No. 22-CF-349

DISTRICT OF COLUMBIA
COURT OF APPEALS

GARY PROCTOR,
Appellant,

v.

UNITED STATES,
Appellee.

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

REPLY BRIEF OF APPELLANT GARY PROCTOR

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INTRODUCTION

Gary Proctor is serving a life sentence because of a trial that included impermissible hearsay statements, flagrant burden shifting, and repeated references to his prior incarceration. The government fails to explain away these errors.

First, the trial court admitted hearsay statements that Mr. Proctor allegedly asked Jerome Diggs not to testify in the CPO proceeding, which supposedly showed motive. The government's defense of this ruling mistakenly conflates separate questions (whether Mr. Proctor supposedly sought to avoid testimony against his father or against himself) and depends on a fantastical theory: That Mr. Proctor murdered Diggs to avoid criminal changes based on an event, the cookout brawl, that the police had already investigated and let go.

Second, the jury heard repeated testimony and saw multiple photos establishing that Mr. Proctor had previously been incarcerated, apparently for a long time. And third, during its closing argument rebuttal, the prosecution improperly insinuated to the jury that Mr. Proctor had not produced evidence to *outweigh* the government's case. The upshot is that the prosecution was allowed to portray Mr. Proctor as a criminal who needed to prove his own innocence.

These errors could not be rectified by a curative instruction, and their cumulative effect requires reversal. And even setting aside these errors, the evidence was insufficient to support the verdict.

ARGUMENT

I. The errors must be considered cumulatively.

The government argues that the errors in this case caused no prejudice, but it attempts to do so by considering each ground separately. However, "[t]he standard for reversal where more than one error is asserted on appeal is whether the cumulative impact of the errors substantially influenced the jury's verdict." *Smith v. United States*, 26 A.3d 248, 264 (D.C. 2011) (citation omitted). Even "individual errors, not warranting reversal, may when combined so impair the right to a fair trial that reversal is required." *Id.* (cleaned up). Courts will "evaluate the significance of the alleged errors and their combined effect against the strength of the prosecution's case." *Id.*

In this instance, the cumulative errors consisted of the admission of Diane Offutt's hearsay statements, improper showing of prison photos, and improper burden of proof statements made during closing argument. These errors, individually and when considered together, significantly damaged Mr. Proctor's presumption of innocence until proven guilty. The hearsay statements allowed the jury to hear testimony alleging that Mr. Proctor made a declarant unavailable at trial, which painted Mr. Proctor as a violent criminal. *See* Appendix ("App.") 625, App. 896. The hearsay statements, in connection with the photos of Mr. Proctor in prison, likely supported any conceivable notion that he was capable of committing, or had

committed, crimes amounting to a lengthy stay in prison. And the prosecutor's rebuttal statements shifting the burden of proof wrongly undermined the presumption of innocence by implying that Mr. Proctor bore some burden to overcome this evidence. *See* App. 943.

As explained further below, the government's case was insufficient to establish Mr. Proctor's guilt, and the combined effect of the errors substantially influenced the jury, which ultimately led to his conviction. Thus, reversal of Mr. Proctor's convictions is required. *See Smith*, 26 A.3d at 264.

II. The trial court abused its discretion by admitting Diane Offutt's hearsay testimony under *Devonshire*.

Because both the trial court and the government have jumbled together different aspects of this issue, the facts warrant a brief recap. Mr. Proctor's father, Gary Offutt Sr., initiated Civil Protection Order (CPO) proceedings against Diane Offutt on July 20, 2015. The CPO proceedings were based on a series of threatening text messages and phone calls that Diane Offutt sent Gary Offutt Sr. after the July 11 fight at the cookout, which allegedly involved Gary Offutt Sr., the decedent Diggs (Diane Offutt's brother), Anthony Offutt, Ronell Offutt (Diane Offutt's son), and (according to some accounts) Mr. Proctor.

The trial court allowed the government to admit two statements by Diane Offutt alleging that the decedent had told her that Mr. Proctor had asked him not to testify in the CPO proceedings against Diane and offered him money not to do so.

See App. 625. In allowing this testimony, the court held that *Devonshire v. United States*, 691 A.2d 165 (D.C. 1997) can apply to CPO proceedings, concluding that such proceedings are "quasi criminal" because they "have to be premised on facts that would be sufficient to show a criminal act had taken place, which then would give rise frankly to the possibility of future criminal proceedings." App. 69–70. And the court asserted that the CPO proceeding at issue "would give rise . . . to the possibility of future criminal proceedings" because it was premised on an "assault" that appeared to be "eligible for some sort of felony assault charge"—the July 11 fight. App. 70. In fact, the CPO proceeding was premised on the harassing series of text messages and phone calls from Diane Offutt.

A. The government's criminal-exposure theory is unsupported.

The government says the court appropriately inferred that Proctor murdered Diggs "to prevent damaging testimony against both him and his father" in the CPO proceeding, since Diggs would have testified about the cookout fight. Government's Brief ("Gov't Br.") 23–24. But neither Mr. Proctor nor his father was a respondent in the CPO proceeding—Mr. Proctor's father was the petitioner, and Mr. Proctor was not a party at all. So neither Mr. Proctor nor his father faced any liability or jeopardy in that proceeding. And the CPO proceeding was not about the cookout fight, but about Diane Offutt's threatening conduct thereafter. Testimony about the cookout would not have been relevant to whether Mr. Proctor's father was entitled

to a CPO against Ms. Offutt based on her later conduct. The government is thus forced to offer a two-step theory: It says Mr. Proctor was motivated by "Proctor and his father's exposure to criminal liability" in some future prosecution because Diggs's testimony would have "threatened to implicate Proctor and his father" in a criminal assault at the cookout. *Id.* at 25.

This theory is too attenuated and unsupported. *Devonshire*'s forfeiture doctrine applies only to a "potential witness," meaning someone "expected to give damaging testimony in some future proceeding." *Crutchfield v. United States*, 779 A.2d 307, 332 (D.C. 2001) (cleaned up). That is, forfeiture applies only "as long as it is reasonably foreseeable that the investigation [of the defendant] will culminate in the bringing of charges" and the witness will play some role in that process. *United States v. Houlihan*, 92 F.3d 1271, 1280 (1st Cir. 1996). Likewise, the doctrine requires that the defendant have "procure[d] a witness's unavailability for trial with the purpose of preventing the witness from testifying." *Devonshire*, 691 A.2d at 168. Neither requirement is met here, for largely the same reason: Mr. Proctor and his father faced no material risk of future criminal prosecution based on anything Diggs might have said in the CPO proceedings.

The government's contrary argument assumes that Diggs's testimony might have revealed new information or allegations about Mr. Proctor's or his father's conduct that exposed them to criminal charges. *See* Gov't Br. 25. But the police

were called to the scene of the July 11 fight. They investigated, and thus would have learned what Diggs (and all the other witnesses) said about what happened. Yet they made no arrests. *See* App. 56 n.4, App. 74, App. 635–36. Indeed, the government submitted no evidence of any investigation, arrests, or pending charges.

Against this backdrop, the trial court had no basis to conclude that Diggs was a "potential witness" against Mr. Proctor or his father simply because he might have repeated, in a civil proceeding against a different party based on later events, what he already would have told law enforcement about the cookout fight. This absence of any material exposure distinguishes this Court's forfeiture-by-wrongdoing cases, which all involve some evidence that (i) the decedent was or would be an actual witness and (ii) the defendant knew it. *See, e.g.*, *Devonshire*, 691 A.2d at 167 (one of the assailants learned that the witness was "cooperating with the police"); *Ward v. United States*, 55 A.3d 840, 847–48 (D.C. 2012) (the decedent told others that she saw the defendant shoot the victim and was followed by the defendant to the police station); *Jenkins v. United States*, 80 A.3d 978, 986 (D.C. 2013) (the declarant testified at a grand jury which resulted in the defendant's indictment). Likewise, the lack of any real criminal exposure renders implausible the court's inference that Mr. Proctor *murdered* Diggs just to prevent him from repeating his account in a civil proceeding between two third parties. *See State v. Maestas*, 412 P.3d 79, 90 (N.M.

2018) ("'[I]indirect and attenuated' consequences will not satisfy the [procurement] condition for purposes of forfeiture.") (citation omitted).

The government tries to bolster this attenuated theory with "circumstantial evidence." *See* Gov't Br. 23. But none of these facts—related to the timing of the fight, the CPO proceeding, and Diggs's death—show that Mr. Proctor faced any "potential negative consequences" from Diggs's testimony. *Contra id.* at 24. The government also assumes that Mr. Proctor actually knew that Diggs previously arrived at court to testify in a separate family dispute, even though the decedent ultimately left the without testifying. *See* Gov't Br. 23, App. 38–39.

Taking all of this into account, Diane Offutt's hearsay statements themselves do not support the trial court's ruling. The issue is not whether the court could *consider* these statements, *contra* Gov't Br. 24, but whether they satisfy *Devonshire*'s requirements standing alone. They do not. *See Jenkins*, 80 A.3d at 996, 997 n.49 (distinguishing "consider[ing] the substance of proffered hearsay together with independent evidence" from "'pure' bootstrapping in which the testimony of the missing witness is the *only* evidence supporting forfeiture") (emphasis in original). And even taken at face value, they do nothing to alter the analysis just explained: That Mr. Proctor supposedly wanted Diggs not to testify does not show either that Diggs could offer "damaging testimony" exposing anyone

to new criminal lability, *see Crutchfield*, 779 A.2d at 332, or that Mr. Proctor would have sought to prevent such testimony.

Finally, the government's theory that Mr. Proctor sought to protect his father fails for another reason: Gary Offutt Sr. was the Petitioner who *initiated* the CPO proceeding. Thus, if he feared any damaging testimony (against himself or Mr. Proctor), he could simply have dismissed the proceeding voluntarily, negating any risk. That he did not do so underscores that Diggs was not a potential witness expected to offer damaging testimony.

B. The government fails to explain away the trial court's factual confusion.

The trial court's error is underscored by its factual misunderstanding. The court mistakenly believed the CPO proceeding was premised on an "assault" instead of threatening text messages. App. 70. On that basis, it apparently believed that testimony in the CPO proceeding would bear directly on a potentially criminal matter. That was incorrect. *See* Gov't Br. 17.

In response, the government quotes the court's analysis stripped of its context and transformed, arguing that the court "understood" that the decedent's *testimony*, not the CPO proceeding itself, pertained to "an assault . . . eligible for some sort of felony . . . charge." Gov't Br. 25 (citation omitted). The court's actual conclusion, however, was that *CPO hearings* "have to be premised on facts that would be sufficient to show a criminal act had taken place," and that the premise *of the CPO*

"would give rise . . . to the possibility of future criminal proceedings." App. 70. In other words, the court admitted the hearsay statements based on its erroneous understanding of the government's proffer and the nature *of the proceeding* in which the decedent was purportedly going to testify.

The government argues that the court clearly understood these facts before reaching its determination. First, the court's determination about whether *Devonshire* applied was made by the court *before* any attempt to clarify the factual landscape during the subsequent hearing. *See* App. 72–73 (court reiterating its prior determination that *Devonshire* applies). Moreover, the only evidence the government provides that the court "clear[ly]" understood the same facts it had previously confused was that the prosecution repeated its proffer and the court responded to clarify the date the statements at issue were made. *See* Gov't Br. 26–27. But the prosecution had also explained its proffer during the earlier proceeding when the court misapprehended the facts at issue. The court's only response to this repeated proffer had nothing to do with the facts it confused.

The court's misunderstanding colored its entire *Devonshire* analysis and its ultimate determination that the scant evidence proffered by the government was sufficient to establish each of the *Devonshire* elements by a preponderance of the evidence.

C. The hearsay statements were prejudicial.

In determining whether an error was prejudicial, this Court considers whether it can be said "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." *McRoy v. United States*, 106 A.3d 1051, 1059 (D.C. 2015) (citation omitted). That is not the case here.

The admitted statement created the illusion of a motive for the killing where none existed. This supposed motive was so significant that it was one of the first things the prosecutors invoked in their closing before the jury. App. 888. Lacking direct physical evidence, the government introduced and relied on motive as a means to identify Mr. Proctor as the decedent's murderer on three different instances, which irreparably tainted the verdict. *Cf. Harrison v. United States*, 30 A.3d 169, 178 n.22 (D.C. 2011) ("[W]hile evidence of motive may be important for a variety of reasons, a court should take care that 'motive' does not become a back door to admit highly prejudicial evidence of little legitimate probative value.") (citation omitted). The government responds that its "identification evidence was overwhelming," Gov't Br. 29, but as explained below, that is not so—especially given the court's other errors.

III. The government's mischaracterization of its burden and the admission of Mr. Proctor's prison photos was improper and prejudicial.

Mr. Proctor's due-process rights were fatally undermined by the combination of (i) the repeated references to his prior incarceration, (ii) photos of him in prison garb, and (iii) the government's rebuttal argument that the burden of proof was like a seesaw. Because these errors affected his constitutional rights, they are subject to the constitutional harmless error analysis. Br. 24.[1]

Both Kevin Diggs and Christal Johnson testified that they met Mr. Proctor "shortly after he got released from prison." *See* App. 797, App. 130. Defense counsel's decision to decline the opportunity for curative instruction was a necessary strategic decision to minimize the damage that had already occurred. App. 342 ("[T]here is absolutely no curative instruction that can be given that could, in any way, minimize or mitigate the immense prejudice that Mr. Proctor has suffered as a consequence of the jury hearing this information.").

Further damage occurred when the government published photos to the jury showing Mr. Proctor in his prison uniform while posing with other inmates. App. 657–60 (references to Gov't Exs. 205, 206). The government responds that "the trial

[1] The government says the plain-error standard applies to part of this argument, but the case it cites applies "[w]hen an appellant argues for a mistrial *after having failed to seek one in the trial court*." Gov't Br. 41–42 (quoting *McGriff v. United States*, 705 A.2d 282, 288–89 (D.C. 1997)) (emphasis added). Mr. Proctor did seek a mistrial, repeatedly. *See* Br. 10. He also preserved his objection to the prison photos. *See id.*

court found" that "on their face there was no indicia that the photographs depicted people in prison." Gov't Br. 42. That mischaracterizes the record. In the cited passage, the court simply stated that it was not inferring the prosecutor's malintent in showing the photos. App. 666–67. The court acknowledged that the photos showed Mr. Proctor in a prison uniform, but declined to find prejudice because the publication of the photos were "put up briefly and taken down," after Mr. Proctor's counsel requested that they be removed. App. 667, App. 658.[2]

In short, the jury was told on four separate occasions—in words and photos—that Mr. Proctor had previously been incarcerated. "Because of the risk that jurors will make an inference of criminal propensity from prior criminal activity, evidence of a prior conviction is presumptively prejudicial and contrary to the presumption of innocence." *Lucas v. United States*, 102 A.3d 270, 276 (D.C. 2014). A curative instruction could not have rectified the resulting harm. "[I]n the face of seriously prejudicial evidence, curative instructions, particularly those buried within the charge-in-chief at the end of trial, are of minimal worth." *Williams v. United States*, 382 A.2d 1, 7 (D.C. 1978); *see also, e.g.*, *Bishop v. United States*, 983 A.2d 1029, 1041 (D.C. 2009) (despite curative instruction, the admission of mugshot was "not harmless beyond a reasonable doubt"). And while the government disputes (Gov't

[2] The government displayed photo Exhibit 206 shortly after Mr. Proctor's counsel requested that photo Exhibit 205 be taken down. App. 660.

Br. at 41) that these repeated references indicated anything about the *duration* of his imprisonment, it does not deny either that Mr. Proctor looks visibly younger in the prison photos or that a family member like Kevin Diggs would surely have met Mr. Proctor sooner had he not been imprisoned for a long time. *See* Br. 25. This evidence was highly prejudicial.[3]

The government then used its last words in closing to suggest that Mr. Proctor had the burden to produce evidence of his innocence. App. 942–43. This misconduct was acknowledged by the court after Mr. Proctor's objection. App. 955–56. These prejudicial remarks could not be remedied by standard instruction on the burden of proof, particularly given that Mr. Proctor's counsel did not have the opportunity to respond to the remarks, and the standard instructions were not delivered at the time the government improperly placed the burden on Mr. Proctor.

IV. The evidence was insufficient to prove guilt beyond a reasonable doubt.

Contrary to the prosecution's claims, the evidence introduced at trial was insufficient to establish Mr. Proctor as the responsible party. The purported identification of Mr. Proctor was derived from the decedent's unreliable and inconsistent dying declarations, made under circumstances where he was experiencing significant blood loss and under the influence of alcohol and other

[3] Even if the inclusion of the prejudicial photos should be evaluated under plain error, the cumulative effect of the errors in this case warrants reversal.

drugs. Moreover, the circumstantial physical evidence introduced by the prosecution is inconclusive and required the jury to cross the bounds of permissible inference and enter the forbidden territory of conjecture and speculation. *See In re D.R.*, 96 A.3d 45, 51 (D.C. 2014).

The government's key evidence identifying Mr. Proctor was the decedent's statements to his sister and neighbor allegedly identifying his shooter. The decedent's physical condition at the time of the declarations—having suffered multiple gunshot wounds that injured his vital organs, significant blood loss, and the influence of alcohol and other drugs—casts serious doubt on his cognitive abilities to accurately recount the identity of his assailant.

Moreover, the decedent offered inconsistent declarations. The police officer present on the scene heard the decedent identify, "Little Man," (the name of his pet chihuahua), not "Little Gary." App. 247. Given these deficiencies, the decedent's statements were insufficient to prove the identity of the shooter.

The government also says that it introduced "substantial evidence corroborating" Mr. Proctor's identity as the shooter. Gov't Br. at 49. But the evidence was far from sufficient to show proof beyond a reasonable doubt. The prosecution's claim that ballistics evidence linked Mr. Proctor to ammunition, a gun, and a magazine consistent with those used in the shooting is overstated: The most charitable interpretation of the government's evidence is that it merely established

Mr. Proctor's possession of a common, commercially available firearm and ammunition. Importantly, nothing establishes that the gun Mr. Proctor allegedly possessed was actually the same as that used in the shooting—it was one of multiple possible types.

The prosecution also insists that an eyewitness, Darnell Gibson, placed Mr. Proctor near the scene of the murder at the time of the murder. Gov't Br. 9. Yet the government itself called Mr. Gibson a noncredible witness while speaking to the jury because of Mr. Gibson's inconsistent statements. App. 950. Indeed, Mr. Gibson never testified about his purported identification of Mr. Proctor. The testimony came from a different witness, Lynette Gibson, who was a habitual drug user who "regularly hung out and used drugs with Diggs and Johnson." Gov't Br. 9. Similarly, the government's argument that cell site data—which cannot determine location with precision—placed Mr. Proctor near the scene of the murder is wholly insufficient as Mr. Proctor lives across the street from the decedent.

Although the government attempts to stitch together a patchwork of evidence to link Mr. Proctor to the shooting, the results are insufficient to prove beyond a reasonable doubt that Mr. Proctor perpetrated the killing in this case.

CONCLUSION

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

Dated: August 22, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of August 2024, a copy of the foregoing Brief was served electronically on the counsel below via the Court's E-Filing system.

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