaif*, 139 S. Ct. at 2194. Specifically, 18 U.S.C. § 924(a)(2), the offense's penalty

[12] This dissimilarity of the federal and District FIP statutes distinguishes appellant's reliance on *Carrell v. United States*, 165 A.3d 314 (D.C. 2017) (en banc). In *Carrell*, this Court relied upon the similarity of the federal and district statutes—and their complete silence on *mens rea*—when adopting the Supreme Court's reasoning for interpreting the appropriate *mens rea* standard for the District's threats statute. *See id.* at 319. Here, only the District's FIP statute is silent on *mens rea*, while the federal statute requires a "knowing" violation. *Compare* D.C. Code § 22-4503, *with* 18 U.S.C. §§ 922(g), 924(a)(2).

provision, applies to "whoever *knowingly* violates" § 922(g), among other provisions (emphasis added). A key question for the Supreme Court was thus "what it means for a defendant to know that he has 'violate[d]' § 922(g)." *Rehaif*, 139 S. Ct. at 2195. Because, "[a]s 'a matter of ordinary English grammar,' we normally read the statutory term 'knowingly' as applying to all the subsequently listed elements of the crime," and because "everyone agrees that the word 'knowingly' applies to § 922(g)'s possession element, which is situated after the status element," the Court saw "no basis to interpret 'knowingly' as applying to the second § 922(g) element but not the first." *Id.* at 2196 (quoting *Flores-Figueroa v. United States*, 556 U.S. 646, 650 (2009)). Rather, the Court concluded that, "by specifying that a defendant may be convicted only if he 'knowingly violates' §922(g), Congress intended to require the Government to establish that the defendant knew he violated the material elements of §922(g)," including the status element. *Id.*

In contrast to 18 U.S.C. § 924(a)(2), § 22-4503(a)(1) does not specify that a violation must be knowing, stating only that

> No person shall own or keep a firearm, or have a firearm in his or her possession or under his or her control, within the District of Columbia, if the person: (1) Has been convicted in

> any court of a crime punishable by imprisonment for a term exceeding one year[.]

Indeed, § 22-4503(a)(1) contains no *mens rea* requirement at all on its face, and this Court has interpreted the statute's *mens rea* element as requiring that a defendant knowingly possessed a firearm. *See, e.g.*, *Myers v. United States*, 56 A.3d 1148, 1151-52 (D.C. 2012).

The question whether to apply a knowledge requirement to § 22-4503(a)(1)'s status element, "though not expressed in the statute, is a question of legislative intent to be answered by construction of the statute." *McIntosh v. Washington*, 395 A.2d 744, 756 (D.C. 1978). Neither the statutory text nor the statutory history supports finding the legislature intended to require a knowledge-of-status requirement. Unlike in *Rehaif*, there is no basis in the statutory text to apply that requirement to the status element. *See generally Staples v. United States*, 511 U.S. 600, 609 (1994) ("[D]ifferent elements of the same offense can require different mental states."). In contrast to 18 U.S.C. § 922(g), the status element comes after, not before, the possessory element to which a knowing *mens rea* applies. And as a matter of "ordinary English grammar," inserting a "knowing" requirement into § 22-4503(a)(1) shows that such a requirement does not apply to the status element:

> No person shall [knowingly] own or keep a firearm, or have a firearm in his or her possession or under his or her control, within the District of Columbia, if the person: (1) Has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year[.]

See Fikes, 597 S.W.3d at 333-34.

Beyond the plain language of § 22-4503(a), there are additional reasons to conclude that Congress did not intend to apply a knowledge requirement to the statute's status element. The United States Congress—which enacted both the federal firearms offense at issue in *Rehaif* and the original version of § 22-4503(a), *see* Pub. L. No. 83-85, § 204, 67 Stat. 90, 93 (1953)—explicitly included a "knowing" requirement in 18 U.S.C. § 924(a)(2), but not in § 22-4503(a). Moreover, in enacting the original version of § 22-4503(a), Congress required that those who "keep a pistol for, or intentionally make a pistol available to" a previously convicted felon "know[ ] that [t]he [felon] has been so convicted," but did not enact such a knowledge-of-status requirement for the felons themselves. Pub. L. No. 83-85, § 204, 67 Stat. 90, 93-94 (1953) ("No person shall own or keep a pistol, or have a pistol in his possession or under his control, within the District of Columbia, if . . . he has been convicted in the District of Columbia or elsewhere of a felony"; "No person

shall keep a pistol for, or intentionally make a pistol available to, such a person, knowing that he has been so convicted or that he is a drug addict."). These contrasting statutory provisions in which Congress omitted a knowledge requirement from § 22-4503(a), but included it elsewhere are strong evidence that Congress did not intend to require the government to prove that a defendant knows his status as a previously convicted felon under § 22-4503(a)(1). *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

Finally, declining to read a knowledge-of-status requirement into § 22-4503(a)(1) is consistent with this Court's prior decisions interpreting the elements of the statute without reference to such a requirement. *See Washington v. United States*, 53 A.3d 307, 309 (D.C. 2012) (enumerating elements of FIP in context of *Blockburger*[13] analysis); *Dorsey v. United States*, 154 A.3d 106, 112 (D.C. 2017) (same in context of challenge to

[13] *Blockburger v. United States,* 284 U.S. 299 (1932).

evidentiary sufficiency). It is also consistent with prior decisions of this Court that have repeatedly found, in the context of the District's firearms regulations, that a defendant's knowledge that he possessed a firearm (rather than his knowledge of the relevant regulation or licensing requirement) is sufficient for conviction. *See McIntosh,* 395 A.2d at 756 (knowledge of duty to register firearm not required to convict for a failure to so register because "where dangerous or deleterious devices or products are involved, the probability of regulation is so great that anyone who is aware that he is either in possession of or dealing with them must be presumed to be aware of the regulation"); *see also McMillen v. United States*, 407 A.2d 603, 605 (D.C. 1979) (rejecting argument Government must prove not only that a defendant intended to carry a gun, but that he intended to do so "without a license," because "[t]he District of Columbia has a great interest in protecting its citizenry from the dangers inherent in widespread ownership of weapons, . . . and licensure is a legitimate means of attaining that goal"); *Brown v. United States*, 379 A.2d 708, 710 n.3 (D.C. 1977) ("[T]he proscribed act is that of generally intending to carry a pistol coupled with the fact that such pistol is carried unlicensed in the District of Columbia."); *Mitchell v. United*

States, 302 A.2d 216, 217 (D.C. 1973) ("It is well settled that proof of intent to use a weapon for an unlawful purpose is not an element of the crime defined in § 22-3204. . . . And, although criminal intent, or an evil state of mind, is an essential ingredient in crimes derived from the common law, carrying a pistol without a license was not an offense at common law and all that is needed to prove a violation of such code provision is an intent to do the proscribed act.") (citations omitted).[14] Thus, "under the statutory scheme that Congress enacted for the District of Columbia, anyone who knowingly and intentionally possesses a

[14] These decisions are consistent with *McNeely v. United States*, 874 A.2d 371 (D.C. 2005), on which appellant relies. *McNeely* determined that an owner could be held strictly liable for an attack by his pit bull that caused injury or death, rejecting that the statute incorporated any *mens rea* requirement beyond that the owner knew his animal was a pit bull. *See id.* at 380. The court justified its application of strict liability because the Act was "primarily a public welfare offense the regulates potentially harmful or injurious items," where the dangerous nature of the item should alert a defendant "to the probability of strict regulation," and the burden is properly "place[d] . . . on the defendant to ascertain at his peril whether [his conduct] comes within the inhibition of the statute." *Id.* at 390 (quoting *Staples*, 511 U.S. at 607). This Court has recognized that guns also constitute such potentially harmful or injurious items, *see McIntosh*, 395 A.2d at 756, and the requirement that a defendant know he is in possession of a gun to convict under § 22-4503 mirrors *McNeely*'s requirement that an owner know he possess a pit bull for criminal liability to attach under the Pit Bull Act.

weapon in this jurisdiction does so at his or her own risk[.]" *Moore v. United States*, 927 A.2d 1040, 1055 (D.C. 2007).

Even assuming plain error, appellant is not entitled to reversal because he cannot show that the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. Appellant "does not argue that he actually lacked knowledge of his status as a felon." *United States v. Staggers*, 961 F.3d 745, 756 (5th Cir. 2020). This is understandable because the record establishes that he must have known he was a convicted felon. First, in 2005 appellant was sentenced to 40 months' imprisonment for an armed robbery and 24 months' imprisonment for an assault with a dangerous weapon (R.3 at 5-6).[15] *See Johnson*, 963 F.3d at 854 ("Several of our sister circuits have relied on uncontroverted evidence that a defendant was sentenced to more than a

[15] Courts of appeals that have expressly considered the issue have concluded that, when assessing the impact of a *Rehaif* error under plain-error's fourth prong, a court may "consider reliable evidence in the record on appeal that was not part of the trial record." *United States v. Miller*, 954 F.3d 551, 560 (2d Cir. 2020); *see also United States v. Johnson*, 963 F.3d 847, 852-53 (9th Cir. 2020); *Staggers*, 961 F.3d at 756; *United States v. Maez*, 960 F.3d 949, 962-63 (7th Cir. 2020). Further, at least two other courts of appeals have implicitly approved this practice. *See United States v. McLellan*, 958 F.3d 1110, 1119 (11th Cir. 2020); *United States v. Ward*, 957 F.3d 691, 695 & n.1 (6th Cir. 2020).

year in prison when rejecting post-*Rehaif* challenges to trial verdicts under plain-error review.") (listing authorities). Second, at trial, appellant stipulated that he was a prohibited felon and, although such a stipulation "does not automatically establish knowledge of felony status, it is strongly suggestive of it." *Ward*, 957 F.3d at 695 (quoting *United States v. Conley*, 802 Fed. App'x 919, 923 (6th Cir. 2020)).

IV. The Government Does Not Oppose Remand for Resentencing on the UF Conviction.

The trial court sentenced appellant for UF to a suspended 22-months, concurrent with his FIP sentence (R.27). The UF sentence exceeded the maximum permissible sentence for a UF conviction absent application of the statute's recidivist enhancement for individuals previously convicted of UF. *See* D.C. Code §§ 7-2507.06(a), -.06(a)(2)(A) (one-year maximum sentence for UF conviction, "except . . . any person who is convicted a second time for possessing an unregistered firearm" is subject to "imprison[ment of] not more than 5 years"). Because the UF enhancement is based upon a prior conviction, it may be applied only where, before trial the government has filed enhancement papers providing notice of the conviction triggering the enhancement. *See* D.C. Code § 23-111(a). The government did not file any such enhancement

papers here.[16] The trial court's UF sentence therefore exceeded the applicable one-year statutory maximum. In light of this, the government does not oppose appellant's request to remand for resentencing on his UF conviction. *See Robinson v. United States*, 756 A.2d 448, 452-55 (D.C. 2000).

CONCLUSION

WHEREFORE, the government respectfully submits that the judgment of the Superior Court should be affirmed, but requests that the case be remanded for resentencing on appellant's UF conviction.

Respectfully submitted,

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[16] The government did file an information providing notice of appellant's prior armed robbery conviction that enhanced the penalty provisions applicable to his FIP conviction (R.15).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have caused a copy of the foregoing to be served by electronic means, through the Court's EFS system, upon counsel for appellant, Adrian Madsen, madsen.adrian.eric@gmail.com, on this 14th day of October, 2020.

/s/
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