BRIEF FOR APPELLEE

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 23-CF-195

M.H., Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

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

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Cr. No. 2018-CF1-18592

TABLE OF CONTENTS

TABLE OF AUTHORITIES*

Cases

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

Statutes

Rules

ISSUES PRESENTED

I. Whether the trial court erred in admitting S.B.'s out-of-court text messages to E.B., a close childhood friend, as statements against penal interest, where: (1) these texts were not ambiguous when read in context with S.B.'s earlier face-to-face confession to E.B. that he and M.H. had killed the victim, and demonstrated S.B.'s consciousness of guilt and exposed him to criminal liability; (2) S.B. made no attempt to minimize his conduct in the murder or shift blame onto M.H.; and (3) in any event, any error was harmless, given the compelling evidence of M.H.'s guilt, including the identification testimony of three government eyewitnesses and S.B.'s in-person confession to E.B.

II. Whether the trial court abused its discretion in admitting evidence of S.B.'s prior gun possession, where: (1) the evidence was relevant to corroborate E.B.'s testimony concerning S.B.'s confession; (2) the relevance of this evidence was not substantially outweighed by any unfair prejudice to M.H.; and (3) any error in admitting this evidence was harmless.

III. Whether the trial court abused its discretion in declining to order a mistrial due to ambiguous references to M.H.'s prior arrest in text messages between S.B. and E.B., where: (1) the reference in the text message was not immediately apparent and did not elicit any objection or request for curative action from the defense at trial; (2) two prior references to arrest in the detectives' testimony were

brief and inadvertent; and (3) the potential prejudice to M.H. was remediated through cross-examination and jury instruction.

IV. Whether, even assuming, arguendo, that the trial court erred in failing to recognize that it had discretion to impose a sentence below the statutory mandatory minimum under the Incarceration Reduction Amendment Act, this Court should order resentencing where the trial judge expressly stated that she would not have sentenced M.H. below the mandatory minimum even if she had discretion to do so.

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COUNTERSTATEMENT OF THE CASE

On July 23, 2019, an indictment was filed against appellant M.H. and another person whose identity was unknown to the grand jury based on the murder of 15-year-old G.W. on December 13, 2018[1] (Record on Appeal (R.) 113-14 (Indictment

[1] M.H.'s co-defendant was later identified as S.B. Both M.H. and S.B. were 16 years old on December 13, 2018. M.H. was charged as an adult, and S.B. was never charged because he was shot to death on September 10, 2019, approximately nine months after G.W.'s murder. Because M.H., S.B., and G.W. were all juveniles at the time the murder was committed, we refer to them by their initials. We refer to E.B. by her initials because she was also a juvenile. We refer to B.L. by her initials because of her testimony regarding her substance abuse.

pp. 1-2)).[2] M.H. was charged with first-degree premediated murder while armed with aggravating circumstances (D.C. Code §§ 22-2101, -2104.01(b)(4), -4502; D.C. Code § 24-403 .01(b-2)); possession of a firearm during a crime of violence (PFCV) (D.C. Code § 22-4504(b)); and carrying a pistol without a license (CPWL) (D.C. Code § 22-4504(a)) (R. 113-14 (Indictment pp. 1-2)).

From October 20-31, 2022, M.H. was tried by jury before the Honorable Rainey Brandt (R. 39-43 (Docket Sheet pp. 39-43)). On November 2, 2022, the jury convicted M.H. of first-degree premeditated murder while armed, PFCV, and CPWL, but could not reach a verdict on aggravating circumstances in connection with the murder charge (11/2/22 Transcript (Tr.) 44-48; R. 1401-02 (Verdict Form pp. 1-2)).

On March 1, 2023, Judge Brandt sentenced M.H. to a total of 40 years of imprisonment, with a mandatory-minimum term of 30 years, to be followed by five years of supervised release (3/1/23 Tr. 53-54; R. 1530 (Judgment p. 1)). M.H. noted a timely appeal on March 10, 2023 (R. 1531-34 (Notice p. 1)).

[2] All page references to the record on appeal are to the PDF page numbers.

The Trial

The Government's Evidence

At about 3:40 p.m., on December 13, 2018, M.H. and S.B., who were both armed, chased G.W. to 2919 Knox Place, Southeast. S.B. stood watch outside of 2919 Knox Place, while M.H. followed G.W. into the building and fired 16 rounds of ammunition into G.W., who later died from these gunshot wounds.

1. Background

In December 2018, G.W. lived at 2921 Knox Place, Southeast (10/20/22 Tr. 50-52, 57, 119; 10/24/22 Tr. 258-59). In the hallway near G.W.'s apartment, there was graffiti on the wall that stated, "F Gus, F Leek, F Spread Gang" (10/20/22 Tr. 87-91; 10/28/22 Tr. 155-56, 173-74).

M.H. was known in the neighborhood by the nickname "Leek" and lived in the same area as G.W. on Hartford Street, Southeast (10/24/22 Tr. 268; 10/25/22 Tr. 99; 10/27/22 Tr. 84-85, 112-16).[3] S.B. lived in the same area as M.H. and G.W. (10/27/22 Tr. 216). M.H. and S.B. were close friends (10/27/22 Tr. 219).

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[3] Two social media accounts were associated with M.H.'s cell phone: (1) Gusgang_Leek; and (2) SPG_Leek (10/25/22 Tr. 35, 41-45, 106-13). The Gusgang_Leek Instagram account records showed that the associated email address for this account was spreadgangleek@gmail.com (10/28/22 Tr. 181-91; 10/31/22 Tr. 109). The SPG_Leek Instagram account records showed that the associated email for this account was h[redacted]l[redacted]@yahoo.com (10/28/22 Tr. 181-91; 10/31/22 Tr. 109).

Photographs of M.H. and S.B. posing together on S.B.'s Instagram account (YRN_bigs[redacted]) and M.H.'s Instagram accounts (Gusgang_Leek and SPG_Leek) were admitted into evidence (10/27/22 Tr. 210, 220-30; 10/28/22 Tr. 186-91).[4]

On December 13, 2018, at approximately 2:40 p.m., Clarence Cash looked out his window on Hartford Street, when he noticed a group of about five to six young African American men standing in front of the building across the street from him (10/27/22 Tr. 43-47, 51, 59-60).[5] This group of young men was arguing with another group of people from a different neighborhood (10/27/22 Tr. 47-48, 67). Cash had seen the same situation arise on two to three prior occasions and had become so concerned by the arguing that he called 911 that day (10/27/22 Tr. 46, 48-49, 71).

2. The Murder

On December 13, 2018, after G.W. left his apartment, his brother heard gunshots (10/20/22 Tr. 70-72, 101, 112-13). G.W.'s brother went outside to check on G.W., and he heard someone say that G.W. was in the hallway of 2919 Knox

[4] On appeal, M.H. challenges the admission of several of these photographs, which we discuss in more detail infra.

[5] From his apartment, Cash would often see some of these young men go up the stairs of 2404 Hartford Street to a third-floor apartment, which belonged to a young woman named B.L.; B.L. allowed these young men to hang out in her apartment, including M.H. (10/27/22 Tr. 55-62, 81-85, 95-96, 107-08, 112-16).

Place, where their cousin lived (10/20/22 Tr. 72-76, 92, 100-03, 113, 119). G.W.'s brother found G.W. on the third floor with multiple gunshot wounds (10/20/22 Tr. 77-80, 104). G.W. was transported by ambulance to the hospital where he later died (10/20/22 Tr. 130-31, 154, 166-67). The medical examiner concluded that G.W. suffered a total of 17 gunshot wounds, including one to his chest and multiple wounds to his arms, hands, and legs (10/24/22 Tr. 60).[6] The medical examiner opined that the cause of death was exsanguination or bleeding to death from multiple gunshot wounds and the manner of death was homicide (10/24/22 Tr. 107-09).

Video footage from the vicinity of the apartment building showed two armed men – the first dressed in black and the second in green or gray – chasing G.W. in the direction of 2919 Knox Place and then running away from 2919 Knox Place (10/31/22 Tr. 86-92). Footage from an MPD crime camera located at Hartford Street and 24th Place, Southeast, showed these two individuals exiting 2919 Knox Place and running up Knox Place toward the intersection of Hartford and 24th Place (10/24/22 Tr. 150-56, 173-85).

[6] Sixteen .40 caliber shell casings were recovered from inside the stairwell of 2919 Knox Place, all of which had been fired from the same firearm (10/26/22 Tr. 223-24, 252-53; 10/28/22 Tr. 118-31, 147, 176-78).

3. Eyewitness Identification Testimony

a. Joseph Phelps

Joseph Phelps lived on Knox Place with his wife and grandson (10/26/22 Tr. 88-89, 107).[7] His grandson was friends with G.W., who lived upstairs in the same building as Phelps, and Phelps had known G.W. for ten years (10/26/22 Tr. 99-101, 116, 184). At about 3:40 p.m., on December 13, 2018, Phelps was standing outside when he saw G.W. run out of 2923 Knox Place, turn toward 2919 Knox Place, and run right by him (10/26/22 Tr. 99, 102-03, 106-07). Phelps also saw two men run out of 2923 Knox Place, chasing after G.W. (10/26/22 Tr. 114-18, 125-26, 128, 190). One of the men was wearing a "North Face"-style black jacket, blue jeans, and a mask (10/26/22 Tr. 122-25). The mask covered most of the man's face except for his eyes (10/26/22 Tr. 193). The second man was wearing a dark lime-green jacket and a brown cargo mask (10/26/22 Tr. 127-28).

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[7] Phelps was detained in Prince Georges County, Maryland, on pending misdemeanor theft charges at the time of his testimony (10/26/22 Tr. 83, 85-86). Phelps was impeached with numerous prior convictions from D.C., Maryland, and Virginia, including a 2017 felony Bail Reform Act violation in D.C.; a 2010 and a 2008 burglary in Maryland; a 2008 misdemeanor theft in Maryland; and a 2005 distribution of a controlled substance in D.C. (10/26/22 Tr. 84-85).

At trial, Phelps was a reluctant witness (10/26/22 Tr. 120-22, 144-45, 179, 198-200). Phelps denied seeing anything unusual that day; he was impeached with his sworn grand-jury testimony, which was admitted as substantive evidence (10/26/22 Tr. 96-101, 103-06, 108-14, 116-18, 122-69, 172-75; 10/28/22 Tr. 190). The government's summary of Phelps's testimony above is based largely on his grand-jury testimony.

Phelps recognized the man in the black jacket as M.H., even though he was wearing a mask (10/26/22 Tr. 129-31, 135-36). Before G.W.'s murder, Phelps had frequently seen M.H. in the neighborhood, around three to four times a week (10/26/22 Tr. 131-33). Phelps would typically see M.H. standing in front of 2921 Knox Place, and Phelps's grandson had informed Phelps of M.H.'s name (10/26/22 Tr. 133-36).[8] As for the man in the lime-green jacket, Phelps did not know this person by name, but he had seen him with M.H. before G.W.'s murder (10/26/22 Tr. 165-68, 172-73).

Phelps did not see anything in G.W.'s hands as G.W. ran past him (10/26/22 Tr. 103-06). Phelps, however, saw M.H. and the man in the lime-green jacket each holding a gun as they chased after G.W. (10/26/22 Tr. 145-49). Once G.W. reached 2919 Knox Place, G.W. opened the door and ran inside the building (10/26/22 Tr. 108-09). As M.H. ran past, Phelps heard M.H. say to the man in the lime-green jacket, "He ran in that building, right there" (10/26/22 Tr. 140-43, 190-91). M.H. followed G.W. into 2919 Knox Place, while the man in the lime-green jacket waited outside (10/26/22 Tr. 150-52).

[8] Phelps did not tell the police officers he spoke with on the day of G.W.'s murder that he knew the name of the man in black (10/26/22 Tr. 180-82, 186-87, 194). At trial, Phelps did not make an in-court identification of M.H., claiming that he would be unable to recognize him (10/26/22 Tr. 137).

After G.W. and M.H. ran into 2919 Knox Place, Phelps heard approximately nine to ten gunshots coming from inside the building (10/26/22 Tr. 153-54). Once the gunshots stopped, Phelps saw M.H. come out of 2919 Knox Place, stumble in the parking lot, and drop his gun (10/26/22 Tr. 154-57). The man in the lime-green jacket helped M.H. up, telling M.H., "Get up man, get up" (10/26/22 Tr. 158-59). M.H. picked up his gun, and the two men ran around the corner toward the gate of the parking lot and onto Hartford Street (10/26/22 Tr. 158-65).

b. Loveval Tribble

In December 2018, Loveval Tribble, who was known in the neighborhood as "L," lived on Knox Place with his wife and his 16-year-old stepson (10/28/22 Tr. 15, 34-35). G.W. and Tribble's stepson were cousins, and G.W. often came over to Tribble's apartment to play video games with his stepson (10/28/22 Tr. 16).

At about 3:30 p.m., on December 13, 2018, Tribble was standing outside when he saw G.W. run past him and enter 2919 Knox Place (10/28/22 Tr. 18-20). Tribble heard G.W. say, "Are they coming?" (10/28/22 Tr. 20-21). Tribble turned to look and saw two African American men coming from 2925 Knox Place and heading in the same direction as G.W. (10/28/22 Tr. 21-23). The man in front was armed with a gun and wearing all black, including a black face mask that covered most of his head and face but exposed his eyes (10/28/22 Tr. 22-23, 26-27, 50, 66). The second man was a couple of feet behind the man in black and he was also armed with a gun

and wearing green clothing and a green face mask (10/28/22 Tr. 23, 27). The man in black followed G.W. into 2919 Knox Place, while the man in green stayed outside the building (10/28/22 Tr. 23-24, 27). Tribble had seen the man in black in the neighborhood on three or four prior occasions in 2018 both with his mask on and with his mask off (10/28/22 Tr. 24-25). When the man in black ran past him that day, Tribble recognized him as M[redacted] from Hartford Street (10/28/22 Tr. 26).[9]

After M[redacted] went inside 2919 Knox Place, Tribble heard six to eight gunshots coming from inside the building (10/28/22 Tr. 27-28). When the gunshots stopped, the man in green went inside 2919 Knox Place, and shortly thereafter, both M[redacted] and the man in green came out of the building, went through the gate, and turned onto Hartford Street (10/28/22 Tr. 30-31).

Detective Brackett interviewed Tribble inside his apartment a little over an hour after G.W.'s murder (10/20/22 Tr. 190-91; 10/24/22 Tr. 225-28; 10/28/22 Tr. 32-33, 47-49). Tribble provided Detective Brackett with a description of the two men he saw chasing G.W. and entering 2919 Knox Place (10/20/22 Tr. 190-94). Tribble told Detective Brackett that both men were armed with black guns (10/20/22 Tr. 194). Tribble described one of the men as a black male, brown eyes, 5' 7" to 5'

[9] On cross-examination, Tribble was confronted with portions of his grand-jury testimony where he was shown clips of the surveillance-video footage, and he testified that the two men running in the footage did not look like the same men he had seen (10/28/22 Tr. 54-65, 67-69).

8" tall, 175 lbs., and wearing a green jacket and a green mask (10/20/22 Tr. 194-95). Tribble described the other man as a black male, 5' 5" to 5' 6" tall, 130 to 150 lbs., wearing a black jacket, a black mask, and black and gray sneakers (10/20/22 Tr. 195-99). Tribble further informed Detective Brackett that he knew the man wearing black from the neighborhood as M[redacted] from Hartford Street (10/20/22 Tr. 195-97).

Later that evening, Tribble was interviewed at the homicide branch (10/24/22 Tr. 185-86, 229; 10/28/22 Tr. 33, 49). Tribble told Detective Brackett that he would be able to recognize M[redacted], the man in black, if he were shown some photographs (10/24/22 Tr. 233-35). Another MPD detective, who was unfamiliar with the investigation, conducted an identification procedure and Tribble selected photograph six, which depicted M.H. (10/24/22 Tr. 191-219; 10/28/22 Tr. 33-38, 42-43). Tribble told detectives that he was "110 percent certain" that the photograph he had selected was M[redacted], the man in black who followed G.W. into 2919 Knox Place (10/24/22 Tr. 212-13, 236-37, 256-58).[10]

[10] The detectives asked Tribble how he was able to recognize M.H. when M.H. was wearing a mask (10/28/22 Tr. 51). Tribble responded that he knew it was M.H. because he had seen M.H. wearing those clothes and mask once before (10/24/22 Tr. 51-52). At trial, however, Tribble did not identify M.H. in court because he stated that he would not be able to recognize him (10/28/22 Tr. 26).

c. B.L.

In December 2018, B.L. lived in an apartment on Hartford Street, S.E. (10/27/22 Tr. 80-81).[11] B.L. allowed several boys who lived in the neighborhood to hang out in her apartment and sometimes stay the night (10/27/22 Tr. 81-83). One of those boys was a 16-year-old boy whom she knew as "Leek" and later identified in a photograph and in court as M.H. (10/27/22 Tr. 84-85, 107-08, 112-16). B.L. had known M.H. since 2015, called him her nephew, and had seen him in her apartment numerous times before G.W.'s murder (10/27/22 Tr. 84-85, 89, 114).

In the afternoon of December 13, 2018, B.L. was in her bedroom with her girlfriend, when she heard "a whole spray" of gunshots (10/27/22 Tr. 83, 90, 134-37, 142-43).[12] Approximately 15 to 20 minutes after the gunshots had ended, B.L. saw M.H. inside her apartment holding a black and silver gun, and he appeared to be out of breath (10/27/22 Tr. 89-92, 136-42). M.H. was wearing the same black

[11] B.L. had previously been convicted of prostitution in Tennessee in 2018; unlawful entry and entering a property to damage in Virginia in 2015; felony drug possession and prostitution in 2014; and unauthorized distribution of drugs in 2014 (10/27/22 Tr. 106-07). B.L. further testified that she was a drug user who used crack cocaine and still suffered from addiction at the time of trial (10/27/22 Tr. 107, 130). B.L. had entered a rehabilitation program about a month before trial but had recently checked herself out of the program (10/27/22 Tr. 131).

[12] In December 2018, B.L. was smoking crack cocaine multiple times a day and had been smoking crack cocaine when she heard gunshots on December 13, 2018 (10/27/22 Tr. 107, 137, 139).

Helly Hansen jacket B.L. had seen him wearing earlier in the day when she had encountered him in the first-floor hallway of her apartment building (10/27/22 Tr. 103-04). Upon seeing the gun, B.L. asked M.H. to leave her apartment because something did not feel right (10/27/22 Tr. 92).

Later that evening, B.L. was interviewed by homicide detectives at the police station (10/27/22 Tr. 107). The detectives showed her surveillance video footage from around the time of G.W.'s murder (10/27/22 Tr. 122-23). According to B.L., the individual wearing a black Helly Hansen jacket on this footage appeared to be M.H. (10/27/22 Tr. 123-31). B.L. acknowledged that other young men in the neighborhood wore Helly Hansen jackets, but she explained that she was able to identify M.H. on this footage because she saw him "every other day with the same Helly Hansen jacket and the same body figure" (10/27/22 Tr. 140-41).

4. S.B.'s Confession to E.B.

After midnight, on September 10, 2019, S.B. was found lying on the ground outside of 3017 24th Place, Southeast, suffering from gunshot wounds from which he later died (10/25/22 Tr. 15-18; 10/27/22 Tr. 15-26, 30-32). A cell phone was found by S.B.'s feet (10/25/22 Tr. 18-21; 10/27/22 Tr. 24-25, 32-33). Information was extracted from this cell phone, including text messages between this device and a cell phone belonging to E.B. (10/27/22 Tr. 172-83, 197-98, 211-13; Government Exhibit (GX) 452.16). E.B., who had been friends with S.B. since elementary school,

confirmed that the phone number associated with the cell phone recovered at S.B.'s feet belonged to S.B. (10/27/22 Tr. 208-09, 211-12, 232-33).

Although E.B. and S.B. attended different high schools, they remained friends and even dated "on and off" (10/27/22 Tr. 209-10, 232-33). The two primarily contacted each other through text messages and social media and would see each other in person every couple of months (10/27/22 Tr. 209-11). In January 2019, E.B. and S.B. met at S.B.'s home (10/27/22 Tr. 216, 234). E.B. noticed that S.B. had a gun tucked in his waistband, which took her by surprise (10/27/22 Tr. 230-31, 234). She did not know S.B. to be the type of person to carry a gun (10/27/22 Tr. 230). S.B. also told E.B. that he and Leek had killed G.W. (10/27/22 Tr. 216-17). S.B. did not provide E.B. with any details about G.W.'s murder at this time (10/27/22 Tr. 217). Although E.B. had never personally met Leek, S.B. had talked about Leek and told her that Leek was his close friend (10/27/22 Tr. 219, 248). S.B. had also pointed out Leek in various photographs and videos he had posted on his Instagram page (10/27/22 Tr. 219-230, 248). Some of these photographs showed S.B. holding or pointing a gun (10/27/22 Tr. 230-31, 237).

In March 2019, E.B. visited S.B. at his home and had another conversation with him about G.W.'s murder (10/27/22 Tr. 217-18, 239). At the time, accounts of G.W.'s murder had come out on the news and people were posting about G.W.'s death on social media (10/27/22 Tr. 218, 239-43). S.B. told E.B. that: (1) he and his

friend Leek had killed G.W.; (2) "both of them had chased [G.W.] to the building and shot him"; and (3) he was the person wearing the green hoodie, while Leek was the person wearing the black hoodie (10/27/22 Tr. 218-19, 243, 253-54).[13]

On May 6, 2019, E.B. and S.B. exchanged a series of text messages in which S.B. referred to G.W.'s murder (10/27/22 Tr. 213; GX 452.16).[14] The exchange began with E.B. asking S.B., "What you've up to[?]," and S.B. answering, "Cooling, staying down," explaining that he "[c]an't do too much, the feds . . . be . . . on my ass" (10/27/22 Tr. 214). E.B. remarks, "That's what's up, and damn, they geeking," and S.B. further informs her, "Yeah. Then, they keep stepping my man back." (10/27/22 Tr. 214.). E.B. responds, "What did he do, has he been behaving correctly[?]" (10/27/22 Tr. 215). S.B. responds, "Still in for that murder shit," and reminds E.B., "Yeah. Remember I told you the story." (10/27/22 Tr. 215.) E.B. replies, "Oh, yeah, oh, yeah. Damn, I had forgot and why they keep stepping him back. That's his first charge." (10/27/22 Tr. 215.) S.B. answers, "Nah, cuz they trying to find out who the second shooter is. They don't really got no evidence."

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[13] After S.B. confessed to her, E.B. "didn't really buy it" (10/27/22 Tr. 244-45). E.B. did not think to tell her parents or the police that S.B. and his friend Leek had killed G.W. (10/27/22 Tr. 244, 247-48).

[14] M.H. has included this text message exchange – GX 452.16 – in his limited appendix filed with his brief (Appendix for M.H. (App.) 74-77). All page references to the appendix are to the PDF page numbers.

(10/27/22 Tr. 253.) E.B. cautions S.B., "Yeah, I'm going to need you lay low for a while" (10/27/22 Tr. 253). At trial, E.B. explained that the "story" to which S.B. had referred in this text exchange involved the role that he and his friend Leek had in killing G.W. (10/27/22 Tr. 215).

SUMMARY OF ARGUMENT

The trial court did not err in admitting S.B.'s out-of-court text messages to E.B. as statements against penal interest. When read in context with S.B.'s earlier face-to-face confession to E.B. that he and M.H. had killed G.W., these texts were not ambiguous and instead demonstrated S.B.'s consciousness of guilt and exposed him to criminal liability. S.B. made no attempt to minimize his conduct or shift blame onto M.H. in either his face-to-face or text communications with S.B., and thus his admissions of guilt to E.B. were truly inculpatory as to him. In any event, any error in the admission of S.B.'s text messages was harmless. There was compelling evidence of M.H.'s guilt, including the identification testimony of three government eyewitnesses and S.B.'s in-person confession to E.B.

The trial court did not abuse its discretion in admitting evidence of S.B.'s prior gun possession to corroborate E.B.'s testimony. The photographs and testimony about S.B.'s gun possession established S.B.'s close relationship to M.H. and his ability to procure guns for use in the murder. In any event, M.H. was not unfairly prejudiced by this evidence. The photographs and testimony did not directly suggest

that M.H. possessed a gun, and the defense used the photographs to suggest that S.B. merely posed as a rapper to impress E.B. Moreover, any error in admitting this evidence was harmless. E.B. had no motive whatsoever to fabricate a confession that S.B., a close childhood friend who was now deceased, had confided in her. The government's identification evidence against M.H. was also strong.

The trial court did not err, let alone plainly err, in declining to declare a mistrial based upon the admission of S.B.'s text message alluding to M.H.'s prior arrest. S.B.'s text message made only a brief and vague reference to M.H.'s prior arrest. Indeed, defense counsel did not suggest that the text should be excluded or redacted on this basis. Although two other government witnesses had inadvertently mentioned M.H.'s prior arrest, the trial court sufficiently mitigated the prejudicial impact of those isolated references. In any case, the interests of justice do not demand reversal because the evidence of M.H.'s guilt was strong, and these isolated references would have had no tendency to sway the verdict.

Even assuming, arguendo, that the trial court plainly erred in failing to recognize that it had discretion to impose a sentence below the statutory mandatory minimum under D.C. Code § 24-403.01(c)(2), resentencing is not warranted. The trial judge explicitly stated on the record that she would not have sentenced M.H. below the mandatory minimum even if she had the discretion to do so.

ARGUMENT

I. The Trial Court Did Not Err in Admitting S.B.'s Text Messages to E.B. as Statements Against Penal Interest.

M.H. challenges the admission of S.B.'s May 2019 texts to E.B., claiming that they do "not qualify as statements against penal interest because they gave no details of the shooting and said nothing about his purported role in it" (Brief for M.H. at 22-35). These contentions lack merit, and any conceivable error was harmless.

A. Additional Background

Before trial, the government filed a motion in limine to admit, as statements against penal interest, S.B.'s out-of-court statements to E.B. regarding G.W.'s murder (Sealed Supplemental Record #1 (SR.) 204-63 (Gov't Mot.)). First, in March 2019, S.B. told E.B. that he and "Leek" chased G.W. into a building and shot him and that S.B. was wearing a green hoodie at the time (SR. 211 (Gov't Mot. p. 9); 10/6/22 Tr. 200-01). Second, on May 6, 2019, the following text exchange took place between S.B. and E.B., during which S.B. referenced G.W.'s murder:

[E.B.]: Definitely! What You Been Up To Tho?

[S.B.]: Cooling staying down.

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

[E.B.]: That's Wassup & Damn They Geeking

[S.B.]: Yeah

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

[E.B.]: What He Do?

[E.B.]: Have He Been Behaving Correctly?

[S.B.]: Still in for dat murder shit

[S.B.]: Yea

[S.B.]: Member I told you the story

[E.B.]: Oh Yea Oh Yea

[E.B.]: Damn [I] Had Forgot & Why They Keep Stepping Him Back Thats His First Charge?

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

[E.B.]: Yeaa Imma need For You to Lay Lo[w] for Aah While

[S.B.]: Dats what I been doing

(SR. 267-68 (Gov't Response pp. 3-4); 10/6/22 Tr. 200; App. 74-77).

During an evidentiary hearing on the government's motion in limine, E.B. testified that she and S.B. had been friends since the third grade (10/6/22 Tr. 20-21, 74). S.B. and E.B. were close, and they would vent to each other about things going on in their personal lives (10/6/22 Tr. 37-38). Before G.W.'s murder, S.B. had talked about his friend Leek with E.B., telling her that he had "a really strong bond" with Leek (10/6/22 Tr. 33). S.B. showed E.B. a video on his Instagram page of the two of them and pointed out Leek to her, stating "That's Leek" (10/6/22 34, 53-55). E.B. also identified Leek and S.B. in several group photographs posted on S.B.'s

Instagram page days before and after G.W.'s murder (10/6/22 Tr. 60-68; SR. 272 (Gov't Response p. 8)).[15]

In January 2019, E.B. went to S.B.'s apartment and S.B. told her, "[M]e and my man got one, or we caught an op" (10/6/22 Tr. 28-35, 80, 95). E.B. explained that an "op" was someone you have animosity against to the point that you would want to harm them (10/6/22 Tr. 28-33, 35). In March 2019, E.B. saw a video on the news regarding G.W.'s murder that showed two suspects – a boy in a black hoodie and another boy in a green hoodie – running toward a building (10/6/22 Tr. 25-26, 35, 38, 89). E.B. and S.B. were discussing this video when S.B. told her, "[T]hat is me and Leek in the video on the news" (10/6/22 Tr. 35-36, 38). S.B. further told E.B. that: (1) he was the boy in the green hoodie; (2) "[m]e and my friend, Leek, killed [G.W.]"; and (3) "[m]e and my friend Leek chased [G.W.] to the building and we shot him" (10/6/22 Tr. 39, 78, 85-86, 89-91). According to E.B., she was just "a listening ear" for S.B.; he did not appear to be trying to impress her when he confided in her (10/6/22 Tr. 40, 75-76, 92).

Finally, E.B. testified about her May 16, 2019, text exchange with S.B., which is set forth in full above (10/6/22 Tr. 42-50). When S.B. texted her, "Remember, I

[15] M.H. did not object to the admission of these photographs for purposes of the motions hearing, but he did object to the admission of some of these photographs at trial, as we discuss infra (10/6/22 Tr. 68).

told you that story," E.B. understood S.B. to be referring to their conversation in March 2019 about killing G.W. (10/6/22 Tr. 48-49).

The trial court ruled that S.B.'s statements to E.B. were admissible as statements against penal interest (10/7/22 Tr. 49-55). First, the trial judge found that S.B. in fact made the statements in question (10/7/22 Tr. 51-52). Second, the court found that S.B. was unavailable as a witness because he had been shot and killed in September 2019 (10/7/22 Tr. 52). Third, the court found that there were corroborating circumstances that clearly indicated the trustworthiness of S.B.'s statements (10/7/22 Tr. 53). The court noted that: (1) S.B. first mentioned the subject of murder to E.B. in January 2019, shortly after G.W.'s murder on December 13, 2018; (2) S.B. made these statements to E.B., who was a trusted childhood friend; and (3) there was some extrinsic evidence corroborating these statements, including the surveillance video footage showing two men (one dressed in black and the other in green) chasing G.W., and the Instagram photos of S.B. and M.H. hanging out together (10/7/22 Tr. 53-55). The court concluded, "after assessing each statement," that S.B.'s statements clearly went against his penal interest – i.e., S.B. "[wa]s essentially confessing to [E.B.] his role in . . . [G.W.]'s murder, and he[was] identifying both himself and who else was with him" (10/7/22 Tr. 53-55).

B. Standard of Review and Legal Principles

A statement against penal interest is admissible because it is "unlikely that a rational person would admit to a crime if it were not true." *Laumer v. United States*, 409 A.2d 190, 197 (D.C. 1979) (en banc) (adopting the statement against penal interest hearsay exception set forth in Fed. R. Evid. 804(b)(3)). To admit a statement under this exception, the trial court must find by a preponderance of evidence that: (1) the declarant in fact made the statement; (2) the declarant is unavailable; and (3) "there exist corroborating circumstances that clearly indicate the trustworthiness of the statement." *Laumer*, 409 A.2d at 199; *Devonshire v. United States*, 691 A.2d 165, 169 (D.C. 1997). Corroborating circumstances must indicate the reliability of the statement and "relevant considerations include: (1) the timing of the declaration; (2) to whom the statement was made; (3) the existence of corroborating evidence in the case; and (4) the extent to which the declaration is really against the declarant's interest." *Walker v. United States*, 167 A.3d 1191, 1209 (D.C. 2017) (footnote and internal quotation marks omitted).

The trial court's conclusion that a statement is against the declarant's penal interest is a question of law, which this Court reviews de novo. *Thomas v. United States*, 978 A.2d 1211, 1225 (D.C. 2009). "However, [this Court] will not disturb the factual findings supporting the [trial] court's conclusion unless they are clearly erroneous." *Id*.

Because the erroneous admission of hearsay evidence does not rise to the level of constitutional error, this Court "appl[ies] the less stringent harmlessness standard of *Kotteakos v. United States*[, 328 U.S. 750, 765 (1946)]." *Thomas*, 978 A.2d at 1232. Under this standard, for an error to be deemed harmless, this Court must be satisfied "with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error." *Kotteakos*, 328 U.S. at 765.

C. Discussion

1. There Was No Error.

M.H. does not challenge "the trial court's subsidiary factual determinations" on the *Laumer* three-part test for admissibility (Brief for M.H. at 22-23 & n.14). Rather, relying on *Thomas*, 978 A.2d 1211, M.H. argues that S.B.'s texts were too "cryptic" or "ambiguous" for the trial court to conclude that these statements were against his penal interest (Brief for M.H. at 25-26; App. 74-77). He points out that these texts did not explicitly mention S.B.'s role in G.W.'s murder, nor did they provide any details demonstrating that S.B. had any special knowledge about it (Brief for M.H. at 25).

M.H.'s claim rests on a faulty premise, however. The Supreme Court has recognized that "whether a statement is self-inculpatory or not can only be determined by viewing it in context," and "[e]ven statements that are on their face

neutral may actually be against the declarant's interest." *Williamson v. United States*, 512 U.S. 594, 603 (1994). When S.B.'s texts to E.B. are read in context – i.e., together with his face-to-face conversation with E.B. in March 2019 – it is clear that these texts were self-inculpatory and exposed S.B. to criminal liability.

E.B. testified at the pretrial hearing that, when S.B. texted her, "Remember, I told you that story" about "that murder shit," she understood him to be referring to their conversation in March 2019 in which he revealed that he and his friend Leek had shot G.W. (10/6/22 Tr. 48-49). Moreover, S.B. texted E.B. that "the feds be on me and my men ass" and "they trying to find out who the 2nd shooter is," and it is clear why S.B. was "[c]ooling," "staying down," "[could]n't do to[o] much," and "[l]ay[ing] [l]ow," as E.B. explicitly warned him to do (10/6/22 Tr. 200; App. 74-77). The police were searching for the second shooter, and S.B. and E.B. both knew that S.B. was the second man involved in G.W.'s shooting. S.B.'s texts to E.B. reassured her that he was avoiding the police and thus reflected his consciousness of guilt. *See, e.g., Ashby v. United States*, 199 A.3d 634, 655 (D.C. 2019) (although "some of Ashby's statements may seem as if he was attempting to shift the blame" to his co-defendant, "these statements [we]re in no way 'neutral' to Ashby, as he admitted to committing the actual murder, implicating [his co-defendant] as part of a conspiracy that, if discovered, would only heighten the potential jeopardy for Ashby"). *See generally Headspeth v. United States*, 86 A.3d 559, 565 (D.C. 2014)

(flight and concealment "are admissible as evidence of consciousness of guilt, and thus of guilt itself.") (internal quotation marks and citation omitted).

M.H.'s reliance on *Thomas* is misplaced (Brief for M.H. at 25-26). In *Thomas*, this Court held that Thomas's statement to a witness, "that him and Ron was going to finish that shit with Slush," which Thomas made to the witness *before* the victim was murdered, was too "ambiguous" or "cryptic" to "clearly expose him to criminal liability at the time he made it." *Thomas*, 978 A.2d at 1231-32 ("[W]hat, exactly, did Thomas intend to do?"). The Court noted, however, that *had* Thomas made this remark to the witness "shortly after [the victim] was murdered," it would have found that "his statement rather clearly would have subjected him to criminal liability." *Id.* at 1231. In this case, S.B. texted that "the feds be on me and my men ass" and that he was "[c]ooling[,] staying down" in May 2019, *after* G.W. had been murdered, *after* M.H. had been arrested for G.W.'s murder, *after* news accounts had broadcast surveillance footage of the two suspects, and *after* S.B. had confessed to E.B. Given the context in which these texts were made, there was no ambiguity in their meaning; they were clearly self-inculpatory.[16]

[16] Because, when read in context, there was no ambiguity or vagueness in the meaning of S.B.'s texts, M.H.'s reliance on *Andrews v. United States*, 981 A.2d 571 (D.C. 2009); *United States v. Butler*, 71 F.3d 243 (7th Cir. 1995); and *State v. Ashby*, 567 N.W.2d 21 (Minn. 1997), is likewise misplaced (see Brief for M.H. at 26-28).

M.H. further contends that the trial court erred in admitting S.B.'s texts because it failed to parse out each statement (Brief for M.H. at 23-24 (citing *Thomas*, 978 A.2d at 1229)). In *Thomas,* the Court stated that "the trial court must assess each component remark for admissibility as a statement against penal interest rather than base its ruling on the overall self-inculpatory quality of the declarant's narrative in its totality." 978 A.2d at 1228-29. In particular, the Court noted that "[a]ccomplice statements – statements in which the declarants incriminate their putative confederates as well as themselves – demand 'especially' careful parsing and evaluation by the trial court," because "[f]requently . . . such statements are not genuinely self-inculpatory, but merely attempts to shift blame or curry favor." *Id.* at 1229.

Here, the trial judge expressly acknowledged that "[t]he law require[d] the [c]ourt to assess each statement," and only "after assessing each statement" did the court conclude that S.B.'s statements to E.B. were admissible as statements against penal interest (10/7/22 Tr. 55). The record clearly supported this ruling. S.B. clearly admitted his role in the shooting and did not minimize his conduct or shift blame onto M.H. in any of his conversations with E.B. either in-person or by text. In March 2019, S.B. told E.B., "[T]hat is *me and Leek* in the video on the news"; "*[m]e and my friend, Leek,* killed [G.W.]"; and "*[m]e and my friend Leek* chased [G.W.] to the building and *we* shot him" (10/6/22 Tr. 35-39, 78, 85-86, 89-91 (emphasis added)).

In his May 2019 text messages to E.B., S.B. updated his close childhood friend on the situation he had told her about in March 2019, telling her that "the feds" were "on [his] ass" and looking for the second shooter and he was trying to avoid them by "[c]ooling[,] staying down" (10/6/22 Tr. 200). His admission to E.B. that he was actively trying to evade the police reflected his consciousness of guilt. Accordingly, there was "a clear showing" that S.B.'s texts to E.B. were "truly inculpatory of [S.B.]," and therefore admissible. *Thomas*, 978 A.2d at 1229.

2. Any Error Was Harmless.

In any event, even assuming, arguendo, that the trial court erred in admitting these texts as statements against penal interest, any error was harmless. Even apart from S.B.'s text messages to E.B., there was compelling evidence that M.H. was the shooter based on (1) the eyewitness identification testimony of Phelps, Tribble, and B.L.; and (2) S.B.'s in-person confession to E.B. in March 2019, the admission of which M.H. does not challenge on appeal. On the strength of this evidence, this Court can say "with fair assurance . . . that the judgment was not substantially swayed by the [alleged] error" in admitting S.B.'s May 2019 text messages. *Kotteakos*, 328 U.S. at 765.

First, three independent eyewitnesses – all of whom knew M.H. from the neighborhood and none of whom were shown to harbor any ill-will toward M.H. or have any motive to fabricate their testimony – identified M.H. as the armed man

dressed in black. Specifically, Phelps and Tribble, both of whom knew G.W. and M.H. from the neighborhood, testified that they saw M.H., who was dressed in black, run past them with a gun in his hand and chase G.W. into 2919 Knox Place (10/26/22 Tr. 99-103, 106-09, 114-18, 122-37, 140-52, 190-94; 10/28/22 Tr. 16, 18, 20-27, 50, 66). Immediately thereafter, both men heard gunshots and saw M.H. run out of 2919 Knox Place toward Hartford Street (10/26/22 Tr. 153-65; 10/28/22 Tr. 27-28, 30-31). B.L., who knew M.H. well, testified that shortly after she heard gunshots, M.H. entered her apartment holding a gun and wearing a black Helly Hansen jacket, and he appeared to be out of breath (10/27/22 Tr. 80-85, 89-92, 103-04, 107-08, 112-16, 136-37, 142). B.L. also identified M.H. on the surveillance footage as the suspect wearing a black Helly Hansen jacket (10/27/22 Tr. 107, 122-31, 140-41).

M.H. challenges the strength of this identification testimony and the government's case by attacking the credibility of Phelps, Tribble, and B.L. (Brief for M.H. at 32-34). Contrary to M.H.'s contentions, the identifications were strong. All three knew M.H. Specifically, B.L. had known M.H. since 2015, called M.H. her nephew, and had allowed him to stay in her apartment on numerous occasions before G.W.'s murder (10/27/22 Tr. 81-85, 89, 107-08, 112-16). Given her close relationship with M.H., it was highly unlikely that she would misidentify M.H. as the person who ran into her apartment holding a gun shortly after G.W.'s murder. In fact, B.L. was able to identify M.H. on the surveillance footage; as she explained,

B.L. had seen M.H. "every other day with the same Helly Hansen jacket and the same body figure" (10/27/22 Tr. 107, 122-31, 140-41). Likewise, Phelps was able to recognize M.H., even though M.H. was wearing a mask, because Phelps frequently saw M.H. in the neighborhood (around three to four times a week) and knew him by his full name (10/26/22 Tr. 131-37, 193-94).

Although Tribble had less familiarity with M.H., Tribble testified that, before G.W.'s murder, he had seen M.H. three to four times both with his mask on and off (10/28/22 Tr. 24-25). Tribble was thus able to recognize the man in black, who ran right past him, as M[redacted] from Hartford Street (10/28/22 Tr. 26). Tribble's trial testimony was corroborated by his prior statement of identification made just one hour after G.W.'s murder, when Tribble told Detective Brackett that he recognized the man wearing black, who had chased G.W. into 2919 Knox Place, as M[redacted] from Hartford Street (10/20/22 Tr. 190-99; 10/24/22 Tr. 225-28; 10/28/22 Tr. 32-33, 47-49). Later that evening, Tribble selected a photograph of M.H. from an array as the person he knew as M[redacted] from Hartford Street (10/24/22 Tr. 185-86, 191-95, 203-05, 210-12, 218-20, 229, 233-36; 10/28/22 Tr. 33-38, 42-43, 49). After choosing M.H.'s photograph, Tribble told Detective Brackett that he was "110 percent certain" of his selection (10/24/22 Tr. 212-13, 236-37, 256-58).

The credibility problems of which M.H. complains were all aired before the jury, and "[i]t [wa]s the jury's province to resolve questions of credibility and to

make reasonable inferences from the evidence." *Foreman v. United States*, 114 A.3d 631, 639 (D.C. 2015) (internal quotation marks and citation omitted). Indeed, this Court has found the erroneous admission of hearsay evidence to be harmless even when there are credibility issues with the government's witnesses. *See id.* at 641-42 (any error in admission of prior statement of identification by witness was harmless where other witnesses identified defendant as the shooter, even though "there was evidence that some of the witnesses had been drinking or using drugs," because "jury was responsible for determining their credibility"); *id*. (error was also harmless "[e]ven though some of these witnesses repeatedly claimed that they could not remember the events or evaded direct responses to questions," since "their sworn statements and grand jury testimony were properly admitted into evidence").

Second, S.B. admitted to E.B. that he and Leek chased and shot G.W. and that he and Leek were the two suspects on the surveillance footage. This confession corroborated Phelps's, Tribble's, and B.L.'s identifications of M.H. To be sure, as M.H. notes (Brief for M.H. at 28-32), the government did argue that S.B.'s text messages corroborated E.B.'s testimony regarding their March 2019 in-person conversation. M.H. overstates the centrality of these texts to the government's case, however. The government's reference to S.B.'s May 2019 texts spanned only one page of its initial closing argument (see 10/31/22 Tr. 115), which in its entirety was approximately 40 pages long (see 10/31/22 Tr. 85-125). In the defense closing

argument, defense counsel argued that there was no evidence to corroborate S.B.'s admissions of guilt to E.B. (10/31/22 Tr. 155). In rebuttal, the government responded by reiterating that S.B.'s text to E.B., "remember I told you the story," corroborated their earlier conversation (10/31/22 Tr. 159-60). That was the extent of the government's discussion of the text messages.

More importantly, E.B.'s credibility did not need bolstering. The jury would most certainly have credited E.B.'s testimony regarding S.B.'s confession to her regardless of the text messages. E.B. and S.B. had been friends since elementary school (10/27/22 Tr. 208-12, 232-33), and as the government argued, S.B. confided in E.B. about his involvement in G.W.'s murder because she was "a close personal friend" whom he trusted with this information (10/31/22 Tr. 160). Contrary to M.H.'s suggestions (Brief for M.H. at 29-30 & n.18), E.B.'s failure to go to the police immediately after S.B. confessed his role in G.W.'s murder did not undermine her credibility, but rather underscored her loyalty to her childhood friend. After S.B. was murdered in September 2019, E.B. obviously no longer needed to protect him from prosecution. Thus, when E.B. testified at M.H.'s trial in October 2022, she had absolutely no reason to lie about S.B.'s confession in March 2019. Given E.B.'s utter lack of motive to fabricate, the jury had ample grounds to credit her testimony regarding her March 2019 conversation with S.B. The limited corroboration

provided by S.B.'s text message, which merely alluded to this prior conversation, was hardly crucial to the government's case.

II. The Trial Court Did Not Abuse its Discretion by Admitting Evidence About S.B.'s Prior Possession of Guns.

M.H. challenges the admission of three photographs depicting S.B. with a gun and E.B.'s testimony that she saw S.B. with a gun in January 2019 (Brief for M.H. at 35-42).[17] M.H. argues that this evidence was admitted for the improper purpose of showing S.B.'s propensity for possessing guns (*id*. at 35). M.H. did not object to E.B.'s testimony, however. And the trial court reasonably admitted the photographs for the limited purpose of corroborating E.B.'s testimony about S.B.'s confession to this murder. M.H. was not unduly prejudiced by the admission of this evidence in any event.

A. Additional Background

At the pretrial hearing on the government's motion in limine to admit S.B.'s out-of-court statements, E.B. testified that when she visited S.B. at his home in January 2019, she saw S.B. with a firearm at his hip (10/6/22 Tr. 36-37). M.H. did

[17] M.H. has included these photographs – GX 454.13, GX 457.1, GX 457.3 – in the limited appendix filed with his brief (App. 78 (GX 454.13); App. 79 (GX 457.2); App. 80 (GX 457.3)).

not object to this testimony at the pretrial hearing. Later, at trial, E.B. reiterated that when she met S.B. in January 2019, she noticed he had a gun tucked in his waistband (10/27/22 Tr. 230-31, 234). Again, M.H. did not object to this testimony.

Before trial, M.H. objected to the admission of various photographs taken from his and S.B.'s Instagram accounts as unduly prejudicial (10/13/22 Tr. 51-54; 10/18/22 Tr. 5-22). As relevant to this appeal, M.H. objected to GX 454.13, a photograph posted on M.H.'s Instagram account (gusgangleek) about a week before G.W.'s murder (10/18/22 Tr. 8-12; App. 78). The photograph depicted three boys with M.H. on the left, and S.B., who was holding a gun, on the right (10/18/22 Tr. 8-11; App. 78). S.B.'s Instagram account "yrn_bigs[redacted]" was written in the upper left corner, and the photograph was captioned "Trap$hit," which was a reference to "trap," a style of rap popular in the area (10/18/22 Tr. 9-12; App. 78). M.H. argued that the "styling of the photograph" created the impression of dangerousness and criminality and was unduly prejudicial (10/18/22 Tr. 9-10). The government argued that the photograph was highly probative because it showed the association between M.H. and his accomplice shortly before the murder and would corroborate E.B.'s expected testimony that S.B. told her that he was the second gunman (10/18/22 Tr. 10-11). The trial court ruled that GX 454.13 was admissible because it showed a camaraderie between M.H. and S.B. and "goes to support testimony that the

government plans to elicit from another witness in this trial," and therefore its probative value was not outweighed by any prejudice (10/18/22 Tr. 12).

M.H. also objected to GX 457.2 and GX 457.3, two photographs posted on S.B.'s Instagram account (yrn_bigs[redacted]) (10/18/22 Tr. 19-20; App. 79-80). GX 457.2 depicted S.B. pointing a gun at the camera (App. 79). GX 457.3 depicted S.B. seated on the stairs with cash and a gun next to him (App. 80). The government argued that both these photographs showed that S.B. had access to firearms and would corroborate E.B.'s testimony that S.B. had confessed that he and Leek shot G.W. (10/18/22 Tr. 19-20). The trial court ruled that GX 457.2 and GX 457.3 were admissible because they supported E.B.'s testimony regarding S.B. and "the type of individual that [he] may have become," and were therefore not unfairly prejudicial (10/18/22 Tr. 22).[18]

B. Standard of Review and Legal Principles

This Court will review a trial court's evidentiary decisions for "abuse of discretion, and in doing so, broadly defer to the trial court due to its familiarity with the details of the case and its greater experience in evidentiary matters." *Drake v.*

[18] The government also argued that the prohibition against using prior bad acts evidence to show propensity applied only with respect to a criminal defendant (10/18/22 Tr. 20). Although the prosecutors misstated the law on this point, *see, e.g.*, *Austin v. United States*, 64 A.3d 413, 421-22 (D.C. 2013), the trial court did not rely upon this theory in admitting the evidence.

United States, 315 A.3d 1196, 1207 (D.C. 2024) (internal quotation marks and citation omitted). "This deference particularly applies where the trial court must consider the relevance and potential prejudice of the evidence." *Id*. (internal quotation marks and citation omitted). Where a defendant does not fairly apprise the trial judge of the basis for an evidentiary objection, however, this Court will review only for plain error. *See, e.g., Perkins v. United States*, 760 A.2d 604, 608-09 (D.C. 2000). M.H. did not object to E.B.'s testimony that she saw S.B. with a gun in his waistband in January 2019. Thus, M.H. must bear the "formidable burden" to show that the admission of this testimony was a plain and obvious error resulting in a miscarriage of justice. *Id.* at 609.

"Under *Drew v. United States*, 331 F.2d 85 (D.C. Cir. 1964), evidence of 'other crimes' is not admissible to prove general criminal propensity, but other-crimes evidence can be admitted for another 'substantial, legitimate purpose.'" *Drake*, 315 A.3d at 1207 (quoting *Drew*, 331 F.2d at 89-90). "[W]hile corroboration is not a classic example of a non-propensity purpose, 'evidence of other crimes or acts is admissible to corroborate evidence that itself has a legitimate non-propensity purpose.'" *Jones v. United States*, 27 A.3d 1130, 1146 (D.C. 2011) (quoting *United States v. Bowie*, 232 F.3d 923, 933 (D.C. Cir. 2000) (collecting cases)). Moreover, even if prior bad acts evidence is relevant and admissible for a valid purpose other than to show propensity, it may nonetheless be excluded if its probative value is

substantially outweighed by the danger of unfair prejudice. *Johnson v. United States*, 683 A.2d 1087, 1100 (D.C. 1996) (en banc) (adopting Fed. R. Evid. 403)).

C. Discussion

The trial court did not abuse its discretion in concluding that evidence concerning S.B.'s prior gun possession corroborated the statements against penal interest that S.B. made to E.B. In particular, the photographs and E.B.'s own observation of S.B.'s gun possession showed S.B.'s close connection to M.H. and his access to firearms. Given the attacks on E.B.'s credibility, the trial court appropriately recognized that the relevance of this evidence was not substantially outweighed by its prejudicial effect. *See, e.g., Jones*, 27 A.3d at 1146 ("[t]he fact that the North Carolina evidence [about an uncharged robbery] corroborated the details of Jones's confession to his participation in the robbery suggests that Jones spoke with candor about his role in the murder as well"); *Minick v. United States*, 506 A.2d 1115, 1119 (D.C. 1986) (parole papers and testimony concerning the papers admissible as evidence of appellant's identity; although parole papers implied the existence of a prior criminal record, "[t]he witnesses' specific reference to a detail like the parole papers added 'narrative veracity' to their testimony and reinforced their credibility to recall the events of the evening in question"); *Bowie*, 232 F.3d at 932-33 (in prosecution for possession of counterfeit currency, upholding

district court's admission of uncharged act of possession of counterfeit currency one month before charged crime to corroborate defendant's confession).

Contrary to M.H.'s claims (Brief for M.H. at 37), *Dodson v. United States*, 288 A.3d 1168 (D.C. 2023), does not suggest that the trial court abused its discretion here. In *Dodson*, defense counsel posited that the child victim "H.B." falsely accused Dodson due to fear of her abusive father. *Id*. at 1172. When the father testified, defense counsel sought to introduce extrinsic evidence to show that a 2012 investigation into the father's abuse against H.B. had been conducted by the Child and Family Services Agency. *Id*. at 1173. Defense counsel initially argued that evidence about this 2012 investigation would "corroborate" the child's testimony about her father's anger. *Id.* The trial court declined to admit the evidence on this basis, however, "[a]fter determining that the government would not contest H.B.'s testimony that her father had hit her, and had hit her mother in her presence." *Id*. at 1174. Otherwise, the trial court found that the 2012 investigation offered little to rebut the father's trial testimony. *Id*. Thus, *Dodson* differs markedly from this case. The extrinsic evidence of the father's other bad acts in *Dodson* was *not* offered to corroborate the child's account about her father's prior bad acts; there was no challenge to the child's credibility on that score. Rather, the trial court properly precluded the defense from offering these extrinsic acts "in order to impeach" the father's testimony about how he interacted with his child when she reported the

alleged sexual misconduct. *Id.* at 1176. Thus, *Dodson* stands for the unremarkable proposition that prior bad acts may not be used as propensity evidence to impeach a witness. *Id*. *Dodson* does not establish that the trial court in this case abused its discretion by admitting evidence about S.B.'s prior gun possession in the presence of M.H. to corroborate E.B.'s challenged testimony.

Even assuming, arguendo, that the trial court erred in admitting evidence of S.B.'s prior gun possession, reversal is not required because M.H. was not unfairly prejudiced. Evidence of S.B.'s prior possession of guns was not, as M.H. claims, "a major part of the case for the prosecution" (Brief for M.H. at 42 (internal quotation marks and citation omitted)). In its initial closing argument, the government briefly noted the photographs and did not mention E.B.'s testimony that she had seen S.B. with a gun in January 2019 (10/31/22 Tr. 114). In response to the defense argument that there was no evidence to back up E.B.'s testimony that S.B. had confessed to her (10/31/22 Tr. 155), the government argued in rebuttal that E.B. also testified that "she saw [S.B.] with a gun in his waistband" and "[t]hat back[ed] up that [S.B.] could easily be a killer" (10/31/22 Tr. 159-60). That was the extent of the discussion of S.B.'s prior possession of guns in the government's initial and rebuttal closings.

Although the evidence of S.B.'s gun possession corroborated E.B.'s account, her testimony was highly credible even without this evidence. As the government argued, the jury could be assured that S.B. was not lying to E.B. about the fact that

he and Leek had killed G.W. given the close nature of their relationship (10/31/22 Tr. 160 ("It was something he confided in a close, personal friend.")). E.B. also had no motive to fabricate a story that her close childhood friend, who had since passed away, confessed his involvement in G.W.'s murder to her. The limited corroboration provided by evidence that S.B. had previously possessed a gun did not sway the verdict, particularly given the identification testimony of Phelps, Tribble, and B.L.

Furthermore, as defense counsel recognized, the photographs of S.B. with guns were "very theatrical," like the "trap" style of rap referenced in one of the photographs (10/18/22 Tr. 9-10). In closing, defense counsel argued that S.B. was "creating an image for himself" by posting these photographs on his Instagram account (10/31/22 Tr. 155-56). Under these circumstances, these photographs were not as inflammatory or as indicative of S.B.'s "propensity for violence" as M.H. suggests on appeal (Brief for M.H. at 44). In fact, there was no evidence of M.H.'s (as opposed to S.B.'s) prior possession of guns. Thus, it was highly unlikely that the jury would conclude that M.H. was involved in "guns, drugs, gangs" merely after seeing the stylized photograph of S.B. and M.H. posing as gangsters, as M.H. suggests (Brief for M.H. at 44).

Accordingly, any error in the admission of evidence of S.B.'s prior gun possession was harmless – i.e., the error "was sufficiently insignificant to give [this

Court] fair assurance that the judgment was not substantially swayed by it." *Foreman*, 114 A.3d at 640 (internal quotation marks and citation omitted).

III. The Trial Court Did Not Abuse its Discretion in Declining to Order a Mistrial to Remedy the Admission of Evidence Alluding to M.H.'s Prior Arrest.

M.H. challenges the admission of S.B.'s text message to E.B. telling her, "Nah," in response to her question whether this was M.H.'s first charge (Brief for M.H. at 46-47). He contends that this reference to a prior arrest requires reversal (*id*. at 46-48). Because M.H. did not object to this portion of the text message exchange as improperly referring to his prior arrest and move to exclude its admission on this ground, this Court must review for plain error only. Reversal is not warranted because M.H. cannot show that he was prejudiced by this text message under any standard.

A. Additional Background

Two government witnesses inadvertently referred to M.H.'s prior arrest at trial. MPD Detective Sean Brackett testified about the photo identification procedure conducted with Tribble (10/24/22 Tr. 185-95). During this testimony, Detective Brackett explained generally how photo arrays were created, stating, "There's a database that we use in order to generate the photos, and they're photographs obtained by the police department of individuals who have been arrested in the city" (10/24/22 Tr. 195). M.H. objected and moved for a mistrial (10/24/22 Tr. 195-96).

The prosecutor, at the suggestion of the court, agreed to try "to clean this up" by leading Detective Brackett with questions regarding other sources of photographs the police used to create arrays (10/24/22 Tr. 196-97). Upon resuming his testimony, Detective Brackett stated that photographs used in arrays sometimes came from school identification photographs and perhaps family members (10/24/22 Tr. 201). The trial judge ultimately denied M.H.'s motion for a mistrial, ruling that Detective Brackett's slip was not "significant enough to merit a mistrial," given the government's further questioning of Detective Brackett about other sources the police used to compile arrays (10/24/22 Tr. 198-200; 10/25/22 Tr. 6-7).

Later that same day, MPD Detective Jose Morales testified about the execution of M.H.'s arrest warrant (10/24/22 Tr. 266-68). Detective Morales explained that he knew what M.H. looked like because he "had a picture of him from . . . a 2018 arrest" (10/24/22 Tr. 273). M.H. objected (10/24/22 Tr. 273). The government requested a curative instruction while M.H. again moved for a mistrial (10/24/22 Tr. 273-77). The trial court instructed the jury "to disregard any reference to a prior arrest" and "what the detective just testified to," and excused the jury for the day (10/24/22 Tr. 276-78). The next day, the court ruled that Detective Morales's mention of a 2018 arrest photo did not warrant a mistrial, given that the court immediately gave the jury a curative instruction ordering them to disregard this testimony and struck the reference to a prior arrest from the record (10/25/22 Tr. 7).

At the pretrial hearing on the government's motion in limine to admit S.B.'s out-of-court statements, E.B. testified that, during the May 6, 2019, text exchange, when S.B. told her that M.H. was "[s]till in for that murder shit," she asked S.B., "[W]hy they keep stepping him back? That's his first charge." (10/6/22 Tr. 47-48.) S.B. responded, "Nah, because they trying to find out who the second shooter is, and they don't really got no evidence" (10/6/22 Tr. 49). M.H. did not object to this testimony, or seek to preclude it, on the ground that it implied that M.H. had previously been arrested (10/6/22 Tr. 49). Later, at trial, E.B. testified to this same text message exchange (10/27/22 Tr. 215, 253). Again, M.H. made no objection to this testimony at trial on the ground that it impermissibly implied that he had a prior arrest, nor did he move for a mistrial or seek a less drastic remedy, such as striking the testimony or requesting a curative instruction (10/27/22 Tr. 253).

B. Standard of Review and Legal Principles

"The risk from the admissibility of a prior arrest of the defendant is that 'the jury may infer . . . that the defendant is a bad [person] and that he [or she] therefore probably committed the crime for which he [or she] is on trial.'" *Clark v. United States*, 639 A.2d 76, 79 (D.C. 1993) (quoting *Bennett v. United States*, 597 A.2d 24, 27 (D.C. 1991)). This Court has also noted, however, that "a reference to a defendant's prior arrest or imprisonment" does not necessarily result in prejudice so great as to require a mistrial. *Id*. at 78-79; *accord McRoy v. United States*, 106 A.3d

1051, 1061 (D.C. 2015) ("Improper references to a defendant's criminal history, though potentially prejudicial, do not always warrant a mistrial."). "Whether to declare a mistrial is within the sound discretion of the trial court, and its decision in that regard will not be disturbed except in extreme situations threatening a miscarriage of justice." *Goins v. United States*, 617 A.2d 956, 958 (D.C. 1992) (internal quotation marks and citations omitted). Indeed, "[w]henever possible, the court should seek to avoid a mistrial by appropriate corrective action which will minimize potential prejudice." *Id.*

M.H. does not contend that the trial court should have declared a mistrial following the testimony of Detectives Brackett and Morales. Instead, he argues that "the text message reference to M.H.'s criminal record was error" and now claims that it warranted a mistrial (Brief for M.H. at 47). At no point, however, did M.H. object to the admission of the text messages between E.B. and S.B. on the ground that S.B.'s response impermissibly implied that M.H. had previously been arrested. More importantly, M.H. did not demand a mistrial because the text messages contained an oblique reference to his criminal record. Because M.H. raises this

argument for the first time on appeal, this Court must review for plain error only. *See Perkins*, 760 A.2d at 608-09.[19]

C. Discussion

M.H. cannot show plain error or prejudice here. Indeed, it is not clear that the jury would have even picked up on this passing allusion to M.H.'s prior arrest in the text message, especially since the government did not discuss this portion of E.B.'s and S.B.'s text message exchange at all in its closing argument (see 10/31/22 Tr. 115, 159-60). At most, S.B.'s text message reference to M.H.'s prior arrest was subtle, brief, and lacking in any real detail. Because "the evidence of other crimes [wa]s . . . weak," "the danger of improper inference" as to M.H.'s guilt "[wa]s much less." *Clark*, 639 A.2d at 79; *see also id*. at 79-80 (noting that where nature of prior charge or arrest was not specified, "the risk of an improper inference of guilt by the

[19] M.H. contends that he preserved this issue for appeal because, "[i]n addition to objecting to that statement as inadmissible hearsay, [he] objected that it was substantially more prejudicial than probative" under Fed. R. Evid. 403 (Brief for M.H. at 47 (citing R. 1169 (Def. Opp. p.3, n.1); 10/06/2022 Tr. 211-12; 10/27/2022 Tr. 197). He is mistaken. His hearsay objection and general invocation of Rule 403 did not "fairly apprise[]" the trial court of the claim M.H. now makes on appeal. *Perkins*, 760 A.2d at 610. Had M.H. timely objected on this specific ground, the trial court could have remedied the situation by redacting from the text exchange E.B.'s question, "That's his first charge," and S.B.'s response, "Nah," to eliminate any reference to M.H.'s prior arrest (10/6/22 Tr. 47-49). Because M.H. did not object on this ground, this Court should review his claim for plain error. *Perkins*, 760 A.2d at 610 (applying plain error where the "the prosecutor never had the opportunity to state his views on the matter, and the judge had no occasion to consider whether there were other, less prejudicial means" to address the issue).

jury was less than in the situation where the crime charged and the prior arrest involve the same offense") (internal quotation marks and citation omitted). Indeed, M.H. apparently attached little importance to S.B.'s text message referring to his prior arrest because he never moved to preclude its admission before trial. Nor did he move for a mistrial after this evidence was admitted. "Although a failure to object promptly is not dispositive of the issue of prejudice, . . . it constitutes some evidence that appellants did not immediately perceive the challenged argument as prejudicial." *Parks v. United States*, 451 A.2d 591, 613 (D.C. 1982), *rejected on other grounds by Lawson v. United States*, 514 A.2d 787, 789-90 (D.C. 1986).

M.H. contends that the prejudice stemming from S.B.'s allusion to his prior arrest in the text message was heightened because Detectives Brackett and Morales had also previously referred to an arrest (Brief for M.H. at 47-48). The trial court took steps to mitigate any harm to M.H. caused by these earlier two references, however, and M.H. does not suggest that those remedial measures lacked force. *See McRoy*, 106 A.3d at 1061 (noting that trial court "issued a clear curative instruction, which we presume the jury followed, absent evidence to the contrary"); *Battle v. United States*, 630 A.2d 211, 224-25 (D.C. 1993) (no abuse of discretion in declining to order a mistrial where two witnesses adverted to other incidents of sexual abuse committed by the defendant where the trial judge granted the defense request for a curative instruction and struck the testimony of one witness "to the extent that it may

have referred to other occasions"). Therefore, M.H. cannot show error, let alone plain error, arising from the trial court's failure to declare a mistrial, sua sponte, based on the admission of this text message.

IV. M.H. Was Not Prejudiced by Any Error in the Trial Court's Failure to Recognize That It Had Discretion to Impose a Sentence Below the Mandatory Minimum.

M.H. contends that the trial court failed to recognize that it had discretion to sentence him below the mandatory minimum pursuant to D.C. Code § 24-403.01(c)(2), and that he is entitled to a resentencing (Brief for M.H. at 48-50). Even assuming error, M.H. was not prejudiced and a resentencing is not warranted.

A. Additional Background

In his sentencing memorandum, despite conceding that he "[wa]s not a 'youthful offender' pursuant to D.C. Code § 24-901(6)," M.H. claimed that the trial court had discretion to sentence him below the 30-year mandatory minimum because the "Youth Rehabilitation Act [YRA] grant[ed] the [c]ourt the ability to issue a sentence less than any mandatory-minimum term otherwise required by law, 'notwithstanding any other law' (D.C. Code § [2]4-903(b)(2))" (R. 1489 (Def. Sent. Memo. p. 2)). At the sentencing hearing, M.H. reiterated his argument that, under D.C. Code § 24-903(b)(2), the trial court had discretion to sentence him below the 30-year mandatory minimum for first-degree murder (3/1/23 Tr. 7-8).

The trial court found that it did not have discretion under the YRA to sentence below the mandatory minimum because M.H. had been convicted of first-degree murder, which disqualified him from falling within the definition of a "youthful offender" (3/1/23 Tr. 7-8). Furthermore, the court made clear that even if it had discretion under the YRA, it would not sentence M.H. below the mandatory minimum (3/1/23 Tr. 8 ("even if the Youth Act were to apply here and the [c]ourt believes, legally, it does not, this is not the type of situation that the [c]ourt would be inclined to deviate from the guideline")).[20] The court ultimately sentenced M.H. to 40 years of imprisonment on the first-degree murder charge, 10 years above the mandatory minimum, for the "senseless" death of a 15-year-old boy (3/1/23 Tr. 53-54).

B. Standard of Review and Legal Principles

Before the trial court, M.H. invoked only the YRA, D.C. Code § 24-903(b)(2), and never cited the Incarceration Reduction Amendment Act of 2016 (IRAA), D.C. Code § 24-403.01(c)(2), as grounds for a sentence below the mandatory minimum. Because M.H. invokes the IRAA for the first time on appeal, this Court must review this claim of sentencing error for plain error only. *See Perkins*, 760 A.2d at 608-09.

[20] M.H.'s presentence report (PSR) determined that the applicable guideline range for his first-degree premeditated murder conviction was 360 to 720 months or 30 to 60 years of incarceration (SR. 294 (PSR p. 21)). M.H. agreed with the PSR's calculation of the applicable guideline range (R. 1489 (Def. Sent. Memo. p. 2)).

C. Discussion

Even assuming, arguendo, that the trial court plainly erred in failing to recognize its discretion to sentence M.H. below the mandatory minimum under D.C. Code § 24-403.01(c)(2), M.H. was not prejudiced by the error. The trial judge explicitly stated that, even if she had discretion to sentence M.H. below the mandatory minimum, she would not have done so in the circumstances of this case (3/1/23 Tr. 8). Thus, a remand for resentencing is unnecessary because the record makes clear that the trial court would not sentence M.H. below the mandatory minimum even if she had discretion to do so. *See generally Williams v. United States*, 503 U.S. 193, 203 (1992) ("If the party defending the sentence persuades the court of appeals that the district court would have imposed the same sentence absent the erroneous factor, then a remand is not required. . . ."); *Briscoe v. United States*, 181 A.3d 651, 664 (D.C. 2018) (even if trial court plainly erred in failing to recognize that it had discretion to sentence below the 60-month mandatory-minimum sentence for armed robbery under the YRA, the error did not affect defendant's substantial rights where trial court also imposed concurrent 60-month sentence for conviction for possession of a firearm during a crime of violence and this sentence was upheld on appeal).

CONCLUSION

WHEREFORE, the government respectfully submits that the judgment of the Superior Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have caused a copy of the foregoing to be served by electronic means, through the Court's EFS system, upon counsel for appellant, Paul Maneri, Esq., Public Defender Service, on this 21st day of October, 2024.

/s/
ANNE Y. PARK
Assistant United States Attorney