No. 22-CF-0349

DISTRICT OF COLUMBIA
COURT OF APPEALS

GARY N. PROCTOR,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the Superior Court for the District of Columbia
Criminal Division, No. 2015-CF1-10128
Honorable Judge Dayson.

BRIEF OF APPELLANT GARY N. PROCTOR

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RULE 28(a)(2)(A) STATEMENT

The parties to this appeal are Gary Proctor and the United States. Mr. Proctor was represented at trial by Steven Kiersh and is currently represented on appeal by appointed counsel Marisa S. West, Lakeisha F. Mays, Rimsha Syeda, and Ausjia Perlow of Sidley Austin LLP. The United States was represented at trial by Alicia Long and Gideon Light. There were no intervenors or *amici curiae* at trial, and there are none expected on appeal.

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STATEMENT OF JURISDICTION

Mr. Proctor, by and through undersigned counsel, appeals from the final judgment of conviction and sentence in 2015-CF1-10128. A1009.

REQUEST FOR ORAL ARGUMENT

This case raises important legal questions about the improper admission of hearsay evidence. It also involves an extensive record, which has generated several hundred pages of transcripts. Appellant Gary Proctor respectfully requests oral argument because he believes that it would substantially aid the Court in deciding critical legal issues embedded in the record.

ISSUES PRESENTED

I. Whether the trial court erroneously admitted hearsay evidence under the forfeiture-by-wrongdoing exception set out in *Devonshire v. United States*, 691 A.2d 165 (D.C. 1997).

II. Whether repeated references to Mr. Proctor's prior incarceration and the prosecution's reference to a defense burden of proof denied Mr. Proctor the presumption of innocence.

III. Whether the prosecution presented sufficient evidence to sustain a conviction for first-degree murder.

STATEMENT OF THE CASE

Following a trial in which improperly admitted hearsay and flagrant burden shifting by the prosecution tainted the jury and irreparably damaged the presumption of innocence until proven guilty, Gary Proctor was convicted on four counts, including first degree murder while armed and associated crimes, on August 1, 2019. Mr. Proctor, who is currently serving a life sentence without the possibility of release, appeals each conviction.

At trial, the court erred by permitting the prosecution to introduce improper, prejudicial evidence of other crimes—including hearsay evidence alleging that Mr. Proctor attempted to interfere with a potential witness's testimony in a civil protection order hearing and refusing to grant motions for a mistrial following

repeated references to Mr. Proctor's prior incarceration. Further, the prosecution's flagrant burden shifting arguments that served to abdicate its duty to prove guilt of the charged crimes beyond a reasonable doubt, were not cured by the insufficient instructions provided by the trial court.

Last, the evidence presented at trial was insufficient to prove beyond a reasonable doubt that Mr. Proctor was the shooter in this case. The witness testimony that purported to identify Mr. Proctor was unreliable and the scant physical evidence presented at trial was insufficient to support a verdict of guilt beyond a reasonable doubt. These errors, individually and cumulatively, warrant acquittal or the reversal of Mr. Proctor's convictions and remand for a new trial.

STATEMENT OF FACTS

I. TWO WEEKS BEFORE SHOOTING: JULY 11, 2015 COOKOUT IN PRINCE GEORGE'S COUNTY, MARYLAND

Mr. Proctor and the decedent, Jerome Diggs, were cousins, and in 2015, they were also neighbors who lived across the street from each other. A53; A537, 541. On July 11, 2015, members of the Offutt family hosted a cookout in Prince George's County which was attended by the decedent, Diane Offutt (the decedent's sister), Gary Offutt (Mr. Proctor's father), Mr. Proctor, and several others. *See* A812-14; A616-17. Witness testimony regarding the cookout varied widely. By most accounts, a fight occurred that centered on Ronell Offutt, one of Ms. Offutt's sons (the decedent's nephew). *See e.g.*, A784-87, 789. According to one witness, the

brawl may have started because Ronell Offutt assaulted Gary Offutt. *See* A812-14, 829. Some attendees at the cookout then called upon Mr. Proctor for assistance. A830. According to some witnesses, Mr. Proctor, Gary Offutt, and several others physically defended Gary Offutt against his attacker. *See e.g.*, A784-87. Towards the end of the fight, Anthony Offutt (the decedent's and Gary Offutt's cousin), the host of the cookout, punched the decedent in the face. *See e.g.*, A784-87, 790; A819. Police responded to the incident, but no arrests were made. A56 n.4 (noting police were called to cookout); A74 (conceding no arrests made).

II. ONE WEEK BEFORE SHOOTING: CIVIL PROTECTIVE ORDER PROCEEDINGS

After the July 15, 2015 cookout, Ms. Offutt sent a series of threatening text messages and voicemails to Gary Offutt, because, according to her, Ronnell Offutt was injured in the family feud. *See* A621, 640. In these messages, Ms. Offutt made several baseless allegations, including that Mr. Offutt kidnapped an underaged girl who had gone missing nearby. A646-47. She subsequently admitted to officers that this allegation was untruthful, but stated that she sent the threatening messages because she was afraid that Mr. Offutt (or Mr. Proctor) would hurt her family. A621-24, 646-47.

Concerned about these threatening messages from Ms. Offutt, Gary Offutt filed for a civil protective order on July 20, 2015. A1008; SA1-2. The Superior Court set a hearing on the order for August 3, 2015. SA9. According to Ms. Offutt, she

told the decedent about the upcoming hearing, at which point the decedent informed her that Mr. Proctor had allegedly "offered [the decedent and his girlfriend, Christal Johnson] money not to come to court," but the decedent responded "no, that he was coming." A625.

At the August 3, 2015 CPO hearing, Ms. Offutt consented to the entry of the order of protection, which required that she remain 100 feet from Gary Offutt and not contact him, his girlfriend, or his stepdaughter. A1007; SA18-19. Ms. Offutt did not admit to or contest the underlying conduct, and neither she nor any witnesses testified on her behalf. *See generally*, SA10-17.[1]

III. ONE TO TWO DAYS BEFORE SHOOTING: JULY 25, 2019 FIGHT WITH "MR. SUNNY," "MR. TIM," AND CHRISTAL JOHNSON

On July 25 or 26, 2019, the decedent allegedly punched and shoved "Mr. Sunny," A211-14, a man who lived with the decedent and his girlfriend, A152-53. He also hit another man present at the time, "Mr. Tim."[2] A820-21. Decedent apparently assaulted the two men either because he believed his girlfriend was having an affair with Mr. Sunny or because Mr. Sunny was supplying her with drugs. *See* A152-53; A820-21, 833. The decedent's girlfriend, Christal Johnson, who was

[1] The trial court took judicial notice of the docket in 2015 CPO 002825. A882. On appeal, Mr. Proctor moves separately to supplement the record and for this court to take judicial notice of the CPO petition, notice, and order; and the transcript of the August 3, 2015 hearing in that case.

[2] The full names of Mr. Sunny and Mr. Tim were not referenced at trial.

present during the altercation, left their home to stay at a friend's house because she was upset with the decedent. A821.

IV. THE SHOOTING

On July 27, 2015, at approximately 4:52 pm, the decedent was shot inside of his residence at 1360 First Street, Southwest, in the District of Columbia. *See* A1. Rather than dialing 911, the decedent called his sister, Ms. Offutt, after being shot. A544. According to Ms. Offutt, the decedent stated, "Gary came in here and shot me," then said "little Gary." *Id*. After the call, the decedent crawled to his backyard, where he was found by neighbors, who attempted to render aid. A167-68, 171-74. Meanwhile, Ms. Offutt called 911 and reported the shooting, identifying her cousin, Gary Proctor, as the shooter. A544-46; Tr. Ex. 305 at 3:20-3:27.

Two witnesses on the scene heard the decedent attempt to identify the shooter. According to his neighbor, Myia Crews, who was rendering aid to the decedent, the decedent said "Little Gary" shot him. A179. According to Metropolitan Police Officer Brian Taylor, the first responding officer, the decedent said "Little Man" shot him. A245, 247. Little Man is the name of the decedent's dog. A312.

Shortly after identifying his dog as the shooter, the decedent lost consciousness. A247. He was pronounced dead that evening at 5:37 pm. A884. An autopsy revealed that the decedent had been shot seven times, resulting in his death.

A991, 993-96. The toxicology report showed alcohol, cocaine, and THC in his system at the time of death. A1002-04.

V. THE INVESTIGATION

Based on the murky "identifications" by the decedent, on July 28, 2015, police executed a search warrant on Mr. Proctor's residence shared with his mother at 1359 First Street, Southwest. *See* A81-83. During the execution of the warrant, police recovered .40 caliber ammunition. A661-64. A firearm was not recovered. The search of Mr. Proctor's vehicle recovered a list with names and numerical values. A1006. The list included "Diggs," which the prosecution argued at trial referred to the decedent. *Id*. There were nine other names on the list, including "Sunny" and "Crystal." *Id*.

Police conducted a forensic analysis of Mr. Proctor's phone and found photos allegedly depicting Mr. Proctor holding a gun. A849-51, 873-74. Police also obtained cell site records which showed that around the time of the murder, Mr. Proctor's cell phone pinged cell towers near Mr. Proctor's residence, which was across the street from where the decedent was killed, A699-702; *see* A987, and then near his father's home. A703; *see* A989.

Mr. Proctor was arrested and charged with the murder of the decedent on July 28, 2015. A1.

VI. PRE-TRIAL MOTIONS

A. *Drew* Evidence

Mr. Proctor moved *in limine* to exclude evidence of uncharged conduct. A6-9. The prosecution opposed the motion. A10-17, 18-24. The trial court granted in part and denied in part Mr. Proctor's motion, admitting evidence regarding the July 2015 cookout and Mr. Proctor's alleged drug dealing, A32-33, but excluding other evidence related to alleged prior assaults of the decedent in 2012, A39-41, 47-49.

B. *Devonshire* Evidence

The prosecution moved *in limine* to admit hearsay statements allegedly heard by Ms. Offutt regarding the decedent's out-of-court statements that Mr. Proctor had attempted to dissuade the decedent from testifying on Ms. Offutt's behalf in the 2015 CPO hearing. A50-60. The trial court granted the motion on the basis that *Devonshire* was applicable to CPO hearings and to cases in which a witness is killed for the benefit of a third party, A72, 79, and the testimony was elicited at trial. A624-26.

VII. TRIAL

At trial, the prosecution offered three motives for why Mr. Proctor would fatally harm his cousin. First, it presented evidence that the decedent allegedly engaged in a drug transaction with Mr. Proctor and owed Mr. Proctor $120 at the time of his death. *See* A889-90. Second, the prosecution offered evidence that the

decedent had allegedly argued with Mr. Proctor some weeks before the shooting because the decedent allegedly told Mr. Proctor that he could no longer sell drugs from the decedent's house. *See* A781-82; A891-94. As a final motive, the prosecution presented evidence that Mr. Proctor and the decedent were allegedly involved in a long-standing family feud which centered around Gary Offutt. *See* A894-97.

Clearly prejudicing Mr. Proctor, the government's case alluded to Mr. Proctor's prior incarceration in three instances. First, Kevin Diggs, the decedent's brother and the first witness to testify, informed the jury that Mr. Proctor had been "locked up." A130-31. Mr. Proctor's trial counsel objected and moved for a mistrial, and though the objection was sustained, the damage had been done. *Id*. The trial court denied the motion for a mistrial. A336-345. Second, during the testimony of Metropolitan Police Officer Thomas Coughlin regarding items recovered during the search of Mr. Proctor's home, the prosecution published to the jury photos showing Mr. Proctor obviously in prison posing with other inmates. *See* A657. Mr. Proctor's trial counsel asked to approach, objected to the photos, and requested they be taken down, A658, and not sent back to the jury, A666. The court struck the photos and the prosecution agreed to withdraw them, A668. Third, Christal Johnson testified that she had "met Gary shortly after he got released from prison." A797. Again, Mr. Proctor's trial counsel objected, and renewed his motion for a mistrial, A798-99, but

evidence that Mr. Proctor had been incarcerated had already been heard by the jury. Again, the trial court denied the motion for a mistrial. A875-77.

There was very little physical evidence presented at trial, and that which was presented was weak, at best. The prosecution's firearms expert testified that the ammunition recovered from Mr. Proctor's home—Smith and Wesson bullets manufactured by Hornady (which the expert testified was one of the five largest ammunition manufacturers in the United States)—were consistent with that used in the shooting. A377-80, 400-04. The firearms expert also testified that the firearm depicted in the photos recovered from Mr. Proctor's phone was *one of four types* that could have been used in the shooting. A393-94, 406-14.

According to the prosecution's expert, most of the DNA discovered at the scene of the shooting that could be compared matched the decedent. A483, 496-500. For one sample, the DNA expert testified that Mr. Proctor could not be excluded. A503. Mr. Proctor was not a match for any of the DNA recovered. A483, 496-500.

Mr. Proctor's trial counsel, Mr. Kiersh, did not present a defense case. In closing arguments, Mr. Kiersh emphasized and relied upon the government's burden of proof and pointed to weaknesses in the prosecution's evidence establishing identity: the lack of a gun or eyewitnesses to the shooting; the decedent's violent altercations with others (Anthony Offutt, Ms. Johnson, Mr. Tim, Mr. Sunny) close in time to the shooting; credibility issues with the witnesses, including Ms. Offutt;

and the conflicting identifications of the shooter as "Little Gary" and "Little Man," the decedent's dog. A919-37.

In its rebuttal, the prosecution unconstitutionally described the burden of proof as a seesaw:

> You need to find the elements, and we have met our burden in terms of giving you this evidence. And how have we met our burden? When we talk about a "burden," you think of something heavy; right? You think of the weight. It's the weight of the evidence. You are the judges of the facts.
>
> And you now get to weigh all of this evidence. We can talk until we're blue in the face, but you have the job of deciding how weighty this evidence is. Now, right above Judge Dayson -- and you see it up there -- are the scales of justice. They've been there the whole trial, they've been here for decades. The reason that they're up is because that's what your job is: You take the evidence, and you weigh it.
>
> And I submit to you that when you look at the scales of justice, after you've considered all of the evidence together -- and I say "together," not one by one. **You're going to put them all on the scale -- that scale is going to look like a seesaw -- right? -- with maybe a ten-year-old on one end and a two-year-old on the other. It's going to be all of the way to one side. That's real, hard evidence. That's how the government has met its burden.**
>
> . . .
>
> If it was just her, would that be enough? **The seesaw would be pretty close to the ground already**, but there's more. . . .

A942-43, 951 (emphasis added). Mr. Kiersh objected to the prosecution's reference to a seesaw at the bench and moved for a mistrial, arguing that such imagery improperly suggests to the jury that Mr. Proctor has a burden to outweigh the government's evidence. A955-58. The trial court denied his request for a mistrial, A970-71, and offered a general jury instruction as an attempt to cure the uncurable argument by the government, A957-58.

Through trial counsel, Mr. Proctor also moved for a mistrial on the basis that the prosecution improperly introduced evidence of Mr. Proctor's prior incarceration. A955-57. Again, Mr. Proctor's motion for a mistrial was denied. A968-70.

SUMMARY OF ARGUMENT

Mr. Proctors convictions should be reversed for three reasons.

First, the trial court erroneously admitted hearsay evidence under the forfeiture-by-wrongdoing ("*Devonshire*") doctrine despite that (1) there was insufficient evidence to show that Mr. Proctor intended to prevent the decedent's testimony, either for himself or the benefit of his father; and (2) as a matter of law, the decedent was not a witness against Mr. Proctor in any proceeding or investigation.

Second, Mr. Proctor was denied a fair trial because (1) improper evidence of Mr. Proctor's prior conviction and incarceration was put before the jury; and (2) the prosecution invited the jury to consider the lack of defense evidence in its rebuttal.

Accordingly, Mr. Proctor was denied his constitutional right to the presumption of innocence until proven guilty, and his conviction is improperly based on a general criminal character rather than evidence of the charged crimes.

Third, no reasonable jury could have convicted Mr. Proctor based on the actual evidence presented at trial. The available testimonial evidence that the government purported connected Mr. Proctor to the charged crimes was defective. The key identification evidence came from the unreliable statements of the decedent, who was under the influence of alcohol and other drugs, relayed to the jury through ear witnesses who did not see the shooting. Because the decedent was gravely injured and under the influence of perception-modifying substances at the time of the identifications, his statements were insufficient to show guilt beyond a reasonable doubt. Mr. Proctor's convictions should therefore be reversed.

ARGUMENT

I. THE TRIAL COURT ERRED IN ADMITTING PREJUDICIAL HEARSAY UNDER *DEVONSHIRE*.

Over Mr. Proctor's objection, the trial court admitted statements purportedly made by the decedent asserting that Mr. Proctor had attempted to dissuade the decedent from testifying in an upcoming CPO hearing to which neither Mr. Proctor nor the decedent were a party. *See* A50-60; A61-71; A72-80.

This Court's decision in *Devonshire v. United States* canonizes the forfeiture-by-wrongdoing doctrine under which a defendant may forfeit the right to object to

the admission of out-of-court statements on confrontation or hearsay grounds because the defendant: (1) kills (or otherwise procures the unavailability of) (2) a witness (3) in order to prevent that witness's future testimony. 691 A.2d 165, 168-69 (D.C. 1997).[3] The proponent of the hearsay must prove each of these elements by a preponderance of the evidence. *Devonshire*, 691 A.2d at 169; *Roberson v. United States*, 961 A.2d 1092, 1095 (D.C. 2008). The trial court considered whether *Devonshire* applies for the benefit of a third party (*i.e.*, Mr. Proctor acting on behalf of his father) and whether a CPO hearing would be the type of proceeding that would implicate the *Devonshire* doctrine. *See* A61-71; A72-80.

Where, as here, the appellant opposed the motion *in limine* to admit the hearsay,[4] this Court reviews the erroneous admission of evidence for abuse of discretion, reviewing the trial court's underlying factual findings for clear error and its legal conclusions *de novo*. *Jenkins v. United States*, 80 A.3d 978, 989 (D.C. 2013).

In its motion, the prosecution argued that Mr. Proctor killed the decedent to prevent his testimony at the CPO hearing because it would be damaging to Mr.

[3] The intent element recognized by this Court is articulated in FRE 804(b)(6) and further described as a constitutional requirement in *Giles v. California*, 554 U.S. 353, 374 (2008). *See Hairston v. United States*, 264 A.3d 642, 646 (D.C. 2021).

[4] Mr. Proctor's counsel orally delivered his opposition to the government's motion *in limine* to admit the hearsay statements under *Devonshire*. A62-65.

Proctor's father or to Mr. Proctor himself in some future criminal proceeding. *See* A56. However, the prosecution failed to show that it was more likely than not that Mr. Proctor intended to prevent the decedent's future testimony or colluded with his father for the same. *See Ward v. United States*, 55 A.3d 840, 849 (D.C. 2012) (holding that evidence was sufficient to find that third-party colluded to kill a witness *at defendant's behest*). And it failed to show that the decedent was a witness against Mr. Proctor within the meaning of *Devonshire*. The court therefore abused its discretion in admitting the hearsay statements.

A. The Trial Court Erred in Finding that Mr. Proctor Intended to Prevent the Decedent's Testimony.

The trial court relied on *United States v. Stewart*, 485 F.3d 666, 672 (2d Cir. 2007), to note that *Devonshire* is satisfied when evidence shows that a defendant "wrongfully and intentionally render[ed] a Declarant unavailable as a witness." A68. With no evidence, except for the very hearsay sought to be admitted, the prosecution alleged that Mr. Proctor murdered his cousin because the decedent could have served as a witness in a CPO hearing. The government proffered that Mr. Proctor and his father feared that the decedent would testify that Ms. Offutt sent the threatening messages because of the assault on Ronnell Offutt at the July 2015 cookout. This testimony, prosecutors argued, could have resulted in an investigation of and criminal charges against Mr. Proctor and his father, even though police had not made any arrests when they responded to the cookout. Nevertheless, according to the

prosecutors, Mr. Proctor acted to silence the decedent on his own and his father's behalf. Ms. Offutt was the sole source of the information underlying this theory.

Beyond Ms. Offutt's self-serving hearsay testimony, there was no evidence that Mr. Proctor believed the decedent or anyone else intended to testify at the CPO hearing: no subpoenas were returned to the court, and no one but Ms. Offutt appeared on her behalf at the hearing. *See generally* A1007-08; *see generally* SA10-17. Though Ms. Offutt claimed that Christal Johnson witnessed Mr. Proctor offer the decedent money not to testify, Ms. Johnson did not corroborate that claim at trial. *See generally* A791-841.

Moreover, the trial court's findings supporting her ruling on the *Devonshire* motion demonstrate her confusion of the factual background. For example, the trial court mistakenly observed that the motion was not "about a CPO that is premised on a nasty phone call or a push or a slap." A70. On the contrary, the CPO petition was filed by Mr. Offutt for "nasty," threatening text messages and phone calls from Ms. Offutt. *See* A66; A53. It was not, as the trial court found, a CPO about "an assault that . . . appeared to be eligible for some sort of felony [] charge." A70. This confusion created real harm. Here, where Mr. Proctor was not a party to the CPO hearing, the alleged perpetrator underlying the CPO petition was Ms. Offutt, not Mr. Proctor or Gary Offutt, and the conduct at issue was "nasty" messages and calls from Ms. Offutt rather than a felony assault, the trial court's conclusion that Mr. Proctor

intended to preclude the decedent's CPO testimony by means of murder is patently unreasonable.

The trial court relied on *Hairston* to hold that *Devonshire* applied with equal force to so-called "quasi-criminal" CPO cases. *See Hairston*, 264 A.3d at 646-49 (affirming decision where defendant killed ex-girlfriend who filed for CPO). That may be a reasonable holding where the *respondent* to the CPO seeks to silence a witness against him—a drastic measure to avoid the drastic consequences of that witness's testimony. Here, however, where the *petitioner*, Gary Offutt, wishes to prevent the witness's testimony, he has an easy option: he can voluntarily dismiss the petition before the hearing. *See* D.C. Sup. Ct. Domestic Violence Division R. 10(a)(1). Thus, it is unreasonable that a petitioner, let alone a family member of a petitioner, would harm a potential witness to silence him under these circumstances.

Nor did the government's motion *in limine* proffer evidence showing that Mr. Proctor colluded with his father to kill the decedent on Mr. Offutt's behalf. *See* A53-54 (alleging no facts showing collusion). Though *Devonshire* applies when "the trial court finds that a defendant procured a witness's death to benefit some *other* person," that finding must also be supported by the preponderance of the evidence. *Ward*, 55 A.3d at 849 (emphasis in original) (noting that the record included evidence aside from the hearsay statements that showed a conspiracy to murder the witness by a preponderance of the evidence). Neither Mr. Proctor nor his father were charged

with conspiracy in connection with this case and no evidence at trial or proffered at the motions hearing supported such a conspiracy.

B. As A Matter of Law, the Decedent Was Not A Witness Against Mr. Proctor in Any Proceeding or Investigation.

The *Devonshire* hearsay and confrontation clause exception is not boundless. In order for it to apply, the person made unavailable must have been an actual or potential witness. *See* Fed. R. Evid. 804(b)(6). Here, the decedent may have been a witness against Gary Offutt, but not Mr. Proctor, and there is insufficient evidence that Mr. Proctor acted on his father's behalf to prevent the decedent's testimony.

Nor was the decedent a *potential* witness against *Mr. Proctor*. The *Devonshire* exception applies to a potential witness only "as long as it is reasonably foreseeable that the investigation [of the defendant] will culminate in the bringing of charges." *United States v. Houlihan*, 92 F.3d 1271, 1280 (1st Cir. 1996). In this case, the possibility of future criminal charges was too remote, speculative, and attenuated as to Mr. Proctor to support a finding of forfeiture by wrongdoing. No charges were shown to be brought or pending against Mr. Proctor. *See generally* A50-60; A74 (prosecution conceding that no one was arrested at the barbecue brawl putatively forming the basis for future criminal charges). The prosecution did not allege that the decedent was cooperating with any investigation into Mr. Proctor, or that any such investigation existed at all. A54; A74. Nor did the decedent allegedly make *any* statements to police about Mr. Proctor. The prosecution thus failed to allege facts

showing that any future testimony against Mr. Proctor in a criminal proceeding was reasonably foreseeable. Accordingly, *Devonshire* does not apply, and the trial court erred by admitting the hearsay statements.

C. The Erroneously Admitted Statements Were Prejudicial.

To determine whether erroneously admitted evidence caused substantial prejudice, this Court considers whether it can be said "with fair assurance, after pondering all that happened without stripping the erroneous action[s] from the whole, that the judgment was not substantially swayed by the error[s]." *Goins v. United* States, 617 A.2d 956, 960 (D.C. 1992) (quoting *Kotteakos v. United States*, 328 U.S. 750, 765 (1946)). The erroneously admitted evidence was prejudicial because it created the illusion of motive in a case otherwise lacking compelling evidence and served as improper evidence to establish Mr. Proctor's alleged bad character.

Given the lack of direct physical evidence, the prosecution introduced motive evidence to attempt to identify Mr. Proctor as the shooter. Indeed, motive was the first thing the prosecution discussed in its closing, offering three potential reasons Mr. Proctor would want to kill the decedent. A889 ($120 debt); A891-93 (argument regarding using the decedent's home for drug deals); A896-97 (preclusion of the decedent's CPO testimony). Given the weakness of the first two potential motives,

the final motive, which was supported by the improper hearsay testimony, was arguably the most persuasive. Its introduction irreparably tainted the verdict.

II. PROCTOR WAS DENIED A FAIR TRIAL BECAUSE OF IMPROPER EVIDENCE AND STATEMENTS VIOLATING THE PRESUMPTION OF INNOCENCE.

Mr. Proctor's trial was tainted by prejudicial references to his prior incarceration and by the government's mischaracterization of its burden of proof, both of which denied him the presumption of innocence. "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." *Coffin v. United States*, 156 U.S. 432, 453 (1895). In service of that presumption, "courts must be alert to factors that may undermine the fairness of the fact-finding process" and "must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt." *Estelle v. Williams*, 425 U.S. 501, 503 (1976). Because the jury could have been led to convict based on evidence of general criminal propensity and impermissible inferences shifting the burden of proof to the defense, Mr. Proctor did not receive a fair trial.

Mr. Proctor's counsel objected to these incidents, *see* A130 (K. Diggs' testimony regarding Mr. Proctor's incarceration); A658 (incarceration photos); A798-99 (Johnson's testimony regarding Mr. Proctor's incarceration); A955

(government's closing argument shifting the burden of proof), and made multiple motions for a mistrial, A131; A799; A955-57. Accordingly, the trial court's decision to deny a mistrial is reviewed for abuse of discretion. *Austin v. United States*, 292 A.3d 763, 776 (D.C. 2023). This Court will overturn a denial of a mistrial where the court's decision "appears unreasonable, irrational, or unfair, or [] the situation is so extreme that the failure to reverse would result in a miscarriage of justice." *Id.*

A. The Visual and Testimonial References to Mr. Proctor's Prior History of Incarceration Tainted the Verdict and Were Unduly Prejudicial.

In three discrete instances, the jury was informed of Mr. Proctor's prior incarceration in prison: twice through witness testimony and once when the prosecution published photos of Mr. Proctor standing on the prison yard with other inmates to the jury. *See* A130 (K. Diggs); A797 (Johnson); A657-58 (photos). This Court has repeatedly acknowledged that references to a prior criminal conviction present a high risk of prejudice because "the jury may infer . . . that the defendant is a bad person and that he or she therefore probably committed the crime for which he or she is on trial." *Clark v. United States*, 639 A.2d 76, 79 (D.C. 1993) (cleaned up) (quoting *Bennett v. United States*, 597 A.2d 24, 27 (D.C. 1991). "[O]ther crimes evidence may 'result in casting such an atmosphere of aspersion and disrepute about the defendant as to convince the jury that he is a habitual lawbreaker who should be punished and confined for the good of the community.'" *Thompson v. United States*,

546 A.2d 414, 419 (D.C. 1988) (quoting *Pinkey v. United States*, 363 F.2d 696, 698 (D.C. Cir. 1966)).

The first reference to Mr. Proctor's criminal history occurred at the beginning of trial during the prosecution's direct examination of its first witness. A130. Kevin Diggs' allusion to Mr. Proctor's past incarceration cast a shadow of Mr. Proctor's criminal history over the remainder of the trial in which the government's theory was buttressed by other crimes evidence that the trial court improperly admitted. *See infra* Part. I. One reference is sufficient to prejudice a jury against a defendant, but here, another witness also mentioned Mr. Proctor's incarceration. A797.

Further, during the testimony of Officer Coughlin, the government published to the jury photos showing Mr. Proctor on the prison recreation yard posing with other inmates. A657-58. This Court has repeatedly recognized the great risk of prejudice introduced by photos that imply a criminal conviction. *See Bishop v. United States*, 983 A.2d 1029, 1041 (D.C. 2009) (concluding that admission of mugshot was "not harmless beyond a reasonable doubt" despite curative instruction.). The prosecution argued that the photos were not clearly from prison because, *inter alia*, Mr. Proctor's uniform was not orange. A667. The trial court, by contrast, acknowledged that the photos showed Mr. Proctor in a prison uniform, but concluded that their publication was too brief to prejudice Mr. Proctor. *Id*. Yet combined with the earlier reference to Mr. Proctor being "locked up," A130, these

photos firmly established that Mr. Proctor had been incarcerated, leaving the jury to infer that Mr. Proctor was a bad actor with a criminal past. *See Williams v. United States*, 382 A.2d 1, 7 (D.C. 1978) (noting that jury may have been influenced by "improper, indirect proof of appellants' criminal pasts.").

The contravention of Mr. Proctor's constitutional rights was extremely prejudicial. Under the Supreme Court's decision in *Chapman v. California*, errors which infringe upon due process rights guaranteed by the Fifth and Fourteenth Amendments require reversal unless they were harmless beyond a reasonable doubt. 386 U.S. 18, 21, 24 (1967). Errors implicating the presumption of innocence—a due process right, *see Estelle*, 425 U.S. at 503 (presumption of innocence is a basic component of fair trial right secured by Fourteenth Amendment)—are subject to the constitutional harmless error analysis under *Chapman*. 386 U.S. at 21; *Bishop*, 983 A.3d at 1038-39.

The improperly disclosed evidence of Mr. Proctor's prior incarceration served only to demonstrate Mr. Proctor's alleged criminal character, an improper conclusion that was reinforced by the other crimes evidence allowed at trial. Mr. Proctor's sanitized stipulation that he had a prior conviction for purposes of the felon in possession charge does not lessen the prejudice caused by the improper testimony and publication of the prison photos. Though the jury was told that he was convicted of a crime "*punishable* by a imprisonment for a term exceeding one year," A885, the

stipulation does not establish that he actually served prison time. For a more minor or nonviolent felony, one might be sentenced to probation or receive a suspended sentence. The references at trial, however, not only established that he served time in prison, they showed that he served *significant* time, which connotes a serious, even violent crime from which the jury improperly could draw inferences of general criminal character.

Evidencing his lengthy prison stay, both witnesses that testified to Mr. Proctor's incarceration used Mr. Proctor's release from prison as their point of reference for meeting him. In particular, the testimony of Kevin Diggs, a family member, who did not meet Mr. Proctor until his release from prison, allowed the jury to infer that Mr. Proctor had been incarcerated for a prolonged period. The photos provide further proof that Mr. Proctor served a long prison sentence. He is visibly younger in the prison photos, appearing to be in his late teens versus around 35 years old when each witness recalled that he had just been released from prison.

There was no dispute that the *repeated* introduction of Mr. Proctor's prior incarceration was improper. The prosecution acknowledged that it had not intended to elicit any of the witness's statements nor intentionally included the prison photos. *See* A133; A799-80; A665. Nonetheless, the three references to Mr. Proctor's prior incarceration, each themselves and cumulatively, served to deprive Mr. Proctor of a fair trial. The trial court's denial of a mistrial was an abuse of discretion because the

prejudicial references, considered in context with the government's heavy reliance on other crimes evidence, could not be remedied by re-instruction. *See Thompson*, 546 A.2d at 426 (D.C. 1988) (noting that courts "inquire as to whether the risk of prejudice has been or can be meaningfully reduced by the trial judge's instructions.").

A corrective instruction would not have purged the prejudice here. The trial court gave a general corrective instruction regarding the photographs, but the curative instruction was insufficient to overcome the prejudice already done. "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction." *Thompson*, 546 A.2d at 425 (D.C. 1988) (quoting *Krulewitch v. United States*, 336 U.S. 440, 453, (1949) (Jackson, J. concurring)). Mr. Proctor declined corrective instructions for the testimonial references because such instruction would call further attention to the testimony, only magnifying its prejudicial effect. A132 (Mr. Kiersh noting that "requesting an instruction at this point is [] just going to highlight the information, and . . . add[] to the prejudice."); A799 (same). The damage was done, and a new trial before a new jury was warranted. Thus under either standard of prejudice one cannot say beyond a reasonable doubt, or even with fair assurance, that the error in denying a mistrial in light of these references was harmless.

B. The Government's Rebuttal Argument Impermissibly Shifted the Burden of Proof to Mr. Proctor in Violation of the Presumption of Innocence.

In a criminal trial, the prosecution is afforded the last word because it has the burden of proof and production: to show guilt beyond a reasonable doubt by competent evidence. In this case, the prosecution used its rebuttal to suggest that the jury weigh the evidence against Mr. Proctor like a "seesaw" with "a ten-year-old on one end and a two-year-old on the other." A942-43. But Mr. Proctor had no burden to produce evidence, let alone a burden to outweigh the government's evidence. The prosecution's prejudicial remarks made moments before the jury was to deliberate denied Mr. Proctor the presumption of innocence and thus, the right to a fair trial.

In evaluating a prosecutor's statements, this Court will determine whether misconduct occurred, and if so, "consider the gravity of the misconduct, its relationship to the issue of guilt, the effect of any corrective action by the trial judge, and the strength of the government's case" to determine whether prejudice occurred. *Golsun v. United States*, 592 A.2d 1054, 1059 (D.C. 1991); *Porter v. United States*, 826 A.2d 398, 406 (D.C. 2003).

1. The prosecutor's comments amounted to misconduct.

The misconduct here was plain and acknowledged by the trial court. When discussing Mr. Proctor's objection at the bench, the trial court stated: "indicating that there are two sides for the jury to weigh against each other, it does suggest that

one side has to put on evidence." A956. When the prosecutor disagreed that the statements were inappropriate, the court countered, "believe me: When it came out of your mouth, that [it suggests a defense burden] was the first thing I thought." *Id*. The prosecution told the jury to weigh the two sides and, more persuasively, did so via a well-known visual metaphor that would leave an impression on the jurors. The court therefore abused its discretion in denying a mistrial because, as discussed below, re-instruction was insufficient to remedy the unfairness and ensure that justice was carried out.

2. The remarks prejudiced Mr. Proctor.

Despite finding that the prosecutor's rebuttal remarks offended the presumption of innocence, the trial court denied Mr. Proctor's motion for a mistrial, holding an instruction to be a sufficient remedy. A958. The trial court then began its general charge to the jury with the standard instruction on the burden of proof.[5] A959. This instruction was insufficient, however, to restore Mr. Proctor's presumption of innocence because the misconduct undermined the core of Mr. Proctor's defense—the prosecution's affirmative and complete burden—and it was

[5] The court instructed: "Ladies and gentlemen, I have a few instructions for you. The first one is to remind you of an instruction that I gave you yesterday: 'The defendant in this case, Mr. Proctor, has no burden of proof. That meant that he is not required to put on any evidence in this case. The government bears the burden of proving each of the elements of each of the offense beyond a reasonable doubt.'" A959.

not delivered at the time of the remark or separately from the general instructions. *See* A955-59.

The timing of the prosecutor's remarks is particularly significant: "[i]mproper 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." *Lucas v. United States*, 102 A.3d 270, 279 (D.C. 2014) (alteration in original) (quoting *Anthony v. United States*, 935 A.2d 275, 284 (D.C. 2007). Had Mr. Proctor's counsel had an opportunity to respond to the remarks, he could have countered the improper analogy by explaining the burden of proof and re-emphasizing with particularity the weaknesses that kept the prosecution from meeting it. Instead, the jury's last impression of the case before deliberation underscored that Mr. Proctor did not put on a defense case and could not prove his innocence against the weight of the evidence on the government's side of the seesaw.

III. THE EVIDENCE WAS INSUFFICIENT TO PROVE GUILT BEYOND A REASONABLE DOUBT.

This Court reviews the sufficiency of the evidence supporting a conviction *de novo*. *See Bailey v. United States*, 257 A.3d 486, 492 (D.C. 2021). Reversal is warranted when, "according deference to the fact-finder to weigh the evidence, determine the credibility of the witnesses, and draw all justifiable inferences of fact," the evidence "is such that a reasonable juror must have a reasonable doubt as to the existence of any of the essential elements of the crime." *Williams v. United States*,

113 A.3d 554, 560 (D.C. 2015) (cleaned up). Where the evidence presented at trial was insufficient, the appellant is entitled to entry of a judgment of acquittal. *See Burks v. United States*, 437 U.S. 1, 18 (1978); *see also Stack v. United States*, 519 A.2d 147, 161 n.1 (D.C. 1986) (Mack, J., concurring) ("Retrial is constitutionally forbidden where the evidence presented at trial was insufficient to convict." (citing *Burks*, 437 U.S. at 18)).

Mr. Proctor's convictions must be reversed. The prosecution did not prove beyond a reasonable doubt that Mr. Proctor was responsible for the decedent's death. There was no eyewitness testimony of the shooting itself; the decedent's statements identifying his shooter came after catastrophic blood loss and while he was under the influence of alcohol, cocaine, and marijuana; and witnesses provided conflicting accounts of decedent's last words. The limited, circumstantial physical evidence offered at trial was even weaker. Accordingly, the evidence offered at trial was insufficient to establish guilt beyond a reasonable doubt.

A. Witness Testimony At Trial Was Insufficient to Prove Beyond a Reasonable Doubt that Mr. Proctor Was Involved in the Shooting.

The prosecution failed to prove beyond a reasonable doubt that Mr. Proctor was involved in shooting the decedent. The central identification of Mr. Proctor came in the form of the decedent's conflicting dying declarations, as relayed by earwitnesses. Given the decedent's condition when he made these statements, they were unreliable. When the decedent called Ms. Offutt to report that he had been shot,

he had been shot seven times, including in the chest. A737, 744, 756. By the time he had been shot in the lung and liver, he had already experienced significant blood loss. A762, 766. These injuries, coupled with the fact that decedent was under the influence of alcohol and other drugs, undoubtedly impacted his ability to reason and to accurately recount the identity of his shooter.

The decedent's unreliability as a witness to his own murder is underscored by the varying identifications offered by the witnesses at trial. One witness heard the decedent say "Little Gary," A179-80; another heard him say "Little Man." A247. A witness later noted that "Little Man" was the name of the decedent's chihuahua. A312. Witnesses also testified that the decedent had trouble breathing and speaking, A293, and that he lost consciousness on the scene just after attempting the identification, A247. Given these deficiencies, the decedent's statements—and the inconsistent accounts relaying them—were insufficient to prove the identity of the shooter.

B. Other Evidence Does Not Establish Guilt Beyond a Reasonable Doubt.

The physical evidence presented at trial—DNA, cell phone data, ammunition, and photos depicting Mr. Proctor holding a firearm on another occasion—was insufficient to show proof beyond a reasonable doubt. Mr. Proctor's DNA was not matched to that found on the scene: Mr. Proctor was not a match for four of the five items from which the government's DNA expert obtained results and could compare

the samples to Mr. Proctor and the decedent. A483, 496-500. For one sample, the prosecution was unable to match the partial DNA profile to Mr. Proctor and the strongest statement the DNA expert could make was that Mr. Proctor could not be excluded as a source of the sample. A503.

The remaining evidence is similarly non-inculpatory. Mr. Proctor lived across the street from the decedent, so the data obtained from cell towers—which are not able to provide a precise location—was too general and non-specific to be inculpatory. *See* A680 (testifying that cell site pinpoints sectors, but "you don't know where within that sector the phone would be"); A698-99 (admitting that cell tower data "can't distinguish between" Mr. Proctor's residence and the decedent's, which are across the street from each other). Nor could guilt rest on a photograph of Mr. Proctor allegedly holding a common, commercially available firearm or possession of common, commercially available ammunition. As Mr. Proctor's trial counsel emphasized in his closing argument, several other people had ongoing issues with the decedent: he continuously assaulted his long-time girlfriend and got into an altercation with two others men shortly before the shooting. A927-28, 931. Accordingly, the evidence adduced at trial was insufficient to prove beyond a reasonable doubt that Mr. Proctor committed the murder at issue.

CONCLUSION

For the foregoing reasons, Mr. Proctor should be acquitted or his convictions reversed and the case should be remanded to the trial court for further proceedings.

Date: March 18, 2024

Respectfully submitted,

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REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (amended May 2, 2023), this certificate must be filed in conjunction with all briefs submitted in all criminal cases designated with a "CF" (criminal felony), "CM" (criminal misdemeanor), "CT" (criminal traffic), and "CO" (criminal other) docketing number. Please note that although briefs with above designations must comply with the requirements of this redaction certificate, criminal sub-case types involving child sex abuse, cruelty to children, domestic violence, sexual abuse, and misdemeanor sexual abuse will not be available for viewing online.

If you are incarcerated, are not represented by an attorney (also called being "pro se"), and not able to redact your brief, please initial the box below at "G" to certify you are unable to file a redacted brief. Once Box "G" is checked, you do not need a file a separate motion to request leave to file an unredacted brief.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21, amended May 2, 2023, and Super. Ct. Crim. R. 49.1, and removed the following information from my brief:

A. All information listed in Super. Ct. Crim. R. 49.1(a) has been removed, including:

(1) An individual's social-security number
(2) Taxpayer-identification number
(3) Driver's license or non-driver's' license identification card number
(4) Birth date
(5) The name of an individual known to be a minor as defined under D.C. Code § 16-2301(3)
(6) Financial account numbers

(7) The party or nonparty making the filing shall include the following:

(a) the acronym "SS#" where the individual's social-security number would have been included;
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(d) the year of the individual's birth;
(e) the minor's initials;
(f) the last four digits of the financial-account number; and
(g) the city and state of the home address.

B. Any information revealing the identity of an individual receiving mental health services and/or under evaluation for substance-use-disorder services. *See* DCCA Order No. M-274-21, May 2, 2023, para. No. 2.

C. All pre-sentence reports (PSRs); these reports were filed as separate documents and not attached to the brief as an appendix.

D. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

E. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

F. Any other information required by law to be kept confidential or protected from public disclosure.

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G. I certify that I am incarcerated, I am not represented by an attorney (also called being "pro se"), and I am not able to redact this brief. This form will be attached to the original filing as record of this notice and the filing will be unavailable for viewing through online public access.

/s Marisa S. West	22-CF-0349
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CERTIFICATE OF SERVICE

I hereby certify that on this 18 day of March, 2024, a copy of the foregoing Brief of Appellant was served electronically on the following counsel of record:

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