BRIEF FOR APPELLEE

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DISTRICT OF COLUMBIA
COURT OF APPEALS

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No. 23-CF-937

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NWABUEZE IGWE,   Appellant,

v.

UNITED STATES OF AMERICA,   Appellee.

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

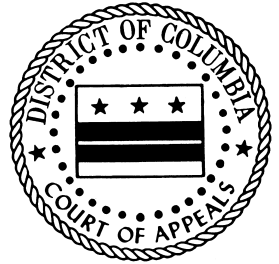———————————————

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ISSUES PRESENTED

I.   Whether any error by the trial court in admitting testimony identifying appellant, Nwabueze Igwe, and his victim in surveillance footage and describing their conduct was harmless, when the impact of the testimony was insignificant and where, moreover, there was overwhelming evidence of Igwe's guilt.

II.   Whether the trial court erred by admitting testimony that the complaining witness informed police that people near the scene of the armed robbery were not the assailant, when that testimony explained the course of the police investigation and the effect on the listener.

III.   Whether the trial court plainly erred by not sua sponte striking statements from the government's closing argument that permissibly argued how the evidence met the government's burden of proof and how the defense arguments did not raise a reasonable doubt.

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INTRODUCTION

As Judge Schwelb observed 14 years ago, when the "defendant is
identified by the victim[ ]" and "*also* found in possession of stolen
property," it is almost always "game, set and match for the prosecution"
in robbery cases. *In re T.C.*, 999 A.2d 72, 85 (D.C. 2010) (Schwelb, S.J.,
concurring) (emphasis in original). The evidence in Nwabueze Igwe's trial
for armed robbery on a Metro train proved just that and more. Not only
did the victim identify Igwe with total certainty as his assailant just over

two hours after the robbery, he also identified Igwe again in open court before the jury. And not only did Igwe still have the victim's property at the time of his arrest, he also had on him the knife he used in that robbery.

Despite this evidence, Igwe claims that the trial court committed reversible error because it permitted a government witness to identify him and the victim in surveillance footage without proper foundation and to narrate their actions. Even if erroneously admitted, that testimony did not substantially sway the verdict given the minimal impact of the testimony and, moreover, the overwhelming direct and circumstantial evidence proving Igwe's guilt. Igwe's other claims of trial court error lack merit and also are overcome by the compelling evidence of guilt. Other than a single merger of convictions, the judgment of the trial court should be affirmed.

COUNTERSTATEMENT OF THE CASE

On May 24, 2023, Igwe was charged by indictment with one count of armed robbery, in violation of D.C. Code §§ 22–2801, 4502, one count of assault with a dangerous weapon (ADW), in violation of *id.* § 22–402,

and one count of carrying a dangerous weapon, in violation of *id.* § 22–4504(a)(1) (Record on Appeal (R.) 9).

Following a three-day trial before the Honorable Jason Park, a jury convicted Igwe on all counts (R. 14; 6/7/23 Transcript (Tr.) 80). On November 6, 2023, Judge Park sentenced Igwe to 48 months' incarceration followed by five years of supervised release for the armed robbery, 48 months' incarceration followed by three years of supervised release for the ADW, and 48 months' incarceration followed by three years of supervised release for the carrying of a dangerous weapon, with all sentences running concurrently (R. 31; 11/6/23 Tr. 19). Igwe filed a timely notice of appeal that same day (R. 32).

The Trial

The Government's Evidence

Shortly after 9:30 p.m. on February 13, 2023, Igwe robbed Aldair Moran at knifepoint on the Green Line Metro train as it arrived at Gallery Place Station (6/5/23 Tr. 208–23; see Government Exhibit (Exh.)

30).[1] When Moran first boarded the train to head home from work several stations earlier, a tall man wearing dark clothing and a "beanie" hat and carrying a few bags—whom Moran later identified as Igwe—was on the train "hollering" and "shouting" at the people to sit on the opposite side of the car (6/5/23 Tr. 208–13, 223; 6/6/23 Tr. 24). Igwe eventually approached Moran and told Moran to change his seat (6/5/23 Tr. 211–13, 223). Moran complied (*id.*)

As the train arrived at Gallery Place Station, Moran felt somebody "snatch[ ]" his black North Face backpack containing his glasses case and his Chop't uniform from the seat next to him (6/5/23 Tr. 213, 219; see 6/6/23 Tr. 16; Exh. 14). Moran stood up to find Igwe holding his backpack (6/5/23 Tr. 214–17, 223). Igwe pulled out a knife with "silver on the blade" and ordered Moran to back up (*id.*). Igwe's brandishing the knife "shocked" Moran and made him fear that Igwe was going to stab him (*id.* at 218, 223–25). Igwe exited the train onto the Gallery Place Station platform with Moran's backpack (*id.* at 219; Exh. 19). Moran followed

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[1] The Government Exhibits referenced in this brief are attached to the government's motion to supplement the record. All of the Metro surveillance footage introduced by the government was authenticated and admitted into evidence by stipulation (6/6/23 Tr. 193–94).

him out and began looking around for someone who could help him (6/5/23 Tr. 219–26; 6/6/23 Tr. 6–7; Exh. 19; Exh. 20 at counter 18:38–18:42; Exh. 21 at counter 18:44–18:50). He saw two police officers at the top of the escalator and approached them to report the armed robbery (*id.* at 223–26; 6/6/23 Tr. 7–8, 77). Moran told them that the man who robbed him was tall, Black, wearing black clothing and a beanie, and carrying his own bag in addition to Moran's backpack (6/6/23 Tr. 31–33; see *id.* at 71, 140–41).[2]

Metropolitan Transit Police Department (MTPD) Officer Balhis and Officer Deen escorted Moran back to the platform to identify the assailant (6/6/23 Tr. 8, 71–72, 81–82, 89). Moran told the officers that none of the people standing on the platform was the robber (*id.* at 8–11, 89–91). The officers then took Moran to the upstairs mezzanine, where they stopped an individual whom Moran initially believed to be the attacker (*id.* at 9–14, 91–95, 142, 150). Moran lacked confidence in the

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[2] Although Moran initially did not recall reporting that the assailant wore a ski mask, Igwe on cross-examination elicited that Moran reported to police that the robber had a black ski mask (6/6/23 Tr. 31–32), which Igwe did not have on him at the time he was detained (*id.* 31–33, 71, 141).

identification and confirmed just three minutes later that the man was not the assailant (*id.* at 12–13, 93–94, 141–42, 145–50).

MTPD then broadened its investigation to locate the suspect (see 6/6/23 Tr. 95). Surveillance footage of Gallery Place platform showed the suspect exiting and re-entering the Mount Vernon Square Station-bound Green Line train (*id.* at 72–73, 78–79, 81, 87–88, 95, 106–07, 112–13, 123–24, 184–85; Exh. 30 at 9:38:17–9:38:35; Exh. 37),[3] leaving that train at Mount Vernon Square Station (6/6/23 Tr. 107, 124–26, 165–66, 185–91; Exhs. 38, 41 at counter 2:03–2:09), and then making his way toward the Station exit (6/6/23 Tr. 126–29, 189–91; Exh. 38). Using the Mount Vernon Square Station footage, MTPD issued a be-on-the-lookout (BOLO) poster showing the suspect wearing a black jacket with a Nike symbol and multicolored shoes and carrying a large clear plastic bag and another dark bag (6/6/23 Tr. 95–97, 107–10, 126–28, 156; Exh. 35; see Exh. 38). Over Igwe's objection, Officer Balhis identified Moran and Igwe

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[3] Based on the content of Officer Balhis's testimony, page 184 of the June 6, 2023, transcript mistakenly identifies Exhibit 30 as Exhibits 39 and 41 (see 6/6/23 Tr. 184–85; Exh. 30).

as individuals depicted in that footage and described their actions (6/6/23 Tr. 72–81, 87–89, 97–114, 123–29, 165–66, 184–91).

Less than 90 minutes after the robbery, Officers Balhis and Deen spotted and detained Igwe re-entering Gallery Place Station, as he wore clothing and carried bags matching the robber's description and the BOLO (6/6/23 Tr. 104–13, 129–38, 180, 191–92; Exhs. 2, 7, 8, 13, 35, 36, 39 at counter 0:00–0:30, 40 at counter 0:00–0:24). Moran then identified Igwe as his assailant with "100 percent" certainty during a show-up identification procedure that occurred just over two hours after the robbery (6/6/23 Tr. 15–16, 57, 131–32, 172; see Exh. 30). MTPD arrested Igwe (6/6/23 Tr. 104–06). At the time of his arrest, Igwe possessed Moran's black North Face backpack, Chop't uniform, and eyeglasses case (*id.* at 16, 104–05, 136–37, 184; Exhs. 1, 8), and had a knife with silver decoration on the blade (6/5/23 Tr. 199–200, 203–07, 6/6/23 Tr. 104–06, 131, 184; Exh. 11).

Moran again identified Igwe in court as the person who robbed him (6/5/23 Tr. 223). Officer Balhis also identified Igwe in court as the suspect she arrested for the robbery of Moran (6/6/23 Tr. 103–04).

The Defense Evidence

The defense did not present any witnesses but moved into evidence without objection eight photographs and two videos from Gallery Place Station (6/6/23 Tr. 213–15; see R. 11).

SUMMARY OF ARGUMENT

First, the trial court did not abuse its discretion by permitting Officer Balhis to identify Igwe and Moran in Metro surveillance footage and to describe their actions in that footage. Even if it were error to admit this testimony, the evidence did not substantially sway Igwe's conviction. The challenged testimony was largely duplicative of Moran's testimony and added little to the evidence against Igwe. Moreover, the evidence overwhelmingly established Igwe's identity as the armed robber. The direct evidence against Igwe included both a show-up identification of Igwe as the armed robber by Moran that was made with complete certainty and an in-court identification of Igwe by Moran. The circumstantial evidence was just as powerful: Igwe was stopped less than 90 minutes after the robbery inexplicably still holding Moran's stolen property as well as a knife matching the description of the robbery weapon. And surveillance footage capturing the assailant leaving the

scene of the robbery allowed the jury to draw its own conclusion about whether that individual, who wore clothes and carried bags matching those worn and carried by Igwe at the time of his arrest, was Igwe.

Second, the trial court did not err by permitting Officer Balhis to testify that Moran informed her that other people on the platform shortly after the robbery were not the suspect. That testimony was not hearsay because it explained the course of MTPD's investigation. It was separately excepted from the rule against hearsay because it demonstrated the effect it had on Officer Balhis and why she continued her investigation. In any event, any error in admitting that testimony would be harmless because it was cumulative of Moran's testimony and immaterial compared to the overwhelming evidence of Igwe's guilt.

Third, the trial court did not plainly err by not sua sponte striking isolated remarks during the government's closing and rebuttal statements. Those remarks urged the jury to convict Igwe because the government met its burden to prove each element beyond a reasonable doubt and responded to defense arguments by arguing that they did not raise a reasonable doubt. Igwe fails to even show in the first instance that these comments, which focused on the evidence and how it satisfied the

government's burden on the elements, were improper. Even if improper, Igwe also cannot establish that the trial court's failure to intervene was error, much less obvious error. Igwe also fails to meet his burden to show prejudice and an impact on the fairness, integrity, and public reputation of judicial proceedings. Any marginal prejudicial effect of the challenged statements pales in comparison to the significant evidence of Igwe's guilt and was appropriately addressed by the trial court's instructions to the jury on burdens of proof and the role of closing arguments.

Fourth, a limited remand is appropriate to dismiss Igwe's ADW conviction that merges with his conviction for armed robbery; but re-sentencing is not necessary because those sentences run concurrently.

ARGUMENT

I. Any Error in the Admission of Officer Balhis's Testimony About the Surveillance Footage Was Harmless.

Igwe argues (Br. 29–38) that the trial court abused its discretion by permitting Officer Balhis to identify both Igwe and Moran in Metro surveillance footage and to describe their actions in that footage. The Court does not need to decide whether the government laid a proper foundation for the identifications and whether it was appropriate for the

officer to narrate what was happening in the video. Even if the trial court erred in permitting the testimony, any error was harmless. Officer Balhis's testimony about the surveillance video was largely cumulative of Moran's testimony. Moreover, there was overwhelming evidence that Igwe was the armed robber, including Moran twice identifying Igwe as his assailant, Igwe's possession of Moran's property and a knife matching the robbery weapon just 90 minutes after the robbery, and surveillance footage capturing the assailant with clothing and bags matching Igwe's at the time of his arrest. The cumulative effect of that evidence overpowers the evidentiary errors that Igwe claims on appeal.

A. Additional Background.

Exhibit 30, a compilation of Metro surveillance footage authenticated and admitted into evidence through the parties' stipulation, depicts around two minutes of the Gallery Place Station platform surrounding the arrival and departure of the Metro train in which the robbery occurred (see Exh. 30). When shown Exhibit 30, Officer Balhis identified Moran as one of the two people exiting one of the train cars onto the platform (6/6/23 Tr. 72–73, 78–79; see Exh. 30 at 09:38:17–09:38:24). Igwe objected to Officer Balhis's testimony as "hearsay,"

asserting that she must have "learned" that the individual in the footage was Moran "because she was not there present when this happened" (*id.* at 74–76). The trial court held the objection in abeyance to allow the government to establish that she was not relaying hearsay (*id.* at 77).

Officer Balhis then testified that Moran reported the robbery to her, an interaction that occurred seconds later after the train left the station (6/6/23 Tr. 77; see Exh. 30 at 09:38:49, 09:39:42), that she spent "an hour and a half" with Moran that evening (6/6/23 Tr. 77–78), and that she knew that the person in the footage was Moran because "of what he was wearing" (*id.* at 79). Igwe renewed his objection, and the trial overruled it (*id.*). Officer Balhis later testified without objection that Exhibit 30 also shows Moran running on the platform to find an officer (6/6/23 Tr. 88–89; Exh. 30 at 09:38:35–09:38:50).

Discussing that same compilation, Officer Balhis also identified Igwe as the other person leaving the same train car holding a large clear trash bag and other darker bags before jumping back on the train headed for Mount Vernon Square Station (6/6/23 Tr. 79, 82, 87–89; Exh. 30 at 09:38:17–09:38:35). Igwe objected to the foundation for Officer Balhis's testimony (6/6/23 Tr. 79–81, 82–86, 87, 95–96, 98–101). During a bench

conference to resolve Igwe's objection, the trial court asked Igwe's counsel whether it would be "sufficient" if the government "can lay the foundation that [Officer Balhis] interacted with [Igwe] directly that evening and saw him, saw what he was wearing, saw what he was carrying, and if she explains why she believes that is the defendant" (*id.* at 101–02). Igwe's counsel agreed that foundation would suffice (*id.* at 102).

The government elicited from Officer Balhis that she interacted with Igwe directly that evening incident to his arrest and observed what he was wearing and carrying (6/6/23 Tr. 103–04, 108–10, 135–38, 192; see Exh. 2). Officer Balhis also explained that she was identifying Igwe in the surveillance footage because the individual depicted in that footage was wearing the same "all black" clothing with a "Nike" symbol on his jacket and "multi-colored" shoes and possessed the same "clear trash bag" as Igwe when he was arrested less than 90 minutes later (*id.* at 104–14, 135–38, 188).

After that evidence, Igwe—with one exception[4]—did not object to the foundation of Officer Balhis's testimony identifying Igwe in other

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[4] Igwe objected that the surveillance footage in Exhibit 41 did not depict enough of the individual exiting the train car at Mount Vernon Square

(continued . . .)

surveillance footage exiting and re-entering the Metro train at Gallery Place Station (6/6/23 Tr. 106–07, 112–14, 124–25, 136–37, 184–85; Exhs. 1, 30, 37, 39), exiting a train at Mount Vernon Square Station and proceeding toward the station exit (6/6/23 Tr. 125–29, 137–38, 189–91; Exhs. 2, 38), and as the person in the BOLO poster derived from that footage (6/6/23 Tr. 107–10; Exh. 35).

In reviewing surveillance footage identical to what was contained in Exhibit 30, Moran identified himself as exiting a train at Gallery Place Station and then running on the platform (6/5/23 Tr. 220–23, 225–26; 6/6/23 Tr. 6–7; Exhs. 19, 20, 21). Moran also testified that he was looking around for help (6/5/23 Tr. 222). Asked at whom he was looking in the video (Exh. 19), Moran replied, "I see the defendant with my stuff," and identified Igwe in court (6/5/23 Tr. 222–23). Igwe did not object to Moran's testimony about the surveillance video or his identification of Igwe, nor does he challenge it on appeal.

Station for Officer Balhis to identify that person as Igwe (6/6/23 Tr. 185–88; Exh. 41). The trial court overruled that objection (6/6/23 Tr. 188).

B. Standard of Review and Applicable Legal Principles.

In general, the admission of evidence is reviewed for abuse of discretion. *(Wonell) Jones v. United States*, 263 A.3d 445, 454 (D.C. 2021). In applying that standard of review, this Court first determines whether the trial court based its challenged discretionary ruling on correct legal principles and on a correct understanding of the nature of the evidence. *Id.* Second, even if it finds that the trial court erred in exercising its discretion, this Court "will not hold that the trial court 'abused its discretion' unless "the impact of that error requires reversal.'" *Id.* (quoting *Johnson v. United States*, 398 A.2d 354, 366 (D.C. 1979)). Non-constitutional errors, such as those claimed here, are harmless and not grounds for reversal if the Court can "say with fair assurance" that the error did not "substantially sway the jury's verdict." *Id.* at 460 (citing *Kotteakos v. United States*, 328 U.S. 750, 765 (1946)).

Officer Balhis's testimony identifying Moran from the surveillance video should be reviewed for abuse of discretion because Igwe objected to that testimony (6/6/23 Tr. 74–76, 79). Igwe did not preserve his objection to the officer's testimony identifying Igwe, however. Although he initially objected that there was insufficient foundation for that identification (*id.*

at 79–81, 82–86, 87, 95–96, 98–101), he later agreed that it would be "sufficient" if the government laid the appropriate foundation (*id.* at 102). And then, after the government elicited evidence showing the basis for the officer's identification, he (with one exception) did not object again (see *id.* at 106–10, 112–14, 124–29, 136–38, 189–91). If the Court agrees that Igwe failed to preserve his objection here, his challenge to the officer's identification of him from the video should be reviewed for plain error. *See Sanchez v. United States*, 919 A.2d 1148, 1151 (D.C. 2007) ("Initially, however, we must consider the government's argument that appellant 'invited' or at least acquiesced in the [challenged] ruling, and thus may not complain of it or may do so only under review for plain error.").[5] Ultimately, though, the standard of review does not matter,

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[5] Likewise, Igwe did not object to Officer Balhis's testimony that the surveillance footage depicted: (1) an individual holding a clear trash bag leaving and re-entering the train at Gallery Place Station (6/6/23 Tr. 87–88; Exh. 30); (2) Moran running on the platform to find an officer (6/6/23 Tr. 88–89; Exh. 30); or (3) Igwe walking through Mount Vernon Square Station carrying a clear trash bag (6/6/23 Tr. 125–29; Exh. 38). If the Court agrees that Igwe's objection to Officer Balhis's identifications of Moran and Igwe in the surveillance footage did not extend to her testimony describing their actions in that footage, that too would be reviewed for plain error. *See (Otis) Jones v. United States*, 813 A.2d 220, 226 (D.C. 2002) (noting that to preserve a claim for appeal, an objection

because even under the abuse-of-discretion standard, Igwe is not entitled

to reversal.

C. Any Error in Admitting Officer Balhis's Testimony Identifying Igwe and Moran and Describing Their Actions Was Harmless.

It is not clear that the trial court erred in admitting Officer Balhis's

testimony identifying Igwe and Moran in the surveillance video and

describing their actions. Officer Balhis's identification of Moran in the

surveillance footage of the Gallery Place Station platform had a reliable

foundation based on the evidence that she interacted with him just

seconds later, spent an hour-and-half with him that evening, and could

identify him in the footage based on the clothes he was wearing (see

6/6/23 Tr. 77–79, 89; Exh. 30 at 09:38:49, 09:39:42). Officer Balhis was

also familiar with Igwe's clothing, possessions, and appearance from the

significant time she spent with him incident to his detention that evening

(see 6/6/23 Tr. 103–04, 108–10, 135–38, 192; Exh. 2). Given Igwe's

agreement on the sufficiency of the foundation for this type of

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must identify the specific portion of the testimony and precise grounds for the objection) (citations omitted).

identification testimony (6/6/23 Tr. 101–02), it was hardly error for the trial court to permit Officer Balhis to identify Igwe in the footage based on her familiarity with his matching characteristics (see *id.* at 104–14, 135–38, 188).[6] And Officer Balhis's testimony contextualizing the surveillance footage by describing the action it captured and explaining its relevance to the investigation simply aided the jury's understanding of that evidence. *But see Callaham v. United States*, 268 A.3d 833, 848 (D.C. 2022).

This Court need not decide whether there was error, however. Even if the trial court did err in allowing the evidence, the error was harmless. Officer Balhis's testimony about the video added little to the government's case, and there was overwhelming evidence of guilt.

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[6] *See, e.g.*, *United States v. Jackson*, 688 F.2d 1121, 1123–26 (7th Cir. 1982) (upholding admission of civilian witness identification of defendant in a photograph when witness interacted with defendant "only one time" at a Christmas party because that was "sufficient" to support her lay opinion testimony and assist the jury); *Robinson v. People*, 927 P.2d 381, 384 & n.1 (Colo. 1996) (en banc) (holding that it was permissible for detective who had arrested the defendant on a prior occasion to identify the defendant in a surveillance photograph because even that level of familiarity made the detective "more likely to correctly identify [the defendant] from the photograph than was the jury"); *but see Geter v. United States*, 306 A.3d 126, 135–39 (D.C. 2023).

To start, the challenged testimony hardly could have affected the jury's consideration of the case. Igwe never disputed that someone robbed Moran with a knife. The only issue at trial was identification. Yet Officer Balhis's testimony about the video added little to the evidence of Igwe's identity as the assailant.

First, Officer Balhis's identification of Moran, the victim, in the surveillance footage had no bearing on who was the armed robber. And Igwe does not offer any specific argument on how that testimony prejudiced him (cf. Br. 45–48). Nor could he establish any such harm, as it entirely duplicated Moran's testimony identifying himself in identical surveillance footage (6/5/23 Tr. 219–26; 6/6/23 Tr. 6–7; Exhs. 19–21). *See United States v. Nelson*, 217 A.3d 717, 723 (D.C. 2019) (reasoning that an evidentiary error may be harmless "if the tainted evidence was cumulative or duplicative of other evidence presented to the jury") (cleaned up) (collecting cases).

Second, Officer Balhis's identification of Igwe in the surveillance footage supported only two facts. First, that Igwe exited the train onto the Gallery Place Station platform after the robbery and re-entered that train to leave the station. And second, that he was the individual depicted

in the BOLO adapted from surveillance footage of Mount Vernon Square. But Moran identified Igwe without objection in identical footage of Gallery Place Station (6/5/23 Tr. 219–23; Exh. 19). That footage shows Igwe exit and then hop back on the train (Exh. 19 at counter 01:35–01:37). This alleviates any prejudicial impact of that aspect of Officer Balhis's testimony. *See Nelson*, 217 A.3d at 723. And while Officer Balhis's identification of Igwe as the person depicted in the footage that was adapted into the BOLO helped explain why she stopped Igwe as a *suspect*, which he does not challenge, the force of that evidence relevant to identifying him as the *robber* is entirely overshadowed by Moran's direct identification of Igwe in both the show-up procedure and in court as the assailant (6/5/23 Tr. 223; 6/6/23 Tr. 15–16, 57, 131–32, 172).

Third, separate from the identification testimony, Officer Balhis's description of the action in the surveillance footage had no material impact because the footage speaks for itself. In any event, her testimony about Moran's actions was blunted by Moran's testimony describing the events at Gallery Place Station (6/5/23 Tr. 219–26; 6/6/23 Tr. 7–8, 77; Exhs. 20, 21) and his duplicative description of identical surveillance footage (6/6/23 Tr. 72–73, 78–79, 88–89; Exhs. 19, 20, 21; see Exh. 30 at

09:38:17–09:38:24, 09:38:35–09:38:50). *See Nelson*, 217 A.3d at 723.

Likewise, Moran's testimony identifying Igwe in surveillance footage

that shows Igwe exit and re-enter the departing train independently

established that Igwe left Gallery Place Station (6/5/23 Tr. 219–23; Exh.

19). *See Nelson*, 217 A.3d at 723. Finally, Igwe's actions in Mount Vernon

Square Station played little, if any, role proving his identity as the armed

robber. Igwe offers no argument to the contrary.

Moreover, there was powerful evidence of Igwe's guilt. The direct

evidence proving that Igwe was the robber was formidable. Just over two

hours after the robbery, Moran identified Igwe with "100 percent"

certainty as the person who robbed him (6/6/23 Tr. 15–16, 57, 131–32; see

6/5/23 Tr. 218–19; 6/6/23 Tr. 172; Exh. 30).[7] Moran also identified Igwe

in open court as his assailant (6/5/23 Tr. 223). Officer Balhis likewise

identified Igwe in court as the person whom Moran had identified as the

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[7] Although Moran initially identified another individual at the station as
his assailant immediately following the robbery, he testified that he
lacked confidence in that identification and quickly retracted that
identification (6/6/23 Tr. 9–14, 91–95, 142, 150, 160–61; see Exh. 22).
Given Moran's quick retraction of this identification, his confidence in
identifying Igwe just hours later, and the significant circumstantial
evidence implicating Igwe, Moran's fleeting mistaken identification did
not meaningfully undermine the identification of Igwe as the assailant.

robber and whom she arrested (6/6/23 Tr. 103–04). Additionally, Moran

identified Igwe in surveillance footage of the Gallery Place Station

platform seconds after the robbery and testified that the items Igwe was

holding in that footage were Moran's property (6/5/23 Tr. 222–23; Exh.

19).

The circumstantial evidence of Igwe's guilt was just as powerful.

When Igwe was detained less than 90 minutes after the robbery, he still

possessed Moran's backpack and its contents (6/6/23 Tr. 16, 104–05, 136–

37, 184; Exhs. 1, 8). Igwe never explained why he had the proceeds of the

armed robbery so soon after the incident. *See Byrd v. United States*, 598

A.2d 386, 392–93 (D.C. 1991) (en banc) ("A defendant's unexplained (or

unsatisfactorily explained) possession of recently stolen property may

support a conviction of larceny . . . .") (citation omitted). He also had on

him a knife with silver decorations on the blade matching Moran's

description of the robbery weapon (6/5/23 Tr. 216; 6/6/23 Tr. 104–06, 131,

184; Exh. 11).[8] He matched the physical appearance given by Moran,

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[8] Igwe asserts (Br. 47) that the knife he possessed did not match the
description given by Moran. That is incorrect. Moran testified that the
knife had "silver on the blade" (6/5/23 Tr. 216), and the photograph of the

wore dark clothing matching that description, and held bags just as
Moran described (6/6/23 Tr. 31–33; see *id.* at 71, 140–41; see Exhs. 1, 2,
7, 8, 39, 40).[9]

Further still, by the parties' stipulation, all the Metro surveillance
footage was admitted into evidence (6/6/23 Tr. 193–94). Thus, the jurors
could watch the man whom Moran identified as Igwe in the footage of the
Gallery Place Station platform exit the train and then—just before
MTPD officers accompanied Moran back down the escalator (see Exh. 30
at 09:38:34–09:34:43)—suddenly hop back on to depart for Mount Vernon
Square Station. And separate from any testimony by Officer Balhis, the
jurors could judge for themselves whether Igwe, who was detained less
than two hours later wearing black clothing and holding a black bag and

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knife Igwe possessed plainly shows that the blade was decorated from
base to tip with a silver webbing design (Exh. 11).

[9] Igwe argues (Br. 46–47) that the government's case was weak because
there was no video of the robbery and Moran provided only a "general"
description of the suspect to police, which included that he wore a ski
mask. That Moran was robbed was never disputed. To the extent that
Igwe claims Moran's description to police was too generic, that would at
most go to the basis for his stop, which he does not challenge. But to the
extent he claims it undermines his identity as the perpetrator, that is
vitiated by Moran's show-up and in-court identifications of Igwe as the
robber (6/5/23 Tr. 223; 6/6/23 Tr. 15–16, 57, 131–32, 172).

a large clear plastic garbage bag, was the same man from the footage clad in black and holding a large clear plastic garbage bag and other darker bags.

The cumulative impact of the direct and circumstantial evidence here went well beyond the "game, set and match" evidence described by Judge Schwelb in *In re T.C.*, 999 A.2d at 85 (Schwelb, S.J., concurring). It even compares favorably to *Arnold v. United States*, in which this Court found on abuse-of-discretion review that the prosecutor's improper reference to a missing witnesses had "no appreciable effect on the verdict" because of the strength of the government's case. 511 A.2d 399, 416–17 (D.C. 1986). In that case, like here, the government's "quite strong" evidence was that the defendant still had the proceeds shortly after the robbery and a victim of the robbery identified him as the assailant. *Id.* at 417. In contrast, the jury here had before it not just that evidence but also the victim's subsequent in-court identification of Igwe, the victim's testimony that he was 100% confident that Igwe was his assailant, Igwe's possession of a weapon matching that used in the robbery, and

surveillance video of the assailant immediately after the robbery that the jury could review for itself.[10]

Given the strength of that evidence, the introduction of Officer Balhis's testimony identifying Moran and Igwe in the surveillance footage and describing their conduct could not have swayed the jurors' determination that Igwe was guilty of the armed robbery. Accordingly, any error in admitting this testimony was harmless. *See Arnold*, 511 A.2d at 417.

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[10] The strength of the government's case against Igwe also compares favorably to *Geter*, 306 A.3d 126. In that case, this Court held on plain-error review that there was no "reasonable probability" that the erroneous admission of testimony identifying the defendant as the shooter in surveillance footage "affected the outcome" of the trial because of the strength of the government's case. *Id.* at 139–41 (cleaned up). As here, this evidence was "not the whole, let alone a crucial component of the evidence implicating" the defendant as the person responsible for the assault with intent to kill while armed. *Id.* But, unlike here, the government's case against the defendant was mostly circumstantial. Beyond grand jury testimony identifying defendant as the shooter, the government relied primarily on surveillance footage of the shooting, testimony generally placing the defendant at the scene and suggesting a motive, expert testimony that "favor[ed] the inclusion" of the defendant's DNA on clothes that the suspect shed during his flight, and data from the defendant's phone concocting a coverup for the shooting and searching the internet about the attack. *See id.* The direct and circumstantial evidence here far more powerfully establishes Igwe's guilt.

II. The Trial Court Did Not Err in Admitting Testimony From Officer Balhis Explaining the Investigative Steps to Identify Igwe.

Igwe next claims (Br. 39–41) that the trial court erred by permitting Officer Balhis to testify that Moran told her that certain individuals on the Gallery Place Metro Station platform were not his assailant. According to Igwe, this testimony was inadmissible hearsay. Although Igwe asserts that this evidentiary claim is reviewed de novo instead of for abuse of discretion,[11] it is meritless under any standard of review.

Over Igwe's objection, the trial court permitted Officer Balhis to testify that Moran told her that none of the people she approached on the Gallery Place Metro Station platform shortly after the robbery was the perpetrator (6/6/23 Tr. 90–91). Officer Balhis further explained that she took Moran upstairs for further investigation because he did not identify any of the people on the platform as the robber (*id.* at 91–92).

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[11] As this Court recently explained in *Torney v. United States*, it "review[s] the admissibility of evidence for abuse of discretion, but the underlying question of whether or not a particular hearsay exception applies to certain statements is a question of law which we review de novo." 300 A.3d 760, 778 (D.C. 2023) (cleaned up). The distinction between these standards of review has no consequence in this case because the trial court did not err at all.

Although Igwe argues (Br. 39–41) that this statement does not fall under the exception to the rule against hearsay for prior statements of identification, Officer Balhis's testimony was not hearsay at all. This Court has long recognized that "[e]vidence outlining the background of an investigation is admissible as non-hearsay." *Perritt v. United States*, 640 A.2d 702, 705 (D.C. 1994) (citations omitted). That exception extends to statements "explain[ing] the investigatory process" and offered to show how it "culminated in the identification of [defendant] by [eyewitnesses] present at the scene of the [crime]." *Id.* at 704–05. That is precisely the evidence offered here, as it explained why Officer Balhis continued her investigation for the robbery suspect after Moran did not identify his attacker on the platform.

For largely the same reason, Officer Balhis's testimony would be admissible as an exception to the rule against hearsay "to show the state of mind of the listener," because "[r]egardless of the truth or falsity of the statement itself, the effect the statement . . . explain[ed] or provide[d] a motive for the listener's subsequent conduct." *Matter of C. D.*, 437 A.2d 171, 175 (D.C. 1981) (citations omitted). Because Moran's statements

explained and provided a motive for Officer Balhis's continued investigation, they are also admissible under this hearsay exception.

Even if it were error to admit this testimony, it was harmless for two independent reasons. *First*, the only conceivable prejudice from this testimony would be the negative implication that Igwe was the culprit through ruling out other individuals in the station. But, as explained above, the significant direct and circumstantial evidence at trial establishing Igwe's guilt dwarfs the marginal impact of this testimony. *Second*, the jury already learned the substance of Officer Balhis's challenged testimony from Moran's unobjected-to testimony that he accompanied officers back to the Gallery Place Metro Station platform and told them he did not see his assailant there (6/6/23 Tr. 8, 10). There is thus no harm from Officer Balhis's substantively cumulative testimony. *See Nelson*, 217 A.3d at 723.

III. The Trial Court Did Not Plainly Err by Not Sua Sponte Striking Statements During the Government's Closing Argument.

Igwe claims (Br. 41–45) that the trial court plainly erred by failing sua sponte to strike statements by the government during closing argument related to (1) the evidence establishing Moran's fear caused by

Igwe's armed assault, and (2) how the evidence satisfied the government's burden to prove the elements beyond a reasonable doubt and how the defense's arguments did not raise a reasonable doubt. Igwe cannot even make the threshold showing that these comments on the case consistent with the evidence and the trial court's jury instructions on burdens of proof were inappropriate, let alone that the trial court plainly erred in in not striking them sua sponte. Nor can he satisfy the third and fourth prongs of plain-error review.

A.   Additional Background.

The statements that Igwe challenges (Br. 41–45) are summarized in context below and bolded for ease of reference.

The Trial Court's Instructions

In its instructions to the jury before closing argument, the trial court relayed four familiar instructions. First, that "every defendant in a criminal case is presumed to be innocent" and that "presumption . . . remains with the defendant throughout trial unless and until the Government proves he is guilty beyond a reasonable doubt" (6/7/23 Tr. 11). Second, that this "burden . . . never shifts throughout the trial" (*id.*). Third, that "[r]easonable doubt" is a "doubt based on reason" and "not an

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imaginary doubt" or "a doubt based on speculation or guesswork" (*id.* at 12). And fourth, that the "statements and arguments of the lawyers are not evidence" but merely "intended to assist you in understanding the evidence" (*id.* at 10–11).

The Government's Closing

The government began its closing by acknowledging that it "must prove beyond a reasonable doubt" each element of the charged offenses, that this "burden of proof . . . is always with the Government," that it "carr[ies] this burden throughout the trial," and that the burden "never shifts to the defendant" (6/7/23 Tr. 28).

In summarizing the evidence that Igwe assaulted Moran by committing an act that put Moran in fear of immediate injury, the government urged the jury to recall Moran's testimony that he was "scared" because his attacker "was bigger than him" and "had a knife" (6/7/23 Tr. 29). The government again referenced that evidence at the end of its summation by arguing that Moran was "afraid that [Igwe] was going to stab him," and so he was not just "robbed of his backpack," but "**his sense of security was taken as well,**" and that he now "**look[s]**

both ways" and "**doesn't feel as safe anymore**" when he rides the Metro (*id.* at 38–40).[12]

The government ended its closing by asking the jury to "[f]ind [Igwe] guilty of all counts" and **"[f]ind justice for Aldair Moran**," arguing that Igwe's actions assaulting and robbing Moran "**can't stand**," and urging the jury to "[f]ollow the evidence," because "it will lead you straight to Mr. Igwe" as the person responsible (6/7/23 Tr. 38–39).

The Defense Closing

In his closing, Igwe's central theme was that there was reasonable doubt about his identity as the assailant. Building off that theme, Igwe argued, without reference to any particular evidence, that the record "indicates" that "the robber" opened Moran's North Face backpack and saw only "stuff of value . . . to Mr. Moran, but not of value to anyone else" and so he "discarded" that bag, which was "later on picked up by Mr. Igwe" at some uncertain place and time between the robbery and Igwe's arrest a short while later (6/7/23 Tr. 40–41).

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[12] Moran had testified, without objection, that as a result of Igwe's assault, he was "affected . . . a lot," is now "more cautious riding the train at night, looking over my shoulders, looking around me, my surroundings" and "more careful getting in the train" and noticing "who's on the train car and who's getting in the train car" (6/6/23 Tr. 19).

Igwe also asserted that Moran's identification of Igwe was not reliable because he earlier mistakenly identified another individual as the attacker (*id.* at 44–49, 56). And Igwe argued that Officer Balhis's identification of him in surveillance footage through his multi-colored shoes was unreliable because the footage was "monochromatic" (*id.* at 52–53). Igwe closed his argument by telling the jury that it was "duty-bound to acquit" if it believed that Igwe was only "more likely than not the robber" or even if it were "highly probable" that he is the culprit, as that is not "pro[of] beyond a reasonable doubt" (*id.* at 55).

The Government's Rebuttal

In rebuttal, the government responded by arguing that Igwe's claim that he is the "unluckiest man alive" for innocently finding Moran's belongings and then being arrested while possessing that property "makes no sense" based on the "on the evidence that's before you in this case" (6/7/23 Tr. 57–58). Echoing the trial court's instructions on reasonable doubt, the government argued that to accept Igwe's version of events would require "**the exact type of speculation and guesswork that Judge Park instructed . . . [that] you're not allowed to engage in**" (*id.*). Again invoking those instructions, the government urged the

jury to "look up in Judge Park's jury instructions the term 'reasonable doubt,'" because "**reasonable doubt is not just some term that you can haphazardly throw around in order to excuse robbing somebody on the Metro at knifepoint**," but is rather "**a legal term of art that carries an important meaning to it**" (*id.* at 63).

To counter Igwe's attack on the reliability of Moran's identification, the government argued that it took "courage" for Moran to recant his initial misidentification because "he's not just focused on finding somebody" but instead "**wants to find the person who did this to him, the person who took his backpack away, the person who took his dignity away**": "And that's Mr. Igwe" (6/7/23 Tr. 61–62).

And, replying to Igwe's assertion that Officer Balhis's identification of Igwe is unreliable because of the low fidelity depiction of the assailant's shoes in the surveillance video, the government focused the jury's attention on the **"elements of the offenses"** and argued that "**reasonable doubt**" is not about whether "**the Jordans are three-colored or multicolored**" but whether it met its burden to prove those elements beyond a reasonable doubt (*id.* at 63). The government then

summarized at length the evidence at trial establishing those elements, including Igwe's identity as the culprit (see *id.* at 63–69).

The government concluded its rebuttal by arguing that Igwe is not the "unluckiest man alive" for being arrested in possession of "Moran's belongings" and "a knife" like the assailant used, but rather that title belongs to Moran because "**[w]hat happened to him is wrong**" and "**he did not deserve to have to look down a knife just because he was trying to get home that day**" (6/7/23 Tr. 69). And in asking the jury to "hold [Igwe] accountable and find him guilty on all counts," the government emphasized that the "evidence . . . is all right there" proving Igwe's guilt because he "ha[d Moran's] backpack" and "the trash bag" from the time of the robbery to the time of his arrest (*id.* at 69–70).

B.   Standard of Review and Applicable Legal Principles.

Igwe correctly notes (at 41–42) that this Court must review for plain error his unpreserved claim that the trial court failed sua sponte to strike statements made by the government during closing argument. *See Portillo v. United States*, 62 A.3d 1243, 1257 (D.C. 2013). Igwe thus must show that (1) the trial court erred, and (2) the error was "plain," meaning

"clearly at odds with established and settled law" and "not subject to reasonable dispute." *Malloy v. United States*, 186 A.3d 802, 814–15 & n.48 (D.C. 2018) (cleaned up). He must then show that (3) the error "affected his substantial rights," by establishing a "reasonable probability of a different outcome but for the established error." *Geter*, 306 A.3d at 139–40 (cleaned up). If those prongs are satisfied, then this Court in its "discretion" may reverse his conviction "only if" Igwe establishes that (4) the error resulted in his conviction despite his "actual[ ] innocen[ce]" or otherwise "seriously affect[ed] the fairness, integrity, or public reputation" of judicial proceedings. *Fadero v. United States*, 59 A.3d 1239, 1248 (D.C. 2013) (cleaned up); *In re Taylor*, 73 A.3d 85, 103 (D.C. 2013) (cleaned up).

Igwe's burden to establish plain error is "formidable." *Comford v. United States*, 947 A.2d 1181, 1189 (D.C. 2008). And this Court reserves reversal only for "particularly egregious situations" in which the trial court's failure to act was so prejudicial that it "jeopardize[d] the fairness and integrity of [the] trial." *Portillo*, 62 A.3d at 1257 (cleaned up); *see also United States v. Young*, 470 U.S. 1, 11 (1985) (a criminal conviction "is

not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements must be viewed in context").

C. Igwe Cannot Show That the Government's Statements Were Improper or That the Trial Court Plainly Erred in Overseeing Closing Arguments.

Igwe fails to clear the initial threshold to establish that the government's closing remarks were improper and that the trial court thus erred in allowing them.

He first claims that the government inflamed jurors' passions by (1) mentioning the psychological impact Igwe's attack had on Moran, and (2) imploring the jury to "find justice" for Moran by convicting Igwe because Moran did not "deserve" to be assaulted and robbed and such crimes "can't stand" (Br. 42–43 (citing 6/7/23 Tr. 38–39, 62–63, 69)). But these are permissible comments on the evidence and not an attempt to mislead the jury into convicting Igwe based on emotion.

As this Court has explained, "the government is not required to deliver a dispassionate presentation of sterile facts" when "making its case to the jury," and so it may argue to the jury about the "human toll" of the charged crime. *Chatmon v. United States*, 801 A.2d 92, 100 (D.C.

2002) (citation omitted). The context of these statements is critical. The government may not, for example, highlight disturbing evidence unmoored from the elements of the offense to trigger an "emotional response of inflamed passions" in jurors and "suggest[] that *someone* should be held responsible" for a heinous crime because that urges the jury to produce a verdict not "based on the evidence and law." *Id.* at 100–02 (emphasis in original) (citation omitted). By contrast, it is appropriate for the government to use even highly evocative evidence to argue that it has satisfied its burden to prove an element of an offense. *See, e.g.*, *Perez v. United States*, 968 A.2d 39, 81 (D.C. 2009) (contrasting *Chatmon* and finding it permissible for government to focus on evidence of "stab wounds" and use vivid descriptions such as "eviscerated abdomen" and "intestines were hanging out of his stomach").

The challenged statements here fit well within the latter category of permissible arguments. To start, the government was merely commenting on evidence that had been admitted without objection. *See* n.12, supra. Furthermore, the government's argument about the impact that Igwe's assault had on Moran was delivered in the context of discussing the fear element of ADW that it had to prove beyond a

reasonable doubt (6/7/23 Tr. 29, 37–39).[13] And, unlike in *Chatmon*, the government did not focus on this evidence to urge the jury convict just *anyone*. Rather, it repeatedly urged the jury to "follow the evidence" that led to Igwe as the culprit for the Metro attack (*id.* at 35, 39–40, 64–70).

There is also nothing improper about the government asking the jury to "do justice" by returning a guilty verdict. This Court has repeatedly observed that a call to "do justice" by convicting the defendant is not an improper statement during argument, as contrasted with more generalized calls to "send a message." *See Bost v. United States*, 178 A.3d 1156, 1192 (D.C. 2018); *see also Battle v. United States*, 754 A.2d 312, 321 (D.C. 2000) (describing a call to "do justice" an "innocuous appeal"). The comments asking the jury to "[f]ind justice for Aldair Moran," by

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[13] Igwe argues (Br. 42) that evidence of the psychological impact of the attack on Moran lacks "any legal relevance" to the charges in this case. Not so. The standard for relevance is a low bar: it "need only tend[ ] to make the existence or nonexistence of a fact more or less probable than would be the case without that evidence." *Gardner v. United States*, 140 A.3d 1172, 1187 (D.C. 2016) (citation omitted). The psychological impact of Igwe's attack, including Moran's continued fear, tends to make it more probable that Igwe "committed a threatening act that reasonably would create in another person a fear of immediate injury." *Joiner-Die v. United States*, 899 A.2d 762, 765 (D.C. 2006); see 6/7/23 Tr. 21 (instructing jury on that element).

"[f]ollow[ing] the evidence" that "will lead you straight to Mr. Igwe" and then "[f]ind[ing] [him] guilty on all counts" (6/7/23 Tr. 39–40) fit well within those permissible boundaries.

Igwe's second claim (Br. 42–43) that the government shifted its burden of proof is equally meritless. Far from attempting to shift its burden, the government repeatedly emphasized to the jury that it had the burden to prove each element beyond a reasonable doubt and directed the jury to the trial court's instructions on the definition of that standard of proof (6/7/23 Tr. 28, 57–58, 63). And in arguing how the evidence at trial satisfied its burden on the elements and how the defense arguments did not raise a reasonable doubt, the government accomplished the exact purpose of closing statements: to "sharpen and clarify the issues for resolution by the trier of fact" by "argu[ing] the inferences to be drawn from all the testimony, and point[ing] out the weaknesses of [its] adversary[y's] positions." *Herring v. New York*, 422 U.S. 853, 862 (1975); *see Harris v. United States,* 602 A.2d 154, 165 (D.C. 1992) (en banc) (reasoning that the government may "argue the strength of its case and contrast it with the weakness of [the] defense" without shifting the burden of proof).

That principle is equally applicable to the government's rebuttal arguments responding to specific points raised by the defense. *See Lazo v. United States*, 930 A.2d 183, 187 (D.C. 2007); *see also Harris*, 602 A.2d at 165 (reasoning that the government did not shift the burden of proof by arguing that there was no "corroboration" for the version of events given by the defense). The government did just that by pointing out that Igwe's theory of innocent possession was speculative and not supported by the evidence and then directing the jury's attention to the trial court's definition of reasonable doubt (6/7/23 Tr. 57–58). Likewise, the government permissibly countered Igwe's attacks on Moran's and Officer Balhis's testimony identifying Igwe by arguing that any minor inconsistencies did not raise a reasonable doubt about Igwe's identity as the assailant and then redirecting the jury's attention to the sweeping evidence establishing Igwe's guilt (*id.* at 61–70).

Because Igwe cannot establish that the government's arguments were improper, he cannot demonstrate that the trial court's failure to intervene sua sponte was error, much less plain error.[14]

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[14] It is perhaps because of the propriety of these arguments that not only did the trial court deem it appropriate not to intervene but also that Igwe

D. Even if the Trial Court Plainly Erred, Igwe Cannot Establish Prejudice From the Remarks or an Impact on the Fairness, Integrity, or Public Reputation of Judicial Proceedings.

Even if Igwe could show that the statements were so improper that the trial court plainly erred by failing to intervene sua sponte, he cannot meet the remaining requirements of plain-error review. Specifically, he fails to establish that this is the rare "particularly egregious" case in which the court's failure to act was so prejudicial that it "jeopardize[d] the fairness and integrity of his trial." *Portillo*, 62 A.3d at 1257 (cleaned up).

Igwe argues (Br. 45) that the government's closing informed the jury that it "need not prove identification beyond a reasonable doubt" to

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never even sought to have the trial court address the statements he challenges now, even though he objected to other aspects of the government's closing (see, e.g., 6/7/23 Tr. 57). "The failure of experienced counsel to object" suggests that the defense "perceived little if any prejudice to their case at the time." *Burgess v. United States*, 786 A.2d 561, 572 (D.C. 2001) (citation omitted). And, given the superior position of the trial court to evaluate the impact of the government's argument, *see Irick v. United States*, 565 A.2d 26, 32 (D.C. 1989), Igwe offers no compelling reason for this Court to second-guess the trial court's considerable discretion in managing the parties' closing arguments in this case.

secure his conviction. That argument is baseless. The government spent almost its entire closing and rebuttal marshaling the evidence—from in-court identifications of Igwe, to show-up identifications of Igwe, to physical evidence tying Igwe to the crime, to Metro surveillance footage capturing the suspect—to argue to the jury that it proved beyond a reasonable doubt that Igwe was person who robbed and assaulted Moran. It never so much as hinted to the jury that it did not have to prove Igwe's identity beyond a reasonable doubt.

Setting aside the faulty foundation of his argument, Igwe does not demonstrate that the court's failure to act had a "particularly egregious" prejudicial effect on the trial. *Portillo*, 62 A.3d at 1257 (cleaned up). That is because the "overall character of the prosecutor's arguments . . . were very much focused on discussing the evidence and the weaknesses in defense counsel's arguments for the existence of reasonable doubt," and so any incremental prejudicial effect of these "isolated remarks" pales in comparison to the "strength of the evidence" establishing Igwe's guilt. *Trotter v. United States*, 121 A.3d 40, 54 (D.C. 2015). For that reason, any possible prejudice that Igwe could derive from these comments was more than adequately addressed by the trial court's instructions that the

parties' arguments "are not evidence" and that the government must prove Igwe "is guilty beyond a reasonable doubt" (6/7/23 Tr. 10–11). "The jury is presumed to have followed these instructions . . . and this court [should] not upset the verdict by assuming the jury declined to do so." *Harris*, 602 A.2d at 165 (cleaned up); *see Harrison v. United States*, 76 A.3d 826, 844 (D.C. 2013).[15]

IV. A Limited Remand is Appropriate to Vacate the Merged ADW Conviction.

Igwe's final claim (Br. 49–50) is that his robbery and ADW convictions merge. Based on *Morris v. United States*, 622 A.2d 1116, 1129 (D.C. 1993), the government agrees. The appropriate remedy is a limited remand for the trial court to vacate the ADW conviction. *Briscoe v. United States*, 181 A.3d 651, 665 (D.C. 2018). Resentencing is not necessary

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[15] Although Igwe argues (Br. 45–48) that the cumulative impact of all the errors he claims requires reversal, that fails because he cannot establish error in the first instance. And, even if he could, any error would not— standing alone or together—substantially sway the verdict or undermine the outcome of the trial. The central issue in this case was who committed the robbery. And, as discussed in detail above, the direct and circumstantial evidence establishing Igwe's guilt towers over the impact of his claimed errors.

because the trial court ordered Igwe's robbery and ADW sentences to run concurrently (R. 31). *See Briscoe*, 181 A.3d at 665.

CONCLUSION

WHEREFORE, the government respectfully submits that the case be remanded for the limited purpose of vacating the ADW conviction but that the judgment of the Superior Court otherwise should be affirmed.

Respectfully submitted,

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