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BRIEF FOR APPELLEE

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 24-CF-48

LUIS RIVERA, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

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

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Cr. No. 2023-CF3-3464

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ISSUES PRESENTED

I. Whether, in responding to a jury note asking if the government had to establish that appellant Luis Rivera intended to assault a specific officer to prove the offense of assault on a police officer (APO), the trial court committed reversible error, where: (1) the court followed this Court's precedents in rejecting Rivera's position that APO requires proof that a defendant specifically intended to harm a particular officer; (2) the court reasonably interpreted the jury note as seeking guidance on how to define the universe of proper victims, and it thus instructed on the concurrent-intent concept of a zone of harm created by a defendant's assaultive conduct; and (3) any error was harmless.

II. Whether the trial court abused its discretion in limiting cross-examination of certain officer witnesses about potential corruption bias and currying-favor bias, when (1) Rivera failed to proffer facts suggesting any type bias to corrupt the truth at trial similar to blackmail, bribery, witness tampering, or manufacturing evidence; (2) the trial court permitted Rivera to cross-examine a witness on a pending civil lawsuit consistent with the scope of currying-favor bias; and (3) the trial court

properly prohibited cross-examination of a witness for currying-favor bias based on an internal investigation of which he had no knowledge.

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COUNTERSTATEMENT OF THE CASE

On September 13, 2023, a grand jury indicted Luis Rivera on two counts of felony assault on a law enforcement officer (APO) while armed, in violation of D.C. Code §§ 22–405(c), 4502 (Record on Appeal (R.) 60–61 (Indictment)).[1] Following a jury trial before the Honorable Heidi M. Pasichow, Rivera was convicted of two counts of the lesser-included

[1] All citations to the Record (R.) refer to the PDF page number.

offense of misdemeanor APO (12/14/23 Transcript (Tr.) 33–35; R. 191–93 (Verdict Form)). On December 18, 2023, Judge Pasichow sentenced Rivera to 180 days' incarceration on each count, to run consecutively (12/18/23 Tr. 15; R. 194 (Judgment & Commitment Order)). On January 17, 2024, Rivera noted a timely appeal (R. 195–97 (Notice of Appeal)).

The Trial

The Government's Evidence

Between 8:19 p.m. and 8:20 p.m. on June 22, 2020, Rivera threw two metal objects into a crowd of uniformed police officers who were attempting to remove unruly protestors from Lafayette Square, ultimately striking and injuring two officers (see 12/11/23 Tr. 21–26, 29–30, 34–37, 87–99, 102–103, 115–17, 128, 132–42, 152–57; 12/12/23 Tr. 43–56, 89–90, 92–95; 12/13/23 Tr. 19–30).

Metropolitan Police Department (MPD) Officer Phillip Burggraf was one of the officers summoned to Lafayette Square to assist U.S. Park Police officers in their efforts to remove protestors from the park (12/11/23 Tr. 21–26, 29–30). Officer Burggraf reported to Lafayette Square in full police gear clearly marked with the words "Metropolitan Police," with his badge and nameplate prominently displayed (*id.* at 22–

24). Upon his arrival, Officer Burggraf joined a group of hundreds of uniformed officers that formed a line to move protestors out of the area (*id.* at 25–26, 29, 71; see Government Exhibit (Exh.) 30 (Officer Burggraf body-worn camera footage)).[2] At 8:19 p.m., Officer Burggraf spotted a metal object flying at him that came from the group of protestors standing in front of the line of officers at H Street, Northwest (12/11/23 Tr. 34, 41, 43, 54, 71–72; Exh. 30 at 20:19:35–20:19:37). He tried to dodge the object, which appeared to be a part of a metal bike rack, but it struck him on the shin (12/11/23 Tr. 34–37, 41, 43, 49, 51). The impact ripped through his clothing and left him with a two-inch laceration that required medical attention and several sterile adhesive strips to close the wound (*id.* at 36–37, 44–45, 50–51, 61, 66, 70–71; see Exh. 26 (photograph of laceration)). Officer Burggraf did not see who threw the object (12/11/23 Tr. 70).

MPD Officer Anthony Boone also responded to Lafayette Square (12/13/23 Tr. 19–24). He wore his full police uniform (*id.* at 20–21; see *id.* at 47–49; Exh. 31 (MPD body-worn camera footage from unidentified

[2] All exhibits referenced in this brief are attached to the government's motion to supplement the record.

officer)). After joining the line of police officers, Officer Boone noticed a T-shaped metal object flying from the group of protestors toward his face (12/13/23 Tr. 27–30; 42–52; Exh. 31 at 20:20:02–20:20:04; Exh. 32 (Officer Boone body-worn camera footage) at 20:20:02–20:20:04; Exh. 41 (Officer Boone slow-motion body-worn camera footage) at 20:20:02–20:20:04; Exh. 25 (still image from Officer Boone body-worn camera footage)). Officer Boone attempted to dodge the object, but it struck his shoulder (*id.*). The impact caused him pain and left him with some scratches, but he remained on the line without seeking medical attention (12/13/23 Tr. 28–32; 53–54). He, too, did not see who threw the object (*id.* at 32, 54).

U.S. Park Police Detective Sergeant Carl Holmberg was stationed at the police line near Officer Boone (see 12/11/23 Tr. 122–28, 132–35; see Exh. 31). While standing in the crowd of officers, he saw a metal object thrown in his direction by the group of protestors at 8:20 p.m. (12/11/23 Tr. 128–30, 132–42; see Exh. 31 at 20:19:34–20:19:38, 20:20:02–20:20:04). He also confirmed that the only people in the path of that object were police officers (12/11/23 Tr. 142).

MPD Detective Molly Pelta and MPD Officer Brandon Motley were stationed at the front of the police line near H Street, Northwest, fronting

Lafayette Square (12/11/23 Tr. 77–85; 12/12/23 Tr. 40–43; see Exh. 35 (Detective Pelta body-worn camera footage); Exh. 33 (Officer Motley body-worn camera footage)). Detective Pelta saw a man wearing a white shirt with light shorts and a red bandana throw pieces of metal, which appeared to be the bottom of a bike rack, at the police line at 8:19 p.m. and 8:20 p.m. (12/11/23 Tr. 85–99, 102–103, 115–17; see Exh. 35 at 20:19:31–20:20:04; Exh. 43 (Detective Pelta slow-motion body-worn camera footage at 20:19:31–20:20:04; Exh. 20 (still image from Detective Pelta body-worn camera footage)). Officer Motley likewise saw the same man throw objects into the crowd of police officers (12/12/23 Tr. 43–56, 89; Exh. 33 (Officer Motley body-worn camera footage) at 20:19:31–20:19:36, 20:20:02–20:20:03; Exh. 42 (Officer Motley slow-motion body-worn camera footage) at 20:20:02–20:20:03); Exh. 21 (still image from Officer Motley body-worn camera footage)).

Following the incident, MPD Detective Yaroslav Babich began investigating who threw the two objects at the police officers (12/11/23 Tr. 144–50). During that investigation, he spoke to Detective Pelta, who identified the man in the white shirt with light shorts and a red bandana as the man she saw throwing the objects at the officers (*id.* at 100–04,

156–57). After reviewing additional body-worn camera footage from the incident, Detective Babich saw the same man interacting with police officers a few minutes later (*id.* at 149–52; see 12/12/23 Tr. 19–20). He created a be-on-the-lookout (BOLO) notice for the individual, which Detective Pelta confirmed depicted the man she saw throwing the projectiles (12/11/23 Tr. 100–04, 154–57; Exh. 23 (photograph of Rivera used for BOLO); Exh. 24 (BOLO)). After Detective Babich distributed the BOLO, Felicia Murray notified him that she recognized the man to be Rivera based on her interactions with Rivera through her job (12/11/23 Tr. 152–54; 12/12/23 Tr. 92–93).[3] Murray testified and again identified the person in Detective Babich's BOLO as Rivera, whom she recognized based on her interactions with him for 30-minute intervals at least twice per month between March 2019 and October 2020 (12/12/23 Tr. 92–95; Exh. 23).

[3] Rivera attempted to impeach Detective Babich's testimony by playing body-worn camera footage from two different officers, which captured this later interaction but appeared to have their time stamps off-sync by approximately 11 seconds (see 12/12/23 Tr. 21–27; Defense Exhs. 1, 2). Detective Babich later testified that these videos were used only for creating the BOLO and did not capture the assaults (12/12/23 Tr. 31–32). He confirmed that the assaults were captured on other body-worn camera footage (*id.* at 31).

The Defense Evidence

The defense introduced four exhibits of body-worn camera footage but did not call any witnesses (12/13/23 Tr. 114; Def. Exhs. 1–4).

SUMMARY OF ARGUMENT

The trial court did not commit reversible error in responding to a jury note asking whether the government had to prove that Rivera attempted to injure a specific named officer to establish an APO. Following this Court's clear and controlling precedents holding that APO is a general-intent offense, the trial court correctly rejected Rivera's request to instruct the jury that the government had to prove he specifically attempted to injure the named officers.

Reasonably interpreting the jury's note to be seeking guidance on how to determine whether the injured officers were the proper victims of Rivera's assault, the trial court instructed the jury on the concurrent-intent concept of a "zone of harm" created by a defendant's actions. Under that theory, a jury may infer that anyone within the zone of harm created by a defendant's assaultive conduct was an intended victim of that assault. The trial court reasonably determined that this concept could

apply based on the evidence that Rivera threw two metal projectiles at a crowd of uniformed police officers.

To the extent the trial court erred in instructing the jury that the government had to prove Rivera acted with the specific intent to injure the crowd of officers, such error was harmless. Because APO is a general-intent offense, that instruction unnecessarily raised the government's standard of proof and thus *benefitted* Rivera. Because the specific intent to injure encompasses the general intent to act, the jury necessarily found the requisite mens rea for APO. And the supplemental instruction did not displace the government's burden to show that Rivera acted voluntarily and had the requisite knowledge—elements on which the jury was properly instructed and whose proof Rivera does not dispute on appeal.

The trial court did not err in limiting Rivera's proposed cross-examination of certain officers related to corruption bias or currying favor bias. Rivera sought to cross-examine officers for corruption bias based on their [redacted] in other cases. But he never proffered any facts showing how those [redacted],

would demonstrate a bias to corrupt to the truth at trial. On the contrary, those [redacted] do not reflect the type of misconduct like bribery, blackmail, witness coaching, witness tampering, and manufacturing evidence that typically underlies this type of bias. The trial court also correctly ruled on the scope of Rivera's currying-favor cross-examination. It permitted Rivera to cross-examine one witness about the existence of a civil lawsuit related his conduct as a police officer in a manner sufficient to reveal any potential bias to curry favor with the government. And it properly prohibited Rivera from cross-examining another witness about currying-favor bias related to [redacted] of which the witness had no knowledge.

Regardless, any error in limiting Rivera's cross-examination would be harmless under any standard. The government's case did not hinge on the credibility of the testimony of the officers on whom Rivera focuses. The critical aspects of those witnesses' testimony were corroborated by both a significant amount of body-worn camera footage and by consistent accounts of witnesses whose testimony Rivera does not challenge on appeal. And the government's case against Rivera centered on body-worn camera footage capturing him throwing projectiles, body-worn camera

footage depicting the projectiles hitting officers, and Rivera's identification in still images of body-worn camera footage by an unbiased witness who was familiar with his appearance.

ARGUMENT

I. The Trial Court Correctly Instructed the Jury on the Intent Element of APO.

A. Additional Background

During deliberations, the jury sent a note asking whether it was "necessary for the Government to prove that the defendant was attempting to injure a specific named officer" (R. 188 (Jury Note)). Rivera argued that this was necessary because APO requires the government to name an officer as the victim of the assault (12/14/23 Tr. 2). The government, citing *Cheek v. United States*, 103 A.3d 1019 (D.C. 2014), countered that APO is a general-intent crime that requires the government only to prove that the defendant intended to commit the proscribed act (12/14/23 Tr. 4–5). Rivera maintained that the government had to prove that the defendant specifically intended to strike a police officer (*id.* at 8–9). Referencing *In re E.D.P.*, 573 A.2d 1307 (D.C. 1990), among other cases, the government explained that it is not necessary to

prove that the defendant intended to strike a specific officer (12/14/23 Tr. 9–11).

The government suggested that the trial court adopt Criminal Jury Instruction for the District of Columbia No. 3.201, which outlines the doctrines of transferred and concurrent intent (12/14/23 Tr. 11–12). The court agreed that those doctrines could apply based on the evidence at trial (*id.* at 11–14). Rivera objected to using the instruction and posited that the government had not proved that he was trying to hit a specific person and then ultimately hit someone else (*id.* at 14–15, 19–20). The trial court disagreed, noting that the officers "in th[e police] line were the targets [in] the direction to which th[e metal] object was thrown," so "there is an intended victim, it's just that it's an unidentified officer since there's no testimony that the officers who were allegedly injured ever . . . met the defendant" (*id.* at 15–21). It then resolved to instruct the jury consistent with Instruction No. 3.201 over Rivera's objection (*id.* at 22).

The trial court ultimately issued a written concurrent-intent instruction to the jury adapted from Instruction No. 3.201 stating:

> I further instruct you that if the government proves beyond a reasonable doubt that Luis Rivera threw T-shaped objects and that by throwing T-shaped objects, created a zone of harm/danger around the line of law enforcement officers, with

> the intent to injure/harm them, you may infer that Luis Rivera intended to injure/harm any other person in the anticipated zone of harm/danger and Luis Rivera has committed the same type of assault against Phillip Burggraf and/or Anthony Boone as he would have committed had he also injured/banned the line of law enforcement officers. This principle applies whether or not the intended victim is also injured/harmed and whether or not the intended victim is identified. (R. 189 (Response to Jury Note).)

B. Standard of Review and Applicable Legal Principles

When a jury sends a note expressing confusion about the law, trial courts are charged with crafting an appropriate response to address any juror confusion. *See Buskey v. United States*, 148 A.3d 1193, 1205–06 (D.C. 2016) (citations omitted). This Court reviews the trial court's supplemental instructions in response to a jury note for abuse of discretion. *Williams v. United States*, 314 A.3d 1158, 1180 (D.C. 2024) (citation omitted). It reviews de novo whether the instruction was an adequate statement of the law. *Fleming v. United States*, 224 A.3d 213, 219 (D.C. 2020) (en banc) (citations omitted).

Under abuse-of-discretion review, the Court must first determine whether the trial court erred in exercising its discretion and, if so, whether the impact of that error is of sufficient magnitude and prejudice to the defendant as to require reversal. *See Johnson v. United States*, 398

A.2d 354, 365–67 (D.C. 1979). For non-constitutional claims, reversal is not warranted unless the error substantially swayed the verdict. *See Kotteakos v. United States*, 328 U.S. 750, 764–65 (1946)).

To prove APO, the government must establish "the elements of simple assault" and the "additional element that the defendant knew or should have known that the victim was a police officer." *In re J.S.*, 19 A.3d 328, 330–31 (D.C. 2011) (cleaned up).

C. Discussion

The trial court's response to the jury note affords no basis for reversal. As this Court recognized in *Cheek*, APO is a "general intent" crime, and thus the "government need only show that [a defendant] inten[ded] to commit the proscribed act." 103 A.3d at 1021 (cleaned up). Contrary to Rivera's position below, which he reiterates again on appeal (Appellant's Brief (Br.) 8–10), the government did not need to prove that Rivera specifically intended to strike Officer Boone and Officer Burggraf—or indeed any officer at all—to convict Rivera of APO. *See In re E.D.P.*, 573 A.2d at 1308 (sustaining APO convictions under the theory of transferred intent when a juvenile detainee intended to punch a fellow detainee but instead struck officers attempting to break up a fight).

Rather, the mens rea for APO required only that Rivera threw the metal objects voluntarily and purposefully and not by mistake or accident, as the trial court appropriately informed the jury in its final instructions (12/13/23 Tr. 138, 149–50). *See In re J.S.*, 19 A.3d at 330–31, 334 & n.7. Accordingly, the correct answer to the jury's question about whether the government had to "prove that the defendant was attempting to injure a specific named officer" (R. 188 (Jury Note)) was no. *See In re E.D.P.*, 573 A.2d at 1308. The trial court thus did not err in rejecting Rivera's request to instruct the jury that it had to find that Rivera intentionally targeted Officers Boone and Burggraf.[4]

Rivera also cannot show any reversible error in the trial court's instruction on concurrent intent. We recognize that, as the name of the

[4] Rivera's recommended alternative instruction (Br. 10), which he offers without any citation to supporting case law, fails for the same reason. Any instruction to the jury that the government had to prove that "the object was specifically thrown at police officers" (Br. 10) is foreclosed by this Court's holdings that APO is a general intent crime, *In re J.S.*, 19 A.3d at 330–31, and that it can be established without proof that the defendant intended to hit an officer at all, *In re E.D.P.*, 573 A.2d at 1308. The second part of Rivera's proposed instruction—that the jury could find that "those hit" by the objects "were the proper victims" (Br. 10)—is consistent with the "zone of harm" instruction given by the trial court, as discussed in the text.

doctrine suggests, the concurrent-intent instruction fits best with offenses that require proof of a specific intent. *See, e.g., Nixon v. United States*, 730 A.2d 145, 148–49 (D.C. 1999) (specific intent to kill). As discussed, APO does not require such proof. But on the particular facts of this case, it is far from clear that the trial court abused its discretion in using the instruction to clear up apparent jury confusion.

The trial court reasonably interpreted the jury note to be seeking guidance on whether it could consider Officers Boone and Burggraf as proper victims of Rivera's assault (see 12/14/23 Tr. 7–8, 10–11, 13–14, 17, 20–21). Indeed, at time of the jury's inquiry, the jury was still considering the felony APO charge, which, as the trial court instructed, required it to find that Rivera "committed a violent act that created a grave risk of causing significant bodily injury to" Officers Boone and Burggraf (12/13/23 Tr. 130, 143).

Based on the evidence that Rivera threw multiple metal objects at a large group of uniformed police officers, it was not unreasonable for the trial court to provide guidance by explaining the theory of concurrent intent and its concept of the "zone of harm." As this Court recognized in *In re E.D.P.*, the government can establish APO under the doctrine of

transferred intent when a defendant intends to commit an assaultive act but unintentionally strikes an officer covered by the statute. 573 A.2d at 1308. Under the related doctrine of concurrent intent, a jury may similarly infer that people within a "zone of harm" created by a defendant's assaultive conduct are victims of that assault. *See Nixon*, 730 A.2d at 148–49 (citation omitted). Indeed, this Court has, at least implicitly, recognized that the zone-of-harm concept from the doctrine of concurrent intent could apply to an APO when a defendant's actions put multiple victims in harm's way. *See Fletcher v. United States*, 335 A.2d 248, 249, 251 & n.1 (D.C. 1975) (per curiam) (affirming convictions for both assault with intent to kill while armed and APO with a dangerous weapon where the defendant opened fire on a group of police officers at close range); *see also Walls v. United States*, 773 A.2d 424, 434 (D.C. 2001) (listing *Fletcher* in its discussion of concurrent-intent cases). Thus, it was reasonable for the trial court to instruct the jury that it could consider whether Rivera "created a zone of harm/danger around the line of law enforcement officers" by "throwing T-shaped objects" and whether Officers Burggraf and Boone were proper victims within that

"anticipated zone of harm/danger," even if the "intended victim" was never "injured" or "identified" (R. 189 (Response to Jury Note)).[5]

Ideally, the trial court should have modified the specific-intent language from model instruction to reflect the general intent mens rea of APO. The supplemental instruction informed the jury that the government had to prove that Rivera "threw T-shaped objects . . . *with the intent to injure/harm*" officers within the "zone of harm/danger" (R. 189 (Response to Jury Note) (emphasis added)). Although we acknowledge that the government requested the standard instruction, the court need only to have stated that Rivera created a zone of harm by throwing the T-shaped objects voluntarily and purposefully and not by mistake or accident.

If the trial court erred in the wording of its response to the jury note, however, Rivera could not have been substantially prejudiced for three reasons.

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[5] That instruction was directly adapted from model Criminal Jury Instruction for the District of Columbia No. 3.201, which this Court has cited with approval. *See (Donell) Washington v. United States*, 111 A.3d 16, 23–24 & n.6 (D.C. 2015).

First, any harm flowing from that error would *benefit* Rivera because it increased the government's burden of proof. Instead of the general intent to perform the assaultive act required to prove the mens rea of APO, the supplemental instruction unnecessarily informed the jury that the government had to prove that Rivera acted for the specific purpose of injuring or harming the officers.

Second, and relatedly, a defendant's specific intent to act to cause injury to another would logically encompass his general intent to perform that action. *See (David) Washington v. United States*, 689 A.2d 568, 573 (D.C. 1997) (recognizing that assault with a dangerous weapon is a lesser-included offense of assault with intent to kill while armed without the specific-intent element) (citations omitted). Thus, if the jury found that Rivera acted with the specific intent to injure by throwing the metal objects at the crowd of police officers, then it necessarily had to find that Rivera had the general intent to perform that action.

And third, the error did not relieve the government of its burden of proof or confuse the issues before the jury. Even under this unnecessarily heightened burden of proof, the government still had to prove that Rivera acted voluntarily by throwing metal objects at the officers, as the trial

court had instructed (12/13/23 Tr. 138, 149–50). Likewise, the government still had the burden to prove the separate element that Rivera knew or reasonably knew or had reason to know that the foreseeable victim of his assault was a police officer (*id.*). Because the "jury is presumed to have followed [its] instructions," this Court should "not upset the verdict by assuming the jury declined to do so." *Harris v. United States*, 602 A.2d 154, 165 (D.C. 1992) (en banc) (cleaned up). Furthermore, Rivera does not dispute that he acted voluntarily in throwing the projectiles. Nor is there any meaningful dispute that the evidence proved beyond a reasonable doubt that he knew or should have known he was throwing metal objects at police officers.[6] The Court thus can conclude that any error in the trial court's supplemental instruction on concurrent intent did not substantially sway the verdict. *See Kotteakos*, 328 U.S. at 765.

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[6] Multiple witnesses testified that the man later identified as Rivera threw two objects at the line of uniformed police officers (12/11/23 Tr. 86–99, 102–104, 115–17; 12/12/23 Tr. 43–55). Multiple witnesses testified that only uniformed police officers occupied the areas in the path of Rivera's projectiles (12/11/23 Tr. 116–17, 142; 12/12/23 Tr. 56, 89–90). And multiple angles of video footage captured both Rivera throwing the objects and the crowd of uniformed police officers that stood in the path of his missiles (see, e.g., Exhs. 30, 31, 32, 33, 35).

II. The Trial Court Did Not Abuse Its Discretion in Restricting Rivera from Cross-Examining Witnesses on Irrelevant Matters.

A. Additional Background

1. Cross-Examination of Officer Boone

Prior to cross-examining Officer Boone, Rivera sought and received permission to question him, on a theory of currying-favor bias, about being a defendant in a pending civil lawsuit related to a wrongful arrest (12/13/23 Tr. 3–15). Immediately after questioning Officer Boone about whether police used force against protestors in the instant case, Rivera proceeded to question Officer Boone about the pending lawsuit (12/13/23 Tr. 60–63). Rivera elicited that Officer Boone was a defendant in a pending lawsuit (*id.* at 63). But, when he asked Officer Boone whether lawsuit related to his conduct on the job, Officer Boone replied that, "as far as I actually go on the lawsuit," he did not know because he "had nothing to do with the scene [that was the subject of the] lawsuit" (*id.*).

When Rivera attempted to question him further, the government objected, and the trial court convened a bench conference (12/13/23 Tr. 63–64). The trial court observed that Rivera asking these questions "right after [his] use of force questions[ ] seems to indicate that th[is is] a

lawsuit regarding use of force" (*id.* at 65; see *id.* at 67, 69, 71–72, 75, 80). Rivera stated that he had no further questions for Officer Boone, that he "was able to . . . ask about the lawsuit," and "that's what I did" (*id.* at 70, 78; see *id.* at 72–73). To address the perceived implication that Officer Boone had been accused of excessive use of force in this case, the trial court issued a curative instruction to the jury:

> There was reference that was made on cross-examination to a civil lawsuit pending against . . . this officer, others, including the District of Columbia. That lawsuit is not related to the circumstances in this case. It's not related to the events of June 22nd, 2020. (*Id.* at 85.)

Rivera also sought to cross-examine Officer Boone on a [redacted] (12/13/23 Tr. 15–16; see Sealed Supp. Exh. 1 (Officer Boone Redacted PPMS Information)).[7] [redacted]

[7] [redacted] (see Sealed Supp. Exh. 1).

[redacted][8]

The government argued that this [redacted] did not establish bias and noted that there was nothing suggesting that Officer Boone committed any type of similar infraction in this case (*id.* at 16–17). The trial court sustained the objection (*id.* at 17).

Rivera otherwise cross-examined Officer Boone extensively about his recollection of the events of June 22, 2020, including his limited knowledge of what was the object that hit him, his ignorance of his assailant, the severity of his injuries, and his observations of the tactics that police used to clear protestors from Lafayette Square (see 12/13/23 Tr. 52–63).

2. Cross-Examination of Detective Babich

Rivera cross-examined Detective Babich at length about the body-worn camera footage he reviewed during his investigation and about how some of the footage unrelated to the assault captured from different

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[8] [redacted] (see 12/13/23 Tr. 16).

officers' cameras appeared to be desynchronized by approximately 11 seconds (12/12/23 Tr. 18–29).

At the end of Detective Babich's redirect examination, Rivera sought to re-open cross-examination to question the detective about an [redacted] (12/12/23 Tr. 32–33). [redacted] (*id.* at 72–73; see *id.* at 83–84; Sealed Supp. Exh. 2 (Detective Babich Redacted PPMS Information)). [redacted] (12/12/23 Tr. 73).[9]

[9] [redacted] (see 12/12/23 Tr. 69–70, 74).

Rivera proffered that this [redacted] demonstrated Detective Babich's corruption bias and affected his credibility as a witness (12/12/23 Tr. 34–35, 75–77). The government objected, arguing that the proffer and nature of the [redacted] did not relate to that theory of bias (*id.* at 73–75, 82–83). The court initially sustained the government's objection to the cross-examination, permitted the parties to present further arguments on the issue, and then sustained the objection again on the basis that the misconduct at issue did not reveal corruption bias (*id.* at 39, 86–87).

3. Cross-Examination of Officer Burggraf

Rivera cross-examined Officer Burggraf on a range of topics, including the severity of his injuries, that he did not see who threw the object that hit him, and that he saw other objects being thrown around that time (12/11/23 Tr. 60–72).

Following Officer Burggraf's testimony, Rivera proposed to recall him as a witness to cross-examine him on a [redacted] (see 12/11/23 Tr. 83–84; 12/13/23 Tr. 92). The government objected and proffered that Officer Burggraf informed prosecutors that

he was not aware of [redacted] (12/13/23 Tr. 93–94). The trial court offered Rivera the opportunity to voir dire Officer Burggraf about his awareness of the [redacted] (*id.* at 96). Rivera declined and accepted the government's representation in lieu of the hearing (*id.*). The government confirmed again with Officer Burggraf that he was not aware of [redacted], (*id.* at 96, 104–05). Rivera proposed asking him in front of the jury whether he was aware of [redacted] (*id.* at 105). The court found that there would be no basis to do so based on his lack of knowledge (*id.*).[10]

4. Cross-Examination of Officer Motley

After cross-examining Officer Motley to elicit that he was unaware of whether the object was thrown at a specific target, whether the object hit anyone, and what the object was (12/12/23 Tr. 55–60), Rivera then

[10] Rivera also mentioned that he would have asked Officer Burggraf about [redacted] but stated that "based on the other rulings, it doesn't appear that I'm going to be able to ask about that" (12/13/23 Tr. 92). Rivera did not press the position, ask the trial court for a ruling, proffer any facts that would establish permissible grounds for cross-examination, or otherwise seek to examine Officer Burggraf on that point. He thus forfeited the issue and failed to present any grounds on which the policy violations could be admissible.

proposed to cross-examine Officer Motley about [redacted] (*id.* at 60; see *id.* at 87–88; Sealed Supp. Exh. 3 (Officer Motley Redacted PPMS Information)).[11] The government objected that the cross-examination would be improper because Rivera's proffer did not establish that the [redacted] would support that Officer Motley had a corruption bias or a bias to curry favor or otherwise was not credible because he had an untruthful character (12/12/23 Tr. 60, 87–88). The trial court agreed and sustained the objection (*id.* at 88).

5. Cross-Examination of Officer Rodriguez

Rivera cross-examined Officer Rodriguez on several topics, including that he did not recall having a specific conversation with a civilian on June 22, 2020, captured by his body-worn camera, that he saw officers using pepper spray, and that he did not know why his body-worn camera footage might be asynchronous with footage from another officer's camera (12/12/23 Tr. 104–12).

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11 [redacted] (see 12/12/23 Tr. 70, 87).

Rivera then sought to cross-examine Officer Rodriguez about [redacted] (see 12/12/23 Tr. 113–16; Sealed Supp. Exh. 4 (Officer Rodriguez Redacted PPMS Information)). [redacted] (see 12/12/23 Tr. 113–16; Sealed Supp. Exh. 4). [redacted] (see 12/12/23 Tr. 113–16; Sealed Supp. Exh. 4). [redacted] (see 12/12/23 Tr. 113–16; Sealed Supp. Exh. 4).[12] Without explaining the precise theory of bias, Rivera asserted that this incident undermined Officer Rodriguez's credibility and

[12] [redacted] (see 12/12/23 Tr. 115).

reliability as a witness (12/12/23 Tr. 113, 116). The government argued that Officer Rodriguez [redacted] (see *id.* at 115–16). The trial court sustained the objection (*id.* at 117).

B. Applicable Legal Principles and Standard of Review

"The Confrontation Clause of the Sixth Amendment guarantees a defendant in a criminal case the right to confront witnesses against him." *Smith v. United States*, 180 A.3d 45, 51 (D.C. 2018) (cleaned up). Thus, a trial court may not prohibit a defendant from cross-examining a witness in a manner that "keeps from the jury relevant and important facts bearing on the trustworthiness of crucial testimony." *Id.* (cleaned up). However, the Sixth Amendment "guarantees the *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Gardner v. United States*, 140 A.3d 1172, 1191 (D.C. 2016) (quoting *Delaware v. Van*

Arsdall, 475 U.S. 673, 679 (1986)) (emphasis in original). The trial judge thus may use "its discretion [to] limit cross-examination into matters having little relevance or probative value to the issues raised at trial." *Payne v. United States*, 516 A.2d 484, 498 (D.C. 1986) (cleaned up). And it may also exercise its "sound discretion" to reasonably limit "the extent of cross-examination of a witness with respect to an appropriate subject of inquiry," such as to avoid juror confusion or when the prejudice of the cross-examination outweighs its probative value. *Cunningham v. United States*, 974 A.2d 240, 245 (D.C. 2009) (cleaned up).

Generally, a party cannot cross-examine a witness based on prior misconduct by "present[ing] evidence that a person acted in a certain fashion on a prior occasion in order to show conformity with that behavior in a later setting." *Dodson v. United States*, 288 A.3d 1168, 1176 (D.C. 2023) (quoting *Austin v. United States*, 64 A.3d 413, 422 (D.C. 2013)) (cleaned up); *see Brown v. United States*, 726 A.2d 149, 153 (D.C. 1999).[13]

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[13] As an exception to the rule against propensity evidence, a party may cross-examine a witness on a prior bad act that establishes his or her untruthful character that "bears directly upon the veracity of the witness in respect to the issues involved in the trial." *Moore v. United States*, 114 A.3d 646, 654 (D.C. 2015) (cleaned up); *see (Wonell) Jones v. United States*, 263 A.3d 445, 456 n.4 (D.C. 2021). That theory of impeachment is (continued . . .)

A party may, however, cross-examine a witness about misconduct unrelated to the case to establish that he or she has a bias that would motivate him or her to lie under oath. *See Smith*, 180 A.3d at 51. This appeal implicates two distinct theories of that form of bias.

The first theory of bias relevant to this appeal is so-called "corruption bias," which implicates a witness's "willingness to give false testimony" and "obstruct the discovery of the truth." *Smith*, 180 A.3d at 51–53 (cleaned up). For cross-examination of this type of bias to be proper, it must be "probative not merely of the witness's lack of veracity, but of his corruption—his willingness to obstruct the discovery of the truth by manufacturing or suppressing testimony or otherwise to thwart the ascertainment of truth in a judicial proceeding." *Id.* at 58 (cleaned up). The types of prior bad acts that this Court has recognized as relevant to this theory of bias include witness tampering, *see Longus v. United States*, 52 A.3d 836, 851–54 (D.C. 2012), coaching witnesses to lie, *see id.*, blackmailing witnesses, *see In re C.B.N.*, 499 A.2d 1215, 1217–21 (D.C.

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separate from bias. Rivera, however, focuses his claim exclusively on bias cross-examination (see Br. 11, 15–17). He thus abandons any claim he might have about cross-examining the witnesses on this theory. *See Bardoff v. United States*, 628 A.2d 86, 90 n.8 (D.C. 1993).

1985), bribing witnesses, *see id.* at 1219 (citations omitted), and reporting a fabricated murder confession to law enforcement and manufacturing corroborating evidence, *see Coates v. United States*, 113 A.3d 564, 569–75 (D.C. 2015).

The second relevant theory is "currying-favor" bias. This type of bias might arise when an officer is or was the subject of a police department or other government investigation during the time that he or she played an active role in the instant case. *See Howard v. United States*, 241 A.3d 554, 564 (D.C. 2020); *Vaughn v. United States*, 93 A.3d 1237, 1265 n.33 (D.C. 2014); *Martinez v. United States*, 982 A.2d 789, 794–95 (D.C. 2009). The theory animating this type of bias is that the officer may harbor "a motive to slant his testimony in favor of the government in hopes of protecting or redeeming his stature with the police department." *Martinez*, 982 A.2d at 794 (cleaned up). "[I]t is . . . the witness'[s] subjective belief of the potentially beneficial effects that his testimony may have upon his own situation that provides the basis for such inquiry on cross-examination." *Lewis v. United States*, 10 A.3d 646, 653 (D.C. 2010) (cleaned up). The scope of this type of cross-examination is generally limited to the existence of the investigation, possible sanctions,

and the general nature of the allegations. *See Furr v. United States*, 157 A.3d 1245, 1251 (D.C. 2017) ("Only the fact that this investigation was pursued, with potential adverse consequences . . . was probative of this motive [to curry favor]."). Moreover, when a witness "d[oes] not know the underlying facts [that] would arguably create bias," then it is not an "abuse [of] discretion [to] preclud[e] cross-examination" on that basis. *Cunningham*, 974 A.2d at 246 (citation omitted).

"[B]efore a line of bias questioning can be pursued, the proponent must provide an adequate foundational proffer to establish the relevance of a proposed inquiry by facts from which the trial court may surmise that the line of questioning is in fact probative of bias." *Ashby v. United States*, 199 A.3d 634, 660 (D.C. 2018) (cleaned up). "[T]he burden of showing the relevance of particular evidence to the issue of bias rests on its proponent." *Coles v. United States*, 808 A.2d 485, 490 (D.C. 2002) (cleaned up). And the trial judge has broad discretion in determining whether particular evidence is relevant to bias. *Id.* "Moreover, not everything tends to show bias, and courts may exclude evidence that is only marginally useful for this purpose." *Id.* (cleaned up). Thus, after assessing the proponent's proffer, the trial court in its discretion may

"preclud[e] cross-examination where the connection between the facts cited by defense counsel and the proposed line of questioning is too speculative to support the questions." *Smith*, 180 A.3d at 54 (cleaned up).

On appeal, it is the appellant's burden to demonstrate that he was "prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness." *Van Arsdall*, 475 U.S. at 680. This Court reviews a trial court's decision to limit cross-examination based on the proffer presented by the proponent. *See Smith*, 180 A.3d at 55. The standard of review "depends on whether the trial court has permitted sufficient cross-examination to comport with the requirements of the Sixth Amendment right to confrontation." *Gardner v. United States*, 140 A.3d 1172, 1191 n.28 (D.C. 2016) (cleaned up). If the defendant was "wholly deprived . . . of any opportunity to cross-examine a witness or present evidence concerning bias," this Court will affirm if "the error was harmless beyond a reasonable doubt." *Id.* (quotation marks omitted). Where the trial court's limitation on cross examination does not violate the Sixth Amendment, however, this Court reviews for an abuse of discretion "under the less

stringent test for harmless error" set forth in *Kotteakos*, 328 U.S. at 765. *Id.* (quotation marks omitted).

In assessing harmlessness, the Court considers "the importance of the witness[es'] testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and . . . the overall strength of the prosecution's case." *Van Arsdall*, 475 U.S. at 684.

C. The Trial Court Appropriately Limited the Scope of Cross-Examination.

1. Corruption Bias

On appeal, Rivera asserts (Br. 16) that Officer Boone's [redacted] reveals his corruption bias. Rivera, however, failed to connect Officer Boone's [redacted] to some "willingness to obstruct the discovery of the truth by manufacturing or suppressing testimony." *In re C.B.N.*, 499 A.3d at 1219 (cleaned up).

To be sure, [redacted].

But Rivera never proffered any facts supporting a "well-reasoned suspicion" that Officer Boone [redacted] to cover up some sort of illegal activity or misconduct. *Smith*, 180 A.3d at 57–59. Indeed, Rivera never alleged any underlying misconduct at all that Officer Boone would have been attempting to cover up. Officer Boone's [redacted] does not establish that he has a bias for corruptly "obstruct[ing] the discovery of the truth . . . in a judicial proceeding." *Smith*, 180 A.3d at 57–59 (cleaned up).

Rivera likewise does not establish that the trial court erred by not permitting him to cross-examine Detective Babich about [redacted]. Rivera never proffered facts linking Detective Babich's [redacted] to any type of corrupt activity suggesting he would have a bias to frustrate the truth-seeking process at trial. There is no logical relationship between [redacted] and actions like bribery, blackmail, witness tampering, and manufacturing evidence that might reveal a bias to corrupt the truth at *trial*. *See Coates*,

113 A.3d at 569–75; *Longus*, 52 A.3d at 851–54; *In re C.B.N.*, 499 A.2d at 1217–21.

Rivera otherwise does not articulate any argument for why the trial court erred in limiting his cross-examination of other officers on sustained violations of various MPD policies (cf. Br. 15–17). His failure to do so waives any claim he might have related to those proposed lines of cross-examination. *See Bardoff v. United States*, 628 A.2d 86, 90 n.8 (D.C. 1993). And, at the very least it cannot satisfy his burden to establish error on appeal. But putting those infirmities aside, any such claim he might argue would be meritless.

As with Officer Boone's [redacted], Rivera never proffered any facts supporting that Officer Motley and Officer Burggraf [redacted] meras in unrelated cases to cover up misconduct or actively suppress the truth (see 12/12/23 Tr. 60, 87–88; 12/13/23 Tr. 92).

Likewise, Rivera failed to justify his proposed cross-examination of Officer Rodriguez related to his [redacted] (see 12/12/23 Tr. 113–16). Although Officer Rodriguez was

only disciplined for his [redacted], Rivera sought to question him about an opinion by an assistant chief of police speculating that he [redacted] (see *id.*). That opinion was formed based on the assistant chief's review of the disciplinary file (see *id.*). Even if that speculation based on a second-hand review of a case file were admissible[14] and accepted at face value, Officer Rodriguez's decision to [redacted] does not support a well-reasoned suspicion that he has a bias to corrupt the truth at trial similar to bribery, blackmail, witness tampering, or manufacturing evidence. *See Coates*, 113 A.3d at 569–75; *Longus*, 52 A.3d at 851–54; *In re C.B.N.*, 499 A.2d at 1217–21.

[14] The trial court could have excluded that opinion on the basis that it was speculative, premised on hearsay, and risked inviting a collateral trial-within-a-trial that would confuse the jury on the merits of the instant case. *See, e.g.*, *Furr*, 157 A.3d at 1251 & n.13 (reasoning that the findings of an administrative investigation into police officer's misconduct would be inadmissible "because they [are] based on hearsay rather than [the investigator's] personal knowledge of what happened").

2. Currying-Favor Bias and Pending Lawsuits and Investigations

While Rivera recites the record related to the trial court's rulings related to currying-favor bias, he does not develop any argument about why those rulings were erroneous (cf. Br. 15–17). His arguments on their face appear to be confined only to the trial court's limitation of cross-examination for corruption bias (see *id.* at 16–17). He thus abandons his currying-favor bias claims on appeal, *see Bardoff*, 628 A.2d at 90 n.8, and separately cannot sustain his burden to establish error on those claims.

Nevertheless, the trial court did not err. It permitted Rivera to cross-examine Officer Boone about being a defendant in a pending lawsuit related to his conduct as a police officer (12/13/23 Tr. 63). And it permitted Officer Boone to testify about his perceived role in the alleged conduct underlying the case (*id.*). It thus allowed Rivera to explore the reasons that Officer Boone might curry favor for the government. *See Furr*, 157 A.3d at 1251; *see also (Emmett) Jones v. United States*, 853 A.2d 146, 152 (D.C. 2004) ("Once sufficient cross-examination has occurred to satisfy the Sixth Amendment, . . . the trial judge may curtail cross-examination because of concerns of harassment, prejudice,

confusion of the issues, . . . or interrogation that is . . . only marginally relevant . . . .") (citation omitted).[15]

The trial court also correctly handled Rivera's proposed cross-examination of Officer Burggraf related to [redacted] of which he was unaware. Following the government's proffer that Officer Burggraf had no knowledge of [redacted], the trial court offered Rivera the opportunity to voir dire Officer Burggraf outside the presence of the jury (12/13/23 Tr. 93–96). Although Rivera accepted the government's representation and declined the voir dire opportunity, he proposed to question Officer Burggraf about [redacted] before the jury (*id.* at 96, 105). The trial court appropriately denied that request as baseless (*id.* at 105). That decision aligns with this Court's recognition that a witness must know about the pending matter to have a reason to curry favor for the government. *See Cunningham*, 974 A.2d at 246.

[15] Rivera does not challenge the trial court's curative instruction following Officer Boone's testimony, which abandons any potential claim of error he might have about that instruction. *Bardoff*, 628 A.2d at 90 n.8

D. Any Error in Partially Limiting Cross-Examination Was Harmless Under Any Standard of Review.

Even if the trial court's restrictions on cross-examination were error, they would be harmless under any standard.

To start, it was never seriously disputed at trial that Officers Burggraf and Boone were each struck by metal projectiles hurled from the crowd of protestors. And even if Rivera were permitted to ask them further questions to develop their supposed biases to fabricate their testimony, the fact that they were struck by the metal projectiles was captured by their body-worn camera footage, which any possible bias did not affect (Exh. 30 at 20:19:35–20:19:37; Exh. 32 at 20:20:02–20:20:04).

The central issue at trial instead was whether Rivera was the person who threw the objects at the police officers seconds apart between 8:19 p.m. and 8:20 p.m. Here, too, any effort by Rivera to develop any ostensible bias of Officers Rodriguez, Boone, Burggraf, or Motley or Detective Babich to lie would not have swayed the verdict under any standard.

Officers Rodriguez, Boone, and Motley never claimed to have seen the person who threw the projectiles at the line of the officers. Their testimony was inconsequential to the ultimate issue of identification.

Instead, to prove identity, the government called Detective Pelta, who testified that she saw a man later identified as Rivera throw two projectiles at the line of officers between 8:19 p.m. and 8:20 p.m., which was also captured on her body-worn camera footage (12/11/23 Tr. 87–99, 102–104, 115–17; Exh. 35 at 20:19:31–20:20:04). The timing and location of those throws align with the projectiles that hit Officers Boone and Burggraf based on their body-worn camera footage (see Exh. 35 at 20:19:31–20:20:04; Exh. 30 at 20:19:35–20:19:37; Exh. 32 at 20:20:02–20:20:04). Officer Motley likewise saw the same man throwing projectiles at the same time from a nearly identical vantage point (12/12/23 Tr. 43–56, 89). That testimony was corroborated not only by Detective Pelta's testimony and body-worn camera footage, but also his own objective, unbiased body-worn camera footage (see Exh. 33 at 20:19:31–20:20:04; Exh. 35 at 20:19:31–20:20:04).

While Detective Babich's testimony was helpful to explain the background of the investigation that ultimately led to Rivera's

identification, the critical aspects of identifying Rivera as the assailant were established and corroborated by other witnesses who are not the subject of Rivera's claim. Detective Pelta, who witnessed firsthand Rivera throwing the objects at officers testified that Detective Babich's BOLO depicted the person whom she saw throwing the projectiles at the officers at 8:19 p.m. and 8:20 p.m. and that she confirmed the same to him (12/11/23 Tr. 100–04; Exhs. 23, 24). Likewise, Murray reviewed that same BOLO and identified Rivera as the person depicted based on her knowledge of his appearance from her ongoing and extensive contacts with Rivera during that period (12/12/23 Tr. 92–95; Exh. 23). Moreover, the jury was able to observe Rivera at trial and compare him to the assailant captured in the body-worn camera footage from June 22, 2020. Indeed, based on Rivera's likeness to the person depicted in the body-worn camera footage, that is exactly what the government encouraged the jury to do in its closing arguments (12/13/23 Tr. 159).

In sum, the government's case was strong and built primarily on objective video evidence and testimony from witnesses not implicated by his appeal. The critical aspects of the challenged witnesses' testimony were significantly corroborated by objective body-worn camera footage

and testimony from the unbiased witnesses, and in many instances both. Even if Rivera could have convinced the jury to discredit the challenged witnesses' testimony in their entirety, his actions and identity were overwhelmingly established by the other evidence in the record. Accordingly, any error in limiting Rivera's further cross-examination of these five officers into some potential bias would be harmless under any standard.

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 T. Heslep, Esq., on this 16th day of December, 2024.

/s/
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