BRIEF FOR APPELLEE

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 24-CF-758

BRYANT PHILLIPS, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

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

Cr. No. 2022-CF1-4306

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II. Whether the trial court abused its discretion by denying Phillips's motion for a mistrial, where A.H.'s reference to "house arrest" was brief and non-specific, the government's case against Phillips was strong, and the trial court took immediate mitigating action by striking the testimony when Phillips's counsel objected.

III. Whether the trial court plainly erred by not sua sponte repeating in the final jury charge a limiting instruction it gave immediately after the relevant testimony, where Phillips's trial counsel made a tactical decision not to request such an instruction, and Phillips has failed to show a reasonable probability he would have been acquitted if the court had simply repeated the same instruction verbatim in the final charge.

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By indictment filed on February 18, 2023, Bryant Phillips was charged with two counts of first-degree sexual abuse (D.C. Code §§ 22-3002(a)(1), (2), (4)); one count of kidnapping (D.C. Code § 22-2001); two counts of assault with a dangerous weapon (D.C. Code § 22-402); one count of assault with significant bodily injury (ASBI) while armed (D.C. Code §§ 22-404(a)(2), 4502); and one count of felony threats (D.C. Code § 22-1810) (Record on Appeal (R) 127-28 (Indictment)).[1] The charges were based on

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

Phillips's ongoing abuse of complainant A.H. between June 5, 2022, and June 8, 2022, during which time Phillips sexually assaulted A.H. multiple times, punched her, struck and strangled her with a belt, burned her with a hot iron, and forced her to consume crack cocaine by threatening to commit more violence against her if she disobeyed him (R127-28; 3/28/24 Transcript (Tr.) 94-96).

On March 25, 2024, a jury trial began before the Honorable Anthony Epstein (3/25/24 Tr. 110). On March 28, 2024, the jury found Phillips guilty on all charges (R337-38 (Verdict Form); 3/28/24 Tr. 129).[2] On August 9, 2024, Judge Epstein sentenced Phillips to an aggregate term of lifetime incarceration without the possibility of release (R381-82; 8/9/24 Tr. 16-17).[3] On August 19, 2024, Phillips timely appealed (R383-84 (Notice of Appeal)).

The Trial

The Government's Evidence

A.H. met Bryant Phillips on a flight from Las Vegas to Washington, D.C., in February 2021 (3/26/24 AM Tr. 34, 56). A.H. was a human-resources assistant for the

[2] At the close of evidence, the government voluntarily dismissed the "while armed" enhancement for ASBI due to the absence of testimony specifically attributing A.H.'s need for immediate medical treatment to the injury she suffered when Phillips struck her with a hot iron (3/27/24 Tr. 152-54; 3/28/24 Tr. 12).

[3] Phillips's maximum sentence was increased to life based on his multiple prior convictions for crimes of violence (R232-33, R360). *See* D.C. Code § 22-1804a(a)(2).

Coast Guard who had previously served as an intelligence analyst for the Marines (*id.* at 27-32). She was returning from a trip to celebrate her 55th birthday with her younger brother (*id.* at 34-36). A.H. and Phillips sat next to each other on the flight, and they had a casual conversation that led them to exchange phone numbers (*id.* at 36-37).

After A.H. returned home to Maryland, Phillips called her, and they stayed in touch (3/26/24 AM Tr. 37-38). A couple of months after they met, A.H. and Phillips began a sexual relationship, which A.H. characterized as "[f]riends with benefits" (*id.* at 52-53). A.H. made clear she was not interested in being Phillips's "girlfriend," and she told him that she hoped to pursue a more serious relationship with someone else (*id.* at 54-55). Despite this, Phillips expressed anger when A.H. did not immediately respond to his repeated texts and phone calls or cut short a conversation with him to speak with a family member (*id.* at 121-23, 133-34). Phillips also expressed jealousy when A.H. received attention from other men (*id.*).[4] At the time, however, A.H. did not perceive significant problems with the nature of their relationship (*id.* at 55).

On June 2, 2022, Phillips gave A.H. a ride to the airport so she could travel to a bowling tournament in Ohio (3/26/24 AM Tr. 59). During the drive, Phillips "got upset" at A.H. and pulled his car onto a side road (*id.*). Phillips "[s]tarted making threats" and

[4] In a text exchange presented at trial, A.H. sent Phillips a video of her dancing, and he responded, "I see dancing with another n* and flirting" (Gov. Ex. 204). The government will file a motion to supplement the record on appeal with its trial exhibits.

warned A.H. that he would "do things to [her]" so that "[p]eople weren't going to find [her]" (*id*. at 59-60). Although A.H. felt "scared" during this incident, she accepted Phillips's explanation that it was a post-traumatic-stress-disorder (PTSD) episode,[5] and he drove her the rest of the way to the airport (*id*. at 60).

While A.H. was at the bowling tournament, Phillips "constantly" called her on FaceTime, asking her to "show him" "who [she] was around" "to see if [she] was talking to anyone" (3/26/24 AM Tr. 61). The calls were so disruptive that A.H. eventually stopped answering them during the day (*id*. at 61-62). One night, A.H. fell asleep in her hotel room during a FaceTime call with Phillips (*id*. at 62). When she awoke, Phillips told her that he had heard the television changing channels while she slept, and he accused her of having another man "in the room with [her]" (*id*.). Although A.H. insisted "there was nobody there," Phillips asked her to give him the address of the bowling tournament, and he said he would drive to Ohio to see her in person (*id*. at 63). A.H. gave Phillips the address "out of frustration," but he did not ultimately travel to the tournament (*id*. at 63, 132).

On June 5, 2022, A.H. flew back from her trip, and her brother gave her a ride from the airport to her home (3/26/24 AM Tr. 8-9, 63-64). A.H.'s brother did not notice anything wrong or unusual with her at that time (*id*. at 8-10). Later that night, A.H. went

[5] A.H. was familiar with PTSD, as she suffered from it after her military deployment with the Marines (3/26/24 AM Tr. 60).

to Phillips's apartment in D.C., which she and Phillips had planned before she left Ohio (*id*. at 57, 64-65). Since it was already late, A.H. brought a change of clothes with her, intending to stay overnight before driving her mother (who had Alzheimer's disease) to a doctor's appointment the next day (*id*. at 9, 65-66, 88-89).

When A.H. arrived at Phillips's apartment, he greeted her pleasantly (3/26/24 AM Tr. 66). After A.H. put her belongings down in the bedroom, however, Phillips took both of her cell phones, closed the door, and told her to take off her clothes (*id*. at 70-71, 75-76). Concerned about Phillips's angry demeanor, A.H. said she was going to leave (*id*. at 71). Phillips responded that she "wasn't going anywhere" (*id*.). Phillips accused A.H. of being with another man in her hotel room and demanded to know who it was (*id.* at 72). A.H. repeatedly denied that anyone was with her (*id*.). When A.H. tried reaching for the bedroom door handle, Phillips stopped her and pushed her back (*id*.). Phillips again angrily told A.H. to take off her clothes and get on the bed (*id*. at 72-73). A.H. "begg[ed]" Phillips to let her leave, but he instead punched her in the face (*id*.). "[S]cared," and seeing "stars" from the punch, A.H. took off her clothes (*id*.).

Phillips forced A.H. onto the bed and began to strike her with a belt (3/26/24 AM Tr. 72-74). Phillips repeatedly hit A.H. with the belt on her buttocks and back of her legs, demanding to know who was with her in the hotel room (*id*.). A.H. begged Phillips to stop and screamed for help, to no avail (*id*.). Phillips wrapped the belt around A.H.'s neck and strangled her with it until she nearly lost consciousness (*id*. at 105). Phillips

also showed A.H. a pair of garden shears and said he would cut off her fingers if she did not tell him "who was in the [hotel] room" (*id*. at 74). Phillips told A.H. that "we're going to chop you up and no one [is] ever going to be able to find you" (*id*.). He then called out for someone to "get the bags ready" for A.H.'s body, acting as though he had accomplices elsewhere in the apartment (*id*.).[6]

A.H. tried to escape by running out of the bedroom, but Phillips caught her before she reached the apartment door (3/26/24 AM Tr. 76). Phillips punched A.H. in the side of her face and took her back to the bedroom (*id*.). He told her that if she tried to run again, he would "gash [her] in the head with an iron" (*id*.). Phillips later showed the iron to A.H. and "kept telling [her] he was going to burn [her] eyes so that nobody would want [her], but he would want [her]" (*id*. at 77). When Phillips heated the iron and tried to press it against A.H.'s eyes, she blocked it with her left hand, causing a severe burn (*id*. at 78).[7]

After A.H.'s escape attempt, Phillips forced her back onto the bed and made her raise her buttocks in the air (3/26/24 AM Tr. 76-77). Phillips told A.H. "this going to hurt you [more] than this is going to hurt me" and proceeded to anally rape her (*id*.). A.H. felt that she "couldn't really do anything but lay there, because [Phillips] had [her]

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[6] A.H. did not see anyone else in Phillips's apartment that day or the following days (3/26/24 AM Tr. 75).

[7] At trial, almost two years later, A.H.'s hand still had a visible scar from this burn (3/26/24 AM Tr. 78).

gripped around the waist and he was pulling [her] to him" (*id*. at 77). Fearing that Phillips was "going to kill [her]," A.H. "started telling him what he wanted to hear" about being with another man in her hotel room (*id.* at 75).

Phillips later brought A.H. a tray with rocks of crack cocaine and a pipe (3/26/24 AM Tr. 75, 78; 3/26/24 PM Tr. 24). Phillips told A.H. he wanted her "to be mine," and he was "tired of [her] taking too long to make up [her] mind" (3/26/24 AM Tr. 78-79). He insisted that she smoke crack—which she had never done before—because when she became addicted, she would need to come to him for more (*id.*; 3/26/24 PM Tr. 24). Phillips threatened more violence if A.H. did not comply, and he watched her to see "the smoke come out [of her] mouth" (3/26/24 AM Tr. 79). A.H. smoked the crack, which made her feel unlike herself (*id*. at 80; 3/26/24 PM Tr. 24). Phillips demanded that A.H. "tell him stories about what the guys did to [her] when [she] was in the hotel," requiring her to "make up things" (3/26/24 AM Tr. 80). Phillips also smoked crack, after which he forcibly "shove[d]" his penis down A.H.'s throat (*id*.).

Phillips's abuse of A.H. went on for multiple days (3/26/24 AM Tr. 80-81; 3/26/24 PM Tr. 25). Throughout this time, Phillips repeatedly compelled A.H. to smoke crack, and he engaged her in forcible oral sex so often that her throat became sore (3/26/24 AM Tr. 100). When A.H. told Phillips that she wanted him to stop, "[h]e didn't care" (*id*. at 80). Phillips also attempted to vaginally rape A.H. at one point, but he was unable to sustain an erection because he was too high on crack (*id.* at 115-16). Another

time, Phillips degraded A.H. by placing duct tape over her mouth (*id*. at 94). Phillips allowed A.H. access to her phones only twice: once to call her mother to say she would reschedule the missed medical appointment, and once to text a coworker about when she would return to work (*id*. at 88-90). Both times, Phillips stood next to A.H. and watched her closely (*id*.).

A.H.'s mental and physical condition deteriorated as a result of the assaults, cocaine use, and lack of food and sleep (3/26/24 AM Tr. 115). She experienced vision problems, ringing in her ears, difficulty swallowing, difficulty breathing, lightheadedness, dizziness, and severe pain in her face, hands, legs, and buttocks (3/27/24 Tr. 113-14). A.H. acknowledged that, in her disoriented state, the crack at times made her feel "horny" despite the circumstances, and at one point she may have told Phillips to suck on her breasts, although she could not remember for certain (3/26/24 PM Tr. 45).

As time passed, A.H. felt "it was useless" to think about escaping because her earlier attempts had failed (3/26/24 PM Tr. 41). A.H. therefore did not flee when Phillips left her alone in the apartment "once or twice" so he could buy more drugs (3/26/24 AM Tr. 114-15). Phillips "came back so fast" that there was little time for A.H. to put on her clothes, and she knew she could not outrun or overpower him if he discovered her trying to leave (*id*. at 82-83, 114-15; 3/26/24 PM Tr. 33, 40). Although she had been a Marines analyst, A.H. was in her 50s, and it had been over 30 years since

she completed hand-to-hand combat training (3/26/24 AM Tr. 32-33; 3/26/24 PM Tr. 40). Also, A.H. had suffered a stroke two years earlier, and she felt "weakness" in her arms and legs since that time (3/26/24 AM Tr. 32-33).

Phillips brought A.H. with him on several trips outside the apartment (3/26/24 AM Tr. 81). They went "around the corner" to buy more crack (*id.* at 81-83). Phillips brought A.H. to an ATM, where he demanded that she withdraw money to pay for more drugs (*id.*). While they were outside, Phillips stood "so close" to A.H. that she did not believe she could get away from him (*id*.). Phillips once brought A.H. to a Safeway so she could buy a bandage after the burn on her hand "bubbled up" (*id*. at 85). Although Phillips told A.H. he would wait in the car, she feared he had followed her inside, and she was too disoriented to think of a way to signal the cashier for help (*id*.). According to A.H., she did not dare disobey Phillips during these trips based on his earlier threat that he would kill her (*id*. at 83-84). A.H. believed this threat was genuine "because [Phillips] told [her] he had murdered someone before" (*id*.).

On the morning of June 8, 2022, Phillips told A.H. that she should return to work to earn more money for drug purchases (3/26/24 AM Tr. 81, 90). As A.H. got dressed, she put the duct tape that Phillips used on her mouth in her bag, hoping it would contain DNA evidence that could help convince someone about her ordeal (*id*. at 111-12). Phillips demanded that A.H. stay on a Facetime call with him for her entire drive, so he could watch her and make sure she was doing what he asked (*id*. at 91-92).

A.H. called her supervisor on speakerphone when she reached her desk at work (3/26/24 AM Tr. 92; 3/26/24 PM Tr. 11). The supervisor heard Phillips screaming on A.H.'s cell phone, demanding in a "[l]oud and scary" voice to know "who the hell" A.H. was talking to because he had told her "not to call anyone" (3/26/24 AM Tr. 92-93; 3/26/24 PM Tr. 13-14). A.H.'s supervisor told her to go to security, which she did (*id*.).

The security officer who met with A.H. noticed the burn on her hand and a "body odor like she hadn't taken a shower" for a long time (3/2/24 AM Tr. 22-23). While A.H. spoke with him, the officer saw Phillips attempt seven FaceTime calls to her, seconds apart (*id*. at 24). A.H. provided law enforcement with the ATM receipt from the withdrawal that Phillips forced to her make, and she explained that the duct tape Phillips had used to cover her mouth was in her car (*id*. at 94, 111-13). A.H. was transported to a hospital, where she was admitted for a four-night stay (*id*. at 95-97).

The government presented photographs and expert testimony about A.H.'s injuries (3/26/24 AM Tr. 100-10; 3/27/24 Tr. 115-125). The sexual assault nurse examiner observed 18 injuries on A.H.'s body, including bruising on her head, neck, shoulders, arms, chest, back, legs, and buttocks (*id*.). A.H. had marks on her thighs consistent with being struck by a belt (3/26/24 AM Tr. 107-09; 3/26/24 PM Tr. 57-59; 3/27/24 Tr. 122-24). She also had marks on her neck consistent with being strangled by a belt, and she suffered a broken blood vessel in her eye, which is a "very common" result of strangulation (3/26/24 AM Tr. 105-06; 3/27/24 Tr. 117). A.H. had a second-

degree burn on her hand where Phillips had struck her with the hot iron (3/26/24 AM Tr. 104; 3/26/24 PM Tr. 57-59; 3/27/24 Tr. 120).[8]

Cell phone records and text messages further corroborated A.H.'s account of her relationship and interactions with Phillips, including her confinement (3/26/24 AM Tr. 118-37; 3/28/24 Tr. 19, 35, 104-06). A.H.'s phones were turned off from the evening of June 5 until the morning of June 8, with only the two exceptions about which A.H. testified (*id.*). The records showed the lengthy FaceTime call on June 8, when Phillips monitored A.H. for her entire drive to work (*id.*). The records also showed Phillips making dozens of calls to A.H.'s phone on June 8 while she was meeting with law enforcement officers and medical personnel (3/26/24 AM Tr. 136-37; 3/28/24 Tr. 105).

The government also presented physical evidence that corroborated A.H.'s account. This included the ATM receipt that A.H. provided to law enforcement (3/26/24 AM Tr. 94, 111-13). It also included the piece of duct tape that A.H. took from Phillips's apartment, which contained DNA from both A.H. and Phillips (3/26/24 AM Tr. 94, 99-100; 3/27/24 Tr. 23-26, 71-72).

[8] The nurse examiner explained that the lack of injuries to A.H.'s genital areas was "very common" when time had passed after a sexual assault, since those parts of the body are "made to stretch" and "heal very quickly" (3/27/24 Tr. 130-31). A DNA expert similarly explained that the absence of male DNA on A.H.'s rectal swab was not surprising, given that several days had passed since Phillips's anal rape of A.H., and she would have defecated and wiped in the meantime (*id*. at 86-88, 93-94).

Several people who knew A.H. as a family member, friend, and employee testified about how unusual it was for her to fall out of contact for multiple days (3/26/24 AM Tr. 10-11; 3/26/24 PM Tr. 10-11; 3/27/24 Tr. 11-15). A.H.'s brother and a coworker friend testified about numerous unsuccessful attempts to reach A.H. by phone from June 6 through June 8, 2022 (3/26/24 AM Tr. 11; 3/27/24 Tr. 13). A.H.'s brother testified that she had appeared fine when he picked her up at the airport on June 5, and her subsequent disappearance was so alarming that he called family members and friends, as well as local hospitals, to try locating her (3/26/24 AM Tr. 11).

The Defense Evidence

Detective James Payne testified that he was unable to obtain a search warrant in time to investigate the inside of Phillips's apartment (3/28/24 Tr. 53-54, 58-61). Although A.H. knew Phillips's address from memory, she did not recall his apartment number, and Phillips had moved out by the time Payne found that information (*id.*). Payne also testified that A.H. was unable to identify the specific ATM she used or the specific Safeway where Phillips brought her (3/28/24 Tr. 55).[9]

Phillips's mother testified that saw her son outside his apartment in June 2022, at which time he approached her car and spoke briefly through the door (3/28/24 Tr.

[9] A.H. explained that she was unable to recall every detail of her ordeal when she spoke with law enforcement afterward (3/26/24 PM Tr. 42-43).

64). During this conversation, Phillips's mother saw A.H. standing across the street, waiting for Phillips to return and not attempting to flee (*id*. at 66). Phillips's mother did not think A.H. looked "distressed," but she acknowledged this was the only time she ever saw A.H., and she was not familiar with her normal demeanor (*id*. at 66-68).

SUMMARY OF ARGUMENT

First, Phillips's claim that the trial court should have precluded A.H. from testifying that Phillips told her he had murdered someone is barred under the invited-error doctrine, since Phillips implicitly agreed multiple times with the trial court's understanding that he had conceded such testimony was proper. To the extent this claim is reviewable, Phillips has failed to demonstrate error, let alone plain error. A.H.'s testimony was not "true 'other crimes' evidence" because—as the trial court properly instructed the jury—it was not introduced to prove, and did not prove, that Phillips had actually committed a murder. *Sweet v. United States*, 449 A.2d 315, 318 (D.C. 1982). This Court and others have consistently found similar testimony admissible where it was relevant to a victim's state of mind in kidnapping and sex-offenses cases. Here, the testimony helped explain why A.H. did not flee or ask for help despite having opportunities to do so, which was put squarely at issue by the defense theory that any sexual activity was consensual and A.H. was free to leave at any time (3/28/24 Tr. 92).

Second, the trial court did not abuse its discretion by denying Phillips's motion for a mistrial because, as the trial court concluded with "confiden[ce]" after the verdict,

A.H.'s reference to Phillips being on "house arrest" did not substantially sway the jury (3/28/24 Tr. 142). A.H.'s testimony was brief and non-specific, as she did not provide any details about the "house arrest," nor did she attribute it to a particular conviction. Contrary to Phillips's assertion, the testimony did not "cement" for the jury that Phillips "was in fact a convicted murderer," because house arrest (in contrast to incarceration) is not necessarily indicative of a conviction for a crime as serious as murder. In addition, the government had a strong case against Phillips, and the trial court took immediate mitigating action after Phillips's counsel objected to A.H.'s testimony.

Third, the trial court did not plainly err by not repeating in the final jury charge the same limiting instruction that it gave after A.H.'s testimony that Phillips said he had committed a murder. This Court has repeatedly recognized that defense counsel is entitled to make a tactical choice not to highlight unfavorable evidence through supplemental jury instructions, which is precisely what occurred in this case. The trial court's decision to follow the defense's preferred approach was reasonable under the circumstances and was not error—plain or otherwise. In addition, Phillips has failed to show a reasonable probability that he would have been acquitted if the trial court had simply repeated the same instruction verbatim in the final charge.

Fourth, the trial court did not plainly err in issuing an enhanced sentence under D.C. Code § 22-1804a(a)(2). Phillips was not prejudiced by the court's failure to strictly comply with the inquiry procedure set forth in D.C. Code § 23-111(b) because he does

not dispute the accuracy or validity of his prior convictions set forth in the government's pretrial information. In addition, Phillips's murder-for-hire conviction under 18 U.S.C. § 1958 is a crime of a violence under the plain language of D.C. Code § 23-1331(4), which encompasses both "solicitation" of and "conspiracy" to commit murder.

ARGUMENT

I. A.H.'s Testimony About Her Knowledge of Phillips's Criminal History Does Not Warrant Reversal.

A. Additional Background

On August 18, 2023, the government filed a motion in limine about certain out-of-court statements by A.H. (R158-64 (Mot.)). The government sought to introduce testimony by law enforcement officers and medical personnel that A.H. told them she was aware that Phillips had previously committed murder (R158-59 (Mot. at 1-2)). The government contended that such testimony satisfied the hearsay exception "for a statement of the declarant's then-existing state of mind" (*id.*). The government argued that A.H.'s state of mind was relevant because her fear of Phillips helped explain why she did not attempt "to escape or run away" (R160 (Mot. at 3)). The government's motion did not address any potential testimony by A.H. herself about the reasons that she feared Phillips and did not try to escape.

On September 22, 2023, Phillips filed an opposition, arguing that the proffered testimony did not satisfy any hearsay exception (R246-49 (Opp. at 7-10)). Phillips

acknowledged that "[t]here is no question that the prosecutor can ask the complainant on the witness stand why she chose not to seek help," and A.H. could testify about her fear of Phillips (R249 (Opp. at 10)). Phillips argued, however, that A.H.'s statements to others should be excluded because "her state of mind while talking to investigators" was not "relevant to any issue in the case" (R247 (Opp. at 8)). Phillips further argued that "repeatedly informing the jury about [Phillips's] murder conviction" would be so unfairly prejudicial as to outweigh any probative value (R249 (Opp. at 10)).

The trial court addressed the government's motion at a pretrial hearing (3/15/24 Tr. 5-9). At the outset, the court noted its understanding that "the defense concedes that A.H. can testify that the reason she did not go sooner to law enforcement is that she was afraid of Mr. Phillips and that one reason she was afraid was because of his prior murder conviction" (*id*. at 5). Phillips's counsel did not dispute this characterization (*id*.).

The trial court concluded that A.H.'s "fearful" demeanor when she told others "that she was afraid of Mr. Phillips because of his murder conviction" was probative as to her state of mind. The court agreed with Phillips, however, that "multiple repetitions" of testimony about the prior murder would be "unnecessary and unduly prejudicial" (3/15/24 Tr. 6). The court thus granted the government's motion only in part, permitting hearsay testimony on this topic from "one witness and one witness only" (*id*.). The court then reiterated its understanding that "there's no dispute that [A.H.] can testify about her fear and the reason for her fear," and that Phillips's objection concerned only the

testimony about what "[A.H.] told other people" (*id*. at 7-8). The defense again did not contest this characterization of its position, even after the court expressly asked the parties if it was necessary to "clarify" anything (*id*. at 7-8, 15). The court's ruling on the government's motion was ultimately rendered moot when the government did not elicit at trial any statements that A.H. made to others about her fear of Phillips.

Before jury selection, the court discussed a proposed limiting instruction for "when [A.H.] testifies about [Phillips's] criminal history" (3/25/24 Tr. 4-5). Both parties agreed to the language of this instruction (*id*.). Phillips's counsel again did not assert any objection to A.H.'s expected testimony on this subject (*id.*).

The government made no reference to Phillips's criminal history during its opening statement (3/25/24 Tr. 110-18). In Phillips's opening statement, his counsel explained the defense theory that A.H. consented to Phillips's conduct and then lied about her ordeal to protect her "career" and "livelihood" (*id*. at 120). Defense counsel argued that A.H.'s failure to "run or flee" or "ask anybody for help" was "not consistent with someone who is kidnapped" (*id*. at 119-20).

During A.H.'s direct examination, government counsel asked her to describe the early stages of her relationship with Phillips (3/26/24 AM Tr. 38). A.H. responded, "He was not able to leave because he was on house arrest, so I would go over to see him" (*id*.). On defense counsel's objection, the trial court immediately instructed the jury that it would "strike" this testimony and told government counsel to "proceed" with the

examination (*id.*). In its initial instructions, the court had explained to the jury: "If a question is asked and answered and I then rule that the answer should be stricken, you must disregard both the question and the answer in your deliberations" (3/25/24 Tr. 99).

After A.H. answered five other unrelated questions about her early interactions with Phillips, defense counsel requested a bench conference (3/26/24 AM Tr. 38-39). Phillips's counsel initially asked the court to instruct the jury to "completely disregard" A.H.'s testimony about Phillips's "house arrest" (*id.* at 40). The court indicated it would be "happy to give an instruction," but noted that it had already struck the testimony and was concerned about "repeat[ing] it," which could risk "reinforc[ing] it" (*id.*).

Phillips's counsel moved for a mistrial, which the trial court denied (3/26/24 AM Tr. 40). The court reiterated its offer to provide a "more specific, curative instruction," but again cautioned that this would require the court "to repeat what it is I'm instructing them to ignore" (*id.* at 41). Phillips's counsel explained his understanding that A.H. could testify that she was "scared of [Phillips], because [she] thought he was convicted of [murder]," but argued the reference to "house arrest" was "extremely prejudicial," and a "mistrial [was] the only appropriate remedy" (*id.* at 43-44). Government counsel, meanwhile, confirmed that the government "wasn't expecting" A.H.'s testimony and had not intended to elicit it, but argued that a mistrial was unwarranted (*id.* at 42). After the trial court reiterated its denial of Phillips's mistrial request, defense counsel shifted course and indicated that "we're not asking for any additional instruction right now,"

so long as the agreed-upon limiting instruction was given after A.H. testified about her fear of Phillips (*id.* at 50-51).[10] The trial court agreed to this approach (*id*. at 51).

Later in A.H.'s direct examination, government counsel asked A.H. why she had complied with Phillips's demands during their trips outside the apartment (3/26/24 AM Tr. 83). A.H. explained that she remained afraid based on Phillips's earlier threat to kill her (*id*.). When government counsel asked why A.H. believed this was a "real threat," A.H. responded, "Because he told me he had murdered someone before" (*id*. at 83-84). The trial court immediately instructed the jury as follows, using language agreed upon by both parties:

> Ladies and Gentlemen, you have just heard testimony about [A.H.'s] belief about Mr. Phillips'[s] criminal history[.] [T]hat testimony is relevant only to [A.H.'s] state of mind during the events in this case. It is not relevant to anything else. This evidence is not being admitted to prove that [A.H.'s] belief about Mr. Phillips'[s] criminal history is accurate, and you cannot consider it for that purpose. This testimony is not evidence that Mr. Phillips is guilty of the offense as charged in this case, and you must not draw that inference. (*Id*. at 84.)

In its final instructions, the court reminded the jury that "you may consider only the evidence properly admitted in this trial," and "[y]ou should disregard any testimony that I ordered stricken" (3/28/24 Tr. 8-9, 79). Phillips did not request, and the court did not deliver, any additional instruction concerning A.H.'s testimony about Phillips's

[10] The defense never indicated that, due to the "house arrest" testimony, Phillips now objected to A.H.'s anticipated testimony about her fear (3/26/24 AM Tr. 38-51).

criminal history (*id*.). At Phillips's request, the court instructed the jury that "[i]t's the Defense's theory that any sexual activity between Mr. Phillips and [A.H.] was consensual," and A.H. "was not kidnapped and was free to leave at any time" (*id*. at 92). In closing argument, Phillips's counsel repeatedly questioned why A.H. had made "no attempt to leave or ask for help" (*id*. at 119-20, 123-24). Government counsel made no reference in closing or rebuttal to A.H.'s testimony about Phillips's prior murder or the stricken testimony about house arrest (*id*. at 92-113, 126-32).

The trial court twice reaffirmed its denial of Phillips's request for a mistrial, elaborating on its rationale. In discussing the final jury instructions, the court noted that the jury was unlikely to afford much weight to A.H.'s reference to "house arrest," given that she had met Phillips on a flight from Las Vegas, at which time he was clearly not confined at his home (3/28/24 Tr. 8-9). After the verdict, the court reiterated that it "remain[ed] firmly convinced in the correctness" of its denial of a mistrial (*id*. at 142). The court explained that "the [g]overnment's evidence was basically overwhelming," given that A.H. "was an entirely believable witness" and "key parts of her testimony were corroborated" by other evidence (*id*.). Noting that the government did not mention Phillips's criminal history in closing or rebuttal, the trial court concluded that it was "quite confident that the reference, which I immediately struck as to house arrest[,] was not a factor in the jury's verdict" (*id*.).

B. Phillips's Claim That the Trial Court Erred by Permitting A.H.'s Testimony About a Prior Murder Is Barred Under the Invited-Error Doctrine, and, Alternatively, Fails Under Plain-Error Review.

1. Standard of Review and Legal Principles

"[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." *Preacher v. United States*, 934 A.2d 363, 368 (D.C. 2007).

Where a defendant objected to the admission of evidence, this Court reviews the trial court's ruling for abuse of discretion, "broadly defer[ring] to the trial court due to its familiarity with the details of the case[.]" *Young v. United States*, 305 A.3d 402, 434 (D.C. 2023) (cleaned up). Where evidence was admitted at trial without objection, however, this Court reviews for plain error. *See Walker v. United States*, 201 A.3d 586, 593-94 (D.C. 2019). To prevail on plain-error review, "an appellant must show that (1) there is error; (2) such error is plain, meaning clear or obvious, by the time of appellate review; (3) the error affected appellant's substantial rights; and (4) the error seriously affected the fairness, integrity, or public reputation of [the] judicial proceedings." *Morris v. United States*, 337 A.3d 872, 881 (D.C. 2025) (cleaned up). Where the appellant was convicted after a jury trial, the third prong of plain-error review requires him to demonstrate a reasonable probability that, absent the alleged error, the jury would have acquitted him. *See id*. at 885.

Evidence that a defendant has committed other crimes is "inadmissible to prove that the defendant has a disposition to commit crime, from which the jury might infer that the defendant committed the crime charged." *Sweet v. United States*, 449 A.2d 315, 318 (D.C. 1982). Evidence does not constitute "true 'other crimes' evidence," however, where it is "not introduced to prove, and [does] not prove, that other crimes actually had been committed." *Id.* at 319. This includes perpetrators' statements claiming to have committed other violent crimes that are "introduced only for the purpose of showing the effect they had upon the complainant's state of mind." *Id. See also Boone v. United States*, 769 A.2d 811, 824-25 (D.C. 2001) (evidence was not "true 'other crimes' evidence" where it was introduced "only for the purpose of showing the effect" that the statement had upon the listener's state of mind).

This Court has adopted "the policy set forth in Federal Rule of Evidence 403 that evidence, although relevant and otherwise admissible, may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." *(William) Johnson v. United States,* 683 A.2d 1087, 1099 (D.C. 1996) (en banc). Deference to the trial court is particularly strong for Rule 403 assessments because "a trial court virtually always is in the better position to assess the admissibility of the evidence in the context of the particular case before it." *(Markus) Johnson v. United States*, 960 A.2d 281, 294-95 (D.C. 2008) (cleaned up). A claim based on Rule 403

that was not raised at trial is reviewed only for plain error. *See Comford v. United States*, 947 A.2d 1181, 1188-89 (D.C. 2008).

2. Discussion

Phillips's claim (Br. at 15-16) that the trial court should have precluded A.H. from testifying that Phillips told her "he had murdered someone before" (3/26/24 AM Tr. 83-84) is barred under the invited-error doctrine. The trial court reasonably interpreted Phillips's position at trial as "conced[ing] that A.H. can testify that the reason she did not go sooner to law enforcement is that she was afraid of Mr. Phillips and that one reason she was afraid was because of his prior murder conviction" (3/15/24 Tr. 5). *See Brown v. United States*, 627 A.2d 499, 508 (D.C. 1993) ("We have repeatedly held that a defendant may not take one position at trial and a contradictory position on appeal."). When the trial court described the defense position this way multiple times during the motion hearing, Phillips's counsel never disputed the court's characterization, even after the court expressly asked the parties if it was necessary to "clarify" anything (3/15/24 Tr. 5-8, 15).

To the extent this claim is reviewable at all, moreover, it is subject to plain-error review. *See Walker*, 201 A.3d at 593-94. That is because at no point during the trial proceedings did Phillips ever object to the introduction of this testimony. *See Ebron v. United States*, 838 A.2d 1140, 1147 (D.C. 2003) ("the purpose behind the contemporaneous objection rule" is for a party to "put the court on notice of the

objection, the reason for it, and the relief sought"). Phillips (Br. at 8) argues that he "hotly contested that knowledge of the murder conviction motivated [A.H.'s] fear." Phillips did challenge A.H.'s credibility on this point as a factual matter, and he argued that it weighed against the probative value of "repeatedly informing the jury about [Phillips's] murder conviction" through hearsay testimony by law enforcement officers and medical personnel (R249 (Opp. at 10)). Despite numerous opportunities, however, Phillips never objected to A.H. herself providing testimony on this subject.

In any case, Phillips has failed to demonstrate error, let alone clear or obvious error, on this ground. Contrary to Phillips's claim (Br. at 16) that A.H.'s testimony "was to establish propensity," the trial court expressly instructed the jury, using language agreed upon by both parties, that the testimony was "relevant only to [A.H.'s] state of mind during the events in this case," and it was "not being admitted to prove that [A.H.'s] belief about Mr. Phillips'[s] criminal history is accurate" —let alone that Phillips had a propensity to commit crime (3/26/24 AM Tr. 84). The evidence was thus not "true 'other crimes' evidence" at all. *Sweet*, 449 A.2d at 319.[11]

Phillips's assertion (Br. at 14-16) that A.H.'s testimony was only "marginally relevant," and thus should have been excluded under Rule 403, is belied by the record. While Phillips now argues that A.H.'s reluctance to flee was "fully explained" by other

[11] Phillips does not challenge A.H.'s testimony on the ground that it was hearsay, as it fell under the exception for party-opponent admissions. *See Comford*, 947 A.2d at 1185.

evidence, he argued precisely the opposite at trial, repeatedly questioning A.H.'s credibility because she had made "no attempt to leave or ask for help" (3/28/24 Tr. 119-20, 123-24). The defense theory that any sexual activity between Phillips and A.H. was "consensual" and that A.H. "was free to leave at any time" (3/28/24 Tr. 92) put A.H.'s state of mind squarely at issue. As this Court has explained, "unfair prejudice" under Rule 403 is "minimized" where, as here, "the evidence is admitted for a valid purpose and has substantial probative value, the prosecution does not present or argue it improperly, and the court correctly instructs the jury on the permissible use it may make of the evidence." *Jenkins v. United States*, 80 A.3d 978, 999 (D.C. 2013).

This Court and others have consistently found similar testimony admissible where it was relevant to a victim's state of mind in kidnapping and sex-offenses cases. In *Sweet*, for example, this Court found no error where the complainant testified that one of her assailants told her "he had killed" someone else and another assailant told her "he had gone to prison for murder, kidnapping, and rape." 449 A.2d at 318. The testimony "was admitted by the trial court for the limited purpose of showing the complainant's state of mind during her abduction," and it helped explain why she "reasonably feared that, if she did not submit [to the assailants], they would physically harm her." *Id*. Likewise, in *State v. Wideman,* 650 A.2d 571 (Conn. Ct. App. 1994), the court found no error where the victim testified about her knowledge of the defendant's prior homicide conviction because it "convey[ed] to the jury the victim's fear of the

defendant" and was probative "to explain why she did not try to run away." *Id*. at 575. *See also State v. Barney*, 436 P.3d 231, 235 (Utah Ct. App. 2018) (no error where victim's testimony about defendant's prior bad acts "show[ed] her state of mind as to why she did not try to escape"); *State v. Bayles,* 551 N.W.2d 600, 604-05 (Iowa 1996) (no error where victim's testimony about defendant's prior bad acts helped "explain her decision not to resist the alleged kidnapping or alleged sexual abuse").

In addition, Phillips has failed to show, as he must on plain-error review, a reasonable probability that he would have been acquitted if A.H.'s testimony on this topic had been excluded. As noted, the jury was properly instructed to consider the testimony only for the limited purpose of assessing A.H.'s state of mind during her ordeal—particularly her failure to flee or ask for help despite opportunities to do so (3/26/24 AM Tr. 84). Juries are presumed to follow instructions absent evidence to the contrary. *See Harris v. United States,* 602 A.2d 154, 165 (D.C. 1992) (en banc). As Phillips now acknowledges (Br. at 15-16), and the government argued in closing and rebuttal (3/28/24 Tr. 95-96, 130), A.H. had ample reason to fear Phillips's response if she attempted to run away based solely on the multiple violent beatings and sexual assaults that he had already inflicted upon her.

Furthermore, as the trial court observed after the verdict, the government's evidence was "basically overwhelming" (3/28/24 Tr. 142). A.H.'s account was detailed and "entirely believable" (*id*.), particularly given her frank acknowledgment

of unhelpful facts, such as the crack making her feel "horny" and prompting her to ask Phillips to engage in certain sexual acts (3/26/24 PM Tr. 45). A.H. also readily acknowledged that she could not recall certain details when she spoke with law enforcement due to the disorienting nature of her ordeal (*id.* at 42-43). Even so, A.H.'s testimony was extensively corroborated by other evidence. A.H. had numerous physical injuries, including a second-degree burn on her hand, marks on her thighs consistent with being struck by a belt, marks on her neck consistent with being strangled by a belt, and a broken blood vessel in her eye, a common result of strangulation (3/26/24 AM Tr. 100-10; 3/27/24 Tr. 115-125). When A.H. returned to work, her supervisor heard Phillips demanding in a "[l]oud and scary" voice to know "who the hell" A.H. was talking to because he had told her "not to call anyone" (3/26/24 AM Tr. 92-93; 3/26/24 PM Tr. 13-14). The security officer who first met with A.H. was immediately struck by the severe burn on her hand and a "body odor like she hadn't taken a shower" for a long time (3/2/24 AM Tr. 22-23). The government also presented corroborative physical and electronic evidence, including the ATM receipt, the duct tape with A.H.'s and Phillips's DNA on it, and cell phone records that were consistent with A.H.'s account.

Finally, the defense theory that A.H. had fabricated her entire ordeal "to save her career after missing multiple days of work and using narcotics" (3/28/24 Tr. 92) was directly contradicted by trial evidence. Although A.H.'s family and friends were deeply concerned by her disappearance, her supervisor testified that in June 2022 (during the

pandemic) most employees were working remotely, and employees could receive up to three days of sick time upon a simple request, without the need for a medical note (3/26/24 PM Tr. 8-9). Furthermore, in six years with the Coast Guard, A.H. had not been drug-tested even once (*id*. at 40). A.H. thus had no motive for such an elaborate fabrication, given that "[her] career was never on the line" (3/28/24 Tr. 130-31).

C. The Trial Court Did Not Abuse Its Discretion By Denying Phillips's Motion for a Mistrial.

1. Standard of Review and Legal Principles

A trial court has "broad discretion" as to mistrial motions, and this Court will reverse the denial of such a motion "only if it appears irrational, unreasonable, or so extreme that failure to reverse would result in a miscarriage of justice." *Atkinson v. United States*, 121 A.3d 780, 788-89 (D.C. 2015) (citation omitted). A mistrial "is a severe remedy . . . to be avoided whenever possible, and one to be taken only in circumstances manifesting a necessity therefor." *Id.* at 788. Although "instances occur in almost every trial where inadmissible evidence creeps in, usually inadvertently," "[a] defendant is entitled to a fair trial but not a perfect one." *Carpenter v. United States,* 430 A.2d 496, 506 (D.C. 1981) (quoting *Bruton v. United States*, 391 U.S. 123, 135 (1968)). Thus, "[w]henever possible, the court should seek to avoid a mistrial by appropriate corrective action which will minimize potential prejudice." *Goins v. United States*, 617 A.2d 956, 958-59 (D.C. 1992). "In assessing the potential prejudice to a defendant, we

look to the gravity of the misconduct, the relative strength of the government's case, the centrality of the issue affected, and any mitigating actions taken by the court." *Austin v. United States*, 292 A.3d 763, 776 (D.C. 2023) (cleaned up).

2. Discussion

The trial court acted well within its discretion in declining to grant a mistrial, as shown under each of the primary factors for assessing potential prejudice.

First, the "gravity" of A.H.'s improper testimony "was not particularly potent," as it consisted of a single fleeting reference to Phillips being on "house arrest" soon after she met him (3/26/24 AM Tr. 38). *Austin*, 292 A.3d at 776. The testimony was "brief and non-specific," *id*., since A.H. did not provide any details about Phillips's house arrest, nor did she attribute it to any particular legal proceeding, let alone to a conviction for a particular crime. After the trial court told the jury that the testimony was stricken, A.H.'s direct examination proceeded with five unrelated questions about the nature and frequency of A.H.'s and Phillips's interactions early in their relationship (3/26/24 AM Tr. 38-39). Thus, it would not have been apparent to the jury that the ensuing bench conference concerned the earlier stricken testimony. After the bench conference, Phillips's "house arrest" was not mentioned again by any witness, the court, or counsel for either side for the duration of the trial.

Contrary to Phillips's assertion (Br. at 17), A.H.'s brief and unexplained reference to "house arrest" did not definitively "cement" for the jury that Phillips "was

in fact a convicted murderer." When A.H. later testified that Phillips told her "he had murdered someone" (3/26/24 AM Tr. 83-84), there were multiple reasons the jury would not have presumed that he was on "house arrest" for that purported murder. As the trial court observed, A.H. met Phillips on a flight from Las Vegas, at which time he was clearly not confined at his home (3/28/24 Tr. 8-9). To the jury's knowledge, therefore, the house arrest may have resulted from a subsequent legal proceeding. This is particularly true since house arrest, in contrast to incarceration, is not necessarily indicative of a conviction for a crime as serious as murder.

Second, as discussed at greater length above (see pages 26-28), "the government had a strong case." *Austin*, 292 A.3d at 777. Indeed, as the trial court assessed after the verdict, the government's evidence was "basically overwhelming" (3/28/24 Tr. 142). A.H., who was not impeached in any significant way, provided a detailed and "entirely believable" account, which was corroborated by medical evidence about her injuries, testimony from her supervisor about Phillips's controlling behavior, cell phone records, and other physical evidence (*id.*). The defense theory that A.H. fabricated her ordeal to save her job, meanwhile, was directly contradicted by the trial evidence.

Third, whether Phillips was on house arrest near the start of his relationship with A.H. was not "a central issue in the case." *Austin*, 292 A.3d at 777. Phillips's theory that A.H. fabricated her ordeal was based on the defense's challenges to the plausibility of her account—particularly the fact that she did not flee or ask for help despite

opportunities to do so (3/28/24 Tr. 119-20, 123-24). As addressed in Section I.B, above, Phillips did not contest at trial that A.H. could properly attribute her fear of him to her belief that he previously committed murder—whether or not that belief was accurate. Phillips being on house arrest at some point, whether for the purported murder or for some other legal proceeding, did not directly bear on the jury's assessment as to whether A.H.'s explanations for her fear and her resulting conduct were credible.

Fourth, the trial court took immediate mitigating action after defense counsel objected, instructing the jury that it would "strike" A.H.'s testimony about Phillips's "house arrest" (3/26/24 AM Tr. 38). The court expressly instructed the jury in the initial instructions and the final instructions that it must disregard any testimony the court ordered stricken (3/25/24 Tr. 99; 3/28/24 Tr. 79), and juries are presumed to follow such instructions. *See Harris*, 602 A.2d at 165. Although the trial court offered multiple times to provide a "more specific" curative instruction if the defense wanted one, Phillips's counsel ultimately opted against any such request (3/26/24 AM Tr. 40-41, 50-51). Instead, defense counsel preferred to move forward without any further reference to the "house arrest" testimony, as long as the parties' agreed-upon limiting instruction was given immediately after A.H. testified about her fear of Phillips (*id*. at 50-51). In agreeing to that approach, the trial court "complied with each of the defense's requests short of granting a mistrial." *Austin*, 292 A.3d at 777.

For all of these reasons, this Court should defer to the trial court's "confident" conclusion "that [A.H.'s] reference, which [the court] immediately struck as to house arrest[,] was not a factor in the jury's verdict" (3/28/24 Tr. 142). *See Moore v. United States*, 927 A.2d 1040, 1063 (D.C. 2007) (trial court did not abuse discretion in denying mistrial where improper evidence did not "substantially sway" the jury).

D. The Trial Court Did Not Plainly Err by Not Repeating Its Limiting Instruction, Sua Sponte, in the Final Jury Instructions.

1. Standard of Review and Legal Principles

Phillips's claim (Br. at 19-20) that the trial court erred by not repeating in the final jury charge the limiting instruction it gave after A.H.'s testimony about Phillips previously committing murder is reviewable only for plain error. District of Columbia Superior Court Criminal Rule 30 provides: "No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto . . . stating distinctly the matter to which that party objects and the grounds for the objection." The purpose of this rule is "to give the trial court the opportunity to correct errors and omissions which otherwise might necessitate a new trial." *Robinson v. United States*, 649 A.2d 584, 586 (D.C. 1994) (quotation marks omitted).

2. Discussion

It was not error, let alone clear or obvious error, for the trial court not to repeat its limiting instruction in the final charge where Phillips's counsel did not request any

such instruction. This Court has repeatedly recognized that defense counsel is entitled to make a "tactical choice" not to "highlight" unfavorable evidence through "supplemental jury instructions." *Gilliam v. United States*, 707 A.2d 784, 787 (D.C. 1998). *See also Busey v. United States*, 747 A.2d 1153, 1167 (D.C. 2000) ("[W]e are mindful that defense counsel's failure to request a limiting instruction may well have been a tactical decision to avoid having the trial judge emphasize to the jury the significance of the unfavorable evidence"). The record indicates that is precisely what occurred in this case. Earlier in the trial, Phillips's counsel declined the court's offer to provide a specific curative instruction as to A.H.'s "house arrest" testimony for this very reason, instead asking only that the parties' agreed-upon limiting instruction be given immediately after A.H. testified about her fear of Phillips (3/26/24 AM Tr. 40-41, 50-51). The trial court's decision to follow the defense's preferred approach was reasonable under the circumstances of this case and was not error—plain or otherwise.

Phillips's reliance (Br. at 19-20) on case law addressing a trial court's obligation to issue a sua sponte cautionary instruction when a defendant testifies and is impeached with his own prior convictions is misplaced. *See Fields v. United States*, 396 A.2d 522, 526 (D.C. 1978); *Dixon v. United States*, 287 A.2d 89, 100 (D.C. 1972). This Court has strictly limited the reach of that rule, which is rooted in a defendant's constitutional rights, and has declined to apply it even where similar evidence of a defendant's criminal history is elicited during cross-examination of defense character witnesses. *See*

Maura v. United States, 555 A.2d 1015, 1018 (D.C. 1989). Outside the context of a defendant's own testimony, if defense counsel has "chosen not to object or to request a particular instruction, a defendant as a general rule should not be allowed to claim the omission as error on appeal." *Id*. Furthermore, even where the rule applies, this Court has found plain error only where "the trial court does not give sua sponte *either an immediate cautionary instruction or a final jury instruction* on the limited purpose of the evidence." *Id*. at 1017 (emphasis added). In this case, as discussed, an immediate instruction was given, using language jointly agreed upon by the parties.

In addition, Phillips has failed to satisfy the prejudice standard for plain-error review. Phillips does not propose any different or additional language the trial court should have used in its limiting instruction to the jury. Since the testimony at issue was not repeated or even referenced after the trial court delivered its limiting instruction—including in the government's closing argument and rebuttal—Phillips has failed to show a reasonable probability that he would have been acquitted if the trial court had simply repeated the same instruction verbatim in the final charge.

II. The Trial Court Did Not Plainly Err in Issuing an Enhanced Sentence Under D.C. Code § 22-1804a(a)(2).

In his supplemental brief (at 6-13), Phillips erroneously conflates two issues: (i) whether the trial court plainly erred by failing to inquire if he disputed the accuracy or validity of his prior convictions set forth in the government's pretrial information;

and (ii) whether the trial court plainly erred by treating his federal murder-for-hire conviction as a "crime of violence" for purposes of imposing an enhanced sentence. Phillips has failed to demonstrate plain error as to either issue.

A. Additional Background

At a status hearing on January 9, 2023, the government notified Phillips that, if the case proceeded to trial, the government would seek an enhanced sentence pursuant to D.C. Code § 22-1804a(a)(2) based on Phillips having at least two prior convictions for crimes of violence (1/9/23 Tr. 4). Government counsel specified that the qualifying convictions were "an armed bank robbery out of Tennessee" and "a murder for [hire] conviction out of Pennsylvania" (*id.*).

On September 21, 2023, the government filed a pretrial information as to Phillips's prior convictions pursuant to D.C. Code § 23-111(a) (R232-33 (Information)). The information listed multiple federal-court convictions, including one for bank robbery in 1994, and one for murder-for-hire in 2013 (*id.*). The information further stated that, because Phillips had been convicted of at least two prior crimes of violence not committed on the same occasion, he could face a maximum sentence "up to, and including, life without the possibility of release" in this case (*id.*).

On August 2, 2024, after Phillips was found guilty on all counts, the government filed a sentencing memorandum that recommended lifetime incarceration without the possibility of release (R355-71 (Sent. Mem.)). The government indicated that this

enhanced sentence was permitted under § 22-1804a(a)(2) based on Phillips's prior convictions (R360 & n.3 (Sent. Mem. p. 6)). At the sentencing hearing on August 9, 2024, the trial court largely adopted the government's proposal and sentenced Phillips to an aggregate term of life without the possibility of release (8/9/24 Tr. 16-17). Before issuing the sentence, the trial court did not conduct an inquiry with Phillips to ask whether he affirmed or denied that he had been convicted of the offenses listed in the government's information (*id*. at 3-18).

At no point during the pretrial, trial, or sentencing proceedings did Phillips dispute the accuracy of the government's information as to his prior convictions or challenge the validity of those convictions. Nor did Phillips ever assert that he was not subject to an enhanced sentence under § 22-1804a(a)(2) because he did not have at least two prior convictions for crimes of violence under D.C. law.

B. The Court's Failure to Conduct an Inquiry Under D.C. Code § 23-111(b) Was Not Reversible Error.

1. Standard of Review and Legal Principles

A claim under D.C. Code § 23-111(b) that is first raised on appeal is reviewed for plain error. *See Brocksmith v. United States*, 99 A.3d 690, 702 (D.C. 2014).

If the government files a pretrial information indicating that a defendant is eligible for an enhanced sentence based on prior convictions:

> [T]he court shall, after conviction but before pronouncement of sentence, inquire of the person with respect to whom the information

> was filed whether he affirms or denies that he has been previously convicted as alleged in the information, and shall inform him that any challenge to a previous conviction which is not made before sentence is imposed may not thereafter be raised to attack the sentence.

D.C. Code § 23-111(b). If the defendant "denies any allegation of the information of previous conviction, or claims that any conviction alleged is invalid," he must file a written response. D.C. Code § 23-111(c)(1). Any such challenge is resolved at a hearing at which either party may present evidence about the defendant's criminal history. *Id*.

2. Discussion

The trial court's failure to "strictly comply" with the inquiry procedure set forth in D.C. Code § 23-111(b) did not affect Phillips's substantial rights or the fairness, integrity, or public reputation of the proceedings, and it therefore does not warrant reversal on plain-error review. *Brocksmith*, 99 A.3d at 703 (citing *United States v. Olano,* 507 U.S. 725, 732 (1993)). Phillips does not "attempt to dispute any prior conviction" listed in the government's information, nor does he "contest the validity" of his federal murder-for-hire or bank robbery convictions. *Id*. Although Phillips asserts that the government's information had "clerical mistakes" regarding the court name and docket number for one of his convictions (Supp. Br. at 5, 9), such "technical violations" of § 23-111(b) "constitute harmless error" and do not require a remand for resentencing. *Norman v. United States*, 623 A.2d 1165, 1168 (D.C. 1993). *See also Brocksmith*, 99

A.3d at 703 (declining to "waste scarce judicial resources and remand" for a § 23-111(b) inquiry where defendant did not dispute any prior convictions).

Phillips contends (Supp. Br. at 6) he was prejudiced by the lack of a § 23-111(b) inquiry because it deprived him of the opportunity to challenge his eligibility for an enhanced sentence on the ground that his murder-for-hire conviction was not a "crime of violence." This argument misconstrues the purpose of § 23-111(b), which requires the trial court to ask the "the person with respect to whom the information was filed whether he affirms or denies that he has been previously convicted as alleged in the information." D.C. Code § 23-111(b). Such an inquiry asks only whether the defendant was, in fact, convicted of the offenses listed in the government's information—which Phillips does not dispute. While § 23-111(c) also permits a defendant to raise a "claim[ ] that any conviction alleged is invalid"—because, for example, it was "obtained in violation of the Constitution of the United States"—Phillips does not purport to challenge the validity of any of his prior convictions. In short, Phillips's claim that he was not eligible for an enhanced sentence under D.C. Code § 22-1804a(a)(2) because one of his prior convictions was not a "crime of violence" does not implicate the inquiry procedure in D.C. Code § 23-111(b).

C. The Trial Court Did Not Plainly Err by Finding the Murder-for-Hire Conviction Was a Crime of Violence for Purposes of Enhancing the Sentence.

1. Standard of Review and Legal Principles

A challenge to whether a defendant's prior conviction is a "crime of violence" that was not asserted in the trial court is reviewed for plain error. *See Dorsey v. United States*, 154 A.3d 106, 122 & n.19 (D.C. 2017).

A defendant is eligible for an enhanced sentence up to life without the possibility of release if he is convicted of a "crime of violence," and he has previously been convicted of at least two "crimes of violence" not committed on the same occasion. *See* D.C. Code § 22-1804a(a)(2). The definition for a "crime of violence" is set forth in D.C. Code § 23-1331(4). *See Towles v. United States*, 115 A.3d 1222, 1233-34 (D.C. 2015). That section provides:

> (4) The term "crime of violence" means aggravated assault; act of terrorism; arson; assault on a police officer (felony); assault with a dangerous weapon; assault with intent to kill, commit first degree sexual abuse, commit second degree sexual abuse, or commit child sexual abuse; assault with significant bodily injury; assault with intent to commit any other offense; burglary; carjacking; armed carjacking; child sexual abuse; cruelty to children in the first degree; extortion or blackmail accompanied by threats of violence; gang recruitment, participation, or retention by the use or threatened use of force, coercion, or intimidation; kidnapping; malicious disfigurement; manslaughter; manufacture or possession of a weapon of mass destruction; mayhem; murder; robbery; sexual abuse in the first, second, or third degrees; misdemeanor sexual abuse pursuant to § 22-3006(b); misdemeanor sexual abuse of a child or minor pursuant to § 22-3010.01 (a-1); strangulation; use, dissemination, or detonation of a weapon of mass destruction; or an attempt, solicitation, or conspiracy to commit any of the foregoing offenses.

D.C. Code § 23-1331(4).

Whether a defendant's prior conviction is a "crime of violence" under § 23-1331(4) is a legal determination made by the trial court. *See Dorsey*, 154 A.3d at 123-26. A crime that is not specifically listed may qualify as a "crime of violence" if it is "substantially the same offense" as a crime enumerated in the statute. *Parks v. United States*, 627 A.2d 1, 9-10 (D.C. 1993). For a conviction from another jurisdiction, the analysis depends on whether it "would have constituted . . . a crime of violence, if committed in the District of Columbia." *Dorsey*, 154 A.3d at 125-26.

2. Discussion

The trial court did not err—and certainly did not plainly err—in finding that Phillips was eligible for an enhanced sentence under D.C. Code § 22-1804a(a)(2). Phillips does not dispute that multiple convictions in this case and his 1994 bank robbery conviction are "crimes of violence" under D.C. Code § 23-1331(4). Phillips challenges only his 2013 murder-for-hire conviction, in violation of 18 U.S.C. § 1958, which he argues (i) is not "clearly included" in § 23-1331(4)'s definition of a "crime of violence," and (ii) has been found by some federal courts not to qualify as a "crime of violence" under federal statutes (Supp. Br. at 9-13). Both arguments are meritless.

Phillips's contention that murder-for-hire under 18 U.S.C. § 1958 encompasses "lesser conduct" than murder (Supp. Br. at 10-11) overlooks that the same is true for § 23-1331(4)'s definition of a "crime of violence." Section 23-1331(4) identifies

"murder" as an enumerated offense and also expressly includes any "attempt, solicitation, or conspiracy to commit any of the foregoing offenses." D.C. Code § 23-1331(4). A defendant violates the federal murder-for-hire statute by (1) traveling in or causing another to travel in interstate or foreign commerce, or using or causing another to use any facility of interstate or foreign commerce, (2) with intent that a murder be committed (3) in return for a promise or agreement to pay anything of pecuniary value. *See United States v. Buselli*, 106 F.4th 1273, 1282-83 (11th Cir. 2024) (citing 18 U.S.C. § 1958). Thus, while a defendant need not actually commit or attempt to commit a murder to violate § 1958, he must at least participate in a scheme based on a promise of payment with the intent of effectuating a murder. Such conduct constitutes "solicitation" of murder or "conspiracy" to commit murder and thus qualifies as a "crime of violence" under the plain language of D.C. Code § 23-1331(4).

Furthermore, Phillips's conviction was not for the base version of murder-for-hire, which carries a maximum sentence of 10 years' (120 months') incarceration. *See* 18 U.S.C. § 1958. The maximum penalty increases to 20 years (240 months) "if personal injury results," and to death or life imprisonment "if death results." *Id*. Phillips pleaded guilty to an information charging him with a murder-for-hire scheme "resulting in the deaths" of two victims. *United States v. Bryant Phillips*, No. 2:05-cr-609-RBS (E.D. Pa.), Information (Dkt. 1) (Oct. 21, 2005). The court sentenced him to 216 months' incarceration, meaning that his conviction required proof that, at a

minimum, "personal injury result[ed]" from the murder-for-hire scheme. *See id*., Judgment (Dkt. 35) (Jan. 30, 2013). To the extent there is any ambiguity about whether the base version of 18 U.S.C. § 1958 is a "crime of violence" under D.C. Code § 23-1331(4)—and we submit there is none—Phillips's participation in a murder-for-hire scheme that was carried out to the point of causing physical injury to the victims certainly qualifies as "substantially the same offense" as engaging in a conspiracy to commit murder. *Parks*, 627 A.2d at 9-10.[12]

In addition, Phillips's reliance on federal courts' interpretations of the "crime of violence" definitions in certain federal statutes is misplaced. In the aftermath of *United States v. Davis*, 588 U.S. 445 (2019), a "crime of violence" under 18 U.S.C. § 924(c)(3)(A)—and other similarly worded federal statutes—requires an offense to have as an element "the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 924(c)(3)(A). As Phillips notes (Supp. Br. at 12), some federal courts have held that the base version of murder-for-hire under 18 U.S.C. § 1958 does not satisfy this definition. "[H]owever, the United States and the District of Columbia define 'crime of violence' in very different ways." *Fadero v.*

[12] Phillips is incorrect that his conviction for an enhanced version of 18 U.S.C. § 1958 is irrelevant because a crime-of-violence analysis cannot rely on "case-specific inquiries" (Supp. Br. at 12). Where, as here, an alternative version of an offense has a different statutory punishment, it is a distinct crime with different elements for purposes of the categorical approach. *See Mathis v. United States*, 579 U.S. 500, 518 (2016).

United States, 180 A.3d 1068, 1072 (D.C. 2018) (cleaned up). As discussed above, the D.C. Code defines crimes of violence "by reference to a list of the offenses so designated" in § 23-1331(4). *Id*. That list includes solicitation and conspiracy to commit murder, even if those crimes do not require the use, attempted use, or threatened use of physical force. D.C. Code § 23-1331(4).[13]

At the very least, the trial court did not plainly err in deeming Phillips's murder-for-hire conviction to be a crime of violence for purposes of enhancing his sentence under D.C. Code § 22-1804a(a)(2). *See Dorsey*, 154 A.3d at 126. A claim subject to plain-error review fails if the alleged error "is not obvious under existing case law." *Washington v. United States*, 122 A.3d 927, 935 (D.C. 2015). *See also Baxter v. United States*, 640 A.2d 714, 717-18 (D.C. 1994) (trial judge "did not commit plain error by failing, sua sponte, to intercede in the case with theories and contentions not presented by the parties" based on issues that "ha[d] not been decided in this jurisdiction"). Phillips has not identified any authority holding that a murder-for-hire conviction under

[13] In any event, Phillips's conviction for the enhanced version of 18 U.S.C. § 1958—which required proof that, at a minimum, his participation in a murder-for-hire scheme caused personal injury—would satisfy the so-called "force clause" of 18 U.S.C. § 924(c)(3)(A). *Cf. United States v. Runyon*, 994 F.3d 192, 203 (4th Cir. 2020) (enhanced version of 18 U.S.C. § 1958 in which "death results" is a "crime of violence" under § 924(c)(3)(A)). This Court need not address that issue, however, since Phillips's claim fails under the plain language of D.C. Code § 23-1331(4).

18 U.S.C. § 1958 is not a "crime of violence" under D.C. Code § 23-1331(4), and his interpretation is certainly not a "clear" or "obvious" reading of the statutory text.

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, Sean R. Day, Esq., sean@dayincourt.net, on this 22nd day of September, 2025.

/s/
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