24-CF-0758

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRYANT PHILLIPS
Appellant

v.

UNITED STATES
Appellee

ON APPEAL FROM THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

Case No. 2022-CF1-004306

REPLY BRIEF OF APPELLANT

Sean R. Day
D.C. Bar No. 452420
6411 Ivy Ln Ste 304
Greenbelt MD 20770-1405
301.220.2270
Sean@DayInCourt.Net
Attorney for Appellant

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ARGUMENT

I. The trial court abused its discretion in allowing evidence of Mr. Phillips's prior murder conviction.

On the admission of A.H.'s testimony that Mr. Phillips told her he was convicted of murder, the government argues that the invited error doctrine should apply; or alternatively that plain error review applies.

The invited error doctrine applies where a party or attorney effectively lures the trial court into an error so they may try to get a reversal if they lose; it is about gaming the system. *See, e.g., Brown v. United States*, 864 A.2d 996, 1001-02 (D.C. 2005). That did not happen here.

The government's motion in limine regarding A.H.'s testimony was part of a group of motions filed the same day (08/18/23):

— *Government's Motion in Limine to Introduce Out-of-Court Statements Pursuant to Clark* [statements A.H. made to others that Mr. Phillips told her about his murder conviction] (R. 158)

— *Government's Motion in Limine to Exclude Evidence of Complainant's Past Sexual Behavior* (R. 165)

— *Government's Motion to Introduce Evidence of Defendant's Other Crimes and Bad Acts Pursuant to Johnson* [drug purchases and use during the course of events charged] (R. 170)

— *Government's Motion in Limine Seeking Admission of Portions of Complainant's Statements* [statement of identification; report of rape; statements for medical treatment] (R. 178)

Defense counsel filed an omnibus response. (R. 240) Regarding the issue here, trial counsel agreed that A.H. could testify she did not leave because she was afraid: "There is no question that the prosecutor can ask the complainant on the witness stand why she chose not to seek help. If the truthful answer is 'because I was too afraid,' obviously that is competent testimony." (R. 249) Defense counsel did not state that A.H. could testify that the *reason* for her fear was that Mr. Phillips told her he was a convicted murderer. Obviously, though, as the trial court ruled over objection that a third party could testify that A.H. told them that she was afraid because Mr. Phillips told her he was a convicted murderer, one can infer that the trial court was allowing A.H. to testify directly as well. It would surely be odd if the court had ruled that a third party could testify that A.H. told them that Mr. Phillips told her he was a convicted murdered, but that A.H. could not testify directly about it. At the very least one can say, regarding A.H. testifying about Mr. Phillips's alleged statement to her, any objection would have been futile.

Defense counsel thought none of it was relevant and that it was highly prejudicial. Mr. Phillips's attorney wrote:

> It also seems a bit disingenuous to argue that her

> knowledge of the defendant's criminal record made her too afraid to ask anyone for help in a well-lit supermarket with dozens of people inside, when it hadn't stopped her from having sexual relations with him over the course of a year, and it hadn't kept her from voluntarily going to his apartment on June 5. ... It certainly seems to have been an evanescent fear, invoked only when it served the complainant's purposes.
>
> Finally, the defendant must express some astonishment at the prosecution's argument that repeatedly informing the jury about the defendant's murder conviction would not be unfairly prejudicial to him because he is not charged with murder in this case. He finds it difficult to understand how that argument can be made with a straight face.

(Opp p. 10 at R. 249.) This is not the writing of an attorney inviting the trial court to let it all in to game the system.

The government is correct that when the trial court was reciting the filings and announcing its rulings, the court said, in the middle of that narrative, "the defense concedes that A.H. can testify that the reason she did not go sooner to law enforcement is that she was afraid of Mr. Phillips and that one reason she was afraid was because of his prior murder conviction." (03/15/23 at 5) As the government summarized afterward, "A.H. can testify herself she was fearful, and then one additional person can say she told us that she was fearful because of? Just making sure." (7) There was no point for defense counsel to object to A.H.'s direct testimony if the court was allowing the secondary hearsay

testimony; any such objection would have been overruled.

Regarding plain error review, the purpose of the plain error rule is not to be punitive, but to ensure that issues before this court were fairly presented and considered by the trial court, as they were here. *Bayer v. United States*, 651 A.2d 308, 311 n.1 (D.C. 1994). Additionally, parties are excused from objecting where it would be futile to do so. *Muir v. District of Columbia*, 129 A.3d 265, 273-74 (D.C. 2016). Normally, the futility rule is applied where the law was clearly against the appellant at the time of trial and so it would have been pointless and wasteful of judicial resources to object, but then there is a change in the law during the appeal. But the rationale applies equally to the unusual situation here, where the judge overruled an objection for hearsay testimony and would have obviously overruled any objection to the direct testimony.[1]

But even assuming that plain error review applies, the requirements are satisfied. Under plain error review, an appellant must show "(1) error, (2) that is plain, (3) that affected the appellant's substantial rights," and that "(4) the error seriously affects the fairness, integrity, or public

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[1] If, however, the trial court had sustained the objection to the hearsay testimony, the attorney would have needed to object to the direct testimony or be subject to plain error review.

reputation of judicial proceedings." *Miller v. United States*, 209 A.3d 75, 78 (D.C. 2019) (internal brackets and quotation marks omitted) (quoting *Fortune v. United States*, 59 A.3d 949, 954 (D.C. 2013)).

For reasons stated in the opening brief, the error was plain. Little could be more prejudicial than evidence that a defendant is a convicted murderer. The evidence had little relevance for explaining why A.H. was afraid to leave when the same information did not stop her from having an ongoing relationship with Mr. Phillips. Furthermore, it was cumulative. All the violence, threats, and fear to which A.H. testified and which the government recounts in detail in its brief, explained A.H.'s reluctance to flee (*if true*, as noted in the opening brief at 15-16). The jury did not need the additional, highly prejudicial information that Mr. Phillips was, according to A.H., a convicted murderer.

This case is distinguishable from *Sweet v. United States*, 449 A.2d 315, 318 (D.C. 1982), cited by the government, in which kidnappers stated their prior crimes during the kidnapping to instill fear and force compliance. In this case, A.H. testified that Mr. Phillips told her the information in the past, as a sort of disclosure one might make in a relationship, not as part of his alleged imprisonment of A.H. The alleged murder conviction did not

cause A.H. to fear having a relationship with Mr. Phillips, and Mr. Phillips was, according to A.H., imprisoning her, threatening her, assaulting her, and raping her. Adding evidence that Mr. Phillips told A.H. some time before that he was a convicted murderer was not to explain A.H.'s state of mind during the alleged course of events; it was to bias the jury against Mr. Phillips.

The error affected Ms. Phillips's substantial rights as there is a reasonable probability that, without A.H.'s incredibly prejudicial testimony that Mr. Phillips was a convicted murderer, the result would have been different. *Fortune*, 59 A.3d at 954. This highly prejudicial evidence would easily counter doubts a jury would have about A.H.'s allegations, in which Mr. Phillips is alleged to have had an inexplicable, prolonged outburst of malice and violence, where A.H. did not flee and was unable to provide detectives with basic information necessary to conduct a full investigation (*e.g.*, location where she was allegedly held, ATM she said she used, Safeway store she said they visited).

Finally, the error affected the fairness and integrity of the proceedings, as the error was "so clearly prejudicial to substantial rights." *Watts v. United States*, 362 A.2d 706, 709 (D.C. 1976).

II. The trial court abused its discretion in not granting a mistrial after the complainant spontaneously testified that Mr. Phillips was on home detention when they met.

The government argues that A.H.'s spontaneous statement that Mr. Phillips was on home detention when they started dating was only mildly prejudicial. But as Mr. Phillips argued at the time, it corroborated A.H.'s testimony that Mr. Phillips told her he was a convicted murderer. Without the corroboration, the jury could have discredited the claim that Mr. Phillips was a convicted murdered — either because it was something that A.H. made up, or something that Mr. Phillips made up.

The government responds that the jury would not likely have thought Mr. Phillips was on home detention for a murder conviction. (Govt. Br. at 29-30) But if that is what the jury thought, that would just amplify the prejudice — that Mr. Phillips was on home detention for something else, which means (in the jury's mind) he probably was a convicted murderer first then some newer case caused the home detention, and so clearly he must have done all the things A.H. said he did.

This condemning evidence could not be erased from the jury's mind with an instruction.

III. The trial court committed plain error in failing to give a final limiting instruction regarding the complaining witness's testimony that Mr. Phillips was convicted of murder.

In *Maura v. United States*, 555 A.2d 1015, 1017 (D.C. 1989), the court declined to extend the rule in *Cobb v. United States*, 252 A.2d 516 (D.C. 1969) — that the court must give limiting instructions regarding the prior-convictions impeachment of a testifying defendant — to the same evidence coming in to impeach a character witness. The distinction drawn in *Maura* was that a defendant's guilt or innocence is less central during a character witness's testimony than during a defendant's testimony. Whether a defendant's criminal convictions go to the jury with one witness versus another is a somewhat puzzling distinction that should not be expanded further.

The government suggests that it might have been a strategic decision not to request a final limiting instruction before deliberations. There is no way to know on this record. But *Cobb* set requirements for the trial court, and it is not the trial court's purview to make strategic decisions for the defendant. The trial court should have raised the issue at which time the defense could have made a strategic decision.

IV. The trial court committed plain error by failing to conduct an inquiry regarding the Information as to Previous Convictions pursuant to D.C. Code § 23-111. [From Supplemental Brief]

A. Where a defendant does not get the mandatory § 23-111 hearing, the only issue on appeal is whether the error is harmless.

As to the lack of a § 23-111 inquiry and hearing to determine whether Mr. Phillips could receive an enhanced sentence, the government attempts to split the issue in two: (1) whether Mr. Phillips received such a hearing, at which time the only issue would be whether the convictions exist; and (2) whether the trial court erred in deciding that the federal murder-for-hire conviction was a "crime of violence" under the enhancement statute. (Govt. Br. at 34-38) They do this possibly so they can argue that whether the murder-for-hire conviction qualifies as a "crime of violence" — not simply whether Mr. Phillips received the mandatory hearing — is reviewable only for plain error.

This is a conveniently advantageous position that leaves a defendant in a no-win situation. The government argues that a hearing under D.C. Code § 23-111 is not the appropriate time for the defendant to challenge whether the stated convictions qualify as crimes of violence, because a § 23-111 inquiry "asks only whether the defendant was, in fact, convicted of

the offenses listed in the government's information … [and] also permits a defendant to raise a 'claim[ ] that any conviction alleged is invalid.'" (Govt. Br. at 38) According to the government, the "claim that he was not eligible for an enhanced sentence under D.C. Code § 22-1804a(a)(2) because one of his prior convictions was not a 'crime of violence' does not implicate the inquiry procedure in D.C. Code § 23-111(b)." (*Id.*)

If a 23-111 hearing is not the appropriate time to make such a challenge, when would be the appropriate time? On appeal is the next opportunity, it would seem (the § 23-111 hearing occurs "after conviction but before pronouncement of sentence"). So, according to the government, a defendant is subject to plain error review for failing to make an objection for which there was never an appropriate time to make it.

In its analysis, the government points to *Dorsey v. United States*, 154 A.3d 106 (D.C. 2017), in which a defendant was subjected to plain error review for failing to challenge whether a conviction triggered the enhancement. The difference is that Mr. Dorsey received the mandatory inquiry; Mr. Phillips did not. *Dorsey* ultimately contradicts the government's position about what the 23-111 hearing covers. In *Dorsey*, this

court thought the § 23-111 inquiry was the appropriate time to make the objection, as it subjected Dorsey to plain error review for not objecting during the inquiry. *Id.* at 122 n.19 (defense counsel told the trial court he accepted the government's representations).

Undersigned counsel analyzes it correctly. Mr. Phillips did not receive the mandatory § 23-111 inquiry ("the court shall"), and the matter gets remanded unless the error was harmless.

B. The error was not harmless.

The government goes through a byzantine analysis to try to establish that Mr. Phillips's prior conviction for murder-for-hire qualifies as a crime of violence for the purposes of D.C. Code § 22-1804a(a)(2) (adopting the definition of "crime of violence" in § 23-1331(4) via § 22-4501(1B)).

The government argues that Mr. Phillips "pleaded guilty to an information charging him with a murder-for-hire scheme 'resulting in the deaths' of two victims." (Govt. Br. at 41) While we may know what Mr. Phillips was charged with, without the plea transcript or some other proof we do not know the specifics of his plea agreement. Regardless, that type

of analysis the Supreme Court has rejected for the federal enhancement statute, as it would require "reconstruct[ing], long after the original conviction, the conduct underlying that conviction." *United States v. Davis*, 588 U.S. 445, 454, 139 S. Ct. 2319, 2327 (2019). The question of whether a crime qualifies under § 22-1804a(a)(2) should be ministerially answered: Is the crime listed or not? *Colter v. United States*, 37 A.3d 282, 284 (D.C. 2012). Murder-for-hire is not listed and therefore does not quality.

The government goes on to argue that the 2013 docket entry shows a sentence that could only have occurred if there had been a "personal injury," and claims that this is not a case-specific inquiry, it is just determining what crime Mr. Phillips pleaded guilty to. (Govt. Br. at 41-42) This too requires a case-specific inquiry. The court may only review case documents to determine "the fact of a prior conviction and the then-existing elements of that offense," not "what the defendant actually did." *Erlinger v. United States*, 602 U.S. 821, 839-40, 144 S. Ct. 1840, 1854-55 (2024). "No more is allowed." *Id.* The government suggests that Mr. Phillips's sentence in the federal case is just a limited peek at the record that is allowed to determine the elements of the offense. A sentence, however, is not an element of the offense; nor does it necessarily reveal

the elements, as there might be some separate enhancement that was triggered to allow a sentence higher than the lower-level maximum. Furthermore, even if the sentence for Mr. Phillips reveals a personal injury, many crimes involve personal injury but do not qualify as defined "crimes of violence."

The government further argues that Mr. Phillips's conviction for murder-for-hire triggers the provision that covers *conspiracy* or *solicitation* of a listed crime (conceding that murder-for-hire might not involve *attempt*), arguing that murder-for-hire necessarily involves conspiracy or solicitation to murder. It is wrong on both parts.

Regarding conspiracy, conspiracy requires (1) "an agreement between two or more persons to commit a criminal offense"; (2) knowing participation"; (3) "intent to commit the criminal objective"; and (4) an overt act by a co-conspirator in furtherance of the conspiracy. *Bailey v. United States*, 257 A.3d 486, 493 (D.C. 2021) (internal quotation marks omitted). Murder-for-hire, however, can be committed with just one person, as in *United States v. Ransbottom*, 914 F.2d 743, 746 (6th Cir.), *cert. denied*, 498 U.S. 971, 111 S. Ct. 439 (1990). Ms. Ransbottom asked a man to quote her a fee to kill her husband. The man then alerted law

enforcement. Ms. Ransbottom traveled to another state to obtain photos of the place where her husband was living. The court held that the statute could be violated by a sole perpetrator, reasoning that it was "not solely an anti-conspiracy statute." *Id.* at 746.

Regarding solicitation, murder-for-hire is committed when one "travels in interstate or foreign commerce, or uses or causes another to use the mail … or any facility of interstate or foreign commerce, with intent that murder be committed … as consideration for a promise or agreement to pay, anything of pecuniary value." The word "solicit" does not appear, and a conviction for murder-for-hire may fall short of solicitation. As explained by the Eighth Circuit, the statute only requires use of interstate commerce plus intent, not solicitation:

> To be convicted of violating 18 U.S.C. § 1958(a) an individual need only travel or use a facility of interstate commerce, or cause another to do so, intending a murder be committed for hire. Although an offer of something of value in exchange for the commission of murder will be made at some point, 18 U.S.C. § 1958(a) does not require that the offer have been made or accepted before the statute is violated.

United States v. Smith, 755 F.3d 645, 647 (8th Cir. 2014). That is, one may commit murder-for-hire before a solicitation occurs. For instance, if one travels from the District to Maryland with the hope and intent of finding

someone in Maryland to kill a target, they have already committed murder-for-hire. Finding someone, much less soliciting them, is not required under the literal text of the federal statute.

Murder-for-hire is not a listed "crime of violence" nor it is necessarily conspiracy or solicitation to murder. Therefore, it does not permit the enhanced sentence.

Respectfully submitted,
/s/ Sean R Day
Sean R. Day (D.C. Bar No. 452420)
6411 Ivy Ln Ste 304
Greenbelt MD 20770-1405
301.220.2270
Sean@DayInCourt.Net
Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that a copy of this **Reply Brief** has been served electronically, by the Appellate E-Filing System, upon:

Chrisellen R. Kolb, Esquire, Chief of the Appellate Division, Office of the United States Attorney USADC.DCCAFilings@usdoj.gov

and

Timothy R. Cahill, Assistant United States Attorney
Timothy.Cahill@usdoj.gov

this **14th** day of **October 2025.**

/s/ Sean R Day
Sean R. Day