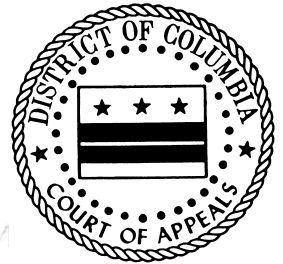


**DISTRICT OF COLUMBIA
COURT OF APPEALS**



LUIS RIVERA

V.

UNITED STATES

Clerk of the Court

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

BRIEF OF APPELLANT

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PARTIES

The United States was represented below by AUSA Lindsay Miller and AUSA Valerie Tsesarenko. The defendant was represented by Kyle McGonigal.

RIVERA STATEMENT OF THE CASE

Luis Rivera was charged by indictment with two counts of assault on a police officer, significant bodily injury or grave risk, while armed. 22 D.C. Code 405 (c), 4502. These charges came in connection with incidents that happened on June 20, 2020, near Lafayette Park in Northwest, D.C. At that time police were present at a protest demonstration.

Mr. Rivera was arrested almost three years later and held without bond. The case came for jury trial before the Honorable Heidi Pasichow of the Superior Court on December 5, 2023. On December 14, 2023, Mr. Rivera was acquitted of all felony charges, but convicted of two misdemeanor APO lesser included offenses.

On December 18, 2023, Mr. Rivera was sentenced to 180 days straight time on each charge. This appeal followed.

FACTS

The United States opened on the claim that Mr. Rivera twice tossed metal objects, possibly parts of a bicycle rack, into the police line at the demonstration. Two officers were allegedly hit by those objects. Officer Burggraf sustained a cut on his shin. Officer Boone was hit on the shoulder. As to Officer Burggraf, the government proceeded on the dual bases of actual significant injury and of grave

danger of significant injury. As to Officer Boone, the sole theory was grave danger. (Tr. 12/11/23 at 12.)

Officer PHILLIP BURGGRAF of MPD testified first. (20.) He was a twenty-year veteran of the force, assigned to patrol in the Fourth District. However, he was also a member of the Civil Disobedience Unit (CDU). On June 22, 2020, he was in uniform in Lafayette Park due to a demonstration. People were at a statue making an effort to damage it. Officers were ordered to clear the area. They did that by forming a line and moving the demonstrators north toward H Street.

The officer was standing in the police line. Metal objects were being thrown. He could hear them landing. At 8:19 pm one came at him. He was hit in the right shin and got a small cut. (35-36.) He went to the clinic the next day and the wound was photographed.

The object that hit him was presented to the jury in a picture from his body worn camera. It was a T shaped piece of metal. (41-42.) The witness testified that he withdrew from the line, got some treatment and went back. When he walked around, he could see quite a few pieces of metal on the ground similar to the one that hit him. (51.)

A slow-motion portion of his body camera was shown, where the object could be seen emerging from the crowd. (53-54.)

Cross-examination showed that the officer was standing behind the initial police line when he was hit. The object that hit him went over the first police line. There were hundreds of police officers out there. (70-71.)

MOLLY PELTA, nee Ames, was the next government witness. (76.) She was an MPD detective. She came to the park that day, in uniform, wearing her CDU gear, which included a helmet with a shield mask. She was in the front line. Her body worn camera footage showed a man picking up a metal object and moving away from the line, then throwing the object. (93-95.)

The man was wearing a light-colored shirt and shorts and a red bandana. He threw two objects, as seen on the BWC footage. In July of 2020 Detective Babich sent her a BOLO, asking if she recognized the person. She did recognize the person who she saw throw the metal objects.

Cross-examination brought out that the 'bike racks' referenced in this case were not truly bike racks. Instead, they were a type of defense used in crowd situations by police as a separator. (110-111.)

The detective did not see anyone hit by the thrown objects. They were not thrown at her but were thrown at the police line. She could not say that any particular officer was a target.

Detective Sergeant CARL HOLMBERG, of the Park Police, was next to testify for the United States. (122.) He arrived at Lafayette Park at about 8:00 pm and consulted with a Lieutenant. At around 8:18 pm he was further toward H Street. At 8:20 pm he saw a metal object fly over the police line and land near him. (129.) He viewed MPD body worn camera footage. He appeared in that footage, and a metal object flew over near him. Only police officers were in the vicinity at that time. (142.)

Detective YAROSLAV BABICH of MPD was the investigating officer for this event. (144.) He worked for MPD Riot Task Force. He was not at the park for the demonstration that day.

The detective reviewed lots of video footage from that day. He saw an individual throw objects twice at the police line. He then saw that same person talking to an officer sometime later. (150.) A still photo of this person was produced from that officer's BWC footage. He then sent the picture to Felicia Murray who identified the person as Luis Rivera. He then made a BOLO and sent it out to various MPD officers.

Detective Pelta identified Mr. Rivera, the man in the BOLO, as the person she saw throwing the objects. (156-157.) He then obtained an arrest warrant for Mr. Rivera.

Cross-examination was done the next day. (12/12 at 18.) It brought out that there was an eleven second time difference between BWC footage of the same event from two separate officers.

Redirect brought out that one of the BWC videos showed both throws and was a continuous video. (31.)

BRANDON MOTLEY, an MPD officer, was at Lafayette Park in uniform at the time of the demonstration. (40.) He was in the area near H Street at 8:18 pm that day. He had his body worn camera on. He can be heard on the clip played to shout 'red bandana' so as to identify the person who threw something into the crowd. He saw that happen, and his BWC footage showed two throws. (49.)

Cross-examination focused upon the fact that the witness did not see the objects hit anyone. He simply said the objects were thrown into the crowd. (54-55.) The BWC footage showed civilians with back packs close to the crowd of officers.

Redirect brought out that the crowd where the object was directed was all police officers. (89-90.)

FELICIA MURRAY testified remotely. (91.) Detective Babich sent her a photograph of a person she recognized. She had seen him twice a month for over a year, face to face.¹

Cross brought out that she hadn't seen him recently and did not know his family or friends.

Officer BRIAN RODRIGUEZ was present at Lafayette Park that day, as part of his bicycle unit. (97.) He was in uniform. He identified some officers on his BWC video. (Apparently Mr. Rivera appeared on it, eight minutes after the tossing incident.)

Cross-examination brought out that the witness and at least one other officer were using mace on the protesters.

Officer ANTHONY BOONE was at Lafayette Park, in the police line. (18.) The police formed the line to push the people out of the park. After that was done, they held the line at around H Street.

He had a bottle of urine thrown on him. Then later he saw an object coming out of the sky at him. He ducked and it hit him in the shoulder. (27-28.) His BWC footage caught the moment when the object was in the air.

¹ She was his probation officer but was not allowed to say that.

BWC footage from another officer was shown. It apparently showed the object flying past the officer.

Cross-examination showed a clip where the officer next to this one maced a woman in the face, despite the fact that at that point the civilians were no longer in the park.

The government rested.

The defense presented no evidence.

An MJOA was denied. (114-115.)

There was argument. Instructions were read to the jury and the jurors retired to deliberate. On the morning of December 14, a jury note was received which asked, 'is it necessary for the Government to prove that the defendant was attempting to injure a specific named officer.' There was a lengthy discussion of the matter, and the judge gave a version of the Red Book Instruction 3.201(B). That instruction was adapted to an APO charge.

The jury returned verdicts soon thereafter.

THE MODIFIED CONCURRENT INTENT INSTRUCTION GIVEN IN RESPONSE TO A JURY NOTE WAS PREJUDICIAL ERROR.

The government case did not show that any particular police officer, or anyone else, was specifically targeted by the two thrown objects. If anything, the objects may have been tossed over the police line.

The jury note focused the parties and judge on this fact. A lengthy discussion ensued. (Tr. 12/14/23.) It resulted in a note to the jury which read as follows:

'I have already instructed you on the offense of Assault on a Law Enforcement Officer with Significant Bodily Injury of Grave Risk While Armed and the two lesser included offenses. I further instruct you that if the government proves beyond a reasonable doubt that Luis Rivera threw T-shaped objects and that by throwing T-shaped objects, created a zone of harm/danger around the line of law enforcement officers, with intent to injure/harm them, you may infer that Luis Rivera intended to injure/harm any other person in the anticipated zone of harm/danger and Luis Rivera has committed the same type of assault against Phillip Burggraf and/or Anthony Boone as he would have committed had he also injured/harmed the line of law enforcement officers. This principle applies whether or not the intended victim is also injured/harmed and whether or not the intended victim is identified.

Throughout the discussion of the response to the jury note, the defense opposed using the concurrent intent instruction. One reason advanced was that, in an APO context, the defendant must know specifically that the target is a law enforcement officer. But the person who threw the objects could not have known that about some random person hit. (Note that Officer Burggraf was hit

behind the police line.) No one maintained that either complainant was a known or specifically intended target.

The defense further objected to the final sentence, as applied to this case, since there was no specific intended victim. The last sentence makes it appear as if there was an intended victim.

The United States initially cited *Cheek v. United States*, 103 A.3d 1019 (D.C. 2014) for the proposition that APO is a general intent crime.

The defense cited two cases in opposition to that. They were *Williams v. United States*, 887 A.2d 1000 (D.C. 2005) and *Buchanan v. United States*, 32 A.3d 990 (D.C. 2011).

The doctrine of concurrent intent has developed largely in cases concerning the specific intent to kill. The case of *Ford v. State*, 625 A.2d 924 (Md. 1993) has often been cited for its discussion of concurrent and transferred intent. Cases from this jurisdiction have discussed the matter extensively. One basic tenant of the discussions of instructional error is that the instruction must be based upon a reasonable interpretation of the facts of the case. Further, the instruction must correctly state the elements of the theory of liability. *Buskey v. United States*, 148 A.3d 1193, 1205 (D.C. 2016); *Fleming v. United States*, 224 A.3d 214, 219, *en banc* (D.C. 2020).

Here there was no evidence that any specific officer was a target. Further, the charged crime did not involve a specific intent element, save for the intent to harm a police officer.

This instruction, especially with the final sentence, posits a situation that was not supported by the evidence. That is that there was an intended victim, and that the charged victim was an unintended victim. It was not supported by the evidence.

Further, the instruction, by conjuring up a 'zone of harm/danger' did not correctly state the theory of liability. There was evidence here that both named victims were hit by the thrown objects. There was no need for an instruction designed to deal with a specific intent crime.

The instruction as read was confusing and did not comport with the evidence. The judge could simply have told the jury that if all other elements were satisfied, and the object was specifically thrown at police officers, those hit were the proper victims.

Reading the instruction was not harmless, since it posited a factual basis not supported by the evidence. Thus, the jury was allowed to speculate. Indeed, it was encouraged to do so.

**IT WAS PREJUDICIAL ERROR FOR THE JUDGE TO DISALLOW ALMOST ALL
IMPEACHMENT MATERIAL AS TO THE GOVERNMENT POLICE WITNESSES.**

The defense proposed to impeach multiple officers who testified with various types of evidence that the officer had possible bias. Almost every instance set out by the defense was disallowed by the judge.

There was a proffer as to Detective Babich. He had been suspended for conduct unbecoming an officer. That suspension, and the incident underlying it, happened in 2021, after he had obtained the warrant in this case. (Tr. 12/12, 32-38.) Citing *Longus v. United States*, 52 A.3d 836, 850-858 (D.C. 2012), the defendant wanted to show that the suspension was relevant to the Detective's honesty and integrity – so called corruption bias. However, the judge only considered whether the witness had a motive to curry favor with the government. The judge concluded that the timing of the charge and disposition precluded that. So, no mention of the matter was allowed at that point.

Officer Motley had two sustained violations for failure to activate his body-worn camera. (12/12, 60.) The judge read the *Longus* case over lunch and saw that she needed more detail as to the substance of the sustained violation of Detective Babich. She inquired. (Tr. 12/12, 71-80.)

Apparently Detective Babich admonished another officer about speaking to the press, because what he said to the press may be contradicted by the body-worn footage. At a certain point, the judge seemed to agree that the conduct for which he was disciplined did go to honesty, or willingness to break the rules. She summarizes the sustained allegation as follows: 'A sustained finding related to the officer sending direct messages to a non-law enforcement personnel.....about an active investigation he was directly associated with...' (73.)

There was another passage as the judge ruled that the material could not be used. In that, indicates that the prior sustained complaint was troubling. (83-84.) Referencing the complaint she says, '...it doesn't mean anything good or appropriate...'"

But she focused upon the testimony of Detective Babich in this case and did not see how casting doubt on his veracity, or showing his willingness to break MPD rules could reasonably affect the jury's confidence in that testimony. This ruling usurped the jury's function.

Babich's testimony was foundational. His direct had a section where he described how officers brought their devices to the station where there was a secure room that held charging stations, which also allowed the date to download

to an overall system. His testimony bolstered the credibility of the video, in terms of whether it was easily doctored.

He also testified that the time and date indications on the videos were accurate.

Yet on cross examination it was shown that two cameras depicting the exact same moment had time readings eleven seconds apart.

It is to be noted that even if the video depicted two throws by the person identified as Mr. Rivera, there was also testimony that many objects were thrown at police that day. Officer Burggraf testified that after he was hit, he saw numerous objects similar to the one that hit him on the ground in back of the police line. (Tr. 12/11 at 51.)

An eleven second difference in the times of the various videos, thus, could be crucial in determining whether the one that hit him was thrown by the defendant.

So, Detective Babich's testimony about the accuracy and security of the videos was quite important and subject to impeachment by showing that he was not necessarily to be trusted as to police matters.

The judge should have allowed the jury to evaluate the impeachment.

Later in the day, Officer Rodriguez testified. The defendant wanted to use a finding of egregious misconduct to impeach him. The judge did not allow that.

The misconduct was as follows, while driving to an assignment., the officer sideswiped a civilian vehicle and did not either stop or report the incident. The owner of the other car called 911. After that, the officer returned to the scene of the sideswipe. The finding on this incident was that the officer only reported it because of the 911 call and would not have done so otherwise. (Tr. 12/12 at 113-115.)

The judge did not explain her ruling.

The other 'victim' of the thrown objects was Officer Boone. He had a pending civil suit against him for unlawful arrest of a juvenile. (Tr. 12/13, 3-15.) The judge allowed minimal cross on that issue, since the suit was still pending, against Officer Boone, other officers, and the District of Columbia. The defense was not allowed to ask about the actual nature of the complaint – false arrest of a juvenile.

The same officer, in 2018, was disciplined for turning off his body-worn camera and then being involved in a use of force incident. (15-17.) The matter was sustained in 2019. The argument was that it showed rule breaking and deception. The judge disallowed cross on the matter, without explanation.

When the defense began asking about the pending lawsuit at the end of the cross, the judge became angry because, just prior to those questions, the officer had been asked about the fact that the officer next to him in the police line had maced some people who were not any threat to police.

Despite the fact that the questions asked by defense counsel in no way violated her restrictions on the cross, the judge felt that the timing of the questions – after the use of force questions about the other officer – implied that the suit may have been for use of force. (Which it was.)

She ended up giving an instruction separating the two matters. (85.)

The final impeachment matter had to do with possibly recalling Officer Burggraf. There were two matters. One, a body-worn camera violation, was conceded due to the prior court rulings. (12/13, 92.)

The second matter had to do with a currently pending use of force investigation. The United States made inquiries of Officer Burggraf and reported that he had no knowledge of the open investigation. So, the officer was not recalled.

A defendant has a Sixth Amendment right to confront and cross-examine any witness who testifies against him. *Longus v. United States*, 52 A.3d 836 (D.C. 2012).

There are two types of bias referenced in that case – motive to curry favor with the government, and ‘corruption bias.’ Corruption bias seems a misnomer. In effect, the phrase references evidence of bad character, or a willingness to thwart justice. In that regard, the evidence that several of the officers who testified had sustained violations for turning off their body-worn cameras constituted such evidence. Yet the judge uniformly disallowed such impeachment. She offered no explanation.

As we can see from the BWC violation adduced in the discussion of Officer Boone, such a violation shows a ‘propensity or willingness to thwart the ascertainment of truth in a judicial proceeding.’ *Longus*, 852, quoting *Bennett v. United States*, 736 A.2d 1117, 1123 (D.C. 2000). Boone turned off his BWC and then immediately was involved in an incident which resulted in a use of force investigation. (12/13, 15-17.)

MPD officers are not disciplined for accidentally turning off their cameras or the sound connected to them. Presumably, the act has to be intentional. That is, the BWC is turned off to conceal something. Such an act clearly shows a willingness to thwart the ascertainment of the truth. As such, it impacts the credibility of the testifying officer. It should have been allowed.

Several police officers who testified in this case had at least one instance of conduct that qualified at 'corruption bias.' This included both of the named 'victims.' Yet the jury heard not a single word about these violations.

PREJUDICE

The judge's rulings on the impeachment issues constituted Constitutional error. Mr. Rivera was prejudiced by those errors, especially when they are considered as a whole.

The government bears the burden of showing that the errors set out above were harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967).

In making that evaluation the court should consider the importance of the witness' testimony, whether the testimony was cumulative, any corroborating or contradictory evidence, and the extent of cross-examination allowed. *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986); *Longus*, 854.

In this case, one might speculate that the judge felt as if the BWC video corroborated the police testimony.

The *Van Arsdall*, factors count against the government. The officers' testimony was quite important, both individually and taken as a whole. It was not

cumulative. There was absolutely no cross-examination allowed that challenged any officer's veracity or showed a willingness to hide the truth.

That leaves the BWC material as corroborating evidence. It could be argued that even if nearly every police officer was shown to be untrustworthy, the video would still stand.

The officers who testified had corruption bias, except Detective Pelta and Park Police Detective Holmberg. The BWC material was produced by and held in the custody of MPD. If Mr. Rivera had been able to shake the confidence of the jury in several of the testifying police officers, why wouldn't that have undermined the BWC material as well?

The jury should have been permitted to evaluate the question of whether the BWC material could be trusted in light of the possibility that many of the officers who testified about the material may not have been trustworthy.

CONCLUSION

For the stated reasons, the judgment of the Superior Court must be reversed.

Respectfully submitted,

\\TTH\\s

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Service: A true copy of this Brief has been served upon the USAODC< Appellate Division, via the Court's electronic service system, this 29th day of August, 2024.

\\TTH\\s