BRIEF FOR APPELLEE

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 23-CF-331

GREGORY PHILLIP WOOD, 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. 2019-CF2-15427

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ISSUE PRESENTED

Whether sufficient evidence supported appellant Gregory Wood's conviction for tampering with physical evidence, where Wood stomped on a bag of suspected drugs and scraped it across the ground, where the term "alters" in the tampering statute means no more than "makes different," and where the jury could reasonably infer that Wood's conduct altered the bag.

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COUNTERSTATEMENT OF THE CASE

On October 19, 2020, appellant Gregory Wood[1] was charged in a 15-count indictment that included several charges of drug distribution while armed, weapons charges, and tampering with physical evidence (R. 18). On February 10, 2023, a jury acquitted Wood of most of the charges but

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[1] At times in the record, appellant is referred to as either Gregory Wood or Gregory Woods. Because the indictment, the judgment and commitment order, and the case caption for the appeal in this Court all refer to him as "Wood," we use that name here.

convicted him of the lesser-included offense of attempted unlawful possession of a controlled substance[2] and tampering with physical evidence (R. 106). On March 30, 2023, the Honorable Jason Park sentenced Wood to time served (R. 111). Wood timely appealed (R. 112).

The Trial

The Government's Evidence

On December 4, 2019, officers were conducting a "buy bust"[3] operation at a gas station in Northeast Washington, D.C. (2/7/23 Transcript (Tr.) 37, 40). An undercover officer approached a car in the parking lot of the gas station, saw in the driver's seat a man whom he later identified as Wood, and asked for some crack cocaine (2/8/23 Tr. 15-17). The undercover officer got in the car and gave the driver $20 in exchange for crack cocaine (*id.* at 17, 19). The undercover officer left the

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[2] This charge was a lesser-included offense of attempted unlawful possession with intent to distribute a controlled substance (R. 106). The government had elected to pursue attempted drug distribution charges at trial rather than distribution charges (2/1/23 Tr. 176-78). That decision also removed the necessary predicate for the while-armed offenses (*id.*).

[3] A "buy bust" is when an undercover officer buys drugs and then broadcasts a description of the seller to arresting officers nearby (2/7/23 Tr. 32, 36).

car, went about a block away, and radioed to the arrest team that the transaction was complete and that the team could move in to make the arrest (*id.* at 21, 23-24; 2/7/23 Tr. 38). The arresting officers approached a silver SUV, which matched the description of the car that they had been given (2/7/23 Tr. 45, 47). When they opened the front door, they saw Wood in the driver's seat (*id.* 49).

Officers had Wood step out of the car, placed him under arrest, and began searching him (2/7/23 Tr. 50, 52). During that search, a white object fell from Wood's waistband to the ground (*id.* at 72; see Gov. Ex. 19 at 00:29:32). When an officer tried to reach for the object, Wood "stepped" or "stomped" on it and "dragged his foot back" as if to "smear" or "scrap[e]" the object (2/7/23 Tr. 72, 75, 159-61; see Gov. Ex. 19 at 00:29:34). An officer pushed Wood's leg away from the object because he saw that Wood's leg was on it (2/7/23 Tr. 74-75). Officers moved Wood away from the object and recovered it (*id.* at 72; Gov. Ex. 19 at 00:29:36). They saw that the object was a clear plastic bag containing multiple small pieces of a white rock-like substance, which was consistent with cocaine

base (2/7/23 Tr. 75-76, 161-62; 2/8/23 Tr. 125; Gov. Ex. 8). The bag weighed 1.2 grams (2/7/23 Tr. 165).[4]

The Jury Instructions and Closings

The trial court instructed the jury that the elements of tampering with physical evidence were that Wood (1) knew a trial was likely to be instituted, (2) altered an object, and (3) intended to alter that object to reduce its value as evidence or its availability for use as evidence at trial (R. 103 at 38; 2/9/23 Tr. 78). In its closing argument, the government argued that Wood had tampered with the bag of suspected drugs when he stomped on it and made a motion as if to scrape it backwards (2/9/23 Tr. 88, 96). In his closing argument, defense counsel argued, among other things, that the government had not proven that Wood had altered the object (*id.* at 116).

SUMMARY OF ARGUMENT

Sufficient evidence supported Wood's conviction for tampering with physical evidence. Wood's conduct fell within the meaning of "alters" in

[4] The defense put on a short case that consisted of testimony from a defense investigator and a forensics professor (2/8/23 Tr. 194; 2/9/23 Tr. 8). Neither witness provided testimony relevant to the issues on appeal.

the tampering statute, D.C. Code 22-723(a). Contrary to Wood's claims, the statute does not require that the object be "significantly" altered or that its evidentiary value be diminished. The statute requires only that the defendant "alter[]" the object. The ordinary meaning of "alters" is "makes different," no more. This Court's broad reading of "tamper" and "alter" in *In re R.F.H.,* 354 A.2d 844 (D.C. 1976), supports reading "alters" in D.C. Code § 22-723(a) according to its plain meaning. Wood fails to justify adding words to the statute.

Based on the ordinary meaning of "alters," there was sufficient evidence for the jury to find that Wood altered physical evidence. A reasonable juror could infer that Wood's actions of stomping on the plastic bag and scraping it across the ground altered the bag.

Even if there was insufficient evidence of actual tampering, there was sufficient evidence to support Wood's conviction for the lesser-included offense of attempted tampering.

ARGUMENT

There Was Sufficient Evidence to Support's Wood's Conviction for Tampering with Physical Evidence.

Wood does not challenge his conviction for attempted unlawful possession of a controlled substance. He does challenge, however, his conviction for tampering with physical evidence on the ground that it was not supported by sufficient evidence. Wood's insufficiency claim is without merit.

A. Standard of Review and Applicable Legal Principles

"When reviewing an insufficiency-of-the-evidence claim, [this Court] view[s] the evidence in the light most favorable to the government, drawing all reasonable inferences in the government's favor, and giving deference to the jury's right to determine credibility and weight." *Dorsey v. United States*, 154 A.3d 106, 112 (D.C. 2017). The evidence will be deemed "sufficient if, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the charged offense beyond a reasonable doubt." *Bassil v. United States*, 147 A.3d 303, 307 (D.C. 2016) (citation omitted) (cleaned up). Furthermore, "the evidence need not negate every possible

inference of innocence." *Young v. United States*, 305 A.3d 402, 415 (D.C. 2023) (quoting *Walker v. United States*, 167 A.3d 1191, 1201 (D.C. 2017)). Therefore, "[a]n appellant making a claim of evidentiary insufficiency bears the heavy burden of showing that the prosecution offered no evidence upon which a reasonable mind could find guilt beyond a reasonable doubt." *Dorsey*, 154 A.3d at 112. "It is the factfinder's prerogative to determine credibility and to make reasonable inferences from the facts which have been proven." *Smith v. United States*, 809 A.2d 1216, 1222 (D.C. 2002). "In considering the sufficiency of the evidence, [this Court] make[s] no distinction between direct and circumstantial evidence, and circumstantial evidence is not intrinsically inferior to direct evidence." *Id.* (internal quotation marks omitted).

The tampering statute under which Wood was convicted provides:

> A person commits the offense of tampering with physical evidence if, knowing or having reason to believe an official proceeding has begun or knowing that an official proceeding is likely to be instituted, that person alters, destroys, mutilates, conceals, or removes a record, document, or other object, with intent to impair its integrity or its availability for use in the official proceeding.

D.C. Code § 22-723(a).

The offense of tampering with physical evidence thus requires that the defendant (1) knew or had reason to believe that an official proceeding had begun or was likely to be instituted; (2) altered, destroyed, mutilated, concealed, or removed a record, document, or other object; and (3) intended to impair the object's integrity or its availability for use in the official proceeding. *Id.*

This Court reviews questions of statutory interpretation de novo. *Peterson v. United States*, 997 A.2d 682, 683 (D.C. 2010).[5] The "primary"

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[5] Because Wood did not raise in the trial court his argument that the statute does not reach conduct that does not significantly alter an object or diminish its evidentiary value, arguably this Court should review that statutory claim for plain error. *See, e.g.*, *Mitchell v. United States*, 741 A.2d 1049, 1052 (D.C. 1999) (reviewing for plain error a claim, which was not made in the trial court, that the conviction was "based on conduct which the statute does not make a crime and which the regulation relied upon . . . cannot make a crime"). More recent decisions of this Court, however, have declined to apply plain-error review under similar circumstances. *See, e.g.*, *Campbell v. United States*, 163 A.3d 790, 793-94 (D.C. 2017) (reviewing de novo a claim that conduct did not fall within the relevant statute even though the defendant did not make the argument below because the defendant had preserved sufficiency challenges); *(Ronald) Wynn v. United States*, 80 A.3d 211, 216 (D.C. 2013) (declining to apply plain-error review because "the circumstances here call for us to engage in *de novo* review in order to avoid affirming a conviction for conduct that was not a crime"); *(Cotey) Wynn v. United States*, 48 A.3d 181, 187-88 (D.C. 2012) (reviewing a statutory construction claim de novo where the defendants had preserved sufficiency challenges and "[a]t bottom, [this Court was] called upon to

(continued . . .)

rule of statutory interpretation "is that the intent of the lawmaker is to be found in the language that [they] ha[ve] used." *Peoples Drug Stores, Inc. v. District of Columbia*, 470 A.2d 751, 753 (D.C. 1983) (en banc). Furthermore, "[i]t is a 'fundamental canon of statutory construction' that, 'unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.'" *Sandifer v. United States Steel Corp.*, 571 U.S. 220, 228 (2014) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)); *accord Peoples Drug*, 470 A.2d at 753 ("[I]n examining the statutory language, it is axiomatic that the words of the statute should be construed according to their ordinary sense and with the meaning commonly attributed to them."). "Generally speaking, if the plain meaning of statutory language is clear and unambiguous and will not produce an absurd result, [this Court] will look no further." *Hood v.*

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determine the reach of the statute which prohibits [the conduct at issue]"); *cf. Kornegay v. United States*, 236 A.3d 414, 418 & n.7 (D.C. 2020) (reviewing a statutory argument not made in the trial court de novo because "it is well settled in this jurisdiction that a full range of challenges to the sufficiency of the evidence are automatically preserved at a bench trial by a defendant's plea of not guilty . . . [including] challenges to the requisite elements of the crime") (quoting *Carrell v. United States*, 165 A.3d 314, 326 (D.C. 2017) (en banc)). Even under de novo review, however, Wood's claims fail for the reasons discussed infra.

United States, 28 A.3d 553, 559 (D.C. 2011) (internal quotation marks omitted); *accord, e.g., Larracuente v. United States*, 211 A.3d 1140, 1143 (D.C. 2019); *Eaglin v. District of Columbia*, 123 A.3d 953, 955-56 (D.C. 2015). If the statute's words are ambiguous, on the other hand, then this Court may turn to the statute's legislative history to determine its meaning. *See Hood*, 28 A.3d at 559.

B. Discussion

There was sufficient evidence to support Wood's conviction for tampering with physical evidence. Wood does not contest that the evidence was sufficient as to the first and third elements of tampering—that he knew or had reason to believe that an official proceeding had begun or was likely to be instituted, and that he intended to impair the object's integrity or its availability for use in the official proceeding. He challenges only the proof on the second element—that he altered, destroyed, mutilated, concealed, or removed a record, document, or other object. The government proceeded on the "alters" option of the statute (see 2/9/23 Tr. 96), and the jury was instructed accordingly (*id.* at 78). The issue on appeal, therefore, is whether there was sufficient evidence that Wood "altered" an object. A jury reasonably could find there was

such evidence. For purposes of the tampering statute, "alters" means only "makes different" and does not require, as Wood argues, a "significant" change or a diminishment in the object's evidentiary value. A reasonable juror could find that by stomping on the plastic bag of suspected drugs and scraping it across the ground, Wood "altered" physical evidence.

1. "Alters" Means No More Than "Makes Different."

Wood argues (at 9-11, 14-22) that his conduct did not fall within the tampering statute because he did not "alter" the bag of suspected drugs. Specifically, Wood argues (at 15-16) that the term "alters" means "a *significant* change, one capable of diminishing the object's evidentiary value at an anticipated proceeding." This argument ignores the ordinary meaning of the term "alters," which also accords with how this Court has interpreted the term "tampering" generally and the word "alters" specifically. Wood's attempt to add language to the statute should be rejected.

The plain meaning of "alters" is straight-forward. To "alter" means "to make different without changing into something else." Alter Definition, *Merriam-Webster.com* (last accessed Apr. 8, 2024); *see also*

Alter Definition, *The American Heritage Dictionary* 99 (2d ed. 1982) ("[t]o change or make different; modify"); Alter Definition, *Webster's Third New International Dictionary of the English Language* 63 (Unabridged 1966) ("to cause to become different in some particular characteristic . . . without changing into something else"). Because the plain meaning of "alters" is unambiguous and does not produce absurd results, that meaning should control. *See Hood*, 28 A.3d at 559; *Larracuente*, 211 A.3d at 1143; *Eaglin*, 123 A.3d at 955-56.

Interpreting "alters" in the tampering statute in accordance with the ordinary meaning of that word is consistent with how this Court has treated tampering liability. In *In re R.F.H.*, 354 A.2d 844 (D.C. 1976), this Court considered a challenge to a police regulation that made it unlawful to "tamper with or move a parked vehicle[.]" *Id.* at 845 & n.1. It noted that Black's Law Dictionary defined "tamper" as "to meddle so as to alter a thing, especially to make corrupting or perverting changes . . . to interfere improperly . . . ." *Id.* at 847 (quoting *Black's Law Dictionary* 1627 (4th ed. 1968) (alteration omitted)). Webster's Dictionary similarly defined "tamper" as "to alter for an improper purpose or in an improper way." *Id.* (quoting *Webster's Third New International Dictionary of the*

English Language 2336 (Unabridged 1969)). And the American Heritage Dictionary listed several meaning of "tamper," including: "1. To interfere in a harmful manner. . . . 3. To bring about an improper situation or condition by clandestine means. . . . 4. To alter improperly . . . ." *Id.* (quoting *The American Heritage Dictionary of the English Language* 1314 (1969)).

Based on these definitions, the Court found that the word "tamper" "connotes wrongful or harmful interference" with the object in question. *In re R.F.H.*, 354 A.2d at 847. In the context of the tampering regulation in *In re R.F.H.*, these definitions meant that it was illegal "to open or alter a vehicle or any of its contents with an unlawful purpose, or to attempt to do the same." *Id.* (quotation marks omitted). As an example, this Court noted that an individual who attempted to pick the lock of a car would have tampered with it within the meaning of the regulation, even if he failed to actually pick the lock, because, had he succeeded, the car would have changed from a locked to an unlocked condition, "thereby constituting a physical alteration." *Id.*

In re R.F.H. is significant for two reasons. First, it underscores the breadth of the common meaning of "tampering." As Wood notes (at 16),

what the statute at issue defines is "tampering with physical evidence." D.C. Code § 22-723(a). *In re R.F.H.* indicates that "tampering" should not be read narrowly, as Wood argues. Second, *In re R.F.H.* shows that "alters" does not mean anything more than the ordinary meaning of that word. The Court's equation of unlocking a car to the "physical alteration" required for tampering, *see* 354 A.2d at 847, illustrates that "alter" in the context of tampering includes even minor physical changes.

Wood errs (at 11, 14-16, 18-19, 21-22) when he argues that in order to commit a crime under D.C. Code § 22-723(a), a defendant must "significantly" change or diminish the evidentiary value of the record, document, or other object in question. The tampering statute nowhere uses the word "significant," nor does it require that the object's evidentiary value in fact be diminished. It simply uses the word "alters" and requires an "intent" to impair the object's integrity or availability for use in the official proceeding. D.C. Code § 22-723(a). Wood is attempting to add language to the tampering statute, despite the general rule that courts do not "usually read into statutes words that aren't there." *Rossil Fasteners, Inc. v. Fossil, Inc.*, 140 S. Ct. 1492, 1495 (2020). Furthermore, Wood's interpretation of the statute runs contrary to the plain meaning

of "alters," which does not include any of the restrictions he proposes. Given the Court's obligation to construe the statute according to the ordinary meaning of the words the legislature chose, *e.g., Sandifer*, 571 U.S. at 228, Wood's attempt to bypass the plain meaning of "alters" should be rejected.

Wood's arguments for rewriting the statutory language are without merit. He relies (at 16) on the fact that the offense is called "tampering" with evidence, and he argues that "tampering" necessarily means reducing the object's value. As we have discussed, *In re R.F.H.* and the definitions on which the Court relied make it clear that a defendant need not succeed in significantly changing the object—or in somehow diminishing its evidentiary value—in order to "tamper" with it. Rather, a defendant must simply "meddle so as to alter a thing," "alter for an improper purpose," or "interfere in a harmful manner." *In re R.F.H.*, 354 A.2d at 847 (citing various dictionary definitions of "tamper").

Contrary to Wood's claim (at 16), the mens rea element of § 22-723(a) does not indicate a requirement that the alteration actually diminish the object's evidentiary value. The actus reus and the mens rea of tampering are two different elements. The defendant must alter an

object with the intent to diminish its evidentiary value, but there is no requirement that the defendant succeed in that effort.

The other verbs in the tampering statute do not justify ignoring the plain meaning of "alters," as Wood asserts (at 16). Wood argues that "alters" must be read consistently with "destroys," "mutilates," "conceals," or "removes," which all either "*significantly* change the object ('destroys,' 'mutilates') or otherwise render is unusable as evidence ('conceals,' 'removes')." This argument overstates the impact of the other verbs. One can "conceal" an object without necessarily rendering it unusable as evidence. The concealment can be temporary, for example, or not very effective. Similarly, one can take a document from a file and place it in a new location: the person has "removed" the document, but the document, although now in a different place, may still be usable as evidence.

Moreover, "alters" does work that the other verbs do not. Take, for example, adulteration of a photograph. The person has not destroyed, concealed, or removed the photograph, and the adulteration may not be so significant as to amount to mutilation. *See* Mutilate Definition, *The American Heritage Dictionary* 825 (2d ed. 1982) (defining "mutilate" as

"[t]o cut off or destroy a limb or other essential part" or "[t]o render imperfect by excising or radically altering a part"). Yet, the photograph would certainly be altered, and if the other elements of the offense were met, the defendant would have tampered with physical evidence. As another example, a person could change a single digit in a business record—perhaps to back-date a contract or to modify an amount. In such a case, "alter" would reach the conduct in a way that the other verbs would not. Reading "alters" in the way that Wood suggests would violate this Court's obligation "to avoid conclusions that effectively read language out of a statute whenever a reasonable interpretation is available that can give meaning to each word in the statute." *Lee v. United States*, 276 A.3d 12, 18 (D.C. 2022).

The legislative history and purpose of the tampering statute also do not warrant adding restrictions to the statutory language, despite Wood's claim (at 15-17). To start, because the meaning of "alters" on its face is unambiguous and does not produce an absurd result, the Court should "look no further." *Hood*, 28A.3d at 559. In any event, the legislative history does not shed any light as to the meaning of "alters." It does not further elaborate on that term, nor does it discuss the tampering statute

in any depth. *See* Council of the District of Columbia, Comm. on the Judiciary, *Rep. on Bill No. 4-133* at 25 (Jun. 1, 1982); *Extension of Comments on Bill No. 4-133: The District of Columbia Theft and White Collar Crimes Act of 1982* at 103-05 (July 20, 1982). Although, as Wood notes (at 16-17), the Council used the word "destruction" in its reports, Wood overemphasizes the significance of that word. The Council clearly intended for the tampering statute to reach beyond mere destruction because it also included the words "alters, . . . mutilates, conceals, or removes" as bases for liability. *See* D.C. Code § 22-723(a).

Wood errs in relying (at 18) on the legislative history for obstruction of justice to support his claim that the Council intended to criminalize only acts that actually resulted in harm to evidence. The fact that the Council chose to use the word "endeavor" in a separate statute casts limited light on its intent for the tampering statute. Moreover, reading "alter" as "makes different" does not mean that the tampering statute treats mere attempts the same as completed tampering.[6] Even the verb "alters" requires some physical impact on the record, document, or other

[6] As we discuss infra, attempted tampering is a lesser-included offense of tampering.

object. What "alters" does not require, however, is that the impact be "significant" or that it diminish the object's evidentiary value.[7]

Anderson v. State, 123 P.3d 1110 (Alaska Ct. App. 2005), on which Wood relies (at 20), does not justify this Court's adding language to the D.C. tampering statute. In that case the defendant separately discarded a handgun, a magazine, and ammunition from a car while being chased by police. *Id.* at 1111-12, 1117-19. He was convicted under the Alaska tampering statute, which, like D.C. Code § 22-723(a), penalized one who, among other verbs, "alters" physical evidence with intent to impair its

[7] Wood also cites (at 18) *American Jurisprudence* for the proposition that the Council did not intend to criminalize unsuccessful attempts to impair an object's availability or use, but that secondary source relies on *Harris v. State*, 991 A.2d 1135 (Del. 2010), an out-of-jurisdiction case that was construing a differently worded statute. *See id.* at 1138 & n.3 (analyzing whether the evidence was "suppresse[d]" within the meaning of the statute). In any event, this Court should decline to give *Harris* any persuasive authority. That case's crabbed interpretation of Delaware's tampering statute does not align with the broader purpose of D.C.'s tampering statute: preventing interference with physical evidence. And to the extent that *American Jurisprudence* or *Harris* implies that attempted tampering is not a crime, that proposition conflicts with the many cases in which this Court has upheld attempted-tampering convictions. *See, e.g.*, *Taylor v. United States*, 267 A.3d 1051, 1060 (D.C. 2022); *Mobley v. United States*, 101 A.3d 406, 423-25 (D.C. 2014); *(Lafayette) Bailey v. United States*, 10 A.3d 637, 641-42 (D.C. 2010); *Timberlake v. United States*, 758 A.2d 978, 980 (D.C. 2000).

integrity or availability in an official proceeding. *Id.* at 1117. In reversing the defendant's conviction, the Alaska Court of Appeals cautioned that a broad reading of the statute's verbs could lead to harsh results not intended by the legislature. *Id.* at 1118. The court rejected the government's argument that the defendant's removal of the magazine from the handgun amounted to an "alteration," holding that "[t]o constitute an 'alteration,' the defendant's conduct must disguise or alter the evidentiary value of the article." *Id.* The court went on to explain that "the test" for whether conduct amounts to tampering "appears to be whether the defendant disposed of the evidence in a manner that destroyed it or that made its recovery substantially more difficult or impossible." *Id.* at 1119.

This Court should decline to follow *Anderson*, which is an out-of-jurisdiction case interpreting an Alaska statute and, of course, is not controlling. In *Anderson*, there was no indication that the defendant's actions frustrated the police's subsequent location of those items, to which the police would have had easy access because the defendant had abandoned them. Here, by contrast, Wood actively stomped and scraped contraband in an effort to alter or destroy the evidence and thereby keep

the evidence beyond the police's reach entirely. But moreover, *Anderson* did not address the plain meaning of "alters" or the general rule that courts should not be adding words to a statute. Nor was the Alaska court guided, as this Court should be, by this Court's prior decision in *In re R.F.H.*, which reflects a broad interpretation of "tampering" generally and "alteration" in particular. The correct approach for this Court is to apply the ordinary meaning of the word "alter" and require no more than conduct that somehow makes the object different.

2. Wood "Altered" Physical Evidence

The jury reasonably could find that Wood's conduct amounted to tampering. In the absence of any defense objection or further definition from the trial court, the jury would apply an ordinary understanding of the word "alters" when examining Wood's conduct. *See* R. 103 at 38; 2/9/23 Tr. 78 (jury instructed that it must find that Wood "altered" an object). There was sufficient evidence from which the jury would infer that Wood altered, i.e., made a change to, the plastic bag.

As the officers testified, when Wood saw that the bag had fallen out of his waistband, he "stomped" on it so that his foot was "actually on the product" (2/7/23 Tr. 75). He "dragged his foot back" so as to "smear" or

"scrap[e]" the bag across the ground (*id.* at 159-61). An officer had to push Wood's leg away from the object, and several officers had to forcefully remove Wood several steps back while lifting his leg up in order to protect the evidence (2/7/23 Tr. 74-75).

The video corroborates this testimony. After the bag fell out, Wood lifted his leg, shortly paused as if measuring his blow, and then stomped down where the bag was (Gov. Ex. 19 at 00:29:34). One officer had to immediately move Wood back from the object while two other officers struggled to pull Wood back from either side (*id.*). All three officers ultimately had to lift Wood up and place him on the hood of a car with Wood's legs up in the air (*id.* at 00:29:38). The video therefore shows an urgent situation in which officers had to quickly act in response to Wood's stomping action. The jury could reasonably infer that the officers acted that way because they understood that Wood was trying to damage the evidence and they needed to protect it.

Based on the evidence, the jury could find that Wood altered the plastic bag. A reasonable juror could infer that stomping on a plastic bag and dragging it on the ground so as to "smear" or "scrap[e]" it necessarily makes the bag different, either by changing the form of the bag's contents

or by dirtying or scuffing the bag's surface.[8] Contrary to Wood's claim (at 23), the jury's verdict was not based on "speculation." The jury was simply using its common sense and everyday experience, as it was permitted to do. *See Covington v. United States*, 278 A.3d 90, 99 (D.C. 2022) ("Jurors need not check their common sense at the courthouse doors, but are permitted to use the saving grace of common sense and their everyday experience to draw reasonable inferences from the evidence presented." (internal quotation marks omitted)).[9] Wood's argument (at 21) that crushing the rocks of suspected cocaine base could not have affected their evidentiary value is beside the point. As discussed, all the jury had to find was that the bag was altered in some way. There was sufficient evidence to support that finding.

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[8] Although Wood focuses on the drugs inside the bag, the bag itself was physical evidence and in fact was admitted at trial (2/7/23 Tr. 75-77).

[9] Wood argues (at 24) that "[t]here is also no way to discern whether any conceivable change to the baggie or its contents would have resulted from Mr. Wood's stomping action or from earlier the impact of falling to the ground when police pulled on his waistband." But the two events are not comparable. A reasonable jury could infer that the alteration would happen from Wood's forceful stomping and scraping, rather than the bag simply falling to the ground from a short distance.

Wood complains (at 24) that the officers did not testify as to any change in the bag's contents from before the stomp versus afterwards. As an initial matter, it is difficult to see how the officers could have meaningfully testified as to the state of the bag's contents before Wood's actions given the bag's small size, its rapid fall to the ground, and Wood's almost immediate stomping action.[10] Wood's proposed framework, therefore, would essentially create a loophole in the tampering statute

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[10] White claims (at 24) that "[b]oth testifying officers described the baggie and its contents in virtually identical terms both before and after the charged stomping." But in the testimony that Wood quotes, it is not clear that the officers were purporting to describe what they saw in the bag before it hit the ground. To the contrary, Detective Tran first described the bag in more generic terms as "a white product or object [that] came out from [Wood's waistband] and fell to the ground" (2/7/23 Tr. 72). That generic description is consistent with someone who saw the bag only briefly and did not see its contents, which would make sense given the rapid nature of the events as shown on the video. It was only when the prosecutor asked a follow-up question that Detective Tran testified that the object was "a clear plastic bag and inside . . . was a white rock like substance. Multiple pieces." (*Id.*). It is unclear, however, whether Detective Tran was testifying as to the bag's contents based on his knowledge at trial. In the interim, he had recovered and reviewed the evidence (*id.* at 72, 75).

Likewise, it is not clear from the context whether Detective Love was testifying as to any observations of the bag before it hit the ground (2/7/23 Tr. 159). He merely testified that a clear plastic bag with a white rock-like substance fell from Wood's waistband, but he did so at trial after he had recovered the evidence and by then knew that the bag contained the white rock-like substance (*id.* at 159, 161-62, 165).

for a defendant who was obviously tampering with evidence but acted too quickly for police to see the exact appearance of the object beforehand.

But in any event, even if such testimony were possible, its absence does not mean that there is no evidence of alteration. An officer testifying as to the state of the bag's contents both before and after Wood's actions might have been helpful direct evidence, but this Court "make[s] no distinction between direct and circumstantial evidence, and circumstantial evidence is not intrinsically inferior to direct evidence." *Smith*, 809 A.2d at 1222 (internal quotation marks and alteration omitted). The officers' testimony, when combined with the video, provided sufficient circumstantial evidence for the jury to conclude that Wood altered the evidence when he stomped on the bag and scraped it across the ground.[11]

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[11] Wood cites (at 22-23) *Stahmann v. State*, 548 S.W.3d 46 (Tex. App. 2018), but in that case the defendant merely tossed a pill bottle over a fence. *Id.* at 54. The prosecution attempted to argue that that action had caused a partially torn label and smeared text on the bottle given that it had rained earlier that day. *Id.* The *Stahmann* court rejected those arguments because there was no evidence of what the pill bottle looked like prior to the throw, nor was there any evidence regarding the wetness of the ground or that the defendant's "throw could have otherwise caused the smudges." *Id.* at 54-55. Nonetheless, the *Stahmann* court did not reject the proposition that a jury could reasonably infer that the evidence

(continued . . .)

Nor is the government required to "negate every possible inference of innocence." *Young*, 305 A.3d at 415. Wood attempts (at 24) to advance his innocence based on an inference that there was no change in the evidence given the lack of testimony about the bag's contents pre-stomp. But the jury was not required to accept that inference, and on appeal, this Court reviews all inferences in favor of the government, not Wood. *See Dorsey*, 154 A.3d at 112. When viewing the evidence in the light most favorable to the government, as long as "*any* rational trier of fact could have found the essential elements of the charged offense beyond a reasonable doubt," this Court "must deem the proof of guilt sufficient[.]"

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had been altered even without evidence of its prior state. *See id.* at 55 (noting precedent holding that it was reasonable for a jury to infer the alteration given the state of the evidence when recovered).

Moreover, the situation in *Stahmann* differs from the situation here. Throwing a pill bottle over a fence would not necessarily cause tears to a label or smudging, and the rain had occurred earlier that day. Under those circumstances, the evidence that the defendant's actions had caused any alteration was weak. *See also Stahmann v. State*, 602 S.W.3d 573, 580 (Tex. Crim. App. 2020) ("[T]he mere act of throwing the pill bottle did not change the bottle itself."). But here, Wood stomped on an object and dragged it across the ground. That action inherently causes damage in a way that simply tossing an object over a fence does not. Accordingly, the jury could draw a reasonable inference that Wood's actions altered the evidence.

Bassil, 147 A.3d at 307. Under that standard, Wood's conviction should stand.

3. Alternatively, There Was Sufficient Evidence to Support Wood's Conviction for Attempted Tampering.

Finally, even if this Court were to find that Wood's actions did not constitute completed tampering, it should find that his actions constituted attempted tampering. *See* D.C. Code § 22-1803 ("Whoever shall attempt to commit any crime, . . . shall be punished by a fine not more than the amount set forth in § 22-3571.01 or by imprisonment for not more than 180 days, or both."); *see also A.F. v. State*, 850 So. 2d 667, 668 (Fla. Dist. Ct. App. 2003) (remanding so that trial court could enter a conviction for attempted tampering even though the evidence was insufficient to prove the completed crime).

"It is well-established that this [C]ourt may direct or allow the entry of judgment for a lesser included offense when a conviction for a greater offense is reversed on grounds that affect only the greater offense." *Robinson v. United States*, 100 A.3d 95, 110 (D.C. 2014) (internal quotation marks and alteration omitted). "An attempt is a lesser-

included offense of the completed crime[.]" *Washington v. United States*, 965 A.2d 35, 42 n.21 (D.C. 2009) This Court exercises that authority when it is "just in the circumstances," i.e., it is "clear (1) that the evidence adduced at trial fails to support one or more elements of the crime of which appellant was convicted, (2) that such evidence sufficiently sustains all the elements of another offense, (3) that the latter is a lesser included offense of the former, and (4) that no undue prejudice will result to the accused." *(Steven) Bailey v. United States*, 257 A.3d 486, 497-98 (D.C. 2021) (internal quotation marks and citation omitted).

Assuming that this Court disagrees that Wood's conduct constituted a completed tampering, all four factors supporting entry of judgment for the attempted offense are present here. *First*, the evidence at trial would have failed to support the element of altering. *Second*, all of the other elements would be satisfied because Wood indisputably intended to alter the evidence, even if he did not succeed, and he did so knowing an official proceeding was likely to be instituted. Indeed, Wood has not contested the sufficiency of the evidence for these other elements. *Third*, attempted tampering is a lesser-included offense of tampering. *See, e.g.*, *Washington*, 965 A.2d at 42 n.21; *A.F.*, 850 So. 2d at 668. *Fourth*,

no undue prejudice would attach to Wood. He had an opportunity to contest the evidence of tampering at trial, and he argued to the jury why his conduct did not constitute that offense (2/9/23 Tr. 116). Furthermore, the offense is captured on video (Gov. Ex. 19).

Put another way, Wood, at the least, came "dangerously close to completing a crime" because, except for the police's interference, he would have further altered the bag or even destroyed the integrity the drugs, and he took a "substantial step" towards completing the crime by stomping on the bag and scraping it across the ground. *See Mobley v. United States*, 101 A.3d 406, 424-25 (D.C. 2014) (laying out this test while affirming an attempted-tampering conviction). Wood's actions fit comfortably within the scenarios of other cases in which this Court has affirmed attempted-tampering convictions. *See Taylor v. United States*, 267 A.3d 1051, 1054-55, 1060-61 (D.C. 2022) (evidence sufficient for attempted tampering when defendant attempted but failed to move the gun out of police view); *Timberlake v. United States*, 758 A.2d 978, 979-80 & n.1, 982-83 (D.C. 2000) (evidence sufficient for attempted tampering when defendant placed several plastic bags of cocaine and heroin in his

mouth before spitting them out after a struggle with police).[12] Thus, even if this Court concludes that Wood's conduct does not constitute a completed tampering under the statute, the proper course would be to remand for the trial court to enter a conviction for attempted tampering.

[12] *Timberlake* also refutes Wood's claim (at 19) that "liability should not attach" for a "failed attempt[] at tampering" such as a hypothetical defendant who places narcotics in his mouth but fails to swallow it before police intervene.

CONCLUSION

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

Respectfully submitted,

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Court of Appeals

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Pursuant to Administrative Order No. M-274-21 (amended May 2, 2023), this certificate must be filed in conjunction with all briefs submitted in all criminal cases designated with a "CF" (criminal felony), "CM" (criminal misdemeanor), "CT" (criminal traffic), and "CO" (criminal other) docketing number. Please note that although briefs with above designations must comply with the requirements of this redaction certificate, criminal sub-case types involving child sex abuse, cruelty to children, domestic violence, sexual abuse, and misdemeanor sexual abuse will not be available for viewing online.

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A. All information listed in Super. Ct. Crim. R. 49.1(a) has been removed, including:

(1) An individual's social-security number
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(6) Financial account numbers

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(a) the acronym "SS#" where the individual's social-security number would have been included;
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(d) the year of the individual's birth;
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(f) the last four digits of the financial-account number; and (g) the city and state of the home address.

B. Any information revealing the identity of an individual receiving mental health services and/or under evaluation for substance-use disorder services. *See* DCCA Order No. M-274-21, May 2, 2023, para. No. 2.

C. All pre-sentence reports (PSRs); these reports were filed as separate documents and not attached to the brief as an appendix.

D. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

E. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

F. Any other information required by law to be kept confidential or protected from public disclosure.

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23-CF-331
Case Number(s)

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Name

4/9/2024
Date

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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, Fleming Terrell, Esq., fterrell@pdsdc.org, on this 9th day of April, 2024.

/s/
KEVIN BIRNEY
Assistant United States Attorney