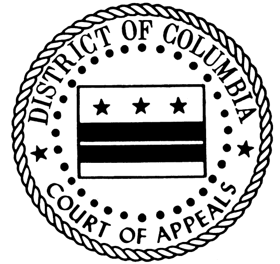

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BRIEF FOR APPELLEE

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 23-CF-432

STEVEN ROBIN, 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. 2022-CF2-3264

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ISSUES PRESENTED

I. Whether the trial court abused its discretion in denying appellant Steven Robin's motion for a new trial on the ground that Robin had a right to be present, to have his lawyer present, and to have a judge preside when a U.S. Marshal provided a firearm admitted into evidence to the jury consistent with the protocols agreed to by the parties, where the U.S. Marshal's ministerial interaction with the jury was limited to giving guidance on how to safely handle the firearm and facilitating the jury's inspection of the firearm, the U.S. Marshal did not engage in any substantive discussions with jurors, and the judge would have permitted that exact inspection even if the defense had been present to lodge an objection.

II. Whether, even assuming error in permitting the U.S. Marshal to supervise the examination of the firearm exhibit in the jury room, Robin is entitled to a new trial, where the record establishes that the absence of Robin and his lawyer during this process was harmless beyond a reasonable doubt, and whether, even assuming this Court considers Robin's unpreserved claim that the U.S. Marshal usurped judicial authority at a critical stage of the trial, Robin can establish a manifest

injustice where case precedent establishes that the jury had a right to inspect the firearm in that manner, the judge confirmed he would have permitted the jury to inspect the firearm in that manner, and the evidence of Robin's guilt was overwhelming.

DISTRICT OF COLUMBIA
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No. 23-CF-432

STEVEN ROBIN, Appellant,

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UNITED STATES OF AMERICA, Appellee.

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

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

On July 20, 2022, appellant Steven Robin was charged by indictment with one count of unlawful possession of a firearm after being convicted of a crime punishable by imprisonment for a term exceeding one year, in violation of D.C. Code § 22–4503(a)(1); one count of carrying a pistol without a license, in violation of D.C. Code § 22–4504(a)(2); one count of possession of a large capacity ammunition feeding device, in violation of D.C. Code § 7–2506.01(b); one count of possession of an

unregistered firearm, in violation of D.C. Code § 7–2502.01(a); and one count of unlawful possession of ammunition, in violation of D.C. Code § 7–2506.01(a)(3) (Record on Appeal (R.) 864–65 (Indictment)).[1] Following a jury trial before the Honorable James A. Crowell, Robin was convicted on all counts on November 15, 2022 (11/15/22 Transcript (Tr.) 50–51; R. 1230–31 (Verdict Form)).

Two weeks later, Robin filed a motion for a new trial on the grounds that he and his counsel were not present when (1) the trial court received and responded to a note from the jury requesting to inspect the firearm evidence, (2) the U.S. Marshal supervised the jury's safe handling of that evidence, and (3) the jury inspected that evidence by attempting to recreate Robin's gun toss (R. 1232–55 (Def.'s Motion for New Trial) (MNT)). The government opposed that motion (*id.* at 1257–69 (Gov's Opp.)). The trial court denied the motion, finding no violation of any of right to presence or counsel (Appellant's Limited App'x (A.) 4–14 (Order)).

On April 18, 2023, Judge Crowell sentenced Robin to total term of 22 months in prison followed by three years of supervised release

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[1] All page references to the Appendix and the Record are to the PDF page.

(R. 1293 (Judgment and Commitment Order)). Robin then filed a timely notice of appeal (*id.* at 1294–95 (Notice of Appeal)).

The Trial

The Government's Evidence

In the early evening of June 8, 2022, investigators with the Metropolitan Police Department's Violent Crime Impact Team drove unmarked vehicles on routine patrol on the 4900 block of G Street SE in Washington, D.C. (11/9/22 Tr. 125–26, 128–29, 133; 11/10/22 Tr. 139–42; 11/14/22 Tr. 91–93). During their patrol, Investigators Bryan Madera, Brandon Joseph, and Emily Painten arrived at a parking lot on that block where they observed Robin speaking to another individual (11/9/22 Tr. 129–34; 11/10/22 Tr. 142, 146–48; 11/14/22 Tr. 93–95).

After police arrived, Robin broke off the conversation, turned away, and walked directly towards the rear of a black SUV parked in the lot (11/9/22 Tr. 133–36; 11/10/22 Tr. 148–50; 11/14/22 Tr. 93–95). En route to the SUV, Robin grabbed at his waistband in a manner that the investigators recognized to be consistent with carrying a firearm (11/9/22 Tr. 134–37; 11/10/22 Tr. 41–43, 146–49). Robin squatted behind the SUV, which obstructed the investigators' vantage point, and then quickly

walked away from the vehicle while adjusting his pants (11/9/22 Tr. 134–37; 11/10/22 148–50; 11/14/22 Tr. 93–94). Suspecting that he had just discarded a firearm, the investigators detained Robin to investigate the area around the SUV for weapons (11/9/22 Tr. 137; 11/14/22 Tr. 93–95).[2]

Seconds after Robin squatted behind the SUV, Investigator Joseph and a colleague looked underneath the vehicle and immediately spotted a handgun on the ground (11/9/22 Tr. 137–38; 11/10/22 Tr. 150–53; 11/14/22 Tr. 95–96; Exh. 2b at counter 00:15–00:38; Exh. 6b at 19:00:28–19:01:20). After Investigator Joseph recovered the loaded firearm from under the vehicle, he transferred custody of the evidence at the police station to Investigator Allorie Sanders (11/10/22 Tr. 154).[3] Investigator

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[2] Surveillance footage of the parking lot showed the arrival of the unmarked police vehicles and captured Robin walking toward the parked SUV, moving his hands towards his waistline, bending over behind the SUV, removing his right hand from his waistband, extending his hand towards the bottom of the parked vehicle, and then walking away from the SUV before being detained (Government Exhibit (Exh.) 2b; see 11/9/22 Tr. 138–45). Government Exhibits 2, 3, and 6 were attached to Appellant's Limited Appendix and incorporated into the record on August 6, 2024. The government's remaining electronic exhibits—Government Exhibits 1, 8, 9, and 10—are attached to the government's motion to supplement.

[3] When Investigator Joseph recovered the firearm, the weapon was loaded with a magazine (Exh. 6b at 19:00:50–19:01:20; see 11/10/22 Tr. 155–57, 170; Exh. 8). Investigator Joseph also described to the jury

(continued . . .)

Sanders processed the firearm by ejecting the magazine from the firearm, unloading 14 rounds of ammunition from the magazine and an additional round in the chamber of the firearm, and then swabbing the firearm and magazine for DNA (11/14/22 Tr. 38–39, 46–53).[4]

An expert laboratory compared the DNA collected from the firearm and magazine to a reference sample that police officers obtained from swab of Robin's cheek (11/10/22 Tr. 56–63, 98–99; see *id.* at 231–34; 11/14/22 Tr. 47–52; Exhs. 15, 16). Based on the DNA expert's analysis, the sample collected from the magazine did not contain sufficient information to be suitable for comparison (11/10/22 Tr. 101–02).[5] The mixture of DNA collected from the firearm, however, was approximately

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the different parts of the weapon, including where the magazine is loaded (11/10/22 Tr. 155–57).

[4] Investigator Joseph wore gloves when recovering and handling the firearm (Exh. 6b at 19:00:50–19:01:20). Both Investigator Joseph and Investigator Sanders confirmed that Government Exhibit 12a was the firearm recovered from the scene and processed and the magazine that had been loaded into the firearm, that Government Exhibit 12b was the ammunition from the magazine and firearm, and that Government Exhibits 8, 9, and 10 were the processing photographs of that firearm, magazine, and ammunition (11/10/22 Tr. 155, 158–60, 162; 11/14/22 Tr. 45–46, 52; Exhs. 8–10, 12a, 12b).

[5] The DNA expert was, however, able to conclude that there was male DNA on the magazine (11/10/22 Tr. 101–02).

49.3 quintillion times more likely to have included Robin as a contributor than not (*id.* at 100–02).[6]

Robin had no registration certificate or license to carry a firearm in the District of Columbia; he was also barred from carrying a firearm because he had previously been convicted of a crime punishable by over a year in prison (11/10/22 Tr. 131–37; 11/14/22 Tr. 104).

The Defense Evidence

The defense did not present any witnesses but moved into evidence certain documents, photographs, and videos that it used during cross-examination of the government's witnesses (11/14/22 Tr. 161; see R. 1226–27 (Exh. Summary)).

The Final Jury Instructions and Jury Note

Prior to closing arguments, the trial court discussed the proposed jury instructions with the parties (11/14/22 Tr. 110–47). While Robin lodged several objections to various proposed instructions during that

[6] The laboratory employees who worked with the DNA evidence explained the laboratory's standard procedures for safely handling the DNA evidence and avoiding contamination of that evidence (11/10/22 Tr. 65–66, 96–97).

conference, he did not object to the court's proposal to use the standard Criminal Jury Instruction No. 2.501 related to the process for the jury's examination of firearms evidence under the supervision of a U.S. Marshal (cf. *id.*).[7]

Consistent with the standard instruction and as agreed by the parties, the trial court instructed the jury about the process for requesting and inspecting the firearm evidence:

> If you wish to examine the weapon please let madam clerk know and we will have a U.S. Marshal come in and bring that to you. For security purposes, the United States Marshal will remain in the jury room while each of you have an opportunity to review the evidence. You should not discuss the evidence or otherwise discuss the case among yourselves while the Marshal is present in the jury room. You may ask to examine this evidence as often as you find it necessary to do so. (11/14/22 Tr. 184–85.)

Robin again did not object when the trial court delivered that instruction (cf. *id.*). Nor did he request to be present if the jury requested to see the firearm (cf. *id.*).

[7] As the trial court noted in its order denying Robin's motion for a new trial, it provided the parties with the language of this proposed instruction on November 9, 2022—the same day as opening arguments (A. 6 (Order p. 3)).

During deliberations, the jury sent a note asking to see the firearms evidence (R. 1228 (Jury Note)). The trial court, without summoning the parties, directed the U.S. Marshal to transmit the firearms evidence to the jury consistent with the procedure outlined in the jury instructions (A. 6–7 (Order pp. 3–4)).

Robin's Motion for a New Trial

The Parties' Claims

In his motion for a new trial, Robin—without any accompanying affidavit—described conversations that a member of his defense team had with an unknown number of jurors following trial (R. 1234 (MNT p. 3)). According to Robin, jurors informed his defense team that:

- A U.S. Marshal brought the "firearm to the jury" (R. 1234 (PDF (MNT p. 3));
- A juror asked the U.S. Marshal if the U.S. Marshal "could put the magazine in the gun" (*id.*);
- The U.S. Marshal "responded in the affirmative," and advised jurors that they "were able to put the magazine in the firearm but not the bullets" (*id.*);

- Either the U.S. Marshal or one of the jurors then inserted the magazine in the firearm (*id.*);[8] and
- A juror tossed the firearm loaded with the empty magazine while the U.S. Marshal was present in the jury room (*id.*).[9]

Based on these post-verdict reports, Robin argued that (1) his rights to due process and counsel during the critical stages of trial were violated when the trial court did not notify him and give him an "opportunity to respond" to the jury's note requesting to inspect the firearm (R. 1232, 1235–43 (MNT pp. 1, 4–12)); (2) those same rights were violated when the jurors had a "conversation with the marshal" and tossed the firearm

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[8] One juror recalled that it was the U.S. Marshal who loaded the magazine into the gun at the jury's request, but other jurors were unsure whether it was the U.S. Marshal or a juror who ultimately loaded the firearm (R. 1234 (MNT p. 3 & n.1)).

[9] According to Robin, a single juror told his defense team that "a juror was particularly curious about the magazine because she 'wondered how [Robin's] DNA could be on the firearm but not on the magazine'" (R. 1238 (MNT p. 3)). Based on the report of a single juror, Robin asserted that "jurors . . . wanted to see if they could toss [the firearm] as far as Mr. Robin in the short time the government claimed he did" (*id.*). Robin likewise asserted that, according to that juror, "the presence of the gun was integral to the jury reaching its verdict" (*id.*). Robin further asserted that the "jury initially believed that Mr. Robin bent down too quickly to be able to toss a firearm, but ultimately concluded that he would have been able to do so based on their experiments with the firearm" (*id.* at 1238–39 (MNT pp. 3–4) (emphasis added)).

in his presence (*id.* at 1232 (MNT p. 1); and (3) the jury's inspection of the firearm by tossing it with an empty magazine was an impermissible "jury view" and "new" evidence that he had a right to "confront" (*id.* at 1237–38 (MNT pp. 6–7)).

The government opposed Robin's motion (R. 1257 (Opp.)). Citing *McConnaughey v. United States*, 804 A.2d 334, 342 (D.C. 2002), the government argued that a court may transmit evidence to a jury in response to a note requesting to inspect that evidence without first notifying the defendant and his counsel (R. 1260–64 (Opp. pp. 2–6)). The government also argued that any error would have been harmless because the note was non-substantive and the parties had already agreed on the procedure for the requesting and inspecting the firearm (*id.* at 1262–66 (Opp. pp. 6–8)).

Moreover, the jury did not improperly consider new or extrinsic evidence by loading the firearm with the empty magazine and tossing it in the jury room (R. 1264–69 (Opp. pp. 8–13) (collecting cases)). And the limited safety instructions that the U.S. Marshal gave to jurors about safely handling the firearm were not prohibited ex parte communications

about the law, evidence, or merits of the case (*id.* at 1264–68 (Opp. pp. 8–10)).

The Trial Court's Ruling

The trial court denied Robin's motion (A. 4–5 (Order pp. 1–2)). First, the Constitution and the Rules of Criminal Procedure did not require the presence of Robin or his counsel when the court transmitted admitted evidence to the jury in response to a juror note because such a "ministerial action" is not a "stage" of the trial (*id.* at 4–5, 8–11 (Order pp. 1–2, 5–8)). The court also noted that Robin never objected to the procedures the court outlined governing jury requests to inspect the firearm under the supervision of a U.S. Marshal (*id.* at 4–9 (Order pp. 1–6)).

Second, the trial court determined that the jurors' inspection of the firearm evidence under the U.S. Marshal's supervision did not constitute a "jury view" or "new evidence" because the items were already "admitted into evidence under established safety protocols" (A. 5, 11–12 (Order pp. 2, 8–9)). Moreover, the court would have rejected any argument by the defense to admonish jurors not to conduct any demonstration with the firearm because "[p]lainly, the jury was entitled to examine the firearm

and test the validity of the parties' argument[s]" (*id.* at 12 (Order p. 9)). The trial court also would not have entertained any request to instruct the jury about differences between the circumstances of the crime and the jury's inspection of the firearm in the jury room because jurors do not shed their "collective common sense and ability" to understand these basic differences (*id.*).

Finally, the court rejected Robin's claim that the alleged ex parte communication between the U.S. Marshal and jurors was a stage of the trial requiring his presence (A. 13 (Order p. 10)). The limited discussion of safety protocols between the U.S. Marshal and the jury did not "touch on any fact in controversy or law applicable to the case" (*id.*). Rather, the U.S. Marshal's actions "parallel[ed] the Court's ministerial function" in explaining "for safety reasons," what "he could and could not do with the firearm as [the jurors] examined it" (*id.*).

SUMMARY OF ARGUMENT

The trial court did not abuse its discretion in denying Robin's motion for a new trial. Robin fails to establish that there was a violation of any right for him or his counsel to be present in the jury room when the U.S. Marshal oversaw the jurors' safe handling of the firearm

evidence. The U.S. Marshal's transmission of the evidence was a ministerial procedure that was not a critical stage of the trial triggering Robin's right to presence or counsel. And the U.S. Marshal's limited interactions with the jury by giving safety instructions, answering a single question about those safety instructions, and facilitating jurors' inspection of the firearm discharged that ministerial duty. Robin had no right to be present or have counsel present for these ministerial tasks.

Robin now claims for the first time that the U.S. Marshal usurped judicial authority by supervising the jury's examination of the firearm. He has forfeited such a claim, however, because he agreed to the procedure for transmitting the firearms evidence to the jury. But even if this Court reviews that unpreserved claim, it would do so only for plain error. Robin cannot show plain error in the trial court's failure to declare, sua sponte, a new trial because it entrusted the U.S. Marshal with the ministerial task of overseeing the jury's safe handling of the firearm.

In any event, any conceivable error in permitting the U.S. Marshal to supervise the jury's safe handling of the firearm without Robin and his counsel present is not a structural defect. Rather, this Court reviews such claims to determine if any error would be harmless beyond a reasonable

doubt. That standard is satisfied here. The jury had a right to inspect the firearm, magazine, and ammunition. It was also entitled to load the empty magazine into the firearm and attempt to replicate Robin's gun toss. The U.S. Marshal did not enlarge or curtail that inspection in any way. Nor did the U.S. Marshal engage in any substantive discussion with the jury. Furthermore, the record demonstrates that the absence of Robin and his counsel had no impact; the trial court would have permitted that exact type of inspection even if the defense had objected. Finally, given the overwhelming evidence of Robin's guilt, affirmance of Robin's conviction would cause no manifest injustice.

ARGUMENT

I. Robin Had No Right to be Present or Have Counsel Present for the Jury's Inspection of the Evidence Consistent with the Agreed-Upon Safety Protocols Outlined by the Court.

A. Standard of Review and Applicable Legal Principles

This Court will not reverse a trial court's denial of a motion for new trial absent a "clear showing" that the trial court abused its discretion. *Derrington v. United States*, 488 A.2d 1314, 1340 (D.C. 1985) (citation omitted). Under abuse-of-discretion review, the Court must first

determine whether the trial court erred in exercising its discretion and, if so, whether that error is of a magnitude requiring reversal. *See (James) Johnson v. United States*, 398 A.2d 354, 365–67 (D.C. 1979).

For unpreserved claims, however, this Court applies the plain-error standard of review. *See Tyler v. United States*, 975 A.2d 848, 859 n.44 (D.C. 2009) (failure to raise in motion for new trial the basis for claim later asserted on appeal results in "review for plain error") (citations omitted); Super. Ct. Crim. R. 52(b). Under that "stringent" standard, reversal is warranted "only in exceptional circumstances." *Robinson v. United States*, 649 A.2d 584, 586 (D.C. 1994) (citations omitted). Appellant has the "formidable" burden to establish that (1) the trial court erred, (2) the error was "plain" and "clearly at odds with established and settled law," (3) the error affected his "substantial rights" to the extent that there is a "reasonable probability" of a different outcome at trial but for the error, and (4) this Court should exercise its discretion to reverse because the error resulted in a "miscarriage of justice" or "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *Malloy v. United States*, 186 A.3d 802, 814–22 & n.50 (D.C. 2018) (cleaned up).

B. Robin Had No Right to be Present or Have His Counsel Present During the Jury's Receipt and Inspection of the Evidence.

During the "critical stages" of his trial, a criminal defendant has a due process right to be present, *see Rushen v. Spain*, 464 U.S. 114, 117 (1983), a Sixth Amendment right to have his counsel present, *see Iowa v. Tovar*, 541 U.S. 77, 80–81 (2004) (citations omitted); *United States v. Wade*, 388 U.S. 218, 227–28 (1967), and a constitutional right to have a judge preside, *see Gomez v. United States*, 490 U.S. 858, 876 (1989)). Beyond these constitutional rights, a defendant has a corresponding Super. Ct. Crim. R. 43(b)(2) right to be present during all "stage[s]" of his trial. *See Euceda v. United States*, 66 A.3d 994, 1006 (D.C. 2013).

Not all aspects of a trial constitute a "critical stage" or "stage" triggering these rights. *See Dallago v. United States*, 427 F.2d 546, 552–53 (D.C. Cir. 1969) (citations omitted); *Walker v. United States*, 982 A.2d 723, 741–42 (D.C. 2009). Among the parts of a trial not requiring a defendant's presence are the jury's receipt and inspection of evidence during deliberations. *See Dallago*, 427 F.2d at 552–53; *McConnaughey*, 804 A.2d at 341 & n.7; *Quarles v. United States*, 349 A.2d 690, 691–92 (D.C. 1975); *see also United States v. Sobamowo*, 892 F.2d 90, 97 (D.C.

Cir. 1989) (Ginsburg, J.) (recognizing that that replaying an audiotape admitted into evidence for a deliberating jury "was not a stage of trial" implicating a defendant's constitutional or Rule 43 rights) (citations omitted).[10] As explained by then-Judge Ginsburg in *Sobamowo*, a defendant's absence during the ministerial processes of transmitting evidence to the jury and facilitating jurors' inspection of that evidence has "no 'relation . . . to the ful[l]ness of [his] opportunity to defend' [himself]." 892 F.2d at 97 (quoting *United States v. Gagnon*, 470 U.S. 522, 526 (1985) (per curiam)); *see also Dallago*, 427 F.2d at 553 ("[T]he mechanical operation of transmit[ing the evidence]" is a "ministerial" act that is not a "stage of the trial within Rule 43, or a critical step in the proceedings where counsel's absence might derogate from the accused's right to a fair trial.") (cleaned up).

Robin explicitly abandons any claim that he had a right to be present or have counsel present when the court responded to the jury's note requesting the firearms evidence (Appellant's Brief (Br.) 19 n.15). He does not challenge the trial court's decision to have the U.S. Marshal

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[10] As it relates to Robin's claims, the federal counterpart to Super. Ct. Crim. R. 43(b)(2) is substantively identical to the local rule. *See Van Dyke v. United States*, 27 A.3d 1114, 1122 (D.C. 2011); Fed. R. Crim. P. 43(a)(2).

transmit the firearm, magazine, and ammunition in evidence to the jury and oversee the safe handling of the weapon. Indeed, all of that was carried out consistent with the procedures that the court previously covered with the parties (11/14/22 Tr. 184–85), and the standard practice in this jurisdiction, *see* D.C. Crim. Jury Instruction No. 2.501 (2022). "[T]he invited error doctrine precludes a party from asserting as error on appeal a course that [they have] induced the trial court to take." *Young v. United States*, 305 A.3d 402, 430 (D.C. 2023) (quoting, inter alia, *Preacher v. United States*, 934 A.2d 363, 368 (D.C. 2007)) (cleaned up).

Robin also identifies no right requiring his presence in the jury room while jurors inspect the evidence. *See Sobamowo*, 892 F.2d at 97; *Dallago*, 427 F.2d at 552–53. He likewise establishes no error related to the way the jury "examine[d] the [firearm and magazine] admitted in evidence" prior to rendering a verdict. *Dallago*, 427 F.2d at 553. Jurors are entitled to examine admitted evidence to test the parties' theories of the case, which includes loading the empty magazine into the firearm and attempting to replicate the gun toss that Robin claimed could not

have happened (see 11/15/22 Tr. 34–35).[11] *See, e.g.*, *United States v. Abeyta*, 27 F.3d 470, 477 (10th Cir. 1994) (jury permitted to use a juror's personal pocket knife to reenact crime); *Kurina v. Thieret*, 853 F.2d 1409, 1413–14 (7th Cir. 1988) (jury permitted to conduct an experiment with cardboard replica of knife to reenact stabbing in testing defense theory that victim had been attacked by a right-handed assailant); *United States v. Avery*, 717 F.2d 1020, 1025–26 (6th Cir. 1983) (jury permitted to conduct demonstration with milk cartons admitted into evidence in an attempt to test defense argument that defendant could not have moved

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[11] To the extent that Robin suggests (Br. 38) that the act of loading the magazine into the firearm somehow introduced extrinsic evidence to the jury about how a firearm is loaded, that is meritless. To start, the jury heard testimony describing the parts of the firearm, including the receiver where the magazine is loaded into the weapon (11/10/22 Tr. 156–57). In any event, the mechanical process of how a magazine is loaded into a firearm has no conceivable bearing on the jury's consideration of whether Robin possessed a firearm. And, contrary to Robin's argument (Br. 37), it requires nothing more than common sense for the jury to look at a photograph of the magazine inside of the firearm (Exh. 8) to determine why the exposed parts of a firearm might contain DNA suitable for full comparison but not the largely unexposed magazine loaded into the firearm. *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.") (cleaned up).

them in the timeframe presented by the government); *United States v. Hawkins*, 595 F.2d 751, 753 (D.C. Cir. 1978) (per curiam) (jury permitted to experiment with binoculars admitted into evidence to attempt to test defense theory that police officers were unable to perceive details of drug transaction from observation post).[12] Here, the trial court made clear

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[12] *See also, e.g.*, *Gonzales v. Adams*, 370 F. App'x 867, 868 (9th Cir. 2010) (jury permitted to test sharpness of knife admitted into evidence because jurors may "manipulat[e] an object in evidence during deliberations to test its properties") (citation omitted); *Fletcher v. McKee*, 355 F. App'x 935, 935–40 (6th Cir. 2009) (jury permitted to conduct experiment with gun admitted into evidence to test defense theory that victim accidentally shot herself); *Bogle v. Galaza*, 38 F. App'x 437, 438 (9th Cir. 2002) (jury permitted to insert key into a lock of a safe because it may "examine all pieces of evidence carefully" and "reenact the crime using the evidence before it") (citations omitted); *United States v. Hephner*, 410 F.2d 930, 936 (7th Cir. 1969) (jury permitted to have juror cover his head and put on sunglasses to assess whether identification of an individual in that disguise would be possible); *People v. Peterson*, 472 P.3d 382, 427–29 (Cal. 2020) (jury permitted to enter boat in which murder victim was transported and examine vessel by rocking it on land, even though boat was in the water during crime because jurors may "manipulate a physical exhibit admitted into evidence at trial"); *Brown v. State*, 160 N.E.3d 205, 213–14 (Ind. Ct. App. 2020) (jury permitted to examine firearm admitted into evidence by pulling trigger); *Fields v. Commonwealth*, 2014 WL 7688714, at *2–4 (Ky. Dec. 18, 2014) (jury permitted to use knife admitted into evidence to attempt to unscrew cabinet doors in jury room to test whether defendant could have removed screws at crime scene); *State v. Pauline*, 60 P.3d 306, 329–30 (Haw. 2002) (jury permitted to open and close door to trunk of car admitted into evidence in examining murder vehicle and portion of vehicle where body was transported); *Mitchell v. State*, 726 N.E.2d 1228, 1237–39 (Ind. 2000), *abrogated on*

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that, even if the defense had objected to the jury's examination of the firearms evidence, the court would have exercised its discretion to permit that exact review and reenactment (A. 5, 11–12 (Order pp. 2, 8–9)). Under these circumstances, Robin's absence did not result in any deprivation of his constitutional or statutory rights. *See Gagnon*, 470 U.S. at 526.[13]

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other grounds by Beattie v. State, 924 N.E.2d 643 (Ind. 2010) (jury permitted to use wooden rod admitted into evidence to reenact beating by striking a chair); *State v. Balisok*, 866 P.2d 631, 632–34 (Wash. 1994) (en banc) (jury permitted to reenact crime by having juror wear defendant's jacket admitted into evidence, placing a firearm admitted into evidence into the jacket pocket, and recreating fight to determine whether firearm could be shot in manner asserted by the defense); *State v. Chamberlain*, 819 P.2d 673, 681–83 (N.M. 1991) (jury permitted to use firearm and holster admitted into evidence to attempt to replicate sound on audio recording); *State v. Rainer*, 411 N.W.2d 490, 498–99 (Minn. 1987) (jury permitted to experiment with firearm in evidence by attempting to get it to misfire over a two-hour period); *State v. Ashworth*, 647 P.2d 1281, 1287 (Kan. 1982) (jury permitted to attempt to reenact shooting of victim using gun admitted into evidence to test the validity of the improbable "gymnastic sequence of events" underlying the defense's theory of the case); *Brown v. State*, 4 P.2d 129, 130–31 (Okla. 1931) (jury permitted to inspect and experiment with axe admitted into evidence); *Taylor v. Commonwealth*, 17 S.E. 812, 815–16 (Va. 1893) (jury permitted to request firearm admitted into evidence, disassemble it, and examine its parts to determine if it was used consistent with the alleged crime even though firearm was never disassembled at trial).

[13] During closing argument, Robin's counsel rhetorically asked the jury "[h]ow in the world [was Robin] supposed to be able to reach in his pants[,] . . . pull out a firearm, bend back and throw it under an SUV in the split second" before police arrived (11/15/22 Tr. 34–35). Having

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C. The U.S. Marshal's Ministerial Actions Facilitating the Jury's Safe Review of the Evidence Was Not a "Stage" of the Trial Triggering Robin's Rights.

Just as Robin has no right to be present or have counsel present for the jury's receipt and inspection of the evidence, Robin had no right to presence during the U.S. Marshal's ministerial acts facilitating that transmission and review.

As an initial matter, Robin never objected when the trial court explained that the U.S. Marshal would accompany the firearm back to the jury room for "security purposes" and remain there while the jury handled the evidence (11/14/22 Tr. 184–85). He also never suggested that the trial court could not delegate the ministerial task of supervising the jury's safe handling of the firearm to the U.S. Marshal (*id.*). Because he acquiesced to these procedures, Robin has waived any challenge (Br. 25) to the trial court's decision to allow the U.S. Marshal to supervise the jury's safe handling of the firearm evidence. *See Young,* 305 A.3d at 429–

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invited the jury to examine the likelihood that Robin had tossed the gun in the manner described by the police, Robin "is hardly in [a] position to complain" that the jury sought to reenact the officers' account of events. *Hawkins*, 595 F.2d at 753.

30; *Lay v. United States*, 831 A.2d 1015, 1021 (D.C. 2003) (citation omitted).

But even if this Court were to entertain Robin's claim, he cannot establish any error. Contrary to Robin's sweeping assertions (Br. 18–31), "[t]he mere occurrence of an *ex parte* conversation between a trial judge and a juror does not constitute a deprivation of any constitutional right" per se. *Gagnon*, 470 U.S. at 526 (quoting *Rushen*, 464 U.S. at 125–26 (Stevens, J., concurring)). Indeed, the "defense has no constitutional right to be present at every interaction between a judge and a juror"; that right attaches only at the critical stages of a trial when the defendant's presence "has a relation, reasonably substantial, to the ful[l]ness of his opportunity to defend against the charge" and "to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." *Id.* (quoting *Rushen*, 464 U.S. at 125–26 (Stevens, J., concurring)) (cleaned up).[14]

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[14] Although this Court has cited *Smith v. United States*, 389 A.2d 1356, 1361 (D.C. 1978), for the proposition that a "defendant and his counsel have a right to be informed of all communications from the jury and to offer their reactions before the trial judge undertakes to respond," subsequent Supreme Court precedent has called this broad statement into question. *Smith* cited to the Supreme Court's opinion in *Rogers v.*
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Here, there is no allegation that the U.S. Marshal discussed the facts of the case, that he opined on the operation of the firearm, or that

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United States, 422 U.S. 35, 39 (1975), for that proposition. *Rogers* itself concerned a substantive jury note seeking guidance from the judge about the nature of the verdict it could render that the Supreme Court found to be "tantamount to a request for further instruction." 422 U.S. at 36–39. Nine years after *Rogers* (and seven years after *Smith*), however, the Supreme Court stated in *Gagnon* that "the mere occurrence of an *ex parte* conversation" with a juror "does not constitute a deprivation of any constitutional right." 470 U.S. at 526 (quoting *Rushen*, 464 U.S. at 125–26 (Stevens, J., concurring)). Consistent with that Supreme Court precedent, this Court has more recently acknowledged that not all ex parte communications with jurors constitute a "critical stage" of the trial implicating a defendant's rights to presence or counsel. *See Walker*, 982 A.2d at 740–42 (disagreeing with argument that ex parte ministerial communications about juror availability amounted to a "critical stage" of the proceedings because defendant's "presence would be useless" and the "benefit but a shadow") (quoting *Frye v. United States*, 926 A.2d 1085, 1103 (D.C. 2005)). Since *Gagnon*, federal courts have similarly recognized a dividing line between substantive communications with jurors triggering a defendant's rights and discussions regarding ministerial matters. *See, e.g.*, *United States v. Carson*, 455 F.3d 336, 348–50, 354 (D.C. Cir. 2006) (no error when a U.S. Marshal had extensive ex parte communications with several deliberating jurors concerning ministerial matters "unrelated to the merits of the case"). And, as the Sixth Circuit recently explained, if a defendant's right to presence were to apply to ministerial ex parte communications between jurors and court staff, then it would lead to the absurd result of defendants "trail[ing] the jury to lunch, to the break room, in and out of security, and so on," and forcing "courtroom deputies, law clerks, and court security officers . . . to recount every interaction with a juror on the record, regardless of the general administrative nature of the communication." *United States v. Bravata*, 636 F. App'x 277, 293 n.2 (6th Cir. 2016).

he participated in the jurors' deliberations of Robin's guilt. Nor is there any suggestion that he played any role in the jury's reenactment of Robin's gun toss or its evaluation of that demonstration. And this Court should not assume that the U.S. Marshal interacted with the jury in any such substantive way, as the trial court explicitly instructed jurors not to "discuss the evidence" or "otherwise discuss the case among yourselves while the Marshal is present in the jury room" (11/14/22 Tr. 184–85). *See Gray v. United States*, 589 A.2d 912, 918 (D.C. 1991) ("Juries are presumed to follow the trial court's instructions," and this Court "will not upset the verdict by assuming the jury declined to do so.") (citations omitted).

Rather, Robin's claim rests on the premise that the U.S. Marshal's discharge of his delegated administrative duty to supervise the jury's safe handling of dangerous evidence in the jury room is a critical stage of trial at which a defendant must be present. The case precedent does not support Robin's contention. For example, in *People v. Kelly*, the Appellate Division of the New York Supreme Court considered a defendant's claim that his right to be present at a stage of the trial was violated when a court security officer took a bayonet in evidence to the deliberating jury

but refused to let jurors handle the unsheathed weapon out of concern for juror safety. 11 A.D.3d 133, 138–46 (N.Y. App. Div. 2004), *aff'd* 832 N.E.2d 1179 (N.Y. 2005). In rejecting that claim, *Kelly* reasoned that the "officer's refusal to relinquish control of the bayonet" in response to the jury request was a "purely ministerial" action that was part of his "ministerial duty of safeguarding the jury." *Id.* at 143–44. The officer's safety guidance and his refusal to give jurors control of the bayonet "did not convey any legal instruction or impart any information to the jurors about the trial evidence." *Id.* at 144 (citation omitted). Accordingly, the "defendant had no right to be present when the officer refused to allow the jurors to have possession of the bayonet and sheath," as there is no right to be "present during jury deliberations" and no "right to be present when a court officer performs a ministerial task during [those] deliberations." *Id.* at 145 (citation omitted). The same conclusion follows here, as the U.S. Marshal enabled the jury to examine the firearms evidence safely and refused to load bullets into the magazine.

Federal precedents likewise support that a defendant has no right to be present when court staff performs ministerial tasks to facilitate the jury's review of the evidence. For example, in *United States v. Holton*, the

D.C. Circuit rejected the defendant's claim that he had a right to be present when a courtroom clerk took audiotapes in evidence to the jury room and then remained to play the portions of the tapes that the jury asked to hear. 116 F.3d 1536, 1545–46 (D.C. Cir. 1997). As *Holton* reasoned, by performing the mechanical task of playing the audiotape that the jury asked to hear, the clerk's actions did not rise to a "stage of trial" implicating the defendant's right to be present or have counsel present. *Id.* (quoting *Sobamowo*, 892 F.2d at 96). Likewise, the Ninth Circuit found no violation of a defendant's constitutional or statutory right to presence when the jury requested to review parts of a video interrogation in evidence and the judge responded by sending a courtroom deputy to speak to the jury about the portions it wished to review. *United States v. Martinez-Camargo*, 765 F. App'x 205, 209–10 (9th Cir. 2019). As *Martinez-Camargo* explained, because there was no reason to presume that anything substantive was discussed about the facts or law of the case, this ex parte communication related to the jurors' review of the evidence was not a "stage" of the trial implicating the defendant's rights. *Id.* So too here.

In contrast to the ministerial actions in these cases and here, the cases that Robin cites (Br. 20, 27–30) all involved far more substantive exchanges between the jury and court staff. For example, *Winestock v. United States* involved a note from the jury asking to see evidence that had not been admitted at trial, which required a substantive response from the court describing what evidence the jury could consider during deliberations. 429 A.2d 519, 528 (D.C. 1981). Both *Euceda* and *(Chris) Johnson v. United States* likewise involved substantive notes from the jury asking for clarification on legal questions involving the elements of the offense or the effect of an affirmative defense, which required carefully crafted judicial responses. *Euceda*, 66 A.3d at 997–98, 1000–02, 1005–10; *(Chris) Johnson*, 804 A.2d 297, 302–03, 305–07 (D.C. 2002). *Roberts v. United States* similarly featured a juror note to the judge revealing a jury deadlock, the numerical division of that deadlock, and a juror's difficulties during deliberations, requiring the judge to exercise her judgment on how to instruct the jury to proceed. 213 A.3d 593, 594–99 (D.C. 2019).[15]

[15] And although the jury's note in *Hallmon v. United States* asking the judge for a written copy of the instructions was not strictly substantive,

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Contrary to Robin's claims (Br. 30), the discharge of these ministerial tasks did not require the defense's presence. Robin could have addressed any concerns about the safety protocols relating to the firearm evidence or any potential prejudice arising from the jurors' examination of the firearm in the jury room when the trial court first proposed the procedures and instructed the jury. But Robin never objected. Nor is there any reason to believe that the defense would have had any substantive concerns about these procedures. And any quibbling over courthouse safety protocols within the U.S. Marshal's purview would have gone nowhere given that the judge generally followed these procedures (see 11/14/22 Tr. 184–85; A. 13 (Order p. 10)). Because Robin and his counsel "could have done nothing" had they been present "nor would they have gained anything by attending," *Gagnon*, 470 U.S. at 527

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it was error for the judge's law clerk to intercept that communication intended for the judge to answer it instead of the judge. 722 A.2d 26, 27–28 (D.C. 1998). Here, by contrast, the jury never directed its non-substantive safety questions to the judge. Instead, the jury properly posed its questions to the U.S. Marshal whom the parties agreed would be present in the jury room for the explicit purpose of ensuring that the jury handled the firearm safely.

(cleaned up), their presence "would be useless" and the "benefit but a shadow." *Walker*, 982 A.2d at 741 (quoting *Frye*, 926 A.2d at 1103).

D. The Trial Court Did Not Plainly Err by Failing to Declare a New Trial, Sua Sponte, on the Ground that the U.S. Marshal Usurped the Judge's Authority to Preside Over a Stage of Robin's Trial.

In moving for a new trial, Robin never claimed that the U.S. Marshal presided over a stage of his trial (cf. R. 1236–47 (MNT)). Robin has forfeited that claim because he agreed to the procedure for transmitting the firearms evidence to the jury under the supervision of the U.S. Marshal (see 11/14/22 Tr. 184–85; A. 13). *See, e.g.*, *Young*, 305 A.3d at 429–30. But even if Robin's claim were not procedurally barred, he raises it for the first time on appeal (Br. 16–27) and thus plain-error review applies. *See Tyler*, 975 A.2d at 859 n.44; *see also Griffin v. United States*, 144 A.3d 34, 36–37 (D.C. 2016) (applying plain-error review to unpreserved claims of ostensibly structural errors).

Robin fails to meet his burden to establish plain and obvious error because he cannot identify any critical stage of his trial that was presided over by anyone other than a Superior Court judge. Rather, he simply repackages his right-to-presence and right-to-counsel claims as a new

claim that the U.S. Marshal usurped the authority of the Superior Court judge and presided over his trial. The U.S. Marshal engaged in no such subterfuge. He did not preside over voir dire, such as the magistrate in *Gomez*, 490 U.S. at 876. He issued no rulings on pretrial motions. He never resolved any objections, received any testimony, nor admitted any exhibits at trial. He played no role in crafting jury instructions or deciding the parties' disputes over the law governing the case. He did not receive the verdict, enter a judgment against Robin, or sentence him for illegally carrying a firearm in the District of Columbia.

Nor did the U.S. Marshal adjudicate a substantive jury note, as Robin contends (see Br. 16–27). As detailed above, the trial court—following the procedures agreed to by the parties—directed the U.S. Marshal to take the firearm evidence to the jury room and to oversee the jurors' safe handling of that evidence (11/14/22 Tr. 184–85). The U.S. Marshal did not replace the judge or usurp judicial authority by going over basic safety guidelines with the jury for handling the fully operational firearm and live ammunition. *See United States v. Desir*, 257 F.3d 1233, 1237 (11th Cir. 2001) (collecting cases and noting that there

is no right to have a judge preside over "ministerial" and "mechanical" aspects of trial).

The U.S. Marshal's interaction with the jury here is no different than the bailiff's actions in *Kelly* when he unilaterally refused the jury's request to handle a bayonet during deliberations. 11 A.D.3d at 143–44. As *Kelly* explained, those actions were "neither a delegation nor usurpation of judicial authority" because they were "purely ministerial" acts that "fulfill[ed the officer's] ministerial duty of safeguarding the jury" that "did not convey any legal instruction or impart any information to the jurors about the trial evidence." *Id.* Therefore, the trial court did not err, let alone plainly err, in declining to grant a new trial, sua sponte, on the unpreserved claim that the U.S. Marshal presided over a stage of Robin's trial.

II. If There Were Error, Robin is Not Entitled to Reversal Under Any Standard.

A. Robin is Not Entitled to Automatic Reversal on Any Claim.

This Court should reject Robin's claim that he is entitled to automatic reversal due to structural error (Br. 32–34). Instead, this Court has consistently applied constitutional harmless-error analysis

where a defendant was denied presence or counsel at a stage of his trial. *Euceda*, 66 A.3d at 1006–07 (applying the harmless-beyond-a-reasonable-doubt standard from *Chapman v. California*, 386 U.S. 18, 24 (1967)); *see, e.g.*, *Roberts*, 213 A.3d at 596–99; *Van Dyke*, 27 A.3d at 1125–30; *Hallmon*, 722 A.2d at 28; *Winestock*, 429 A.2d at 529–30; *see also Rushen*, 464 U.S. at 117–21 ("emphatically disagree[ing]" with principle that ex parte communications with the jury can never be harmless error).

Although the Supreme Court has recognized that harmless-error review does not apply when person without jurisdiction presides over a critical stage of a defendant's trial over the defendant's explicit objection, *Gomez* 490 U.S. at 876, this line of analysis does not assist Robin. Indeed, *Gomez* can be distinguished on its facts. Unlike the defendant in that case who expressly objected to having a magistrate judge preside over voir dire, *id.* at 860–61, 876, Robin was aware that the U.S. Marshal would play a ministerial role in facilitating the jury's safe handling of the firearm evidence and never objected to that procedure (11/14/22 Tr. 184–85). If anything, this case is analogous to *Peretz v. United States,* 501 U.S. 923, 924–39 (1991), in which the Supreme Court affirmed a conviction and rejected the petitioner's argument that *Gomez* required reversal

when a magistrate judge presided over voir dire with the consent of the parties. This Court in *Hallmon* also expressly rejected the argument that it was "per se" reversible error when a law clerk "improperly assumed the judge's authority" and "presided over" a stage of the trial by unilaterally responding to a jury note in the absence of defendant and his counsel. 722 A.2d at 27–28. Rather, the Court reviewed that claim for harmless error and affirmed the conviction. *Id.*

In any case, even assuming, for the sake of argument, that Robin has established error and that this Court will treat his latter unpreserved claim as structural, it remains Robin's burden to establish that this Court should exercise its discretion to reverse to prevent manifest injustice. *Keerikkattil v. United States*, 313 A.3d 591, 601–02 (D.C. 2024) (explaining that structural errors merely remove the defendant's burden under prong three of plain-error review) (citations omitted).

B. Reversal Is Not Warranted Because Any Error Would Be Harmless Beyond a Reasonable Doubt and Would Not Undermine the Fairness, Integrity, or Reputation of Judicial Proceedings.

Any error arising from the U.S. Marshal's limited interactions with the jury would be harmless beyond a reasonable doubt and would not warrant reversal to prevent a manifest injustice.

First, even if it were error, the U.S. Marshal's ministerial actions facilitating the jury's safe handling and inspection of the firearm could hardly have affected the verdict.

The firearm, magazine, and ammunition were all admitted into evidence (Exhs. 12a, 12b). Specifically, the jury heard testimony that investigators witnessed Robin's actions in the parking lot and suspected that he tossed a firearm when he ducked behind a parked SUV (11/9/22 Tr. 125–37, 174–75; 11/10/22 Tr. 41–43, 139–50; 11/14/23 Tr. 91–95). The jury saw surveillance footage capturing Robin squat behind the SUV, remove his hands from his waistband, and then move his hands toward the vehicle's undercarriage (Exh. 2b; see 11/9/22 Tr. 138–45). The jury received evidence that the firearm was loaded with a magazine when it was recovered (see Exh. 6b at 19:00:50–19:01:20; Exh. 8; 11/10/22

Tr. 155–57, 170) and that the magazine was later ejected from the firearm at the station when police processed it for DNA (11/14/22 Tr. 38). The jury learned about the various parts of the firearm, including where the magazine is loaded into the firearm through the receiver (11/10/22 Tr. 156–57). The jury was instructed, without any objection from Robin, that it could examine the firearm under the supervision of the U.S. Marshal who would be present for "security purposes" (11/14/22 Tr. 184–85; see A. 6, 13 (Order pp. 6, 10)). And Robin's counsel argued to the jury that it would not have been possible for him to have discarded the firearm beneath the SUV in the "split second" before police arrived (11/15/22 Tr. 34–35). Robin cannot now claim prejudice because the jury critically evaluated the evidence, accepted his implicit invitation to test his theory of the case with the physical evidence, and followed the trial court's instructions on conducting that review. *See Hawkins*, 595 F.2d at 753 & n.7.

The jury had every right to examine the evidence at trial, including the firearm, to probe the parties' theories of the case consistent with the evidence. *See supra* n.12. Because the jury was at liberty to inspect the evidence by loading the magazine into the firearm and then replicating

the gun toss, there was nothing about the U.S. Marshal facilitating the jury's inspection of the firearm—in the exact manner that the jury requested—that could have prejudiced Robin and nothing to be gained by his or his counsel's presence. *See, e.g.*, *Hallmon*, 722 A.2d at 28 (finding error harmless beyond a reasonable doubt when clerk responded ex parte to a jury note requesting a written copy of the instructions by informing jury that it could ask for any part of the instructions to be re-read in open court, which the jury had a right to do).[16]

Instead, Robin's arguments about prejudice (Br. 36–40) rest on assertions that contradict the averments in his motion for a new trial. On appeal, he submits that it was the U.S. Marshal—not the jury—who made the "unilateral decision" to load the magazine into the firearm, to

[16] The U.S. Marshal's explanation of safety protocols to the jury was plainly a ministerial task unrelated to the merits or substance of the case. Indeed, this Court has recognized that even substantive ex parte communications between court staff and jurors may be harmless error, especially when the defendant fails to identify any concrete prejudice from his or his counsel's absence, as here. In *(Chris) Johnson*, this Court found that a clerk responding to a "substantive" jury note asking about application of affirmative defense to be harmless error because the defense had an opportunity to weigh in on a substantially similar note. 804 A.2d at 302–03, 306–07. Here, during the jury-instruction conference, Robin was afforded a similar opportunity to weigh in on the procedures under which the jury could inspect the firearm and the U.S. Marshal's role supervising the jury's safe handling of the firearm.

"alter[] the firearm from its condition on the scene," and to "change[] the firearm from its condition in the courtroom" (*id.*). But in his motion for a new trial, Robin asserted that it was a "*juror* [who] ask[ed] the marshal if the marshal could put the magazine in the gun" (R. 1234 (MNT p. 3) (emphasis added)). Moreover, Robin now contends that it was the U.S. Marshal who "led the jury to conduct an attempted reenactment" with the firearm (Br. 38). But, again, Robin's motion for a new trial averred that it was the "*jurors*" who "proceeded to conduct a demonstration with the gun" because "they wanted to see if they could toss it as far as Mr. Robin" (R. 1234 (MNT p. 3) (emphasis added)). Thus, any argument by Robin that it was the U.S. Marshal—not the jury—driving the process of the jury's inspection of the firearm finds no basis in the record.[17]

Second, Robin fails to identify anything that could have been gained from his presence or his counsel's presence with respect to the U.S.

[17] Although it is unclear from Robin's motion for a new trial whether it was the U.S. Marshal or a juror who ultimately loaded the magazine into the firearm (R. 1234 (MNT p. 3)), it was the jury—not the U.S. Marshal—that initiated the request to inspect the firearm loaded with the empty magazine (*id.*).

Marshal's ministerial acts facilitating the jurors' safe handling of the firearm.

For instance, he claims (Br. 38–40) that the jury's verdict was swayed because its reenactment of the firearm toss did not accurately replicate the parking lot crime scene. According to Robin, he should have had an opportunity point out those differences to the jury and the jury should never have been permitted to inspect the firearm under these conditions. Of course, this argument does not implicate any action by the U.S. Marshal. The U.S. Marshal played no role at all in selecting the venue for the jury's deliberations. He merely facilitated the jury's inspection of the firearm evidence in the exact manner that the jury sought to review that evidence and consistent with the procedures outlined by the trial court (see R. 1234 (MNT p. 3); 11/14/22 Tr. 184–85).

Nor is there any basis upon which to find that Robin was prejudiced by the jury's examination of the firearm or its reenactment of the gun toss with an empty magazine in the jury room. Jurors are permitted to use the "saving grace of common sense" when evaluating the evidence at trial and drawing reasonable inferences from that evidence. *Covington v. United States*, 278 A.3d 90, 99 (D.C. 2022) (citation omitted). That

bedrock principle applies to the jury's inspection of physical evidence and reenactment of the testimony. *See, e.g.*, *Abeyta*, 27 F.3d at 477; *Kurina*, 853 F.2d at 1413–14; *Avery*, 717 F.2d at 1026. Thus, this Court may safely presume that the jury would appreciate that the circumstances of the gun toss in the jury room did not precisely match the conditions of the crime.

Here, jurors knew from the evidence that the firearm was fully loaded when it was recovered (see 11/10/22 Tr. 155–57, 170; Exh. 6b at 19:00:50–19:01:20; Exh. 8). And they knew from the evidence that Robin was not accused of possessing a firearm in a D.C. Superior Court jury room (11/9/22 Tr. 129–32; 11/10/22 Tr. 142, 146–48; 11/14/22 Tr. 93–94). Thus, from that evidence and their common sense, the jury would have been (1) aware that the firearm was in a slightly different state than when it was recovered on scene, and (2) cognizant that they were recreating the toss in a location other than the crime scene. To accept Robin's claim of prejudice and harm, this Court would also have to accept that the D.C. jury pool is incapable of making these common-sense observations. It should not.[18] *See Covington*, 278 A.3d at 99.

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[18] In his motion for a new trial, Robin also speculates that the jury "[s]eemingly . . . concluded" based on its inspection of the firearm that
(continued . . .)

Furthermore, any argument that Robin or his counsel could have presented to the judge would have been fruitless. Robin theorizes (Br. 40–41) that there is no way to know whether the trial judge would have permitted the jury to inspect the firearm loaded with the empty magazine. No speculation is necessary. The trial court confirmed in its order denying Robin's motion for a new trial that it would not have prohibited the jury's inspection of the firearm because jurors are permitted to "conduct demonstrations during deliberations with admitted evidence" and thus "entitled to examine the firearm and test

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Robin was able to toss it under the SUV before police arrived (R. 1234–35). That fails on three levels. *First*, according to his own pleading, no juror ever said that the gun toss reenactment was dispositive to his or her reaching a guilty verdict (cf. *id.*). *Second*, there is equally no suggestion in Robin's pleadings that the jury failed to inspect the live ammunition. The jury, of course, was free to do so and could have judged its weight or even tossed it around the room to determine what material effect, if any, it might have had on their reenactment of the gun toss. *Third*, in any case, Robin may not use information about the internal workings of the jury's deliberations to impeach the verdict. *Kittle v. United States*, 65 A.3d 1144, 1148–49 (D.C. 2013) (collecting cases); *see Tann v. United States*, 127 A.3d 400, 471 n.61 (D.C. 2015) ("[J]urors' statements" may not be used "to show the effect [that an ostensibly extrinsic influence] had on the jury's deliberative process" because "inquiry into the thought processes of the jurors" is prohibited.) (cleaned up). Nor is it appropriate for this Court to rely on those statements in assessing the impact or harmlessness of any error. *See Fortune v. United States*, 65 A.3d 75, 82–85 (D.C. 2013).

the validity of the parties' argument[s]" (A. 12 (Order p. 9)). The trial court also stated that it would not have entertained any request for further argument or instruction to the jury about differences between a loaded and unloaded firearm or the jury room and a parking lot. Such information was unnecessary because the "jury does not shed its collective common sense and ability to interpret that an unloaded firearm in an indoor carpeted room may behave differently than a loaded firearm in an outdoor parking lot" (*id.*). And, as the trial court explained, the U.S. Marshal's safety instructions to the jury for handling the firearm were an extension of the trial court's "ministerial function" (*id.* at 13 (Order p. 10)). Based on that recognition by the trial court, there is no reason to conclude that the trial court would have granted any request by Robin to override the courthouse safety procedures for handling weapons enforced by the U.S. Marshal. Thus, none of the reasons offered by Robin for why he was prejudiced from his absence during this ministerial stage of the trial would have had any impact on the jury's deliberations. *See Winestock*, 429 A.2d at 529–30 (finding harmless error when court, ex parte, instructed jury to continue deliberations; even if defendant might

have requested an alternative approach, there was no reason to believe the trial court would have adopted it).

Third, as the Supreme Court instructs, any claim based on the absence of the defendant and his counsel must be "considered in light of the whole record." *Gagnon*, 470 U.S. at 526–27 (citation omitted). That the U.S. Marshal's actions beyond a reasonable doubt did not impact the jury's verdict is confirmed by the overwhelming evidence of Robin's guilt.

The jury heard from multiple eyewitnesses that Robin walked over to the SUV under which the firearm was recovered, grabbed his waistband in a manner consistent with carrying a firearm, briefly bent down behind the SUV, and then quickly walked away (11/9/22 Tr. 125–37, 174–75; 11/10/22 Tr. 41–43, 139–50; 11/14/23 Tr. 91–95). It saw surveillance footage of the parking lot captured Robin walking over the SUV, fumbling with his waistband, and then moving his right hand from his waistband toward the bottom of the parked vehicle before walking away (Exh. 2b; see 11/9/22 Tr. 138–45). It heard testimony and saw video establishing that seconds after Robin left the SUV, police officers spotted and recovered the loaded firearm from under the vehicle (11/9/22 Tr. 137–38; 11/10/22 Tr. 150–53; 11/14/22 Tr. 95–96; Exh. 2b at counter 00:15–

00:38; Exh. 6b at 19:00:28–19:01:20). And beyond that evidence of Robin's possession of the discarded firearm, the jury heard powerful testimony from a DNA expert that the mixture of DNA recovered from that firearm was nearly 50 *quintillion* times more likely to have come from Robin than not (11/10/22 Tr. 100).

Finally, as it relates to Robin's unpreserved claim that the U.S. Marshal presided over a stage of his trial, Robin cannot demonstrate that affirmance of his conviction would undermine the fairness, integrity, or reputation of judicial proceedings. As explained above, the U.S. Marshal's limited interactions with the jury merely permitted the jury to inspect the firearm evidence in the manner to which the parties had agreed and instructed the jury. If the firearms evidence had been transmitted to the jurors without the supervision of the U.S. Marshal, then the jurors presumably would have inspected the firearm in the exact same manner. And if the question about safely handling the firearm were submitted to the trial judge, his order denying Robin's motion for a new trial confirms that he would have permitted the jury to inspect the firearm in the same manner (A. 12–13 (Order pp. 9–10)). Because the jury's deliberations would have been the same in any of these scenarios, Robin fails to meet

his heavy burden to show that this Court must exercise its discretion to reverse his conviction on plain-error review.

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, Jaclyn Frankfurter, Esq. and Sarah McDonald, Esq., on this 27th day of September, 2024.

/s/

Dylan M. Aluise
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