BRIEF FOR APPELLEE

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 24-CF-191

MARQUETTE JORDAN, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

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

Cr. No. 2018-CF1-6586

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II. Whether the trial court erred in admitting evidence that Jordan rummaged through the decedent's pockets after stabbing him and shortly thereafter was found in possession of, or in close proximity to, the decedent's belongings, where (1) the rummaging evidence was invited and, in any event, was not plainly erroneous; (2) the evidence was properly admitted under *Johnson v. United States*, 683 A.2d 1087 (D.C. 1996) (en banc), and *Drew v. United States*, 331 F.2d 85 (D.C. Cir. 1964); and (3) the probative value of the evidence was not substantially outweighed by the risk of undue prejudice.

III. Whether the trial court erred in admitting evidence that Jordan falsely claimed to suffer from cancer, where the probative value of this consciousness-of-guilt evidence was not substantially outweighed by the risk of undue prejudice, and where, in any event, this evidence did not materially affect the verdict.

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COUNTERSTATEMENT OF THE CASE

By indictment filed on November 29, 2018, Marquette Jordan was charged with first-degree murder while armed, in violation of D.C. Code §§ 22-2101, -4502; robbery while armed, in violation of D.C. Code §§ 22-2801, -4502; two counts of threats, in violation of D.C. Code § 22-1810; assault with a dangerous weapon ("ADW"), in violation of D.C. Code § 22-402; simple assault, in violation of D.C. Code § 22-404; and carrying a dangerous weapon ("CDW"), in violation of D.C.

Code § 22-4504(a) (Record ("R.") II 438-440 (Indictment)).[1] A jury trial commenced on March 28, 2022, before the Honorable Rainey Brandt (R.I 53 (Docket)). At the conclusion of the government's case, the government dismissed the two counts of threats and the ADW charge (R.I 57 (Docket)). On April 12, 2022, the jury returned a partial verdict acquitting Jordan of robbery while armed (4/12/22 Tr. 10). On April 18, 2022, the jury returned another partial verdict, acquitting Jordan of first-degree murder while armed (4/18/22 Tr. 35). The jury was unable to reach a verdict on the lesser-included offense of second-degree murder while armed or the remaining charges (CDW and simple assault), and the court declared a mistrial on those charges (*id.* at 35-36).

A retrial of those three charges began on November 15, 2023 (11/15/23 Tr. 16). On December 19, 2023, the jury found Jordan guilty of all three counts (12/19/23 Tr. 4). On March 1, 2024, the court sentenced Jordan to consecutive terms of incarceration of 30 years, followed by five years of supervised release, for second-degree murder while armed, and two years, followed by three years of supervised release, for CDW (3/1/24 Tr. 40-41). The court imposed a concurrent sentence of

[1] Record citations are to the PDF page number of the volume indicated. "Tr." refers to the transcript of the trial court proceedings on the date indicated. "App. Br." refers to appellant's brief.

180 days' incarceration for simple assault (*id.*). On March 3, 2024, Jordan filed a timely notice of appeal (R. 540 (Notice of Appeal)).

The Trial

The Government's Evidence

On April 29, 2018, Ivan Lynch and Tyrone Johnson celebrated Lynch's birthday by attending a barbecue with their children at the home of Lynch's sister, Elana Lynch (11/28/23 Tr. 86-87; 12/4/23 Tr. 87). In the early morning hours of April 30, after dropping off their children, Johnson and Lynch drove to the Hyattsville metro station to pick up Jordan; Jordan's on-again-off-again girlfriend, Ashley Carmon; and Carmon's two children (11/27/23 Tr. 41-44; 11/28/23 Tr. 87-91). The group then picked up Juanice Beverly, a longtime friend of Jordan, and drove to Johnson's mother's apartment at 900 Fifth Street, SE, where they planned to "drink and smoke and hang out" (11/17/23 Tr. 114, 117, 120; 11/27/23 Tr. 49-50, 152; 11/28/23Tr. 80, 97-98).

After some time, Lynch announced that he was ready to go home (11/27/23 Tr. 56). Jordan said that he had left something in Lynch's car, and the two walked out together (11/27/23 Tr. 56-57).

When Jordan and Lynch returned twenty minutes later, Jordan appeared to be "mad" (11/27/23 Tr. 57). Carmon asked him what was wrong, and Jordan responded, "Don't ask me what's wrong. You know what's up." (*Id.* at 58.) When Carmon

repeated her question, Jordan called her a "bitch" and a "whore," threatened to "whoop her ass," and punched her in the face (11/27/23 Tr. 59-60, 97; 11/28/23 Tr. 105, 109).

Lynch intervened and told Jordan not to "yell at [Carmon] like that" (11/17/23 Tr. 122, 124; 11/27/23 Tr. 63-67; 11/28/23 Tr. 113). Jordan and Lynch then started "yelling" and "fighting" (11/17/23 Tr. 125-26; 11/27/23 Tr. 65, 69; 11/28/23 Tr. 114). Jordan pushed and punched Lynch, and Lynch tried to "wrestle [Jordan] down" to "restrain him" (11/27/23 Tr. 71, 74, 78). Johnson and Carmon told Jordan to "stop," as he was the "aggressor" (11/27/23 Tr. 73, 81; 11/28/23 Tr. 115, 119). Jordan appeared to have trouble breathing and asked Carmon for help (11/27/23 Tr. 157-58). Carmon tried unsuccessfully to pull them apart (11/27/23 Tr. 75). Beverly grabbed the two children, turned them to face the wall, and covered their eyes and ears with her hands (11/17/23 Tr. 126-27).

The fight eventually moved from the living room to the kitchen (11/27/23 Tr. 74). With Lynch on his knees still holding Jordan by the waist, Jordan reached into the dishwasher, pulled out a butcher knife, and stabbed Lynch in the back (11/27/23 Tr. 82-85; 11/28/23 Tr. 61-63).[2] Lynch fell to the floor (11/27/23 Tr. 89-90). When

[2] Johnson testified that Jordan grabbed the knife from the kitchen counter and, while on top of Lynch, swung the knife three or four times (11/28/23 Tr. 116, 155; 11/29/23 Tr. 81). When Johnson was initially interviewed by police on the night of (continued . . .)

Carmon drew close to look at Lynch, Jordan "angr[ily]" said, "I'll kill you too" (11/27/23 Tr. 90-91). Scared that she was "going to be next," Carmon ran from the apartment without a jacket, shoes, or her children (11/27/23 Tr. 98-100). Still holding a couch cushion that she had grabbed to "shield" herself, Carmon ran down the street and hid under a car (11/27/23 Tr. 91, 100-01).

After the stabbing, Jordan went through Lynch's pockets (11/29/23 Tr. 90, 122-23). Johnson told everyone to leave and called 911 (11/28/23 Tr. 119-20). At approximately 2:47 a.m., Officer Christopher John responded to the scene in a marked police car with lights and sirens activated (11/15/23 Tr. 93-95, 101). As he approached, John saw Jordan walking away from the building with two children (*id.* at 95-96, 98). Jordan did not attempt to make contact with John (*id.* at 97). After speaking with a security officer in the building, John went outside and attempted to locate Jordan, but Jordan was nowhere to be seen (*id.* at 105-06).

John and other officers proceeded to the apartment, where they found Lynch unresponsive on the floor (11/15/23 Tr. 106-07).[3] John broadcast a lookout for Jordan (*id.* at 113-14). Carmon eventually returned to the apartment shoeless and

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the murder, he denied knowing what had happened or who had killed Lynch (11/28/23 Tr. 131-33, 168).

[3] Lynch had multiple stab wounds, including three to the back and two to the left chest, one of which penetrated his heart and killed him (11/29/23 Tr. 146-47, 163-65). He also suffered "blunt force injuries" to his head, neck, torso, and extremities (*id.* at 147).

crying (*id.* at 116-17). Still holding the couch cushion, Carmon was bleeding from her forearm and nose (*id.* at 118-19).

Officer Marta Spajic was on patrol in a marked police cruiser when she saw Jordan and the two children a short distance from the apartment building, at Fifth and L Streets, SE (11/17/23 Tr. 57-58). Spajic and Jordan "locked eyes," and Jordan quickened his pace (*id.* at 59-60). Moments later, Spajic heard the lookout and made a U-turn (*id.* at 60). Jordan "took off running," with one child in his arms and the other running behind him (*id.* at 60-62, 88).

At 2:56 a.m., approximately seven minutes after Johnson called 911, Spajic stopped Jordan in the 600 block of L Street, near Van Ness Elementary School (11/17/23 Tr. 61-63; 12/5/23 Tr. 51-52).[4] Lynch's blood was on Jordan's pants and black tank top (11/17/23 Tr. 67; 12/4/23 Tr. 45-50), and Lynch's car keys were in his pocket (11/30/23 Tr. 73-74). Spajic asked Jordan whom the children belonged to, but Jordan was not forthcoming (11/17/23 Tr. 70, 84).[5] Jordan identified himself as Marquette Johnson and offered "numerous versions" of the spelling of Johnson

[4] The government introduced surveillance footage that showed Jordan walking around Van Ness Elementary School minutes before he was apprehended (11/20/23 Tr. 138-39; Govt. Ex. 428).

[5] Jordan made a series of statements in which he claimed that: he was at his cousin's house; the children belonged to his friend; Jordan took the children from either the hallway or the elevator; and Jordan did not really know the children (Govt. Exs. 424b, 424e, 424f).

(*id.* at 71). Jordan also claimed that he had cancer (Govt. Ex. 424c). Although Jordan told Spajic that he had not been "in a fight" (Govt. Ex. 424d), he gave a different account, unprompted, to another officer: "a dude tried to hurt his girlfriend" and "pull[ed] a knife on her" (11/17/23 Tr. 92, 95-96; Govt. Ex. 447a). Jordan claimed that the "knife dropped," he (Jordan) picked it up, and he and his friend then started "fighting" (11/29/23 Tr. 191-92; Govt. Ex. 447a). Jordan denied stabbing anyone (Govt. Ex. 447a).

Police canvassed the area and searched in and around the apartment but did not find a knife or any other weapon (11/17/23 Tr. 93; 11/20/23 Tr. 21, 43, 99-102; 11/30/23 Tr. 67-68). However, Lynch's cell phone was found on the sidewalk in the same block where Jordan was apprehended (11/17/23 Tr. 106, 109; 11/20/23 Tr. 38-40; 11/30/23 Tr. 69). Later, Lynch's wallet was mailed to his residence in Maryland; the return address on the envelope was Van Ness Elementary School (11/30/23 Tr. 92).

A few weeks after the murder, Jordan and Carmon got back together (11/28/23 Tr. 31). Jordan told Carmon that he was "upset" about Carmon's statements to the police (*id.*). Jordan proposed to Carmon, explaining that if they were married, she "wouldn't be able to testify against him" (11/27/23 Tr. 135).[6]

[6] Carmon refused his proposal (11/27/23 Tr. 135). Although Carmon loved Jordan, she was scared of him (11/28/23 Tr. 53). The Child and Family Services Agency had (continued . . .)

The Defense

Jordan presented no evidence. In closing, Jordan asserted several defense theories: (1) reasonable doubt based on the alleged incredibility of the government's witnesses and weaknesses in the police investigation (12/5/23 Tr. 81-102; 106-20); (2) mitigating circumstances based on the evidence that Lynch had Jordan in a "hold," and that Jordan "couldn't breathe" and called out for help (*id.* at 121-22); and (3) third-party perpetrator—i.e., that Carmon was the actual murderer, and that Johnson had assisted her in covering up the crime (*id.* at 95-97, 122-23).

SUMMARY OF ARGUMENT

The trial court did not abuse its discretion in dismissing Juror 15 and replacing him with an alternate. Two jurors separately complained that Juror 15 was unable or unwilling to participate in the deliberative process, and Juror 15 himself unequivocally stated that he could not deliberate further. The record thus amply supported the court's conclusion that Juror 15 was incapable of carrying out his duties as a juror.

Jordan invited any error in the admission of Johnson's testimony that Jordan rummaged through Lynch's pockets after stabbing him. Even if not invited, this

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previously directed that neither Carmon nor her children were to be around Jordan (*id.* at 52).

evidence did not amount to plain error. Likewise, the trial court did not abuse its discretion in admitting evidence of Jordan's possession of Lynch's keys, wallet, and cell phone shortly after the murder. This evidence was admissible under *(William) Johnson v. United States*, 683 A.2d 1087 (D.C. 1996) (en banc), and *Drew v. United States*, 331 F.2d 85 (D.C. Cir. 1964), and its probative value was not substantially outweighed by the risk of undue prejudice.

The trial court also did not err in admitting evidence of Jordan's untruthful statement to police that he suffered from cancer. This evidence was probative of Jordan's consciousness of guilt and was only minimally, if at all, prejudicial. In any event, there is no reasonable likelihood that the alleged error materially affected the verdict.

ARGUMENT

I. The Trial Court Did Not Abuse its Discretion in Dismissing a Juror During Deliberations.

Jordan claims that the trial court abused its discretion by dismissing Juror 15 during deliberations, because the court failed to apply the correct legal standard and because there was a reasonable possibility that the juror's removal stemmed from his view of the evidence (App. Br. 31-44). This claim is meritless.

A. Additional Background

On Tuesday, December 5, 2023, the jury began deliberations at 3:25 p.m. and, after approximately one hour, was excused for the night (12/5/23 Tr. 167, 173). They deliberated the entire next day (R. 481 (Note); 12/6/23 Tr. 4). The jury did not sit for deliberations the following two days (December 7 and 8) (12/5/23 Tr. 169; R. 91 (Docket)). Deliberations resumed on Monday, December 11 (12/5/23 Tr. 169-70; R. 91 (Docket), 482 (Note)), and continued without incident on December 12 and 13.[7]

On December 13, 2023, Juror 15 sent a note asking to be "removed due to financial reasons" (R. 491 (Note)). In discussing this request, the court and the parties noted that Juror 15 was retired and had not previously "raised a financial issue" (12/13/23 Tr. 12, 14). Later that day, the court and the parties questioned Juror 15 about his circumstances (*id.* at 19-29). Juror 15 explained that he worked on "construction drafting" and "permit[ting]" and was self-employed (*id.* at 19-20). He did this work to supplement his retirement income (*id.* at 25-26). He explained that he was behind on his mortgage payment, was "in a bind" financially, and was "begging" the court to excuse him (*id.* at 19-20, 26). When asked whether he had an

[7] The jurors sent several notes between December 11 and 13, mostly concerning scheduling matters or requesting to view certain evidence (R. 484, 486-89, 491-92 (Notes)). The one substantive note read: "Question on order of considering charges: In order to consider manslaughter, does the jury first need to determine, unanimously, that Marquette is NOT GUILTY of second-degree murder?" to which the court responded, "Yes, you are correct." (R. 493 (Note).)

imminent deadline for a project and whether an alternative deliberation schedule would be helpful, Juror 15 responded that he did not have anything imminently due and declined to suggest any modifications to the deliberation schedule (*id.* at 23-28).

The government and defense counsel agreed that Juror 15 should not be removed (12/13/23 Tr. 30-32). Both parties perceived that the juror was not experiencing "the crisis he's suggesting" (*id.* at 31, 37). The court agreed, stating:

> I think this job thing is a total ruse. I think he wants to get off the jury. I'm getting the vibes from him that he's tired of being here and none of us know what's going on back there, but to . . . both your points, . . . his answers weren't definitive answers. His answers were cagey[.] (*Id*. at 33.)

The court, with the agreement of the parties, ultimately instructed Juror 15 that if he had a work-related appointment at "a definitive time," they would "make every effort to accommodate it" (*id.* at 36-37; R. 495 (Note)).

The following morning, Juror 28 sent two notes to the court (12/14/23 Tr. 4). The first note read: "Could we get the 12 questions asked to us at the beginning of trial as well as all voir dire instructions?" (*id*.; R. 498 (Note)). The second note read:

> I am fearful that our jury could be held in contempt of court due to one juror showing a clear lack of willingness to participate in juror responsibilities and refusal to accept the court's structure. I feel that it was the juror's responsibility to disclose that when we were all questioned/asked to perform our duties at the start of this trial. This has nothing to do with [the] verdict, but the disregard for the system itself. (R. 500 (Note) (emphasis in original); 12/24/23 Tr. 9.)

The court sought "clarification" from Juror 28 about the meaning of her second note, prefacing its questions by instructing her not to reveal anything about the jury's deliberations (12/14/23 Tr. 13). Juror 28 explained that one juror showed a lack of "willingness to participate in conversation" (*id.*). This juror would "not say[] anything," even when asked to share his thoughts, and had a tone that suggested, "I won't participate, I can't do this" (*id.* at 14). The juror had expressly stated, "I can't make a decision" (*id.* at 15). Juror 28 noted that this had been going on for "a couple of days," and that the juror in question had at times played on his phone and not listened as fellow jurors were talking (*id.* at 15-16). Though Juror 28 was hesitant to speak for others, she observed that other jurors appeared to share her concerns (*id.* at 16, 18-19). Juror 28 ultimately revealed that the juror in question was Juror 15 (*id.* at 19).

Later that morning, Juror 13 submitted a note that read in pertinent part:

> A specific juror misunderstands the fundamental responsibilities of being a juror in a criminal trial. This juror throughout the process thought they were part of a majority decision (like in civil juries), and didn't think s/he was obligating themselves to a unanimous decision process.
>
> Now understanding that this role is part of a unanimous decision has created averseness to participating in the process due to emotional duress [and] perceived burden of a unanimous decision. This juror has made it clear that they are not comfortable making judgments against others [and] being part of this process. We believe the misunderstanding of the process of this individual from the start is why this person wasn't parsed out during voir dire. We have asked for the original 12 juror questions so that we can more thoroughly help this

> juror understand what should have been communicated from the start of this process. It is unfair to this juror [and] the greater process that s/he hadn't had the correct understanding for the past 4 weeks until now. (R. 501 (Note).)

The court took this second note as "confirmation" that there was a juror who misunderstood "th[e] process" and had started to affect the jury's "ability to deliberate effectively" (12/14/23 Tr. 22). The prosecutor suggested that the notes could not be considered "in isolation"; rather, they had to be considered together with the note from the previous day and the court's voir dire of Juror 15 (*id.* at 22-23). The court agreed that the second note was "about the same juror" (*id.* at 23).

After a lunch break, the court and the parties discussed the appropriate voir dire of Juror 15 (12/14/23 Tr. 31-37). Defense counsel indicated that they would leave the questioning to the court's discretion but urged the court to determine whether the juror had a "closed mind" or a "dissenting mind" (*id.* at 31, 33). The court recognized that voir dire under these circumstances was "precarious," but that it was necessary to determine (1) whether the juror was "unwilling to participate in the deliberations," and (2) whether he understood "his obligation as a member of this jury" (*id.* at 32-33).[8]

[8] The court and the parties agreed that the court would have to be careful in questioning Juror 15 after what transpired the day before, because "he's going to say yes to any question that gets him out of here" (12/14/23 Tr. 34-36). The court remarked that Juror 15's "body language and everything from yesterday" suggested as much (*id.* at 35).

The court prefaced its voir dire of Juror 15 by advising him not to reveal anything about the jury's deliberations. The court then questioned Juror 15 as follows:

> The court: [W]hen the Court read the final jury instructions to the jury, before the jury started to deliberate, did you understand the Court's instructions?
>
> The juror: No.
>
> The court: What is it about the Court's instructions that you did not understand?
>
> The juror: I didn't understand that we all have to come to the same agreement.
>
> . . . .
>
> The court: So when the jury instruction was read that reads a verdict must represent the considered judgment of each juror and in order to return a verdict each juror must agree on the verdict. In other words, your verdicts must be unanimous, you're telling us that you did not understand that?
>
> The juror: Correct.
>
> . . . .
>
> The court: You and your fellow jurors have been deliberating for four days and some change now, not counting today. Have you been participating in those deliberations?
>
> The juror: Yes.
>
> The court: Okay. And understanding that . . . some of us are active participants, meaning we like to talk a lot.
>
> The juror: Yeah.

The court: And others of us are more passive participants, meaning we sit back and we listen, but when a question is asked of us, we answer the question as best we can. Do you understand the difference?

The juror: Yeah.

The court: Which category . . . would best describe the type of person you are in the deliberation process? Are you an active talking all the time person, are you more sit back and listen and assess?

The juror: I think we all was active and –

The court: No, no, no, only you.

The juror: Okay. Yeah, I was active. . . .

The court: So you talk, you engage –

The juror: Yeah.

The court: – with your fellow jurors?

The juror: Yes.

The court: Okay. . . . [S]o the following sentence is true or false: I have been an active participant in the deliberations.

The juror: Yes.

. . . .

The court: Juror Number 15, . . . going back to the jury instructions, . . . how has the knowledge of the fact that the verdict must be unanimous, how has that affected your ability to deliberate?

The juror: I don't understand that question.

The court: So you told us earlier that you didn't understand that the jurors had to reach the same agreement?

The juror: Correct.

The court: . . . [N]ow that you know that, has that affected your ability to deliberate?

The juror: I'd probably say yes. The question is still kind of not clear, but . . .

The court: . . . [W]hen I asked you, did you have any trouble understanding the jury instructions, you said yes because you didn't understand that the jurors have to reach the same agreement.

The juror: Correct.

. . . .

The court: . . . I guess now I've got two questions. The first question is has the -- has the issue that you didn't understand the jury instructions made it hard for you to deliberate up to this point?

The juror: I would say yes.

The court: Okay. So – but now that you understand that the jury has to reach a unanimous verdict, are you able to continue with your deliberations?

The juror: I'm going to say no.

The court: Why?

The juror: I have – I get my own little idea that I hold onto and I think I'm going to hold onto it.

. . . .

The court: I'm not sure what you mean by that. . . . Can you explain [that] without telling us what you and your fellow jurors are talking about.

The juror: That's kind of hard to do. It's – I don't know how to state this. (12/14/23 Tr. 38-43.)

Based on this colloquy, defense counsel asserted that Juror 15 "ha[d] his mind made up" about the verdict, and requested that the court ask the juror whether he could "continue deliberations without sacrificing [his] individual judgment" (12/14/23 Tr. 44). Concerned that this would cause the juror to reveal information about the deliberations, the prosecutor suggested that the court address another topic raised in the notes—whether Juror 15 had "an issue passing judgment and [with] the process as a whole" (*id.* at 44-45, 50).

The court disagreed with defense counsel's assessment that it was simply a matter of Juror 15 having made up his mind (12/14/23 Tr. 48). The court highlighted that Juror 13's note made clear that Juror 15 was "just shut down in there" and "not participating in the process" (*id.*). The court posited that it could be "gamesmanship": "this juror wants off this jury, and he couldn't get it his way with the financial issue so now he's back claiming that he didn't understand" (*id.* at 48-49).

The court subsequently recalled Juror 15 and questioned him further:

The court: Do you have any issue passing judgment?

The juror: Yes, I do.

. . . .

The court: . . . [H]as your financial situation affected your ability to deliberate?

The juror: No.

> The court: Okay. So . . . are you telling us that the fact that you can't pass judgment is affecting your ability to deliberate?
>
> The juror: I would say yeah. (12/14/23 Tr. 50-51.)

Government and defense counsel agreed that no more questions should be asked (12/14/23 Tr. 52, 58).[9] Defense counsel maintained that Juror 15 had likely already reached a decision, "may not want to be swayed" by other jurors, and could not be excused on that basis (*id*. at 51). The government, on the other hand, asserted that removal was necessary because Juror 15 had requested to be excused the previous day; had since then become an "active distraction" to his fellow jurors; and had made clear that he could not "deliberate and reach a judgment" (*id.* at 54).

The court concluded that Juror 15 should be dismissed (12/14/23 Tr. 66). The court noted that although it could not remove a juror "just because they have become a distraction," in this case "[t]wo different jurors ha[d] observed in their own way that there [wa]s a lack of participation" by Juror 15 (*id.* at 64-65). Further, Juror 15's "actual answers" supported those claims: he was twice asked whether, understanding the unanimity requirement, he could resume deliberations, and each time "his unequivocal answer was no" (*id.* at 65-66). The court observed, "[N]ot being able to

[9] Defense counsel later suggested that the court could ask Juror 15 whether he had already reached his own decision on guilt (12/14/23 Tr. 59-60). The court declined to ask this question because it risked delving into the substance of the jury's deliberations (*id.* at 60).

continue to deliberate makes him unavailable under the rules. And I've got no choice but to remove him from this jury." (*Id.* at 66.) The court thus excused Juror 15 and replaced him with an alternate (*id.* at 72; 12/15/23 Tr. 17).

The reconstituted jury began deliberations anew on the morning of December 18, 2023 (12/18/23 Tr. 9-12). The following day, they resumed deliberations at 1:35 p.m. (12/19/23 Tr. 2). Approximately one hour later, the jury returned its verdicts, convicting Jordan of all counts (*id*. at 2-4).

B. Standard of Review and Applicable Legal Principles

Superior Court Rule of Criminal Procedure 24(c)(1) allows the trial court "to replace any jurors who are unable to perform or who are disqualified from performing their duties" with an alternate. "[A] trial court appropriately may find an empaneled juror 'unable or disqualified to perform juror duties' . . . where the court perceives a serious risk that the juror's ability to deliberate fully and fairly will be compromised . . . ." *Hinton v. United States*, 979 A.2d 663, 680 (D.C. 2009) (en banc). However, "a juror may not be excused for the purpose of breaking a deadlock or because of her views on the merits." *Shotikare v. United States*, 779 A.2d 335, 344 (D.C. 2001).

"Recognizing the trial judge's superior ability to observe the demeanor of the juror and her familiarity with the proceedings," this Court reviews a claim of Rule

24(c) error for abuse of discretion. *Hinton*, 979 A.2d at 683 (citation omitted). "A court abuses its discretion in replacing a juror under Rule 24(c) if it replaced the juror for an improper or legally insufficient reason, if its ruling lacked a firm factual foundation, or if the trial court otherwise failed to exercise its judgment in a rational and informed manner." *Israel v. United States*, 109 A.3d 594, 612 (D.C. 2014) (citation and internal quotation marks omitted). In making this assessment, this Court will not "second-guess a reasonable judgment of the trial court." *Hinton*, 979 A.2d at 684.

C. Discussion

The trial court did not abuse its discretion in dismissing Juror 15 and replacing him with an alternate. There was substantial evidence that Juror 15 was unable or unwilling to carry out his duties as a juror. As the trial court correctly observed (12/14/23 Tr. 64), two separate jurors had complained that Juror 15 was unwilling to participate in the deliberative process (R. 500 (Juror 28: "one juror show[s] a clear lack of willingness to participate"); R. 501 (Juror 13: describing juror's "averseness to participating in the process")). Juror 28 explained that Juror 15 had shown an "[un]willingness to participate in conversation, period," even when prompted by others to share "any thoughts" at all, and had at times been distracted "playing on their phone," not listening (12/14/23 Tr. 13-15). According to Juror 28, Juror 15 had expressly stated, "I can't make a decision. Period." (*Id.* at 15.) In addition, Juror 13

noted that "[t]his juror has made it clear that they are not comfortable making judgments against others [and] being part of this process" (R. 501).[10]

Juror 15's statements confirmed these observations. After the court explained the unanimity requirement, Juror 15 twice indicated that he would not be able to deliberate further (12/14/23 Tr. 42-43). Asked point blank whether he had "any issue passing judgment," Juror 15 stated, "Yes, I do." (*Id.* at 50.) He then made clear that "the fact that [he could not] pass judgment [wa]s affecting [his] ability to deliberate" (*id*. at 51).

Based on the observations of Jurors 28 and 13, and Juror 15's own admissions, the trial court reasonably concluded that Juror 15 was "[un]able to continue to deliberate" and therefore "unavailable under the rules" (12/14/23 Tr. 66). This conclusion was buttressed by the court's voir dire of Juror 15 the previous day. After requesting dismissal based on his financial situation, Juror 15 was "cagey" and vague in his responses to questioning, leading the parties and the court to question his credibility (12/13/23 Tr. 31, 33, 37). Having heard his answers and witnessed his

[10] Jordan notes that the trial court never "verified that it was Juror 13 who authored the note" or "confirm[ed] the subject of the note was Juror 15, as opposed to some other juror" (App. Br. 24 n.12). But there was no real dispute about the author of the note or its subject—the author included their juror number and signature at the bottom of the note, and Juror 15's acknowledgment that he was confused about the unanimity requirement, as referenced in the note, confirmed that he was the subject (R. 501; 12/14/23 Tr. 38-39).

demeanor, the court suggested that "this job thing is a total ruse. I think he wants to get off the jury. I'm getting the vibes from him that he's tired of being here . . . ." (*Id*. at 33.) It was no surprise, then, that the very next day, Juror 15 demonstrated an unwillingness to participate and told the court that he would not be able to deliberate. As defense counsel noted, and the trial court agreed, Juror 15 would "say yes to any question that gets him out of here" (12/14/23 Tr. 35). Faced with a juror who refused to "participat[e] in the process" (R. 501), the court was well within its discretion to remove the juror and replace him with an alternate. *See Israel*, 109 A.3d at 613 (no abuse of discretion in removal of juror who "was not deliberating" and had rendered fellow jurors' efforts to deliberate "unproductive"); *Brown v. United States*, 818 A.2d 179, 185 (D.C. 2003) (trial court properly dismissed juror who "refused to participate in the deliberation process"; "the presence of a juror incapable of or unwilling to deliberate and decide a case on the evidence undermines the fairness of a trial"); *Shotikare*, 779 A.2d at 346 ("when a juror's unprovoked misconduct upsets deliberations and prevents the jury from functioning as a jury must function—there exist 'extraordinary circumstances' and 'just cause' to excuse the disruptive juror" under D.C. Code § 16-705(c)).

Jordan contends that the trial court abused its discretion because it failed to apply the correct legal standard (App. Br. 31-33). Although the court referred only generally to "the rules" and did not specifically cite Rule 24(c) or its language, "[a]

trial court need not use this language, . . . so long as it 'was scrutinizing whether [the juror] had the capacity to continue to serve as a juror.'" *Hobbs v. United States*, 18 A.3d 796, 800 (D.C. 2011) (quoting *Hinton*, 979 A.2d at 684). The court did just that, focusing its inquiry on whether Juror 15 was participating in the deliberations, understood the court's instructions and the responsibilities of the jury, and felt capable of continuing to deliberate in light of the juror's admitted issues with "passing judgment" and following the unanimity instruction.

Highlighting the court's statement that it had "no choice but to remove [Juror 15,]" Jordan asserts that the court failed to recognize that it had discretion (App. Br. 31-32). This assertion ignores the court's scrupulous efforts to determine whether Juror 15 was willing and able to carry out his duties as a juror, and its recognition that he could not be removed because of how he would "vote" or simply because he may have become a "distraction" (12/14/23 Tr. 57, 65). In context, the court's statement that it had "no choice but to remove [Juror 15]" reflected the court's understanding that it had "'both the responsibility and the authority to dismiss a juror whose refusal or unwillingness to follow the applicable law becomes known to the judge during . . . trial.'" *Brown*, 818 A.2d at185 (quoting *United States v. Thomas*, 116 F.3d 606, 616 (2d Cir. 1997)); *Thomas*, 116 F.3d at 617 ("[I]t would be a dereliction of duty for a judge to remain indifferent to reports that a juror is intent on violating his oath.").

Jordan argues that the court did not consider the "motivating reason for Juror 15's 'unavailability'" or apply the strict standard of *Shotikare*, which prohibits removal of a juror if there is "any reasonable possibility that the impetus for a juror's dismissal stems from the juror's views on the merits of the case." 779 A.2d at 345 (citations omitted). Consistent with *Shotikare*, however, the court responded to the reports of Juror's 15 unwillingness to participate "with caution, tact, and respect for the prerogatives of the jury." *Id.* The court undertook a sensitive inquiry into the allegations raised by the juror notes, cautioning both Jurors 28 and 15 not to discuss the jury's deliberations, while at the same time endeavoring to understand whether Juror 15 was incapable of participating in the process. Though Jordan suggests (at 34-35) that the court's questioning did not go far enough, *Shotikare* cautioned that in conducting such an inquiry, "the judge 'may not delve deeply into a juror's motivations.' . . . As a result, the record that is generated in the course of the inquiry will be less than exhaustive; and the reasons for the disruption of deliberations may be less than clear." 779 A.2d at 345 (citation omitted).

In any event, the trial court did probe Juror 15 about his motivations. When Juror 15 indicated that he would not be able to continue deliberations understanding that the jury would have to reach a unanimous verdict, the court asked, "Why?" (12/14/23 Tr. 43). Juror 15 responded, "I get my own little idea that I hold onto and I think I'm going to hold onto it" (*id.*). The court pressed Juror 15 to explain what

he meant without revealing what he and his fellow jurors were talking about, but the juror simply answered, "That's kind of hard to do" (*id.*). Jordan did not request further questioning to clarify Juror 15's "little idea" remark or his motivations more generally, and after a few follow-up questions about whether Juror 15's "issues passing judgment" or his financial situation would affect his ability to deliberate, the parties and the court agreed that no more questions could be asked "without crossing a line" (*id.* at 52, 58). Given his position below, Jordan should not now be heard to complain about the sufficiency of the court's inquiry. *See Butts v. United States*, 822 A.2d 407, 416 (D.C. 2003) ("This [C]ourt has repeatedly held that a defendant may not take one position at trial and a contradictory position on appeal.") (quotation marks and citation omitted).[11]

Jordan nevertheless argues that Juror 15's "little idea" comment was proof that he had reached a verdict, and that there was thus a "reasonable possibility" that disagreement with the majority was at the heart of his apparent unwillingness to deliberate (App. Br. 34, 41). However, as the trial court recognized (12/14/23 Tr. 49), Juror 15's remark was ambiguous at best. Nothing in record suggests that the

[11] Jordan also did not request that the court voir dire the remaining jurors. To the extent Jordan challenges the sufficiency of the court's inquiry (see App. Br. 35), any error should be reviewed only for plain error. *See (Curtis) Howard v. United States*, 663 A.2d 524, 530 n.13 (D.C. 1995) (applying plain-error review where defendant did not request to voir dire ineligible juror). For the reasons described in text infra, Jordan fails to show any error, much less plain error.

"little idea" he was "hold[ing] onto" had anything do to with the merits of the case. To the contrary, Juror 28 was emphatic that Juror 15's "lack of willingness to participate . . . ha[d] nothing to do with [the] verdict," described how Juror 15 had failed to engage with the rest of the jurors and instead had been distracted by his phone, and recalled that Juror 15 had stated, "I can't make a decision. Period." (R. 500; 12/14/23 Tr. 14-15.) Juror 13 likewise made clear that Juror 15 had a "fundamental" misunderstanding of his responsibilities as a juror and was "averse[] to participating in the process" (R. 501). In accordance with the court's instructions, no details about the jury's deliberations or how anyone stood on the issues was disclosed. And nothing in Juror 15's responses indicated that he had disagreed with his fellow jurors on the merits or felt pressured to conform.

Even if Juror 15's isolated "little idea" statement suggested that he was a dissenter, that alone would not undermine the court's decision to remove him. Removal is inappropriate only if there is a reasonable possibility that it "stems from the juror's views on the merits of the case." *Shotikare*, 779 A.2d at 345. Here, there is no reasonable possibility that Juror 15 was dismissed because of his views. Instead, the court excused him because of his "lack of participation," as observed by fellow jurors, and his "unequivocal" indication that he could not deliberate (12/14/23 Tr. 64-66). *See Israel*, 109 A.3d at 615 (where juror had exhibited "hostility" to government during trial, removal was nevertheless appropriate; "the juror 'was not

removed for her nonconforming view of the evidence[,]' but 'was removed for her . . . refusal to perform her duty as a juror by deliberating together with the other jurors'" (citation omitted)); *Shotikare*, 779 A.2d at 345 (where trial court was aware of deadlock, removal of juror was not abuse of discretion because it was based on juror's threats and intimidation of fellow jurors, not on juror's status as a holdout).

Jordan contends that the trial court erroneously ignored Juror 15's assurances that he was an active participant in the deliberations (App. Br. 35). But the court was not required to credit those statements, particularly given the contrary statements of Jurors 28 and 13. *See Israel*, 109 A.3d at 613 (judge "was entitled to credit the foreperson's stated impression, and the other jurors' agreement, that [removed juror] expressed that her mind was closed as to the case[,] . . . and he was entitled to discredit [removed juror's] claim that she was merely 'standing on the evidence'"); *Brown*, 818 A.2d at 186-87 (trial court did not clearly err in "credit[ing] the broad consensus among the jurors that [one juror] had refused to participate in the deliberation process"; court was "not obliged to accept" removed juror's claim that "his unwillingness to deliberate further was 'based on the evidence presented,' i.e., its deficiency").

In any event, regardless of whether Juror 15 had previously participated in the deliberations, the trial court properly dismissed the juror because any such participation had ceased by the time Jurors 28 and 13 submitted their notes, and

because Juror 15 himself acknowledged that he would not be able to continue deliberating further (12/14/23 Tr. 43, 51, 64-66). *See Braxton v. United States*, 852 A.2d 941, 947 (D.C. 2004) ("[A] judge may not sit idly by when he or she has been advised that a juror has declined to follow the law or comply with the court's instructions.").[12]

Jordan argues that Juror 15's professed inability to *continue* deliberating was insufficient to support his removal because it might have stemmed from his views of the evidence and his "belief that further deliberation would not produce agreement" (App. Br. 34 & n.22, 43). This assertion is purely speculative. As discussed, Juror 15 expressly indicated that he would not be able to continue deliberating due to (1) the unanimity requirement, and (2) "the fact that [he could not] pass judgment" (12/14/23 Tr. 43, 51). Nothing in the record establishes that he had actually reached a judgment; to the contrary, Juror 28 recounted that Juror 15

[12] Contrary to Jordan's contention (at 38-39), the timing of the juror notes actually cuts against Jordan's claim. The complaints of Juror 15's unwillingness to participate in deliberations came just a day after the court denied his request to be dismissed for financial reasons. After questioning Juror 15 again, the court surmised that Juror 15's assertion that he did not understand the unanimity instruction was likely just "gamesmanship": "this juror wants off this jury, and he couldn't get it his way with the financial issue so now he's back claiming that he didn't understand" (12/14/23 Tr. 48-49). *See United States v. Abbell*, 271 F.3d 1286, 1303 (11th Cir. 2001) ("Because the demeanor of the pertinent juror is important to juror misconduct determinations, the [trial] court is uniquely situated to make the credibility determinations that must be made in cases like this one: where a juror's motivations and intentions are at issue.") (cited with approval in *Brown*, 818 A.2d at 187).

explicitly stated that he could not make any decision at all (*id.* at 15). Juror 13 similarly observed that Juror 15 was "not comfortable making judgments against others" (R. 501). Given this evidence, the trial court was entitled to take Juror 15 at his word when he acknowledged that he would be unable to continuing deliberating.[13]

Finally, Jordan asserts that the trial court should have given a "clarifying instruction" or declared a mistrial (App. Br.35-36). Jordan requested neither remedy in the trial court, however, and therefore must show plain error affecting substantial rights. *See Braxton*, 852 A.2d at 949 n.10 (plain-error review applies to unpreserved claim that trial court erred by failing to declare mistrial after removal of juror). Under the plain-error standard, a defendant must establish: "(1) 'error,' (2) that is 'plain,' and (3) that 'affect[s] substantial rights.' If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.'" *(Joyce) Johnson v. United States*, 520 U.S. 461, 467 (1997) (citations omitted).

[13] Although, as Jordan notes, Juror 15 "never refused to follow the court's instruction, listen to his fellow jurors, or consider all the evidence" (App. Br. 43), the record amply supported the court's conclusion that Juror 15's admitted inability to deliberate made him "unavailable" to serve as a juror.

Although this Court has recognized that "seeing how a non-deliberating juror conducts herself after a re-instruction can move a trial court closer to a firm factual foundation about the juror's capacity going forward," it has emphasized that "Rule 24(c) imposes no explicit 'exhaustion of alternative remedies' requirement, and . . . that other circumstances can provide the necessary factual foundation for a finding that a juror is unable to carry out her oath." *Israel*, 109 A.3d at 615 (upholding trial judge's decision not to give additional instruction to juror who refused to deliberate). Based on the juror notes and the voir dire of Jurors 28 and 15, the court had a firm factual foundation for its finding that Juror 15 was incapable of deliberating with his fellow jurors, as he was sworn to do.

Further, there was no basis for the court to sua sponte declare a mistrial. The very "purpose of . . . Rule [24(c)] is to enable courts to avoid mistrials by replacing incapacitated or disqualified jurors with alternates." *Hinton*, 979 A.2d at 679. Nevertheless, "[i]t might be incumbent on the trial judge to grant a motion for a mistrial where, for example, the judge's inquiry into the conduct of the juror who is excused has revealed the juror's views on the merits or the juror's status as a holdout." *Shotikare*, 779 A.2d at 347. However, where, as here, neither the juror's "views on the merits nor the numerical split of the jury ha[s] been revealed," removal of the juror "does not without more mandate declaration of a mistrial." *Id.* Given that Juror 15 "had refused to deliberate for reasons extrinsic to the evidence," *see*

Brown, 818 A.2d at 188, his removal did not coerce a verdict, as Jordan claims (at 36-37). Instead, "removing him freed the jury to consider the case on the merits and perform their lawful function." *Brown*, 818 A.2d at 188.

Contrary to Jordan's contention (at 36-37), the fact that the reconstituted jury returned a guilty verdict after a little over a day of deliberations does not demonstrate that Juror 15 was a holdout or that the verdict was coerced. *See Shotikare*, 779 A.2d at 346 ("The fact that the jury deliberated only a short while longer does not mean that any juror felt undue pressure to reach a verdict."). Before releasing the jury to begin its deliberations anew, the court instructed: "[Y]ou must start with a clean slate. . . . Any of you, if you wish may change your minds as to any position you took before." (12/18/23 Tr. 10.) The jury then deliberated for several hours before returning a verdict. As in *Shotikare*, "[t]he jury's numerical split had not been disclosed, and the jurors had no reason to think that the judge knew how they were divided." 779 A.2d at 346. Further, the trial court "did not give an anti-deadlock instruction"; instead, it gave an instruction "calculated to eliminate the possibility . . . [of] coerc[ion]." *Id.* Thus, "[t]he jurors should have felt unpressured in this case." *Id.*

Because "mistrials entail substantial costs and are disfavored in this as in other situations, th[is] [C]ourt [has] held that [it] will reverse the decision to deny a mistrial only if the decision appears irrational, unreasonable, or so extreme that failure to

reverse would result in a miscarriage of justice." *Shotikare*, 779 A.2d at 347 (internal quotation marks and citation omitted). For the reasons discussed above, Jordan has not shown that the trial court's failure to declare a mistrial was obviously erroneous under this standard.

II. The Trial Court Did Not Err in Admitting Evidence That Jordan Went Through Lynch's Pockets and Possessed Lynch's Property After the Murder.

Jordan claims that the trial court erred in admitting testimony that he rummaged through Lynch's pockets after the stabbing and that he was found in possession of Lynch's belongings (App. Br. 45-53). Because Jordan invited the rummaging testimony, this Court should decline to consider his claim. In any event, Jordan has failed to demonstrate any error, plain or otherwise, in the admission of the evidence.

A. Additional Background

At a pretrial hearing on July 3, 2023, the government represented that it intended to introduce evidence that Jordan took Lynch's wallet, cell phone, and keys, and discarded some of those items on his flight path, as evidence of consciousness of guilt (7/3/23 Tr. 9-10). The government asserted that Jordan's actions after the murder were relevant to his state of mind (*id.* at 12). The court expressed concern that evidence of Jordan "rifling through pockets" was more prejudicial than probative but invited the parties to brief the issue (*id.* at 13-14).

On July 8, 2023, Jordan filed a motion in limine to preclude the government from introducing evidence of the acquitted counts, including evidence that Jordan had acquired or possessed Lynch's cell phone, wallet, and keys (R.III 355 (Mot. In Limine)). Jordan argued that this evidence had minimal probative value which was substantially outweighed by the potential for undue prejudice (*id.* at 3-4).

In opposition, the government argued that the evidence was admissible under *(William) Johnson*, 683 A.2d at 1087, and *Toliver v. United States*, 468 A.2d 958, 961 (D.C. 1983), because it was direct and substantial proof of the charged crimes, closely intertwined with those crimes, and necessary to place those crimes in context. (R.III 367 at 1, 7, 11 (Govt. Response to Mot. in Limine)). The fact that Jordan rummaged through Lynch's pockets moments after stabbing him and left the crime scene with Lynch's belongings was "direct proof" of Jordan's guilt and rebutted any claim of self-defense (*id.* at 11-12).[14] The government asserted that the evidence was also admissible under *Drew*, 331 F.2d at 85, to show motive, intent, identity, and absence of mistake (R.III 367 at 1, 16).

After further argument by the parties, the trial court concluded that Jordan's possession of Lynch's cell phone was "highly relevant" in light of Jordan's

[14] The government argued that this evidence also rebutted Jordan's statements to police, and his testimony in the first trial, that he took the phone to call 911, when there was no evidence of such a call, and that he walked around after the murder seeking help (R.III 367 at 11-12; 7/28/23 Tr. 33-34).

testimony at the first trial and was not unduly prejudicial because the phone was not taken from Lynch's person (7/28/23 Tr. 34-35, 40, 44, 48). However, the court continued to have concerns about the wallet and keys and suggested that a cautionary instruction could ameliorate any prejudice (*id.* at 39-40, 43-44, 56). Subsequently, the parties jointly submitted a proposed cautionary instruction (11/14/23 Tr. 12-13). Defense counsel made clear, however, that they were not waiving their objection to the evidence (*id.* at 13; 7/28/23 Tr. 42-43, 54; 11/15/23 Tr. 9-10).

Before trial started on November 15, 2023, the court ruled that evidence of the keys and wallet was also admissible:

> The Court is going to allow the government to mention – to proffer up evidence about the keys and the wallet because the government is not proffering that evidence as propensity evidence; instead, the government is offering that evidence to support its argument that it[']s consciousness of guilt with respect to what Mr. Jordan did or did not do after he left the apartment that evening. . . . [T]hat squarely fits in the analysis of being *Johnson* evidence because without that being a part of the government's storyboard, their storyboard does not make any sense.
>
> This jury is going to see several minutes of video of Mr. Jordan walking around the playground at Van Ness Elementary School. Van Ness Elementary School is directly tied to an envelope that the decedent's father receives a few days after his death[] that . . . contained the wallet. (11/15/23 Tr. 8.)

At defense counsel's request (11/28/23 Tr. 78), the trial court gave the proposed limiting instruction at the beginning of Johnson's testimony:

> [Y]ou're about to hear evidence that Marquette Jordan was seen going through Ivan Lynch's pockets. You also will hear evidence or have

> heard evidence that Mr. Lynch's phone was recovered near 500 L Street, Southeast, and that Mr. Lynch's wallet was mailed to his family from Van Ness Elementary School. You have heard evidence that Marquette Jordan possessed Ivan Lynch's car keys – or will hear evidence of that. It is up to you to decide whether to accept that evidence. . . .
>
> If you find that Marquette Jordan went through Ivan Lynch's pockets or possessed Ivan Lynch's property, you may use this evidence only for the limited purpose of determining Marquette Jordan's state of mind, his intent, and whether or not that evidence is consciousness of guilt . . . as to what he is charged with, murder in the second degree, carrying a dangerous weapon, and simple assault.
>
> You may not use this evidence for any other purpose. Marquette Jordan is only on trial for the crimes charged. Marquette Jordan is not charged in this case with any offense relating to going through Ivan Lynch's pocket and possessing Ivan Lynch's property. You may not use this evidence to conclude Marquette Jordan has a bad character, and you may not convict Marquette Jordan of the crimes charged simply because you believe he may have done something wrong not specifically charged as crimes in this case. (*Id*. at 81-82.)

Johnson was not asked on direct examination about Jordan rummaging through Lynch's pockets. On cross-examination, however, defense counsel raised the issue, asking, "You had testified that you saw Marquette look into Ivan's pockets after the incident. You never actually saw him take anything from Ivan's pockets; correct?" (11/29/23 Tr. 90). Johnson responded in the negative (*id.*).

On redirect, the government questioned Johnson about this testimony (11/29/23 Tr. 122-23). Johnson affirmed that he had seen Jordan go through Lynch's pockets after the stabbing (*id.*). Johnson stated that he "heard some keys jiggling" but did not see Jordan take the keys (*id.* at 123).

In its final instructions to the jury, the court repeated the limiting instruction it gave before Johnson's testimony (12/5/23 Tr. 34-35).

B. Standard of Review and Legal Principles

"Evidence of prior bad acts that are criminal in nature and independent of the crime charged are inadmissible if offered to prove predisposition to commit the crime charged." *Bacchus v. United States*, 970 A.2d 269, 273 (D.C. 2009) (citing *Drew*, 331 F.2d at 89-90). However, so-called *Drew* evidence is admissible to prove motive, intent, the absence of mistake or accident, a common scheme or plan, or the identity of the person charged with the crime. *Drew*, 331 F.2d at 90.

In addition, "*Drew* does not apply where such evidence (1) is direct and substantial proof of the charged crime, (2) is closely intertwined with the evidence of the charged crime, or (3) is necessary to place the charged crime in an understandable context." *(William) Johnson*, 683 A.2d at 1098; *see also Toliver*, 468 A.2d at 960 (other-crimes evidence may be admissible "to complete the story of the crime on trial by proving its immediate context"). "[T]his limited class of evidence is not other crimes evidence because it is too intimately entangled with the charged criminal conduct." *Toliver*, 468 A.2d at 960. "The one requirement that applies to the admission of all evidence of 'other crimes,' *Drew* and non-*Drew* alike, is that relevance, or probative value, must be weighed against the danger of unfair prejudice." *Busey v. United States*, 747 A.2d 1153, 1165 (D.C. 2000).

"The trial court has wide latitude in determining the admissibility of prior bad acts evidence." *Bacchus*, 970 A.2d at 274. This Court reviews a trial court's evidentiary decisions for abuse of discretion, and in doing so, "broadly defer[s] to the trial court due to its familiarity with the details of the case and its greater experience in evidentiary matters." *Drake v. United States*, 315 A.3d 1196, 1207 (D.C. 2024) (citation and internal quotation marks omitted). "This deference particularly applies where the trial court must consider the relevance and potential prejudice of the evidence." *Id.*

C. Discussion

1. Jordan Invited Any Error in the Admission of Testimony that He Rummaged Through Lynch's Pockets.

This Court should decline to consider Jordan's challenge to Johnson's testimony that Jordan rummaged through the decedent's pockets after killing him, because that testimony was elicited by Jordan on cross-examination. *See Parker v. United States*, 757 A.2d 1280, 1286–87 (D.C. 2000) (where challenged evidence was "first raised by defense counsel on cross-examination[,] . . . error that occurred, if any, was invited by defense counsel" (citation and quotation marks omitted)); *Gonzalez v. United States*, 697 A.2d 819, 826 (D.C. 1997) (defense counsel "invited" any error arising from "highly prejudicial" testimony that counsel himself elicited on cross-examination of expert witness); *see also (Nathaniel) Howard v. United*

States, 978 A.2d 1202, 1211 (D.C. 2009) ("When the government elicits testimony on a subject during redirect examination that the defense brought up during cross-examination, the defendant 'cannot well complain of being prejudiced by a situation which [he] created,'" because 'the error that occurred, if any, was invited by defense counsel.'" (citations omitted)). Although the court flagged this testimony by giving the limiting instruction before Johnson testified, that too was at defense counsel's invitation (11/28/23 Tr. 78). The government did not question Johnson about the rummaging on direct examination. It was Jordan who chose to raise the issue for the first time on cross-examination, despite having objected to testimony on the subject pretrial. Any error was therefore invited. *See Henny v. United States*, 321 A.3d 621, 633 (D.C. 2024) (where defendant "made the choice not to call another witness," this Court would not "further scrutinize what [defendant] invited"); *Preacher v. United States*, 934 A.2d 363, 368 (D.C. 2007) ([T]he invited error doctrine precludes a party from asserting as error on appeal a course that he or she has induced the trial court to take.").

Should this Court choose to consider Jordan's claim, the admission of Johnson's testimony on this point should be reviewed only for plain error. *See Parker*, 757 A.2d at 1287 (applying plain-error review to admission of redirect testimony on topic that defendant first introduced on cross-examination). For the reasons described below, Jordan cannot establish any error much less plain error.

2. The evidence was properly admitted.

The trial court did not plainly err in admitting evidence that Jordan rummaged through Lynch's pockets after stabbing him. Nor did it abuse its discretion in admitting evidence that, shortly after the murder, Jordan was found in possession of Lynch's keys and in close proximity to Lynch's cell phone and, inferentially, Lynch's wallet. This evidence was properly admitted under *(William) Johnson* because it was "direct and substantial proof of the charged crime," "closely intertwined with the evidence of the charged crime," and "necessary to place the charged crime in an understandable context." 683 A.2d at 1098. Jordan's actions minutes after the murder were relevant to "explain the immediate circumstances surrounding the offense charged" and "complete the story of the crime." *Id.* (citations omitted). That Jordan had the presence of mind to go through Lynch's pockets right after stabbing him multiple times showed that Jordan was the aggressor, intended to kill Lynch, and did not act in the heat of passion. Further, the cell phone and wallet evidence supported a reasonable inference that Jordan had jettisoned those items as he fled, in fear of apprehension and because of his guilty conscience. This evidence was direct proof of guilt and therefore "squarely fit[]" the *Johnson* rubric, as the trial court correctly concluded (11/15/23 Tr. 8). *See Burgess v. United States*, 786 A.2d 561, 569 (D.C. 2001) (consciousness-of-guilt evidence was "directly admissible evidence of the charged crime separate from its potential

status as evidence of other, uncharged crimes," and was thus admissible under *Johnson*).

Even if Jordan's pocket-rummaging and possession of Lynch's belongings did not constitute *Johnson* evidence, it was nevertheless admissible under the *Drew* exceptions for evidence of identity and intent.[15] Jordan disputed the identity evidence, asserting that Carmon was in fact the perpetrator (12/5/23 Tr. 95-97, 122-23). Evidence that Jordan had Lynch's property, and had attempted to discard that property shortly after the murder, helped demonstrate that Jordan, not Carmon, had committed the crime. *See Vines v. United States*, 70 A.3d 1170, 1175 (D.C. 2013) (evidence of crimes committed during defendant's flight from police was admissible under *Drew* to show "consciousness of guilt and [defendant's] identity as the perpetrator of the robberies" he had committed the previous day).

Jordan alternatively argued that there were mitigating circumstances that excused his conduct: Lynch had put Jordan in a "hold," causing Jordan to have difficulty breathing and to call out for help (12/5/23 Tr. 121-22). Though Jordan did not expressly raise self-defense, his mitigation arguments placed his state of mind at

[15] To be precise, only the rummaging would constitute "other crimes" evidence. Mere possession of Lynch's belongings, without more, was not a crime. *See Wheeler v. United States*, 470 A.2d 761 (D.C.1983) (evidence that during three-month period defendant had rung doorbells, peered into windows, wandered between houses and bushes, posed as a salesman and workman, followed one woman, and given an alias to a police officer, was "not sufficiently 'criminal' to fall within *Drew*'s scope").

issue. Evidence that Jordan took the time to go through Lynch's pockets after the stabbing, rather than immediately flee the situation, undermined any suggestion that Jordan acted in the heat of passion and showed that Jordan was the aggressor. *See Medley v. United States*, 104 A.3d 115, 129 (D.C. 2014) (in self-defense case, evidence of prior assault was probative of defendant's motive and "state of mind").

Jordan acknowledges that "attempts to hide or destroy evidence can evince consciousness of guilt" but contends that such evidence "was irrelevant" in this case because he took the items from Lynch *after* the stabbing (App. Br. 50). Contrary to Jordan's contention, however, the circumstances under which he discarded the evidence were highly probative of his state of mind. Jordan got rid of Lynch's belongings only after it became apparent that law enforcement was closing in. As Jordan was making his escape, Officer John drove by him with lights and sirens activated (11/15/23 Tr. 93-96, 101), and minutes later, Officer Spajic "locked eyes" with Jordan and made a U-turn to pursue him (11/17/23 Tr. 59-60). Surveillance video showed that, in the interim, Jordan walked around Van Ness Elementary School (11/20/23 Tr. 138-39; Govt. Ex. 428). The discovery of Lynch's cell phone in the same block where Jordan was apprehended, and the return of Lynch's wallet in an envelope originating from Van Ness Elementary School, was thus powerful evidence that Jordan had rid himself of Lynch's property because he knew it could connect him to the murder. *See Peterson v. United States*, 657 A.2d 756, 761 (D.C.

1995) (defendant's attempt to hide clothing that would identify him after seeing marked police car showed consciousness of guilt).[16]

Jordan nonetheless asserts that any minimal probative value was substantially outweighed by the risk of prejudice (App. Br. 48-52). Mindful of the prejudice that would arise from an inference of propensity (see 7/28/23 Tr. 35, 39-40, 44-45), the trial court took pains to mitigate any harm by giving a strongly worded limiting instruction that prohibited the jury from concluding that Jordan had a bad character and from convicting him of the crimes charged "simply because you believe he may have done something wrong not specifically charged as crimes in this case" (11/28/23 Tr. 82). *See Frye v. United States*, 926 A.2d 1085, 1094 (D.C. 2005) ("[This Court] presume[s] that . . . limiting instructions 'will reduce, if not dissipate, the danger of unfairness and prejudice'" from other-crimes evidence.) (citation

[16] Jordan argues that this evidence was "unnecessary" to establish a connection between him and the decedent (App. Br. 48). But "the law does not require that the prosecution sanitize its evidence" where, as here, a defendant's alleged "other crimes" "ar[i]se from the same series of transactions which underlay the charged . . . offense." *Toliver v. United States*, 468 A.2d 958, 961 (D.C. 1983); *see also Hagans v. United States*, 96 A.3d 1, 30 (D.C. 2014) (rejecting argument that details of defendant's participation in uncharged shooting were unnecessary, where such details were "necessary for a coherent presentation," and "[a] truncated account that withheld this information from the jury would have eviscerated the legitimate probative value of the . . . evidence").

omitted).[17] Importantly, the government did not argue propensity. Further, the risk of prejudice was minimal given that the conduct was entirely unlike the charged offense. *See Valdez v. United States*, 320 A.3d 339, 362 (D.C. 2024) (potential prejudice did not outweigh probative value where defendant's prior crimes were not "comparable to, or suggestive of, the homicides and rape for which [he] was on trial," and where government "did not argue propensity"); *Coleman v. United States*, 779 A.2d 297, 306 (D.C. 2001) ("The greater the similarity in the crimes, the greater the suggestion that the defendant has 'a propensity to commit the crime charged,' which is the prejudice the *Drew* rule seeks to avert.").

3. Any error was harmless.

Even assuming, arguendo, that the trial court plainly erred in admitting the pocket-rummaging testimony or abused its discretion in admitting the evidence of the keys, wallet, and cell phone, reversal is not required because Jordan was not prejudiced by the evidence. *See Veney v. United States*, 936 A.2d 811, 828 (D.C.), *modified*, 936 A.2d 809 (D.C. 2007) (applying harmless-error standard of *Kotteakos v. United States*, 328 U.S. 750 (1946), to preserved objection to other-crimes

[17] Jordan suggests that the limiting instruction was inadequate, because "it strains credulity that jurors would not consider the possibility of robbery as a motive for the stabbing" (App. Br. 51). Putting aside that Jordan affirmatively proposed this instruction, this claim must be rejected because "jurors are presumed to follow the court's instructions." *Frye*, 926 A.2d at 1094. Jordan fails to rebut that presumption.

evidence). The government did not argue that Jordan robbed Lynch, that robbery was the motive for the murder, or that Jordan had a propensity to commit crime. Indeed, the government mentioned Jordan's rifling through Lynch's pockets only once during a lengthy closing argument (12/5/23 Tr. 50), and referred to the keys, cell phone, and wallet only to suggest that Jordan was "shedding" evidence as he fled (*id.* at 71-72, 142-43). The defense closing highlighted the weaknesses in this evidence, emphasizing that (1) there was no direct evidence that Jordan took Lynch's property, (2) Jordan's continued presence near the apartment building after the murder was inconsistent with guilt, and (3) there was no forensic evidence linking Jordan to the cell phone or wallet (12/5/23 Tr. 104-05, 114-15, 120). Additionally, as discussed, the court's comprehensive limiting instruction greatly diminished, if not eliminated, the risk of prejudice.

Further, it is highly unlikely that the evidence had any material effect on the verdict given the strength of the government's case. Two eyewitnesses identified Jordan as the murderer, Lynch's blood was on Jordan's clothing, and Jordan's statements after the murder (providing a false name, spontaneously denying that he had stabbed anyone, and proposing to Carmon so that she would not testify against him) compellingly demonstrated consciousness of guilt. In light of this evidence, there is no reasonable probability that the jury would have acquitted Jordan of the murder had it not learned that Jordan went through Lynch's pockets and took his

property. *See Sanders v. United States*, 809 A.2d 584, 591 (D.C. 2002) (no prejudice from admission of other-crimes evidence given trial court's "extensive limiting instructions" (substantially similar to instructions given here), "government's restrained closing argument," and "strength of the government's case"); *Murphy v. United States*, 572 A.2d 435, 439 (D.C. 1990) (admission of other-crimes evidence was harmless considering strength of government's case and repeated limiting instruction).

III. The Trial Court Properly Admitted Evidence That Jordan Lied About Having Cancer.

Jordan challenges the admission of (1) his statement to police that he had cancer and (2) his medical records proving the falsity of this statement (App. Br. 53-54). Because this evidence was properly admitted to show consciousness of guilt, Jordan's challenge must fail.

A. Background

The government introduced body-worn-camera footage showing Officer Spajic's apprehension of Jordan (Govt. Ex. 424a). During their interaction, Jordan lied about his name, would not answer questions about the children, and stated that he had cancer (11/17/23 Tr. 71; Govt. Ex. 424b, 424c). Jordan did not object to the admission of those statements.

Subsequently, the government sought to admit records of Jordan's medical treatment after his arrest to (1) rebut any self-defense claim by showing that he did not have injuries, and (2) impeach his statement to police that he had cancer (11/28/23 Tr. 70-73). Defense counsel objected on grounds that he did not intend to raise self-defense and that, particularly as to the cancer issue, any probative value was outweighed by the potential prejudice (*id.* at 73-75; 11/29/23 Tr. 15, 24-25). Jordan claimed that his statement about having cancer was a "throwaway statement" that had nothing to do with this case and had the potential to inflame the jury (11/29/23 Tr. 16, 23-25). The government responded that the statement showed Jordan's state of mind—at the same time he lied to Officer Spajic about his name and his whereabouts, he also lied about having cancer (11/29/23 Tr. 18-19).

The court ruled that the medical records were admissible to "counterbalance" Jordan's "self-serving statement" that he had cancer (11/29/23 Tr. 212). The court determined that the evidence was probative of Jordan's dishonesty during his interactions with the police (*id.* at 213).

Dr. Fidelis Doh testified that he examined Jordan on May 1, 2018 (11/30/23 Tr. 33). Jordan did not indicate that he had cancer, despite having been asked whether he had any "medical conditions or problems," nor did he appear to have any physical injuries or respiratory issues (11/30/23 Tr. 34-35, 41-44). Jordan's medical records also did not show any treatment for cancer (*id.* at 39-40, 47).

B. Standard of Review

"[T]he evaluation and weighing of evidence for relevance and potential prejudice is quintessentially a discretionary function of the trial court, and [this Court] owe[s] a great degree of deference to its decision." *(William) Johnson*, 683 A.2d at 1095. As noted, where an objection is preserved, this Court reviews a trial court's admission of evidence for abuse of discretion. *See Bynum v. United States*, 133 A.3d 983, 985 (D.C. 2016). "If, however, a defendant has failed to object at trial to evidence contested on appeal, [this Court] review[s] for plain error." *(Tyrell) Johnson v. United States*, 232 A.3d 156, 161 (D.C. 2020).

Although Jordan objected to the admission of his medical records, he did not raise a contemporaneous objection to the admission of his statement that he had cancer (see 11/29/23 Tr. (noting that statement came in without objection)). Accordingly, Jordan's challenge to the admission of that statement should be reviewed only for plain error.

C. Discussion

The trial court did not plainly err in admitting Jordan's statement that he had cancer, nor did it abuse its discretion in admitting Dr. Doh's testimony and Jordan's medical records to prove the falsity of that statement. Jordan's false claim that he suffered from cancer, like his assertion of a false name and his evasive responses about the children, demonstrated consciousness of guilt. *See Bassil v. United States*,

147 A.3d 303, 308–09 (D.C. 2016) ("[A] false exculpatory statement (or other evasion) permits the finder of fact to 'infer consciousness of guilt, and therefore guilt itself.'"); *Thompson v. United States*, 690 A.2d 479, 485 n.12 (D.C. 1997) (defendant's "lies" may "give[] rise to an inference of consciousness of guilt"); *Mills v. United States*, 599 A.2d 775, 783–84 (D.C. 1991) ("[T]he ultimate inference that is drawn from a person's self-serving lies is that he or she 'did it'[.]"); *Hordge v. United States*, 545 A.2d 1249, 1256 (D.C. 1988) (jury reasonably could infer consciousness of guilt from defendant's lie to police).

Further, the probative value of this evidence was not substantially outweighed by the risk of undue prejudice. Jordan's cancer claim was a brief, undetailed "throwaway statement," as defense counsel himself observed (11/29/23 Tr. 16). And any prejudice was minimal given that the statement did not substantively relate to the offense. *See United States v. Johnson*, 46 F.3d 1166, 1171 (D.C. Cir. 1995) (defendant's untruthful statement to police about his employment "was probative of consciousness of guilt and was not likely in itself to give rise to any substantial prejudice on the part of the jury").

For these same reasons, any error in admitting the statement did not prejudice Jordan's substantial rights, nor did the medical records substantially sway the verdict. As Jordan acknowledges (at 54), the statement was cumulative of other post-arrest falsehoods. Significantly, the government made no mention of this evidence

in its closing argument, and only briefly referred to it in rebuttal while discussing Jordan's other lies (12/5/23 Tr. 144-45). Finally, given the compelling evidence of Jordan's guilt, discussed supra, there is no reason to believe that but for the alleged error, the jury would have returned a different verdict. *See United States v. Berrios*, 676 F.3d 118, 131-32 (3d Cir. 2012), (admission of defendant's false statement to police was harmless where government's evidence was "overwhelming" and statement was "cumulative to other false and contradictory statements that [defendant] made during the same interrogation"), *abrogated on other grounds by Lora v. United States*, 599 U.S. 453 (2023).

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, Jason K. Clark, Esq., jason@clarkdefense.com, on this 9th day of October, 2025.

/s/
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