BRIEF FOR APPELLEE

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 25-CF-198

JIMMY JOHNSON, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

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

Cr. No. 2024-CF3-3007

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ISSUES PRESENTED

I. Whether there was sufficient evidence to convict Johnson of assault with significant bodily injury where surveillance video showed Johnson forcefully shoving the victim face first into the ground, causing a laceration to his forehead that required multiple sutures.

II. Whether the trial court committed plain error by not sua sponte severing Johnson's trial from that of his co-defendant, where surveillance video provided independent evidence of Johnson's guilt, and the jury was instructed to consider each defendant's guilt separately and to render separate verdicts.

III. Whether the trial court abused its discretion by striking a detective's entire testimony and providing multiple curative instructions, after Johnson objected to a mistrial but instead asked only that the court dismiss the case with prejudice.

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COUNTERSTATEMENT OF THE CASE

By indictment filed on March 29, 2024, appellant Jimmy Johnson and his co-defendant, Gregory Patterson, were charged with armed carjacking (D.C. Code § 22-2803(b)(1)); robbery while armed (D.C. Code §§ 22-2801, -4502); assault with significant bodily injury (ASBI) (D.C. Code § 22-404(a)(2)); and three corresponding counts of possession of a firearm during a crime of violence (PFCV) (D.C. Code § 22-4504(b))

(Record on Appeal (R.) 104-06 (Indictment pp. 1-3)).[1] Johnson was also charged with unlawful possession of a firearm (prior conviction) (D.C. Code § 22-4503(a)(1)); possession of an unregistered firearm (D.C. Code § 7-2502.01(a)); and unlawful possession of ammunition (D.C. Code § 7-2502.01(a)) (R.106 (Indictment p. 3)). On August 31, 2024, Johnson moved to sever these latter three firearm-related counts (R.166-174 (Mtn. pp. 1-9)), which the government did not oppose (9/30/24 Tr. 15-16, 20-21). The trial court thus severed those counts from Johnson's and Patterson's trial (9/30/24 Tr. 20-21).

After a joint jury trial from September 30 to October 8, 2024, before the Honorable Errol Arthur, Johnson was convicted of ASBI (R.271 (Judgment); 10/8/24 Tr. 7). The jury acquitted Johnson of armed carjacking, robbery while armed, and all three corresponding PFCV counts (*id.*).[2] On February 4, 2025, the court sentenced Johnson to 18 months' incarceration followed by three years' supervised release (R.271

[1] Citations to the Record refer to the PDF page number.

[2] Patterson likewise was convicted of ASBI and acquitted of the remaining charges (10/8/24 Tr. 8-10). He did not appeal his conviction.

(Judgment); 2/4/24 Tr. 13).[3] Johnson timely noticed his appeal (R.273 (Notice of Appeal)).

The Trial

At trial, the government's theory was that Johnson, Patterson, and two unidentified individuals conspired with and/or aided and abetted one another to carjack, rob, and assault Nicholas Loukas (10/1/24 Tr. 15-21). The government urged that Johnson supervised Patterson and two unidentified individuals while they attacked Loukas in an alleyway at gunpoint, took his jewelry and watch, and rummaged through his car for other items (*id.*). In addition to Loukas's testimony, the government presented a surveillance video which showed, among other things, Patterson punching Loukas twice and Johnson shoving Loukas face first into the ground (*id.*).

Johnson's defense at trial was that he in fact helped Loukas by telling Patterson and the unidentified individuals to stop attacking him (10/1/24 Tr. 27-29).

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[3] With respect to the severed firearm-related counts, after trial, Johnson pleaded guilty to unlawful possession of a firearm (prior conviction), and was sentenced to a concurrent term of 18 months' incarceration followed by three years' supervised release (R.271 (Judgment); 2/4/24 Tr. 13).

The Government's Evidence

On June 11, 2023, at approximately 10:00 p.m., Loukas—who is missing part of his left arm from his elbow down—was driving near a store located at 1612 Kenilworth Avenue, NW, after he tried to see his 12-year-old daughter (10/1/24 Tr. 30-31, 43, 45; Government Exhibit (Gov't Ex.) 12 at 09:59:44–:46 (showing Loukas's arms)).[4] Loukas drove through the alley next to the store and parked to remove something blocking the alley exit (10/1/24 Tr. 41). When Loukas exited his car, two masked men approached him with a gun and demanded he give them his jewelry (*id*. at 44). Loukas refused, and then a physical fight ensued, during which he was hit in the face with the gun and the men's fists (*id*. at 44-45, 96).

During the fight, Johnson and Patterson arrived on the scene (10/1/24 Tr. 45). Loukas knew Johnson from seeing him near the store with the mother of Loukas's daughter, and Loukas knew Patterson from seeing him with Johnson near the store (10/1/24 Tr. 34, 36-37, 47). Patterson or one of the masked men said, "free car," causing Loukas to

[4] Citations to Government Exhibit 12 refer to the internal time stamp.

jump back into the driver's seat to stop them from taking his car (*id.* at 45, 51; 10/2/24 Tr. 42-43). While Loukas was in the car, Patterson and the two masked men tried to rip his hand off the gear shift and remove his jewelry and watch (10/1/24 Tr. 45, 50, 52). Ultimately, the men took Loukas's watch, ring, diamond chains, and wallet (*id.* at 50-51).

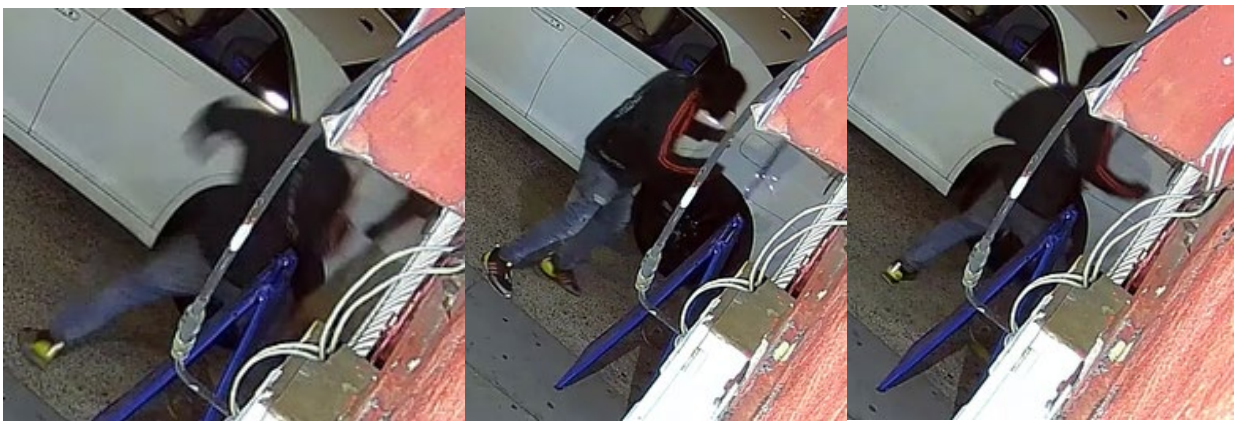
Johnson told the men who were robbing Loukas to "let [him] go, to get off him, he not going to like that, he going to die about it, I respect him, let him go" (10/1/24 Tr. at 45; see also *id.* at 47, 80, 84). Loukas understood Johnson to be saying that Loukas would not give up his jewelry unless the men shot him (*id.* at 109-10; 10/2/24 Tr. 46-47).[5] The masked men let Loukas go and he "talked a little shit" to them; Johnson then told Loukas, "just go ahead, man; you fucked up; get out of here; don't come back around here" (10/1/24 Tr. 45). Loukas returned to his car, drove past the "thing" he had moved, and got out to replace it (*id.* at 101-02). Although, at trial, Loukas did not remember taking these actions (*id.* at 110), surveillance video showed him doing so, and he identified himself

[5] Loukas's statements about Johnson's involvement varied. At the hospital, he told police only three men were involved; he did not include Johnson because Johnson "never touched" him (10/1/24 Tr. 49). Later, Loukas told police he thought Johnson "might have orchestrated it or called the shots" based on a "previous situation" (*id.* at 85-86, 88).

in the video (*id.* at 103, 105, 107). There was no blood on Loukas or his car (10/2/24 Tr. 38-39).

Surveillance video captured parts of the attack, including things Loukas did not remember (10/1/24 Tr. 98; Gov't Ex. 12). The video showed the alley exit and part of the sidewalk in front of the store, but it did not capture what occurred in the alley itself. Before Loukas appeared on video, Johnson—who Loukas recognized in the video by his gait and identified as wearing gray New Balance sneakers (10/1/24 Tr. 107-08, 124-25)—walked in front of the store and turned into the alley, with Patterson a few paces behind (Gov't Ex. 12 at 09:58:10–:26). A little over a minute later, the video captured Loukas driving his car from inside the alley to the alley exit, getting out, and walking toward the trunk of his car, out of the camera's view (*id.* at 9:59:36–:46). As he did so, Patterson walked out of the alley past Loukas and stood on the sidewalk next to Loukas's car (*id.* at 09:59:44–:47).

About 20 seconds later, Patterson wound up, punched Loukas (who was mostly out of the camera's view), assumed a fighting stance, and punched again (Gov't Ex. 12 at 10:00:11–:19).



(Gov't Ex. 12 (zoomed in) at 10:00:12 (showing Loukas on right wearing a white top and tan shorts, and Patterson on left wearing a black jacket and blue jeans throwing first punch), 10:00:14 (showing Patterson in fighting stance), and 10:00:16 (showing Patterson throwing second punch)).[6] As Loukas exited the alley and walked towards his car approximately 10 second later, Johnson—identified by his gray New Balance sneakers—shoved Loukas in the back of his head with enough force that Loukas fell face first into the ground (*id*. at 10:00:30–:33; Gov't Ex. 12a).[7]

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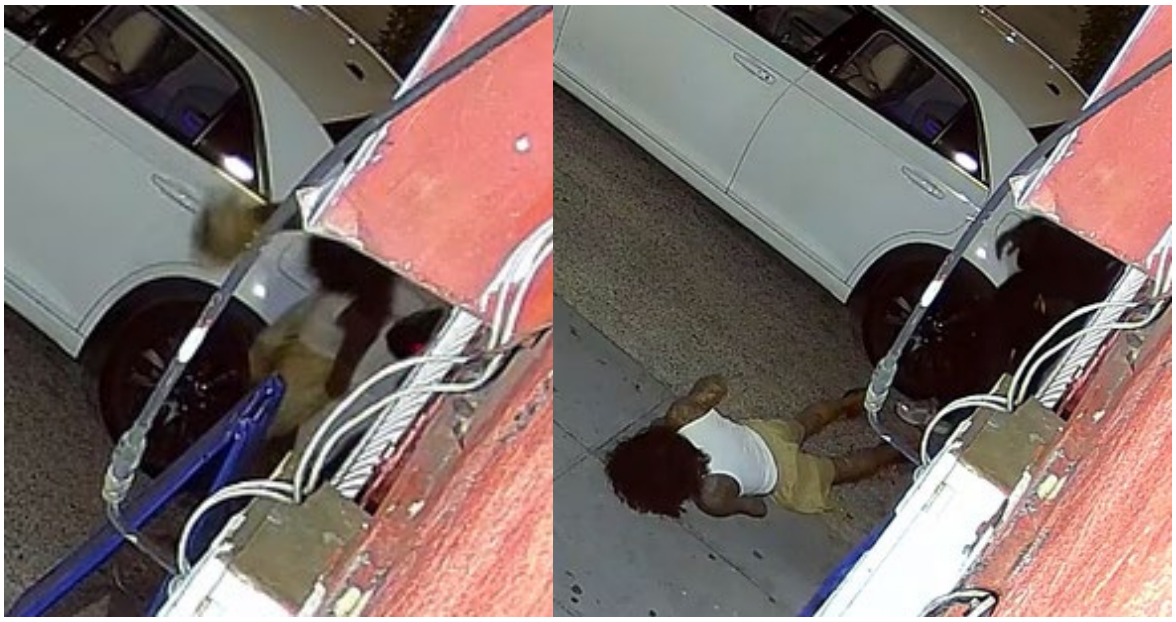
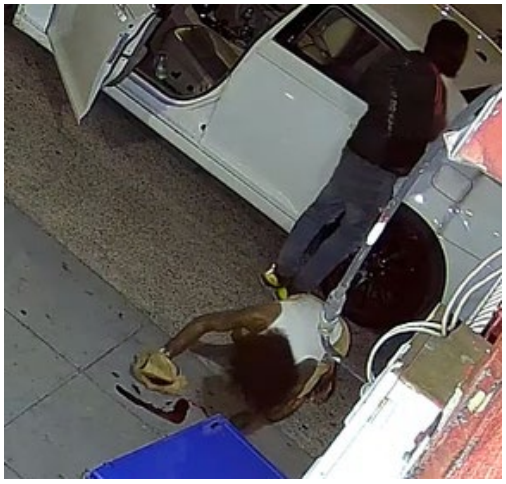
[6] Although Loukas testified that he did not remember Patterson hitting or touching him (10/2/24 Tr. 29, 40), Patterson's counsel admitted in his opening statement that Patterson punched Loukas (10/1/24 Tr. 24). And Loukas identified Patterson in the video (*id*. at 105).

[7] Loukas testified that he did not remember falling or hitting his head and that he did not know that he was hit in the back of the head or that he fell (10/1/24 Tr. 111; 10/2/24 Tr. 41).



(Gov't Ex. 12 (zoomed in) at 10:00:30 (showing Loukas falling forward and Johnson behind) and 10:00:32 (showing Loukas face-down on the sidewalk and Johnson's New Balance sneakers)). Loukas lay face-down on the ground for approximately 30 seconds before he slowly lifted himself to his knees, revealing a pool of blood on the sidewalk where his head had been (Gov't Ex. 12 at 10:00:31–10:01:04).



(Gov't Ex. 12 (zoomed in) at 10:01:01). He stayed hunched over on his knees with his head down for another 30 seconds before he stood again (*id.* at 10:01:04–:34).

While Loukas was face down on the ground, Patterson entered Loukas's car from the driver's door, rummaged around, and waved towards the alley (Gov't Ex. 12 at 10:00:35–10:01:04). Patterson then walked away from Loukas's car (*id.* at 10:01:04–:14). Shortly after he did so, the masked men ran up to Loukas's car and began looking through it (*id.* at 10:01:26–:36). Once Loukas was on his feet again, Johnson directed him towards the driver's seat; before Loukas could get inside, Patterson ran back and grabbed him by the neck (*id.* at 10:01:37–:40). Johnson moved toward the men and eventually Loukas sat in the driver's seat (*id.* at 10:01:41–:49). When he did so, Johnson walked into the alley, and then Patterson and the masked men continued to search the car (*id.* at 10:01:49–10:02:09). Johnson returned and appeared to talk to Patterson and the masked men as they reached over Loukas into the front seats (*id.* at 10:02:09–:34). Johnson then again walked out of the camera's view, at which point the masked men struggled with Loukas while Patterson

looked around the front passenger seat before returning to the driver's door (*id*. at 10:02:35–10:03:40).

Johnson then walked back to the car and watched as the masked men pulled at Loukas in the driver's seat and threw things on the sidewalk while Patterson removed items from the back seat (Gov't Ex. 12 at 10:03:43–10:04:21). Eventually, Johnson positioned himself inside the open driver's side door and appeared to speak to Loukas while Patterson and the masked men crowded around (*id*. at 10:04:40–:56). Then, Johnson stepped aside to allow Patterson to reach back into the car and the group appeared to talk for about 10 seconds before they dispersed (*id*. at 10:04:57–10:05:21). Johnson stayed behind and appeared to speak to Loukas for about 10 seconds until he walked away and Loukas drove off (*id*. at 10:05:22–:41). As Loukas explained at trial, Johnson told him to get out of there and not come back, and he drove himself to the hospital (10/1/24 Tr. 45, 49).

At the hospital, doctors treated Loukas for a three-centimeter-deep laceration to his forehead with three deep sutures and seven superficial sutures (10/2/24 Tr. 7, 10).

SUMMARY OF ARGUMENT

The government presented sufficient evidence of ASBI when it introduced surveillance video showing Johnson forcefully shoving Loukas face first to the ground, causing his head to bleed profusely from a laceration to his forehead that required multiple sutures to treat. Johnson's intent to commit the assault and to cause the injury can be inferred from, among other things, the circumstances in which the assault occurred, the force of his shove, and his reaction afterward, which was to ignore Loukas as he lay face down on the ground in a pool of his own blood for nearly 30 seconds.

The trial court did not commit plain error by failing sua sponte to sever Johnson's trial. Johnson never requested to sever his trial, the evidence—including a surveillance video—provided independent evidence of his guilt, and the jury was instructed to consider each defendant's guilt separately and render separate verdicts.

The trial court did not abuse its discretion by striking a detective's entire testimony and providing multiple curative instructions following his unanticipated response that he recovered a gun in this case, rather than dismissing the case with prejudice, after Johnson made clear that

he objected to a mistrial. And the jury's verdict acquitting Johnson of all armed charges demonstrates that he was not prejudiced by the detective's stricken testimony.

ARGUMENT

I. The Government Presented Sufficient Evidence to Convict Johnson of ASBI.

Johnson does not dispute the sufficiency of the evidence that Loukas suffered a significant bodily injury. He claims (at 21-24), however, that there was insufficient evidence of his intent to cause such injury. Johnson's claim is meritless.

A. Standard of Review and Applicable Legal Principles.

To persuade this Court to reverse a conviction on insufficiency grounds, a defendant "bears a heavy burden." *Hughes v. United States*, 150 A.3d 289, 305 (D.C. 2016). This Court "must review the evidence in the light most favorable to the government, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact." *Simmons v. United States*, 940 A.2d 1014, 1026-27 (D.C. 2008) (internal quotation marks and citation omitted). The

trial evidence "need not compel a finding of guilt." *Bullock v. United States*, 709 A.2d 87, 93 (D.C. 1998) (internal quotation marks and citation omitted). Moreover, "the jury is not bound to accept in full the scenario presented by either side." *Leak v. United States*, 757 A.2d 739, 742 (D.C. 2000). "[R]eversal is warranted only where there is no evidence upon which a reasonable mind could infer guilt beyond a reasonable doubt." *Phenis v. United States*, 909 A.2d 138, 163 (D.C. 2006) (internal quotation marks and citation omitted).

In relevant part, D.C. Code § 22-404(a)(2) provides that a person who "unlawfully assaults . . . and intentionally, knowingly, or recklessly causes significant bodily injury to another" commits the offense of ASBI. Intent "can be properly inferred from actions." *In re D.P.*, 122 A.3d 903, 909 (D.C. 2015) (footnote and citation omitted).

B. Discussion.

There was sufficient evidence for the jury to convict Johnson of ASBI. As recounted above (at 6-10), in the midst of an ongoing group assault on Loukas, and after Patterson had already punched Loukas twice, Johnson pushed Loukas in the back of his head sufficiently hard that Loukas fell face first into the ground, unable to break his fall with

his arms. Loukas lay face-down on the ground for approximately 30 seconds before he slowly lifted himself to his knees, revealing a pool of blood on the sidewalk where his head had been. He stayed hunched over on his knees with his head down for another 30 seconds before he could stand again. This provided more than sufficient evidence for the jury to convict Johnson of ASBI.

Although his argument is somewhat difficult to parse, Johnson appears to argue that he did not intend to assault Loukas at all, and that, if he did, he did not have the requisite intent to cause significant bodily harm (see Brief of Appellant (Br.) at 28 ("Even if the CCTV footage could be constructed to support an argument that Mr. Johnson struck Loukas in the course of interceding on his behalf, the government produced no evidence that Mr. Johnson had the requisite intent to strike or cause harm to Mr. Loukas.")). These arguments are meritless.

First, the surveillance video plainly shows Johnson pushing Loukas in the back of his head, causing Loukas to fall face first into the ground (Gov't Ex. 12 at 10:00:30–:33). After he did so, Johnson did not go to Loukas's aid or take any other actions consistent with his shove having been accidental. And the circumstances of the assault—a group assault

on Loukas, during which Patterson and two masked men repeatedly rifled through Loukas's car over a matter of minutes, and where Johnson never took any aggressive actions toward the other men—further supported the jury's finding that Johnson's assault was intentional and not the result of a mistake or accident. And insofar as Johnson appears to assert (at 4) that it was Patterson who shoved Loukas to the ground, he is incorrect: Loukas identified Johnson in the video as the individual wearing gray New Balance sneakers (10/1/24 Tr. 107-08, 124-25), and the surveillance video showed the man wearing gray New Balance sneakers—Johnson—shoving Loukas to the ground (Gov't Ex. 12 at 10:00:30–:33).

Johnson's argument that there was insufficient evidence of his intent to cause significant bodily injury ignores the well-established principle that intent "can be properly inferred from actions." *In re D.P.*, 122 A.3d at 909 (footnote and citation omitted); *see Wilson–Bey v. United States,* 903 A.2d 818, 839 n.38 (D.C. 2006) (en banc) (jury may infer from action the intent to cause the natural and probable consequences of that act). And it ignores that the statute may be violated where someone "recklessly causes significant bodily injury to another," D.C. Code § 22-

404(a)(2)—in other words, where the defendant is "aware of and disregarded the risk of significant bodily injury that his/her conduct created." Criminal Jury Instructions for the District of Columbia, No. 4.102(A) (2024 ed.). *See Dorsey v. United States*, 902 A.2d 107, 113 (D.C. 2006); *Jones v. United States*, 813 A.2d 220, 225 (D.C. 2002) ("A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct."). Here, the surveillance video shows Johnson forcefully shoving Loukas from behind, causing him to fall face first into the ground before he could even extend an arm to break his fall (Gov't Ex. 12 at 10:00:30–:33). A reasonable jury could infer that Johnson intended to cause significant bodily injury to Loukas—or, at a minimum, that he caused that injury recklessly—based on his conduct. *See*, *e.g.*, *Vines v. United States*, 70 A.3d 1170, 1180 (D.C. 2013) ("a reasonable juror could have inferred the intent to cause bodily harm from [appellant's] extremely reckless conduct, which was almost certain to cause bodily injury to another").[8]

[8] Johnson's argument (at 22-24) that the evidence was insufficient to support a conviction under a conspiracy theory of liability is a red (continued . . .)

II. The Trial Court Did Not Plainly Err By Not Severing Johnson's Trial Sua Sponte.

Contrary to Johnson's claim (at 13-17), the trial court did not plainly err by failing to sua sponte sever his trial where Johnson cannot show that "the very fairness and integrity of the trial" would have been jeopardized absent severance. *(Ronald) Perkins v. United States*, 446 A.2d 19, 27 (D.C. 1982).

A. Additional Background.

Before trial, Johnson moved to sever three firearm-related counts that he alone was charged with, but he did not move to sever his trial from Patterson's (R.166-174 (Mtn. pp. 1-9)). As noted above (at 2), the trial court agreed to sever those counts.

Also before trial, the government filed a motion in limine seeking to introduce Loukas's identifications of Johnson and Patterson when he was interviewed by a detective (R.186-88 (Mot. pp. 1-3)). Over Johnson's

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herring. Johnson is the one who directly caused Loukas's significant bodily injury when he shoved him headfirst into the ground. Although the government relied on theories of accomplice liability when charging Johnson with armed carjacking and armed robbery, the jury acquitted him of those charges. And Patterson's conviction for ASBI—for which the jury presumably relied on accomplice liability—is not at issue here.

and Patterson's objection, the court ruled that with the "appropriate foundation," the government could introduce the evidence "as statements for purposes of identification" (9/30/24 Tr. 24-25).

At trial, Johnson asked the court to reconsider this ruling and, for the first time, mentioned possibly severing his case from Patterson's (10/1/24 Tr. 4-5). Renewing his objection to the government's motion in limine, Johnson argued that, "if the prior identification were not allowed in," he would have moved to sever Johnson's trial because it "potentially could preclude [Loukas] from testifying against [him]" (*id*. at 4).[9] Defense counsel asked the court "to, one, reconsider the motion in limine, and two, upon reconsideration, sever the defendants" (*id.* at 4-5). The court declined to revisit its ruling, stated the "issue is preserved," and invited any appropriate objections during Loukas's testimony (*id*. at 5). Johnson reiterated that he "wanted to preserve . . . what would have been my potential remedy had the Court ruled the other way" (*id*.).

[9] It is unclear on what ground Loukas could have been precluded from testifying in a trial involving only Johnson, and defense counsel never explained how that could be so. Even if Loukas's out-of-court identification had not come in as substantive evidence, he could have described the assault and Johnson's role in it and identified Johnson in the surveillance video.

Loukas testified that during an interview with Detective Nicholas Koven, he identified Johnson in a still image taken from the surveillance video (10/1/24 Tr. 60-62; Gov't Ex. 7 (still image of Johnson)). Loukas confirmed that he "explain[ed] to detectives what [Johnson] did in this case" during that interview (10/1/24 Tr. 62). Next, Loukas was shown a video of the interview, which was marked for identification but not admitted into evidence, and confirmed again that he identified Johnson during the interview (*id.* at 63). Johnson objected that further testimony about the interview was improper impeachment because Loukas had "already identified [Johnson] in court and explained what he did" during the encounter (*id*. at 63-64). The court sustained the objection (*id.* at 67-68). At no point did Johnson move to sever his trial from Patterson's.

B. Applicable Legal Principles and Standard of Review.

"When two or more defendants are charged with jointly committing a criminal offense, there is a strong presumption that they will be tried together." *Harrison v. United States*, 76 A.3d 826, 833-34 (D.C. 2013) (citation omitted). Under Superior Court Rule of Criminal Procedure 12(b)(3)(D), a motion to sever defendants "must be raised by

pretrial motion[.]" Where a defendant does not move to sever his trial, his conviction will be reversed "only if the failure to sever sua sponte amounted to plain error so clearly prejudicial to substantial rights as to jeopardize the very fairness and integrity of the trial." *(Ronald) Perkins*, 446 A.2d at 27 (citation omitted).

C. Discussion.

1. Johnson's Claim is Unpreserved.

Johnson did not move to sever his trial from Patterson's before trial, as Rule 12(b)(3)(D) requires, and he did not ask for that relief during trial. Thus, his claim that the trial court erred by failing to sever the defendants' trials is reviewed only for plain error. *See Hawkins v. United States*, 119 A.3d 687, 703-04 (D.C. 2015); *(Ronald) Perkins*, 446 A.2d at 27.

Johnson's scant reference to a hypothetical motion to sever did not preserve his claim. While asking the court to reconsider its earlier evidentiary ruling, Johnson added that "*if* the prior identification were not allowed in at this trial, the appropriate remedy *would be* [ ] severance" and that he "wanted to preserve . . . what *would have been* [his] *potential* remedy *had* the Court ruled the other way" (10/1/24 Tr. 4-

5 (emphasis added)). But the necessary condition Johnson articulated never materialized because the court declined to change its ruling (*id.*). And Johnson never asked the court to sever his trial from Patterson's independently of its evidentiary ruling. Accordingly, he did not move to sever his trial.[10] And the trial court never ruled on a motion to sever. *See Thorne v. United States*, 582 A.2d 964, 965 (D.C. 1990) ("A party who neglects to seek a ruling on his motion fails to preserve the issue for appeal.").

Moreover, Johnson did not articulate his current argument (at 13-17) that severance was required because the evidence against him was de minimis, as would be required to preserve his claim. *See Timms v. United States*, 25 A.3d 29, 36 (D.C. 2011) ("an objection must sufficiently articulate the objecting party's argument to preserve the claim on appeal"); *(Derrin) Perkins v. United States*, 760 A.2d 604, 609 (D.C. 2000) (specific objections are required to "enable the prosecution to respond to any contentions raised and to make it possible for the trial judge to

[10] Johnson's assertion (at 16) that he made "multiple motions" to sever his trial is incorrect. His pre-trial motion to sever firearm-related counts did not request to sever his trial from Patterson's (R.166-174 (Mtn. pp. 1-9)).

correct the situation without jettisoning the trial.") (citation omitted)).[11] Johnson's severance claim is thus reviewed only for plain error.

2. The Trial Court did not Plainly Err by not Severing Johnson's Trial Sua Sponte.

"Since [Johnson] never made a motion to sever," his conviction may be reversed "only if the failure to sever sua sponte amounted to plain error so clearly prejudicial to substantial rights as to jeopardize the very fairness and integrity of the trial." *(Ronald) Perkins*, 446 A.2d at 27 (citation omitted). Here, the trial court did not plainly err by failing to sever Johnson's trial sua sponte.

The surveillance video showed that, throughout what appeared to be a robbery and/or carjacking of Loukas, Johnson's conduct was interwoven with that of Patterson and the masked men. Johnson entered the alley shortly before Patterson and presumably stood nearby when

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[11] The court's comment that "the issue is preserved" appears to have referred to Johnson's challenge to its evidentiary ruling, not the hypothetical severance motion that Johnson would have made had the court declined to admit Loukas's out-of-court identification of Johnson (10/1/24 Tr. 5). In any event, the determination whether a claim is properly preserved for appeal is one made by this Court, not the trial court.

Patterson wound up and punched Loukas twice (Gov't Ex. 12 at 10:00:10–:19); indeed, Johnson shoved Loukas to the ground just 10 seconds later (*id.* at 10:00:30–:32). After the shove, Johnson left Loukas bleeding from his head, face down on the pavement, and casually walked back into the alley (*id.* at 10:00:33–:36). During the minutes that followed, Johnson remained nearby and appeared to speak with the other assailants, at times pushing Loukas towards the driver's seat (*id.* at 10:01:27–:38) or placing a hand on Patterson when he grabbed Loukas by the neck (*id.* at 10:01:37–:40), but consistently returning to the alley instead of intervening as Patterson and the masked men rifled through Loukas's car looking for items to take (*id.* at 10:01:38–:53). When Johnson again exited the alley, he idly watched from no more than a few feet away for nearly a minute as Patterson and the masked men pulled at Loukas in the driver's seat and threw his belongings on to the sidewalk (*id.* at 10:03:43–10:04:45).

Based on this evidence, the court had no reason to sua sponte sever Johnson's trial. The video supplied "independent evidence of [Johnson's] guilt, and the jury was properly instructed to consider each defendant's guilt separately and render separate verdicts." *Sheffield v. United States*,

111 A.3d 611, 627 (D.C. 2015) (cleaned up); (see 10/7/24 Tr. 28-29 (jury instructions)). Therefore, Johnson cannot show "manifest prejudice resulting from the joinder" of his case with Patterson's. *Sheffield*, 111 A.3d at 627.

Nor was the evidence against Johnson de minimis compared to the evidence against Patterson, as he now claims (at 13-17). *See (Ronald) Perkins*, 446 A.2d at 27 (failure to sever trial sua sponte was not plain error where multiple witnesses identified defendant and described his participation in beating the victim). To the contrary, the "evidence against both defendants [was] essentially the same." *Cunningham v. United States*, 408 A.2d 1240, 1243 (D.C. 1979). Johnson and Patterson faced the same charges at trial, and the government relied on the same evidence to establish their guilt: Loukas's testimony identifying both men and describing their respective actions, and the surveillance video that captured their conduct. *See id.* (finding no plain error in failing to sua sponte sever trials where defendants faced the same charges and "the government's case against both men centered around the [same eyewitness's] testimony"). Although Loukas claimed at trial that Johnson only helped him (10/1/24 Tr. 110), he was impeached with his statement

to detectives that Johnson "might have orchestrated it or called the shots" (10/1/24 Tr. 85-86, 88), and the surveillance video showed Johnson shoving Loukas headfirst into the sidewalk (Gov't Ex. 12 at 10:00:30–:33).

Furthermore, the jury reached identical verdicts as to each defendant, convicting Johnson and Patterson of ASBI and acquitting them of the other offenses. And "their defense strategies did not conflict." *Cunningham*, 408 A.2d at 1243. Patterson claimed that he only assaulted Loukas but did not attempt to rob or carjack him, and Johnson claimed that he was attempting to help Loukas. Johnson thus cannot establish that the trial court's failure to sever his trial from Patterson's was "so clearly prejudicial to substantial rights as to jeopardize the very fairness and integrity of the trial." *(Ronald) Perkins*, 446 A.2d at 27 (citation omitted).

III. The Trial Court Did Not Abuse Its Discretion By Striking the Detective's Entire Testimony.

The trial court did not abuse its discretion by striking the detective's entire testimony after he testified that he had recovered a gun that was the subject of the severed charges against Johnson. Further, the

court's multiple curative instructions effectively mitigated any prejudice to Johnson, as demonstrated by the jury's verdict acquitting him of all armed offenses.

A. Additional Background.

Before trial, the government agreed to sever three firearm-related counts against Johnson that related to the discovery of a gun when Johnson was arrested nine months after the assault at issue in this case (R.167 (Mtn. p. 2); 9/30/24 Tr. 15-16, 20-21). During trial, after Detective Koven answered the question, "Where was defendant Johnson ultimately located at the end of your case," the government asked, "did you ever recover a gun in this case?" (10/2/24 Tr. 138-39). Detective Koven responded, "Yes" (*id.* at 139). Johnson objected and the court sustained the objection (*id.*). The court then released the jury for the day after instructing it to "disregard the question and the answer" (*id.* at 139-40).

The parties discussed the issue for the remainder of the day (10/2/24 Tr. 143-67). The prosecutor explained that he asked the question "toward the end" of Detective Koven's anticipated testimony to cover topics "we didn't have a chance to ask about" (*id.* at 158). Before trial, the prosecutor and the detective had discussed that the severed counts would be

addressed at "another trial . . . at some other point when this case concluded," so he expected the detective to respond "no" that "he didn't find [a gun] on the scene" (*id.* at 158-61). Johnson posited that because severance was litigated before trial, the prosecutor's question was "grossly negligent" and "cannot be cured with a jury instruction" (*id.* at 146-47). In Johnson's view, "the only acceptable remedy . . . is to have this case dismissed with jeopardy attached and with prejudice" (*id.* at 147; see also *id.* at 156 ("given the way that the trial had been going for Mr. Johnson so far, [ ] such gross negligence, again, can only be addressed through a dismissal after jeopardy has attached"), 160-61). The court declined to "rule on the motions to dismiss and the request for a mistrial" at that time (*id.* at 164).

The next morning, Johnson renewed his motion in writing (R.195-197 (Mtn. pp. 1-3)). According to Johnson, before Detective Koven's challenged testimony, the evidence was "incredibly favorable" to him because Loukas had testified that Johnson was "attempting to help him and not hurt him" (R.195 (Mtn. p. 1)). Also, the government was on notice of the prejudicial nature of any mention of a firearm based on its pre-trial agreement to sever the three firearm-related counts (R.196 (Mtn. p. 2)).

The government opposed (R.201-11 (Opp. pp. 1-11)). Acknowledging that its question about a gun recovery was "not specific enough" and "subject to misunderstanding," the government explained that its intent was not to goad a mistrial (R.208-09 (Opp. at 8-9)). The question was designed to "front the fact that the gun was not recovered [at the crime scene], as the government anticipated that the topic would be a major point on cross examination" (R.208 (Opp. at 8)). The prosecutor "fully expect[ed] the Detective to respond in the negative because of the conversations that had taken place during preparation" that the gun recovered during Johnson's arrest "was not on trial but would be tried later" (*id.*). Conceding the potential prejudice that may result from Detective Koven's unanticipated response, the government suggested that the court question Detective Koven to gain his "understanding of the question and prosecutorial intent" and allow Detective Koven to "correct the record," along with a curative instruction if the court deemed appropriate (R.201-02 (Opp. pp. 1-2)).

The court heard oral argument the morning after the challenged testimony and inquired about potential remedies (10/3/24 Tr. 11-53). The court asked defense counsel if, "from [the defense] perspective, the only

remedy here . . . is dismissal and dismissal with prejudice? It's not, as the Government proposes, a limiting or curative instruction," or "other alternatives" such as "striking Detective Koven's testimony in its entirety" (*id.* at 17-18). Counsel for Johnson responded, "I don't think that would cure what the jury heard" (*id.*). Before taking a recess to consider "the defense's motion to dismiss with prejudice," the court clarified that "the defense is not asking for a mistrial," and Johnson answered, "correct" (*id.* at 48).

After a recess, the court denied the motion to dismiss the case with prejudice because it did not find that the government's question was intended to goad a mistrial (10/3/24 Tr. 53, 56, 58). Given that ruling and Johnson's objection to a mistrial, the court weighed the prejudicial nature of the challenged testimony, considered the presumption that juries follow instructions, and decided to "strike Detective Koven's testimony in its entirety" "as not only a remedy, but also as a sanction against the Government" (*id.* at 60-61, 64). Following input from defense counsel (*id.* at 67-69), the court instructed the jurors that Detective Koven's "testimony is stricken from the record in its entirety," including any exhibits admitted during his testimony, and that they were "not to

consider any portion of his testimony in [their] evaluation of these cases" (*id*. at 71).

During the final jury instruction, the court repeated that Detective "Koven's testimony was struck in its entirety. You are to ignore any part of this testimony, and no part of his testimony should play a role in your deliberations." (10/7/24 Tr. 32.)

B. Applicable Legal Principles and Standard of Review.

When a witness provides inadmissible testimony, two "reasonable" corrective actions a court may take are to strike the "offending testimony along with a curative instruction," or to strike the witness's testimony entirely. *Walker v. United States*, 317 A.3d 388, 411 (D.C. 2024). This Court's "cases recognize that an instruction not to consider stricken testimony . . . is usually a sufficient remedy where a jury has heard damaging testimony it should not have been permitted to hear." *Id.* (cleaned up). Courts "ordinarily presume that the jury understands and obeys the trial judge's instructions, and that an instruction to disregard some prejudicial testimony will therefore be effective." *Id.* at 411-12 (cleaned up).

Although a mistrial is also an available remedy, when a defendant objects, a mistrial should only be granted when "the jury is deadlocked" or under "truly exceptional circumstances." *Walker*, 317 A.3d at 401 (identifying "the onset of the COVID-19 pandemic" as a truly exceptional circumstance because "stay-at-home orders prevented litigants and jurors from even convening") (citations omitted).

This Court reviews the trial court's decision to strike testimony in lieu of some greater sanction for an abuse of discretion. *See, e.g.*, *Ulcenat v. United States*, 260 A.3d 684, 689 n.6, 690 (D.C. 2021).

C. Discussion.

The trial court did not abuse its discretion by sanctioning the government for an inartful question that elicited a prejudicial response by striking the witness's entire testimony, instead of granting a mistrial over Johnson's objection or dismissing the case with prejudice. As this Court has explained, "when a prosecutorial error creates a conundrum where the alternative is declaring a mistrial over defense objection," "courts have pretty routinely held" that striking a witness's entire testimony is an appropriate remedy. *Walker*, 317 A.3d at 413.

Here, the court clarified, and Johnson confirmed, that the "only remedy" he requested was "dismissal with prejudice" (10/3/24 Tr. 17-18) and that he was "not asking for a mistrial" (*id.* at 48). Recognizing that no extraordinary circumstances existed that would warrant granting a mistrial over Johnson's objection, the trial court appropriately considered whether to strike only the offending testimony or the Detective's entire testimony. After careful consideration of the parties' oral argument and written motions, the court chose to strike the Detective's entire testimony. The court did not abuse its discretion when it imposed this significant sanction rather than the drastic remedy of a dismissal with prejudice. *See, e.g.*, *Ulcenat*, 260 A.3d at 689 (holding that, "in the context of the egregious [Rule 16] violations in this case," the trial court did not abuse its discretion by deciding to draw an adverse inference against the victim's testimony").

This Court's recent decision in *Walker*—which the trial court found to be "instructive" in constructing the appropriate remedy (10/3/24 Tr. 56)—underscores the lack of any error here. In *Walker*, this Court held that the "trial court erred in declaring a mistrial over [the defendant's] objections" after the government introduced "inadmissible and highly

prejudicial hearsay." *Walker*, 317 A.3d at 392. A mistrial was unnecessary, this Court explained, "both because the case did not present any extraordinary circumstances that precluded [the] trial from proceeding, and because there were reasonable alternatives to a mistrial that might have sufficiently cured the prejudice," including striking the offending testimony or the witness's entire testimony. *Id.* at 392; *see also id.* at 411. As this Court emphasized, "[i]f the defendant would rather proceed, despite the unfair prejudice the prosecution introduced against him, there is no cogent basis for denying him that right." *Id.* at 392. The Court declared a "virtually ironclad rule" that "when prosecutorial error prejudices a defendant, . . . the defendant retains the option to proceed with trial if they wish, so that a mistrial cannot be granted over their objections." *Walker*, 317 A.3d at 403. [12]

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[12] Under *Oregon v. Kennedy*, when a defendant successfully moves for a mistrial, "[o]nly where the governmental conduct in question is intended to 'goad' the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial." 456 U.S. 667, 676 (1982)). The prosecutor's intent is the "critical factor" and the "judge's findings may be set aside only if 'clearly erroneous'." *Coreas v. United States*, 585 A.2d 1376, 1380 (D.C. 1991) (quoting *Fletcher v. United States*, 569 A.2d 597, 598 (D.C. 1990)); *Pennington v. United States*, 471 A.2d 250, 252 (D.C. 1983). Here, the record supports the trial court's finding that the prosecutor did not intend to goad a mistrial. The prosecutor was clear

(continued . . .)

Walker thus makes clear that, left without the option of declaring a mistrial over Johnson's objection, the trial court appropriately chose to proceed by striking the detective's testimony in full and providing multiple curative instructions telling the jury to ignore that testimony entirely. Contrary to Johnson's argument (at 28-29) that these curative instructions were ineffectual, this Court repeatedly has declared that "[j]uries are presumed to follow their instructions." *Parker v. United States*, 249 A.3d 388, 410 (D.C. 2021). Indeed, "caselaw abounds with [ ] cases where curative instructions were found to have sufficiently mitigated extremely damning evidence introduced against a defendant." *Walker*, 317 A.3d at 412; *id.* at 412 n.17 (collecting cases). And there is no evidence in the record that the jury did not follow that instruction here. To the contrary, the jury acquitted Johnson of all offenses related to the use of a firearm during the assault on Loukas (10/8/24 Tr. 7-10).

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that his intent was to ask Detective Koven whether he had recovered any firearms *at the crime scene* to "get ahead of the defense's cross" examination on that issue (10/3/24 Tr. 23-24). As the prosecutor explained, based on prior discussions that Johnson's three severed firearm-related charges would be tried in a separate case, when he "used the term, *this case*," he was "referring to it as [ ] *this trial*"—though he acknowledged in "hindsight" that Detective Koven thought the term referred to "his entire *detective case*" (*id.* at 20-21 (emphasis added)).

Johnson's remaining arguments are meritless and fail to establish grounds for reversal. The detective's testimony about a gun recovery did not "b[ear] directly on the issue of [Johnson's] guilt" for ASBI (Br. at 27 (cleaned up)), which Johnson committed by shoving Loukas headfirst into the ground, as evidenced by the surveillance video. Although the government charged Johnson with a count of PFCV arising from that offense, the jury acquitted Johnson of all three PFCV charges. Nor, for the same reason, was the government's case against Johnson for ASBI "exceedingly weak" (Br. at 27 (cleaned up)). That assault was captured on video, which provided ample evidence for the jury convict Johnson of that charge.

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, Keith B. Lofland, Esq., keithloflandlaw@gmail.com, on this 17th day of September, 2025.

/s/
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