25-CM-198

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

JIMMY JOHNSON
Appellant

v.

UNITED STATES OF AMERICA
Appellee

ON APPEAL FROM
THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

Case No. 2024-CF3-003007
(Honorable Errol Arthur, Associate Judge)

BRIEF OF APPELLANT

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STATEMENT REGARDING PAGE LIMIT

This brief is 30 pages long excluding statements, tables, and addenda required by Rule 28(a)(1)-(4) and Rule 28(f). The type volume does not exceed 13,000 words or 1,300 lines of text in compliance with Rule 28(e).

LIST OF ALL PARTIES, INTERVENORS, AMICI CURIAE, AND THEIR COUNSEL IN THE TRIAL COURT AND IN THE APPELLATE PROCEEDING

Party	Attorneys and Judges - Superior Court	Counsel - Appeal
Jimmy Johnson	Joseph E. McCoy	Keith B. Lofland
United States	Gregory Gimenez, AUSA	Chrisellen R. Kolb
Judge	The Honorable Errol Arthur, Associate Judge	

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STATEMENT REGARDING JURISDICTION

This is a timely appeal from a final order; this Court has jurisdiction pursuant to D.C. Code § 11-721.

STATEMENT OF THE ISSUES

I. Whether the Superior Court erred in denying Appellant's motion to sever his trial from his co-defendant where the substantial evidence of the co-defendant's culpability contrasted with overwhelming evidence adduced at trial that exculpated Appellant?

II. Whether the evidence was sufficient to sustain Appellant's conviction for assault where the exculpatory testimonial evidence from the government's complaining witness that Appellant interceded as a Good Samaritan in aid of that witness directly contradicted the government's theory that Appellant was a co-conspirator in the assault, robbery, and attempted carjacking of the complaining witness?

III. Whether the Superior Court erred in denying Appellant's motion to dismiss where Appellant was prejudiced by the government intentionally eliciting improper testimony from a police witness and where striking that testimony could not reasonably guarantee that the jury only considered evidence properly before it regarding Appellant's case?

STATEMENT OF THE CASE

Mr. Jimmy Johnson ("Appellant") was charged with co-defendant Gregory Patterson[1] under a nine-count felony indictment of the following: Count 1 alleged armed carjacking, in violation of D.C. Code § 22-2803(b)(1) (2001); Counts 2, 4 and 6 alleged possession of a firearm during a crime of violence or dangerous offense, in violation of D.C. Code § 22-4504(b) (2001); Count 3 alleged robbery while armed, in violation of D.C. Code § 22-2801 (2001); Count 5 alleged assault with significant bodily injury, in violation of D.C. Code § 22-404(a)(2) (2001); Count 7 alleged unlawful possession of a firearm (prior conviction), in violation of D.C. Code § 22-4503(a)(1) (2001); Count 8 alleged possession of an unregistered firearm, in violation of D.C. Code § 7-2502.01(a)(X) (2001); and Count 9 alleged unlawful possession of ammunition, in violation of D.C. Code § 7-2506.01(3) (2001).

After a six-day jury trial, Mr. Johnson was convicted only of the assault charge under Count 5. Pursuant to a pretrial motion, Counts 7-9 were severed from the jury trial and Mr. Johnson entered a separate guilty plea to Count 7 alleging unlawful possession of a firearm by one with a prior conviction. For his

[1] See *United States v. Gregory Patterson*, Sup. Ct. D.C. No. 2024-CMD-001976.

convictions under Counts 5 and 7 of the indictment, Mr. Johnson was sentenced to 180 days incarceration, supervised release for 3 years, and a $100 assessment to the Victims of Violent Crime Compensation Act fund on each count—the sentences ordered to run concurrently.

STATEMENT OF FACTS

The government's theory at trial was that on 11 June 2023, Mr. Johnson conspired with Co-Defendant Gregory Patterson, and two unidentified assailants to assault, rob, and attempt to carjack Mr. Nicholas Loukas.

Video of the Assault.

The Government's evidence in support of this theory was principally conjecture drawn from CCTV camera footage from an adjacent building that captured video of Mr. Loukas being assaulted by co-defendant Patterson and the two unidentified assailants.

The CCTV footage showed that on 11 June 2023, at 09:58:18, Co-Defendant Patterson enters the camera frame and walks into the alley adjacent to 1612 Kenilworth Avenue NE. (1 October 2024 Tr. Transcript at 102; Government Exhibit (Gov. Exh.) 12) At 9:58:46, the reflection of light appears on a sign blocking the alley, consistent with headlights from a vehicle driving through the alley. (*Id*.) A person is then seen moving the sign out of the way. (1 October

2024 Tr. Transcript at 103) At 09:59:36, Mr. Loukas' vehicle drives through the alley and stops. (*Id*. at 102) Mr. Loukas exits his vehicle and walks toward the alley. (*Id*. at 102, 105) Co-Defendant Patterson approaches Mr. Loukas and they appear to be talking while two unidentified individuals are off to the side of the car. (*Id*. at 105-106; Gov. Exh. 12B)

Mr. Loukas then walks into the alley and briefly out of camera view. (Gov. Exh. 12) At 10:00:12, Mr. Loukas reemerges into camera view and Co-Defendant Patterson punches Mr. Loukas with his left hand, knocking him out of camera view. (*Id*.) Co-defendant Patterson takes a fighting stance and delivers another punch with his left hand. (*Id*.) Co-Defendant Patterson walks into the alley, out of camera view, and reemerges at 10:00:32, pushing Mr. Loukas onto the ground. (*Id*.) Mr. Loukas remains laying on the ground while Co-Defendant Patterson opened the driver's side door of Mr. Loukas' vehicle and appears to rummage through the driver's door panel and center console. (*Id*.)

Co-Defendant Patterson exits the vehicle and waves toward the alley, appearing to wave people toward him. (Gov. Exh. 12) Simultaneously, Mr. Loukas begins to get up and a pool of blood is seen on the sidewalk where his head was; and as he gets up he is visibly bleeding from his face. (*Id*.) Co-Defendant Patterson walks northbound on the sidewalk and out of camera view. (*Id*.) Mr.

Johnson then enters the frame and attempts to usher Mr. Loukas towards his driver's door. (*Id*.)

Co-Defendant Patterson then runs back into the camera frame, pulls the complainant by the back of his tank top away from the vehicle and appears to hold him while one of the unidentified suspects enters the front passenger seat area of the vehicle. (Gov. Exh. 12) Mr. Johnson positions himself between Mr. Loukas and Co-Defendant Patterson as Patterson appears to be yelling at Loukas and reaches for the left side of his waistband several times. (*Id*.) At 10:02:45, the two masked suspects appear to be attempting to pull Mr. Loukas out of the driver seat and Mr. Loukas pushes them off. (*Id*.) Simultaneously, Co-Defendant Patterson is seen in the front passenger seat, and then walks around to the rear driver side seat, opens the door, and throws Mr. Loukas' jacket on the sidewalk. (1 Oct. 2024 Tr. Transcript at 107-108; Gov. Exh. 12) Co-Defendant Patterson then completely enters the rear compartment of Mr. Loukas' vehicle and appears to be rummaging through it. (1 Oct. 2024 Tr. Transcript at 108; Gov. Exh. 12) The two, unidentified, masked suspects appear to be going through the driver's compartment and throwing objects on the ground while Mr. Johnson is standing next to the vehicle and suspects outside of the vehicle. (Gov. Exh. 12)

Mr. Johnson then speaks to Mr. Loukas and yells something towards one of the masked suspects, at which point that suspect appears to walk towards Mr.

Loukas and yell at him. (Gov. Exh. 12) All of the suspects then walk away and Mr. Loukas drives off. (*Id*.)

Mr. Loukas' Account of the Assault.

Mr. Loukas' account of the assault and robbery provided crucial amplifying context that made clear that Mr. Johnson's only role on 11 June 2023 was as a Good Samaritan interceding between Loukas and his assailants. Consistent with the CCTV footage, Loukas confirmed that evening he was driving down the alley when he encountered water barriers obstructing his way. (1 Oct. 2024 Tr. Transcript at 43) When he got out of his vehicle to move the barriers, he was approached by two masked men. (*Id*. at 43-44) One of the masked men pulled a gun on Loukas and demanded his jewelry; when he hesitated, he was assaulted by the two men and fought back. (*Id*. at 44-45) Loukas testified that at an unknown point during this struggle, a third individual emerged—who he believed to be Co-Defendant Patterson—and he heard Patterson yell something to the effect of "free car!" (*Id*. at 45) Mr. Loukas then broke free and ran to the driver's seat of his car and closed the door. (*Id*.) One of the masked assailants reached through the driver's window and the assailant who pulled the gun opened the passenger door. (*Id*.) The masked assailant at the driver's side reached into the car, pulled Loukas' hands off of his vehicle's steering wheel, pulled a ring off of his finger, and pulled a watch off of his wrist. (*Id*. at 45, 50) The armed assailant attempted to pull the

complainant out of the car from the passenger side. (*Id*. at 45) Simultaneously, Loukas heard Co-Defendant Patterson encouraging and instructing the two masked assailants, making comments to include "free car," and "does he have any money?" (*Id*.)

While Loukas is being assailed by the two masked individuals, he hears Mr. Johnson urging the assailants to stop:

> I'm still being hit by the other guy. I couldn't close the door because I don't have a left hand, but in the midst of it going on, Jimmy [Johnson] ends up saying to them to let me go, to get off of him, he not going to like that, he going to die about it, I respect him, let him go. They let me go.

(1 Oct. 2024 Tr. Transcript at 45) The government's direct examination of Loukas only emphasized that Mr. Johnson's sole role was trying to convince the assailants to leave Loukas alone:

> Q After these two individuals, these two masked individuals began assaulting you, then what happened?
>
> A I fought back, and then eventually I heard Jimmy telling them to stop.
>
> Q Eventually, you heard Jimmy tell them to stop. Was he talking the entire time?
>
> A I wouldn't say the entire time. Whenever I heard him, it's a lot going on. It's just in the midst of commotion. But, every time that I do hear him, it's as if he's telling them to stop or to get off or respect him and leave him alone; he's not about to give y'all anything.

(1 Oct. 2024 Tr. Transcript at 45) Crucially, Loukas was clear that Mr. Johnson was not involved in the assault or robbery on 11 June 2023:

> Q Did you -- did you ever say that there were only three individuals involved?
>
> A Yes.
>
> Q Why is that?
>
> A Because, Jimmy never touched me. At the end of the day, he was there, but he didn't touch me. So in my initial count, I'm not counting him. It's funny in my memory, because the other guy, I remember him being there but I don't remember him ever touching me, you know what I mean, because I didn't see the whole thing until after the fact. But, I don't know if it's because of the count, if I'm counting Jimmy then or if I'm not counting Jimmy and I'm not counting him because it's just the way it happened.

(1 Oct. 2024 Tr. Transcript at 49-50) Similarly, Loukas was clear—notwithstanding his initial contemporaneous account to police—that Mr. Johnson was not the individual that he heard encouraging the assailants:

> Q So did you tell detectives that [Mr. Johnson] told them to take the car?
>
> A Yes, but I don't believe that -- the way that that -- it wasn't him that said that. When I'm thinking about the sounds of the voices, it was something that was said in the midst of everything happening, but it wasn't his voice.

(1 Oct. 2024 Tr. Transcript at 86)

In summary, Mr. Loukas testified that he was neither assaulted, robbed, nor carjacked by Mr. Johnson on 11 June 2023, he never saw Mr. Johnson with a gun

that evening, and that he only heard Mr. Johnson trying to help him by urging the assailants to stop that evening. (2 Oct. 2024 Tr. Transcript at 45-47)

After Mr. Johnson interceded on Mr. Loukas' behalf, Loukas testified that all three assailants walked away and that he then drove away for his safety and drove himself to a local hospital for treatment for a large laceration above his left eye, requiring 10 stitches, along with scratches and small lacerations on his right hand. (2 Oct. 2024 Tr. Transcript at 6, 15) While at the hospital, Mr. Loukas contacted the police about the assault and robbery and reported the loss of several jewelry items he was wearing. (1 Oct. 2024 Tr. Transcript at 50-51)

Despite the contradictory accounts of whether Mr. Johnson had been properly identified as being involved in the assault and robbery of Mr. Loukas, and over the objections Mr. Johnson raised in his motion to sever the trials, (1 Oct. 2024 Tr. Transcript at 4), Mr. Johnson was jointly tried with Co-Defendant Patterson under a nine-count felony indictment of the following: Count 1 alleged armed carjacking; Counts 2, 4 and 6 alleged possession of a firearm during a crime of violence or dangerous offense; Count 3 alleged robbery while armed; Count 5 alleged assault with significant bodily injury Count 7 alleged unlawful possession of a firearm (prior conviction); Count 8 alleged possession of an unregistered firearm; and Count 9 alleged unlawful possession of ammunition. Pursuant to a pretrial consent motion, Count 7 alleging unlawful possession of a firearm by one

with a prior felony conviction, Count 8 alleging possession of an unregistered firearm, and Count 9 alleging unlawful possession of ammunition were severed from the jury trial due to those alleged offenses being distinct from the events of 11 June 2023 (30 September 2024 Tr. Transcript at 20-21)

Trial Errors and Mr. Johnson's Motion to Dismiss.

At trial, the government presented testimony from Detective Nicholas Koven, regarding the investigative steps the Metropolitan Police Department took in this case. (*See e.g.* 2 October 2024 Tr. Transcript at 62) Despite Counts 7, 8, and 9 related to the alleged firearms offenses having been severed from the trial and the trial court having admonished the government to avoid those issues, the government asked Detective Koven during its direct examination whether he had recovered a firearm during his investigation; Detective Koven answered in the affirmative. (2 October 2024 Tr. Transcript at 139) Mr. Johnson's prompt objection to the framing of this question prompted a length colloquy regarding whether the question improperly conflated the issues properly before the jury with those related to the severed charges:

> MR. GIMENEZ: Yeah. Your Honor, the witness knew that this case was only about the June 11th incident, so I think in the moment he was obviously fast forwarding to the other date, which is not part of this case right here. So my questions were going to be about -- because, this is an armed carjacking case, armed robbery, et cetera.
>
> THE COURT: But -- so you -- again, I've stricken the answer; right.

> MR. GIMENEZ: Yeah. So it's the thoroughness of whether or not he found a gun on the scene.
>
> THE COURT: But, you didn't ask that question. You asked him did you find a gun in this case, in a case that's been indicted, in a case where there was a firearm allegedly found, and you -- Mr. McCoy agreed -- no. Mr. McCoy filed the motion to sever those counts. You agreed to it. It was a preliminary issue. And then, you asked, again, an open-ended question. I gave you leeway to lead because we were going through – I didn't use the word, minefields, but we were in a series of minefields and you asked him an open-ended question about this case. And here we are…

(2 October 2024 Tr. Transcript at 143-44) Mr. Johnson raised objections that any curative measures that the court could take would not mitigate the potential that the jury would confuse the legal issues at bar or conflate evidence of Co-Defendant Patterson's culpability with evidence of his limited role in the assault and robbery and moved for the charges to be dismissed:

> MR. MCCOY: Your Honor, at this point I don't believe there's anything that the Court could say to the jury to cure the fact that he just said, oh, I found Mr. Johnson at Ms. Jones' house, and yeah, we found a gun in this case too. I mean, this is an armed carjacking case where they alleged – they're alleging possession of a firearm during a crime of violence.
>
> …
>
> MR. MCCOY: Your Honor, what I would state is this is not an accidental utterance by a police officer. This was a leading question by the prosecutor. Did you find a gun in this case. The only non-perjurious answer was, yes.
>
> That issue had already been litigated. The Government has agreed to sever it. Immediately asking that leading question after the question was, where was Mr. Johnson found in this case, cannot simply be chalked up to a mistake.

> That is grossly negligent. So grossly negligent that it led a piece of evidence, the existence of a gun, come in front of the jury in a case of armed carjacking, armed robbery and PFCOV. That cannot be cured with a jury instruction. It simply cannot.
>
> It was said out of the mouth of the prosecutor; did you find a gun. The cop said, yes. Right. You cannot say, disregard that. They cannot disregard it, specifically in this case.
>
> Given that the jury cannot disregard that and given that it did not arise out of a mistake, but out of gross negligence, the only acceptable remedy at this point is to have this case dismissed with jeopardy attached and with prejudice.

(2 October 2024 Tr. Transcript at 144, 146-47; 3 October 2024 Tr. Transcript at 12-14) Although the trial court disagreed that the prosecutor had engaged in misconduct in posing the question to Detective Koven, it did agree that the question and response prejudiced both Mr. Johnson and Co-Defendant Patterson by introducing issues not properly before the jury. (3 October 2024 Tr. Transcript at 54-60) In light of this prejudice, the trial court struck Detective Koven's testimony in its entirety. (3 October 2024 Tr. Transcript at 63-64)

After the six-day trial, the jury convicted Mr. Johnson only on Count 5. (8 October 2024 Tr. Transcript at 5-8) Mr. Johnson subsequently entered a separate guilty plea to Count 7. For the convictions for Count 5 and Count 7, Mr. Johnson was sentenced on each count to 180 days incarceration, supervised release for 3 years, and a $100 assessment to the Victims of Violent Crime Compensation Act

fund with the sentences ordered to run concurrently. (4 February 2025 Tr. Transcript at 13-14)

Mr. Johnson now appeals his conviction for assault under Count V.

ARGUMENT

I. The Trial Court Erred in Denying Mr. Johnson's Motion to Sever his Case from Co-Defendant Patterson.

Codefendants may be tried together "if they are alleged to have participated in the same act or transactions constituting an offense or offenses." D.C. Code § 23-311. This court recognizes a presumption that persons jointly indicted together should be tried together. *Rollerson v. United States*, 127 A.3d 1220, 1226-1227 (D.C. 2015) (citing *Sousa v. United States*, 400 A.2d 1036, 1040 (D.C. 1979)). This presumption may be rebutted where (1) there are '"irreconcilable defenses so that the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty,'" *Johnson v. United States*, 398 A.2d 354, 368 (D.C. 1979) (citation omitted), (2) one codefendant is seeking to call a codefendant as an exculpatory witness, *id*. at 367-68, or (3) where the evidence against one of the parties is *de minimis*. *Russell v. United States*, 586 A.2d 695, 698 (D.C. 1991).

The trial court should grant severance "'if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.'" *Moore v.*

United States, 927 A.2d 1040, 1056 (D.C. 2007) (quoting *Zafiro v. United States*, 506 U.S. 534, 539 (1993)). This court reviews a trial court's denial of a severance motion for abuse of discretion. *Hagans v. United States*, 96 A.3d 1, 40 (D.C. 2014). This court should reverse such a denial where a defendant shows that he suffered "manifest prejudice" as a result of being tried jointly. *Harrison v. United States*, 76 A.3d 826, 834 (D.C. 2013).

The contrasts are stark between this case and cases where this court has declined to find a trial court abused its discretion in denying severance based on disparities in culpability between co-defendants. For instance, in *Scott v United States*, 619 A.2d 917 (D.C. 1993), this court affirmed the trial court's denial on severance in a prosecution for armed robbery and other offenses where two of the three victims identified the appellant from a photographic array, and two picked her out of a lineup. *Id*. at 930. Crucially, all three victims identified her in court as the female robber, and all three described how she assisted her male co-defendant in carrying out the robbery. *Id*. On that record, this court rejected the argument on appeal that the evidence against appellant Scott was *de minimus* in comparison with the evidence against her male co-defendant. *Id*.

Similarly, in *Elliott v United States*, 633 A.2d 27 (D.C. 1993), this court affirmed a trial court's denial of severance where it found there was substantial evidence of the appellant's motive for committing the charged murder and

involvement in the crime. *Id*. at 32. In that case, several witnesses testified that Elliott accused them of participating in a scheme with the victim to rob him and threatened them for doing so. *Id*. at 32-33. On the night of the murder, Elliott induced the victim to go to a designated location, and shortly thereafter, witnesses recounted hearing gunshots and seeing Elliott running with his co-defendant in an alley. *Id*. Another witness recounted that the co-defendant shot Kearney in the alley about that time. *Id*. Later, Elliott asked his co-defendant and an unindicted individual if they "did him"; and Elliott then confirmed what his co-defendant had said about what Elliott would pay him for the crime. *Id*. Given the strength of this evidence against Elliott, this court found that he could not meet the standard for demonstrating manifest prejudice based upon a claim that the evidence against him was *de minimis* when compared with that of his co-defendant. *Id.*

In this case, the government's theory that Mr. Johnson was a conspirator in the assault and robbery of Mr. Loukas was based solely on a tendentious interpretation of the CCTV footage presented as Government Exhibit 12 that constructed Mr. Johnson's presence and the maelstrom of bodies when Mr. Johnson interceded between Loukas and Co-Defendant Patterson and the two masked assailants as Johnson also participating in the assault. (3 October 2024 Tr. Transcript at 83) However, the government did not at trial, and cannot on this record on appeal, rebut that its own complaining witness consistently testified that

Mr. Johnson's only role on 11 June 2023 was in defense of Mr. Loukas—first urging the assailants to stop assaulting Loukas and then physically interceding and helping Loukas get to his car and escape the beating.

Mr. Johnson strongly objected to being jointly tried with Co-Defendant Patterson. (1 October 2024 Tr. Transcript at 4-5) Mr. Johnson was clearly prejudiced by the trial court denying his multiple motions for severance in that the government's case in chief provided ample evidence of Co-Defendant Patterson's prior animus towards Loukas and unambiguous evidence of Patterson counseling, encouraging, and participating in the assault of Loukas on 11 June 2023. By contrast, not only is the government's case bereft of evidence of Mr. Johnson having a similar motive or animus towards Loukas, but Loukas was consistently clear in his testimony that Mr. Johnson never assaulted him, robbed him, nor attempted to carjack him on that evening. (1 October 2024 Tr. Transcript at 45, 49-50, 86)

Contrary to the circumstances presented in *Scott*, Loukas' testimony clearly establishes Mr. Johnson as a Good Samartian as opposed to a percipient assailant. And contrary to *Elliott*, was no evidence that Mr. Johnson had a motive to assault or rob Loukas, nor was there evidence that he in fact acted as anything other than a peacekeeper on 11 June 2023. Mr. Johnson apparently was tried and convicted

under the theory of "guilt by proximity" even though the only reasons for his proximity to the assault was as a Good Samaritan trying to aid Loukas.

Mr. Johnson suffered manifest prejudice by being tried jointly with Co-Defendant Patterson. The evidence against Patterson—as reflected by his clear participation in the assault in the CCTV footage and Loukas' testimony that Patterson counseled and aided in the assault and robbery—was comprehensive. The evidence against Mr. Johnson was not just *de minimus* when compared to Patterson; the government's theory that Mr. Johnson was a co-conspirator in the assault and robbery was directly contradicted by Loukas' clear and consistent testimony that Mr. Johnson urged the actual assailants to stop and only acted to assist him. Based on the wide disparities in the relative roles between Patterson as a percipient assailant and Mr. Johnson as a Good Samaritan, the joint trial critically impaired the jury's ability to render a reliable judgment distinguishing between these relative roles. Accordingly, this court should reverse Mr. Johnson's conviction for assault as it was contrary to the evidence adduced at trial.

II. The Government Presented Insufficient Evidence to Sustain Mr. Johnson's Conviction for Assault.

In considering a claim of insufficiency of the evidence, this Court views the evidence presented at trial "in the light most favorable to sustaining the conviction,

... giving deference to the [jury's] ability to weigh the evidence and make credibility and factual determinations," *Peery v. United States*, 849 A.2d 999, 1001 (D.C. 2004) (citations omitted), and to "draw reasonable inferences from the testimony." *Dickerson v. United States*, 650 A.2d 680, 683 (D.C. 1994) (citation omitted). To prevail on an insufficiency claim, an appellant must establish "that the government presented no evidence upon which a reasonable mind could find guilt beyond a reasonable doubt." *Peery*, 849 A.2d at 1001 (internal punctuation and citations omitted). Moreover, it is important to note that while review for sufficiency of the evidence is "deferential," "it is not a rubber stamp." *Swinton v. United States*, 902 A.2d 772, 776 n.6 (D.C. 2006). As this court has explained, "[p]roof beyond a reasonable doubt is not merely a guideline for the trier of fact; it also furnishes a standard for judicial review ...." *Rivas v. United States*, 783 A.2d 125, 134 (D.C. 2001) (en banc).

Accordingly, the evidence in a criminal prosecution must be strong enough that a jury behaving rationally could find it persuasive beyond a reasonable doubt. *Id*. The evidence is insufficient to convict if the jury is "required to cross the bounds of permissible inference and enter the forbidden territory of conjecture and speculation" to reach a guilty verdict. *Id*. In short, this Court "must reverse if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt." *Lattimore v. United States*, 684 A.2d 357, 359 (D.C.

1996); *see also Jackson v. Virginia*, 443 U.S. 307, 315 (1979) (impressing upon the factfinder the need to reach a subjective state of near certitude of the guilt of the accused) (emphasis added).

A. The Evidence Rebuts the Government's Theory that Mr. Johnson Assaulted Mr. Loukas.

D.C. Code § 22-404(a)(2) proscribes unlawful assaults, or threat[s[against another person in a menacing manner, "[that] intentionally, knowingly, or recklessly causes significant bodily injury." To support a conviction of assault, the evidence must prove (1) a voluntary act (2) on the part of the defendant to harm another person, and (3) that at the time the defendant committed the act, he must have had the apparent ability to injure the person. *Long v. United States*, 940 A.2d 87, 99 (D.C. 2007) (citation omitted).

This Court has consistently held that convictions for assaultive offenses, such as in this case, require that the government prove the defendant had the intent to commit an offensive touching—however slight. For example, in *Williams v. United States*, 887 A.2d 1000 (D.C. 2005), the D.C. Court of Appeals distinguished between throwing a shoe, as would be required under a general intent offense, and throwing a shoe with the specific intent of hitting the complainant with it. Only the latter act would support a conviction under the statute. *Id*. at 1004.

Similarly, in *Buchanan v. United States*, 32 A.3d 990 (D.C. 2011), the Court rejected the government's argument that an assault conviction could be sustained "so long as [defendant] intended the act of flailing his arms, even if he did not mean to strike the officer." The Court held instead that the assault conviction could only stand if the trial court found on remand that the defendant "intended to use force against the officer." *Id*.

In the Court's *en banc* decision in *Hernandez v. United States*, 286 A.3d 990 (D.C. 2022), the trial court found that the defendant "poked" the complainant somewhere on the body after having been specifically admonished not to do so. The question for the Court of Appeals was whether this offensive touching, performed with minimal force, constituted a criminal assault. The Court found that it did.

The Court continued its analysis of the historical distinctions between categories of general intent crimes and specific intent crimes. Turning to language used in the Model Penal Code, the Court held that the "touching" portion of an offensive touching" cannot be "inadvertent." *Hernandez*, 286 A.3d at 1001. In other words, the government must prove at least general intent to commit the acts that constituted the offense. Moving beyond general intent, however, the Court also held that, the "*mens rea* requirement for the offensiveness of a touch may be

satisfied by applying the Model Penal Code concepts of purpose and knowledge." *Id*. at 1002.

A person acts purposely with respect to a result of his conduct if it is his conscious object . . . to cause such a result." *Id*. (quoting Model Penal Code § 2.02(2)(b)(ii).) In *Hernandez*, the Court noted that the defendant did not dispute the fact that he had touched the complainant deliberately or purposely. *Id*. at 1004. Furthermore, "in the circumstances of this case, a reasonable fact-finder could conclude that the touching was offensive," particularly when the complainant warned Hernandez not to touch him because he would find it offensive": "Although [the trial court] did not use terms from the Model Penal Code, [it] found facts sufficient to permit the conclusion that [Hernandez] knew the victim would find the contact offensive but touched him nevertheless." *Id*.

The government in this case presented no evidence as to Mr. Johnson's intent in the assault. The evidence before the jury included the testimony from Mr. Loukas regarding who assaulted, robbed, and attempted to carjack him on 11 June 2023 and CCTV footage that captured much of the assault. Mr. Loukas was clear that Mr. Johnson did not verbally aid or encourage the actual assailants. (*See e.g*. 1 Oct. 2024 Tr. Transcript at 86) Mr. Loukas was equally clear and consistent in his account that he was neither assaulted, robbed, nor carjacked by Mr. Johnson on 11 June 2023, and that he never saw Mr. Johnson with a gun that evening (2 Oct. 2024

Tr. Transcript at 45-47). The sole evidence of Mr. Johnson's alleged direct participation in the assault was the government's fanciful interpretation of the CCTV footage as possibly capturing an attempted punch by Mr. Johnson when he stepped between the assailants and Loukas and tried to aid Loukas in getting into his car. However, that interpretation of the CCTV footgage is directly rebutted by Loukas' account of the assault and Mr. Johnson's actual role.

Even while giving appropriate deference to the jury's authority to make credibility determinations, viewing this record in the light most favorable to the government, the jury's findings were "plainly wrong." Even if the CCTV footage could be constructed to support an argument that Mr. Johnson struck Loukas in the course of interceding on his behalf, the government produced no evidence that Mr. Johnson had the requisite intent to strike or cause harm to Mr. Loukas. Accordingly, there was insufficient evidence to support Mr. Johnson's conviction for assault.

B. The Evidence Rebuts the Government's Theory that Mr. Johnson Conspired to Assault Mr. Loukas.

Similarly, this record provides insufficient evidence to convict Mr. Johnson for assault under a conspiracy theory of liability. "In evaluating the sufficiency of the evidence to support guilt on a conspiracy theory . . . [this court] evaluate[s] the sufficiency of the evidence in the light most favorable to the government, giving

full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact . . . .” *Collins v. United States*, 73 A.3d 974, 981(D.C. 2013). To establish liability for the acts of co-conspirators, the government had to demonstrate “that an agreement existed, that a substantive crime was committed by a co-conspirator in furtherance of that agreement, and that the substantive crime was a reasonably foreseeable consequence of the agreement between the conspirators.” *Id*. at 982 (citing *Wilson-Bey v. United States*, 903 A.2d 818, 840 (D.C. 2006).

Here, the government’s proof was utterly deficient in proving either an agreement between Mr. Johnson and the assailants to assault, rob, or carjack Mr. Loukas, or that the perpetrators who robbed Loukas were parties to *any* agreement that included Mr. Johnson. The government’s case rests largely on the theory that Mr. Johnson’s mere presence in the vicinity of the assault was evidence of prior knowledge and coordinated action with the assailants, and that—instead of acting to aid Loukas—the CCTV footage showed Johnson acting in concert with the assailants. Again, this theory is not supported by the video evidence that depicted a chaotic scene that Mr. Johnson spontaneously acted to diffuse by coming to Mr. Loukas’ aid. Crucially, Mr. Loukas’ consistent testimony that Mr. Johnson was in fact urging Patterson and the masked assailants to not to assault Loukas directly

rebuts the theory that Mr. Johnson took any concerted action with Patterson and the masked assailants on 11 June 2013.

Even where these circumstances are viewed in the light most favorable to the government, this record provides insufficient evidence from which the jury could infer the existence of an agreement involving Mr. Johnson to rob Mr. Loukas and is therefore insufficient to sustain his conviction for assault.

III. The Trial Court Erred in Denying Mr. Johnson's Motion to Dismiss in Light of the Prosecution Eliciting Improper Testimony from Detective Koven That Could Not Be Cured by Striking His Testimony.

Detective Koven's testimony regarding the discovery of a gun unrelated to the offenses at trial introduced improper argument that created an unreasonable risk that the jury would improperly infer linkages between the severed offenses and the charges before the jury. "In considering claims of improper argument, 'it is [this court's] function to review the record for legal error or abuse of discretion by the trial judge, not by counsel.'" *Robinson v. United States*, 50 A.3d 508, 530 (D.C. 2012), cert. denied, 133 S. Ct. 2404, 185 L. Ed. 2d 1114 (2013) (citation omitted). The trial judge is afforded discretion in how to deal with improper comments. *See Turner v. United States*, 26 A.3d 738, 742 n.7 (D.C. 2011); *Finch v. United States*, 867 A.2d 222, 225 (D.C. 2005). That discretion is not unfettered, however, and "must be exercised in accordance with correct legal principles." *Turner*, 26 A.3d at 742 n.7. A court's exercise of discretion will necessarily turn

on its determination whether an argument is improper. *Lucas v. United States*, 102 A.3d 270, 276 (D.C. 2013).

Here the trial judge conceded that the prosecutor's line of questioning and Detective Koven's answers were improper. (3 October 2024 Tr. Transcript at 54-60) Analogous to the long-standing rule that evidence of prior convictions may not be introduced to prove, nor argument made to suggest, that a defendant is guilty of the crime charged because he has a propensity to commit criminal acts because evidence of a prior conviction is presumptively prejudicial and contrary to the presumption of innocence, *see, e.g., Drew v. United States*, 331 F.2d 85, 89-90 (D.C. Cir. 1964), Mr. Johnson was prejudiced by the improper introduction of an implication that he was connected to purported criminal acts associated with the gun to which Detective Koven alluded.

Where the claim of error was preserved at trial—as it was here by Mr. Johnson's timely objection and perfection via his motion to dismiss—this court reviews the improper comments under a harmless error standard under which the government bears the burden of showing that the verdict was not substantially swayed by the comment such that this court can say, with fair assurance, that the conviction is deserving of judicial confidence and should be affirmed. *See Jones v. United States*, 17 A.3d 628, 634 (D.C. 2011); *Wheeler v. United States,* 930 A.2d 232, 246 (D.C. 2007); *see also Kotteakos v. United States*, 328 U.S. 750, 765, 66 S.

Ct. 1239, 90 L. Ed. 1557 (1946) ("But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected."). In making that determination this court looks at: (1) the "gravity" of the improper comment, (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. *Turner*, 26 A.3d at 742.

A. The Gravity of the Improper Comments Merited the Trial Court's Attempted Curative Steps.

Where a prosecutor repeatedly emphasizes an improper argument, the gravity of the impropriety is heightened. *See Turner*, 26 A.3d at 744. Conversely, there is less gravity in a passing, brief reference. *See Finch*, 867 A.2d at 228. Here, the government's entire theory of the case was that Mr. Johnson was a co-conspirator with Patterson and the unidentified assailants, and as such was jointly culpable in the assault, robbery, and attempted carjacking of Mr. Loukas. However, the contingencies of proof during the trial developed exculpatory testimony from Mr. Loukas that Mr. Johnson's role as a mediator placed him in a fundamentally different role than Patterson and the two masked assailants. The improper question to Detective Koven, in light of Mr. Johnson being jointly tried with Patterson, created an improper inference that the gun that the CCTV footage

and Mr. Loukas' testimony linked to Patterson was likewise linked to Mr. Johnson's charges. The subsequent remedial steps the trial court attempted demonstrates that the prejudicial effect of the improper argument was obvious.

B. The Improper Comments Bore Directly on the Issue of Guilt.

The central question of fact at trial was Mr. Johnson's role relative to Co-Defendant Patterson and the two unidentified assailants. The risk of prejudice to Mr. Johnson in being improperly linked to a notional recovered gun that was unrelated to the charges before the jury and/or properly imputed to issues regarding Co-Defendant Patterson's culpability in the assault were similarly so clear to the trial court that it prompted remediation.

C. The Government's Case Against Mr. Johnson Was Exceedingly Weak.

In this case, the government's case against Mr. Johnson turned on its arguments that the CCTV footage reflected his participation in the assault. However, this theory was directed contradicted by its complaining witness, Mr. Loukas, who consistently testified that Mr. Johnson only interceded on his behalf and attempted to dissuade his actual assailants on 11 June 2023. For the reasons stated *supra* regarding the insufficiency of the evidence to sustain Mr. Johnson's assault conviction, the government's case was not only weak, its theory was directly contradicted by the evidence it presented at trial.

The weakness of this evidence underscores the prejudicial effect of the improper comment on appellant's trial when viewed as a whole. In cases where the government's evidence is strong, but not overwhelming, this court has added weight to the potentially prejudicial effect of the comment. Compare, e.g., *Dorman v. United States*, 491 A.2d 455, 464 (D.C. 1984) (finding improper comments harmless where there was overwhelming evidence of guilt), with *Anthony v. United States*, 935 A.2d 275, 285 (D.C. 2007) (finding improper comments caused substantial prejudice in part because the government's evidence was "problematic" and "not especially compelling").

Here, the prosecutor's line of questioning and Detective Koven's answer alluded to evidence that was neither linked to Mr. Johnson by the testimony presented at trial, nor properly before the jury for consideration. The improper questioning and answer was substantially prejudicial here in light of the overall weakness of the government's evidence linking Mr. Johnson to the assault, and that prejudice prompted the trial court to attempt to fashion an appropriate remedy to mitigate that prejudice to Mr. Johnson's case.

D. The Prejudice to Mr. Johnson's Rights Was Not Cured by the Trial Court's Corrective Actions.

This court's analysis of the improper argument presented hinges on whether the trial court's remedial measures to strike Detective Koven's testimony was

sufficient to purge the prejudicial impact on Mr. Johnson's case. Once an improper comment has been made, the use of timely limiting and curative instructions can be an important consideration in determining "whether a less blatant error was harmless." *Dorman*, 491 A.2d at 462 (noting that the trial court properly instructed the jury three times). In cases where comments are particularly prejudicial, however, even a curative instruction may not be relied upon to overcome the prejudice. *See, e.g., Turner*, 26 A.3d at 744; *Bailey v. United States*, 447 A.2d 779, 783 (D.C. 1982).

Here, the government alluded to improper evidence within the hearing of the jurors. Notwithstanding the trial court's subsequent steps to strike the improper testimony, there simply was no way to un-ring the bell and ensure that the jurors could properly delineate between evidence of guns that were used by Co-Defendant Patterson and the masked assailants and absence of similarly inculpatory evidence linking Mr. Johnson in the context of a joint trial. Thus, even the curative instruction striking Detective Koven's testimony could not mitigate the prejudicial impact on Mr. Johnson. The government's injection of this improper evidence irreparably tainted Mr. Johnson's case and the trial court erred by denying his timely motion to dismiss his charges in light of the obvious prejudice to his rights.

CONCLUSION

For the foregoing reasons, Mr. Johnson requests that this Court reverse the judgment of the trial court with respect to Count V and remand his case for reassessment of his sentence consistent with that judgment.

SIGNATURE OF COUNSEL

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing:

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This 7th day of July 2025.

/s/ Keith B. Lofland