Appeal No. 23-CF-195

DISTRICT OF COLUMBIA COURT OF APPEALS

M.H.,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the Superior Court of the District of Columbia
Criminal Division

BRIEF FOR APPELLANT

SAMIA FAM

MIKEL-MEREDITH WEIDMAN

* PAUL MANERI

PUBLIC DEFENDER SERVICE
633 3rd Street, NW
Washington, DC 20001

* Counsel for Oral Argument

DISCLOSURE STATEMENT

Appellant M.H. was represented at trial by Shawn Sukumar and Matthew P. Wilson of the firm Price Benowitz, LLP. On appeal, M.H. is represented by Public Defender Service attorneys Samia Fam, Mikel-Meredith Weidman, and Paul Maneri. The United States was represented below by Assistant United States Attorneys Michael Liebman and Andrea Coronado, and is represented on appeal by Chrisellen Kolb, Chief of the Appellate Division of the United States Attorney's Office for the District of Columbia.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

* An asterisk denotes an authority upon which M.H. chiefly relies.

Statutes

Rules

Other Authorities

ISSUES PRESENTED

M.H. was tried for a murder that everyone agreed was committed by two people. The government's theory was that those two people were M.H., then 16 years old,[1] and S.B., who died before the trial at the age of 16. M.H.'s defense was misidentification. The issues presented in this appeal are:

I. Whether S.B.'s text messages to his ex-girlfriend—that he was "Cooling staying down," that his "man" was "Still in for dat murder shit," and "member I told you the story"—so clearly exposed him to criminal liability that they were admissible at trial as statements against his penal interest.

II. Whether the trial court violated the prohibition on propensity evidence when it allowed the government to: (1) introduce evidence of S.B.'s possession of guns to show, in the trial court's words, "the type of individual that [S.B.] may have become," and (2) argue in rebuttal that "[S.B.] could easily be a killer."

III. Whether the trial court erred by admitting evidence of M.H.'s prior arrest.

IV. Whether the sentence must be vacated where the trial court failed to recognize its discretion to impose a sentence below the mandatory minimum.

STATEMENT OF THE CASE AND JURISDICTION

Pursuant to D.C. Code § 16-2301(3)(A), M.H. was charged as an adult with one count of first-degree murder while armed (D.C. Code §§ 22-2101, -4502). R.1.[2] In a superseding indictment, the grand jury charged M.H. with one count of first-degree murder while armed with an aggravating circumstance that the murder was

---

[1] Pursuant to this Court's Amended Order No. M-274-21 (Apr. 17, 2024), which requires the use of "initials when referring to minors," counsel refers to appellant as M.H. and will move to recaption the case accordingly. *See* D.C. Code § 16-2301(4) ("The term 'minor' means an individual who is under the age of twenty-one years.").

[2] Citations to "R." refer to the record on appeal. "S.R." refers to the sealed supplemental record.

especially heinous, atrocious, or cruel (D.C. Code §§ 22-2101, -2104.01(b)(4), -4502, 24-403.01(b-2)); one count of possessing a firearm during a crime of violence (D.C. Code § 22-4504(b)); and one count of carrying a pistol without a license (D.C. Code § 22-4504(a)). R.19. A jury trial commenced before the Honorable Rainey Brandt on October 19, 2022. On November 2, 2022, the jury found M.H. guilty of all counts except for the aggravating circumstance, on which it did not reach a verdict. 11/02/2022 Tr. at 44–45.[3] On March 1, 2023, Judge Brandt sentenced M.H. to concurrent terms of 40 years in prison for the murder, 5 years for possessing a firearm during a crime of violence, and 2 years for carrying a pistol without a license. R.116. M.H. filed a timely notice of appeal. R.117. This Court has jurisdiction pursuant to D.C. Code § 11-721(a)(1).

STATEMENT OF FACTS

The charges in this case arose from the December 13, 2018 shooting of 15-year-old G.W. It was undisputed that two masked people—one wearing black, the other wearing green—chased G.W. into an apartment building at 2919 Knox Place, Southeast. It was also undisputed that at approximately 3:40 p.m., the person in black followed G.W. into the building, shot him, and then exited the building through the same door that he had entered, fleeing on foot along with the person in green. The government contended that the person in black was M.H., and that his 16-year-old friend S.B. was the person in green.

[3] Upon the government's motion, Judge Brandt declared a mistrial on the aggravating circumstance and dismissed that aspect of the indictment. *Id.* at 49.

M.H. maintained that he was misidentified. There was no physical evidence connecting him to the shooting: the police recovered no guns from a search of his family's apartment, nor did they ever find the weapon that was used to shoot G.W.; the black jacket worn by the person in the video did not match the only black jacket recovered from M.H.'s apartment; and no DNA evidence connected M.H. to the crime.

The government's theory that M.H. was the person in black rested on three eyewitnesses—Loveval Tribble and Joseph Phelps, neither of whom could recognize M.H. in court, and B.L., who was high on crack cocaine at the time of the shooting—and out-of-court statements purportedly made by S.B. to his ex-girlfriend, Erianna Barbour, prior to his death. Ms. Barbour claimed that in March 2019, S.B. told her that he was the person in green and that M.H. was the person in black. That evidence, as both parties recognized, linked the question of M.H.'s guilt to that of S.B.'s.[4]

To corroborate Ms. Barbour's testimony that S.B. incriminated himself and M.H. in March, the government introduced text messages from May 2019 in which S.B. said nothing about his potential role in the shooting, but told Ms. Barbour "Member I told you the story" and that his "man" was "[s]till in for dat murder shit." In addition, the government introduced evidence showing that S.B. carried guns and

[4] *See* 10/20/2022 Tr. at 44 (defense counsel explaining that "if you have any doubt that [S.B.] may not have been involved, . . . then you have to doubt his purported statements that he participated in the killing with [M.H.]"); 10/31/2022 Tr. at 112–16, 159–60 (government arguing that S.B. was the person in green and that the jury should therefore believe his purported statements to Ms. Barbour).

therefore, in the prosecutor's words at closing, "could easily be a killer." 10/31/2022 Tr. at 159.

Evidentiary Rulings

S.B.'s Out-of-Court Statements

The government moved in limine to admit as statements against penal interest various remarks that S.B. made to Ms. Barbour before his death. S.R.7; 10/06/2022 Tr. at 199–201.[5] M.H. opposed the motion, arguing that the purported statements were not clearly trustworthy because S.B. had a motive to lie: as an aspiring teenage rapper, he might have wanted to gain clout and appear tough by claiming responsibility for the shooting. *See* R.65, 10/06/2022 Tr. at 214. M.H. also argued that the court "must go through each statement line-by-line to determine if each statement . . . is against the declarant's penal interest" and that the statements were substantially more prejudicial than probative. R.65.

At a pretrial hearing, Ms. Barbour testified about three separate conversations that she claimed to have had with S.B. relating to G.W.'s death. The first conversation, she said, took place around January 2019. S.B. purportedly told Ms. Barbour then only that "me and my man got one, or we caught an op (phonetic) today." 10/06/2022 Tr. at 32. Ms. Barbour testified that "[a]n op is somebody that you have a problem with or you have . . . animosity against[.]" *Id.* But she did not explain why she thought that S.B.'s purported statement about catching "an op" in

[5] S.B. was never arrested or indicted in connection with this case.

January related to G.W.'s December death. Ms. Barbour testified that she saw a gun on S.B.'s hip during that January conversation. *Id.* at 36.

Ms. Barbour said that S.B. "didn't fully tell [her]" about the G.W. incident until March 2019, after the news broadcast a video of "a boy running and another boy in a green hoodie and another boy in a black hoodie running towards the building." *Id.* at 35, 38, 83. According to Ms. Barbour, S.B. told her "that is me and [M.H.] in the video on the news," *id.* at 36, that S.B. was "the boy in the green hoodie," *id.* at 39, that "me and my friend, [M.H.], killed [G.W.]," *id.* at 56, and that "me and my friend [M.H.] chased [G.W.] to the building and we shot him," *id.* at 58.

The third conversation that Ms. Barbour testified about—and the only one memorialized in writing—was a series of text messages that she exchanged with S.B. on May 6, 2019. *Id.* at 45–50. Those messages, admitted at trial as Government Exhibit 452.16, read, in relevant part:

Ms. Barbour: Definitely ! What You Been Up To Tho ?

S.B.: Cooling staying down

S.B.: Can't do to much the feds be on me and my men ass

Ms. Barbour: That's Wassup & Damn They Geeking

S.B.: Yeah

S.B.: Den Dey keep stepping my man back

Ms. Barbour: What He Do ?

Ms. Barbour: Have He Been Behaving Correctly ?

S.B.: Still in for dat murder shit

S.B.: Yea

S.B.: Member I told you the story

Ms. Barbour: Oh Yea Oh Yea

Ms. Barbour: Damn Ii Had Forgot & Why They Keep Stepping Him Back That's His First Charge ?

S.B.: Nah and cause they trying find out who the 2nd shooter is and Dey don't really got no evidence

Ms. Barbour: Yeaa Imma Need For You To Lay Love For Aah While

Ms. Barbour: *Low

S.B.: Dats what I been doing

Ms. Barbour: Dont Get Into Any Bullshit

S.B.: I'm cooling frfr

Ms. Barbour assumed that "the story" S.B. referred to in the text messages was the one she said he told her about him and his friend killing G.W., but she did not explain why. 10/06/2022 Tr. at 48. Although Ms. Barbour had never met M.H., *id.* at 204, she identified him in several photographs as the person who S.B. referred to as "[redacted]," *id.* at 61–62.

The court's ruling on the government's motion did not explain how each individual statement was against S.B.'s penal interest. Rather, it found generally that "[S.B.] is essentially confessing to Ms. Barbour his role in the [G.W.] murder," and that therefore *all* of his statements could "come in as statements against penal interest." 10/07/2022 Tr. at 55.

Prior Bad Acts of M.H. and S.B.

The government repeatedly sought to introduce evidence that M.H. and S.B. carried guns. But the court held that any reference to M.H.'s possible possession of guns would be "too inflammatory" given the lack of a connection between those guns and the weapon used to shoot G.W. 10/25/2022 Tr. at 5. When the government sought to elicit testimony that two groups of unidentified, armed Black people were arguing about an hour before G.W. was killed—and that, "inferentially," one of them was M.H., 10/13/2022 Tr. at 30—the court ruled that the reference to any of the group being armed must be excluded. *Id.* at 37. Similarly, the court excluded a photo of M.H. pretending to hold a gun by "pointing his hand out as if [it] is a weapon," 10/18/2022 Tr. at 7, and one of S.B. holding a gun with M.H. kneeling in front of him, *id.* at 15.[6] Both were "highly prejudicial" because "[a]nybody seeing that is going to think, guns, drugs, gang." *Id.* at 16. And when the government sought to allow Loveval Tribble to testify that he had seen M.H. with a gun a month before G.W. was killed, the court emphasized that "unless the government can proffer to me that the weapon that he was seen carrying is somehow related to this case, you're not going to put a gun in this young man's hand[.]" 10/25/2022 Tr. at 5. The government conceded that it could proffer "[o]nly that it was a handgun," and the trial court ruled, "That's too inflammatory. . . . [I]t's my responsibility to make sure

[6] These photos are included in the appendix accompanying this brief at A79 and A80, respectively. Counsel will move to supplement the record on appeal with these excluded photos, along with Government Exhibits 452.16, 454.13, 457.2, and 457.3, each of which was admitted into evidence at trial.

that [M.H.] gets a fair trial, and putting a gun in his hand before this incident happened is just too highly prejudicial." *Id.* at 5–6.

That reasoning did not prevent the court from allowing the government to introduce several photographs of S.B. holding guns to prove that he told Ms. Barbour the truth about his and M.H.'s roles in the shooting. Objecting to one photo (Gov't Ex. 454.13, *see* A76) in which S.B. held what "appear[ed] to be the butt of a gun" while standing next to M.H., defense counsel emphasized that "[w]e have no evidence that the gun is the same gun alleged to have been held by [S.B.] on December 13th, 2018." 10/18/2022 Tr. at 9. The government did not dispute that absence of evidence, instead arguing that it should be able to use the photo because "we have to corroborate Ariana Barber's [sic] testimony that [S.B.] was the second gunman," and the photo "shows the association" between M.H. and S.B. *Id.* at 11. Although the court agreed that the government had plenty of other pictures showing that S.B. and M.H. were friends, *id.* at 16, it ruled that Exhibit 454.13 could be admitted because it "shows a comradery [sic]" between the two teenagers and it would "support testimony that the government plans to elicit from" Ms. Barbour. *Id.* at 12.

The court also ruled, over M.H.'s objection, that the government could admit two other photographs of S.B. with guns: one posted to Instagram on November 15, 2017, in which he points a gun at the camera (Gov't Ex. 457.2, *see* A77), and another posted on August 8, 2018 showing him posing over a gun and cash (Gov't Ex. 457.3, *see* A78). *Id.* at 19–22. The government did not claim that the photographs were direct evidence in this case, *see generally Johnson v. United States*, 683 A.2d 1087

(D.C. 1996) (en banc), nor did it seek to use them for some non-propensity purpose, *see Drew v. United States*, 331 F.2d 85, 90 (D.C. Cir. 1964). Rather, asserting that "Drew/Johnson applies [only] to prior bad acts *of the defendant*," the government argued that the photos were admissible because they "show[] [S.B.] the accomplice's association with firearms" and would corroborate Ms. Barbour's expected testimony that S.B. helped kill G.W. 10/18/2022 Tr. at 19–20 (emphasis added).[7] The court ruled that the photos of S.B. with guns could come in as character evidence to prove his propensity for violence: "[Government Exhibits 457].2 and .3 come in, because it supports part of the government's story board as to the type – well, as to information that will be elicited from another government witness [Erianna Barbour] that speaks to *the type of individual that [S.B.] may have become*." *Id.* at 22 (emphasis added).

The Evidence at Trial

The physical evidence at trial was mostly uncontested. An autopsy showed that G.W. died from 17 wounds caused by 16 gunshots fired at close range. 10/24/2022 Tr. at 60, 63, 67–68. Analysis of shell casings showed that all 16 bullets were fired by the same .40 caliber Smith & Wesson, 10/26/2022 Tr. at 226, which the government did not produce at trial. The government admitted without objection several items seized from M.H.'s family's apartment, including a black Helly Hansen jacket, school schedule, black mask, North Face gloves, and cell phone. 10/25/2022 Tr. at 36–44. DNA analysis showed that M.H.'s DNA was very likely

[7] The transcript attributes these words to defense counsel, but it is clear from context that it was the prosecutor who spoke them.

present on the black jacket and mask recovered from his apartment, and excluded the possibility that G.W.'s DNA was present on those items. 10/26/2022 Tr. at 51, 53–54. Similarly, G.W.'s DNA was very likely present on another black mask recovered from the scene of the shooting, but M.H. and S.B. were excluded as possible contributors to the DNA on that mask. *Id.* at 54–55. There was no blood on any of the clothing items recovered from M.H.'s apartment or on any of the clothes he wore when he was arrested. *Id.*

The government also admitted without objection several clips of surveillance videos, taken from apartment complex and police cameras, capturing some of the moments shortly before and after the shooting. 10/20/2022 Tr. at 210–11, 216, 224; 10/24/2022 Tr. at 135–46, 152, 176–80. Those videos showed the person in green and the person in black, and appeared to show each of them carrying a handgun. *See* 10/24/2022 Tr. at 131. But their faces were not visible, and no one argued that the jury could identify either person based on the videos alone. Thus, the only contested issue at trial—identity—turned on the testimony of the four witnesses who implicated M.H.: Ms. Barbour, Mr. Phelps, Mr. Tribble, and B.L.

S.B.'s Out-of-Court Statements and Possession of Guns

The government admitted S.B.'s hearsay statements and evidence of his gun possession through Ms. Barbour's testimony. On direct examination, the government first asked about the May text messages between her and S.B. 10/27/2022 Tr. at 214. She testified that the "story" he referred to in the texts was about "when him and his friend [redacted] killed [G.W.]." *Id.* at 215.

Ms. Barbour gave inconsistent testimony about when she heard that "story." At first, she said that "the first time" she "heard from [S.B.] that he and his friend, [redacted], killed [G.W.]" was in January 2019. *Id.* at 216. But she quickly backtracked and said that, actually, S.B. did not tell her anything "in January about what he and his friend, [redacted], did[.]" *Id.* at 217. She did not tell the jury about any of S.B.'s purported statements in January. Ms. Barbour then testified that she did not hear from S.B. that "him and his friend, [redacted], killed [G.W.]" until March 2019, "[a]fter the fact" of G.W.'s death "came out on the news." *Id.* at 218; *see also id.* at 239. Ms. Barbour claimed that S.B. told her in March that he was the person in "[t]he green hoody." *Id.* at 219.

Ms. Barbour identified "[redacted]" in ten photographs from Instagram, *id.* at 222–28, including the one in which S.B. held a handgun, *id.* at 226 (Gov't Ex. 454.13). She also identified S.B. in the two other photographs where he appeared with guns. *Id.* at 228 (Gov't Exs. 457.2 and 457.3). And she testified that S.B. "had a gun on his hip" during their January conversation. *Id.* at 230. She could not remember what the gun looked like. *Id.* at 231.

On cross-examination, Ms. Barbour agreed that S.B. tried to project the image of a "tough guy." *Id.* at 237. She also agreed that she just "kind of move[d] on" after S.B. told her about the shooting because she "didn't really buy it." *Id.* at 244–45; *see also id.* at 247–48.

References to M.H.'s Criminal Record

In addition to learning about S.B.'s possession of guns, the jury heard repeated suggestions that M.H. had been arrested before. One detective explained that police

generated a photo array containing M.H.'s photograph using "photographs obtained by the police department of individuals who have been arrested in the city." 10/24/2022 Tr. at 195. Defense counsel immediately moved for a mistrial. *Id.* at 196. The government agreed that the reference to the arrest was "unfortunate," and the trial court instructed the government to ask about other potential sources for photographs used in array procedures. *Id.* at 197, 201. After that additional testimony, defense counsel unsuccessfully renewed his motion for a mistrial, maintaining that "the only thing the jury has to think now is [M.H.] has been previously arrested." *Id.* at 202.

Less than two hours later, another detective testified that he knew what M.H. looked like prior to his arrest because "I had a picture of him from 28 – a 2018 arrest." *Id.* at 273. This time, the court said "[t]here is absolutely no way to clean this one up," and defense counsel argued that a mistrial was now especially warranted given the "cumulative impact" of multiple references to a prior arrest. *Id.* The trial court issued a limited curative instruction to the jury that afternoon.[8] The next morning, the court denied the motion for a mistrial and instead offered to issue another curative instruction. 10/25/2022 Tr. at 7–9. Defense counsel maintained that an instruction would be insufficient, *id.* at 9, but "given the Court's previous rulings," counsel stated that M.H.'s preference would be "to proceed without any additional instruction . . . [s]o as not to highlight the issue." *Id.* at 80. Before it denied

[8] The court instructed the jury: "you are to disregard any reference to a prior arrest. You do not know whether that prior arrest pertained to – well, who the suspect was. So you are to disregard what the detective just testified to." 10/24/2022 Tr. at 277.

the motion for a mistrial, however, the court admonished the government: "the showing of photographs of prior arrests, et cetera, needs to stop and start with this witness because if it happens a third time – well, I'm just going to hope it doesn't happen a third time." 10/24/2022 Tr. at 278–79.

But the court later admitted into evidence a third reference to M.H.'s criminal record. Referring to M.H. in the May 2019 texts, Ms. Barbour asked, "Why They Keep Stepping Him Back *That's His First Charge ?*", to which S.B. responded: "*Nah* and cause they trying find out who the 2nd shooter is and Dey don't really got no evidence." Gov't Ex. 452.16 (emphases added). M.H. objected that this statement, in addition to being inadmissible hearsay, was substantially more prejudicial than probative. R.65 at n.1; 10/06/2022 Tr. at 211–12.

Eyewitnesses to The Chase

The government called two witnesses—Joseph Phelps and Loveval Tribble—who saw two people armed with handguns chasing G.W. Neither witness gave any detail about the guns' appearances other than that they were black. 10/20/2022 Tr. at 194; 10/26/2022 Tr. at 145. Nor did either witness see the face of the person in black, who was wearing a mask covering his face. Their only description of the person in green, whom neither witness identified, was that he had a light-skinned complexion. 10/26/22 Tr. at 174; 10/28/2022 Tr. at 29. And neither witness was able to recognize M.H. in the courtroom at trial.

Mr. Phelps had a laundry list of prior convictions spanning from 1987 to 2017, and at the time of his testimony he was detained pending a trial on theft charges in Maryland. 10/26/2022 Tr. at 83–86. At the time of the shooting, Mr. Phelps was

standing outside of 2919 Knox Place. *Id.* at 94.[9] Although he spoke to the police that day, Mr. Phelps did not identify M.H. until months later. *Id.* at 181–83.

The government elicited most of the key points of Mr. Phelps's testimony via impeachments with his July 2019 grand jury testimony. He testified at trial that he did not recognize the person in black who was chasing G.W. *Id.* at 129. After he was confronted with his grand jury testimony, Mr. Phelps testified that he was able "to recognize that person in the black mask" "[a] little bit. I'm not sure, though, really." *Id.* at 129–30. He was then impeached with his grand jury testimony that he recognized the person in black "[b]ecause I'm to the point of – in life, you know, where that mask didn't make no difference. I already knew who it was." *Id.* at 131. Mr. Phelps acknowledged that his grand jury testimony that he saw the person in black "three to four times a week" was "a good estimate." *Id.* at 132–33.

Mr. Phelps testified that he was "not sure" if he knew the person in black's name when he saw him chasing G.W. *Id.* at 135. After he was confronted with his grand jury testimony, Mr. Phelps said that he recognized M.H. as the person in black and that he knew M.H.'s name through his grandson. *Id.* at 136. Later at trial, the government played one of the surveillance videos showing the person in black and asked Mr. Phelps who it was. Mr. Phelps again said he wasn't sure, but he agreed that in the grand jury, he had watched the same video and identified the person in black as M.H. *Id.* at 163–64. Mr. Phelps was not able to make an in-court identification of M.H. *Id.* at 137.

[9] Mr. Phelps lived at 2921 Knox Place. 10/26/2022 Tr. at 88. He had known G.W., a friend of his grandson's, for years. *Id.* at 99–101.

Loveval Tribble was also standing outside of 2919 Knox Place when he saw two people chasing G.W., who was related to Mr. Tribble's stepson and often spent time at Mr. Tribble's house. 10/28/2022 Tr. at 16, 18–19, 21. Mr. Tribble agreed that he "didn't get a really good look at the person[in black]'s face," *id.* at 67: that person wore a mask that covered everything except for his eyes and "maybe" part of his nose, and Mr. Tribble could not recall the person's eye color or any distinctive facial features. *Id.* at 51, 66–67. Nevertheless, Mr. Tribble told police on the day of the shooting that he recognized the person in black as [redacted] from Hartford Street. 10/20/2022 Tr. at 190–91, 196–97.[10] Later that evening, Mr. Tribble picked M.H.'s photo out of an array and said that he was "110 percent" sure that "[redacted]" was the person in black. 10/24/2022 Tr. at 186, 235, 237, 257.

When defense counsel probed Mr. Tribble as to how he could be so confident in identifying a masked person, Mr. Tribble repeated what he told the detectives at the photo array: that he "just knew," and that he recognized "the clothes he was wearing." 10/28/2022 Tr. at 51. But Mr. Tribble admitted that he had only seen the person who he thought was M.H. "[m]aybe three times" prior to December 13, 2018. *Id.* at 25. He had seen M.H.'s entire face only once. *Id.* And the only other time he had seen the clothes that he recognized on December 13, the person wearing them was also wearing a mask that covered all of his face except for his eyes. *Id.* at 51–52. Moreover, defense counsel impeached Mr. Tribble with his grand jury testimony that M.H. was *not* one of the people in one of the surveillance clips. *Id.* at 62. Like

[10] Hartford Street is "[r]ight around the corner" from 2919 Knox Place. 10/28/2022 Tr. at 26.

Mr. Phelps, Mr. Tribble testified that he would not recognize M.H. if he were in the courtroom. *Id.* at 26.

Other Eyewitnesses

B.L. was the only other witness who testified that M.H. was the person in black. She was addicted to crack cocaine both at the time of her testimony and in December 2018, when she was living in a third-floor apartment at 2404 Hartford Street. 10/27/2022 Tr. at 80, 107, 130. In her three years of living there, she frequently hosted some "neighborhood boys," including M.H., whom she identified in court as "[redacted]." *Id.* at 80, 82, 84, 114–16.

On the afternoon of December 13, 2018, B.L. was smoking crack in the back room of her apartment when she heard two sets of gunshots. *Id.* at 107, 134. She told detectives that she heard the first gunshots between 2 and 3 p.m., and she thought she told them that the second set of gunshots went off around "three or four," but she could not remember. *Id.* at 134. B.L. had "been smoking crack in the time right after [she] heard the second set of gunshots." *Id.* at 137. According to her, about 15 to 20 minutes after that, M.H. entered her apartment wearing a black Helly Hansen jacket, holding a gun and "breathing heavy." *Id.* at 89, 105, 136–37. The government would later tell the jury that it does not take anywhere near that long to run from 2919 Knox Place to B.L.'s apartment, and that the black Helly Hansen jacket that police seized from M.H.'s apartment did not match the one worn by the person in black. 10/31/2022 Tr. at 108, 169.[11] Moreover, unlike Mr. Phelps and Mr. Tribble,

[11] The government did not ask B.L. whether she recognized the black Helly Hansen jacket from M.H.'s apartment. Rather, it elicited testimony from B.L. that on the

who both said that the person in black was carrying a black gun, 10/20/2022 Tr. at 194; 10/26/2022 Tr. at 145, B.L. testified that M.H. was holding a gun that was "black and silver." 10/27/2022 Tr. at 89.

Recognizing that a jury had reason to doubt the accuracy of B.L.'s account, the government sought to corroborate parts of her testimony with the testimony of Clarence Cash, who lived at 2410 Hartford Street. *See* 10/31/2022 Tr. at 116–17 ("The reason we had Mr. Cash testify . . . is because we don't want you to rely on [B.L.]'s testimony."); *see also* 10/13/2022 Tr. at 35. Mr. Cash testified that a group of young people would sometimes hang out in B.L.'s apartment. 10/27/2022 Tr. at 55. He also testified that at around 2:40 p.m. on December 13, 2018, he called 911 because he saw that group arguing with another group of young Black men. *Id.* at 44–48. Mr. Cash believed that the two groups were from the neighborhood "across the street" and "behind" or to "the side of" his building, respectively. *Id.* at 47, 49–54.[12] From his vantage point inside 2410 Hartford Street, Mr. Cash could see that the people outside were "mostly wearing black hoodies," but he could not see their faces. *Id.* at 66.

The government did not argue that M.H., S.B., or G.W. were among the unidentified people that Mr. Cash saw. Its theory was that the shooting was

---

night of the shooting, she watched surveillance footage and identified the person in black as M.H. based on the black jacket. 10/27/2022 Tr. at 122–30. The government argued that a jacket M.H. wore in a photo posted to his Instagram on December 12 matched the one worn by the person in black, and that M.H. must have disposed of the jacket. 10/31/2022 Tr. at 110, 163.

[12] Mr. Cash later clarified that he was talking about people who live in different buildings that are all "within roughly the same block." 10/27/2022 Tr. at 67.

motivated by graffiti inside 2921 Knox Place, the apartment building where G.W. lived, that read, "Fuck Gus Fuck Leek Fuck Spread Gang." Gov't Ex. 99; 10/31/2022 Tr. at 112. The evidence did not establish who was responsible for the graffiti, how long it had been there, or the likelihood that M.H. or S.B. would have seen it.

Closing Arguments

In closing, the government continued to emphasize S.B.'s text messages and his possession of guns as essential pieces of evidence proving that S.B. had truthfully incriminated M.H. as the person in black. *See* 10/31/2022 Tr. at 112–115. It once again showed the jury the photographs of S.B. with guns. *Id.* at 114. And the government expressly underscored the importance of the May 2019 text messages to its case:

> [T]his is very important, this is very important, ladies and gentlemen, because *we don't want you to rely entirely on what Erianna says about a conversation she has.* We know it from [S.B.]'s phone, he's – told her in this text on May 6th, 2019, Member, I told you the story?

Id. at 115 (emphasis added). In rebuttal, after defense counsel argued that Ms. Barbour's testimony was not backed up by any evidence, the government reiterated the importance of the text messages:

> What else backs her up? Not that she just comes in here remembers a conversation. *The text messages*. . . . We have a text message where he – [S.B.] confirms that he had told her about it before. That is corroboration. That is being backed up.

Id. at 159–60 (emphasis added).

Ms. Barbour's testimony was also corroborated, the government argued, by the evidence that S.B. carried guns. The government explicitly told the jury that it should use that evidence to make an inference about S.B.'s propensity for violence:

it argued that Ms. Barbour's testimony that she saw S.B. with a gun in January 2019, in addition to the photos showing him with guns, showed "the kind of person he was. . . . That backs up that *[S.B.] could easily be a killer*." *Id.* at 159 (emphasis added).

Defense counsel argued that there was no evidence to corroborate S.B.'s claimed involvement—and by extension, M.H.'s—in the shooting. The information in S.B.'s statements to Ms. Barbour was public knowledge, and he had a motive to falsely claim responsibility to project a certain image. *Id.* at 155. Indeed, Ms. Barbour herself did not buy S.B.'s story. *Id.* at 156–57. Counsel also argued that each of the government's eyewitnesses was flawed: Mr. Tribble had seen M.H. only a few times, and he did not get a good look at the face of the person in black. *Id.* at 138–39. Mr. Phelps did not identify M.H. until months after the shooting, and his grand jury testimony was not credible in light of how he testified at trial. *Id.* at 143–44. B.L.'s memory was not reliable given her heavy drug usage. *Id.* at 146. And there was "no physical or biological evidence connecting [M.H.] to . . . 2919 Knox Place." *Id.* at 132.

Verdict and Sentencing

On November 2, 2022, the jury found M.H. guilty of first-degree murder while armed, possessing a firearm during a crime of violence, and carrying a pistol without a license. 11/02/2022 Tr. at 44–45.

Although M.H. was 16 years old at the time of the offense, he was ineligible for sentencing under the Youth Rehabilitation Act ("YRA") because he was found guilty of murder. *See* D.C. Code § 24-901(6). Defense counsel maintained, though, that the YRA "grants the Court the ability to issue a sentence less than any

mandatory-minimum term otherwise required by law" and requested that the court sentence M.H. below the mandatory minimum. R.110 at 2. The trial court agreed with the government that the YRA "is completely inapplicable here. The mandatory minimum for first-degree murder in the District of Columbia is 30 years. . . . I can't make that go away." 03/01/2023 Tr. at 7–8; *see also* R.113. No one mentioned the generally applicable felony sentencing statute, which provides that "[n]otwithstanding any other provision of law, if the person committed the offense for which he . . . is being sentenced under this section while under 18 years of age . . . [t]he court may issue a sentence less than the minimum term otherwise required by law." D.C. Code § 24-403.01(c)(2). The court sentenced M.H. to 40 years for the murder, to run concurrently with 5 years for possessing a firearm during a crime of violence and 2 years for carrying a pistol without a license. R.116.

SUMMARY OF ARGUMENT

The trial court committed several errors that denied M.H. a fair trial. First, the court erred by admitting as statements against penal interest S.B.'s text messages to Ms. Barbour that "the feds" were on him, that his "man" was "still in for dat murder shit," and that he "told [her] the story." Those statements, along with his other texts, should have been excluded as hearsay because none of them so clearly exposed S.B. to criminal liability that a reasonable person would not have made them unless believing them to be true. Fed. R. Evid. 804(b)(3). Because the hearsay was critical to bolstering the otherwise shaky credibility of Ms. Barbour's testimony that S.B. had previously incriminated M.H., this error requires reversal.

Second, the court flouted the rule against propensity evidence by allowing the government to admit evidence of S.B.'s gun possession to argue that he "could easily be a killer." This evidence had no legitimate non-propensity purpose. Nor did the government or the court argue that it did. Instead, proceeding on the mistaken assumption that propensity evidence is permitted to prove the conduct of a person other than the accused, both the government and the court expressly embraced a propensity use for the evidence of S.B.'s possession of guns. Because this error impermissibly influenced the jury's determination of whether S.B. had truthfully incriminated M.H., it also requires reversal.

Third, the court erred by admitting into evidence a text message from S.B. referencing M.H.'s criminal record. That error undermined the presumption of innocence, particularly because two other witnesses had already improperly mentioned M.H.'s prior arrest. Especially when combined with the cumulative prejudice of the first two errors, admitting evidence of the prior arrest "'so impair[ed] the right to a fair trial' that reversal is required." *Smith v. United States*, 26 A.3d 248, 264 (D.C. 2011) (quoting *Foreman v. United States*, 792 A.2d 1043, 1058 (D.C. 2002)).

Finally, M.H.'s sentence must be vacated because the trial court failed to recognize its discretion to impose a sentence below the mandatory minimum.

ARGUMENT

I. THE TRIAL COURT ERRED IN ADMITTING S.B.'S MAY 2019 TEXT MESSAGES AS STATEMENTS AGAINST PENAL INTEREST.

S.B.'s May 2019 texts did not qualify as statements against penal interest because they gave no details of the shooting and said nothing about his purported role in it. The trial court's ruling to the contrary, which this Court reviews de novo,[13] was erroneous. Because the government repeatedly stressed that the text messages were "very important" to evaluating Ms. Barbour's credibility, which was critical to its prosecution, this error requires reversal.

A. None of the messages were admissible as statements against penal interest.

Because out-of-court statements lack the safeguards of in-court testimony, they are presumptively unreliable and generally not admissible as trial evidence. *See Williamson v. United States*, 512 U.S. 594, 598 (1994); *Laumer v. United States*, 409 A.2d 190, 194 (D.C. 1979) (en banc). But if an out-of-court statement "so far tend[s] to subject the declarant to . . . criminal liability . . . that a reasonable person in the declarant's position would not have made the statement unless believing it to be true," then the statement may be admitted under the hearsay exception for statements against penal interest. *Thomas v. United States*, 978 A.2d 1211, 1227 (D.C. 2009) (quoting Fed. R. Evid. 804(b)(3) (2009));[14] *see also id.* (noting that this Court has

[13] *Thomas v. United States*, 978 A.2d 1211, 1225 (D.C. 2009).

[14] The trial judge must also "ascertain (1) whether the declarant, in fact, made a statement; (2) whether the declarant is unavailable; and (3) whether corroborating circumstances clearly indicate the trustworthiness of the statement." *Laumer*, 409 A.2d at 199. M.H. does not challenge "the trial court's subsidiary factual determinations" on those points. *Thomas*, 978 A.2d at 1231 (concluding that the trial

adopted Fed. R. Evid. 804(b)(3) and "the Supreme Court's construction of that provision in *Williamson*").[15]

"The premise of this exception is that reasonable people usually do not make statements against their penal interest unless the statements are true; the statements are reliable, and therefore admissible, precisely insofar as they genuinely increase the declarant's exposure to criminal sanction." *Id.* Accordingly, Rule 804(b)(3)'s "text . . . requires a qualifying statement to be *powerfully against interest* and to be likely to be true *because of its against-interest nature*." 30B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 6995 (2023 ed.) (emphases added); *see United States v. Butler*, 71 F.3d 243, 253 (7th Cir. 1995) ("The hearsay exception does not provide that any statement which 'possibly could' or 'maybe might' lead to criminal liability is admissible[.]"); *State v. Ashby*, 567 N.W.2d 21, 26 (Minn. 1997) ("Rule 804(b)(3) requires more than *possible* criminal sanctions from a statement[.]"). Thus, a statement is not admissible under Rule 804(b)(3) if it is "cryptic," *Thomas*, 978 A.2d at 1231, "ambiguous," *Andrews v. United States*, 981 A.2d 571, 576 (D.C. 2009), or "vague," *Ashby*, 567 N.W.2d at 26.

Nor may a neutral or non-self-inculpatory statement be admitted as one against penal interest "simply because [it] happen[s] to be included within 'a broader narrative that is generally self-inculpatory.'" *Thomas*, 978 A.2d at 1228 (quoting

---

court's findings on the *Laumer* factors "are sufficiently supported by the record" but that the trial court erred because statement was not actually against penal interest).

[15] The relevant portion of Rule 804(b)(3) was amended in 2010 with changes that "[we]re intended to be stylistic only." Fed. R. Evid. 804, advisory committee's note to 2010 amendments.

Williamson, 512 U.S. at 600–01). "[T]he fact that a statement is collateral to a self-inculpatory statement says nothing at all about the collateral statement's reliability." *Williamson*, 512 U.S. at 600. As with any 804(b)(3) inquiry, the admissibility of a collateral statement "depends on a clear showing" that the individual statement is "truly inculpatory of the declarant." *Thomas*, 978 A.2d at 1229. Accordingly, "the trial court must assess each component remark for admissibility as a statement against penal interest rather than base its ruling on the overall self-inculpatory quality of the declarant's narrative in its totality." *Thomas*, 978 A.2d at 1229.

The trial court's analysis here utterly flunked that requirement. Its only reasoning—that "[S.B.] is essentially confessing to Ms. Barbour his role in the [G.W.] murder," 10/07/2022 Tr. at 55—failed to differentiate between S.B.'s statements in January, March, and May, much less "careful[ly] pars[e] and evaluat[e]" each component remark from those three conversations. *Thomas*, 978 A.2d at 1229. A proper analysis of the May 2019 text messages shows that none of them "'so far tended to subject [S.B.] to . . . criminal liability" that a reasonable teenager would not have made them unless believing them to be true. *Id.* at 1231.[16] All of the texts should have been excluded.

[16] A child's age should generally be considered when applying an objective, reasonable person test. *See J.D.B. v. North Carolina*, 564 U.S. 261, 272–74 (2011). The declarant's youth is particularly important for the statement against penal interest analysis, because children "often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." *Id.* at 272 (internal quotation marks omitted).

S.B.'s texts were a teenage boy's response to an ex-girlfriend asking him "What You Been Up To," Gov't Ex. 452.16—hardly a setting or prompt that fosters inherently reliable statements. The texts' only reference to any crime is S.B. telling Ms. Barbour that *someone else*—his "man"—is "[s]till in for dat murder shit," and that "they trying find out who the 2nd shooter is and Dey don't really got no evidence." Gov't Ex. 452.16. None of S.B.'s texts claimed that he had any specific knowledge about the murder, much less that he had played a role in it. He simply repeated information that was publicly available from the proceedings in M.H.'s case. *See* 05/06/2019 Tr. at 4 (government informing court that "there is a second shooter . . . we believe, out there").

All that S.B. said about *himself* was that he was "[c]ooling staying down" and that he "[c]an't do to much the feds be on me and my men ass." Gov't Ex. 452.16. Those statements were not self-inculpatory. Unlike admitting to a crime or revealing significant details about how a particular crime was committed, *see Thomas*, 978 A.2d at 1230, S.B.'s unexplained assertion that he was the subject of attention from law enforcement did nothing to expose him to criminal liability for any specific act. Nor is there anything incriminating about stating a desire to avoid such attention: there are myriad "legitimate personal reasons" why "[a]n individual may be motivated to avoid the police." *Miles v. United States*, 181 A.3d 633, 641 (D.C. 2018) (internal quotation marks omitted).

S.B.'s remark that he had previously "told [Ms. Barbour] the story," Gov't Ex. 452.16, was too vague and ambiguous for a reasonable person to think that it would "clearly expose him to criminal liability." *Thomas*, 978 A.2d at 1232. *Thomas*

illustrates that ambiguous statements—even those that are useful to the prosecution—do not meet the standard for admissibility as statements against penal interest. Mr. Thomas and Ron Herndon were tried for a murder that was apparently motivated by revenge for the killing of their friend "Slush." *Id.* at 1219. The government sought to introduce as a statement against penal interest Mr. Thomas's remark, made while he was grabbing a handgun shortly before the shooting that led to his prosecution, "that him and Ron was going to finish that shit with Slush." *Id.* at 1220. This Court recognized that the statement was obviously probative of Mr. Thomas's guilt, noting that it "made it more likely that Thomas did, in fact, meet with Herndon, and that Thomas did, in fact, participate in the shooting." *Id.* at 1232. But the Court held that the statement was not so clearly against Mr. Thomas's penal interest that it was admissible under that exception: "[e]ven in conjunction with his retrieval of a weapon, Thomas's words were somewhat ambiguous." *Id.* at 1231. Unlike "a detailed description . . . of how a complex crime was to be committed," Mr. Thomas's statement, while probative, was too "cryptic" to "clearly expose him to criminal liability." *Id.* at 1231–32.

Other cases confirm that any potential liability S.B. might have incurred by referencing "the story" was too attenuated to make his remark admissible as a statement against penal interest. In *Andrews*, for example, this Court held that because an "ambiguous" statement was open to both incriminating and non-incriminating interpretations, it was not admissible under Rule 804(b)(3). 981 A.2d at 576 ("[W]e cannot know that [the declarant] thought she was making a statement that exposed her to criminal liability."). Likewise, in *Butler*, a declarant's statement

that he was in a room where police found weapons "was not sufficiently against his penal interest to warrant its admission" even though, by making the statement, he "risk[ed] possible weapons charges being brought against him." 71 F.3d at 252–53. And in *Ashby*, a third party's implied confession was not admissible because it was "so vague: there was no explicit confession and no actual acceptance of responsibility. . . . [T]here was no mention of the murder at all." 567 N.W.2d at 26.[17] Both *Butler* and *Ashby* explained that the statements in those cases were inadmissible because Rule 804(b)(3) "requires more than *possible* criminal sanctions from a statement." *Ashby*, 567 N.W.2d at 26; *Butler*, 71 F.3d at 253. "[O]n the contrary, only those statements that 'so far tend to subject' the declarant to criminal liability, such that 'a reasonable person would not have made it unless it were true' are admissible." *Butler*, 71 F.3d at 253 (quoting Fed. R. Evid. 804(b)(3)).

S.B.'s cryptic reference to "the story" was far less incriminating and far more ambiguous than Mr. Thomas's inadmissible statement, made while grabbing a gun, that he "was going to finish that shit with Slush." *Thomas*, 978 A.2d at 1220. Like the statements in *Butler* and *Ashby*, S.B.'s remark "did not admit to anything remotely criminal," *Butler*, 71 F.3d at 253, and "there was no explicit confession and no actual acceptance of responsibility," *Ashby*, 567 N.W.2d at 26. Indeed, S.B.'s reference to "the story" contained no incriminating information whatsoever. Of course, as M.H.'s trial demonstrated, it was *possible* that S.B.'s statement about "the

[17] When someone asked the third party "[w]hy are you letting [Ashby] go to jail for what you did," he responded, "[s]o, the police don't know so I'm not going to tell them." *Ashby*, 567 N.W.2d at 25 n.1.

story" would be used as circumstantial evidence to corroborate that he had previously told Ms. Barbour *something* about the murder. And it was also possible that Ms. Barbour would assume that "the story" referred to the clearly incriminating March statement that S.B. purportedly made about G.W., rather than some other story (for example, the vague statement that he apparently made in January about catching an op). But that was too attenuated a path to criminal liability for admission of the statement under Rule 804(b)(3). *Thomas* and the other cases discussed above demonstrate that a statement may be much more directly probative of guilt and still fall short of the requirement that a statement be "powerfully against interest" to qualify for admission. Wright & Miller, *supra*, § 6995. S.B.'s statement about "the story" was not so unambiguously incriminating on its own that it bore the "necessary indicia of trustworthiness" to be admitted as a statement against his penal interest. *Andrews*, 981 A.2d at 576.

B. Reversal is required.

The government relied heavily on S.B.'s text messages to bolster Ms. Barbour's credibility, which was critical to the case against M.H. The government therefore cannot show "with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error" of admitting the text messages. *Kotteakos v. United States*, 328 U.S. 750, 765 (1946); *see Thomas*, 978 A.2d at 1232. Because the harm analysis "focuses on the impact of the error in the trial that actually occurred, not on whether the same verdict would have been reached in a different trial in which the error was avoided," the Court considers "the centrality of the issue

affected by the error," "the closeness of the case," and "the steps taken to mitigate the effects of the error." *Washington v. United States*, 965 A.2d 35, 41–42, 45 n.30 (D.C. 2009) (internal quotation marks omitted). The Court "cannot treat the erroneous admission of hearsay as harmless unless the error was so inconsequential as to provide reasonable assurance that it made no appreciable difference to the outcome." *In re Ty.B.*, 878 A.2d 1255, 1267 (D.C. 2005). *See also Odemns v. United States*, 901 A.2d 770, 782 (D.C. 2006) ("[W]e must find it *highly probable* that [that] error did not contribute to the verdict." (internal quotation marks omitted)).

Ms. Barbour's testimony about what S.B. told her in an unrecorded face-to-face conversation in March 2019—that he and "[redacted]" killed G.W.—had the potential to devastate M.H.'s misidentification defense. For that potential to be realized, though, the jury had to find Ms. Barbour's story credible. Without the May text messages, that posed a problem. Apart from the fact that S.B. and the person in green both had a light complexion, there was no evidence linking S.B. to the shooting. Nor did any other witness confirm that Ms. Barbour and S.B. spoke about the shooting in March. All the jury had was Ms. Barbour's word, which they had good reason to doubt. She had contradicted herself about one instance where she claimed to have heard the "story," stating that she heard it for "the first time" in January 2019 before backtracking and saying that S.B. did not say anything to her "in January about what he and his friend, [redacted] did." 10/27/2022 Tr. at 216–17. Moreover, the jurors might have naturally expected that if Ms. Barbour had truly heard that a friend of hers committed an unsolved murder, she would have promptly

told someone about it. But it was not until months later that she came forward with the alleged confession.[18]

The government made the text messages the linchpin of its proof that S.B. had implicated M.H., using them to bolster the credibility of Ms. Barbour's story by arguing that S.B. corroborated, in writing, that he had previously spoken to her about the shooting. The government read several of the May text messages to the jury in its opening statement, describing them as "key communications." 10/20/2022 at 37–38. It took care to establish the chain of custody of S.B.'s phone through three witnesses and to explain through a fourth witness how the texts were extracted from the phone. *See* 10/25/2022 Tr. at 19; 10/27/2022 Tr. at 24–25, 32, 179–97. The government oriented Ms. Barbour's direct examination around the text messages, using them to contextualize her prior conversations with S.B. 10/27/2022 Tr. at 215. In closing argument, the government urged the jury to focus its attention on the text messages:

> [T]his is very important, this is very important, ladies and gentlemen, because *we don't want you to rely entirely on what Erianna says about a conversation she has*. We know it from [S.B.]'s phone, he's – told her in this text on May 6th, 2019, Member, I told you the story?

10/31/2022 Tr. at 115 (emphasis added). And the government reiterated the importance of the texts in its rebuttal. *Id.* at 159–60.

Given the government's repeated highlighting of the text messages throughout trial, and especially in its closing argument, it cannot show that their erroneous

[18] In closing, defense counsel argued without objection that Ms. Barbour did not come forward with any information until October 2019.

admission was "so inconsequential as to provide reasonable assurance that it made no appreciable difference to the outcome." *In re Ty.B.*, 878 A.2d at 1267. "A prosecutor's repeated highlighting, during the course of the trial, of an erroneously admitted statement is persuasive evidence of its centrality and prejudicial character," *Andrews v. United States*, 922 A.2d 449, 460 (D.C. 2007), and this Court has "routinely noted that a 'prosecutor's stress upon the centrality of particular evidence in closing argument tells a good deal about whether the admission of the evidence was prejudicial.'" *Morales v. United States*, 248 A.3d 161, 183 n.23 (D.C. 2021) (quoting *Morten v. United States*, 856 A.2d 595, 602 (D.C. 2004)). Moreover, the Court has specifically found harm where, as here, the prosecutor used erroneously admitted hearsay "during closing argument to bolster credibility and corroborate testimony." *Gabramadhin v. United States*, 137 A.3d 178, 186 (D.C. 2016) (citing *Lyons v. United States*, 622 A.2d 34, 48 (D.C.), *reh'g en banc granted and op. vacated*, 635 A.2d 902 (D.C. 1993) (per curiam)).

The prejudice here was even greater than in a typical case where the prosecutor repeatedly highlights evidence that should not have been admitted, because here the prosecutors also told the jury *not* to rely exclusively on Ms. Barbour's testimony. *See* 10/31/2022 Tr. at 115. If the jury followed the government's explicit request, it *must have* relied on the inadmissible texts to give any weight to S.B.'s purported March statement.[19] Conversely, had the texts been

[19] The fact that S.B. was unavailable to testify makes the prejudice here even worse than in cases like *Gabramadhin* and *Lyons.* Unlike in those cases, where the government used inadmissible prior statements *of trial witnesses* to bolster their testimony, *Gabramadhin*, 137 A.3d at 185; *Lyons*, 622 A.2d at 48–49, here the

properly excluded, the jury would have been left to rely on testimony that, in the prosecutors' estimation, was not enough to prove the government's point. That is powerful evidence of the hearsay texts' prejudicial effect, because "[a prosecutor's] own estimate of his case, and of its reception by the jury at the time, is, if not the only, at least a highly relevant measure now of the likelihood of prejudice." *Andrews*, 922 A.2d at 461 (quoting *Garris v. United States*, 390 F.2d 862, 866 (D.C. Cir. 1968)).[20]

The erroneous admission of the text messages was particularly damaging in light of the weaknesses in the government's case and the strong potential for the jury to doubt that the government had the right person. "The prosecution . . . did not produce the weapon used in the shooting or other incriminating physical evidence." *See Simmons v. United States*, 945 A.2d 1183, 1191 (D.C. 2008) (listing these as facts supporting a finding of harm). Instead, "[t]he strength of the prosecution's case against [M.H.] turned largely on the credibility of the witnesses . . . ." *Anthony v. United States*, 935 A.2d 275, 285 (D.C. 2007) (quoting *Lee v. United States*, 668 A.2d 822, 832 (D.C. 1995)). Apart from the impermissibly bolstered Ms. Barbour, the government's three key witnesses—Mr. Tribble, Mr. Phelps, and B.L.—all had significant problems.

---

government impermissibly bolstered Ms. Barbour's testimony with hearsay from a declarant who M.H. never had the chance to cross-examine, and who the jury never had the opportunity to see or hear from themselves.

[20] On top of that, drawing the jury's attention to the texts was doubly prejudicial, because that inadmissible hearsay included an impermissible third reference to M.H.'s criminal record. *See infra* pp. 46–48.

B.L.'s testimony was "quite impeachable," as the prosecutor put it. 10/13/2022 Tr. at 35. She was high on the afternoon of the shooting, 10/27/2022 Tr. at 137, calling into question her perception and memory. Indeed, the government urged the jury not to rely on B.L. for certain facts, arguing that her testimony about when M.H. ran into her apartment "is not consistent with the rest of the evidence." 10/31/2022 Tr. at 117, 169.

The eyewitness identifications from Mr. Tribble and Mr. Phelps were also quite weak. Neither eyewitness could identify M.H. in court. The mask worn by the person in black prevented them from "get[ing] a really good look at the person's face," 10/28/2022 Tr. at 67, and neither witness could articulate any physical characteristics that helped identify the person as M.H., *id.* at 51, 66–67; 10/26/2022 Tr. at 193–94. Mr. Tribble also acknowledged that he had seen the person he believed to be M.H. only three times, and had seen his entire face only once. *See* 10/28/2022 Tr. at 25. As this Court has observed, "[t]he identification of strangers is proverbially untrustworthy." *Odemns*, 901 A.2d at 783 n.16 (quoting *Webster v. United States*, 623 A.2d 1198, 1204 n.15 (D.C. 1993)). Moreover, Mr. Tribble was impeached on cross-examination with his grand jury testimony that M.H. was *not* one of the people in one of the surveillance clips, 10/28/2022 Tr. at 62, undermining his proclamation that he was "110 percent" certain of his identification. In any event, "[e]ven if the witness professes certainty, it is well recognized that the most positive eyewitness is not necessarily the most reliable." *Jones v. United States*, 918 A.2d 389, 409 (D.C. 2007) (internal quotation marks omitted).

The jury also had reasons to doubt Mr. Phelps's and B.L.'s credibility based on their demeanors. Both were palpably upset on the stand.[21] As the prosecutor noted in closing, he had to confront Mr. Phelps with his grand jury testimony "each and every time for every little thing I was asking him about." 10/31/2022 Tr. at 91. And the parties seemingly agreed that B.L.'s hysterical state was helpful to M.H.: while the government requested a break to allow B.L. to compose herself, defense counsel argued to press on, pointing out that "her demeanor is obviously relevant to the jury's consideration." 10/27/2022 Tr. at 109–10.

Much of the government's evidence also undermined the identification of M.H. as the person in black. Mr. Cash testified that several young Black men who were "mostly wearing black hoodies" were arguing in the neighborhood shortly before the shooting, *id.* at 66, showing that multiple other people in the area fit the general description of the shooter and might have had a motive. B.L.'s testimony that M.H. ran into her apartment 15 to 20 minutes after she heard gunshots was "not consistent" with M.H. being the person in black, as the prosecutor recognized. 10/31/2022 Tr. at 169. And Mr. Tribble and Mr. Phelps agreed that the person in black was carrying a "black" gun, 10/20/2022 Tr. at 194; 10/26/2022 Tr. at 145—but according to B.L., M.H. was carrying a "black and silver" gun when he entered her apartment. 10/27/2022 Tr. at 89.

[21] *See, e.g.*, 10/26/2022 Tr. at 198 (prosecutor noting that Mr. Phelps "got kind of annoyed" during his direct examination); 10/27/2022 Tr. at 110 (trial court noting that B.L. "is coming apart up here").

In short, the eyewitnesses' credibility was suspect, and much of their testimony supported M.H.'s misidentification defense. But Ms. Barbour's testimony, if believed, provided direct evidence of M.H.'s guilt that was completely independent of the dubious eyewitness accounts. Accordingly, the erroneous bolstering of her testimony with hearsay was not harmless, especially when the prejudice from this and the other errors at trial is viewed cumulatively. *See Smith v. United States*, 26 A.3d 248, 264 (D.C. 2011).

II. THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF S.B.'S POSSESSION OF GUNS AND ALLOWING THE GOVERNMENT TO MAKE AN IMPROPER PROPENSITY ARGUMENT.

"Generally speaking, a party cannot present evidence that a person acted in a certain fashion on a prior occasion in order to show conformity with that behavior in a later setting." *Brown v. United States*, 726 A.2d 149, 153 (D.C. 1999). That rule prohibits the introduction of character or propensity evidence against *any* person. *Id.* Here, the government elicited testimony from Ms. Barbour that she saw S.B. with a gun, and introduced three photographs—including one with M.H.—depicting S.B. with guns. There was no evidence or argument that any of these weapons were used in the offense or were otherwise relevant beyond propensity. To the contrary, the government explicitly embraced an improper propensity argument, stating that S.B.'s gun possession showed "the kind of person he was" and "backs up that [he] could easily be a killer." 10/31/2022 Tr. at 159. The admission of S.B.'s bad acts to prove his propensity for violence violated this Court's precedents and the plain text of Federal Rule of Evidence 404(b), and the government's explicit propensity argument in rebuttal was a separate error unto itself, *see Lucas v. United States*, 102

A.3d 270, 276 (D.C. 2014). Because proving S.B.'s role in the shooting was critical to the government's case against M.H., these errors were not harmless.

A. The admission of evidence that S.B. possessed guns violated the prohibition against propensity evidence.

The "propensity rule" has "long played" a "fundamental role . . . in Anglo-American jurisprudence." *Thompson v. United States*, 546 A.2d 414, 418 (D.C. 1988). Today, the rule is codified in Federal Rule of Evidence 404(b): "[e]vidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Fed. R. Evid. 404(b)(1); *see Johnson v. United States*, 683 A.2d 1087, 1100 n.17 (D.C. 1996) (en banc) (noting that this portion of Rule 404(b) "is consistent with District of Columbia law").

As the government has recognized, this Court has "rejected th[e] proposition" that the propensity rule applies only to bad acts of the defendant. Brief for United States at 33 n.12, *Dodson v. United States*, 288 A.3d 1168 (D.C. 2023) (No. 16-CF-238) (citing *Austin v. United States*, 64 A.3d 413, 421–22 (D.C. 2013); *Brown*, 726 A.2d at 152–53; Fed. R. Evid. 404(b)). In *Brown*, the defendants in a carjacking case sought to introduce evidence that the complaining witness had previously loaned his car to others and then reported it stolen, characterizing this as evidence of "'a propensity argument we're allowed to bring out.'" 726 A.2d at 152. Although the witness was not a party to the case, this Court held that the evidence was properly excluded, because "evidence offered on a theory of showing a propensity to commit similar acts is inadmissible." *Id.* at 153 (citing *Thompson*, 546 A.2d at 418). The

Court reiterated that principle in *Austin*, 64 A.3d 413. Mr. Austin, accused of killing his ex-girlfriend's child, sought to show that she was responsible for the death by introducing evidence that she had been investigated for assaulting her children. *Austin*, 64 A.3d at 421. Citing *Brown*, the Court upheld the exclusion of that evidence, explaining that Mr. Austin "sought to pursue this line of inquiry for the impermissible purpose of showing propensity." *Id.* at 422.

Dodson reaffirmed that third-party propensity evidence is inadmissible, even if offered to corroborate other evidence. Mr. Dodson argued at trial that allegations of child sexual abuse by the complaining witness, H.B., were not credible, because they were first elicited through fear by questions from her abusive father, John Bush. 288 A.3d at 1172. When Mr. Bush testified that he did not intimidate his daughter on the day of her allegations, Mr. Dodson sought to introduce evidence of Mr. Bush's prior child abuse to "'corroborate' H.B.'s testimony about her father's anger on the day of the incident" and to show "that he did not 'ordinarily interact[]' with H.B. in a calm or gentle manner." *Id.* at 1173. This Court applied the rule from *Brown* and *Austin* and held that the evidence of Mr. Bush's prior bad acts was properly excluded as impermissible propensity evidence. *Id.* at 1176.

These holdings reflect the well-settled understanding that the propensity rule generally bars *all* propensity evidence, regardless of by whom, or against whom, it is offered. The consensus view in "[m]odern law" is that the "general prohibition against the use of character evidence to show conduct . . . makes no express distinction for this purpose between parties and nonparties." 1A Wigmore, Evidence § 68, at 1444 (Tillers rev. 1983); *see also* Fed. R. Evid. 404, advisory committee's

note to 1972 proposed rules ("In most jurisdictions today, the circumstantial use of character is rejected but with important exceptions . . . . This pattern is incorporated in the rule.").

In light of that background, Rule 404(b) sweeps broadly: evidence of prior bad acts "is not admissible to prove *a person's* character in order to show that on a particular occasion *the person* acted in accordance with the character." Fed. R. Evid. 404(b)(1) (emphases added). The Rule thus "applies in both civil and criminal cases" and "*generally prohibits* the introduction of evidence of extrinsic acts that might adversely reflect on *the actor*'s character." *Huddleston v. United States*, 485 U.S. 681, 685 (1988) (emphases added). In *Huddleston*, "[t]he actor . . . was a criminal defendant, and the act in question was 'similar' to the one with which he was charged." *Id.* But the Court emphasized that its "use of these terms is not meant to suggest that our analysis is limited to such circumstances." *Id.* at 685–86. Every federal court of appeals to have addressed the question has similarly held that Rule 404(b)'s bar on propensity evidence applies "to witnesses and third parties" as well as the accused. *United States v. Espinoza*, 880 F.3d 506, 516 (9th Cir. 2018).[22]

---

[22] *See, e.g.*, *United States v. Williams*, 458 F.3d 312, 317 (3d Cir. 2006) ("That the prohibition against propensity evidence applies regardless of by whom—and against whom—it is offered is evident from Rule 404(b)'s plain language . . . . Rather than restricting itself to barring evidence that tends to prove 'the character of the accused' to show conformity therewith, Rule 404(b) bars evidence that tends to prove the character of any '*person*' to show conformity therewith."); *United States v. Lucas*, 357 F.3d 599, 605 (6th Cir. 2004) ("By its plain terms, Rule 404(b) mandates that 'evidence of other crimes, wrongs, or acts is not admissible to prove the character of a *person* in order to show action in conformity therewith,' instead of restricting itself to evidence proving 'the character of the accused.'"); *see also United States v. White Plume*, 847 F.3d 624, 628 (8th Cir. 2017); *United States v. Stephens*, 365 F.3d 967,

The introduction of evidence showing S.B. with guns blatantly violated the bar on propensity evidence. Rather than suggesting that this evidence was admissible for any of the non-propensity purposes described in *Drew* and *Johnson*, the government pressed the plainly incorrect argument that the prohibition on propensity evidence only "applies to prior bad acts of the defendant on trial." 10/18/2022 Tr. at 20. Accordingly, in direct violation of the rule that other bad acts are "not admissible to prove a person's character," Fed. R. Evid. 404(b)(1), the trial court held that the photographs of S.B. were admissible to show "the type of individual that S.B. may have become." *Id.* at 22. And in its rebuttal argument, the government "explicitly . . . suggested to the jury that it conclude that the other crimes evidence evinced a predisposition to commit the charged crime." *Johnson*, 683 A.2d at 1093. The fact that Ms. Barbour "said she saw [S.B.] with a gun in his waistband," the government said, showed "the kind of person he was. . . . That backs up that [S.B.] could easily be a killer." 10/31/2022 at 159.

Even if the government had not expressly disclaimed reliance on *Johnson*, 10/18/2022 Tr. at 20, any connection between the guns seen in S.B.'s possession and the one carried by the person in green was too "conjectural and remote" for the gun evidence to be admissible as direct and substantial proof of the charged crime. *Williams v. United States*, 106 A.3d 1063, 1068 (D.C. 2015) (internal quotation marks omitted). Admissibility of such evidence "turns on consideration of temporal

974–75 (11th Cir. 2004); 22B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 5245 (2d ed. 2023 update) ("[T]he trial judge can exclude evidence of uncharged misconduct of witnesses, co-defendants, or even unidentified third parties where the evidence is offered to prove their conduct.").

proximity and the closeness of the description of the weapon known to be (or have been) in the [person]'s possession with the one used in the charged offense." *Id.* at 1069. Here, the only evidence about the person in green's gun was that it was black,[23] so the government could not have shown a close match with any other gun. Indeed, when it sought to introduce a photograph of S.B. holding a black gun, the government did not contest defense counsel's argument that there was "no evidence that the gun is the same gun alleged to have been held by [S.B.] on December 13th, 2018." 10/18/2022 Tr. at 9. Instead, the government argued propensity. *Id.* at 11. And the trial court's other rulings rejecting similar evidence of M.H. with a vaguely described gun showed that, had the court properly applied the propensity rule to S.B. as well as M.H., it would have excluded evidence of S.B.'s gun possession for lack of a connection to this case. *See* 10/25/2022 Tr. at 5 (ruling that evidence of M.H. with a gun a month before the shooting was not "related to this case" where government could proffer "[o]nly that it was a handgun").

The government's contention that the photos of S.B. with guns would "corroborate Ariana Barber's [sic] testimony that [S.B.] was the second gunman" was not a permissible ground for admission, either. 10/18/2022 Tr. at 11; *see also id.* at 20. As explained above, this Court held in *Dodson* that otherwise inadmissible propensity evidence may not be used to "corroborate" a witness's testimony. 288 A.3d at 1173, 1176; *see supra* p. 37. That makes sense: if other bad acts are "corroborative *only* because they showed the defendant's character and the

[23] *See* 10/20/2022 Tr. at 194; 10/26/2022 Tr. at 145.

likelihood of 'action in conformity therewith,' plainly the rule [404(b)] would call for exclusion." *United States v. Bailey*, 319 F.3d 514, 520 (D.C. Cir. 2003); *see also United States v. Linares*, 367 F.3d 941, 949 (D.C. Cir. 2004) (reiterating that "prior-acts evidence must corroborate other evidence by proving a proper element, such as intent or identity"). Here, both the trial court's findings that the photos "speak[] to the type of individual that [S.B.] may have become" and the government's arguments confirm that the evidence of S.B.'s other bad acts corroborated Ms. Barbour only because they showed his bad character and propensity for violence. *See* 10/18/2022 Tr. at 12, 22; 10/31/2022 Tr. at 159.[24]

Finally, the prosecutor's improper propensity argument in rebuttal "that [S.B.] could easily be a killer," 10/31/2022 Tr. at 159, was error in itself and compounded the erroneous admission of the bad acts evidence. "[A] prosecutor is prohibited from 'suggesting in closing argument that the jury should infer criminal disposition from the evidence of prior crimes.'" *Lucas*, 102 A.3d at 277 (quoting *Ford v. United States*, 487 A.2d 580, 591 (D.C. 1984)). As both the trial judge and the government recognized from the start, the evidence of S.B.'s possession of guns was propensity evidence, pure and simple. *See* 10/18/2022 Tr. at 19–20, 22. The evidence was not

[24] The trial court also found that Gov't Ex. 454.13 "shows a comradery [sic]" between M.H. and S.B. 10/18/2022 Tr. at 12. That alone was not enough to admit the photograph, which showed S.B. holding a gun. The friendship between M.H. and S.B. was not contested: as the court recognized, there were other pictures that demonstrated their friendship, *id.* at 16, and the government in fact admitted nine photographs showing the teenagers together without any guns in sight, 10/27/2022 Tr. at 222–28. Ex. 454.13's minimal legitimate probative value was substantially outweighed by the prejudice of showing S.B. with a gun in his hand while standing next to M.H.

admissible for any legitimate purpose, and neither the government nor the trial court suggested that was the case. Accordingly, there was no way for the jury to understand the prosecutor's rebuttal as anything other than "an invitation to infer criminal propensity." *Lucas*, 102 A.3d at 277.

B. These errors were not harmless.

The government cannot show that the erroneous admission of evidence of S.B.'s gun possession was harmless, because proving that S.B. actually participated in the shooting—and thus that the jury should believe his purported statement incriminating M.H.—was "a major part of the case for the prosecution." *Andrews v. United States*, 922 A.2d 449, 460 (D.C. 2007). As the government recognized before trial, it "ha[d] to corroborate Ariana Barber's [sic] testimony that [S.B.] was the second gunman," but it lacked any eyewitness or physical evidence to do so. 10/18/2022 Tr. at 11, 20. That hole in the government's case grew even larger when Ms. Barbour admitted at trial that she "didn't really buy" S.B.'s supposed story that he and "[redacted]" killed G.W. 10/27/2022 Tr. at 245. The government patched up this significant problem with propensity evidence.

In closing argument, the government voiced a question that was surely on the jurors' minds: "How do we know [S.B.] was the accomplice? The one in the green jacket?" 10/31/2022 Tr. at 113. While answering that question, the government displayed the photograph of "[S.B.] pointing a gun at the camera." *Id.* at 114. Apart from that and the May text messages, the only other proof of S.B.'s claimed involvement was that the person in green and S.B. were both "light skinned." *Id.* at 116. Then, after the defense closing emphasized that Ms. Barbour "didn't buy"

S.B.'s story, the prosecutor doubled down on propensity. As soon as he stood back up, he emphasized that Ms. Barbour "saw [S.B.] with a gun in his waistband. . . . [S]he didn't think that was the kind of person he was. . . . That backs up that [S.B.] could easily be a killer." *Id.* at 159; *see also id.* at 160 (reiterating this point). This repeated "stress upon the centrality" of the propensity evidence "tells a good deal" about the prejudice that it caused. *Morten v. United States*, 856 A.2d 595, 602 (D.C. 2004) (internal quotation marks and brackets omitted). That is doubly true here, where some of the last words that the jury heard not only highlighted the propensity evidence, but made an express and improper argument about how it should be used.

The propensity evidence undoubtedly influenced whether the jury believed S.B.'s purported statement to Ms. Barbour incriminating himself and M.H. Propensity evidence is inadmissible because "it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record." *Michelson v. United States*, 335 U.S. 469, 475–76 (1948). That logic applies equally when the other bad acts are those of someone alleged to have acted alongside a defendant: such evidence always "distract[s] the trier of fact from the main question of what actually happened on the particular occasion," encouraging the jury to prejudge the actor "despite what the evidence in the case shows actually happened." Fed. R. Evid. 404, advisory committee's note to 1972 proposed rules (explaining why propensity evidence is inadmissible in civil cases) (internal quotation marks omitted). Indeed, the jurors likely believed that they were permitted to make a propensity inference to decide the credibility of S.B.'s purported statement, as they received no instruction otherwise. *See, e.g.*, *Washington*, 965 A.2d at 42–43 (noting

that absence of mitigating steps weighs in favor of finding harm). To the contrary, the jury was expressly invited—without correction or qualification—to determine whether S.B. was involved in the shooting by judging his character, rather than the evidence in the case.

The evidence of S.B.'s gun possession also directly cast M.H. in a negative light. Gov't Ex. 454.13 shows S.B. holding a gun while M.H. stands one person over, middle fingers raised. The trial court recognized that a nearly identical photograph was "highly prejudicial" to M.H., 10/18/2022 Tr. at 16, and it would not allow the government to introduce evidence of M.H. carrying a gun on other occasions because "putting a gun in his hand before this incident happened is just too highly prejudicial." 10/25/2022 Tr. at 6. But by putting a gun in S.B.'s hand while he stood next to M.H., the government got the next best thing. With that photo in evidence, it would not take much for the jury to infer that if "[S.B.] could easily be a killer," 10/31/2022 Tr. at 159, then M.H. could be one, too: after all, as the trial court recognized, "[a]nybody seeing" a photo of S.B. holding a gun right next to M.H. "is going to think, guns, drugs, gang." 10/18/2022 Tr. at 16.

The prejudice from admitting evidence of S.B.'s propensity for violence is even greater when viewed in combination with the harm from erroneously admitting his hearsay text messages. *See Sims v. United States*, 213 A.3d 1260, 1272 (D.C. 2019) ("The standard for reversal where more than one error is asserted on appeal is whether the cumulative impact of the errors substantially influenced the jury's verdict." (quoting *Smith v. United States*, 26 A.3d 248, 264 (D.C. 2011)). Both errors lent a façade of credibility to Ms. Barbour's testimony and the purported statements

therein, which was the only evidence of M.H.'s guilt that did not depend on significantly flawed eyewitness testimony.

Similarly, the prejudice from telling the jury about S.B.'s other bad acts was exacerbated by the erroneous admission of the reference to M.H.'s prior arrest. *See infra* pp. 46–48. The combined effect of the bad acts evidence created an especially potent "atmosphere of aspersion and disrepute" that risked convincing the jury that M.H. "should be punished and confined for the good of the community." *Odemns*, 901 A.2d at 783 (internal quotation marks omitted). More specifically, the cumulative impact of the other bad acts encouraged the jury to impermissibly infer that S.B.'s incriminating statement must have been true, because not only he but M.H. as well were "habitual lawbreaker[s]." *Id.*[25]

In sum, the government cannot show that it is "highly probable" that the evidence that S.B. carried guns "did not contribute to the verdict." *Odemns*, 901 A.2d at 782. S.B.'s purported statement incriminating M.H. was a critical piece of evidence—all the more so in light of the problems with the government's

[25] The jury was especially likely to make impermissible propensity inferences about S.B. and M.H. because it was primed to assume the worst of both teenagers. In general, "Black boys are seen as older and less innocent" than their white peers. Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY & SOC. PSYCH. 526, 526 (2014). That bias is "exacerbated in contexts where Black males are dehumanized," *id.*, such as when Black children are portrayed as predators, *State v. Belcher*, 268 A.3d 616, 627 (Conn. 2022) ("[T]he superpredator myth employed a particular tool of dehumanization—portraying Black people as animals."). The government did just that in this trial, asserting six different times in its opening statement that M.H. and S.B. "weren't just walking around, . . . they were on the hunt." 10/20/2022 Tr. at 30; *see also id.* at 27, 31, 32, 33.

eyewitnesses—but it was worth nothing unless the jury believed that he was telling the truth. Given Ms. Barbour's testimony that she did not believe S.B., and the dearth of any other evidence to corroborate S.B.'s participation in the shooting, the Court "cannot say, with fair assurance, after pondering all that happened," that "the judgment was not substantially swayed by" the evidence that S.B. carried guns and the prosecutor's argument that he therefore "could easily be a killer." *Kotteakos*, 328 U.S. at 765.

III. THE TRIAL COURT ERRED BY ADMITTING EVIDENCE OF M.H.'S PRIOR ARREST.

The improper admission of evidence that an accused has been previously arrested "strikes at one of the most fundamental principles of criminal law—the presumption of innocence." *Eady v. United States*, 44 A.3d 257, 270 (D.C. 2012). Indeed, "[o]nce evidence of prior crimes reaches the jury, it is most difficult, if not impossible, to assume continued integrity of the presumption of innocence." *Odemns v. United States*, 901 A.2d 770, 782 (D.C. 2006) (internal quotation marks omitted). Here, the government's "irrelevant and improper" references to M.H.'s prior arrest undermined his right to be presumed innocent. *Eady*, 44 A.3d at 267.

The jury learned from three separate sources—two police officer witnesses and the May 2019 text messages—that M.H. had been arrested before. 10/24/2022 Tr. at 195, 273; Gov't Ex. 452.16. Although the trial court denied M.H.'s requests for a mistrial after the two police officers referred to his prior arrest, 10/24/2022 Tr. at 201; 10/25/2022 Tr. at 7, the court warned that references to "prior arrests, et cetera, needs to stop." 10/24/2022 Tr. at 278. But the court later admitted into

evidence S.B.'s out-of-court statement that M.H. had a criminal record. Gov't Ex. 452.16 (Ms. Barbour: "Why They Keep Stepping Him Back That's His First Charge ?" S.B.: "Nah . . ."); *see* 10/27/2022 Tr. at 197 (admitting Ex. 452.16 in its entirety). In addition to objecting to that statement as inadmissible hearsay, M.H. objected that it was substantially more prejudicial than probative, thus preserving the issue for appeal. *See* R.65 at n.1; 10/06/2022 Tr. at 211–12; 10/27/2022 Tr. at 197.[26]

Admitting as substantive evidence the text message reference to M.H.'s criminal record was error. It was plain to all at trial that the fact of the prior arrest should not have been mentioned, let alone admitted into evidence. *See* 10/24/2022 Tr. at 197, 273, 278–79; *see also Eady*, 44 A.3d at 263 (holding that where evidence of defendant's prior conviction served no legitimate purpose, "it was clear error to admit it as evidence in the trial"). The error was also prejudicial, because evidence of other crimes "is always prejudicial to a defendant." *Eady*, 44 A.3d at 265. "It diverts the attention of the jury from the question of the defendant's responsibility for the crime charged to the improper issue of his bad character," *id.*, tempting the jury "to overlook weaknesses in the government's case," *Bishop v. United States*, 983 A.2d 1029, 1040 (D.C. 2009). Moreover, given that two witnesses had already referred to a previous arrest, "[t]he repetition of this prejudicial information" in the text messages "cannot have escaped the jury's notice." *Eady*, 44 A.3d at 267. The prejudice was further heightened by the fact that the third reference to the prior arrest

[26] Even assuming that this issue was not preserved by trial counsel's objections, the improper admission into evidence of M.H.'s prior arrest was plain error. *See Eady*, 44 A.3d at 263, 265–70.

was admitted as an exhibit—one that the government emphasized was "very important," 10/31/2022 Tr. at 115—allowing the jury to study it during deliberation. For these reasons and those stated above, *see supra* pp. 28–35, 42–46, the admission of evidence of M.H.'s criminal record in combination with the other errors "'so impair[ed] the right to a fair trial' that reversal is required." *Smith*, 26 A.3d at 264 (quoting *Foreman v. United States*, 792 A.2d 1043, 1058 (D.C. 2002)).[27]

IV. M.H.'S SENTENCE MUST BE VACATED.

In the wake of several Supreme Court decisions clarifying the mitigating role that youth must play at sentencing, the D.C. Council passed the Comprehensive Youth Justice Amendment Act of 2016. Recognizing that mandatory minimums prevent courts from taking into account the uniquely mitigating qualities of youth, the Act eliminated mandatory minimums for children charged as adults. *See* D.C. Council Comm. on the Judiciary, Rep. on Bill 21-0683 at 12–14 (Oct. 5, 2016). Pursuant to the Act, the felony sentencing statute was amended to provide that "if the person committed the offense for which he or she is being sentenced under this section while under 18 years of age . . . [t]he court may issue a sentence less than the minimum term otherwise required by law." D.C. Code § 24-403.01(c)(2).

M.H. was 16 years old on the date of the offense. Based on his age, he maintained "that the Court ha[d] discretion" to go below the mandatory minimum

[27] According to the government's recollection, one juror stated in a post-verdict debrief that there "had been quite a bit of 'offense' but not much by way of 'defense,' and that he would have liked to have seen or heard some defense." R.112 at 5. That statement is additional evidence that the presumption of innocence was undermined.

that applies to adults. 03/01/2023 Tr. at 8.[28] But the trial court did not recognize that it had such discretion. *Id.* Because "reversal should follow if it is discerned that the trial court did not recognize its capacity to exercise discretion," *Johnson v. United States*, 398 A.2d 354, 367 (D.C. 1979), the sentence must be vacated.

A trial court's failure to "recognize its capacity to exercise discretion" generally calls for reversal because "[e]ven though the specific harm of the error might not be cognizable, the failure . . . suggests that the trial court did not exercise its judgment properly." *Id.* That is particularly true here "[g]iven the anchoring effect" of mandatory minimums and their "importance . . . to sentencing." *United States v. Palmer*, 35 F.4th 841, 852 (D.C. Cir. 2022) (citations omitted). As the Ninth Circuit explained:

> Mandatory minimums impose stringent starting points on [trial] courts' sentencing authority. The type of discretion afforded a court that is restrained by a statutory minimum is wholly unlike that afforded one that is not. It is therefore impossible for appellate courts to determine how a [trial] court sentencing under a mandatory minimum might have exercised its sentencing discretion had it not been so constrained.

United States v. Mejia-Pimental, 477 F.3d 1100, 1109 (9th Cir. 2007). Accordingly, due to the trial court's error in determining whether he was eligible for a sentence below the mandatory minimum, Mr. Mejia-Pimental was entitled to a resentencing even though the initial sentencing court commented that "it was not 'inclined to go

[28] This was sufficient to preserve the issue. *See, e.g.*, *West v. United States*, 710 A.2d 866, 868 n.3 (D.C. 1998) ("[O]nce a . . . claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments made below." (quoting *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992)). In any event, the court's failure to recognize its discretion to impose a sentence below the mandatory minimum was plain error.

below that statutory mandatory minimum'" and imposed a sentence that was three years longer than the 13-year minimum. *Id.* at 1103, 1109. M.H. is similarly entitled to a resentencing that is untainted by the trial court's erroneous belief that it is constrained by mandatory minimums.

CONCLUSION

This Court should reverse M.H.'s convictions. If the Court affirms the convictions, it should vacate M.H.'s sentence and remand for resentencing.

Respectfully submitted,

Samia Fam /s/
Samia Fam, Bar No. 394445

Mikel-Meredith Weidman /s/
Mikel-Meredith Weidman, Bar No. 503023

Paul Maneri /s/
*Paul Maneri, Bar No. 1722079

PUBLIC DEFENDER SERVICE
633 3rd Street, NW
Washington, DC 20001
(202) 628-1200

*Counsel for Oral Argument

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief has been served, through the Court's electronic filing system, upon Chrisellen Kolb, Esq., Chief, Appellate Division, Office of the United States Attorney, this 3rd day of May, 2024.

Paul Maneri /s/
Paul Maneri, Bar No. 1722079