BRIEF FOR APPELLEE

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 24-CF-828

GRISELDA MARTINEZ-MOZ, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

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

Cr. No. 2022-CF1-1657

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TABLE OF CONTENTS

TABLE OF AUTHORITIES*

Cases

* Authorities upon which we chiefly rely are marked with asterisks.

Statutes

Rules

Other Authorities

ISSUES PRESENTED

I. Whether the trial court abused its discretion in admitting limited other-crimes evidence, under *Johnson v. United States*, 683 A.2d 1087, 1090 (D.C. 1996) (en banc), that Martinez-Moz sexually abused the child victim N.C. in Maryland in June 2019, prompting N.C.'s delayed disclosure of the charged sexual-abuse acts; and whether the trial court plainly erred in failing to consider Martinez-Moz's "transgender status" and an "actual impossibility" defense that she chose not to pursue when the court determined that the probative value of the *Johnson* evidence was not substantially outweighed by the danger of unfair prejudice.

II. Whether, taking the evidence in the light most favorable to the verdict, there was sufficient evidence to convict Martinez-Moz of first-degree child sexual abuse as charged in Count Two based on vaginal penetration, where N.C. testified that Martinez-Moz vaginally raped her a "second time" in D.C. and described details of the incident, including that it occurred after Martinez-Moz forced N.C. to perform oral sex; and whether, on plain-error review, the oral-sex evidence presented at trial constructively amended the indictment, where Martinez-Moz conceded that the evidence was admissible under *Johnson*, and the trial court specifically instructed the jury that its Count Two verdict had to be based on vaginal penetration, not oral sex.

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COUNTERSTATEMENT OF THE CASE

When N.C. was eight years old, she was raped twice by Griselda Martinez-Moz, a close family friend, who was living temporarily with N.C.'s family in Washington, D.C. Like most victims of child sexual abuse, N.C. did not immediately disclose the rapes. Several years later, however, when N.C. was 11 years old and living in Maryland, Martinez-Moz stayed overnight at N.C.'s home and raped her again. N.C. began cutting herself. After N.C.'s mother and grandmother saw the scars and confronted her, N.C. finally disclosed that Martinez-Moz had sexually abused her.

Martinez-Moz was charged with two counts of first-degree child sexual abuse with aggravating circumstances, D.C. Code §§ 22-3008, 3020(a)(1)-(2) (Record on Appeal (R.) 40 (Indictment)). Following a jury trial before the Honorable Michael O'Keefe, Martinez-Moz was found guilty as charged (3/21/24 Transcript (Tr.) 5-6). The trial court denied Martinez-Moz's post-trial motion for judgment of acquittal and for a new trial (R.1069 (8/23/24 Order)) and sentenced her to consecutive 120-month terms of imprisonment on each count, to be followed by a lifetime of supervised release (8/23/24 Tr. 31). Martinez-Moz timely filed notice of appeal (R.1082 (Notice of Appeal)).

The Trial

The Government's Evidence

N.C.'s grandmother, Elba C., met Martinez-Moz through work, and they became close friends (3/12/24 Tr. 68-70). Through her friendship with Elba C., Martinez-Moz also became friends with Elba C.'s daughter, Jessica C., and began spending time with Jessica C.'s "very young" daughter, N.C. (*id.* 68-70, 87).

During this period, Martinez-Moz, who is transgender, was transitioning from male to female, and began going by the names "Marcia" and "Griselda" (3/12/24 Tr. 86-87, 105; 3/18/24 Tr. 95). Both Elba C. and Jessica C. "embraced her change" and brought Martinez-Moz to medical appointments, including surgeries "to get her breasts done and her body done" (3/12/24 Tr. 86-87; 3/18/24 Tr. 95-96). When N.C.

was "around 5 years old," she asked her grandmother "why Marcia [wore] so much makeup," and Elba C. explained that Martinez-Moz "was a man, but she wanted to be a woman, but she still had her male parts" (3/12/24 Tr. 107).

Between 2014 and 2016, N.C.'s family lived in a two-bedroom apartment on Riggs Road, NE, in Washington, D.C. (3/13/24 Tr. 135; 3/18/24 Tr. 102). Martinez-Moz stayed with the family for several months during this period, when N.C. was "[s]even or eight" years old (3/18/24 Tr. 103). Martinez-Moz shared a bedroom with Jessica C. and N.C., while Elba C. and her partner slept in the other bedroom (3/12/24 Tr. 93). Because Jessica C. and Elba C. both worked, Martinez-Moz would often babysit N.C., generally for short periods "between the time that [N.C.] got out of school and [Elba C.] got home from her job" (*id.* 95; 3/18/24 Tr. 110). Martinez-Moz was one of only three people whom Jessica C. allowed to babysit N.C. (3/13/24 Tr. 138). Jessica C. noticed, however, that "the more [she] left [N.C.] with [Martinez-Moz], the more [N.C.] just didn't want [Martinez-Moz] to stay"; N.C. "would throw fits" and "be angry about it" when Martinez-Moz babysat her (3/18/24 Tr. 111). At the time, Jessica C. attributed N.C.'s response to the fact that Martinez-Moz could be strict with N.C. and "made her clean up" after herself (*id.* 111-13).

N.C., who was 16 years old at the time of trial, testified that Martinez-Moz sexually abused her on two occasions during the period that Martinez-Moz stayed with N.C.'s family at the Riggs Road apartment (3/13/24 Tr. 130, 140, 145). The

first time, N.C. recalled that she was on her bed watching the television show "Cecilia" (*id.* 141, 145). Elba C. was at work and Jessica C. had gone to get food at Subway, so N.C. was alone in the apartment with Martinez-Moz (*id.* 140-41). N.C. was "wearing a Disney dress, one of those ones that you just pull over" (*id.* 141). Martinez-Moz "came over and started touching" N.C.'s chest, and then her "lower body," before "put[ting] her penis in [N.C.'s] vagina" (*id.* 142). Martinez-Moz was "on top of" N.C. and N.C. "felt her breath" (*id.*). N.C. looked at the ceiling because she "didn't want to look at" Martinez-Moz, who was "moving inside" N.C. (*id.* 143). Martinez-Moz did not stop when N.C. asked her to (*id.*). N.C. "felt something go in and out every time the bed would shake" (*id.*). N.C. heard "[t]he front door opening" and Martinez-Moz "got up quickly and went to her side of the bed," where "she just looked at" N.C. (*id.*). N.C. felt "empty and tired" after the ordeal and did not disclose it at the time (*id.* 144).

In the second incident, N.C. was also alone in the Riggs Road apartment with Martinez-Moz, "watching the same show" (3/13/24 Tr. 145). Martinez-Moz "motioned" N.C. to come to Martinez-Moz's bed, then "pulled up her dress" and N.C. "saw her penis" (*id.* 145-46). Martinez-Moz "told [N.C.] to suck her penis" (*id.* 147). N.C. testified that "[i]t was warm and tight [and] it felt like [her] throat almost close[d] up" (*id.* 148). Martinez-Moz "had her arm on [N.C.'s] shoulder" and told her "to keep going" (*id.*). Then, Martinez-Moz "put her penis in [N.C.'s] vagina";

N.C. recalled that her "legs [were] straight" and her night gown was pulled up, and Martinez-Moz's dress was also "lifted up" (3/14/24 Tr. 19, 20-21). N.C. did not say anything to Martinez-Moz "the second time" because she "had said something the first time and [Martinez-Moz] didn't stop" (*id.* 21-22).

N.C. testified that she did not disclose these incidents at the time because she was "scared" of "hurt[ing]" her mother, who had health issues (3/13/24 Tr. 154; 3/14/24 Tr. 25). N.C. was "happy" and "relieved" when Martinez-Moz moved out (3/14/24 Tr. 25). N.C. still occasionally saw Martinez-Moz at family gatherings (*id.* 26). N.C.'s grandmother recalled that N.C. "didn't want to see" Martinez-Moz and "got mad" when Martinez-Moz visited during this period (3/12/24 Tr. 99).

Several years later, in June 2019, Elba C., Jessica C., and N.C. lived in an apartment in Maryland (3/12/24 Tr. 108). N.C. was 11 years old (3/13/24 Tr. 130). Elba C. invited Martinez-Moz to a family barbecue (3/12/24 Tr. 108). At the end of the evening, Martinez-Moz wanted to spend the night (*id.* 111). Elba C. offered her own bedroom to Martinez-Moz, but Martinez-Moz declined and asked for "a blanket and pillow [to] sleep on the couch" in the living room (*id.*). At some point during the night, Martinez-Moz went into N.C.'s bedroom (3/14/24 Tr. 29). N.C. "felt

[Martinez-Moz's] penis inside" her (*id.* 30).[1] Elba C. woke up in the middle of the night to use the bathroom and saw that Martinez-Moz was no longer on the sofa (3/12/24 Tr. 112). Elba C. checked in N.C.'s room and saw that Martinez-Moz was "in [N.C.'s] bed" with N.C. (*id.* 112). Elba C. was "very angry" at Martinez-Moz and "asked [her] who [had given] Martinez-Moz permission" to sleep in N.C.'s bed (*id.* 113). Martinez-Moz told Elba C. that she had been cold in the living room (3/12/24 PM Tr. 76). Meanwhile, N.C. "wrapped [a blanket] around [her] lower body" and went to her mother's room (3/14/24 Tr. 29-30). Jessica C. testified that N.C. "was wrapped in a blanket" with "a blank stare" and told Jessica C. that she "just want[ed] to go to bed" (3/18/24 Tr. 116-17).

In late July 2019, N.C. found one of Martinez-Moz's "acrylic nails" in her room (3/14/24 Tr. 32). N.C. had not seen Martinez-Moz since the night of the barbecue; the discovery of the nail caused "[e]verything [to] c[o]me back all at once. It was almost like a flood in [N.C.'s] mind from the very, very beginning." (*Id.*) N.C. cut herself on the wrist, leaving scars that she concealed for a week by wearing a hoodie (*id.*). On July 30, 2019, Elba C. told N.C. to take off the hoodie and saw the scars (3/12/24 Tr. 115-16; 3/14/24 Tr. 32-33). Elba C. showed Jessica C. the scars

[1] As discussed below, the trial court precluded the government from eliciting more detailed testimony from N.C. about the sexual abuse in Maryland (R.476 (1/4/24 Order)).

on N.C.'s arm (3/14/24 Tr. 34). Jessica C. confronted N.C., asking "why [N.C.] did that to [her]self" (*id.*). Jessica C. testified that she felt "pure desperation" in the moment, because she did not "know what was going through [N.C.'s] head" and "[w]hat would possess her to [cut herself]" (3/18/24 Tr. 120). N.C. told her mother that "Marcia had touched [her]" (3/12/24 Tr. 118; 3/14/24 Tr. 34; 3/18/24 Tr. 118-19). Jessica C. brought N.C. to the hospital, where N.C. disclosed that she was "not a virgin no more" (3/18/24 Tr. 119).

Dr. Allison Jackson performed a sexual assault examination on N.C. on August 21, 2019, at Children's National Hospital (3/13/24 Tr. 25, 45). N.C. told Dr. Jackson that "a family friend by the name of Marcia," who was "transgender," would "put her penis inside of" N.C. "every time Marcia would come over" (*id.* 50-51). N.C. estimated that "the first time" was when she "was about 8 or 9 years old," and "the last time" was when "she was about 11" (*id.*). Dr. Jackson did not detect any physical injury during N.C.'s genital exam, which was neither "surprising" nor "inconsistent with what [N.C.] told [Dr. Jackson] about what happened," because "it is rare" to find any injury to the hymen even when "there is clear evidence that there has been penetration" (*id.* 55). Dr. Jackson also testified that delayed disclosure is "very common" in child sexual abuse cases (*id.* 56). Dr. Jackson specifically noted that oral sex is "one of the most difficult things for people to disclose about," and that "children" and "teens" tend to be "very apprehensive about disclosing oral

contact. . . . [T]here's something about the mouth that often withholds them from sharing that information." (*Id.* 111.)

Dr. Sharon Cooper, a leading expert on "the patterns and symptoms of child sexual abuse, including disclosure of child sexual abuse," testified that "delayed disclosure [of child sexual abuse] is far more common than a child telling you right away that something has happened to them" (3/14/24 Tr. 107, 112). Even where the offender does not explicitly tell the child victim not to report the abuse, "it is not uncommon" for the child to remain silent, because "[s]ilence by the offender often causes silence in the victim as well" (*id.* 118). Dr. Cooper testified that "[i]t is not unusual to see the dynamic of self-harm precede a disclosure of child sexual abuse," "most common[ly] . . . when there is acquaintance or familial sexual abuse," and victims "become so upset and so distraught" that they engage in self-harm and then "blurt out" that they have been raped or assaulted (*id.* 127-29). Children who disclose sexual abuse often do so "disjointed[ly]," without supplying "all the details"; therefore, "it takes significant numbers of interviews in therapy in order to generally hear the whole story" (*id.* 132). Moreover, child victims typically "give[] more and more detail" of the full scope of sexual abuse they endured "over time" (*id.* 139).

The Defense Evidence

Martinez-Moz chose not to testify (3/20/24 Tr. 60-61). The defense called five witnesses, three of whom were doctors or nurses who met with N.C. for various

medical purposes in the years following N.C.'s July 2019 disclosure that Martinez-Moz sexually abused her (3/19/24 Tr. 121, 175, 188). Through these witnesses, Martinez-Moz attempted to highlight inconsistencies in N.C.'s disclosures and descriptions of the abuse. See *id*. 138, 148 (during September 2019 physical, N.C. attributed cutting to weight problems and described "history of being raped at approximately eight years of age" by "a trusted close person to the family, a male who identifies as transgender male-to-female"); *id.* 177, 180-81 (during August 2022 appointment connected with weight-loss surgery, N.C. told nurse that "she had been sexually abused as a young child by a transgender woman," "at 11 years old"); *id.* 193, 214-15 (during June 2020 virtual intake appointment with pediatric psychologist to whom N.C. had been referred by her primary-care provider for help with "emotional regulation," N.C. did not share that she had been sexually abused).[2]

[2] In addition, Martinez-Moz called a Child and Family Services Agency (CFSA) investigator, who had responded to N.C.'s home after N.C., who was six years old at the time, told school staff that her mother had pushed her head into a wall (3/19/24 Tr. 114-15). N.C. immediately told the CFSA investigator that she had "just lied" because she was angry that Jessica C. had not stayed at a school party after dropping off supplies (*id.*). The CFSA investigator recalled that N.C. appeared to "feel really bad" and "sorry" about lying, and that "it became really apparent that lying was a bad thing in this family, that they talked about it a lot with [N.C.]" (*id.* 113, 116). Martinez-Moz also called a defense investigator who had timed the walk and drive between the Riggs Road apartment and the nearest Subway location (3/19/24 Tr. 155).

Martinez-Moz requested, and the trial court delivered, a "defendant's theory of the case" jury instruction (3/20/24 Tr. 35, 86). *See generally* Criminal Jury Instructions for the District of Columbia § 9.100 ("A defendant is generally entitled to an instruction on his theory of the case."). Martinez-Moz's defense-theory instruction stated:

> The [d]efense theory of the case is that Ms. Martinez-Moz never sexually abused [N.C.] in any way. That [N.C.] made up this alleged sexual abuse to deflect her mother's anger after her family discovered on July 30th, 2019, that she had been cutting herself. That [N.C.] knew her family would be sympathetic to a claim of sexual abuse and that would permit her to conceal the true reasons for her cutting.
>
> [T]hat [N.C.] now knows that she has no choice but to continue to maintain the story she told on [] July 30th, 2019, because she now significantly bonded with her mom over the supposed shared experience of sexual abuse. And [N.C.] knows her mother would be absolutely furious with her if it was discovered that she made up these allegations. (3/20/24 Tr. 86.)

SUMMARY OF ARGUMENT

The trial court did not abuse its discretion in admitting evidence under *Johnson v. United States*, 683 A.2d 1087 (D.C. 1996) (en banc), that a new incident of sexual abuse by Martinez-Moz in Maryland in June 2019 "finally prompted [N.C.] to come forward" and disclose that Martinez-Moz had sexually abused N.C. in Washington, D.C., several years before. And the court did not plainly err in failing to consider Martinez-Moz's "defense of actual impossibility due to her status as a transgender woman" in its *Johnson* analysis (Brief (Br.) 15). Martinez-Moz never

asked the trial court to consider the admissibility issues in light of her transgender status. In any event, Martinez-Moz ultimately chose *not* to present an actual impossibility defense. Moreover, had she sought to present evidence that she was not physically capable of achieving an erection and penetrating N.C., it would likely have opened the door to *more* other-crimes evidence that Martinez-Moz had successfully fought to keep out, including evidence of another Maryland offense during which Martinez-Moz vaginally penetrated N.C. and ejaculated.

There was sufficient evidence of vaginal penetration to convict Martinez-Moz on Count Two. N.C. testified that Martinez-Moz "put her penis in [N.C.'s] vagina" a "second time" in D.C., after Martinez-Moz forced N.C. to perform oral sex, and provided details of this incident.

Martinez-Moz's unpreserved "fatal variance" claim fares no better. The oral-sex evidence did not constructively amend Count Two of the indictment, let alone on plain-error review. Moreover, any variance did not prejudice Martinez-Moz because the trial court specifically instructed the jury that it had to find that Martinez-Moz vaginally penetrated N.C. to convict on Count Two and could not convict based on oral sex.

ARGUMENT

I. The Court Should Reject Martinez-Moz's Challenges to the Trial Court's Evidentiary Rulings.

Martinez-Moz contends that the Maryland incidents were not admissible under *Johnson* because "there was nothing intrinsic in those alleged crimes that was either necessary or intertwined to place the indicted charges in context" (Br. 15). Martinez-Moz further asserts that the evidence was "unduly prejudicial" because the trial court "ignored [her] defense of impossibility due to her status as a transgender woman" (*id.*). Finally, Martinez-Moz claims that the trial court erred in admitting evidence about the oral sex that occurred during the sexual encounter charged in Count Two (*id.* 21). These claims lack merit.

A. Additional Background

1. The "Other Crimes" Evidence

The indictment charged Martinez-Moz with two counts of first-degree child sexual abuse committed in the District of Columbia between January 1, 2015, and December 31, 2016, when N.C. was "7 or 8 years of age" (R.40-41 (Indictment 1-2)). Both counts involved the "penetration of N.C.'s vulva by [Martinez-Moz's] penis" (*id.*).

On September 23, 2023, the government filed "notice of its intent to introduce evidence of other crimes and bad acts pursuant to *(William) Johnson v. United States*,

683 A.2d 1087 (D.C. 1996) (en banc), *Toliver v. United States*, 468 A.2d 958, 960-61 (D.C. 1983), *Drew v. United States*, 331 F.2d 85 ([D.C. Cir.] 1964), and their progeny" (R.227 (*Drew/Johnson* Notice 1)). The government provided notice of "two other incidents of sexual abuse of the victim that occurred in Maryland" after the two D.C. incidents charged in the indictment: the "Maryland 2017-2018 Couch Incident," which N.C. would testify "occurred when she was approximately 10 years old on the couch at the first apartment her family moved to in Maryland," and involved Martinz-Moz vaginally raping N.C. and ejaculating, so that "her penis" had what N.C. described "as clear and white wet stuff" on it; and the "Maryland June 2019 Incident," in which Martinez-Moz attended a gathering at N.C.'s home, came into N.C.'s room in the middle of the night, got into N.C.'s bed, removed N.C.'s shorts, and vaginally raped her before N.C.'s grandmother opened the bedroom door (R.227-29 (*Drew/Johnson* Notice 1-3)).

The government argued that the Maryland incidents were admissible under *Johnson* and *Toliver*, because they were "necessary to place the charged crime in an understandable context," by "explain[ing] the context surrounding [N.C.'s] disclosure of sexual abuse" in July 2019 (R.232-33 (*Drew/Johnson* Notice 6-7)). The government also argued that the evidence was admissible under *Drew* because "the Maryland incidents plainly demonstrate the defendant's 'criminal intent,' her 'lustful disposition,' and the absence of accident" (R.231 (*Drew/Johnson* Notice 5)).

The government filed a supplemental notice on December 20, 2023, explaining that it "intend[ed] to introduce testimony from [N.C.] that [Martinez-Moz] caused [N.C.] to perform oral sex during an incident that occurred on Riggs Road in Washington, DC," and that N.C. would "testify that prior to vaginal penetration, [Martinez-Moz] instructed [N.C.] to open her mouth" and "then placed her penis in [N.C.'s] mouth" (R.478 (*Drew/Johnson* Order 3)).[3]

On December 27, 2023, Martinez-Moz filed an opposition to the government's *Drew/Johnson* notice, arguing that "the two proposed Maryland incidents" were not admissible as *Johnson* or *Drew* evidence (R.338, 343 (*Drew/Johnson* Opposition 2, 7)). Martinez-Moz conceded, however, that "evidence of the uncharged act of alleged oral sex" was "proper *Johnson/Toliver* evidence, as it is an uncharged act that occurred in very close proximity in time and place to the second charged D.C. act" (R.341 n.1 (*Drew/Johnson* Opposition 5 n.1)).

On January 4, 2024, the trial court ruled on the admissibility of the Maryland incidents in a thorough written order (R.476-89 (*Drew/Johnson* Order 1-14)). The court first found that the Maryland incidents would not be admissible under *Drew* unless "it bec[ame] clear [at trial] that [Martinez-Moz's] state of mind [was] at issue"

[3] The government's supplemental notice does not appear in the record on appeal, but is referenced in Martinez-Moz's opposition and the trial court's order (R.337 (*Drew/Johnson* Opposition 1), 476 (*Drew/Johnson* Order 1)).

(R.483 (*Drew/Johnson* Order 8)). The court also found that the "Maryland 2017-2018 couch incident [was] not admissible under *Johnson*" (R.486 (*Drew/Johnson* Order 11)). But the court "agree[d], to a certain extent, that the June 2019 [incident] is admissible under *Johnson*," as "it provide[d] context for [N.C.'s] eventual disclosure in July 2019" (R.487-88 (*Drew/Johnson* Order 12-13)). The court also determined that "the danger of unfair prejudice does not substantially outweigh the probative value of the evidence," because "[t]he June 2019 incident helps explain the context for [N.C.'s] disclosure and is unlikely to rouse the jury because the jury will already hear other evidence related to child sexual abuse" (R.488 (*Drew/Johnson* Order 13)). The government would be "limited" to presenting evidence "that the June 2019 incident occurred and that [N.C.] describe[d] it as 'the worst incident,'" and would not be allowed to "introduce details" of the June 2019 sexual abuse, in order to "reduce[] any possible prejudice of the incident and adhere[] to why the evidence is admissible under *Johnson*: providing the context and circumstances resulting in the complainant's disclosure" (*id.*). Finally, the court found that evidence of oral sex that preceded the vaginal penetration incident charged in Count Two was admissible under *Johnson* and *Toliver* because it was part of "the immediate circumstances surrounding the charged D.C. offense" (R.489 (*Drew/Johnson* Order 14)). The court also acknowledged Martinez-Moz's

concession that the oral-sex evidence was "'proper *Johnson/Toliver* evidence'" (R.489 n.7 (*Drew/Johnson* Order 14 n.7)).

2. The Impossibility Defense

Also on January 4, 2024, Martinez-Moz filed a motion to continue the trial—which was scheduled to begin four days later—claiming that the defense had "just received" records that Martinez-Moz was "undergoing feminizing hormone therapy," which could have affected her "ability to obtain an erection and engage in penetrative sex" and made it "physically impossible for [Martinez-Moz] to have done any of the things [N.C. alleged]" (R.420-21 (Continuance Motion 1-2)). At a hearing on January 5, 2024, defense counsel stated that a Public Defender Service (PDS) colleague went home for the holidays and "happened to be talking about [this] case with his doctor sister," who suggested that feminizing medication and hormones could "impact[] whether [somebody is] able achieve an erection and maintain an erection and engage in penetrative sex" (1/5/24 Tr. 10-11). The defense obtained medical records showing that Martinez-Moz was taking hormone medications that decreased her testosterone levels and sought a continuance to consult with an expert (*id.*). The government opposed the continuance, arguing that Martinez-Moz herself had known what medication she was taking, so "this [was] not new information" to the defense, and that "[a]n erection is not required for penetration. [The government] see[s] child sex abuse cases all of the time where the abuse occurs with a nonerect

penis." (*Id.* 19, 22.) The trial court granted Martinez-Moz a two-month continuance (*id.* 51).

On February 2, 2024, Martinez-Moz filed expert notices for two doctors who would testify that Martinez-Moz was "taking hormonal therapy" and "had suppressed testosterone levels," which could lead to "an inability or decreased ability to achieve . . . erections during sexual contact" (R.644, 647 (Defense Expert Notices)). The government filed motions to preclude both proposed experts, arguing that Martinez-Moz's expert notices were deficient under Superior Court Criminal Rule 16(d)(2) (R.655, 667 (Government Motions to Preclude)). The government also filed notice of a rebuttal expert, who would testify that transgender women "with low testosterone levels may, but do not necessarily, experience an inability or decreased ability to achieve erections," and that "[e]rections from stimulation may be less significantly affected than spontaneous erections" (R.679-80) (Government Expert Notice)).

After speaking with Martinez-Moz's proposed experts, the government "withdrew its motions to exclude the[se] experts," and filed a motion to reconsider the trial court's January 4, 2024, *Drew/Johnson* Order precluding the government from presenting evidence of the Maryland 2017-2018 couch incident (R.704, 705 (Government Reconsideration Motion 1, 3)). N.C. witnessed Martinez-Moz ejaculate during the couch incident (R.709 (Government Reconsideration Motion

6)). As the government pointed out, if Martinez-Moz put on an impossibility defense by "rely[ing] on the low testosterone levels and the testimony of [her] experts to suggest that, as a result of her low testosterone levels, [she] would have been experiencing erectile dysfunction, and therefore she could not have committed the charged offenses," then "the evidence of the [couch incident would] become extremely relevant and probative" because "[t]he testimony that during the 2017-2018 couch incident [Martinez-Moz] ejaculated is direct evidence that she was capable of sexual arousal and performance" (*id.*). Therefore, N.C.'s "testimony about the penetration that resulted in the ejaculation is 'direct and substantial proof of the charged crime'" (*id.* (quoting *Johnson*, 683 A.2d at 1098)). The trial court took the reconsideration motion under advisement, explaining that the couch incident and ejaculation evidence would not be admissible during the government's case-in-chief, but might become admissible "on rebuttal," "depend[ing] on what" the defense experts would "say about impossibility" (3/7/24 Tr. 3-4). The court emphasized that the couch incident's admissibility would "hinge upon what the experts say" (*id.* 4).

As the government prepared to rest its case-in-chief at trial, the trial court asked whether the government anticipated presenting any rebuttal witnesses, prompting the government to note that "[t]he question still remains whether the [c]ourt would permit in evidence of the ejaculation incident" (3/18/24 Tr. 288). The

court replied that the parties would have "to wait" for a ruling, because "[t]hat's fact-specific" (*id.*). The next day, after Martinez-Moz had called her other witnesses, the defense inquired whether calling "the two erection doctors" to testify would "open[] the door" to evidence that Martinez-Moz ejaculated during the couch incident (3/19/24 Tr. 224-25). The trial court cautioned that its ultimate ruling would be "very fact-specific," and suggested that it would depend on whether "the doctors are going to say there [was] no chance" Martinez-Moz could obtain an erection, or whether she retained some "potential for an erection" (*id.* 224). According to defense counsel, Martinez-Moz was "not willing to take that gamble" and "risk [another] sex offense coming in," so the defense did not call the experts or present evidence that Martinez-Moz could not achieve an erection (*id.* 225, 269).

B. Standard of Review and Applicable Legal Principles

"A trial judge has broad discretion to determine the admissibility of evidence of uncharged misconduct as direct and substantial proof of the crime charged under *Johnson*, and on appeal [this Court's] review of a judge's ruling admitting such evidence is limited to a consideration of whether there has been an abuse of discretion." *Smallwood v. United States*, 312 A.3d 219, 225 (D.C. 2024). "Such review [is] 'supervisory in nature and deferential in attitude.'" *Id.* Moreover, even where this Court finds error, it may find "that the fact of error in the trial court's

determination caused no significant prejudice and hold, therefore, that reversal is not required because the error was harmless." *Id.* (quotation marks omitted).

"When an appellant presents an issue which he did not raise in the trial court, [this Court] review[s], if at all, for plain error, whether the alleged error is non-constitutional or constitutional in nature." *Lowery v. United States*, 3 A.3d 1169, 1172-73 (D.C. 2010). "Under the test for plain error, appellant first must show (1) error, (2) that is plain, and (3) that affected appellant's substantial rights. Even if all three of these conditions are met, this [C]ourt will not reverse unless (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* (quotation marks omitted).

"Under *Drew*, evidence of another crime cannot be introduced to prove disposition of the defendant to commit the crime charged." *Brown v. United States*, 840 A.2d 82, 94 (D.C. 2004). Courts therefore "exclude evidence of other crimes unless that evidence can be admitted for some substantial, legitimate purpose." *Hughes v. United States*, 150 A.3d 289, 301 (D.C. 2016) (quoting *Drew*, 331 F.2d at 89-90). Under *Johnson*, however, "*Drew* does not apply when the challenged evidence '(1) is direct and substantial proof of the charged crime, (2) is closely intertwined with the evidence of the charged crime, or (3) is necessary to place the charged crime in an understandable context.'" *Brown*, 840 A.2d at 94 (quoting *Johnson*, 683 A.2d at 1098). *See also Toliver*, 468 A.2d at 461 ("[I]n cases where

evidence of incidental, uncharged criminal conduct is inextricably intertwined with evidence of the charged offense, evidence of the uncharged criminal conduct is directly admissible without the necessity of a cautionary *Drew* instruction."). "[I]f evidence is to be admitted under *Toliver* or *Johnson*, it must pass the balancing test of probative value against the potential for unfair prejudice. Under that test, evidence otherwise relevant may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." *Hughes*, 150 A.3d at 301 (citations and quotation marks omitted).

C. Discussion

1. The Trial Court Did Not Abuse its Discretion in Admitting as *Johnson* Evidence the 2019 Maryland Incident and the Oral Sex Occurring During the Sexual Abuse Charged in Count Two.

The trial court did not abuse its discretion, let alone plainly err, in admitting "limited" *Johnson* evidence, including evidence that the Maryland June 2019 incident prompted N.C. to disclose Martinez-Moz's sexual abuse the following month, and that Martinez-Moz forced N.C. to perform oral sex before the second charged vaginal rape (R.488 (*Drew/Johnson* Order 13-14)).

As to evidence that the June 2019 incident prompted N.C.'s disclosure, the trial court correctly determined that it was "admissible under *Johnson*" because it was "necessary to place the charged crime in an understandable context" and

"provide[] context for [N.C.'s] eventual disclosure in July 2019" (R.487 (*Drew/Johnson* Order 12)). This Court has previously held that other-crimes evidence is admissible under *Johnson* where "it aid[s] the jury in understanding what finally prompted [a child victim] to come forward with her serious allegations [of child sexual abuse]" and thus "serve[s] to place the charged crimes in context." *Brown*, 840 A.2d at 94. Here, the trial court reasonably found a causal link between the June 2019 incident and N.C.'s disclosure the next month: the renewed abuse and the discovery of Martinez-Moz's acrylic nail in N.C.'s bedroom triggered self-harm, and the discovery of the self-harm by N.C.'s family precipitated N.C.'s disclosure of the sexual abuse (R.488 (*Drew/Johnson* Order 13 ("[F]inding the nail reminded [N.C.] of the abuse, which led her to harm herself.")). Because evidence of the June 2019 incident was necessary to "aid[] the jury in understanding what finally prompted" N.C. to disclose the charged sexual abuse, the trial court did not abuse its discretion in admitting the evidence under *Johnson*. *Brown*, 840 A.2d at 94. *See also Hughes*, 150 A.3d at 302-03 (evidence that supervisor sexually abused other employees and created climate of "fear" in workplace was admissible to explain principal employee victim's delayed disclosure).

Martinez-Moz acknowledges that "the context of the delayed disclosure" was "key here" (Br. 16). She argues, however, that N.C.'s disclosure in July 2019 "was extremely delayed and unjustified" because the charged offenses occurred several

years earlier, and the June 2019 incident "should not have been presented to the jury for this reason alone" (Br. 18). That gets things backwards. The June 2019 incident was highly probative because it helped explain the context of the delayed disclosure and "what finally prompted [N.C.] to come forward." *Brown*, 840 A.2d at 94. Without that explanation, the jury would have been deprived of important context for the disclosure of the charged offenses and susceptible to Martinez-Moz's misleading suggestion that N.C. "disclosed the charged abuse out of the blue, *with no triggering event*, two and a half years after the claimed sexual abuse ended, because it never happened" (Br. 19 (emphasis added)).[4]

As for the oral sex "which occurred during the second incident in D.C. (Count Two)" (Br. 20-21), Martinez-Moz conceded in a trial court pleading that "evidence of the uncharged act of alleged oral sex" was "proper *Johnson/Toliver* evidence" (R.341 n.1 (*Drew/Johnson* Opposition 5 n.1)). Martinez-Moz has thus waived her claim that the trial court "erred in admitting" this evidence (Br. 20), because "a defendant may not take one position at trial and a contradictory position on appeal."

[4] Martinez-Moz also appears to argue that the trial court was required to make findings about the June 2019 incident under a "clear and convincing standard" (Br. 16), but that is a requirement for "*Drew*-type evidence." *Drake v. United States*, 315 A.3d 1196, 1208 (D.C. 2024). The trial court admitted evidence of the June 2019 incident under *Johnson*, so it was not subject to "the *Drew* strictures." *Id.*; *see also Johnson*, 683 A.2d at 1098. Nor is it relevant "why Maryland did not charge" Martinez-Moz (Br. 16). *See Hilton v. United States*, 250 A.3d 1061, 1070 (D.C. 2021) (*Johnson* applies to "uncharged criminal conduct").

Mason v. United States, 53 A.3d 1084, 1102 (D.C. 2012). In any event, the oral sex occurred during the same encounter and immediately preceded the vaginal rape charged in Count Two, so it was admissible under *Johnson* and *Toliver* as "part of the immediate circumstances surrounding" the charged offense and "necessary to place the charged crime in an understandable context." *Hughes*, 150 A.3d at 301 (quotation marks omitted).

2. The Trial Court Did Not Plainly Err in Failing to Address, Sua Sponte, Whether Limited Testimony About the 2019 Maryland Incident Unduly Prejudiced Martinez-Moz in Light of Her Impossibility Claims.

This Court may review only for plain error Martinez-Moz's claim that the trial court abused its discretion in admitting *Johnson* evidence without considering Martinez-Moz's "defense of actual impossibility due to her status as a transgender woman" (Br. 15). Martinez-Moz failed to preserve this issue in the trial court. *See* Super. Ct. Crim. R. 52(b); *Lowery*, 3 A.3d at 1172-73. The trial court issued its *Drew/Johnson* Order on January 4, 2024, finding that "limited" evidence of the Maryland June 2019 incident would be admissible under *Johnson* and "the danger of unfair prejudice does not substantially outweigh the probative value of the evidence" (R.488 (*Drew/Johnson* Order 13)).

On the very same day, in a trial-continuance motion, Martinez-Moz first alerted the court that she wanted to present evidence "to show that it would have been physically impossible for [her] to do any of the things [N.C. was] alleging" (R.421 (Continuance Motion 2)). However, Martinez-Moz never attempted to link her proposed "actual impossibility" defense to the admissibility of the June 2019 incident as *Johnson* evidence, nor did she ask the trial court to reconsider its earlier ruling. By contrast, after speaking with Martinez-Moz's proposed experts, the government requested that the court reconsider its ruling to exclude evidence of the couch incident involving ejaculation, because it would be "necessary to negate the defense of impossibility" (R.708 (Government Reconsideration Motion 5)). Although Martinez-Moz now claims that "her status as a transgender woman" and "defense of actual impossibility" were "huge and tremendously important fact[s]" (Br. 15, 17) in the *Johnson* analysis, she never argued that the trial court should consider these factors in its discretionary balancing of "probative value against the potential for unfair prejudice." *Johnson*, 683 A.2d at 1098. Martinez-Moz's claim thus "presents an issue which [s]he did not raise in the trial court," and is subject to review for plain error only. *Lowery*, 3 A.3d at 1172-73.[5]

[5] Martinez-Moz incorrectly claims that the trial court committed "structural error" in admitting *Johnson* evidence "without taking into account [that Martinez-Moz] was a transgender woman" (Brief 15). "A structural error is different from a 'trial error,' which is capable of being 'quantitatively assessed in the context of other (continued . . .)

Martinez-Moz's central claim appears to be that the probative value of the Maryland June 2019 incident in providing context for N.C.'s delayed disclosure of the charged D.C. offenses was substantially outweighed by the danger of unfair prejudice to her "defense of actual impossibility due to her status as a transgender woman" (Br. 15). According to Martinez-Moz, "the trial [c]ourt gutted her defense of actual impossibility by virtue of her status as a transgender woman, i.e., that she could not have committed the offenses due to her sexual identity as a transgender woman" (*id.* 19). This contention utterly fails.

First, Martinez-Moz did not pursue a defense of actual impossibility. Although Martinez-Moz belatedly noticed experts who would have testified that Martinez-Moz's hormone medication might have made it more difficult for her to achieve an erection in some circumstances, Martinez-Moz did not call these experts. Martinez-Moz also chose not to testify, and she failed to present any other evidence that she was physically incapable of raping N.C. Indeed, Martinez-Moz's "defense

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evidence presented in order to determine whether its admission was harmless.'" *Arthur v. United States*, 986 A.2d 398, 413 (D.C. 2009) (quoting *Arizona v. Fulminante,* 499 U.S. 279, 307-08 (1991)). An alleged error in the admission of other-crimes evidence is a classic example of "trial error" that is clearly subject to harmless-error analysis. *See, e.g., Thomas v. United States*, 59 A.3d 1252, 1262 (D.C. 2013) ("We apply the harmless error test of *Kotteakos v. United States*, [328 U.S. 750, 764-65 (1946),] to the erroneous admission of prior crimes evidence.").

theory of the case" jury instruction did not mention actual impossibility, which is not surprising because there was no evidence that would have supported such an instruction. Rather, the defense theory was that N.C. "made up this alleged sexual abuse to deflect her mother's anger after her family discovered on July 30th, 2019, that she had been cutting herself" (3/20/24 Tr. 86). That the defense theory focused on the context of the delayed disclosure reinforces the significant probative value of the full context of that disclosure, including that Martinez-Moz sexually abused N.C. again a month before the disclosure and that N.C. subsequently found evidence of Martinez-Moz's presence in her bedroom. *Cf. Brown*, 840 A.2d at 94 ("[T]he challenged evidence served to place the charged crimes in context because it aided the jury in understanding what finally prompted S.T. to come forward with her serious allegations.").

In any event, even Martinez-Moz acknowledges (albeit in a footnote), that she did not present any "actual impossibility" evidence at trial. *See* Br. 19 n.3 (noting that Martinez-Moz did not "testify[] in her own defense," "introduce evidence of her prior relationships exclusively with biological males," or "request an actual impossibility instruction"). Thus, Martinez-Moz cannot credibly contend that this "defense was clear" and "the defense theme was one of actual impossibilities that

[she] could not have done these crimes due to her identity as a transgender woman" (*id.* (emphasis omitted)).[6]

Martinez-Moz's claim also fails to address that, had she tried to mount an "actual impossibility" defense, she would likely have opened the door to the admission of *more* other-crimes evidence. As the government pointed out, if Martinez-Moz presented evidence suggesting that she was not capable of sexual performance with her penis, N.C.'s testimony about the 2017-2018 couch incident—in which Martinez-Moz ejaculated while raping N.C.—would become "extremely relevant and probative" as "direct evidence that [Martinez-Moz] was capable of sexual arousal and performance" (R.709 (Government Reconsideration Motion 6)). *Cf. Valdez v. United States,* 320 A.3d 339, 365-67 (D.C. 2024), *cert. petition filed*, No. 25-5537 (Sept. 3, 2025) (where defense cross-examination suggested that government witness belatedly fabricated her testimony about the defendant's confession to an unsolved murder, the trial court did not abuse its discretion in permitting the government to elicit that history of domestic violence explained witness' failure to tell police about the confession at an earlier time); *Pitt v. United States*, 220 A.3d 951, 962 (D.C. 2019) (defendant's testimony that created

[6] There was no evidence that Martinez-Moz was only "attracted to men" or that her "prior relationships [were] exclusively with biological males" (Br.17, 19 n.3). Without Martinez-Moz's testimony, it is unclear how such evidence could be elicited or why it would be admissible.

"misleading impression" that he was "just a fence" who only committed "minor" crimes "opened the door" to evidence that he had committed uncharged burglary). Here, the trial court never ruled on the government's motion for reconsideration on the admissibility of the couch incident because Martinez-Moz decided not to "take that gamble" and chose not to call her experts (3/19/24 Tr. 225, 269).

As for Martinez-Moz's suggestion that "the D.C. Human Rights Act of 1977, and its implementing regulations from 2006" somehow required the trial court to consider her "transgender status" as part of its *Johnson* analysis, Martinez-Moz does not develop this claim beyond a single footnote and admits that she failed to preserve it (Br. 19 n.4). The Court should exercise its discretion not to consider this undeveloped and unpreserved claim, because "[i]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived"; "[i]t is not enough merely to mention a possible argument in the most skeletal way, leaving the [C]ourt to do counsel's work, create the ossature for the argument, and put flesh on its bones." *Comford v. United States*, 947 A.2d 1181, 1188 (D.C. 2008). In any event, the antidiscrimination regulations to which Martinez-Moz cites, *see generally* D.C.M.R. § 4-800, do not plainly and obviously require that the trial court consider "transgender status" before admitting evidence that is otherwise admissible under well-established evidentiary rules. Nor can

Martinez-Moz plausibly allege that she is the victim of discrimination based on her gender identity.

Finally, Martinez-Moz fails to show that any error in failing to consider her transgender status prejudiced her "substantial rights," or "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *Lowery*, 3 A.3d at 1172-73. As explained, an "actual impossibility" defense would not have affected the admissibility under *Johnson* and *Toliver* of the June 2019 incident and the oral sex that preceded the vaginal rape charged in Count Two. Moreover, had the trial court considered the impossibility issue, the trial court would have likely admitted evidence of the 2017-2018 couch incident, including graphic victim testimony about Martinez-Moz's ability to ejaculate. In other words, had the trial court followed Martinez-Moz's logic, the end result would have been the admission of more other-crimes evidence against her, not less.

II. The Trial Court Did Not Err in Denying Martinez-Moz's Motion for Judgment of Acquittal on Count Two.

Martinez-Moz claims that there was insufficient evidence that she vaginally raped N.C. a second time at the Riggs Road apartment, and that the trial court therefore erred in denying a motion for judgment of acquittal on Count Two (Br. 21-24). Martinez-Moz also claims that N.C.'s testimony that Martinez-Moz forced her

to perform oral sex before the second vaginal rape constituted a "fatal variance" from the indictment (*id.* 24-25). These claims are meritless.

A. Standard of Review and Applicable Legal Principles

1. Sufficiency

"When reviewing a claim that the evidence in a criminal trial was insufficient to support the conviction, [this Court] view[s] the evidence in the light most favorable to the government, mindful of the jury's right to determine credibility, weigh the evidence, and draw justifiable inferences of fact. In order to establish a claim of insufficient evidence, appellant must show that the government failed to provide evidence from which a reasonable mind might fairly infer guilt beyond a reasonable doubt. This is a heavy burden." *Blair v. United States*, 114 A.3d 960, 976 (D.C. 2015) (citations and quotation marks omitted).

An individual commits first-degree child sexual abuse if, "being at least 4 years older than a child," the person "engage[] in a sexual act with that child or cause[] that child to engage in a sexual act." D.C. Code § 22-3008. "Sexual act[s]" include "[t]he penetration, however slight, of the anus or vulva of another by a penis," and "[c]ontact between the mouth and the penis." D.C. Code § 22-3001(8)(A)-(B). "The government need not prove full penetration [of the vulva]

since the offense is committed if the male organ enters only the labia of the female organs." *Blair*, 114 A.3d at 976 (quotation marks omitted).

2. Variance

"An amendment of the indictment occurs when the charging terms of the indictment are altered, either literally or in effect, by prosecutor or court after the grand jury has last passed on them." *Ingram v. United States*, 592 A.2d 992, 1005 (D.C. 1991) (emphasis omitted). "It follows that, in evaluating whether the indictment has been amended, the reviewing court compares the evidence and the judge's instructions to the jury with the charge specified in the indictment." *Id.* "[A] constructive amendment occurs when facts introduced at trial go to an essential element of the offense charged, and the facts are different from the facts that would support the offense charged in the indictment." *Carter v. United States*, 826 A.2d 300, 304 (D.C. 2003). "A variance, on the other hand, occurs when the facts proved at trial materially differ from the facts contained in the indictment, but the essential elements of the offense are the same." *Ingram*, 592 A.2d at 1005 (emphasis and quotation marks omitted). "[A] variance will not warrant dismissal except upon a showing of prejudice." *Id.* (quotation marks omitted). "Prejudice is normally considered to be present if there is danger that the accused will be prosecuted a second time for the same offense, or that he was so surprised by the proof that he

was unable to prepare his defense adequately." *Williams v. United States*, 756 A.2d 380, 388 (D.C. 2000) (quotation marks omitted).

To preserve an amendment or variance claim for appellate review, a defendant must make a "timely objection *at trial*." *Francis v. United States*, 256 A.3d 220, 230-31 (D.C. 2021) (emphasis added). The defendant is "requir[ed] to assert at the trial"—before she has opportunity to "secure an acquittal"—an "objection of variance if the prosecution proffers a different means of committing the same crime." *Jackson v. United States*, 359 F.2d 260, 264 & n.3 (D.C. Cir. 1966). Untimely amendment and variance claims are reviewed for plain error. *Francis*, 256 A.3d at 230-31.

B. Discussion

1. There Was Sufficient Evidence of Vaginal Penetration to Convict on Count Two.

Martinez-Moz claims that there was insufficient evidence that she vaginally penetrated N.C. a second time in D.C., and therefore that her motion for judgment of acquittal should have been granted on Count Two (Br. 22-23). As the trial court correctly recognized, however, "there was some evidence from which a jury could conclude that N.C. was vaginally penetrated during the second incident," because N.C. "testified under oath about the second incident of vaginal sex" (R.1074 (Order Denying MJOA 6)). Indeed, even Martinez-Moz acknowledges that "N.C. testified

in relation to Count II, indicating there was in fact a vaginal penetration performed by [Martinez-Moz] in the second instance," and that N.C.'s testimony "g[a]ve details regarding the second instance of vaginal sex, stating that this had occurred in the shared bedroom on [Martinez-Moz's] bed, when [Martinez-Moz's] skirt was lifted" (Br. 8). *See* 3/14/24 Tr. 18-22 (N.C.'s testimony about the "second time" Martinez-Moz "put her penis in [N.C.'s] vagina," after Martinez-Moz forced N.C. to perform oral sex). "As [this Court] has often stated, the testimony of a single witness is sufficient to sustain a criminal conviction"; "[t]his is so even when the witness is not a perfect witness or when the testimony of the single witness is contradicted by other witnesses or evidence." *Smith v. United States*, 175 A.3d 623, 628 (D.C. 2017) (quotation marks omitted). N.C.'s testimony about the second vaginal rape provided sufficient grounds for the jury to convict Martinez-Moz on Count Two.

Martinez-Moz (at 22-23) makes much of the fact that N.C. initially testified at trial that Martinez-Moz forced her to perform oral sex during the second incident on Martinez-Moz's bed, and that N.C. did not recall "anything else" happening before Martinez-Moz "sent [N.C.] back to [her] bed" (3/13/24 Tr. 146-50). However, the government confronted N.C. the next day with her grand-jury testimony and forensic interview, during which N.C. had described Martinez-Moz "put[ting] her penis in [N.C.'s] vagina" during the second incident, and N.C. acknowledged that Martinez-Moz had "put her penis in [N.C.'s] vagina two times in Washington, D.C."

(3/14/24 Tr. 18-19). N.C. explained that she had not testified about the second vaginal rape initially because recalling the oral sex had overwhelmed her and she was "distraught about talking about it" (*id.* 19). N.C. then testified that "the second time [Martinez-Moz] put her penis in [N.C.'s] vagina," occurred while N.C. and Martinez-Moz were "watching Cecilia," the television show (*id.* 20). Although N.C. did not recall as much about the second vaginal rape as about "the first time" or "when [Martinez-Moz] put her penis in [N.C.'s] mouth," N.C. testified that she was lying "towards the middle of [Martinez-Moz's] bed, and [Martinez-Moz's] body was kind of towards the wall-ish . . . since it was a smaller bed" (*id.*). N.C.'s "legs were straight," Martinez-Moz's "dress [was] lifted up," and N.C.'s "night gown [was] lifted . . . up as well" (*id.* 21). N.C. also testified that she "remember[ed] seeing the ceiling," hearing "[Martinez-Moz's] breathing," and feeling "[u]ncomfortable" and "tired," but that she did not say anything to Martinez-Moz "the second time" because N.C. "had said something the first time and [Martinez-Moz] didn't stop" (*id.* 21-22).

Martinez-Moz was free to argue—and did—that the jury should discredit N.C.'s trial testimony about "the second time" Martinez-Moz "put her penis in [N.C.'s] vagina." Defense counsel noted that N.C. initially testified that the second incident involved only oral sex, and N.C. had to be confronted with her grand-jury testimony before acknowledging the second vaginal rape. *See* 3/20/24 Tr. 148-49 (defense counsel's assertion, in closing argument, that this inconsistency

undermined N.C.'s testimony about the "vaginal penetration . . . during that second incident"). But the jury was also entitled to credit N.C.'s testimony that she had left the vaginal penetration out of her initial account of the second incident because she was so "distraught" over the memory of the oral sex. As a government expert explained, oral sex is "one of the most difficult" and unpleasant things for child sexual abuse victims to disclose, and they tend to be "very apprehensive" talking about it (3/13/24 Tr. 111). The record reflects that N.C. became very emotional testifying about the oral sex (*id.* 147), and it is unsurprising that N.C. had difficulty testifying about additional sexual abuse in the aftermath of that ordeal. Even if N.C. may not have been "a perfect witness" and her testimony may have contained inconsistencies, the jury was "entitled to credit her" and her testimony was "sufficient to sustain [the] conviction." *Smith*, 175 A.3d at 627-28. *See also R.W. v. United States*, 958 A.2d 259, 263 (D.C. 2008) (in first-degree sexual abuse case, victim's testimony "[was] not inherently unbelievable simply because it was inconsistent with the testimony of other government witnesses, or was at times, internally inconsistent." (quotation marks omitted)).

Martinez-Moz suggests, wrongly, that she received no advance warning that N.C. would testify that Martinez-Moz "solicited N.C. to perform fellatio," and that N.C.'s testimony was "a totally and not before revealed version of events" (Br. 22). In fact, the government provided notice in December 2023 that N.C. would testify

that Martinez-Moz forced her to perform oral sex during the second incident, and Martinez-Moz acknowledged that this evidence was admissible under *Johnson* and *Toliver* (R.341 n.1 (*Drew/Johnson* Opposition 5 n.1)).

Martinez-Moz also argues that forcing a child to perform oral sex is not punishable as first-degree child sexual abuse and is instead "an entirely separate offense which would be a fourth-degree sexual abuse solicitation or other lesser crimes" (Br. 22-23). To the contrary, first-degree child sexual abuse requires "a sexual act" with a child, D.C. Code § 22-3008, and "sexual act" is defined to include "[c]ontact between the mouth and the penis." D.C. Code § 22-3001(8)(B). *Cf. R.W.*, 958 A.2d at 264 (testimony that defendant "stuck his penis in [victim's] mouth" established a "'sexual act' described in D.C. Code § 22-3001(8)(B)," namely "contact between [victim's] mouth and [defendant's] penis," sufficient to convict defendant of first-degree sexual abuse). In any event, the government did not charge Martinez-Moz with a separate count involving oral sex and instead elicited that evidence as part of the totality of circumstances surrounding the vaginal rape charged in Count Two.

2. There Was No "Fatal Variance" Between the Indictment and the Evidence.

Martinez-Moz briefly claims that there was a "fatal variance" between the indictment and the evidence on Count Two, which "is not subject to harmless error"

and requires that her conviction "must be outright reversed" even without a showing of prejudice (Br. 24). In other words, Martinez-Moz alleges that the evidence of oral sex constructively amended the indictment, which charged "penetration of N.C.'s vulva" by Martinez-Moz's penis (R.41 (Indictment 2)). *See, Carter*, 826 A.2d at 303-04 (if constructive amendment is shown, "reversal per se is mandated, without the need for any showing of prejudice"; but for "a variance (or something less than a variance), then reversal is appropriate only upon a showing of prejudice"); *Robinson v. United States*, 697 A.2d 787, 791 (D.C. 1997) (using "constructive amendment" and "fatal variance" interchangeably); *United States v. Contreras-Avalos*, 139 F.4th 314, 319 (4th Cir. 2025) ("[I]f a conviction results after the district judge in her instructions to the jury 'broadens the bases of conviction beyond those charged in the indictment, a constructive amendment—sometimes referred to as a fatal variance—occurs.'").

Martinez-Moz failed to preserve her constructive-amendment claim by making a "timely objection at trial." *Francis*, 256 A.3d at 230-31. In fact, Martinez-Moz acknowledged that "evidence of the uncharged act of alleged oral sex" was "proper *Johnson/Toliver* evidence, as it [was] an uncharged act that occurred in very close proximity in time and place to the second charged D.C. act," and she did not object to its admission (R.341 n.1 (*Drew/Johnson* Opposition 5 n.1)). Martinez-Moz also requested, and the trial court delivered, a "special unanimity instruction," which

explicitly informed the jury that she was "not charged with any offense related to oral sex," and "that, therefore, [the jurors] must all agree unanimously that in order to find her guilty of the second count, it must be they unanimously agree that she penetrated the child with a penis," because "that's what's charged" (3/20/24 Tr. 30-32). The special-unanimity instruction stated:

> Ms. Martinez-Moz has been charged with one count of first-degree sexual abuse in Count 2. You have heard evidence of more than one act related to this count; one act of alleged oral sex and one act of alleged vaginal penetration. You may only find Ms. Martinez-Moz guilty on this count if the Government proves beyond a reasonable doubt that Ms. Martinez-Moz committed the alleged act of vaginal penetration. You may not find Ms. Martinez-Moz guilty on any count based on the alleged oral sex . . . because Ms. Martinez-Moz is not charged with any incident of alleged oral sex.
>
> You may not return a guilty verdict on this count unless you find . . . beyond a reasonable doubt that Ms. Martinez-Moz committed the act of the alleged vaginal penetration charged in the indictment. (3/20/24 Tr. 85.)

After the trial court agreed to provide the special-unanimity instruction requested by the defense, Martinez-Moz did not seek additional relief or suggest that the instruction was insufficient to address her concerns. "To avoid plain error review, objections must be made with reasonable specificity; the trial court must be fairly apprised as to the question on which it is being asked to rule." *Austin v. United States*, 64 A.3d 413, 419 (D.C. 2013). Only after trial—when any opportunity to address the issue had passed—did Martinez-Moz first suggest that there had been a "fatal variance with the indictment" (R.839 (Post-Trial MJOA 10)). Because Martinez-

Moz failed to make a "timely objection at trial" to preserve her constructive amendment claim, it is subject to plain-error review on appeal. *Francis*, 256 A.3d at 230-31.

Martinez-Moz fails to satisfy any of the elements of plain error. *See Lowery*, 3 A.3d at 1172-73. She has not shown error at all, let alone plain error. A constructive amendment requires an "inconsistency between the indictment and the proof" which goes "to an essential element of the offense." *Carter*, 826 A.3d at 304. *Carter* found no constructive amendment of the indictment where the specific type of "sexual contact" proved at trial (touching of the inner thigh) in convicting the defendant of misdemeanor sexual abuse diverged from the type alleged in the indictment (touching of the genitalia). *Id.* at 304-05. The Court reasoned that misdemeanor sexual abuse required proof of "a sexual act or sexual contact," and that D.C. Code § 22-3001(9) defined "sexual contact" to include "the touching . . . of the genitalia, anus, groin, breast, inner thigh, or buttocks." *Carter*, 826 A.2d at 304-05. Thus, "[t]he face of the statute reveals that the touching of the victim's genitalia is not an element of misdemeanor sexual assault, for this offense can be committed, without contact with the genitalia, by a sexual touching of any one of five other parts of the body." *Id.* at 305.

Carter defeats Martinez-Moz's fatal-variance claims in this case. Here, first-degree child sexual abuse requires the commission of a "sexual act." D.C. Code § 22-

3008. The definition of "sexual act" is contained in the same statute referenced in *Carter*; and like "sexual contact," the statute specifies various means by which a "sexual act" may be committed—including by "penetration, however slight, of the . . . vulva of another by a penis," but also by "[c]ontact between the mouth and the penis." D.C. Code § 22-3001(8). As in *Carter*, "[t]he face of the statute reveals that [penetration of the vulva by a penis] is not an element of [first-degree child sexual abuse], for this offense can be committed, without [penetration of the vulva], by [various other means including 'contact between the mouth and the penis']." 826 A.2d at 305. Thus, Martinez-Moz has not established that the government's evidence amended the indictment, let alone plainly and obviously.

Moreover, "in evaluating whether the indictment has been amended, the reviewing court compares the evidence *and the judge's instructions to the jury* with the charge specified in the indictment." *Ingram*, 592 A.2d at 1005 (emphasis added). The trial court clearly and emphatically instructed the jury that it had to find that Martinez-Moz "committed the act of the alleged vaginal penetration charged in the indictment," and could "not find [her] guilty on any count based on the alleged oral sex" (3/20/24 Tr. 85). "Juries are presumed to follow the trial court's instructions." *Gray v. United States*, 589 A.2d 912, 918 (D.C. 1991). The verdict form also reflects that the jury unanimously found Martinez-Moz guilty of "First Degree Child Sexual Abuse (Ms. Martinez-Moz's penis/N.C.'s vulva)" on Count Two (R.824 (Verdict

Form 2)). *See Zanders v. United States*, 678 A.2d 556, 566 (D.C. 1996) (finding "no 'amendment' or 'variance' of the indictment" where jury instructions and "jury verdict form" were consistent with indictment).

Martinez-Moz also fails to show prejudice to her substantial rights or an error "seriously affect[ing] the fairness, integrity, or public reputation of judicial proceedings." *Lowery*, 3 A.3d at 1172-73. As discussed, Martinez-Moz did not object to the admission of the oral-sex evidence under *Johnson* and *Toliver*; and at Martinez-Moz's request, the trial court gave an appropriate special-unanimity instruction to ensure that the jury's verdict was based on the charged vaginal penetration.

For her part, although Martinez-Moz contends that there was a "fatal variance" (i.e., a constructive amendment) that "must be outright reversed" without a showing of prejudice (Br. 24), she does not appear to argue that she suffered a *prejudicial* variance. "A variance is prejudicial if it either deprives the defendant of an adequate opportunity to prepare a defense" or "exposes [her] to the risk of another prosecution for the same offense." *Zacarias v. United States*, 884 A.2d 83, 87 (D.C. 2005). Martinez-Moz cannot plausibly maintain that she lacked notice of the oral-sex evidence, because the government provided pretrial notice of its intent to introduce this evidence, and Martinez-Moz conceded it was admissible. And the trial court's special-unanimity instruction ensured that Martinez-Moz was convicted

based on the vaginal penetration—and only the vaginal penetration—of N.C. on Count Two. "Where, as here, the defense has eschewed any claim of prejudicial variance, even as a fall-back position, and has made no attempt to show prejudice, reversal upon a ground not asserted either at trial or on appeal cannot be justified." *Carter*, 826 A.2d at 307-08.

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, Abraham Carpio, Esq., on this 22nd day of September, 2025.

/s/
MARK HOBEL
Assistant United States Attorney