DISTRICT OF COLUMBIA COURT OF APPEALS

23-CF-937

NWABUEZE IGWE,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

Appeal from the Superior Court of the
District of Columbia – Criminal Division
2023 CF3 896

APPELLANT'S OPENING BRIEF

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D.C. App. R. 28(a)(2)(A) Statement

Appellant Nwabueze Igwe and appellee the United States were the parties in the trial court. Craig Ricard, Esq. represented Mr. Igwe prior to trial. Damon Catacalos, Esq., represented Mr. Igwe prior to and through trial. Anthony Eugene Smith, Esq., briefly represented Mr. Igwe after trial and prior to sentencing. Adrian E. Madsen, Esq., represented Mr. Igwe through sentencing. Assistant United States Attorneys Leutrell Osborne, Esq., Rashmika Nedungadi, Esq., Elizabeth Van Haasteren, Esq., Stephanie Dinan, Esq., Omeed Assefi, Esq., and Sabena Auyeung, Esq., represented the United States in the Superior Court. Adrian E. Madsen, Esq. represents Mr. Igwe before this court. Assistant United States Attorney Chrisellen Kolb, Esq., represents the United States before this court. There are no interveners or amici curiae. No other provisions of D.C. App. R. 28(a)(2)(A) apply.

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ISSUES PRESENTED

1. Whether the trial court erred by permitting over objection Metro Transit Police Department ("MTPD") Officer Sariah Balhis to testify about events of which Officer Balhis had no personal knowledge, events depicted in video surveillance footage from Metro stations and still images taken from the same video footage.
2. Whether the trial court erred by permitting Officer Balhis, testifying as a lay witness, to identify Mr. Igwe and complainant Aldair Moran as people depicted in video footage and still images without the foundation required by *Sanders v. United States*, 809 A.2d 584 (D.C. 2002).
3. Whether the trial court erred by admitting over objection "statement[s] of non-identification"[1]—statements of the complainant to an officer that several people were *not* his alleged assailant.
4. Whether the trial court plainly erred by failing to order stricken comments by the prosecutor in closing and rebuttal arguments which "attempt[ed] to appeal to the jurors' sympathies," including that the complainant's "sense of security was taken," that the complainant "doesn't feel as safe anymore," that the jury should thus "find justice for" the complainant, that "[w]hat happened to [the complainant] is wrong," that the complainant "did not deserve to have to look

[1] *Randolph v. United States*, 882 A.2d 210, 220 (D.C. 2005).

down a knife just because he was trying to get home that day," and that the complainant's assailant "took his dignity away."

5. Whether the trial court plainly erred by failing to order stricken the prosecutor's comments in closing and rebuttal arguments that usurped the role of the jury and misstated the government's burden of proof, including that "in order for [the jury] to even arrive at that conclusion that [trial counsel] just offered, you would necessarily have to engage in the exact type of speculation and guesswork that [the trial court] instructed you in his jury instructions you're not allowed to engage in," that "reasonable doubt is not just some term that you can haphazardly throw around in order to excuse robbing somebody on the Metro at knifepoint," and "[i]t's not reasonable doubt if the [shoes] are three-colored or multicolored or none of that. It's strictly about the elements of the offenses."
6. Whether Mr. Igwe's convictions for armed robbery and assault with a dangerous weapon merge "where both offenses [we]re committed against the same victim as part of the same criminal incident." *Morris v. United States*, 622 A.2d 1116, 1129 (D.C. 1993).

STATEMENT OF THE CASE

Mr. Igwe was charged by indictment one count of robbery while armed (knife) in violation of D.C. Code § 22-2801, -4502, one count of assault with a dangerous weapon (knife) in violation of D.C. Code § 22-402, and one count of carrying a dangerous weapon in violation of D.C. Code § 22-4504(a)(1), all alleged to have occurred on or about February 13, 2023.

On June 5, 2023, with Mr. Igwe still preventively detained pursuant to D.C. Code § 23-1322(b)(1)(A) and with neither party having filed any substantive motions, the parties appeared for trial. Following three day trial, the jury found Mr. Igwe guilty on all counts. The court sentenced Mr. Igwe to an aggregate 48 months' incarceration. This timely appeal followed.

STATEMENT OF FACTS

On February 13, 2023, officers arrested Mr. Igwe on suspicion of robbery (knife) based on the alleged theft of a backpack aboard a Metro train at the Gallery Place station. App'x. 6 (Docket Entries p.3).[2] Mr. Igwe was arrested approximately two hours after the robbery following complainant Aldair Moran's earlier identification of another man as his assailant, later disavowed.

Following preventive detention pursuant to D.C. Code § 23-1322(b)(1)(A),[3]

[2] "App'x" refers to Mr. Igwe's limited appendix.
[3] 2/14 Tr. "Tr." refers to transcript by the date of proceeding, all in 2023.

being found competent after a preliminary competency screening,[4] and a series of continuances, the matter was set for trial. 3/13 Tr. After Mr. Igwe at least twice requested the appointment of new counsel,[5] the court appointed Damon Catacalos, Esq. to replace Mr. Igwe's prior counsel, Craig Ricard, Esq. The United States did not extend a plea offer at any time, reportedly because Mr. Igwe declined to toll the 100-day clock to bring him to trial. 3/13 Tr. 2-3. Aside from a motion for a protective order governing certain discoverable materials,[6] neither party filed pretrial motions.

On May 24, 2023, a grand jury returned an indictment charging Mr. Igwe with one count of robbery while armed (knife) in violation of D.C. Code § 22-2801, -4502, one count of assault with a dangerous weapon (knife) in violation of D.C. Code § 22-402, and one count of carrying a dangerous weapon in violation of D.C. Code § 22-4504(a)(1), all alleged to have occurred on or about February 13, 2023. App'x 31.

Officer Millard Shum

On June 5, 2023, the parties appeared for trial. Following jury selection and opening statements, the government first called MTPD Crime Scene Officer Millard

[4] 2/23 Tr. Mr. Igwe's counsel requested the examination on February 17, 2023. 2/17 Tr.
[5] 2/23 Tr. 3; 3/6 Tr. 4-13.
[6] R. 50 (PDF). Consistent with recent amendments to D.C. App. R. 28(e), "R. [page number] (PDF)" refers to the record, followed, where appropriate by "the page of the original document."

Shum, through whom it introduced several photographs of a knife and property taken from Mr. Igwe on February 13, 2023, including a "clear trash liner" and a backpack, and photographs of Mr. Igwe himself, also taken on February 13, 2023. 6/5 Tr. 196-207. All were admitted without objection, and Mr. Igwe did not cross-examine Officer Shum. 6/5 Tr. 196-207.

Aldair Moran

The government next called complainant Aldair Moran. Mr. Moran testified that on February 13, 2023, after leaving work for the day, he got on a Green Line train at the Navy Yard Metro station shortly after 9:00 pm. When Mr. Moran got on the train, a "guy" was "hollering" and "shouting," "telling the people who get on the train to 'go that way,' [and] 'go sit on the opposite side.'" Although Mr. Moran believed he "wasn't close to the guy" who was "hollering," the man "approache[d] and t[old]" Mr. Moran to "change [his] seat," so Mr. Moran did. In court, Mr. Moran described "the guy" as "tall," "wearing dark clothing," "ha[ving] a few bags with him," and "ha[ving] a hat."

After Mr. Moran changed seats, the man "didn't say anything else to" Mr. Moran. 6/5 Tr. 213-14 (24-3). Once the train "stopped at Gallery" Place, Mr. Moran "suddenly felt… somebody snatch[]" his "book bag," which had been "on the [] right

next to" him.[7] When Mr. Moran then "g[o]t up" and "turned around," he "s[aw] [his] book bag in his hand." When Mr. Moran "moved forward trying to get [his] bag from him… [h]e… pull[ed] out a knife and t[old]" Mr. Moran "to back up," so Mr. Moran did so. Mr. Moran "looked at [the knife] for a few seconds" and "saw silver on the blade"—"a silver blade." 6/5 Tr. 216-17 (23-4). The man held the knife, as described by the United States, with "his right hand in a fist" and "on his side." When Mr. Moran saw the knife, the Metro train doors were opening at the Gallery Place/Chinatown station.

After the man with Mr. Moran's bag, which contained his "work uniform" and "glasses case," got off the train, Mr. Moran did the same and "look[ed] around for somebody that c[ould] help [him]." When Mr. Moran saw "two police officers at the escalator," he thought, "'I need to go call them,'"[8] before "running up the escalator calling for help." 6/5 Tr. 225 (21-24).[9] Mr. Moran estimated that one to two minutes passed between someone taking his bag and when he saw officers. 6/6 Tr. 7 (20-23). Without objection, Mr. Moran identified Mr. Igwe in court "as the

[7] When later asked to be more specific about where his bag was located when he was sitting on the train, Mr. Moran testified that he "was sitting at the window seat" and he "had [his] bag on the passenger seat to the left side of [him] just right there open." 6/5 Tr. 216 (1-5).
[8] 6/5 Tr. 220 (1-3).
[9] The following day, Mr. Moran characterized this as "walking up the escalator." 6/6 Tr. 7 (10-11).

person who took [his] bag."[10] 6/5 Tr. 223 (1-14). The last time Mr. Moran saw the man who took his bag before speaking with officers was when the man got off the train. 6/6 Tr. 8 (13-15).

Mr. Moran then escorted two officers, a man and a woman, to the train platform[11] where he had last seen the man, but the man was gone. 6/6 Tr. 8 (16-20). After Mr. Moran described the man who took his bag to the police, the officers looked around the station, several times asking Mr. Moran whether a person the officers "pointed to" was the man who took his bag. 6/6 Tr. 9-11. Officers then stopped a man who Mr. Moran "suspected… stole [his] stuff on the train." 6/6 Tr. 12 (10-14). When asked why he later concluded that the man was not the man who had taken his bag, Mr. Moran testified that it "couldn't be the guy that stole [his] book bag" because the man "didn't have [his] stuff" and "the guy who stole [Mr. Moran's] stuff had multiple belongings" and the man stopped "only had one belonging, so that wasn't him." 6/6 Tr. 12 (18-25). Mr. Moran testified that it was "minutes" before he concluded that the man officers stopped was not the man who

[10] Mr. Igwe expects that several issues related to identification, including but not limited to the failure to move suppress an out-of-court identification, will be raised in a D.C. Code § 23-110 motion in this case.

[11] While Mr. Moran did not specify the level of the Metro station on which he first spoke to officers, his testimony makes clear that was at least one floor above the train platform, where Mr. Moran testified that he went "up the escalator" to speak with the officers and that he "took [the officers] down to the bottom floor." 6/6 Tr. 8 (8-9).

had taken his bag and that he "felt really bad" when he came to that conclusion. 6/6 Tr. 13. After officers let that man, later referred to throughout the trial as Mr. Madul, go, officers Mr. Moran went home. 6/6 Tr. 14 (7-12).

About ten minutes after getting home, Mr. Moran received a phone call from a detective who told Mr. Moran, "we found the individual that matches your description." 6/6 Tr. 14 (13-22). An officer drove Mr. Moran to the Gallery Place Metro station where "they ha[d] a man lined up on the wall." 6/6 Tr. 15. After the officer "put the flashlight on him," Mr. Moran "didn't have any doubts about that, 100 percent, that was the guy who took [his] bag." 6/6 Tr. 15 (22-25). Over objection, Mr. Moran testified that he did not "see anything else" when he identified Mr. Igwe as the man who took his bag. 6/6 Tr. 17-19. Mr. Moran testified that "a few minutes" later, officers showed him a bag, which was his. 6/6 Tr. 16.

On cross-examination, Mr. Moran testified that he "c[ouldn't] remember" whether he told police his "assailant" was wearing a ski mask,[12] before later agreeing that "the description" he "gave to… officers" at the top of the escalator "was that [his] assailant was wearing black clothes and a black ski mask. 6/6 Tr. 31-32 (23-5). Mr. Moran acknowledged that he did not provide any description of the man's facial features, complexion, facial hair, or lack thereof, or any specific description of height, indicating that he had used a "hand signal" to estimate height.

[12] 6/6 Tr. 22 (14-20).

Mr. Moran also acknowledged that when he saw "a tall African-American man in dark clothes with a hoodie over his head," a man referred to as Mr. Madul, he told police "that's him,"; i.e., the man who took Mr. Moran's bag. 6/6 Tr. 34. Mr. Moran was within "about four feet" of Mr. Madul and "had plenty of time to look at [Mr. Madul] as he was being questioned by… Officer Balhis." 6/6 Tr. 36. "[R]ight after" Mr. Moran told officers Mr. Madul was not his assailant, officers let Mr. Madul go. 6/6 Tr. 37-38.

When asked about the phone call he received from a detective after returning home on the evening of February 13, Mr. Moran agreed that the detective "was insistent that [he] go and see the person that matched [his] description." 6/6 Tr. 40 (10-13). When he identified Mr. Igwe as the person who took his bag, Mr. Moran indicated that Igwe was against a wall and the only person in handcuffs, that there were officers within "reaching distance" of Mr. Igwe, and that several officers were present. 6/6 Tr. 41-43.

On redirect examination, the government sought to impeach Mr. Moran with grand jury testimony regarding whether his assailant was wearing a beanie or a ski mask. 6/6 Tr. 46, 52-55. Although the trial court initially permitted such testimony over defense objection,[13] it later order the jury to disregard the testimony regarding the grand jury proceedings, concluding that Mr. Moran was never actually

[13] 6/6 Tr. 47-51.

confronted with an answer he gave in the grand jury which would have ostensibly impeached his trial testimony.[14] 6/6 Tr. 219-221. Although the use of pronouns make this less than clear, it appears that Mr. Moran also testified that the distance between Mr. Moran and Mr. Madul exceeded the distance between Mr. Moran and Mr. Igwe when Mr. Moran man an identification of each. 6/6 Tr. 56. Mr. Moran also testified that Mr. Igwe was wearing a beanie when Mr. Moran identified him and that Mr. Moran was "100 percent sure" that Mr. Igwe was the man who robbed him.

Officer Sariah Balhis

The government next called MTPD Officer Sariah Balhis. 6/6 Tr. 69-70. Officer Balhis testified that on February 13, 2023, while at the Gallery Place Metro station, a man approached her and MTPD Officer Mansur Deen on the "Red Line mezzanine" and reported being robbed on a Metro train, describing the robber as "a tall black male wearing all black with a ski mask." 6/6 Tr. 70-71. In response, Officers Balhis and Deen "went downstairs to the lowest-level platform and canvassed for the person that robbed him." 6/6 Tr. 72 (1-3). Not finding "the person who robbed [Mr. Moran] on the platform," the officers "went to where [Mr. Moran] stated he… and the person that robbed him… exited the train." 6/6 Tr. 72 (6-10).

[14] The trial court earlier denied Mr. Igwe's request to recross-examine Mr. Moran about his interaction with prosecutors and police officers testifying in the grand jury. 6/6 Tr. 59-68.

The government then admitted without objection video from the Gallery Place Metro station. While admitted without objection, Mr. Igwe objected on hearsay grounds to Officer Balhis identifying Mr. Moran in the video. Mr. Igwe then elaborated, indicating that because one could not "make out any defining features of the individual," "see that individual's face," or "make out any details," and because Officer Balhis did not observe the events depicted in that portion of the video,[15] Officer Balhis must have known that information because someone else told her. 6/6 Tr. 76. Prompted to lay further "foundation," the government elicited that Officer Balhis saw Mr. Moran for "[m]aybe an hour and a half." 6/6 Tr. 77-78. The trial court then overruled Mr. Igwe's objection, permitting Officer Balhis to testify that she "knew" a person depicted in government exhibit 30 (the same video) was Mr. Moran "because of what he was wearing." 6/6 Tr. 79.

Mr. Igwe then objected when Officer Balhis began to testify that another man depicted in the video, depicting events Officer Balhis had not personally observed, was "the defendant." 6/6 Tr. 79 (17-24). At the bench, Mr. Igwe stated that "number one, there have been no foundational questions asked; number two, it is plain to see that the figure that she is going to be saying is the defendant, again, is not distinguishable in any reasonable way." Mr. Igwe made clear that he was "objecting any time this officer refers to the figure in that video as Mr. Igwe or defendant." 6/6

[15] "[S]he was not there present when this happened; she was upstairs." 6/6 Tr. 76.

Tr. 80-81 (24-2). The trial court then sustained Mr. Igwe's hearsay objection to Officer Balhis testifying that she went to "the end" of the Metro platform because Mr. Moran told Officer Balhis he and his assailant go off the train in that location, but denied Mr. Igwe's request "for an instruction to the jury regarding this officer's identification of both the defendant" before being cut off. 6/6 Tr. 82-86.

Officer Balhis continued testifying about events about which she had no personal knowledge, including "[s]omebody running into the train" with "property," which Officer Balhis described as a "black bag and a clear trash bag," and Mr. Moran "running, trying to find help or an officer." 6/6 Tr. 87-89. Officer Balhis then narrated video footage in which she "went to the end of the platform where [Mr. Moran] stated he last saw the person that robbed him and where him and the person that robbed him exited the train at," the same testimony to which the trial court previously sustained Mr. Igwe's hearsay objection. 6/6 Tr. 89-90.

Over Mr. Igwe's objection, the trial court then permitted Officer Balhis to testify that Mr. Moran said "no" when asked whether several people[16] on the platform were his assailant. 6/6 Tr. 90-91. Officers Balhis and Deen then went "up to the mezzanine" because Mr. Moran "sa[id] that he s[aw] the person who robbed him," a person referred to throughout the trial as Mr. Madul. 6/6 Tr. 92. Through

[16] When asked how many times this happened, Officer Balhis answered "multiple times." 6/6 Tr. 91 (8-11).

Officer Balhis and without objection, the United States then admitted as government exhibit 16 a video depicting Officer Balhis and other officers detaining Mr. Madul, with Mr. Moran also visible. 6/6 Tr. 92-93. Officer Balhis testified that Mr. Moran was "wasn't, like, that confident," that Mr. Madul was his assailant because Mr. Moran said "that's not him" "between two to ten minutes" later. 6/6 Tr. 94. When Mr. Moran said "that's not him," officers "released" Mr. Madul. 6/6 Tr. 95.

When Officer Balhis then began describing what she did next, the trial court overruled Mr. Igwe's objection to Officer Balhis identifying the person in a "be-on-the-lookout poster" ("BOLO") as "the actual person who robbed Mr. Moran," an object lodged as a "challenge [to] her competency in answering this question." 6/6 Tr. 95-96. Officer Balhis testified that the image for the BOLO, government exhibit 32, was taken from footage recorded at the Mount Vernon Square Metro station. After Mr. Igwe renewed his earlier objection to Officer Balhis identifying Mr. Igwe as the person depicted in footage from the Gallery Place station (government exhibit 16), during a lengthy bench conference, the trial court overruled the objection on the understanding that the United States, in the trial court's view, would "lay the foundation" to permit Officer Balhis to identify Mr. Igwe in videos and photographs to which Officer Balhis was not a percipient witness. The trial court appeared to view this foundation as "interacting directly with [Mr. Igwe] that evening and s[eeing] him, s[eeing] what he was wearing, s[eeing] what he was carrying, and…

explain[ing] why she believes that" the person depicted in the video and photographs is Mr. Igwe, and declined Mr. Igwe's request for an instruction "to not consider this officer's identification of the images in the video and the BOLO as the defendant, at least up to this point in the trial, and… to disregard that testimony that [Officer Balhis] ha[d] given up to th[at] point." 6/6 Tr. 101-03.

After an in-court identification of Mr. Igwe as the person she arrested on February 13, 2023, Officer Balhis testified that, when arrested, Mr. Igwe had "Aldair's property," "[a] North Face black backpack, his [work] uniform and an eyeglass case," and a knife, not said to belong to Mr. Moran. 6/6 Tr. 103-106. Officer Balhis then testified that the basis for her previous testimony identifying Mr. Igwe as a person seen in video footage from the Gallery Place Metro station was "based on the description" Mr. Moran provided "and the clear trash bag that he was holding." 6/6 Tr. 106-107. Officer Balhis offered the same testimony, with the same basis for identification, adding in details about the officer's perception of other articles of clothing,[17] regarding a BOLO created from video footage recorded at the Mount Vernon Square Metro station (government exhibit 35). Mr. Igwe then indicated that he had no objection to the following line of questioning:

> I am now going to show Off. Balhis the picture of the defendant in the video of him at a closer angle jumping

[17] 6/6 Tr. 108 (18-23) ("[T]he all black, the bag of his own, his own bag and the Nike symbol/logo on his jacket. Q. Is there anything else distinctive about what he's wearing? A. The shoes.").

> back on the train at Gallery Place. I'm going to show that footage and I'm going to ask how all of those different characteristics that she described are present in the BOLO at Mt. Vernon and present at the arrest in Gallery Place are similar to that person in the footage at Gallery Place.

6/6 Tr. 111 (15-24).

Officer Balhis then testified that Mr. Igwe did not remain at Gallery Place after the robbery and that he went to the Mount Vernon Square Metro station, about which Officer Balhis had no personal knowledge, and without objection repeatedly and at length identified Mr. Igwe as a person depicted in video recorded at the Mount Vernon Square Metro station (government exhibit 38). 6/6 Tr. 123-28.

After some investigation, approximately two hours after the robbery, Officer Balhis "came across" Mr. Igwe at the "7th and H" mezzanine, where officers stopped and searched him, recovering various items, including a knife. 6/6 Tr. 130-31. Some time thereafter, officers conducted a show-up identification procedure with Mr. Moran, who identified Mr. Igwe as the person who robbed him, during which Officer Balhis was "next to" Mr. Igwe. 6/6 Tr. 131-32. Without objection, the United States moved into evidence video footage recorded close in time to the show-up and footage of Mr. Igwe walking in the "breezeway" shortly before his arrest. 6/6 Tr. 133-35. The government then again elicited from Officer Balhis an identification of Mr. Igwe as a person, the suspect, depicted in video capturing events Officer Balhis did not witness. 6/6 Tr. 136-38.

On cross-examination Officer Balhis testified that Mr. Moran was the only witness to the alleged offense with whom officers conferred and that "the description that Mr. Moran gave was of an African-American male dressed in black and a ski mask"; Mr. Moran did not give a height but said the suspect was "tall." 6/6 Tr. 139-40. Mr. Moran did not provide a description of the suspect's facial hair or lack thereof, eyes, voice, or build, and did not specify the color of a bag Mr. Moran said the suspect was carrying. 6/6 Tr. 140-41. Regarding the stop of Mr. Madul, Officer Balhis agreed that Mr. Moran was "within about 15, maybe 20 feet" of Mr. Madul when Mr. Moran said "that's him," then saw Mr. Madul from a distance of "no more than six feet," continued to "look at and see" Mr. Madul, and that she had no reason to doubt the confidence within which Mr. Moran identified Mr. Madul as his assailant until Mr. Moran said, "no, that's not him," which Mr. Moran did for the first time at least three minutes after officers stopped Mr. Madul. 6/6 Tr. 141-51.[18] Regarding differences in appearance between Mr. Igwe and Mr. Madul, Officer Balhis agreed that "Mr. Madul was… much taller than Mr. Igwe," that Mr. Igwe was "around six feet tall," and that Mr. Madul was "approximately… six-feet-six tall." 6/6 Tr. 152-54.

[18] Without objection, video footage from the Gallery Place Metro station depicting the stop of Mr. Madul, Officer Balhis, and, at times, Mr. Moran, was admitted as defense exhibit A.

When asked about the "BOLO" admitted as government exhibit 1, Officer Balhis acknowledged that one could not see any "Nike logo" on the assailant's clothing. 6/6 Tr. 157-58. When asked to describe what colors she could see in what she previously testified were "distinctive" shoes—"multi-colored… Jordans,"[19] Officer Balhis testified that she could see three colors: 1) "black," 2) "like a neutral color at the top," and 3) an unspecified color—"[t]he front of his shoe is a lighter color than the black in the middle." 6/6 Tr. 158. Officer Balhis agreed that "many African-American males… were wearing all black on that particular day riding the Metro who both had dark clothes or all black clothes and dark headgear." 6/6 Tr. 159 (19-23).

Mr. Igwe also admitted a photograph taken of him after Officers Deen and Balhis detained him. Mr. Igwe was not wearing a ski mask and no ski mask was found in his property. 6/6 Tr. 169-71. During a show-up identification procedure with Mr. Moran, which Officer Balhis testified occurred about two hours and fifteen minutes after the robbery, Officer Balhis agreed that Mr. Igwe was in handcuffs, but could not remember whether she had her hand on Mr. Igwe, whether another officer had his or hand on Mr. Igwe, where any other officers were standing, or how many officers were present, other than "multiple" officers being present. 6/6 Tr. 172-77. Officer Balhis testified that the bag which Mr. Igwe possessed when stopped by

[19] 6/6 Tr. 108-09.

officers, which Mr. Moran testified was the bag taken from him, was "at the scene of the show-up," i.e., "topside Gallery Place Metro station." 6/6 Tr. 178 (22-25).

On redirect examination, Officer Balhis testified that Mr. Moran's bag was not "part of the show-up" because it was "inside of [Mr. Igwe's] trash bag," without specifying where relative to Mr. Igwe the trash bag was. 6/6 Tr. 182-83. Officer Balhis also identified Mr. Igwe as a person in two video clips not previously shown to her in court, containing events she did not witness, saying that they showed Mr. Igwe "running inside of the train with the clear trash bag" and "exiting the train at Mt. Vernon Square." 6/6 Tr. 184-85. When Mr. Igwe objected, arguing that "[i]t is just patently unreasonable for… her to say that this is the defendant leaving the train," the trial court overruled the objection, stating that the United States should bring out what the trial court viewed as the foundation, that "it's also the correct station, the time is the same and there are other characteristics." 6/6 Tr. 185-88. The government then again repeatedly and at length elicited testimony from Officer Balhis identifying Mr. Igwe as a person in multiple video clips recorded at the Mount Vernon Square Metro station, events Officer Balhis did not observe. 6/6 Tr. 188-91.

After a stipulation to the admission of government exhibits "derived from Metro surveillance video previously obtained by the Metropolitan Transit Police Department" and defense exhibits, still images taken from the same video footage,

the government rested. 6/6 Tr. 193-94. The court then denied Mr. Igwe's motion for a judgment of acquittal. 6/6 Tr. 195.

The Defense Case

After a *Boyd* inquiry,[20] the defense moved into evidence and published seven still images and moved into evidence two videos and rested. 6/6 Tr. 213-15.

Closing Arguments

After the court instructed the jury,[21] the government began its closing argument. As relevant to this appeal, the government emphasized Officer Balhis's identification of Mr. Igwe as a person depicted in video footage, Mr. Moran's assailant, events to which Officer Balhis was not a percipient witness.

> She also meticulously and painstakingly went through all of the surveillance video that she reviewed from Gallery Place, from Mt. Vernon; and *she identified for you, members of the jury, that it was this defendant who was carrying Aldair Moran's backpack from Gallery Place to Mt. Vernon and then back at Gallery Place.*

6/7 Tr. 30 (14-19) (emphasis added).

> Mr. Moran is going to be identified with the yellow arrow and Mr. Igwe is identified with the red arrow.

6/7 Tr. 31 (8-10).

> Now what I want to do is replay this segment so that you can see what the defendant is doing.

[20] 6/6 Tr. 196-99.
[21] 6/6 Tr. 8-26.

> MS. AUYEUNG: Now, remember, the defendant is identified with the red arrow. He takes a different path.
>
> At this point, he has Aldair Moran's backpack in his hand. He knows it doesn't belong to him. So what does he do? He sees Aldair Moran and then, at that moment as the door begins to close on the Metro train, he hops back in. He needed to leave the scene of the crime; he didn't want to leave a trace.
>
> So there he goes onboard the train; next stop, Mt. Vernon.
>
> MS. AUYEUNG: And here, Mt. Vernon surveillance footage actually depicts his path.
>
> He gets off the train. And, again, members of the jury, he has a bag that he knows doesn't belong to him. So what does he do? Not only does he flee the scene, that bag is now in the translucent trash bag and not in plain view. Because he knew it didn't belong to him, so he needed to make sure that no one sees it.
>
> And I want you to pay close attention, members of the jury, when you're back there deliberating and reviewing the surveillance footage. Pay close attention to the mannerisms, how the defendant is behaving. He's looking back. He's making sure that the coast is clear. He's making sure that no one is following him.

6/7 Tr. 31-33.

The United States also urged the jury to "[f]ind justice for Aldair Moran," a subject to which it would repeatedly return in rebuttal:

> On February 13th of 2023, Aldair Moran was robbed of his backpack; and with that, he testified that – with that, not only was his backpack taken, but his sense of security was taken as well. He told you that he still takes the Metro

> train. But how does he feel now when he's taking the Metro train? He's looking both ways. He doesn't feel as safe anymore. And that, members of the jury, that can't stand. Find justice for Aldair Moran.

6/7 Tr. 38-39.

Mr. Igwe's closing argument focused on misidentification,[22] emphasizing Mr. Moran's identification of Mr. Madul, several inches taller than Mr. Igwe, as the robber from a close distance within minutes of the offense,[23] Mr. Madul's testimony that the robber's knife had a silver blade, whereas Mr. Igwe's knife had a black blade,[24] the suggestive nature of the show-up identification,[25] and that a ski mask, which Mr. Moran told Officer Balhis the robber wore, would have prevented observation of facial features. 6/7 Tr. 42-23. Further seeking to undermine Mr. Moran's identification of him, Mr. Igwe underscored that Mr. Moran never testified that he saw the robber's face and reiterated the paucity of Mr. Moran's description of the robber, which did not include any description of facial features, facial hair, or eyes, but only "a tall African-American male wearing black or dark clothes" with "a black ski mask." 6/7 Tr. 41-42. To further elucidate the point, Mr. Igwe highlighted for the jury images of several people who were "tall African-American male[s]

[22] 6/7 Tr. 51 (7-8) ("Now, this case hangs entirely, again, on the reliability of [Mr. Moran's] identification of Mr. Igwe.").
[23] 6/7 Tr. 44-46,
[24] 6/7 Tr. 43.
[25] 6/7 Tr. 46-49.

wearing black or dark clothes" with some sort of head covering, all at the Gallery Place Metro station close in time to the offense. 6/7 Tr. 49-51. Regarding Mr. Igwe's possession of Mr. Moran's bag at the time of his arrest, Mr. Igwe noted that at least eighty minutes passed between the offense and Mr. Igwe's arrest, arguing that someone else took the bag from Mr. Moran and discarded it and that Mr. Igwe then picked up the bag. 6/7 Tr. 40-41.

In its rebuttal argument, the government highlighted Mr. Moran's statements of "non-identification"—statements to Officer Balhis that several people on the platform were *not* his assailant,[26] made several personal appeals to the jury, made statements usurping the role of the jury, and misstated its burden of proof:

- Now, the unluckiest person in this entire case, that title goes to Aldair Moran. After all, all he did was board the Metro that day. All he did was get on the wrong Metro car at the wrong time and run into the wrong person. What happened to him is wrong. He did not deserve to have to look down a knife just because he was trying to get home that day;[27]
- He wants to find the person who did this to him, the person who took his backpack away, the person who took his dignity away. And that's Mr. Igwe;[28]
- Now, reasonable doubt is not just some term that you can haphazardly throw around in order to excuse robbing somebody on the Metro at knifepoint. It's a legal term of art that carries an important meaning to it;[29]

[26] 6/7 Tr. 61.
[27] 6/7 Tr. 69 (12-19).
[28] 6/7 Tr. 62 (23-25).
[29] 6/7 Tr. 63 (3-6).

- It's not reasonable doubt if the Jordans are three-colored or multicolored or none of that. It's strictly about the elements of the offenses;[30]
- And in order for you to even arrive at that conclusion that Mr. Catacalos just offered, you would necessarily have to engage in the exact type of speculation and guesswork that Judge Park instructed you in his jury instructions you're not allowed to engage in.[31]

The government also highlighted Officer Balhis having identified Mr. Igwe as a person depicted in a video containing events Officer Balhis did not personally observe. 6/7 Tr. 66-67.

Twenty minutes after retiring to deliberate, before receiving admitted exhibits, the jury sent a note reading "We have reached a verdict." 6/7 Tr. 76. Without objection, the trial court sent a note telling the jury that jury instructions and exhibit "are now being provided to you so that you have the opportunity to review them if you wish. When you are preparing to enter the courtroom and deliver your verdicts, please send me a note and we will do so." 6/7 Tr. 77 (6-13). Less than eight minutes later, the jury sent another note indicating it had reached a verdict, finding Mr. Igwe guilty on all counts. 6/7 Tr. 78-81.

Following changes in counsel and a competency evaluation, the court sentenced Mr. Igwe to 48 months' incarceration for armed robbery, 48 months' incarceration for ADW, and 24 months' incarceration for carrying a dangerous

[30] 6/7 Tr. 63 (19-21).
[31] 6/7 Tr. 58 (1-6).

weapon ("CDW"), all to run concurrent with one another, and to be followed by supervised release. App'x 33 (Order).

This timely appeal followed. R. 147-50 (PDF).

SUMMARY OF THE ARGUMENT

"[L]ay witness testimony generally must be based on personal knowledge, whether it is proffered as fact or opinion,"[32] and a person does not "'witness[]'… events in question—and thereby obtain[] personal knowledge of them—solely by watching recorded surveillance footage." *Id.* (collecting cases). The trial court thus abused its discretion by permitting over objection Officer Balhis to repeatedly testify about events depicted in video footage recorded at the Gallery Place and Mount Vernon Square Metro stations (and still images therefrom) of which Officer Balhis had no personal knowledge. *See, e.g.*, 6/6 Tr. 76-89, 101-03, 106-08, 123-28, 136-38, 184-85, 188-91.

"'[L]ay witness opinion testimony regarding the identity of a person in a surveillance photograph or… videotape' is not admissible unless it is 'rationally based on the perception of a witness who is familiar with the defendant's appearance and has had substantial contact with the defendant.'" *Geter v. United States*, 306 A.3d 126, 137 (D.C. 2023) (quoting *Sanders v. United States*, 809 A.2d 584, 596

[32] *Callaham v. United States*, 268 A.3d 833, 848 (D.C. 2022) (internal citations omitted).

(D.C. 2002)). This court has found the "substantial contact" standard satisfied testimony from the defendant's "sister and someone else who had known him for over a decade," a defendant's "ex-girlfriend, a neighbor of twenty-five years, a former boss, a childhood classmate who had seen him recently, a local youth leader who had known him for 'many years,' and another neighbor,"[33] by correctional officers who, "over a period of months, had daily interaction with [the defendants] throughout the routine functions of their jobs,"[34] by officers who had "known [the accused] for seven or eight years," "watched [him] play [sports] throughout their time patrolling the neighborhood," "talk[ed] to [him] daily and had recent contact with him before the shooting,"[35] and by "a social worker assigned to [a] defendant's family two years prior to the shooting, [who] had worked intensely with them for months, and had continued to see the defendant thereafter, albeit less frequently." *Geter*, 306 A.3d at 137 (summarizing *Young v. United States*, 111 A.3d 13, 14-16 (D.C. 2015)).

"This case," like *Geter*, "could hardly be more different than *Sanders* or any case subsequent" as Officer Balhis did not "claim[] either to have any familiarity with Mr. [Igwe]'s 'appearance' or 'physical characteristics' or to have had

[33] *Sanders*, 809 A.2d at 593 n.10 & 594.
[34] *Vaughn v. United States*, 93 A.3d 1237, 1271 (D.C. 2014). This court considered it a "close call" whether this daily contact for months constituted substantial contact.
[35] *Hilton v. United States*, 1061, 1069 (D.C. 2021).

'substantial contact with' him… [i]nstead… purport[ing] to identify the individual [she] saw in the video footage as Mr. [Igwe] based entirely on what he was wearing." 306 A.3d at 137-38. Because "[t]he requisite foundation for [Officer Balhis's] identification testimony under *Sanders* was thus non-existent,… admission of this testimony was in error." *Id.* at 138.

"[T]he prior identification exception" to the rule against hearsay "applies to statements of identification, but not to detailed accounts of the actual crime." *Randolph*, 882 A.2d at 220 (quoting *Brown v. United States*, 840 A.2d 82, 89 (D.C. 2004)). Statements of "non-identification"—those which do not "prove the identity of [] a person or thing"—do not fall within the exception. *Id.* at 220 & n.17. Officer Balhis's testimony that Mr. Moran told her that several people on the Metro platform were *not* the person who robbed him was thus inadmissible hearsay, and the trial court erred by admitting over objection this inadmissible hearsay.

"Prosecutorial remarks that seek to arouse the sympathy of the jurors for the victim are improper." *Hart v. United States*, 538 A.2d 1146, 1150 (D.C. 1988). (quoting *Powell v. United States*, 455 A.2d 405, 410 (D.C. 1982)). Similarly, "a prosecutor's misleading statements during closing argument, especially rebuttal argument, may 'so infect[] [a] trial with unfairness as to make the resulting conviction a denial of due process.'" *Robinson v. United States*, 50 A.3d 508, 531 (D.C. 2012) (quoting *Woodard v. United States*, 56 A.3d 125, 128 (D.C. 2012)).

"Improper prosecutorial comments are looked upon with special disfavor when they appear in the rebuttal because at that point defense counsel has no opportunity to contest or clarify what the prosecutor has said." *Coreas v. United States*, 565 A.2d 594, 605 (D.C. 1989) (quoting *Hall v. United States*, 540 A.2d 442, 448 (D.C. 1988)). Where no objection is lodged in the trial court, this court reviews for plain error. *See, e.g.*, *Young v. United States*, 305 A.3d 402, 418 (D.C. 2023). Where the United States repeatedly sought to arouse the sympathy of the jury, primarily in rebuttal, by stating, inter alia, that the complainant's "sense of security was taken," that the complainant "doesn't feel as safe anymore," that the jury should thus "find justice for" the complainant, that "[w]hat happened to [the complainant] is wrong," that the complainant "did not deserve to have to look down a knife just because he was trying to get home that day," and that the complainant's assailant "took his dignity away," and simultaneously made comments usurping the role of the jury and misstating its burden of proof, effectively telling jurors, inter alia, that acquitting Mr. Igwe would be legally improper, the trial court plainly erred in failing to order these comments stricken.

For non-constitutional error, "[t]he standard for reversal where more than one error is asserted on appeal is whether the cumulative impact of the errors substantially influenced the… verdict." *Smith v. United States*, 26 A.3d 248, 264 (D.C. 2011). That is, reversal is required if this court "cannot say, 'with fair

assurance' that the… verdict was not 'substantially swayed' by the cumulative impact of [such] errors." *In re C.A.*, 186 A.3d 118, 126 (D.C. 2018) (quoting *Kotteakos v. United States*, 328 U.S. 750, 764–65 (1946)). Where Officer Balhis repeatedly identified Mr. Igwe in video footage as the suspect despite lacking personal knowledge and the complete absence of the foundation required by *Sanders*, where no video footage of the robbery itself was admitted, where Mr. Moran, the only percipient, testifying witness, identified Mr. Madul as the robber within about ten minutes of the offense, where Mr. Madul was about six inches taller than Mr. Igwe, where Mr. Moran's description of the robber was sparse and included the robber wearing a "ski mask," and where the color of the knife Mr. Igwe possessed was a different color than the knife Mr. Moran testified the robber possessed, one cannot say with fair assurance that the verdict was not substantially swayed by the cumulative impact of the errors, requiring reversal of all convictions.

Finally, assuming, *arguendo*, that this court does not reverse Mr. Igwe's convictions, Mr. Igwe's ADW conviction must be vacated, as it merges with the armed robbery conviction "where both offenses [we]re committed against the same victim as part of the same criminal incident." *Morris v. United States*, 622 A.2d 1116, 1129 (D.C. 1993).

ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION BY PERMITTING OFFICER BALHIS TO TESTIFY OVER OBJECTION ABOUT EVENTS DEPICTED IN VIDEO FOOTAGE OF WHICH SHE HAD NO PERSONAL KNOWLEDGE.

a. Standard of Review.

Where preserved by a timely objection, this court reviews evidentiary rulings, including whether a witness has personal knowledge necessary to competently testify about an issue, for abuse of discretion. *See, e.g.*, *Grimes v. United States*, 252 A.3d 901, 914 (D.C. 2021). "The determinative factor for purposes of preservation for appellate review is not whether counsel made every conceivable argument, but whether the trial judge was 'fairly apprised as to the question on which [she was] being asked to rule.'" *In re M.C.*, 8 A.3d 1215 (D.C. 2010) (quoting *Hunter v. United States*, 606 A.2d 139, 144 (D.C. 1992)). "[A] trial court abuses its discretion by: (1) failing to consider a relevant factor; (2) relying upon an improper factor; or (3) failing to provide reasons that support the trial court's conclusions." *Tiger Steel Eng'g, LLC v. Symbion Power*, LLC, 195 A.3d 793, 803 (D.C. 2018) (quoting *In re Estate of McDaniel*, 953 A.2d 1021, 1023–24 (D.C. 2008)). "[I]t is necessarily such an abuse for the trial court to employ 'incorrect legal standards.'" *C.A.*, 186 A.3d at 121 (quoting *Mayhand v. United States*, 127 A.3d 1198, 1205 (D.C. 2015)). Where

Mr. Igwe timely objected[36] when Officer Balhis began testifying about events she did not witness, including Mr. Moran and the suspect getting off and on a Metro train at Gallery Place and a person Officer Balhis identified (on video) as the suspect at the Mount Vernon Square Metro station, this court reviews for abuse of discretion.

b. Officer Balhis Lacked Personal Knowledge of the Suspect Entering a Train at the Gallery Place Metro station and of the Suspect's Activities at the Mount Vernon Square Metro station.

Officer Balhis did not witness: 1) Mr. Moran exit a Metro train at the Gallery Place station, which Mr. Moran testified he did within seconds of the alleged offense, 2) the suspect exit a Metro train at the Gallery Place station at the same time Mr. Moran did, 3) the suspect walk around on the train platform at the Gallery Place station after getting off the Metro train, 4) the suspect the get back on a Metro train at Gallery Place, 5) the person Officer Balhis testified was the suspect exit a Metro train at the Mount Vernon Square Metro station, or 6) the person Officer Balhis testified was the suspect[37] then board a Metro train at the Mount Vernon Square station. This was made clear by Officer Balhis's testimony that she "knew" that the suspect "went to Mt. Vernon Square… from our DVR unit" and from "review[ing]

[36] "[S]he was not there present when this happened; she was upstairs." 6/6 Tr. 76.
[37] As discussed, *infra*, even more problematically, Officer Balhis testified that the suspect was Mr. Igwe. Because such testimony was entirely without the foundation required by *Sanders*, for ease, Mr. Igwe characterizes such testimony in this section as having identified the suspect.

surveillance footage in this case,"[38] from her testimony that she learned of the alleged robbery from Mr. Moran while she was "on the Red Line mezzanine," an area not on the same level as the train platform, when Mr. Moran "stat[ed] he was just robbed aboard a train,"[39] from her testimony that the suspect was gone when she "went downstairs to the platform from the mezzanine and canvassed for the person that he stated robbed him,"[40] from Mr. Moran's testimony that when he took officers to the "exact place" where the suspect got off the train, the suspect was not there,[41] and from the total absence of any testimony that Officer Balhis witnessed such events. Yet, the trial court permitted Officer Balhis to testify regarding events falling into each of the aforementioned six categories (and more). *See, e.g.*, 6/6 Tr. 76-89, 101-03, 106-08, 123-28, 136-38, 184-85, 188-91.

When Mr. Igwe objected, inter alia, that Officer Balhis did not witness the events,[42] the trial court overruled the objections,[43] made statements indicating its belief that having later watched video permitted Officer Balhis to offer such testimony. *See, e.g.*, 6/6 Tr. 187-88. The United States, for its part, despite this court's repeated decisions to the contrary, contributed to the trial court's erroneous

[38] 6/6 Tr. 123-24.
[39] 6/6 Tr. 71 (3-6).
[40] 6/6 Tr. 71 (9-11).
[41] 6/6 Tr. 8.
[42] "[S]he was not there present when this happened; she was upstairs." 6/6 Tr. 76.
[43] *See, e.g.*, 6/6 Tr. 95-96, 102-03, 106-07.

understanding of the law, expressly arguing that Officer Balhis was competent to testify about events she did not witness because Officer Balhis later watched video depicting the events.

> Number two, this is footage that she's reviewed even before the Government came to -- before it came to our office. This is footage she's reviewed over the course of her investigation and the compilation which Mr. Catacalos has had for days now.[44]
> …
>
> THE COURT: What is your proffer as to how she's going to establish that?
> MR. ASSEFI: Your Honor, my proffer on how she's going to establish that is that Aldair Moran comes and gives her the description.
> In reviewing the MTPD footage, they see an individual with Aldair Moran's backpack. It's a zoomed-in version – it's a BOLO of Gallery Place and there's a BOLO of Mt. Vernon. Okay?
> And both of those images are what the Government has already admitted in its exhibits, Exhibit 1 and Exhibit 2, and were used as demonstratives. Those were the two images used in the BOLOs. They show the defendant with Aldair Moran's belongings. It shows him with the translucent trash bag.
> And the officers, having seen the footage at Gallery Place and Mt. Vernon of him carrying the bag, jumping back in the train carrying the bag and then finding that exact person with the bag at Gallery Place is what led them to believe that that's the defendant.
> So all of it is going to end with, she arrests that man, Mr. Igwe, at Gallery Place, and no amount of objections changes the fact that she will be able to point to Mr. Igwe sitting there next to Mr. Catacalos and saying "That's the person I arrested. He's carrying the bag that's seen in the

[44] 6/6 Tr. 74-75 (24-3).

> different BOLOs that appears to be the same bag and he matches the description of those BOLOs."[45]
> …
> Your Honor, this is part of the surveillance footage that she reviewed in the case.[46]

In *Callaham*, this court "reaffirm[ed] the requirement that lay witness testimony generally must be based on personal knowledge, whether it is proffered as fact or opinion," and "reject[ed] the government's argument that the detectives 'witnessed' the events in question—and thereby obtained personal knowledge of them—solely by watching recorded surveillance footage." 268 A.3d at 848. Where the trial court over objection permitted Officer Balhis to testify about events in the six categories described, *supra*, of which she had no personal knowledge, based on its misunderstanding of applicable law, it abused its discretion.

II. THE TRIAL COURT ABUSED ITS DISCRETION BY PERMITTING OVER OBJECTION OFFICER BALHIS TO IDENTIFY MR. IGWE AND MR. MORAN AS PEOPLE SHOWN IN VIDEO SURVEILLANCE FOOTAGE DEPICTING EVENTS OFFICER BALHIS DID NOT WITNESS BECAUSE "THE REQUISITE FOUNDATION FOR [OFFICER BALHIS'S] IDENTIFICATION TESTIMONY UNDER *SANDERS* WAS… NON-EXISTENT."

a. Standard of Review.

"The admission of… testimony" by a non-percipient witness "identifying a person in a video or photo is reviewed for abuse of discretion." *Hilton*, 250 A.3d at

[45] 6/6 Tr. 99-100.
[46] 6/6 Tr. 186 (15-16).

1069 (citing *Young*, 111 A.3d at 15 (D.C. 2015)). Where Mr. Igwe objected to both Officer Balhis's identification of Mr. Igwe[47] and Mr. Moran[48] in portions of video depicting events Officer Balhis did not witness, this court reviews for abuse of discretion.[49]

b. Officer Balhis Did Not Claim to Have Any Familiarity With Mr. Igwe's "Physical Appearance" or "Physical Characteristics" Within the Meaning of *Sanders*.

"'[L]ay witness opinion testimony regarding the identity of a person in a surveillance photograph or … videotape' is not admissible unless it is 'rationally

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[47] *See, e.g.*, 6/6 Tr. 79-81 ("Your Honor, I want to give a heads-up, I'm going to be objecting any time this officer refers to the figure in that video as Mr. Igwe or defendant."); 6/6 Tr. 95-96 ("I'm going to challenge her competency in answering this question. Her answer is that this is -- we got a BOLO of the actual person who robbed him, so she is making – she is -- this is a conclusionary – she's making a conclusion; and it was speculation as well."); 6/6 Tr. 100 (13-17) ("This officer has repeatedly referred to the image in both the videos that the Government showed as the "defendant." This officer also referred to the image in the BOLO from Mt. Vernon as the "defendant" rather than the "assailant," and I object, Your Honor.").

[48] *See, e.g.*, 6/6 Tr. 73-76. While Mr. Igwe also argued that such testimony was hearsay because the "only way that [Officer Balhis can say that that is [Mr. Moran] is because, either, during the course of her investigation, consulting with -- and viewing the videos afterwards and speaking with Mr. Moran himself or, perhaps, the prosecutors here who told her that 'that's him," Mr. Igwe also expressly challenged Officer Balhis's ability to identify Mr. Moran, stating "there is no rational way, there's no reasonable way that this witness can take a look at that image and say, yes, that's the complaining witness." 6/6 Tr. 74 (15-17).

[49] Because Mr. Igwe timely objected, this court reviews for abuse of discretion. Even if this court were to look further, when considering whether the trial court was "fairly apprised" of the question on which it was being asked to rule, this court's decision in *Geter*, finding *plain error* in the admission of identification testimony by detectives who, like Officer Balhis, had no prior contact with the accused, reinforces that the answer is yes. 306 A.3d at 137.

based on the perception of a witness who is familiar with the defendant's appearance and has had substantial contact with the defendant.'" *Geter*, 306 A.3d at 137 (quoting *Sanders*, 809 A.2d at 594 n.11 & 596). While some cases may present a close call about whether a witness is familiar with the defendant's appearance, this is not such a case. As in *Geter*, Officer Balhis did not claim "to have any familiarity with Mr. [Igwe's] 'appearance' or 'physical characteristics,'" but instead "purported to identify the individual [she] saw in the video footage as Mr. [Igwe] based entirely on what he was wearing" and what he was carrying. *Id.* at 137-38.[50] That is, Officer Balhis repeatedly purported to identify Mr. Igwe in video based on his shoes, a "Nike symbol/logo on his jacket, and a "translucent" bag described as a trash bag:

> Q. How were you able to determine that this person is the person who jumped on the train, as you mentioned, at Gallery Place?
> A. Based on the description --
> Q. And please be detailed -- okay. So you mentioned the description.
> What else?
> A. The clear trash bag, the black -- wearing the all black, the bag of his own, his own bag and the Nike symbol/logo on his jacket.
> Q. Is there anything else distinctive about what he's wearing?
> A. The shoes.

[50] Officer Balhis could properly identify Mr. Igwe as the person she arrested, including in video showing that arrest (government exhibit 39), but could not (properly) purport to identify Mr. Igwe as the person depicted in photos and videos depicting events she did not witness (government exhibits 1, 2, 30, 36, 38, 41).

6/6 Tr. 108 (11-23); *see id.* at 109-10, 113, 126, 135-36, 137-38.[51]

Indeed, when asked about Mr. Igwe's height, Officer Balhis stated that she "d[id]n't know" and was not "sure his exact height," before finally agreeing that he was "approximately" six feet tall,[52] and, when asked about whether Mr. Madul appeared older than Mr. Igwe, testified that she "c[ould]n't recall." 6/6 Tr. 155 (8-9). While Officer Balhis would in any event, as discussed, *infra*, have lacked the "substantial contact" with Mr. Igwe necessary to do so, she did not testify about Mr. Igwe's skin tone, hair, any identifying marks, eye color, or any other unique physical characteristic; i.e., she did not claim "to have any familiarity with Mr. [Igwe's] 'appearance' or 'physical characteristics.'" Because the trial court failed to consider any legally relevant factor and misapprehended the foundation required to permit such testimony, the trial court necessarily abused its discretion in permitting this identification testimony.

c. Officer Balhis, Who, So Far as the Record Reveals, Only Interacted With Mr. Igwe on the Date of the Offense, Did Not Have "Substantial Contact" With Mr. Igwe.

The trial court abused its discretion in permitting Officer Balhis to purport to identify Mr. Igwe in photographs and video to which she was not a percipient witness

[51] Officer Balhis's identification of Mr. Igwe as a person in video and photographs and as the person who robbed Mr. Moran extended far beyond the times at which she indicated that she was purporting to identify Mr. Igwe by his clothing. *See, e.g.*, 6/6 Tr. 76-89, 101-03, 106-08, 123-28, 136-38, 184-85, 188-91.

[52] 6/6 Tr. 153-54.

for a second, independent reason—Officer Balhis lacked the "substantial contact" with Mr. Igwe required by *Sanders* and its progeny. This court has found no error in trial courts finding this prong satisfied by relationships spanning years or decades, such as childhood friends, spouses, and other romantic partners,[53] officers who knew the defendant for "seven or eight years," and watched him play sports, at times spoke with him daily, and had recent contact with him. *Hilton*, 250 A.3d at 1069. This court considered it a "close call" whether correctional officers who for "months, had daily interaction with [the defendants] throughout the routine functions of their jobs" had such "substantial contact," ultimately concluding they did. *Vaughn*, 93 A.3d at 1271.

As in *Geter*, "[t]his case could hardly be more different than *Sanders* or any case subsequent," with Officer Balhis "on direct [and redirect] repeatedly identif[ying] Mr. [Igwe], a stranger" with whom Officer Balhis testified only that she arrested and conducted a show-up identification with Mr. Moran,[54] "in surveillance footage of… event[s] [she] had not witnessed as if [she] knew [Mr. Igwe] had been there, thereby impermissibly telling the jury to see him as the [robber] in the video footage." 306 A.3d at 137-39. Officer Balhis did not claim to have had "substantial contact," "[t]he requisite foundation for [Officer Balhis's]

[53] *Sanders*, 809 A.2d at 593 n.10 & 594.
[54] Officer Moran testified that she first made contact with Mr. Igwe at 11:01 pm, 6/6 Tr. 192 (1-5), and that the show-up occurred at 11:54 pm. 6/6 Tr. 172 (13-18). Whatever the precise length of that contact, it is exponentially less than the degree of contact found sufficient as a "close call" in *Vaughn.*

identification testimony under *Sanders* was thus non-existent, and admission of this testimony was in error." *Id.* at 138.

d. Officer Balhis Lacked Substantial Contact With Mr. Moran Necessary to Permit Her to Identify Mr. Moran as a Person in Video Footage Depicting Events She Did Not Witness.

While often applied to testimony purporting to identify defendants, this court's holding in *Sanders* is not limited to defendants.

> In the case before us, we now hold that lay witness opinion testimony *regarding the identity of a person in a surveillance photograph or a surveillance videotape* is admissible into evidence, provided that such testimony is: (a) rationally based on the perception of a witness who is familiar with the defendant's appearance and has had substantial contact with the defendant; and (b) helpful to the factfinder in the determination of a fact in issue.

Sanders, 809 A.2d at 596 (emphasis added).

Over objection, Officer Moran repeatedly identified Mr. Moran as a person depicted in government exhibit 30, video footage depicting Mr. Moran and the suspect (whom Officer Moran claimed was Mr. Igwe) exiting a Metro train at the Gallery, despite not having witnessed those events. 6/6 Tr. 73-79. Officer Moran did not testify that she had any contact with Moran prior to or after the date of the offense and testified that on the day of the offense, she interacted with him for "[m]aybe an hour and a half," 6/6 Tr. 77-78 (23-6), plainly insufficient to constitute the "substantial contact" required by *Sanders*. Accordingly, the trial court similarly abused its discretion in permitting this identification testimony.

III. THE TRIAL COURT ABUSED ITS DISCRETION BY ADMITTING OVER OBJECTION OFFICER BALHIS'S TESTIMONY REGARDING MR. MORAN'S STATEMENTS OF "NON-IDENTIFICATION," INADMISSIBLE HEARSAY.

a. Standard of Review.

"Evidentiary rulings, such as a court's decisions to admit hearsay evidence, are generally reviewed by this court for an abuse of discretion." *Grimes*, 252 A.3d at 914 (citing *Dutch v. United States*, 997 A.2d 685, 689 (D.C. 2010)). However, "'whether the trial court adhere[d] to the [appropriate] test for the admission of hearsay' under any given exception 'is a legal question' that [this court] effectively review[s] de novo." *Id.* (quoting *Mayhand*, 127 A.3d at 1205); *accord Parker v. United States*, 249 A.3d 388, 404 (D.C. 2021). Because Mr. Igwe objected to Officer Balhis's testimony that Mr. Moran told her that multiple people she pointed out shortly after the robbery were not the robber,[55] this court reviews de novo whether the trial court adhered to the appropriate test for the admission of hearsay.

b. Mr. Moran's Statements to Officer Balhis Did Not Fall Within the Statement of Prior Identification Exception to the Rule Against Hearsay.

"An out-of-court statement is hearsay, and hence must come within an exception to the rule against hearsay to be admissible, if it is offered for the truth of the matter asserted, but not if it is offered for another ("non-hearsay") purpose."

[55] 6/6 Tr. 90-91.

Jenkins v. United States, 80 A.3d 978, 989 (D.C. 2013) (citing *Cox v. United States*, 898 A.2d 376, 380 (D.C. 2006)). "[A] statement is… not hearsay under the prior-identification exception 'if the declarant testifies at the trial… and is subject to cross-examination concerning the statement and the statement is… an identification of a person made after perceiving the person.'" *Parker*, 249 A.3d at 406 (quoting D.C. Code § 14-102(b)(3)). In order to fall within the statement of prior identification exception, such a statement must *identify* a person. As this court observed in *Randolph*,

> It is sometimes useful to have a dictionary around. *Riggs Nat'l Bank v. District of Columbia*, 581 A.2d 1229, 1235 (D.C.1990). The first meaning of "identification" is "act of identifying"; "identify" means "to recognize or establish as being a particular person or thing." THE AMERICAN COLLEGE DICTIONARY 599 (1951 ed.). The principal meaning of "identify" is "[t]o prove the identity of (a person or thing)." BLACK'S LAW DICTIONARY 761 (8th ed. 1990).

882 A.2d at 220 n.17.

Said another way, the "prior identification exception cannot apply" to "challenged testimony contain[ing] no identification." *Id.* at 219.

Over Mr. Igwe's objection, the trial court permitted Officer Balhis to testify that Mr. Moran told her that "several" or "multiple" people on the Metro platform were *not* the robber.

> Q. In what ways did you look for the assailant on the platform?

> A. By canvassing, pointing out or asking did he see anybody that matched -- or that was the person that robbed him.
> Q. On the platform?
> A. Yes.
> Q. And how many times did you do that? Several times.
> Q. What was Mr. Moran's answer?
> MR. CATACALOS: Objection.
> THE COURT: Overruled.
> BY MR. ASSEFI:
> …
> Q. You had previously mentioned before the objection that you asked Mr. Moran if nearby people were his assailant. I'm asking you, how did he answer that question?
> A. While we were on platform he stated "no."
> Q. And how many times did that happen?
> A. Multiple times.
> Q. And each of those times, did he answer "no"?
> A. On the platform, yes.

6/6 Tr. 90-91.

Because the "challenged testimony contain[ed] no identification," it was inadmissible hearsay, and the trial court erred in permitting this testimony.

IV. THE TRIAL COURT PLAINLY ERRED IN FAILING TO ORDER STRICKEN THE PROSECUTORS' STATEMENTS IN CLOSING AND REBUTTAL ARGUMENTS ATTEMPTING TO APPEAL TO AROUSE THE SYMPATHIES OF THE JURY, USURPING THE ROLE OF THE JURY, AND MISSTATING ITS BURDEN OF PROOF.

a. Standard of Review.

Where no objection to statements in closing argument constituting prosecutorial misconduct is raised, this court reviews for plain error. *See, e.g.*, *Young*, 305 A.3d at 422 (citing *Wills v. United States*, 147 A.3d 761, 767 (D.C.

2016)). Because Mr. Igwe did not object to the statements in questions, this court reviews for plain error, which requires a "show[ing] that a trial court's allowance of evidence was '(1) error, (2) that is plain, (3) that affects substantial rights.'" *Id.* (quotiong *Otts v. United States*, 952 A.2d 156, 161 (D.C. 2008)). "If all three [mentioned] conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* (quoting *Portillo v. United States*, 62 A,3d 1243, 1258 n.17 (D.C. 2013)).

b. The Trial Court's Failure to Strike the Prosecutors' Statements Attempting to Appeal to the Juror's Sympathies, Made Principally in the United States' Rebuttal Argument, Was Plain Error.

This court has repeatedly held that "attempt[ing] to appeal to the jurors' sympathies [is] improper closing argument." *Carpenter v. United States*, 635 A.2d 1289, 1296 (D.C. 1993) (citing *Hart*, 538 A.2d at 1150); *see also Powell v. United States*, 455 A.2d 405, 410 (D.C. 1982), *reh'g denied*, 458 A.2d 412 (1983); *Coreas*, 565 A.2d at 604-05; *Dyson v. United States*, 450 A.2d 432, 438 (D.C. 1982); *Reed v. United States*, 403 A.2d 725, 730 (D.C. 1979). Where this court's decisions on this issue are consistent and date back decades, it is "clear or obvious" under current law that the prosecutor's statements that Mr. Moran had "his sense of security taken," that he "doesn't feel as safe anymore," and that "he's looking both ways," none of which had any legal relevance to the issues were intend to arouse the

sympathies of the jury for Mr. Moran and were thus improper. 6/7 Tr. 38-39. So too the prosecutor's subsequent exhortation that the impact on Mr. Moran "can't stand" and that the jury should thus "[f]ind justice for Aldair Moran." 6/7 Tr. 39. The prosecutor's comments in rebuttal were also "clearly or obviously" improper:

- What happened to him is wrong. He did not deserve to have to look down a knife just because he was trying to get home that day;[56]
- He wants to find the person who did this to him, the person who took his backpack away, the person who took his dignity away.[57]

c. The Trial Court's Failure to Strike the Prosecutor's Statements Usurping the Role of the Jury and Misstating Its Burden of Proof Was Plain Error.

Statements by the government improperly characterizing its burden of proving all elements of an offense beyond a reasonable doubt are improper. *See, e.g.*, *Golsun v. United States*, 592 A.2d 1054, 1059 (D.C. 1991). Claims of comments misstating the government's burden of proof warrant "careful scrutiny because [they] concern[] arguments addressed to "the most important" instruction in a criminal trial, the government's burden to prove guilt beyond a reasonable doubt." *Gilliam v. United States*, 46 A.3d 360, 368 (D.C. 2012) (quoting *Smith v. United States*, 709 A.2d 78, 79–80 (D.C. 1998)). Where "made during rebuttal, depriving the defense of an opportunity to offer a response," the impropriety of such comments is heightened

[56] 6/7 Tr. 69 (17-19).
[57] 6/7 Tr. 62 (23-25).

further still. In this case, the prosecutor made three comments, all in rebuttal, each of which had the effect of usurping the role of the jury or lessening its burden of proof by telling the jury that the defense arguments did not, as a legal matter, amount to reasonable doubt.

- Now, reasonable doubt is not just some term that you can haphazardly throw around in order to excuse robbing somebody on the Metro at knifepoint. It's a legal term of art that carries an important meaning to it;[58]
- It's not reasonable doubt if the Jordans are three-colored or multicolored or none of that. It's strictly about the elements of the offenses;[59]
- And in order for you to even arrive at that conclusion that Mr. Catacalos just offered, you would necessarily have to engage in the exact type of speculation and guesswork that Judge Park instructed you in his jury instructions you're not allowed to engage in.[60]

Given that such improper arguments were addressed to "the most important" instruction in a criminal trial, failing to instruct the jury to disregard the comments was clearly or obviously wrong.

d. The Trial Court's Failure to Strike the Improper Arguments Affected Mr. Igwe's Substantial Rights and Seriously Affected the Fairness, Integrity, and Reputation of the Proceedings.

"[I]n most cases [the 'substantial rights' prong] means that the error must have been prejudicial: It must have affected the outcome of the [trial] court proceedings." *Geter*, 306 A.3d at 139 (quoting *United States v. Olano*, 507 U.S. 725, 734 (1993)).

[58] 6/7 Tr. 63 (3-6).
[59] 6/7 Tr. 63 (19-21).
[60] 6/7 Tr. 58 (1-6).

Said another way, "[t]he question is whether 'the error in fact undermines confidence in the trial's outcome.'" *Id.* at 140 (quoting *Williams v. United States*, 210 A.3d 734, 744 (D.C. 2019)). Where the United States effectively told the jury that it need not prove identification, the only significantly disputed issue in the case, beyond a reasonable doubt, and where, as discussed, *infra*, this was far from an overwhelming case for the government, the trial court's failure to instruct the jury to disregarding the United States' improper arguments affected Mr. Igwe's substantial rights. As also discussed, *infra*, when considered with the improper admission of an extensive amount of identification testimony, where identification was the central issue in the case, the prosecutor's improper comments suggesting that it need not prove identification beyond a reasonable doubt and that Mr. Igwe's arguments did not, as a matter of law, amount to reasonable doubt, seriously impacted the fairness, integrity, and reputation of the proceedings.[61]

V. MR. IGWE'S CONVICTIONS MUST BE REVERSED BECAUSE ONE CANNOT SAY WITH FAIR ASSURANCE THAT THE VERDICT WAS NOT SUBSTANTIALLY SWAYED BY THE CUMULATIVE IMPACT OF THE AFOREMENTIONED ERRORS.

For non-constitutional error, "[t]he standard for reversal where more than one error is asserted on appeal is whether the cumulative impact of the errors substantially influenced the… verdict." *Smith*, 26 A.3d at 264. That is, reversal is

[61] The court need only find one of these three prongs satisfied to grant relief.

required if this court "cannot say, 'with fair assurance' that the… verdict was not 'substantially swayed' by the cumulative impact of [such] errors." *C.A.*, 186 A.3d at 126 (quoting *Kotteakos*, 328 U.S. at 764–65). "In making this evaluation," this court "weigh[s] 'the significance of the alleged errors and their combined effect against the strength of the prosecution's case.'" *Gardner v. United States*, 140 A.3d 1172, 1197 n.38 (D.C. 2016) (citing *Foreman v. United States*, 792 A.2d 1043, 1058 (D.C. 2002)). "This court has" left unresolved "how to evaluate the cumulative impact of such a mixed bag of errors," preserved and unpreserved, "and there is little pertinent authority elsewhere." *Hagans v. United States*, 96 A.3d 1, 44 (D.C. 2014).[62] "[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.'" *Gabramadhin v. United States*, 137 A.3d 178, 186 (D.C. 2016).

Even before reaching the unpreserved errors involving prosecutorial misconduct, the three preserved errors cumulatively require reversal. That is, this was far from an overwhelming case for the government. No video footage of the robbery itself was admitted. Mr. Moran, the only percipient, testifying witness, identified someone other than Mr. Igwe as the robber within about ten minutes of the offense. The person Mr. Moran first identified was about six inches taller than Mr. Igwe. Mr. Moran's description of the robber was sparse and general and

[62] *Hagans* involved both constitutional and non-constitutional errors. 96 A.3d at 44.

included the robber wearing a "ski mask." Whereas Mr. Moran repeatedly testified that the knife held by the robber was silver, the knife Mr. Igwe possessed was black. Against this evidence, the admission of Officer Balhis's improper identification testimony and testimony about events of which she lacked personal knowledge, both emphasized in closing argument,[63] repeatedly told the jury that Officer Balhis "*knew* [Mr. Igwe] had been there, thereby impermissibly telling the jury to see him as the [robber] in the video footage," footage which did not even capture the robbery itself. *Geter*, 306 A.3d at 137-39 (emphasis added).

To be sure, Mr. Igwe had what Mr. Moran testified were his belongings about an hour and a half after the robbery and was a black man wearing dark clothing, but given the many significant issues regarding identification in this case, one cannot say with fair assurance that the verdict was not substantially swayed by the cumulative impact of the errors, requiring reversal on all counts.

Moreover, the government then repeatedly told the jury in its rebuttal argument, a time when improper "comments are looked upon with special disfavor… because… defense counsel has no opportunity to contest or clarify what the prosecutor has said," that the issues Mr. Igwe raised about identification were insufficient as a matter of law to constitute reasonable doubt. Said another way, the prosecutor diluted the government's burden of proof, suggesting that it need not

[63] 6/7 Tr. 30-33.

prove identification beyond a reasonable doubt[64] and that concluding otherwise was impermissible and would be disregarding the judge's instructions.[65] Compounding matters further still, during that same rebuttal argument, the government also repeatedly attempted to arouse the sympathies of the jury for Mr. Moran. Taken together with the voluminous impermissible identification testimony telling the jury that Officer Balhis *knew* that a robbery had been committed and that Mr. Igwe committed it, her extensive testimony regarding events about which she had no personal knowledge, and the admission of impermissible hearsay that Mr. Moran said that other people were *not* the robber, which the United States emphasized in rebuttal,[66] one cannot say with fair assurance that the judgment was not substantially swayed by the cumulative impact of the errors.

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[64] 6/7 Tr. 63 (19-21) ("It's not reasonable doubt if the Jordans are three-colored or multicolored or none of that. It's strictly about the elements of the offenses.")

[65] 6/7 Tr. 58 (1-6) ("And in order for you to even arrive at that conclusion that Mr. Catacalos just offered, you would necessarily have to engage in the exact type of speculation and guesswork that Judge Park instructed you in his jury instructions you're not allowed to engage in."); *id.* at 63 (3-6) ("Now, reasonable doubt is not just some term that you can haphazardly throw around in order to excuse robbing somebody on the Metro at knifepoint. It's a legal term of art that carries an important meaning to it").

[66] 6/7 Tr. 61 (2-17) ("[W]hen we consider Aldair Moran's credibility in that moment right after he's been robbed, it's important to consider that, not only has he just been robbed, but Aldair Moran -- if it were the case that he were just walking around the Metro station saying, "That person could have done it," "That person could have done it," "That person could have done it," well, then, you would have a reason to be skeptical of a later identification, because he was so willing to just find somebody to say was his attacker. But, instead, what was the evidence you heard? Well, both Mr. Moran and Off. Balhis testified on that stand that, right after the robbery, she

VI. ASSUMING, *ARGUENDO*, THAT THIS COURT DOES NOT REVERSE MR. IGWE'S ARMED ROBBERY CONVICTION, MR. IGWE'S ADW CONVICTION MUST BE VACATED BECAUSE IT MERGES WITH THE ARMED ROBBERY CONVICTION.

a. Standard of Review.

This court "review[s] merger issues de novo." *In re Z.B.*, 131 A.3d 351, 354 (D.C. 2016) (citing *Robinson*, 50 A.3d at 532).

b. Mr. Igwe's Conviction for ADW Merges Into the Armed Robbery Conviction Because "Both Offenses [We]re Committed Against the Same Victim as Part of the Same Criminal Incident."

"The Double Jeopardy Clause of the Fifth Amendment 'protects against multiple punishments for the same offense.'" *Id.* (quoting *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969)). "The test to be applied in assessing whether convictions merge for double jeopardy purposes turns on the statutory elements of a particular violation rather than the evidence adduced at trial," and requires application of the *Blockburger*[67] test. *Id.* In this case, the court need not look far, as it has repeatedly reaffirmed that convictions for "armed robbery and assault with a dangerous weapon merge where both offenses are committed against the same victim as part of the same criminal incident." *Morris*, 622 A.2d at 1129 (collecting cases); *see also Briscoe v. United States*, 181 A.3d 651, 655-56 (D.C. 2018). Because Mr. Igwe's convictions

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pointed out a couple of people to him and he said, at least three times she said, and each time he said, "That's not the person who robbed me," "That's not the person who robbed me," "That's not the person who robbed me.").

[67] *Blockburger v. United States*, 284 U.S. 299 (1932).

for armed robbery had a single victim, Mr. Moran, and were part of the same criminal incident, the taking of Mr. Moran's backpack on a Metro train on February 13, 2023, the ADW conviction merges with the armed robbery conviction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Brief was electronically served upon the United States Attorney's Office for the District of Columbia, this 1st day of June, 2024.

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