BRIEF FOR APPELLEE

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 23-CM-998

GEORGE BELL, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

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

Cr. No. 2023-CMD-4685

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ISSUES PRESENTED

I. Whether the trial court erred in denying appellant George Bell's motion to suppress, under the Fourth Amendment, marijuana and other evidence found inside a shopping bag left behind at a construction site, where a mylar bag containing a significant quantity of apparent marijuana could be seen inside the bag; and after the officer saw the mylar bag, Bell returned, verbally took ownership of the shopping bag, admitted the bag contained marijuana, and voluntarily handed the bag of marijuana to a police officer.

II. Whether there was sufficient evidence to find Bell guilty of attempted possession with intent to distribute (PWID) marijuana, as a lesser-included offense of PWID marijuana, where the specific amount of marijuana was not entered into evidence but Bell represented to the court that no specific finding of an amount was necessary for a finding of guilt, and there was evidence from which a factfinder could reasonably infer the amount of marijuana exceeded the legal limit and that Bell was attempting to distribute the marijuana for remuneration.

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COUNTERSTATEMENT OF THE CASE

Procedural History

On July 26, 2023, Bell was charged by information with possession with intent to distribute (PWID) a controlled substance (marijuana), in violation of D.C. Code § 48-901.01(a)(1) (Record (R.) 8 (Information)).[1] Bell filed a motion to suppress tangible evidence pursuant to the Fourth

[1] All citations to the record are to the PDF page numbers.

Amendment on September 26, 2023 (R.23 (Mtn. p.1)). After the government filed its opposition on October 9, 2023 (R.28 (Opp.)), the Honorable Kendra Davis Briggs held an evidentiary hearing and denied the motion on November 27, 2023 (11/27/23 Transcript (Tr.) 95). The parties immediately thereafter agreed to a stipulated trial, following which Judge Briggs found Bell guilty as charged (11/27/23 Tr. 100–01). The same day, Judge Briggs sentenced Bell to 60 days' incarceration, execution of sentence suspended as to all, with six months of unsupervised probation (*id.* 106–07; R. 63 (Judgment and Commitment Order)). Bell was further ordered to pay $50 to the Victims of Violent Crime Compensation Fund (11/27/23 Tr. 107; R. 63). Bell filed a timely notice of appeal on November 28, 2023 (R. 67 (Notice of Appeal)).

The Motion Hearing

The Government's Evidence

Byron Alarcon, an officer with the Metropolitan Police Department and assigned to the Crime Suppression Unit, testified that on July 4, 2023, at approximately 3:20 p.m., he was patrolling in the vicinity of the 5500 block of 7th Street, NW (11/27/23 Tr. 18–19). Officer Alarcon and

his partner, Officer Clifford,[2] entered an alleyway in the 5500 block of 7th Street, a high-crime area known for narcotics (*id.* at 20). This was a cross-shaped alley that led onto both 7th and Kennedy Streets and was abutted by residential buildings (*id.*).

Upon driving into the alley in a marked patrol car, the officers observed a group of individuals in the rear of a vacant property which was under construction and Officer Clifford asked them to leave the property (11/27/23 Tr. 21, 43, 48–49). The officers noticed several items on the vacant lot after the group walked away, including a blue, cloth, Walmart bag (*id.*). The officers then exited their vehicle to canvas the vacant property (*id.*).

Officer Alarcon walked over to the blue bag (which was about two feet by two feet) and, without manipulating it, looked inside using his flashlight to better see within (11/27/23 Tr. 22, 24, 54). Officer Alarcon observed the top of a mylar bag inside of the blue bag (*id.* at 22). As Officer Alarcon explained, mylar bags are often used to package

[2] Officer Clifford's first name was not stated during the hearing testimony.

marijuana flower, and this bag appeared to be consistent with such marijuana packaging (*id.* at 23).

Officer Alarcon then addressed the group of individuals — who had walked a short distance away — seeking to determine if the bag belonged to any of them (11/27/23 Tr.23–24). He informed them that, based on what he saw in the bag, what he believed it contained, and its apparent abandoned nature, he would have to take it to be destroyed (*id.* at 23–25, 55; Government Exhibit (Gov't Ex.) 1 at 15:15:30–50).[3] An individual, later identified as Bell, walked over to Officer Alarcon stating, "[T]hat's my bag. That's my weed, I'm gonna be honest. I ain't gonna let nobody else take the blame for my weed or nothin'." (11/27/23 Tr. 25; Gov't Ex. 1 at 15:15:34–44.) Bell picked up the blue bag and his cellphone, which had also been left there, and took several steps away from Officer Alarcon (11/27/23 Tr. 55; Gov't Ex. 1 at 15:15:48–53). Officer Alarcon stated to Bell, "[H]ey, lemme (sic) see, open that for me. How much you got here?" (Gov't Ex. 1 at 15:15:53–55; 11/27/23 Tr. 25, 60). Bell responded by

[3] Government Exhibit 1 was a copy of body-worn camera footage (11/27/23 Tr. 27–28). The government intends to supplement the record on appeal with this exhibit.

handing the blue bag to Officer Alarcon, and Officer Alarcon then set the bag on the ground (Gov't Ex. 1 at 15:15:54–58; 11/27/23 Tr. 31). Officer Alarcon asked Bell to show him what was in the bag saying, "[T]his is your bag, right? Let me see what's in there man, come on" (Gov't Ex. 1 at 15:15:58–16:01; 11/27/23 Tr. 31). Bell gave no verbal response and instead pulled out the mylar bag and handed it to Officer Alarcon (Gov't Ex. 1 at 15:16:01–07; 11/27/23 Tr. 31). Officer Alarcon determined that the mylar bag contained marijuana,[4] and estimated that it had filled about half of the space within the blue bag (11/27/23 Tr. 25–26, 67). Officer Alarcon also recovered a digital scale with green residue on it and several Ziploc bags from within the blue bag (*id.* at 26). Officer Alarcon further determined that the marijuana contained within the mylar bag

[4] At the suppression hearing, Bell stipulated that the substance contained within the mylar bag was marijuana (11/27/23 Tr. 12–13, 38). The bag itself was introduced into evidence, and in fact was opened to reveal its contents during the hearing (see *id.* at 33–37). We are moving to supplement the record with a photograph of that exhibit (Government Exhibit 2) as well as of Government Exhibit 3 (the small plastic bags and the digital scale), depicting how the exhibits it appeared before the hearing, so that the Court can see the exhibits as they were presented to the trial court. The government is also moving to supplement the record with a second photo depicting a top-down view looking into the mylar bag showing its contents as Officer Alarcon and the court would have seen.

was "in excess" of the "amount . . . of marijuana that [one] can have on [a] public space" (*id.* at 31). Bell was subsequently placed under arrest (*id* at 26.). While conducting a search incident to arrest, officers discovered over $250 in cash on Bell's person (*id.* at 26–27).[5]

The defense presented no evidence.

The Trial Court's Rulings and Findings

In denying the motion to suppress, the trial court ruled that Officer Alarcon had probable cause to search the blue bag after observing the group of individuals walk away from the vacant lot, noticing the mylar bag within the two-foot-by-two-foot blue bag, and hearing Bell answer that the "weed" was his after the officer asked the group if the bag belonged to anyone (11/27/23 Tr. 94). The court found that Bell's response, coupled with Officer Alarcon's observation of the mylar bag and his training and experience with marijuana packaging, were sufficient to justify the search of the blue bag (*id.* at 94–95). The court further found, in the alternative, that Bell voluntarily consented to the search when, after Officer Alarcon asked him how much marijuana Bell had in the bag

[5] At the suppression hearing, Bell stipulated to the presence and the amount of money recovered (11/27/23 Tr. 26–27).

and to let him see inside, Bell gave no verbal response but instead pulled out the mylar bag and handed it to the officer (*id.*).

The Stipulated Trial

After the denial of the motion to suppress the parties agreed to a stipulated trial (11/27/23 Tr. 100–01). In addition to the evidence admitted at the suppression hearing, and Bell's prior stipulations that the substance contained within the mylar bag was marijuana and to the presence of over $250 cash on his person, Bell further stipulated that he intended to distribute the marijuana that was recovered in the mylar bag (*id.* at 97). When asked by the court if the parties had agreed on a stipulation as to the specific amount of marijuana, Bell's counsel told the court "I think it's just the intent to distribute is what's needed for — the finding" (*id.*). The court subsequently found Bell guilty as charged (*id.* at 101).

SUMMARY OF ARGUMENT

Contrary to Bell's assertion on appeal, the police had probable cause to search the blue bag. Officer Alarcon had observed a large mylar bag consistent with packaging for marijuana flower inside of the blue

bag, which initially had been abandoned at the construction site. When Officer Alarcon asked who the bag belonged to, Bell claimed ownership over the blue bag and its contents, and further spontaneously stated that the blue bag contained marijuana. Even assuming arguendo that this was not sufficient for probable cause, Bell voluntarily handed both the blue bag and the mylar bag to Officer Alarcon when the officer asked to see what was inside, and the trial court accordingly did not clearly err in finding that Bell implicitly consented to the search.

Bell's challenge to the sufficiency of the evidence as to the amount of marijuana, raised for the first time on appeal, is invited error and should not be considered by this Court. Bell agreed to resolve the case through a stipulated trial, and when directly asked by the court if Bell was stipulating to a specific amount of marijuana, Bell's counsel expressly told the court that Bell only needed to stipulate to distribution for the court to make a finding of guilt. Bell's counsel accordingly invited any error and to permit his current challenge on appeal would be a manifest injustice and promote gamesmanship.

Even if this Court entertains Bell's current challenge, and assuming arguendo that the evidence did not sufficiently establish the

requisite amount of marijuana to prove completed PWID marijuana, there was sufficient evidence for this Court to direct the trial court to enter judgment on attempted PWID marijuana as a lesser included offense. Officer Alarcon testified that the amount of marijuana he discovered in Bell's possession was in excess of the legal limit, testimony that was supported by the sheer size of the bag and visible amount of marijuana therein. Furthermore, the presence of tools of distribution, including a digital scale and plastic Ziploc bags, considered together with the large sum of cash on Bell's person and Bell's stipulation that he intended to distribute the marijuana in his possession, were more than sufficient for the court to find that Bell intended to distribute the marijuana for remuneration.

ARGUMENT

I. The Trial Court Did Not Err in Denying Bell's Motion to Suppress.

The trial court properly denied Bell's motion to suppress as Officer Alarcon possessed probable cause to search the blue bag after observing a mylar bag within, consistent with marijuana packaging, and Bell informed Officer Alarcon that the bag belonged to him and contained

marijuana. However, even if Officer Alarcon had lacked probable cause, the trial court did not clearly err in finding that Bell consented to the search when he voluntarily handed both the blue bag and the mylar bag to Officer Alarcon.

A. Standard of Review and Applicable Legal Principles

In reviewing a trial court's denial of a motion to suppress evidence on Fourth Amendment grounds, this Court "defer[s] to the trial court's findings of fact 'unless they are clearly erroneous,'" *Mayo v. United States*, 315 A.3d 606, 616 (D.C. 2024) (quoting *Hooks v. United States*, 208 A.3d 741, 745 (D.C. 2019)), and "view[s] those facts, and the reasonable inferences that stem from them, in the light most favorable to the government." *Sharp v. United States*, 132 A.3d 161, 166 (D.C. 2016); *Mayo*, 315 A.3d at 617. Legal issues raised by the suppression motion are reviewed de novo. *Mayo*, 315 A.3d at 616.

B. Discussion

1. Officers' Had Probable Cause to Search the Blue Bag.

Officer Alarcon possessed probable cause to search the blue bag at the time he asked Bell to open the bag and show him how much

marijuana was inside (see Gov't Ex. 1 at 15:15:53–54; 11/27/23 Tr. 25, 60). By that time, Officer Alarcon had observed the blue cloth bag, left behind by a group who apparently were not authorized to be present on a vacant construction site, in a high-crime area known for narcotics (*id.* at 20, 22–25). After looking into the already partially opened blue bag, the officer had observed the top of a mylar bag, which was consistent in his experience with the drug packaging used with marijuana (*id.*at 22–23). Additionally, after Officer Alarcon warned the group that the bag would be seized and destroyed, Bell had approached and expressly informed Officer Alarcon that it was his bag and that it did in fact contain marijuana (*id.* at 25; Gov't Ex. 1 at 15:15:34–44). Moreover, when Bell admitted to ownership of the bag and the presence of marijuana, he told Officer Alarcon, "I ain't gonna let nobody else take the *blame* for my weed or nothin'" — indicating that Bell knew the quantity of the drug therein was not lawful (Gov't Ex. 1 at 15:15:34–44 (emphasis added)). Finally, the mylar bag — as indicated in the body-worn camera footage — was not a small object, but sufficiently sizeable that it nearly filled the blue bag, and Officer Alarcon could tell it contained more than the legal amount of marijuana (11/27/23 Tr. 31).

"'[A]ll that is required for probable cause' is a 'fair probability . . . that drugs or evidence of a drug crime . . . will be found.'" *West v. United States*, 100 A.3d 1076, 1087 (D.C. 2014) (quoting *Florida v. Harris,* 568 U.S. 237, 246 n. 2 (2013)).

> [Probable cause] merely requires that the facts available to the officer would warrant a man of reasonable caution in the belief . . . that certain items may be . . . useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false.

Id. (quoting *Texas v. Brown*, 460 U.S. 730, 742 (1983) (plurality opinion) (cleaned up)). When he asked Bell to show him the blue bag's contents, Officer Alarcon knew (based on both his own observations and Bell's spontaneous admission) the blue bag contained marijuana; he knew the bag belonged to Bell; and based upon Bell's statement that "I ain't gonna let nobody else take the blame for my weed or nothin'," Officer Alarcon had reason to believe the marijuana contained within the blue bag was likely in excess of the legal limit. Therefore, as there was a "fair probability . . . that drugs or evidence of a drug crime . . . would be found" in the blue bag, officers had probable cause to search it. *Harris*, 568 U.S. at 246 n. 2; *West*, 100 A.3d at 1087; *Jenkins v. District of Columbia*, 223 A.3d 884, 890 (D.C. 2020) (explaining that probable cause requires only

a fair probability of a crime, which is less than a preponderance of the evidence).

Challenging this common-sense conclusion, Bell argues (Appellant's Brief (Br.) 8–11) that he was "seized" when Officer Alarcon directed Bell to stop walking away with the blue bag and then asked to see what was inside. He further claims (Br. 11–13) that Officer Alarcon lacked probable cause to make an "arrest" at that point, because the officer did not know for certain that Bell had more than two ounces of the drug (i.e., the legal limit for public possession in the District). Bell presumably claims that this unlawful arrest tainted the officer's subsequent recovery of the evidence inside the bag.

Bell's argument fails, however, because Officer Alarcon did not effectuate an arrest of Bell before asking to see inside the bag. Rather, at most Officer Alarcon conducted a *Terry*[6] stop by asking Bell to let him see inside the bag when Bell started to walk away — a "seizure" for which only reasonable suspicion, not probable cause to arrest, was required. *See, e.g., In re I.J.*, 906 A.2d 249, 257 (D.C. 2006) ("In *Terry*, the [Supreme

[6] *Terry v. Ohio*, 392 U.S. 1 (1968).

C]ourt approved brief investigatory stops, based on a police officer's reasonable articulable suspicion that a person may be involved in criminal activity."). The officer did not lay hands on Bell or handcuff him — even though such actions have been held to be lawful during *Terry* stops, *see In re I.J.*, 906 A.2d at 257–58 — but instead merely delayed Bell's departure to ask him about the quantity of marijuana in the mylar bag. And as described supra, the officer's observations and Bell's own admissions gave the officer, at a minimum, "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant[ed]" an "investigatory stop" of Bell. *See Nixon v. United States*, 870 A.2d 100, 103 (D.C. 2005) (quoting *Terry*, 392 U.S. at 21).

2. Bell Consented to the Search of the Blue Bag By Voluntarily Handing the Mylar Bag to Officer Alarcon.

Even if this Court were to determine Officer Alarcon lacked probable cause to search the blue bag, the trial court's denial of the suppression motion was still proper because Bell voluntarily gave both the blue bag and the mylar bag containing marijuana to Officer Alarcon. The voluntariness of consent is a factual question to be judged under the

totality of the circumstances and is reviewed for clear error. *Ward-Minor v. United States*, 316 A.3d 438, 444–45 (D.C. 2024) (citing *Henderson v. United States*, 276 A.3d 484, 489 (D.C. 2022)). While consent may be implied, it requires an affirmative act by the individual to be searched. *Id.* at 446 (quoting *Hawkins v. United States*, 248 A.3d 125, 129 (D.C. 2021).

That affirmative act was present here. When Bell began to walk away after collecting the blue bag, Officer Alarcon stated, "[H]ey, lemme see, open that for me. How much you got here?" (Gov't Ex. 1 at 15:15:53–54;11/27/23 Tr. 25, 60). However, Bell did not verbally answer or open the blue bag for Officer Alarcon as requested. Rather, Bell went beyond the scope of any request and made the affirmative act of handing the blue bag to Officer Alarcon (Gov't Ex. 1 at 15:15:54–58; 11/27/23 Tr. 31). Officer Alarcon then placed the bag on the ground and addressed Bell again stating, "[T]his is your bag, right? Let me see what's in there man, come on" (Gov't Ex. 1 at 15:15:58–16:01; 11/27/23 Tr. 31). Bell then performed yet another affirmative act and pulled out the mylar bag and handed it to Officer Alarcon (Gov't Ex. 1 at 15:16:01–07; 11/27/23 Tr. 31). Given that Officer Alarcon never asked Bell to hand him either the blue

bag or the mylar bag, these were both voluntary, affirmative acts by Bell and therefore the trial court did not clearly err in its finding. *See, e.g., Brown v. United States*, 983 A.2d 1023, 1027 (D.C. 2009) (holding that although the appellant "did not give explicit, verbal permission" to search inside a pill bottle, she "impliedly consented to the search by handing the bottle to [the officer]); *Henderson*, 276 A.3d at 491–92 (holding officers' request to "pop the hood for us," and appellant's response of pulling the car hood latch and then walking away implicitly gave consent for officers to lift open the hood of the car and use a flashlight to observe what was in plain sight).

Bell nevertheless argues (Br. 13–14) that he did not give voluntary consent because his actions were in response to "command[s]" from Officer Alarcon. The trial court, however, did not find that Officer Alarcon commanded or ordered Bell to let him see inside the blue bag — instead, the court's finding of voluntariness implied that the court was also finding that the officer requested to see inside (see 11/27/23 Tr. 94–95). *See United States v. Gamble*, 77 F. 4th 1041, 1045 (D.C. Cir. 2023) ("A district court's assessment of whether an officer's statements amounted to 'commands' rather than 'questions' would, if challenged, be reviewed

only for clear error."); *see also United States v. Gross*, 784 F.3d 784, 788 (D.C. Cir. 2015) (holding that officer merely asking, "Can I see your waistband?" was not a show of authority). Because neither the officer's specific words nor tone of voice compelled the conclusion that he was issuing commands rather than making a request (see Gov't Ex. 1 at 15:15:58–16:01), Bell has not — and cannot — show clear error in the trial court's finding that Bell gave voluntary consent. *See Anderson v. Bessemer City*, 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.").

II. The Trial Court Did Not Err When It Found Bell Guilty of Possession with Intent to Distribute a Controlled Substance.

Bell asserts the trial court erred in convicting him of PWID marijuana, because the government failed to prove that the amount of marijuana recovered from Bell exceeded the legal limit of two ounces, or that he intended to sell the marijuana (Br. 14). Bell's arguments are unavailing. He raises these issues for the first time on appeal and, as he took contrary positions before the trial court, he is barred from taking a new position now on appeal and any error was invited by Bell. In the

alternative, even if this Court entertains his argument and concludes that evidence of the amount involved was inconclusive, there was sufficient evidence to sustain a conviction for attempted PWID marijuana.

A. Standard of Review and Applicable Legal Principles

In reviewing a claim of insufficient evidence, this Court "must view the evidence in the light most favorable to the government, giving full play to the [fact finder's] right to determine credibility, weigh the evidence, and draw justifiable inferences of fact." *Ewing v. United States*, 36 A.3d 839, 844 (D.C. 2012) (citation omitted). *See also Bolden v. United States*, 835 A.2d 532, 534 (D.C. 2003) (defendants challenging sufficiency of evidence "face a difficult burden"). "The evidence must be sufficiently weighty to allow a finding of guilt beyond a reasonable doubt, but it need not compel such a finding, nor must the government negate every possible inference of innocence." *Johnson v. United States*, 40 A.3d 1, 14 (D.C. 2012) (citation omitted)). Instead, there merely must be "some probative evidence on each of the essential elements of the crime" from which a reasonable person could fairly find guilt beyond a reasonable

doubt. *Jennings v. United States*, 431 A.2d 552, 555 (D.C. 1981) (citation omitted). This Court will vacate a conviction 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).

"In reviewing a bench trial, this [C]ourt will not reverse a conviction for insufficient evidence unless appellant establishes that the trial court's factual findings were plainly wrong or without evidence to support them." *Joiner-Die*, 899 A.2d at 764 (citation and internal quotation marks omitted). "Any factual finding anchored in credibility assessments derived from personal observations of the witnesses is beyond appellate reversal unless those factual findings are clearly erroneous." *Stroman v. United States*, 878 A.2d 1241, 1244 (D.C. 2005).

To support a conviction for PWID of a controlled substance generally under D.C. Code § 48-904(a)(1), the government must prove "(1) the elements of possession, namely that the defendant knowingly exercised direct physical custody or control over an illegal amount of that substance, and (2) as an additional element, a defendant's purpose to distribute the amount possessed." *Kornegay v. United States*, 236 A.3d 414, 418 (D.C. 2020) (cleaned up). With respect to marijuana, however,

amendments enacted in 2015 "carve[ ] out an exception from the crime of possession and provide[ ] that 'it shall be lawful, and shall not be an offense . . . for any person 21 years of age or older to . . . [p]ossess . . . marijuana weighing 2 ounces or less." *See id.* (quoting D.C. Code § 48-904.01(a)(1)(A)). Those amendments further prohibited, however, "sell[ing], offer[ing] for sale, or mak[ing] available for sale any marijuana[,]" D.C. Code § 48-904.01(a)(1)(D), or "[t]ransfer[ring]" marijuana to another person marijuana in excess of one ounce, or for "remuneration". *See* D.C. Code § 48-904.01(a)(1)(C).

"To prove attempted PWID, '[t]he government must establish conduct by the defendant that is reasonably adapted to the accomplishment of the crime of possession of the proscribed substance, and the requisite criminal intent.'" *Bruce v. United States*, 305 A.3d 381, 399 (D.C. 2023) (quoting *Seeney v. United States*, 563 A.2d 1081, 1083 (D.C. 1989)). To find the requisite criminal intent, "'[t]here must be some action, some word, or some conduct that links the [defendant] to the narcotics and indicates that he had some stake in them, some power over them.'" *Id.* (quoting *James v. United States*, 39 A.3d 1262, 1269 (D.C. 2012)) (alterations in original).

B. Discussion

1. Bell Is Barred Under the Invited Error Doctrine from Assuming a Contrary Position from the One He Took Before the Trial Court.

Bell did not raise his sufficiency challenge at the stipulated trial, instead raising it for the first time now on appeal. To the contrary, when asked directly by the trial court whether the parties had agreed to stipulate to a specific amount of marijuana in Bell's possession, Bell's counsel represented to the court, "I think it's just the intent to distribute is what's needed for — the finding" (11/27/23 Tr. 97). Having conceded this point before the trial court, Bell should be barred from now assuming a contrary position on appeal under the invited error doctrine.

"[T]he invited error doctrine 'precludes a party from asserting as error on appeal a course that [they have] induced the trial court to take.'" *Young v. United States*, 305 A.3d 402, 430 (D.C. 2023) (quoting *Preacher v. United States*, 934 A.2d 363, 368 (D.C. 2007))). This rule has long been recognized in the District, with the former Supreme Court of the District of Columbia stating over a century ago that "[a] party cannot be heard to complain in an appellate court of that which he has co-operated in doing in a lower court." *Evans v. Schoonmaker,* 2 App. D.C. 62, 71–72 (1893).

Bell affirmed to the trial court that he was agreeing to a stipulated trial, thereby preserving his right to appeal the denial of the motion to suppress (11/27/23 Tr. 100; Br. 1) — not the sufficiency of the evidence of guilt. And Bell further told the court that he was stipulating to his possession of marijuana, and his intent to distribute that marijuana (*id.* at 12–13, 38, 97). Furthermore, when the court directly asked if the parties had "agree[d] on a specific amount," Bell's counsel affirmatively responded that no such stipulation was necessary, because only "the intent to distribute" was "needed" (*id.* at 97). The trial court, relying in large part upon Bell's representations and the stipulations found him guilty (*id.* at 101).[7]

Bell had the opportunity to object to the court's finding, or to challenge the sufficiency of the evidence and assert — as he does now on appeal — that his stipulations alongside the evidence admitted at the suppression hearing were insufficient evidence upon which to convict

[7] Indeed, it appears likely that the trial court knew and understood that the elements of PWID marijuana required a finding of over two ounces as it engaged in a prolonged discussion with Bell's counsel regarding the effect of the specific amount of marijuana on probable cause (11/27/23 Tr. 79–91).

him, but he chose not to. Indeed, had he done so, the government easily could have introduced evidence establishing that the amount of marijuana recovered from Bell was well in excess of the legal limit — in fact, it weighed over 10 ounces (see 11/27/23 Tr. 102 (statement of prosecutor that Bell possessed more than 10 ounces of marijuana); R.9 (Gerstein) (noting that amount of marijuana weighed 13.1 ounces)). Having directly induced the trial court to accept the stipulated trial — i.e., the resolution of the case negotiated by the parties — Bell should be precluded from asserting an error on appeal which he helped induce the trial court to make. *Young*, 305 A.3d at 430.

Moreover, Bell sought to enter into a stipulated trial so as to preserve his right to challenge on appeal the denial of his motion to suppress the evidence on Fourth Amendment grounds (11/27/23 Tr. 100). By choosing to enter into a stipulated trial to achieve that result, Bell essentially agreed that the elements of the offense would be met — i.e., he effectively pled guilty. *See e.g.*, *Glenn v. United States*, 381 A.2d 772, 775–76 (D.C. 1978) (finding a bench trial on a stipulated record was tantamount to an admission of guilt); *Hopkins v. United States*, 84 A.3d 62, 66 (D.C. 2014). Indeed, to permit a defendant to take advantage of

the court's, government's, and his own counsel's error and escape conviction under these circumstances would undermine the purpose of stipulated trials and incentivize gamesmanship. As this Court has stated, "[a] criminal trial is not a game but 'a quest for truth.'" *Womack v. United States*, 350 A.2d 381, 383 (D.C. 1976) (quoting *Gregory v. United States*, 369 F.2d 185, 188 (D.C. Cir. 1966)); *see also United States v. Nixon*, 418 U.S. 683, 709 (1974) (quoting *Berger v. United States,* 295 U.S. 78, 88 (1935)) ("The twofold aim of criminal justice is that guilt shall not escape or innocence suffer.") Although we assume that Bell's counsel in this case simply misunderstood the necessary elements of the offense, Bell invited the error he now complains of. *See United States v. Chiddo*, 737 F. App'x 917, 920–22 (11th Cir. 2018) (refusing to review the sufficiency of the defendant's factual basis under the invited error doctrine where a defendant signed a plea agreement, acknowledged he had reviewed the indictment with counsel, asserted the stipulated facts supported a conviction, and he then failed to object to the factual basis of the conviction at the plea hearing and at sentencing) (citing *United States v. Love*, 449, F.3d 1154, 1157 (11th Cir. 2006)); *United States v. Pritchett*, 170 F. App'x 252, 254–55 (4th Cir. 2006) (holding defendant invited error

when he withdrew plea to second count and entered guilty plea to first count without a new factual basis being provided); *United States v. Clifford*, No. 21-8004, 2021 WL 5575557 at *1 (10th Cir. Nov. 30, 2021) (finding defendant invited any error when his counsel provided the factual nexus between possession of a firearm and conspiracy to distribute a controlled substance, defendant adopted his counsel's statement, and the district court accepted those statements) (unpublished).

2. In the Alternative, the Evidence was Sufficient to Enter Conviction for Attempted PWID (Marijuana).

In the alternative, even assuming arguendo that this Court entertains Bell's sufficiency challenge, the evidence would at least support conviction for attempted PWID (marijuana), as a lesser included offense of PWID (marijuana). The evidence admitted at the suppression hearing clearly demonstrated that Bell possessed the blue and mylar bags, and he stipulated that the mylar bag contained marijuana (Gov't Ex. 1 at 15:15:34–44; 11/27/23 Tr. 12–13, 38). Thus, the only elements Bell challenges on appeal are whether the amount of marijuana was over

two ounces, and whether he intended to sell the marijuana in his possession for money (rather than distribute it for free) (Br. 16).

With regard to the weight of the marijuana in Bell's possession, "the amount of narcotics the defendant had in his possession, like any element of any crime, can be proven by circumstantial evidence." *Bernard v. United States*, 575 A.2d 1191, 1193 (D.C. 1990) (quoting *Jones v. United States*, 318 A.2d 888, 889 (D.C. 1974)).[8] Officer Alarcon, an MPD officer with over ten years as a law enforcement officer (11/27/23 Tr. 18), testified that the amount of marijuana in the mylar bag was in excess of the amount legally permitted in a public space (*id.* at 31). Additionally, the mylar bag of marijuana itself was introduced into evidence by the government (*id.* at 32, 36), where it could be directly observed by the court.[9] *Newman v. United States*, 49 A.3d 321, 325 (D.C.

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[8] In conducting a review of the record in this case, the undersigned requested an MPD officer take additional photographs of the heat-sealed mylar bag and its contents to determine whether the weight had been written on one of the attached labels or forms. The photographs, however, indicate that the weight of marijuana was not recorded on any of the labels or forms introduced at trial.

[9] The trial court was further able to see the full amount of marijuana recovered when it was admitted into evidence. Counsel for the government opened the heat-sealed bag so the court could see the

(continued . . .)

2012) (noting "[i]t is within the province of the fact finder to draw reasonable inferences from the evidence presented") (quoting *Smith v. United States*, 837 A.2d 87, 93 n. 3 (D.C. 2003)). Moreover, Officer Alarcon testified that the mylar bag took up approximately half of the two-foot-by-two-foot blue, cloth bag (*id.* at 24, 67) — and as noted supra, the mylar bag was indeed quite large (see Gov't Ex. 1 at 15:16:04–06). Furthermore, Bell's statement to Officer Alarcon, "I ain't gonna let nobody else take the blame for my weed or nothin'" (Gov't Ex. 1 at 15:15:34–44), clearly implied that Bell knew, or at least believed, that the quantity of marijuana in the bag was in excess of the legal limit; had Bell believed the quantity was less than two ounces, he would not have felt any need to take legal "blame" for it.[10]

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marijuana contained within (11/27/23 Tr. 33–36). Indeed, in opening the heat-sealed bag containing the marijuana, counsel for the government accidently spilled marijuana onto the courtroom floor with the court noting "it looks like it's in bunches" (*id.* at 35). In fact, the quantity on the floor was sufficient for the court to inquire if there was a broom nearby and for the government to note that a vacuum would be required in order to clean it up (*id.* at 34–35).

[10] It is reasonable to assume Bell knew possessing two ounces or less of marijuana is not a crime in D.C. as the statute decriminalizing possession of this amount of marijuana had been in force for nearly a decade. *See* 62 D.C. Reg. 880 (January 23, 2015).

Additionally, in stipulating that he intended to distribute marijuana for purposes of a charge of PWID a controlled substance, Bell necessarily implied he intended to engage in illegal, not legal conduct — i.e., that he intended to distribute more than two ounces of marijuana or that he intended to do so for money (*id.* at 97). Indeed, because attempted PWID marijuana can be proven not only by showing weight in excess of two ounces, but also by showing intent to distribute for remuneration, Bell's admissions and the evidence found in the blue bag with the marijuana were more than sufficient. As this Court has noted, "[i]ntent to distribute can be inferred when drugs are found together with drug distribution paraphernalia . . . ." *McRae v. United States*, 148 A.3d 269, 274 (D.C. 2016). As described supra, the blue bag contained, alongside the marijuana, a digital scale with green residue and several Ziploc bags, and officers further discovered over $250 in cash on Bell's person, all indications that the marijuana was intended for sale (11/27/23 Tr. 26–27). *See, e.g., Barnes v. United States*, 760 A.2d 556, 558 (D.C. 2000) (listing drug distribution paraphernalia including an electronic scale and plate containing apparent narcotics residue and Ziplock bags); *Bruce*, 305 A.3d at 400 ("As we know beyond peradventure, drug trafficking and

large sums of cash go together.") (quoting *United States v. Farrell*, 921 F.3d 116, 137 n.24 (4th Cir. 2019)).

Bell's reliance (Br. 16) on this Court's decision in *Kornegay* is misplaced. That decision only addressed the elements for the completed offense of PWID marijuana; here, there was more than sufficient evidence to prove attempted PWID marijuana. Bell possessed drug paraphernalia for packaging and distributing marijuana, including plastic baggies and a digital scale with residue (11/27/23 Tr. 26), and unlike in *Kornegay*, Bell stipulated that he intended to distribute the marijuana in his possession (*id.* at 97). Furthermore, there was a visibly and significantly larger quantity of marijuana in the present case than the 1.73 ounces in *Kornegay, see* 236 A.3d at 416. Additionally, Bell was found to have over $250 in cash on his person (*id.* at 26–27). These facts, when combined with the fact that Bell was hanging out with a group of people on a vacant construction site in an alley, and the common-sense understanding that people do not generally measure out and give away drugs for free, permit a reasonable factfinder to infer that Bell was intending to distribute the marijuana for remuneration and is thus guilty of attempted PWID marijuana. *Bruce*, 305 A.3d at 399–400; *See Toyer v.*

United States, 325 A.3d 417, 425 (D.C. 2024) (holding evidence regarding how the drugs were packaged, the amount of money recovered alongside the drugs, and the lack of any paraphernalia for personal consumption of the drugs was sufficient to find defendant guilty of PWID); *Covington v. United States*, 278 A.3d 90, 99 (D.C. 2022) (internal marks omitted) (quoting *(Floyd) Long v. United States*, 156 A.3d 698, 714 (D.C. 2017)) (Factfinders "need not check their common sense at the courthouse doors," and "are permitted to use the saving grace of common sense and their everyday experience to draw reasonable inferences from the evidence presented.").

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, Thomas D. Engle, Esq., tomengle@burkaengle.com, on this 16th day of April, 2025.

/s/
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