BRIEF FOR APPELLEE

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 22-CF-349

GARY N. PROCTOR, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

APPEAL FROM THE SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

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Cr. No. 2015-CF1-10128

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ISSUES PRESENTED

I. Whether the trial court abused its discretion when it admitted statements made by decedent Jerome Diggs to his sister under the forfeiture-by-wrongdoing hearsay exception, where the government's unchallenged proffer established that (1) Diggs was both the victim of an assault and the witness to an assault of another person committed by a group of men including appellant Proctor and his father; (2) Diggs's sister sent angry text messages to Proctor's father after that incident; (3) Proctor's father initiated Civil Protection Order (CPO) proceedings against Diggs's sister in response to those texts; (4) a hearing was scheduled for the CPO proceedings for August 3, 2015; (4) Proctor asked Diggs not to appear at that hearing; and (5) Proctor killed Diggs one week before the August 3 hearing at least in part to prevent his testimony at that hearing; and whether any error in admitting such statements was harmless given the strength of the government's evidence, which included multiple other motives for Diggs's murder.

II. Whether the trial court abused its discretion when it denied Proctor's requests for mistrial following (A) the inadvertent elicitation of brief statements by two witnesses that they met Proctor when he returned from a period of incarceration, where the witness testimony did not specify the reason for Proctor's incarceration, the jury was properly presented with a stipulation that Proctor had been convicted of a crime punishable by at least one year of imprisonment and instructed about the

only proper use they could make of it, and Proctor denied the trial court's offer for a curative instruction; or (B) statements by the government in rebuttal that allegedly invited the jury to place a burden on Proctor to present evidence of his innocence, where the statements were brief and isolated and did not reflect the primary thrust of the government's rebuttal argument, the jury was repeatedly instructed before rebuttal argument that the government bore the burden of proof and Proctor had no obligation to present any evidence, the jury was given a curative instruction immediately after rebuttal argument rearticulating these legal principles, and the government's evidence of guilt was strong.

III. Whether the evidence was sufficient to establish Proctor's identity as Diggs's murderer, where the government introduced Diggs's dying declarations to two separate witnesses identifying Proctor as his killer along with multiple other pieces of circumstantial evidence corroborating these identifications.

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COUNTERSTATEMENT OF THE CASE

On July 27, 2015, Jerome ("Beanie") Diggs was shot seven times in his home. As he bled, he called his sister to make sure she knew the identity of the man who shot him—their cousin, appellant Gary Proctor. He then crawled out of his home into his backyard, where he lay dying on his friend and neighbor's lap. When asked who had done this to him, Diggs again identified Proctor as his murderer. Diggs then died from his gunshot wounds.

Following a trial before the Honorable Danya A. Dayson, a jury convicted Proctor of first-degree premeditated murder while armed, possession of a firearm

during a crime of violence (PFCV), unlawful possession of a firearm (FIP), and carrying a pistol without a license (CPWL) (Record on Appeal ("R") 81). Judge Dayson denied Proctor's subsequent request for a new trial pursuant to Rule 33 (see R. 84, 85, 93, 94). On April 29, 2022, Judge Dayson sentenced Proctor to an aggregate sentence of life imprisonment without the possibility of release (R. 100).[1] Proctor timely noted an appeal (R. 101).

The Trial

The Government's Evidence

In July 2015, Jerome Diggs lived at 1360 First Street, SW, with his three daughters and their mother, Christal Johnson (7/22/19 Transcript (Tr.) 76, 78, 107; 7/24/19 Tr. 85-87; 7/29/19 Tr. 11). Diggs and Johnson were habitual drug users,[2] whose relationship was volatile and often resulted in physical alterations (7/22/19 Tr. 108-09, 110-11; 7/24/19 Tr. 164; 7/29/19 Tr. 14-15, 108). During this time, Johnson also stayed with her mother or friends (see 7/22/19 Tr. 107; 7/29/19 Tr. 12, 40, 127).

[1] Proctor was sentenced to life without release for the first-degree premeditated murder count, and concurrent sentences of 72 months' incarceration for PFCV, 36 months' incarceration for UF, and 24 months' incarceration for CPWL (R. 100).

[2] Diggs would use marijuana and crack cocaine (7/22/19 Tr. 110), while Johnson used marijuana and heroin (7/29/19 Tr. 25-26, 40).

Both Diggs and Johnson would buy drugs from Diggs's second cousin, appellant "Little Gary" Proctor,[3] who lived with his mother in a two-bedroom house across the street from Diggs (7/24/19 Tr. 89, 162; 7/25/19 Tr. 76-78, 84, 160; 7/29/19 Tr. 16, 25-26). Sometimes Proctor would sell drugs on credit, giving the buyer a "tick" to be repaid once they had cash available (7/29/19 Tr. 26-27). Proctor sold drugs to Diggs, Johnson, and others inside and alongside Diggs's house (including in front of Diggs's children) (7/24/19 Tr. 163-64; 7/25/19 Tr. 160-62; 7/29/19 Tr. 26).[4] Shortly before July 11, 2015, however, Diggs argued with Proctor, telling Proctor he could no longer sell drugs out of his house (7/25/19 Tr. 164-65; see also 7/29/19 Tr. 27).

1. The July 11 Cookout and Ensuing Fallout

On July 11, 2015, Anthony Offutt[5] hosted a cookout at his house in Prince George's County, Maryland, that Diggs, Johnson, Proctor, and others attended

[3] Proctor's grandfather's sister was Diggs's grandmother (see 7/24/19 Tr. 87). Proctor was known as "Little Gary" and his father, Gary Offutt, was known as "Big Gary" (*id.* at 87-88; 7/22/19 Tr. 140-41; 7/25/19 Tr. 84, 159; 7/29/19 Tr. 16, 109, 111).

[4] Proctor's mother did not allow anyone to sell drugs from her house and told her son that if she ever learned he was doing so, she would put him out (7/25/19 Tr. 76; 7/29/19 Tr. 25).

[5] For ease of reference, individuals with the last name Offutt may be referred to by their first name.

(7/24/19 Tr. 164, 182; 7/25/19 Tr. 167; 7/29/19 Tr. 32-33). Toward the end of the evening, there was a physical altercation between Diggs's nephew, Ronnell Offutt, and "Big Gary" Offutt, Proctor's father (7/24/19 Tr. 181; 7/29/19 Tr. 32, 114). The altercation culminated in multiple men, including Anthony Offutt, "Little Gary" Proctor, and "Big Gary" Offutt, hitting Ronnell with objects described alternatively as "bats," "canes," "sticks," "pipes," or "poles" (7/25/19 Tr. 169-70; 7/29/19 Tr. 32-38, 114-19). When Diggs tried to speak up on behalf of his nephew, Anthony punched him in the mouth (7/25/19 Tr. 170; 7/29/19 Tr. 37-38).

The next morning, Ronnell called his mother—Diggs's sister, Diane Offutt—from the hospital (7/24/19 Tr. 167). When Diane saw her son later that day, his face was bruised and he had visible knots on the back of his neck and head (*id.*). Based on reports from others, Diane believed that her son had been jumped and beaten with pipes by Big Gary, Little Gary, Jimmy, and Anthony, and Big Gary's girlfriend (*id.* at 168).

Given the attack on her son, Diane was upset, scared, and angry (7/24/19 Tr. 169). She repeatedly texted Big Gary, including threatening to call the police on him for kidnapping a child that had been recently reported missing (*id.* at 171, 188-90).[6] Diane hoped to keep Big Gary from trying to hurt her or her family (*id.* at 170).

[6] Diane did not have personal knowledge that Big Gary had been responsible for the child's disappearance, but only suspected he had been given his interactions with (continued . . .)

On July 23, four days before Diggs's murder, Diane was served with a Civil Protection Order (CPO) taken out by Big Gary based on the text messages (7/24/19 Tr. 172). Diane told Diggs about the CPO and Diggs told her he expected to come to court with her (*id.* at 173). Diggs also told Diane that Little Gary had offered both him and Johnson money to stay away from court, but that Diggs told Little Gary he was "going to stick with his sister" (*id.* at 173-74).

2. Diggs's Fight with Johnson, Mr. Sonny, and Mr. Tim

A day or two before Diggs's murder, Diggs saw Johnson snorting a bag of heroin and knocked it out of her hand (7/29/19 Tr. 40, 51, 59-60). Thinking Mr. Sonny (an elderly widower who lived with Diggs and Johnson after his wife passed) had given Johnson the drugs, Diggs hit Mr. Sonny (*id.* at 30, 40). When Mr. Sonny fell to the ground, Diggs turned to another man present, Mr. Tim, and struck him as well, knocking him to the ground (*id.* at 40). Johnson left and went to stay with her friend Ms. Stephanie (*id.* at 40-41).

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other young girls (7/24/19 Tr. 171-72, 188-90). When police asked her about her text to Big Gary, Diane stated that it was "not true" (*id.* at 194-95).

3. Diggs's Murder

a. Diggs Identifies Proctor as His Murderer to His Sister

On July 27, 2015, while Diane was at work, Diggs called her and immediately told her, "Diane . . . Gary came in here and shot me" (7/24/19 Tr. 90-92). Diggs's voice "sounded like he was hurting . . . [l]ike he was in pain and like he knew he was going to die" (*id.* at 93). After repeating his statement back to him, Diane asked, "[O]ur Gary?" referring to Big Gary Offutt (*id.* at 92, 94). Diggs responded, "[N]o, [L]ittle Gary" (*id.* at 92). Diane asked why Diggs had not called for an ambulance or the police, and he responded that he "just want[ed] somebody to know what happened to him" (*id.*). Diane asked Diggs how many times he had been shot, and he replied, "[A]bout four or five times," before the line went dead (*id.* at 92-93).[7]

Diane immediately called 911 and told the operator, "[M]y brother just called me and told me that my cousin just came into his house and shot him. He's there alone." (Gov't Ex. 305 at 00:21-27.) She explained that she was at work and her brother called "and told me that Little Gary . . . shot him. That's our cousin." (*Id.* at 00:54-1:03). Because she was at work and could not leave immediately, Diane called her brother Kevin Diggs, Sr., while on the phone with 911 (7/24/19 Tr. 94; Gov't

[7] Cellular records from Diggs's cell phone confirmed that his last outgoing call was placed to a contact listed as "Diane" at 4:41:50 p.m. (7/29/19 Tr. 216-18). That call lasted for one minute (*id.*).

Ex. 305 at 1:15-2:56; 7/22/19 Tr. 80). Diane told him to go their mother's house (where Diggs lived) because "Beanie[, her nickname for Diggs,] just called me and say Gary, Little Gary did shot him. He in the house by himself." (Gov't Ex. 305 at 1:41-49; 9/24/19 Tr. 83.) Diane repeated the name Little Gary and explained she had just received a call from Diggs who said to "call the ambulance" and that "Little Gary did shot him like four or five times" (Gov't Ex. 305 at 1:49-2:05, 2:28-35; see also 7/22/19 Tr. 87). Diane told Kevin that Diggs said he "felt like he was dying" and "wanted us to know who did it" (Gov't Ex. 305 at 2:35-45).

Diane returned to her conversation with the 911 operator (Gov't Ex. 305 at 2:50-57). She made sure the operator had Diggs's address, told the operator that "the guy that shot him name is Gary Proctor," and provided a physical description of Proctor (*id*. at 2:57-3:48). When Diane got off work, approximately 45 minutes later, she went immediately to Diggs's house (7/24/19 Tr. 109-10).

b. Diggs Identifies Proctor as His Murderer to Myia Crews

On July 27, 2015, Myia Crews was watching television in her house located three doors down from Diggs's home when she heard multiple gunshots (7/22/19 Tr. 112-14). Crews and her children immediately lay on the floor (*id.* at 114). Crews's father, however, left the house to get a cigarette shortly after the gunshots (*id.* at

116). After five to ten minutes, Crews's father returned and told her that Diggs had been shot and needed help (*id.* at 124, 132).

Crews left her house and saw Diggs laying on his back with half of his body inside and half outside of his back screen-door (7/22/19 Tr. 125). When Crews asked if Diggs had been shot, he said, "yes," and Crews ran to him (*id.* at 124). Diggs, who was in a "bad condition" and "trying to get air," crawled out of his door and laid on his back in his yard (*id.* at 254-48). Crews yelled for Irving Haney, a neighbor and friend of Diggs's son who had come outside after hearing gunshots, to get a towel (*id.* at 126-28, 220-21, 229-30, 241, 250). When Haney could not find a towel inside of Diggs's house quickly, he brought Crews a towel from his own house (*id.* at 251-53, 257-59, 261). Crews put the towel on top of Diggs but could not stop the bleeding because there were "too many holes in his body" (*id.* at 262).

Crews got a pillow from Maurice Spencer, another neighbor who was outside (7/22/19 Tr. 128). Crews laid the pillow on her leg and placed Diggs's head on the pillow, applying pressure to his chest with the towel (*id.* at 130). As Crews talked to Diggs, he kept saying, "I'm not going to make it" (*id.* at 133). Crews called Johnson, who put her cousin Kedewee on the phone (*id.* at 134; 7/29/19 Tr. 41-42).

When Kedewee arrived on the scene, he asked Diggs, "Who did this to you" (7/22/19 Tr. 135). Diggs responded, "Little Gary, Little Gary, Little Gary," saying Proctor's nickname three times in a row (*id.* at 135-36). Although Diggs did not have

the strength to say it loudly, Crews (who had his head on her leg) heard him clearly (*id.* at 137). Kedewee then walked out of the yard (*id.* at 136).

When Metropolitan Police Department (MPD) Officer Brian Taylor responded to the scene, he saw Crews on the ground with a pillow near Diggs, who was clutching his stomach (4/22/19 Tr. 201, 214). Officer Taylor asked Diggs if he knew who shot him (*id.* at 201). Diggs responded in a low voice that Officer Taylor could not understand (*id.* at 203, 205). When Officer Taylor re-asked his question and moved closer, he heard Diggs say something that sounded like, "Little Man" (*id.*).[8] Diggs then lost consciousness and stopped breathing (*id.* at 203).

When paramedics arrived, Crews walked to her mother's yard (7/22/19 Tr. 139). Lynette Gibson, a neighbor who regularly hung out and used drugs with Diggs and Johnson, went to the scene after receiving a call that Diggs had been shot (7/29/19 Tr. 106-08, 129-30).[9] When she arrived, she saw her son, Darnell, standing outside with his friend Jaquan Coates (*id*. at 131). Gibson asked her son if he saw anything, and he told her that after hearing gunshots he saw "Little Gary run out of [Proctor]'s house" and run "across the street" (*id.* at 136-40).[10]

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[8] Diggs had a chihuahua that went by the name "Little Man" (4/22/19 Tr. 267).

[9] Gibson had not used drugs that day (7/29/19 Tr. 144).

[10] At trial, Darnell denied seeing Proctor run out of Diggs's home on the day he was shot (7/29/19 Tr. 93). He also testified, however, that he had memory issues from smoking pot, that he did not have a good recollection of the day Diggs died, and that (continued . . .)

4. Proctor Buys a New Cellphone

The next day, Proctor went into a Boost Mobile phone store on Minnesota Avenue, NE (7/23/19 Tr. 291-92, 297). Proctor was in a hurry and bought a new white cellular phone and received a new phone number (*id.* at 297; 7/24/19 Tr. 27, 34). Later that day, police officers returned to the store with the white phone Proctor had purchased[11] and asked about the transaction (7/24/19 Tr. 32). Officers viewed store video showing Proctor buying the phone (7/23/19 Tr. 294-95; Gov't Ex. 307). The store owner told officers Proctor had left something behind, and officers recovered a black cellular phone that it was determined had belonged to Proctor (7/29/19 Tr. 197-99; 7/30/19 Tr. 39, 41-43).

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he was "from the street" and would not have told his mother "about somebody that was bad if [he] knew that she was going to say something" and similarly would not tell the government about anything he knew because the government was "not going to protect [him]" and he knew "how to mind [his] business and keep his mouth shut" (*id.* at 97-101). Although Darnell testified that he was hanging out at his best friend Coates's house on the day of the murder before he came outside and saw a crowd of people gathered near Diggs (*id.* at 73, 76-79), Coates testified that he was watching television in his bedroom alone that day when he saw police cars and went out on his back porch (*id.* at 176-81).

[11] The police had recovered the phone from Proctor at the time he was arrested (7/30/19 Tr. 44-47).

5. The Investigation

An autopsy concluded that Diggs's cause of death was a homicide resulting from multiple gunshot wounds (7/25/19 Tr. 138).[12] The nature of Diggs's gunshot injuries would not have been immediately fatal and would have permitted him to crawl across the floor, make a phone call, and be able to talk (*id.* at 137-38).

Police recovered eight .40 caliber cartridge cases and two bullets inside Diggs's house within his living room and kitchen (7/23/19 Tr. 94).[13] The cartridge cases were Hornady-brand .40 caliber Smith and Wesson cartridges with nickel-plated brass cylinders and brass primers (*id.* at 98, 134-35).[14] Forensic examination of the casings determined that they had all been fired from the same gun (*id.* at 109, 139-141). Forensic evaluation also showed that one of the bullets from the scene had been fired from the same gun used to shoot the four bullets found in Diggs's body

[12] Forensic examination of the four bullets recovered from Diggs's body determined that they had been fired from the same gun (7/23/19 Tr. 121, 127-28, 132, 135-36, 147).

[13] One of the cartridges was located on the threshold of Diggs's front door, two were in Diggs's front living room area, three were in the laundry area to left of Diggs's back kitchen, and two were on the kitchen floor (7/23/19 Tr. 94, 97-101). Testing of the cartridges did not yield sufficient DNA for comparison (*id.* at 240, 248-49).

[14] Between 2015 and 2017, only two of the seven .40 caliber Smith and Wessin cartridges manufactured by Hornady had nickel-plated brass cartridge cases (7/23/19 Tr. 138-39).

(*id.* at 147).[15] The matching bullets were consistent with having been fired from one of four models of a Smith and Wesson gun (*id.* at 150-51).

Police observed multiple areas within the house with suspected blood and damage consistent with gunfire (7/23/19 Tr. 58, 62-72).[16] They also recovered a pillow, towel, and clothing from the backyard, and an LG cell phone from the kitchen floor (7/23/19 Tr. 78-84; 7/24/19 Tr. 45-46). In the jacket recovered from the backyard, police found a cellular phone without a battery (7/24/19 Tr. 60-62).

The day after Diggs's murder, police executed a search warrant at the two-bedroom house where Proctor lived with his mother (7/24/19 Tr. 197). In Proctor's bedroom police found mail matter addressed to Proctor and a street sign reading, "Little Gary's Avenue" (7/24/19 Tr. 202-04; 7/25/19 Tr. 84-86, 91; Gov't Ex. 202).[17] Police also found a nylon weapons holster and white Velcro brace (7/24/19 Tr. 207).

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[15] The other bullet recovered did not contain sufficient identifying characteristics to permit analysis (7/23/19 Tr. 156-57).

[16] DNA testing of swabs taken of the suspected blood matched Diggs (7/23/19 Tr. 63-66, 69, 255-57). DNA testing of swabs from exterior and interior door handles and knobs generally yielded results not suitable for comparison; however, analysis of the data using a mixture interpretation approach that has since been amended based on "a shift in the DNA community about how mixtures are interpreted" excluded Proctor from the DNA mixture recovered from a swab of the front exterior screen door handle (*id.* at 233-34, 239-40, 253-55, 281-83, 287). Proctor was excluded from the DNA profile obtained from a swab of the interior rear screen door (*id.* at 240-41).

[17] Proctor's mother testified that Proctor's bedroom was never used as a guest room (7/25/19 Tr. 104).

Inside of a coat that was hanging on the bedroom door, police found a gun magazine for a Smith and Wesson Sigma series pistol—one of the four types of pistols capable of having fired the bullets found in Diggs's body and the bullet recovered from Diggs's house—loaded with eight Hornady-brand .40 caliber Smith and Wesson cartridges with nickel-plated brass cylinders and brass primers (*id.* at 208-11; 7/23/19 Tr. 151). The ammunition matched the spent nickel-plated-brass casings recovered from the murder scene (7/23/19 Tr. 159-61).[18] DNA testing on seven of the cartridges and the magazine itself did not yield sufficient data to permit comparison to Proctor (*id.* at 239). Testing on one of the cartridges, however, yielded a single source DNA profile from which Proctor could not be excluded (*id.* at 261). With respect to the frequency of encountering individuals who could not be excluded from the profile obtained, an expert explained that "she would expect to see someone who could not be excluded as a contributor of that profile roughly three or four more times" in a population the size of Washington, D.C. (*id.* at 263-64).

The same day, investigators searched a car registered to and insured in the name of Gary Proctor (7/24/19 Tr. 72-73). Multiple pieces of mail matter addressed to Gary Proctor at his mother's address were found in the car (*id.* at 72-75). Additionally, in the center console there was a small piece of white paper containing

[18] Proctor's mother did not own any guns or ammunition in 2015 (7/25/19 Tr. 93).

a handwritten listing of "multiple different names and numbers" (*id.* at 75). One entry on the list read, "Diggs – 120.00" (*id.* at 76; Gov't Ex. 237). At least one pair of gloves was found in the car (*id.* at 78).

Forensic examination of the cell phone Proctor had turned into the Boost Mobile store when he bought his new phone revealed multiple photographs of guns and magazines (7/29/19 Tr. 206-12). Each of the photographs had been taken with the phone itself; however, the original photographs had been deleted from the phone and therefore the images were available only in a cache of thumbnail images located through forensic processing (*id.*). Four of the photographs depicted a Smith and Wesson Sigma pistol—one of the four Smith and Wesson models determined to have been uniquely capable of making the firing markings found on the bullets recovered from Diggs's body (7/23/19 Tr. 165-72). One of the photographs depicted the Sigma gun loaded with an extended magazine and being held by an individual (whose face was not pictured) wearing a gun holster similar to that found in Proctor's bedroom (*id.* at 166-69). Two other photographs depicted the Sigma gun alongside a magazine matching the one recovered from the jacket hanging in Proctor's bedroom (*id.* at 164, 166, 171).

Proctor's phone also contained a Facebook message in which he referred to himself as "Little Gary from the townhouses," as well as a photograph of him leaning

against the car in which the handwritten listing had been found (7/23/19 Tr. 212-14; Gov't Ex. 502).

Analysis of cell-site data from Proctor's phone revealed that between approximately 3:57 and 4:42 p.m. (immediately before and after Digg's 4:51:50 p.m. call to his sister informing her he had been shot by Little Gary), Proctor's phone utilized cell phone towers whose coverage area included both his and Diggs's homes (7/25/19 Tr. 41-42, 46-48; 7/29/19 Tr. 216-18). Call records and cell-site data showed that at 4:40 p.m., Proctor called his father, Big Gary, and then his phone travelled from the area of the crime scene to the area of Big Gary's house (7/25/19 Tr. 49-50). Shortly thereafter, cell-site records showed Proctor's phone travelling from near Big Gary's house to a location near Minnesota Avenue where the Boost Mobile store was located (*id.* at 52-54). The following morning—the day on which Proctor purchased a new phone and left his at the Boost Mobile store—two calls were made on Proctor's phone from a location near the cell phone store (*id.* at 54).

6. Stipulations and Official Records

The parties stipulated that "[p]rior to July 27, 2015, the defendant, Gary Proctor, had been convicted of a crime punishable by imprisonment for a term

exceeding one year" (7/30/19 Tr. 49).[19] Additionally, the court admitted records showing that, on July 27, 2015, Proctor did not have a license to carry a pistol or a registration certificate for any firearms (*id.* at 50).

The Defense Evidence

Anthony Graham, Esq., a lawyer who represented Proctor in a civil lawsuit arising out of a motor vehicle accident, confirmed that he sent Proctor a check for $8,197 in April 2015, representing Proctor's share of the lawsuit settlement (7/30/19 Tr. 26-28). On cross-examination Graham admitted he did not know how Proctor spent the money or whether Proctor had any outstanding debts at the time (*id.* at 29-30, 33-34).

SUMMARY OF ARGUMENT

The trial court did not err in admitting Digg's statements to his sister recounting Proctor's attempt to get him to refrain from testifying on her behalf at an upcoming CPO hearing under the forfeiture-by-wrongdoing hearsay exception. Any error was harmless given the other strong evidence of Proctor's guilt.

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[19] The jury was immediately given a limiting instruction restricting its use of the stipulation "only for the purpose of proving the last element of the charge of unlawful possession of a firearm" and instructing that it was "not to consider the stipulation for any other purpose" or "speculate or guess as to what the conviction was for" (7/30/19 Tr. 49). This instruction was repeated during the court's final instructions (*id.* at 103).

The trial court did not abuse its discretion when it denied Proctor's requests for a mistrial. The trial court correctly found that any prejudice arising from the brief testimony by two witnesses that they met Proctor when he returned from being incarcerated, when viewed in context, did not require a mistrial. Similarly, the trial court correctly found that any prejudice arising from a brief analogy made by the government in closing argument raising concern regarding whether it appropriately communicated the allocation of the burden of proof and production between the government and defendant was not significant enough to require a mistrial where the jury was repeatedly instructed about the proper burden of proof and production, the trial court gave a corrective instruction, and the government's evidence was strong.

The evidence was sufficient to establish Proctor's identity as Diggs's killer.

ARGUMENT

I. The Trial Court Did Not Abuse Its Discretion When It Admitted Diggs's Statements to His Sister Under the Forfeiture-By-Wrongdoing Exception to Hearsay.

A. Additional Background

Before trial, on June 13, 2015, the government moved in writing to admit statements Diggs made to his sister Diane three days before his murder pursuant to the forfeiture by wrongdoing doctrine set forth in *Devonshire v. United States*, 691 A.2d 165 (D.C. 1997), and *Giles v. California*, 554 U.S. 353 (2008) (Appellant's

Appx. (A) at A50-60). In particular, Diggs told Diane that shortly before the murder, Proctor had asked Diggs not to testify at an upcoming CPO hearing between Diane and Proctor's father, Big Gary (A53-54, A57).

The government explained that after Big Gary, Proctor, and others' assault of Diane's son Ronnell at the July 11 cookout (which resulted in Ronnell being hospitalized and Diggs being punched in the mouth), Diane sent a series of text messages to Big Gary and his girlfriend that resulted in Big Gary initiating proceedings for a CPO against her on July 20, 2015 (A53). On July 23, Diane was served with a notice to appear for an August 3 hearing on the CPO (*id*. at 4-5). The next day, Diane spoke with Diggs, who had been a witness to and victim of the assault on her son, and requested that he testify on her behalf at the hearing (A54). Diggs agreed, telling Diane that, although Proctor had asked him not to testify at the hearing, he would do so (*id.*). Diggs was killed three days later, just one week before the CPO hearing (*id.*). The government also proffered that Proctor had good reason to believe Diggs would be willing to testify against him and his father in court given that, in connection with a prior criminal matter against Proctor and his father in 2012, Diggs had come to the courthouse to testify but was persuaded to leave by another

family member, resulting in the charges being dropped (6/27/19 Tr. 80-82, 95, 7/15/19 Tr. 22-23).[20]

Proctor did not challenge the government's factual proffers, but argued that *Devonshire* was not applicable because "[i]t typically involves the killing of the witness in a criminal trial to make the witness unavailable against the actual Defendant," while here it was alleged that "Proctor tried to discourage [Diggs] from testifying in the civil protective order case" to which Big Gary was the actual party in interest (6/27/19 Tr. 92). The trial court found that the issue was "squarely address[ed]" in *Ward v. United States*, 55 A.3d 840 (D.C. 2012), when this Court found, "[w]e discern no reason why the [*Devonshire*] doctrine . . . should not apply where by a preponderance of the evidence the trial Court finds that the Defendant procured a witness' death to benefit some other person" (*id.* at 93). Proctor then argued both that (1) the desire to prevent Diggs's testimony at the CPO hearing was only one of the multiple proffered motives the government put forward for killing Diggs, (2) that motive was really "a very minor thing" given that "it would be a less likely motive to murder a witness in a civil proceeding than there would be to murder

[20] In a prior pleading, the government set forth information regarding two prior incidents of violence committed by Proctor and his father against Diggs in 2012 (A11). First, Proctor had been charged with assaulting Diggs with a bat on September 9, 2012, after a fight between Diggs, Proctor, and Big Gary (*id.*). Then, on October 12, 2012, a witness saw Big Gary's car drive by Diggs's house moments before multiple shots were fired into the residence (*id.*).

a witness in a criminal proceeding," and (3) the testimony should be excluded under Rule 403, given that its probative value did not outweigh the prejudice to Proctor (*id.* at 93-94).

The government responded that *Devonshire* was applicable because the timing of the events showed that one of Proctor's underlying motives in killing Diggs was "to prevent [Diggs] from providing damaging testimony either to [Proctor] or to his father" (6/27/19 Tr. 95-97).[21] The government highlighted that, given the nature of the assault on Ronnell (which resulted in "pretty serious injuries" for which he was hospitalized), Proctor's father "could have been potentially looking at criminal charges" (*id.* at 97).[22] Additionally, the government pointed out that Proctor's own involvement in the assault on Ronnell and Diggs at the cookout meant the threat of Diggs's testimony "was implicating [Proctor] himself" (*id.*).

The trial court admitted Diggs's statement to Diane concerning Proctor's request that he not testify under the *Devonshire* forfeiture-by-wrongdoing doctrine (7/15/19 Tr. 24). Specifically, the court found that *Devonshire* applied both (1) where an individual procured the witness's absence for the benefit of another person

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[21] The government conceded that this was not the sole motive, but instead was "the straw the broke the camel's back" where animosity among the family had been growing (6/27/19 Tr. 96).

[22] The government noted that even if sworn testimony at the CPO hearing was not given in a criminal proceeding, it "could be used later to further a criminal case" even if the testifying witness later become uncooperative (6/27/19 Tr. 95).

and (2) where the proceeding at which the absent witness was expected to testify was a CPO proceeding (*id.* at 97-101, 17-18, 24). The trial court rejected Proctor's argument that forfeiture-by-wrongdoing applied only when the underlying proceeding from which the witness was absent concerned pending criminal charges—noting that other courts had even gone so far as to "state[] explicitly that the forfeiture princip[le] applies even to situations where there's no ongoing proceeding which the Declarant was scheduled to testify" (6/27/19 Tr. 98-99 (citing *United States v. Stewart*, 485 F.3d 666 (2d Cir. 2007)). The trial court found, however, that it did not need to go so far given that "a CPO seems . . . to be somewhat quasi criminal" and that the testimony that Diggs would have provided (and that Proctor's murder therefore prevented) concerned "an assault that at least on it's [sic] face appeared to be eligible for some sort of felony charge" (*id.* at 99-100).

B. Standard of Review and Applicable Legal Principles

"Under the forfeiture-by-wrongdoing doctrine, a defendant forfeits his Sixth Amendment right to be confronted by a witness against him, as well as his objection to the introduction of hearsay, if he wrongfully procured the unavailability of that witness with the purpose of preventing the witness from testifying." *Roberson v. United States*, 961 A.2d 1092, 1095 & n.6 (D.C. 2008) (citing *Devonshire*, 691 A.2d at 168-69; *Giles*, 554 U.S. at 366-67). As the Supreme Court made clear in *Giles*,

the forfeiture-by-wrongdoing exception "applie[s] only when the defendant engaged in conduct designed to prevent the witness from testifying." 554 U.S. at 359-61. Accordingly, the government must demonstrate that: (1) the defendant engaged in wrongdoing that caused the witness's unavailability; and (2) he did so "to prevent the witness from testifying" *Id.* at 361. As to the purpose prong . . . [t]he government is not required to show that a defendant's sole purpose was to silence the declarant." *Hairston v. United States*, 264 A.3d 642, 646 (D.C. 2021). The government need only establish these "'predicate facts'" by "'a preponderance of the evidence.'" *Roberson*, 961 A.2d at 1095-96 & n.8 (quoting *Devonshire*, 691 A.2d at 169).

This Court reviews the trial court's rulings on the admissibility of hearsay statements under the forfeiture-by-wrongdoing doctrine for an abuse of discretion. *Hairston*, 264 A.3d at 646-47 (citing *Jenkins v. United States*, 80 A.3d 978, 997 (D.C. 2013), and *Roberson*, 961 A.2d at 1097). In so doing, this Court "accept[s] the factual findings on which the rulings rest so long as they are not clearly erroneous." *Jenkins*, 80 A.3d at 989; *accord Roberson*, 961 A.2d at 1097.

C. Discussion

Recognizing the government had the burden to show by a preponderance of the evidence that Proctor murdered Diggs at least in part to obtain his unavailability as a witness at Big Gary and Diane's CPO proceedings in order for the forfeiture-by-wrongdoing doctrine to apply, the trial court correctly found the doctrine was

applicable and admitted Diggs's statements to his sister about his conversation with Proctor (see 6/27/19 Tr. 93; 7/15/19 Tr. 17, 24).[23] The trial court did not clearly err when it determined that at least one motive for Proctor's murder of Diggs was to prevent his testimony at the CPO proceedings. Rather, the record contained ample circumstantial evidence supporting a reasonable inference that one of Proctor's motivations was to prevent damaging testimony against both him and his father during those proceedings. The unchallenged factual proffer before the court included information that (1) Big Gary and Proctor were both involved in an assault against Diane's son Ronnell, which resulted in Ronnell's hospitalization and also caused injury to Diggs; (2) Big Gary filed for a CPO after receiving multiple texts from Diane, who was angry at him for jumping her son; (3) a hearing on the CPO was scheduled for August 3, 2015; (4) Proctor (who knew Diggs had appeared to testify against his family in court on at least one prior occasion) asked Diggs not to testify at that hearing at least four days before he killed him; (5) Diggs told Diane about this conversation three days before his murder; and (6) Proctor killed Diggs one week before the August 3 hearing. It was therefore reasonable for the trial court to

[23] Because Diggs's statements to his sister were non-testimonial, Proctor's Sixth Amendment confrontation rights were not implicated, and the sole issue before this Court is whether the trial court correctly admitted Diggs's statements under the forfeiture by wrongdoing exception to the hearsay rule. *See Ward*, 55 A.3d at 850 & n.10 (citing *Johnson v. United States*, 17 A.3d 621, 627 (D.C. 2011)).

infer that one of Proctor's motivations for killing Diggs was to prevent Diggs from providing testimony against him and his father at the August 3 CPO hearing. *See Hairston*, 264 A.3d at 646-49 (finding trial court reasonably inferred that "at least a partial motive" for defendant's murder of deceased was prevention of testimony at CPO hearing based on (1) the timing of the CPO proceedings in relation to the murder, (2) potential negative consequences defendant could face based on the proceedings, and (3) statements indicative of defendant's desire to have decedent abandon CPO proceedings).

Proctor's argument (at 16-17) that the trial court clearly erred because its factual findings necessarily relied upon the very hearsay statement whose admissibility was at issue to show Proctor knew of Diggs's intent to testify at the CPO hearing has already been rejected by this Court. *See Jenkins*, 80 A.3d at 995-97 (recognizing that, "[a]s a general proposition, a trial court is permitted to rely on hearsay (whether or not it falls within a recognized exception) in ruling on the admissibility of evidence," and refusing to expand narrow carve-out from this rule to forfeiture-by-wrongdoing determinations). Indeed, Proctor cites no authority to the contrary (see Br. 16-17). Moreover, although Diggs's statement was the only direct evidence showing Proctor's state of mind regarding the CPO proceedings, the court's findings were also supported by ample circumstantial evidence regarding the events leading up to the CPO, the family dynamics at play, and the timing of Digg's

murder in relation to the upcoming hearing to permit a reasonable inference that prevention of Diggs's testimony was, in part, a motivation for his murder. *See id.* at 996 ("Generally speaking, it is appropriate and common for judges to consider the substance of proffered hearsay together with independent evidence in determining whether a hearsay exception is available; and this court has implicitly approved such consideration in its forfeiture-by-wrongdoing cases. . . . [W]e perceive no principled reason to forbid it *per se*.").

Proctor also misconstrues the trial court's findings when he argues (at 17-18) that the court was confused regarding the factual background of the CPO proceedings. As an initial matter, Proctor's argument is inapt because the trial court's legal finding that forfeiture-by-wrongdoing was applicable to the wrongful prevention of witness testimony at a CPO hearing did not rely upon which party the witness's testimony supported (see 6/27/19 Tr. 98-101, 7/15/19 Tr. 17). Moreover, the trial court's findings made clear that it understood the real substantive issue animating why Diggs's murder qualified as forfeiture by wrongdoing—it was intended to prevent testimony that threatened to implicate Proctor and his father in "an assault that at least on it's face appeared to be eligible for some sort of felony assault charge" (*id.* at 100). The court, therefore, correctly recognized that the stakes—with respect to Proctor and his father's exposure to criminal liability—was

more than "a nasty phone call or a push or a slap" (*id.*).[24] Proctor's argument also ignores government interchanges with the court at the later July 17, 2014, hearing making clear that the court understood, before ruling on the motion, that Diggs's sister was the respondent rather than the petitioner in the CPO proceedings and was seeking Diggs's testimony to explain the true nature of the assault against her son—the reason she sent the text messages on which Big Gary's CPO petition was based (see 7/15/19 Tr. 20-21 ("[PROSECUTOR]: . . . So [Diane] sends these texts and in response the defendant's father files a CPO actually against her. . . . [S]he talks to the decedent and says hey, I'm now having to go to court . . . I have to go to the CPO

[24] Proctor's attempt (at 18-19) to distinguish *Ward* is unpersuasive. First, the government's factual proffer made clear that Proctor himself was one of several people who attacked Ronnell, and therefore reliance upon conspiracy liability to implicate Proctor's interest in Diggs's testimony was not necessary (see A53, A56-57 & n.4; 6/27/19 Tr. 97 ("[Diggs] also was implicating the Defendant himself. Not just the Defendant's father and it's at that point in time that the Defendant approached the Decedent and encouraged him not to testify against both the Defendant and the Defendant's father."); 7/15/19 Tr. 21 ("[Proctor] asked [Diggs] not to testify against both [Proctor] and his father Big Gary.")). Moreover, in *Ward* this Court stated, without qualification, that "[w]e discern no reason why the doctrine should not apply where . . . the trial court finds that a defendant procured a witness's death to benefit some *other* person," and did not require a conspiracy to murder for application of the doctrine, though one existed in that case. 55 A.3d at 849 (quoting *United States v. (Angela) Johnson*, 495 F.3d 951, 971 (8th Cir. 2007), where defendant sought unavailability of witnesses against boyfriend rather than herself). Under *Ward*, only a finding that the purpose of the killing was to prevent testimony is required; there is no additional requirement of a conspiracy between the murderer and the beneficiary of the killing. *See id.* (finding *Giles* requires only that defendant be on trial for killing victim and it be shown the killing was "for the purpose of preventing testimony").

hearing. Will you testify in my behalf about what really is the result of this assault at the hearing. THE COURT: So that's on the 24th. [PROSECUTOR]: Yes. COURT: Okay.").

Proctor's argument (at 19-20) that the forfeiture-by-wrongdoing exception was not applicable because there was no reasonably foreseeable criminal proceeding at which Diggs would be a witness is wrong both as a legal and a factual matter. First, this court has already approvingly applied the forfeiture by wrongdoing doctrine in the context of a defendant's murder of a witness expected to testify at a CPO proceeding in *Hairston*, where the defendant's concern about the decedent's testimony arose from the potential he would lose visitation with his daughter rather than fear of criminal prosecution. *See* 264 A.3d at 646-49. Similarly, multiple circuits have recognized,

> [t]he text of Rule 804(b)(6)[25] requires only that the defendant intend to render the declarant unavailable 'as a witness.' The text does not require that the declarant would otherwise be a witness at any *particular* trial. . . . A defendant who wrongfully and intentionally renders a declarant unavailable as a witness *in any proceeding* forfeits the right to exclude, on hearsay grounds, the declarant's statements at that proceeding *and any subsequent proceeding*.

United States v. Gray, 405 F.3d 227, 241 (4th Cir. 2005) (first emphasis in original, others added), *quoted in Stewart*, 485 F.3d at 672. Accordingly, Proctor's successful

[25] Rule 804(b)(6) codifies the common-law doctrine of forfeiture by wrongdoing. *United States v. Gray*, 405 F.3d 227, 241 (4th Cir. 2005).

attempt to prevent Diggs's from testifying at the August 3 CPO hearing fits comfortably within the forfeiture doctrine articulated in *Hairston* and *Gray*.

Proctor's citation (at 19) to *United States v. Houlihan*, 92 F.3d 1271 (1st Cir. 1996), does not require a different result. Rather, in *Houlihan*, the First Circuit found that forfeiture arose from the defendant's "intent to silence" a witness with respect to future proceedings, not on the nature or pendency of the proceedings the defendant sought to obstruct. *See id.* at 1279-81. Even if *Houlihan* (which is not binding on this Court) is read more narrowly to restrict application of the forfeiture doctrine only where the purpose of the defendant is to silence a witness about criminal conduct—a restriction not found in *Hairston*, *Giles,* or the text of Rule 804(b)(6)—forfeiture would be applicable. As the trial court recognized, the threat animating Proctor's desire to silence Diggs arose from his concern that Diggs would testify about his and his father's commission of "an assault that at least on its face appeared to be eligible for some sort of felony assault charge" (see 6/27/19 Tr. 100). The proffer here was sufficient to establish the factual bases for forfeiture even under a restrictive reading of *Houlihan*. *See* 92 F.3d at 1280.

Even assuming the trial court erred in admitting Diggs's statements to his sister, any error was harmless. *See Grimes v. United States*, 252 A.3d 901, 919-20 (D.C. 2021) (erroneous admission of hearsay statement subject to harmless error standard under *Kotteakos v. United States*, 328 U.S. 750, 765 (1946)). The

government's identification evidence was overwhelming, and included (1) Diggs's identification of Proctor as his murderer to two separate individuals, (2) eyewitness testimony that Proctor ran from the scene of the murder after the gunshots, (3) cell site data placing Proctor near the scene at the time of the murder, (4) Proctor's possession of the distinctive type of ammunition used to kill Diggs, (5) Proctor's possession of one of the four specific types of gun that must have been used, (6) Proctor's attempt to get rid of his cellular phone the morning after the murder after deleting incriminating photos from the device, and (7) the existence of multiple other motives for Proctor to kill Diggs arising from their drug dealing relationship. Accordingly, this Court can find "with fair assurance . . . that the judgment was not substantially swayed by the error." *Kotteakos*, 328 U.S. at 765; *see Giles v. United States*, 432 A.2d 739, 743-48 (D.C. 1981) (decedent's hearsay statement defendant stabbed him on a prior occasion was harmless given other evidence of hostile relationship and strong evidence of guilt); *Goines v. United States*, 905 A.2d 795, 799-802 (D.C. 2006) (destruction of property victim's testimony about defendant's two prior assaults on her was harmless); *United States v. Meserve*, 271 F.3d 314, 319-20, 330 (1st Cir. 2001) (robbery victim's hearsay statement that she "thought [defendant] might have been the robber" was harmless even where it may have given the jury a greater reason to credit other testimony because it "was but a small contribution to the font of evidence" of guilt).

II. The Trial Court Did Not Abuse Its Discretion When It Denied Proctor's Multiple Requests for a Mistrial.

A. Additional Background

1. Evidence of Proctor's Prior Incarceration

During the first day of testimony, Diane's brother—Kevin Diggs, Sr.—was asked whether he had ever met Proctor before, and he responded:

> One time. I believe it was after my mother passed. They all came to the funeral. He had just came home from some incident of being locked up, and that's when— (7/22/19 Tr. 88.)[26]

Proctor immediately objected, and the court sustained his objection (*id.*). Proctor then approached the bench and requested a mistrial (*id.* at 89). The trial court stated that it would take the request under advisement and asked if, in the meantime, Proctor was asking for any jury instruction to be given in the event a mistrial was not granted (*id.* at 90). Proctor stated he was "not going to ask for an instruction" to keep from highlighting the testimony to the jury (*id.*). At the close of the first day of testimony, the court permitted the parties to make argument and indicated it would rule on the motion in the morning (*id*. at 284-88).

[26] Before his testimony, the government had instructed Kevin that he should not reference Proctor's prior incarceration and therefore did not anticipate the testimony (7/22/19 Tr. 91). Proctor conceded that Kevin's statement had been "blurted out" and disavowed any government misconduct (*id.* at 284-85).

The next day, the trial court denied Proctor's request for a mistrial (7/23/19 Tr. 3-12). It the relied upon the "fleeting" nature of the reference, the lack of detail about the circumstances or nature of the detention/incarceration, the government's good faith, Proctor's rejection of a curative instruction, and the fact the jury was going to learn that Proctor had been convicted of a crime as an element of his FIP charge to find a mistrial was not warranted (*id.* at 4-6 (citing *Clark v. United States*, 639 A.2d 76 (D.C. 1993)). When asked to reconsider, the trial court again denied the request, noting that any prejudice would also be mitigated when the jury was instructed about the limited use that could be made of evidence of Proctor's prior conviction that would be admitted with respect to his FIP charge (*id.* at 10-12).[27]

The following day, crime scene officer Thomas Coughlin authenticated multiple photos and pieces of evidence recovered from the search of Proctor's bedroom (7/24/19 Tr. 196-98). Among the exhibits introduced without objection were Government Exhibits 205 and 206 (*id.* at 198). When Government Exhibit 205 was briefly published, Coughlin identified the exhibit as a picture of photographs that were found in Proctor's bedroom (*id.* at 204). It pictured one photograph of Proctor and another man standing before a cinderblock wall (Gov't Ex. 205). Proctor

[27] The court noted another factor it would consider was the strength of the government's evidence and offered to revisit the motion at the close of the government's case (7/23/19 Tr. 12).

is wearing a tan button up shirt, lighter khaki shorts, a white beanie, black sunglasses, and white shoes (*id.*; 7/14/19 Tr. 212-13). The other man is wearing white sweats, a white fabric hat, and white tennis shoes (Gov't Ex. 205; *id*.). A portion of another picture depicting a woman in a blue jean jacket and a man in street clothes (including a blue zip-up jacket and jeans) appears below the first picture (Gov't Ex. 205; *id*.).

While the government began to authenticate pieces of mail matter, defense counsel asked that Government Exhibit 205 be taken down from view "because Mr. Proctor believes it's taken in prison" (7/24/19 Tr. 205). The government then introduced, without objection, the actual photos depicted in Government Exhibit 205 into evidence as Government Exhibit 26 (*id.* at 206). At the close of the day's testimony, Proctor moved to keep the photographs from going back to the jury as exhibits (*id.* at 213). The government did not object to that proposed action, noting for the record that the photographs "on their face . . . did not scream out to [the government] that the[y] were prison photos" (*id.*). The trial court agreed that "looking at these photos" there was "no reason . . . to believe that the Government or the defense were aware necessarily that they are prison photos" (*id.* at 213-14). The court noted that the although the clothing could be consistent with "institutional clothing," "somebody frankly would have to look at these carefully" and be "familiar with this type of clothing" to even think that that it depicted "institutional garb" (*id.* at 214). Moreover, the court found that it "couldn't tell that when it was up on the

screen" and that because the photographs were not going back to the jury, there was no reason to believe that the brief display prejudiced Proctor (*id.* at 214-15). The court made clear that there was "nothing that made [it] think that the Government was trying to put in prejudicial photographs," and the government withdrew the photographs from evidence (*id.*).

The court demurred to Proctor on whether to formally instruct the jury about the photographs that were struck (7/24/19 Tr. 216; 7/25/19 Tr. 5). Pursuant to Proctor's request, the jury was instructed (without objection):

> Exhibits 205 and 206 which were admitted into evidence yesterday have been withdrawn. They will not be submitted to you during your deliberations and you are not to consider them as evidence in this case. (7/25/19 Tr. 12).

Proctor did not move for mistrial or renew his prior motion (see 7/24/19 Tr. 213-16; 7/25/19 Tr. 5).

The following week, during the government's questioning of Diggs's girlfriend, Johnson, the government asked, "When about did you meet Gary Proctor" (7/29/19 Tr. 16). Johnson responded, "I met Gary shortly after he got released from prison" (*id.*). After a few more questions, Proctor objected and renewed him motion for a mistrial (*id.* at 17-18).[28] Proctor made clear that, as with Kevin's reference to

[28] Defense counsel made clear he had not heard the passing reference, but that Proctor had alerted him to Johnson's mention of prison (7/29/19 Tr. 17).

being "locked up," he did not desire a curative instruction for tactical reasons (*id.* at 18). Both the court and Proctor acknowledged that the government's questions had not been phrased to elicit information about Proctor's prior incarceration (*id.* at 18-19).

At the close of the day's testimony, the trial court heard argument on Proctor's motion (7/29/19 Tr. 229-36). Proctor again reiterated his preference to refrain from instructing the jury to avoid highlighting the testimony (*id.* at 232-34). The following day, the court denied Proctor's motion reincorporating its prior findings and finding that the fleeting repetition did not require a mistrial (7/30/19 Tr. 4-6).

At the close of the government's evidence that day, Proctor took the court up on its offer to renew his mistrial motion in light of the weight of the government's case (7/30/19 Tr. 64). The trial court denied the renewed motion finding that the strength of the government's "dying declarations and the ballistics themselves are fairly strong evidence" that "outweigh any minimal prejudice" from fleeting references to prior incarceration (*id*. at 110, 198-200).

2. The Government's Rebuttal Argument

At the opening of the government's rebuttal argument, the government openly embraced its burden to prove Proctor was guilty beyond a reasonable doubt: "First of all, there's a burden in this case, and it's the government's burden, and we embrace that burden" (7/31/19 Tr. 170). The government went on to remind the jury,

using the language of the jury instructions, about the reasonable doubt standard that applied (*id.* at 170-73). The government also reminded the jury that its job was to determine if the government had met its burden and to weigh the evidence admitted at trial (*id.* at 174).

The government then focused the jury on its job to weigh the evidence by evoking the image of the scales of justice they saw above the judge:

> 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 why your job is: You take the evidence and you weigh it. (7/31/19 Tr. 174.)

The government continued:

> 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 – and 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. Remember that the instructions tell you that it doesn't have to be to a mathematical certainty or an absolute certainty; right? (7/31/19 Tr. 175.)

The government later returned to the seesaw metaphor briefly when discussing Diggs's identification of Proctor as his murderer to Crews, stating, "If it was just her, would that be enough? The seesaw would be pretty close to the ground already, but there's more, because you have Diane. You have the decedent's sister." (7/31/19 Tr. 183). The government later closed its rebuttal by re-acknowledging that it bore

the burden of proof, asking the jury to "conclude that the government has met that burden" (*id.* at 187).

At the close the government's rebuttal argument, Proctor sought a mistrial based on the government's reference to "scales" and a "seesaw" (7/31/19 Tr. 187-88). The trial court found that the government's argument was problematic to the extent that it "suggest[ed] that one side has to put on evidence," but found any such suggestion was unintentional (*id.* at 188).[29] Given that the government had "stated on at least two occasions . . . both at the beginning and at the end that the government does bear the burden and what the burden was," a mistrial was not warranted and any prejudice could be remedied with an immediate curative instruction (*id.* at 190).

When the jury returned, the court immediately gave them the following instruction:

> The first [instruction] 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[s] beyond a reasonable doubt." (7/31/19 Tr. 191.)

[29] The government maintained that its statements directed the jury to consider its role in weighing evidence and did not misstate the government's burden given that it did not "reference defense evidence or the lack thereof at the same point in any way" (7/31/19 Tr. 188-89).

3. The Trial Court Denies Proctor's Request for a New Trial

Nearly two months after a jury found him guilty of all counts, Proctor filed a motion for a new trial pursuant to Super. Ct. Crim. R. 33, asserting that the multiple references to past incarceration and the government's scale analogy in rebuttal argument constituted exceptional circumstances justifying a new trial (R. 84).[30] The government opposed (R. 93).

Following a hearing, the trial court denied the motion in a written order (R. 94). First, the trial court found Proctor was not entitled to a new trial for the two "brief" and "indirect" references to Proctor's prior incarceration (*id.* at 5-6). In particular, the court found that

> [g]iven the brevity of the non-specific references to Mr. Proctor's prior detention, the fact that the government did not intentionally elicit such testimony, the declination of a curative instruction by the defense, the fact that the jury properly learned of a conviction which was punishable by imprisonment by stipulation of the parties and the limiting instruction that the jury was given regarding Mr. Proctor's properly disclosed criminal history, the prejudice that accrued from the brief mentions of Mr. Proctor's criminal history did not merit a mistrial (*id.* at 6).

[30] A month later, Proctor filed a supplemental and corrected motion, correcting "minor typographical errors" and providing reference to the recently transcribed July 22 proceedings (R. 85). These pleadings were filed by Proctor's trial counsel, Steven R. Kiersh, Esq. (R. 84; R.85). Before the hearing on this motion, Kiersh was replaced by Betty Ballester, Esq., who was appointed to represent Proctor with respect to post-trial and sentencing proceedings (R. 89; R. 90).

Next, the court found that although the government's "analogy of the scales and see-saw" in rebuttal argument was "clearly improper" as it "could easily be interpreted as shifting the burden of proof to the defendant," a mistrial was not warranted (R. 94 at 6-9). Specifically, the trial court declined to find the comments resulted in "substantial prejudice" because they were "mitigated substantially by the context in which the statement was made," particularly given that (1) the remark "was an isolated remark within a lengthy rebuttal argument and did not reflect the overall character of the prosecutor's argument," (2) the jury was given a curative instruction and had repeatedly instructed on the proper burden of proof, and (3) "[t]he government's evidence in this case was fairly strong," consisting of two dying declarations, ballistics evidence tying Proctor to the murder, evidence of motive, and evidence that Proctor was in the area at the time of the murder (*id.* at 7-9).

Finally, pointing to the minimal prejudice arising out of both alleged errors, the trial court found "[e]ven taken together, the prejudice the defendant suffered did not result in denying Mr. Proctor a fair trial" (R. 94 at 9-10).

B. Standard of Review and Applicable Legal Principles

"[I]nstances occur in almost every trial where inadmissible evidence creeps in, usually inadvertently." *Coleman v. United States*, 779 A.2d 297, 302 (D.C. 2001) (quoting *Carpenter v. United States*, 430 A.2d 496, 506 (D.C. 1981)). But "[n]ot

every admission of inadmissible hearsay or other evidence can be considered to be reversible error unavoidable through limiting instructions": "[a] defendant is entitled to a fair trial but not a perfect one." *Id.*

"The decision whether to grant a mistrial motion in lieu of alternative relief in response to a prejudicial development at trial is committed to the trial court's discretion." *Trotter v. United States*, 121 A.3d 40, 53 (D.C. 2015). "A mistrial is a severe remedy," *Peyton v. United States*, 709 A.2d 65, 69 (D.C. 1998) (citation omitted), so "[w]henever possible, the court should seek to avoid a mistrial by appropriate corrective action which will minimize potential prejudice," *Goins v. United States*, 617 A.2d 956, 958 (D.C. 1992).

This Court "will reverse a discretionary denial of a mistrial only if the trial court's decision appears irrational, unreasonable, or so extreme that failure to reverse would result in a miscarriage of justice." *Trotter*, 121 A.3d at 53 (citation and quotation marks omitted). "To determine whether a mistrial was necessary, [this Court] consider[s]:

> the gravity of the misconduct [or inappropriate disclosure/statement], the relative strength of the government's case, the centrality of the issue affected, and any mitigating actions taken by the court, all while giving due deference to the decision of the trial judge, who had the advantage of being present not only when the alleged misconduct occurred, but through the trial.

Id. at 53 (quoting *Bennett v. United States*, 597 A.2d 24, 27 (D.C. 1991)); *see also Metts v. United States*, 877 A.2d 113, 118 (D.C. 2005).

C. Discussion

1. Witness References to Proctor's Prior Incarceration Did Not Require a Mistrial.

The trial court did not abuse its discretion when it declined to grant a mistrial based on two witnesses' fleeting references to meeting Proctor after he was released from "prison" (or being "locked up"). As the trial court found, a mistrial was not warranted given that (1) the references to Proctor's prior criminal history were brief, nonspecific, and unsolicited by the government, (2) Proctor declined the opportunity for a curative instruction, and (3) the government's case was strong (see R. 94 at 5-6, 9). *See Wilson v. United States*, 691 A.2d 1157, 1160 (D.C. 1997) ("Here, given (1) Wilson's failure to accept a 'curative instruction' offered by the trial court, (2) the inadvertence of the reference to Wilson's prior incarceration, (3) the brief and nonspecific nature of the witness's statement regarding the prior incarceration, and (4) the strength of the government's case . . . we see no reason to disturb the trial court's ruling [to deny a mistrial]."); *see also McCoy v. United States*, 106 A.3d 1051, 1060-61 (D.C. 2015) (not abuse of discretion to deny mistrial where "[t]he reference to appellant's having been in jail was brief and non-specific, and it was not intentionally elicited by the government"); *Clark*, 639 A.2d at 79-80 (reference to defendant's prior incarceration did not require mistrial where (1) no government misconduct, (2) strong prosecution case, and (3) defendant rejected offer of curative instruction). Moreover, it was proper for the trial court to place the disclosures within

the context of the entire trial, which included permissible introduction of a stipulation that Proctor had been previously convicted of a crime punishable by one year in prison, and instruction on the limited proper use of such information (see R. 94 at 5-6).

Proctor mischaracterizes the record when he argues that references to Proctor's prior incarceration "showed that he served *significant* time" (Br. at 25 (emphasis in original)). This is simply not borne out by the record. Kevin Diggs, Sr. testified that he met Proctor after he had "just came home from some incident of being locked up" (7/22/19 Tr. 88), and Johnson testified she met Proctor "shortly after he got released from prison" (7/29/19 Tr. 16). Neither statement references either explicitly or implicitly the length of time Proctor was in custody.

Proctor attempts to bolster his claim by asserting on appeal (at 22-25) that the two brief references to Proctor's incarceration had greater prejudicial impact because the jury was shown photographs depicting Proctor in a carceral setting on another occasion. First, Proctor never requested a mistrial based upon the government's brief display of the photographs—which were entered into evidence without any initial objection by Proctor—either standing alone or in conjunction with testimony regarding prior incarceration. Having failed to seek a mistrial on this basis below, Proctor's claim on appeal is subject to plain error review. *See McGriff v. United States*, 705 A.2d 282, 288-89 (D.C. 1997) ("When an appellant argues for a mistrial

after having failed to seek one in the trial court, we review the record only for plain error. . . . In determining whether there was plain error, this court considers whether the judge compromised the fundamental fairness of the trial, and permitted a clear miscarriage of justice, by not intervening, *sua sponte* . . . .").

Proctor cannot show that the brief display of the photographs at issue plainly undermined the fundamental fairness of the trial. First, the photographs were stricken from the record and the jury was instructed not to consider them as evidence. Second, Proctor's description of the photographs as "showing Mr. Proctor on the prison recreation yard posing with other inmates," mischaracterizes the record. As the trial court found, on their face there was no indicia that the photographs depicted people in prison (7/24/19 Tr. 213-14 ("I have no reason looking at these photos to believe that the Government or the defense were aware necessarily that they are prison photos.")). Indeed, the trial court found only that the clothing could be considered "consistent with institutional garb" upon a closer inspection than the trial court had been able to make while the photographs were displayed (*id.* at 214-15 ("I couldn't tell that when it was up on the screen. . . . I will just say that it was not apparent to me when it was on the screen and in the same way it is when I'm looking at them here [at the bench]")). Proctor's insistence to the contrary on appeal is meritless, and his citation to *Bishop v. United States*, 983 A.2d 1029, 1036 (D.C. 2009)—a case in which the jury was shown a photograph identified as a "police

photograph" that clearly implied defendant had a prior criminal record—is inapposite.

2. The Government's Statements in Rebuttal Argument Did Not Require a Mistrial.

The trial court also did not abuse its discretion when it denied Proctor's request for a mistrial based on isolated comments made during the government's rebuttal argument. Rather, as the trial court correctly found, the objectionable comments were brief, they did not reflect the overall character of the prosecutor's remarks, the jury was repeatedly instructed on the proper burden of proof at multiple stages of the trial, the court gave an immediate corrective instruction restating the proper burden of proof, and the government's evidence was strong (see R. 94 at 7-9). *See Shepherd v. United States*, 144 A.3d 554, 564 (D.C. 2016) (mistrial not required based on prosecutor misstatements of evidence in rebuttal where "the themes of . . . rebuttal argument were entirely proper," the jury received a corrective instruction that reaffirmed instructions they had received prior to rebuttal, and the evidence of appellant's guilt was strong); *Trotter*, 121 A.3d at 54 (inappropriate rhetoric in rebuttal argument impugning defense counsel and implying he believed the evidence showed his client was guilty did not require a mistrial where it was not egregious, "comments were isolated remarks in a lengthy rebuttal" that appropriately focused on "discussing the evidence and the weaknesses in defense counsel's

arguments for the existence of reasonable doubt," the trial court provided corrective instructions, and there was strong evidence of guilt); *see also id.* at 53 (when determining whether a mistrial is necessary, appellate court gives "due deference to the decision of the trial judge, who had the advantage of being present not only when the alleged misconduct occurred, but through the trial") (quoting *Bennett*, 597 A.2d at 27); *see also Lucas v. United States*, 102 A.3d 270, 277-83 (D.C. 2014) (improper rebuttal comment implying defendant was guilty because he was guilty of a past crime was harmless when viewed in context even where court overruled contemporaneous objection, declined to give a curative instruction, and jury had never received an instruction on the proper use of evidence of defendant's prior conviction); *Plater v. United States*, 745 A.2d 953, 958-59 (D.C. 2000) (prosecutor's incorrect statement that co-defendant's statements could be used against all defendants did not require mistrial where judge had previously explained proper use of the statements during voir dire, instructed that arguments by counsel were not evidence, and provided curative instructions after the improper comment). *Cf. United States v. (Marvin) Johnson*, 713 F.2d 633, 650-51 (8th Cir. 1983) (prosecutor's comment that defense had failed to produce any evidence to rebut reasonable inference from government's evidence "did not shift the burden of proof" where prosecutor acknowledged the government bore the burden of proof and district court later instructed on proper burden of proof), *cited in Allen v. United*

States, 603 A.2d 1219, 1223-25 (D.C. 1992) ("[E]ven if the prosecutor had argued that Allen had the burden of proof with respect to self-defense, one would presume that the jury applied the law as stated by the judge, not by the prosecutor.").

Although Proctor correctly notes (at 29) that this Court has found that improper comments in rebuttal are looked upon with "special disfavor," even the case Proctor relies upon illustrates that the appearance of an improper comment in rebuttal does not necessarily mandate a mistrial. *See Lucas*, 102 A.3d at 279-83 (improper rebuttal comment did not require mistrial despite lack of corrective instruction where comment was a "single, brief, non-emphasized statement" and the government's evidence was strong (though not overwhelming)); *see also Trotter*, 121 A.3d at 54 (improper rhetoric in rebuttal did not require mistrial). Here, as the trial court found, even if the government's brief analogy to a scale and see-saw was construed by a juror to imply that the defendant had some obligation to produce evidence of innocence to counterbalance the government's evidence of guilt, the court's repeated instructions to the contrary were sufficient to disabuse the jury of that notion (see 7/17/19 Tr. 40 (voir dire to determine jurors could follow instructions that defendant is presumed innocent and government bore burden to prove guilty beyond a reasonable doubt); 7/22/19 Tr. 26-27 (preliminary instruction on presumption of innocence, government burden of proof, and principle that the "law does not require a defendant to prove his innocence or to produce any

evidence"); *id.* at 29 (instruction jury is to "accept and apply the law as [the court] state[s] it to you"); 7/30/19 Tr. 77 (pre-closing instructions that trial court's role is to instruct on the law and jury has duty to "accept the law as [the court] instruct[s] you"); *id.* at 81-82 (pre-closing instruction on presumption of innocence, government burden of proof, and principle that the "law does not require Mr. Proctor to prove his innocence or to produce any evidence at all"); 7/31/19 Tr. 191 (post-closing re-instruction that "Proctor has no burden of proof," "is not required to put on any evidence in this case," and "[t]he government bears the burden of proving each of the elements of the offense beyond a reasonable doubt"); R. 79 at 4, 12-14, 27 (written instructions on (1) function of the court; (2) statements and arguments of lawyers are not evidence; (3) defendant's presumption of innocence, government's burden of proof, and reasonable doubt; (4) irrelevance of number of witnesses)). *See Allen*, 603 A.2d at 1223-25 ("Given the clarity of these instructions and the ease with which any reasonable person could understand them, we think it a propos to invoke here Justice Holmes' observation for the Court in *Graham v. United States*, 231 U.S. 474, 481 . . . (1913) that '[i]t would be absurd to upset a verdict upon a speculation that the jury did not do their duty and follow the instructions of the court.' *See also Coates v. United States*, 558 A.2d 1148, 1150 (D.C. 1989). The judge also instructed the jurors that 'it is your duty to accept the law as I state it to you.' Accordingly, even if the prosecutor had argued that Allen had the burden of

proof with respect to self-defense, one would presume that the jury applied the law as stated by the judge, not by the prosecutor."); *Boyde v. California*, 494 U.S. 370, 384-85 (1990) ("[A]rguments of counsel generally carry less weight with a jury than do instructions from the court. The former are usually billed in advance to the jury as matters of argument, not evidence, and are likely viewed as the statements of advocates; the latter, we have often recognized, are viewed as definitive and binding statements of the law. . . . Arguments of counsel which misstate the law are subject to objection and to correction by the court.").

III. The Evidence Was Sufficient to Establish Proctor's Identity as Diggs's Murderer.

A. Standard of Review and Applicable Legal Principles

On appeal, this Court "must deem the proof of guilt sufficient if, 'after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Rivas v. United States*, 783 A.2d 125, 134 (D.C. 2001) (en banc) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

The Court must "examine th[e] evidence in the light most favorable to sustaining the verdict." *Jones v. United States*, 716 A.2d 160, 162 (D.C. 1998). "Deference must be given to the factfinder's duty to determine credibility, weigh the evidence, and draw justifiable inferences of fact." *Lewis v. United States*, 767 A.2d

219, 222 (D.C. 2001). The evidence need not compel a finding of guilty or negate all inferences of innocence. *Collins v. United States*, 73 A.3d 974, 985 (D.C. 2013). Rather, this Court will reverse only where "there has been no evidence produced from which guilt can reasonably be inferred." *Joiner-Die v. United States*, 899 A.2d 762, 764 (D.C. 2006).

B. Discussion

On appeal, Proctor challenges only the sufficiency of the evidence establishing his identity as Diggs's murderer (see Br. 29-32).[31] The government, however, admitted sufficient evidence of Proctor's identity as the murderer through testimony by Diggs's sister and neighbor recounting his dying declarations to his them repeatedly identifying Proctor as the man who shot him. Those statements alone were sufficient to establish his identity as the perpetrator. *Gibson v. United States*, 792 A.2d 1059, 1066 (D.C. 2002) ("This court has often and consistently held that that the testimony of a single witness is sufficient to sustain a criminal conviction, even when other witnesses may testify to the contrary."); *Gethers v. United States*, 684 A.2d 1266, 1273-75 (D.C. 1996) (rejecting sufficiency challenge where reliability of single witness's identification of defendant was challenged,

[31] Having failed to argue that the evidence was insufficient with respect to any other element, Proctor has waived such arguments on appeal. *See Bardoff v. United States*, 628 A.2d 86, 90 n.8 (D.C. 1993).

noting "[c]ases in which reversals are required because the identification evidence was insufficient are 'very rare'") (quoting *In re R.H.M.*, 630 A.2d 705, 706 & n.1 (D.C. 1993)). Moreover, the government introduced substantial evidence corroborating Proctor's identity as the shooter, including ballistics evidence linking Proctor to the distinctive ammunition used as well as to a gun and magazine consistent with those used in the shooting; cell site evidence placing Proctor near the scene of the murder at the time of the murder; an eyewitness who saw Proctor running out of Digg's house after the sound of gunshots; Proctor's attempt to distance himself from the murder and delete incriminating evidence; and multiple motives for the murder. Not only was this evidence sufficient to establish Proctor's identity as the murderer, as the trial court found, the government's evidence was "fairly strong" (see R. 94 at 9).

Proctor's sufficiency argument simply attacks the reliability of Diggs's dying declarations and proffers innocent explanations for the government's corroborating evidence (see Br. 30-32). Such arguments, however, should be rejected as they simply view the evidence in the light most favorable to himself in plain contravention of the applicable standard of review. *See Collins*, 73 A.3d at 985 (sufficiency review requires viewing evidence in light most favorable to government and evidence need not compel a finding of guilt or negate all inferences of innocence); *see also Graham v. United States*, 12 A.3d 1159, 1164 (D.C. 2011)

("Credibility is normally for the jury to determine."); *Gibson*, 792 A.2d at 1066 ("We have also made clear on many occasions that inconsistencies in the evidence affect only its weight, not its sufficiency, and are in any event for the jury to resolve."); *Anderson v. City of Bessemer*, 470 U.S. 564, 574 (1985) ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.").

CONCLUSION

WHEREFORE, the government respectfully submits that the judgment of the Superior Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have caused a copy of the foregoing to be served by electronic means, through the Court's EFS system, upon counsel for appellant, Lakeisha F. Mays, Esq., lakeisha.mays@sidley.com, on this 1st day of August, 2024.

/s/
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