RECORD NOS. [redacted]

In The
District of Columbia
Court of Appeals

ROBERT S. [redacted],

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

ON APPEALS FROM NO. [redacted] AND [redacted] IN THE DISTRICT OF COLUMBIA SUPERIOR COURT, CRIMINAL DIVISION, THE HONORABLE DAYNA A DAYSON, JUDGE

BRIEF OF APPELLANT

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ROBERT S. [redacted],
Appellant

v.

UNITED STATES,
Appellee

APPELLANT'S BRIEF

STATEMENT OF JURISDICTION

This Court has jurisdiction over the final orders and judgements in this case pursuant to D.C. Code § 11-721(a)(1) (2001).

STATEMENT OF THE CASE

On July 26, 2016, the grand jury handed down an indictment charging Appellant Robert [redacted] with two counts of Assault with a Dangerous Weapon, (22 D.C. Code § 402); one count of Possession of a Firearm during a Crime of Violence, (22 D.C. Code § 4504(b)); one count of Unlawful Possession of a Firearm, (22 D.C. Code § 4503(a)(1)); and one count of Threat to Injure, (22 D.C. Code § 1810). On November 16, 2016, the grand jury handed down a second indictment charging one count of Contempt, (11 D.C. Code § 944(a)); and two counts of Obstruction of Justice, (22 D.C. Code § 722(a)(6)). The Government joined those indictments for trial. Appellant was tried by a jury on January 30 and

31, 2017 and February 1, 2, 6, and 7, 2017. The jury returned a conviction on all eight counts of the indictments. The Honorable Dana Dayson sentenced the Appellant to a total sentence of 180 months imprisonment followed by eight years of supervised release. The Appellant noted a timely appeal.

STATEMENT OF FACTS

Kendra [redacted] is Appellant's ex-girlfriend and the mother of his five year old child. (Tr. 2/1/17 at 394, 396). On the night of April 12, 2016, Ms. [redacted] and Appellant were at her apartment together and later left for a friend's apartment. (Tr. 2/1/17 at 396). Ms. [redacted] lived at 21 Atlantic Street SE with her two children, aged seven and five. (Tr. 2/1/17 at 393-394). She had known Mr. [redacted] for approximately five years at the time. (Tr. 2/1/17 at 395). However, in March 2016, Ms. [redacted] and the Appellant broke off their relationship. (Tr. 2/1/17 at 396). In April 2016, she was dating Conrad [redacted]. (Tr. 2/1/17 at 396).

Ms. [redacted], Appellant, and the children travelled to a friend's apartment on Sixth Street SE, (Tr. 2/1/17 at 396), where Ms. [redacted] and Appellant drank alcohol (Tr. 2/1/17 at 398). At some point, Appellant left the party, and at a later point, Conrad [redacted] arrived. (Tr. 2/1/17 at 397). According to Ms. [redacted], Mr. [redacted] also drank alcohol at the party. (Tr. 2/1/17 at 397). Mr. [redacted], Ms. [redacted], and the children left the party together and returned to 21 Atlantic Street SE. (Tr. 2/1/17 at 398, 466). They entered Ms. [redacted]'s apartment and went directly into the

children's bedroom to put the children to bed in their bunk beds. (Tr. 2/1/17 at 405, 472-473). Ms. [redacted] was surprised and angry to find Appellant in the bottom bunk bed and started cursing at him and "tussling" with him to get him leave the apartment. (Tr. 2/1/17 at 405, 413, 415, 475). Mr. [redacted] left the apartment upon seeing the Appellant. (Tr. 2/1/17 at 406, 475). Ms. [redacted] pulled out a knife and Appellant left the apartment. (Tr. 2/1/17 at 414).

Mr. [redacted] went out to his car to retrieve a cell phone charger, then returned to the building's lobby to wait for Appellant to leave. (Tr. 2/1/17 at 476-477, 480). Appellant approached Mr. [redacted] and asked to talk to him. (Tr. 2/2/17 at 8). Appellant told Mr. [redacted] that he did not know why Ms. [redacted] did not want to talk to Appellant. (Tr. 2/2/17 at 7-8). Mr. [redacted] described Appellant as angry and drunk. (Tr. 2/2/17 at 9). He next alleged that Appellant pulled a weapon out of his right jacket pocket and put it in Mr. [redacted]'s face. (Tr. 2/2/17 at 10-11). Mr. [redacted] put his hands in the air while Appellant reportedly stated that he would kill for his family, did not know why Ms. [redacted] would leave him, and would not allow anyone to take his family away from him. (Tr. 2/2/17 at 11-12). Mr. [redacted] testified that Appellant then struck him in the left side of his face with the gun he had been holding. (Tr. 2/2/17 at 13-14).

Mr. [redacted] testified that Mr. [redacted] pulled him outside the building by his sleeve while he struggled to stay inside. (Tr. 2/2/17 at 17-19). Both the Appellant

and Mr. [redacted] ended up standing outside the apartment building on Atlantic Street. (Tr. 2/2/17 at 21). Mr. [redacted] testified that the Appellant then pulled the gun out of his pocket and shot it into the air. (Tr. 2/2/17 at 28-29). Appellant talked to Mr. [redacted] for a little while longer, then walked away. (Tr. 2/2/17 at 27).

Shortly after midnight on April 13, 2016, four officers from the Metropolitan Police Department Seventh District were having coffee at a 7-Eleven store located at Atlantic Street SE and South Capitol Street SE when they heard the sound of a single gunshot. (Tr. 1/30/17 at 43-45). The officers got into two patrol cars and headed in the direction of Atlantic Street SE, where they believed the shot came from, to canvass the area. (Tr. 1/30/17 at 53). Their route took them past 21 Atlantic Street SE, where they observed two men standing outside of an apartment building talking. (Tr. 1/30/17 at 52). The men did not pay any attention to the approaching patrol cars, (Tr. 1/30/17 at 52, 80), did not appear to be arguing, (Tr. 1/30/17 at 80), did not appear to be carrying weapons, id., or looking over at the officers, (Tr. 1/30/17 at 81), so the officers continued past them. (Tr. 1/30/17 at 52, 80). The officers then received a notification from the Shot Spotter system[1]

[1] According to Officer William Whalen, "Shot spotter is a system that's set up around the city to where there are sensors. When a gunshot goes off it detects it and it sends to the patrol units, to our computers or over the radio and tells us that a gunshot just went off in the vicinity of this area and it can pinpoint the side of a building or corner of a street." (Tr. 1/30/17 at 54).

reporting that the shot had gone off at 21 Atlantic Street SE, and subsequently returned to the address. (Tr. 1/30/17 at 54).

When the officers arrived, they observed one of the men walking into the apartment building and the other man walking or jogging (Tr. 1/30/17 at 57, 82) across the street. They approached the man walking into the apartment building, later identified as Conrad [redacted] first, and asked him to display his waistband to confirm that he did not have a firearm concealed there. (Tr. 2/2/17 at 33). He complied with the request and the officers did not observe any weapons on his body. (Tr. 1/30/17 at 84). They asked him whether he had heard a gunshot and he denied that he had. (Tr. 2/6/17 at 41). He did not report to the officers that he had just been struck by a gun or had witnessed a shot being fired into the air. (Tr. 1/30/17 at 84; 2/6/7 at 42). The officers allowed Mr. [redacted] to leave the scene. (Tr. 2/2/17 at 33).

The officers then got into their patrol cars and apprehended the Appellant, the second man, by surrounding him as he walked along South Capitol Street. (Tr. 1/30/17 at 99). They questioned the Appellant about where he was coming from and where he was going. He stated that he had just left 21 Atlantic Street (where the officers had observed him) and that he was on his way to work. (Tr. 1/30/17 at 62). They also asked whether he had any weapons, and he denied that he did. (Tr. 1/30/17 at 94). Appellant declined to consent to a search. (Tr. 1/30/17 at 116).

Nevertheless, Officer Gramieri lifted the Appellant's shirt and observed a firearm tucked into the Appellant's waistband. (Tr. 1/30/17 at 63). The officers retrieved the firearm and immediately placed the Appellant under arrest. (Tr. 1/30/17 at 63).

Mr. [redacted] returned to Ms. [redacted] apartment, where he told Ms. [redacted] what had happened. (Tr. 2/2/17 at 34, 40). Ms. [redacted] left the apartment to go confront Appellant, but instead met the police outside the building. (Tr. 2/2/17 at 37). The officers took statements from both Mr. [redacted] and Ms. [redacted]

The Appellant was detained in the DC Jail pending trial. The Government reviewed calls made from the Appellant's inmate telephone account and, based on calls made in June 2016, alleged that the Appellant attempted to convince Ms. [redacted] and Mr. [redacted] not to testify or to change their testimony in an attempt to obstruct justice. (Tr. 2/7/17 at 202). The jury heard one call between Appellant and Ms. [redacted] (Gov. Exhibit 27) and two calls allegedly between Appellant and a third party. (Gov. Exhibits 26A and B). Those calls formed the basis of the November 16, 2016 indictment charging Contempt and Obstruction of Justice. Specifically, the indictment alleged that between April 13, 2016 and September 1, 2016, Robert [redacted] did corruptly obstruct, impede and endeavor to obstruct and impede the due administration of justice in an official proceeding.

The Government later conducted a search warrant at Ms. [redacted] apartment on December 15, 2016. (Tr. 2/6/17 at 126). As a result of that search, the

Government retrieved three unsigned, undated letters, which they believed were written by the Appellant and sent to Ms. [redacted] (Tr. 2/6/17 at 128; Gov. Exhibits 14, 15, and 16). The letters were alleged to contain suggestions on ways Ms. [redacted] and Mr. [redacted] could assist the Appellant's defense (For example, "So if you can duck all calls or knocks at the door for one hundred days [to avoid service of a subpoena], I'll come home" (Tr. 2/6/17 at 141)) and suggested narratives that they may use (For example, "I told him I just got a new gun, did he want to see it. So I pulled it out and shot it in the air and put it up fast." (Tr. 2/6/17 at 141)). The letters also contained an offer to provide cash in exchange for assistance. (Tr. 2/6/17 at 142). The jury reviewed all three letters, over the Appellant's objection, coupled with a special jury instruction[2] about the use of the letters.

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[2] The instruction concerned the use of the letters to establish the corpus of the obstruction of justice charges within the date range in the indictment and read:

> The government has the burden to show that the obstruction of justice and contempt alleged in the indictment took place during the period set forth in the indictment, that is between April 13th and September 1st of 2016. You may consider the letters introduced into evidence in deciding whether or not the government has proven beyond a reasonable doubt that the defendant obstructed justice or was in contempt of a court order between the dates of April 13th, 2016 and September 1st, 2016. You may also, but are not required to, consider the letters in deciding whether the government has proved beyond a reasonable doubt the defendant's intent during that time period.

(2/1/17 at 428).

SUMMARY OF ARGUMENT

Appellant was subjected to an unlawful stop and search on April 13, 2016. Officers from the Metropolitan Police Department stopped Appellant without a basis in individualized probable cause or reasonable articulable suspicion to believe that he was involved in criminal activity. The primary basis for the stop was the Appellant's mere presence in the general area from which officers believed a gunshot had originated. The officers surrounded Appellant and subjected him to a search, which resulted in the recovery of a handgun. Because the stop and search were unlawful, the gun retrieved from Appellant should have been suppressed. The trial court erred in denying Appellant's motion to suppress and permitting the handgun into evidence.

The trial court improperly admitted three handwritten letters (Gov. Ex. 14, 15, and 16) into evidence without ensuring that the letters fit within the parameters of a hearsay exception. The trial court permitted the letters into evidence under the hearsay exception for a prior statement of a party opponent, also known as the defendant's own statement. However, the Government failed to authenticate the letters as statements made by Appellant, and therefore the letters were not admissible under the hearsay exception. The trial court's error prejudiced the Appellant and requires remand for a new trial.

The trial court also permitted three witnesses to testify about two hearsay statements when those statements did not fall within a hearsay exception. A witness and the complaining witness testified to the detailed account of events the complaining witness reported on the night of the incident. The trial court improperly permitted this testimony, over defense objection, as a hearsay exception for a statement of identification, even though the statements far exceeded what is permissible under that exception. The trial court also permitted a police officer witness to testify to second level hearsay about a conversation he had with the complaining witness that ultimately led to the execution of a search warrant at another witness' home. The trial court erroneously reasoned that this second level hearsay fit within two hearsay exceptions, both of with were wholly inapplicable. The trial court's error in admitting the hearsay evidence on all three occasions prejudiced Appellant and warrants a new trial.

Over objection, the trial court joined for trial two separate indictments pending against Appellant. The joinder was highly prejudicial to Appellant because the Government's evidence pertaining to the charges in the second indictment, namely, three handwritten letters and three recorded telephone calls, were only minimally probative to the charges in the first indictment. The trial court's decision to join the indictments for trial was an abuse of discretion and Appellant should be granted new trials on both indictments.

ARGUMENT

I. The Appellant Was Stopped And Searched In Violation Of The Fourth Amendment And The Fruits Of That Search Must Be Suppressed

Officers of the Metropolitan Police Department accosted and surrounded the Appellant as he was walking down the street, took him into custody, and searched him for weapons. Their stop and search was not supported by probable cause or reasonable articulable suspicion and therefore ran afoul of the Fourth Amendment right to be free from unreasonable searches and seizures. Because the stop and search were unlawful, the fruits of the search, to wit, the gun, should have been suppressed.

Generally speaking, any restraint of a person amounting to a "seizure" is invalid unless justified by probable cause. Florida v. Royer, 460 U.S. 491, 498 (1983). However, the police may conduct an investigatory stop based on less than probable cause provided that, "under the totality of the circumstances, the police officer could reasonably believe that criminal activity was afoot." Duhart v. United States, 589 A.2d 895, 897 (D.C. 1991) (citing Terry v. Ohio, 392 U.S. 1 (1967)). The Supreme Court has made it clear that an individual "may not be detained even momentarily without reasonable, objective grounds for doing so," See Royer, 460 U.S. 491. Evidence obtained by exploitation of the violation of a defendant's Fourth Amendment rights must be suppressed. Hicks v. United States, 730 A.2d 657, 660

(D.C. 1999) (citing New York v. Harris, 495 U.S. 14, 18-19 (1990); Wong Sun v. United States, 371 U.S. 471 (1963)).

In justifying a particular intrusion, an officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. Terry, 392 U.S. at 21. While an officer's subjective reason for making the arrest [or stop] need not be the criminal offense as to which the known facts provide probable cause, Devenpeck v. Alford, 543 U.S. 146 (2004); see also Whren v. United States, 517 U.S. 806, 812-13 (1996), the officer must nonetheless have reasonable articulable suspicion or probable cause that some actual offense has been committed by that person in order to lawfully effectuate a stop. The Supreme Court has consistently stressed the importance of "individualized suspicion" as an essential prerequisite to a valid search or seizure under the Fourth Amendment See Chandler v. Miller, 520 U.S. 305, 308 (1997).

It is a well-settled principle that in the course of a lawful stop, a police officer may conduct a protective frisk for weapons "where he has reason to believe that he is dealing with an armed and dangerous individual . . . ." United States v. Mitchell, 293 U.S. App. D.C. 24, 28 (1991). However, the police are not at liberty to conduct a protective search every time they make an investigative stop. Upshur v. United States, 716 A.2d 981, 983 (D.C.1998). A traffic stop, for example, will

not -- without more --justify a frisk of the person detained. See Cousart v. United States, 618 A.2d 96, 100 (D.C. 1992) (en banc). To justify a self-protective search of the detained person, the police officer must have reason to suspect that the latter "is armed and presently dangerous." Adams v. Williams, 407 U.S. 143, 146 (1972); Ybarra v. Illinois, 444 U.S. 85, 93 (1979) ("officer may conduct a pat down to find weapons that he reasonably believes or suspects are then in the possession of the person he has accosted").

Both the Government and the defense stipulated that the stop in this case was a Terry stop. (Tr. 1/30/17 at 154). The trial court found that the stop was supported by reasonable articulable suspicion to believe that Appellant was the source of the shot fired. (Tr. 1/31/17 at 165). The trial court also found that the same reasonable articulable suspicion supported a frisk of Appellant to determine if he was armed. (Tr. 1/31/17 at 165). The trial court summarized the facts it believed supported finding reasonable articulable suspicion as follows:

> [I]n this case you have the audio observation of the officers, the visual identification of the defendant at 21 Atlantic Street, approximately 25 seconds after the gun is fired, the confirmation soon thereafter that 21 Atlantic, where the defendant had been observed, was in fact the location of where the shots were fired, the elimination of Mr. [redacted] the other person at 21 Atlantic Avenue, 25 seconds after the shot, as the person who would have or who had a gun, the defendant's nervous demeanor as evidenced by his gait and glancing back at 21 Atlantic Avenue, as well as the manner of holding one arm stationary and freely swinging the other arm, all of which amounts, I believe,

> to a reasonable articulable suspicion that he may have been the source of the single shot that was fired a minute or approximately two to three minutes before his stop, I think it's actually closer to two.
>
> (Tr. 1/31/17 at 165).

The trial court failed to properly weigh the evidence in reaching this conclusion. The vast majority of the court's reasoning amounts to the fact that the Appellant was outside 21 Atlantic Street SE very shortly after a gunshot sound was reported through the "shot spotter" system generally from that address. Beyond his physical presence at a populated apartment building, at the Motions hearing on this issue, the officer testified that the Appellant "did not seem phased" by the police presence when the officers passed shortly after hearing the shot, (Tr. 1/30/17 at 52), did not pay any attention to the officers, (Tr. 1/30/17 at 52), did not appear to be armed, (Tr. 1/30/17 at 80), did not appear to be arguing with Mr. [redacted] (Tr. 1/30/17 at 80), walked, did not run, away from the scene before the officers stopped to confront him, (Tr. 1/30/17 at 82, 1/31/17 at 163), and honestly answered the officers when they asked him where he had been, (Tr. 1/30/17 at 62). Moreover, prior to surrounding and searching the Appellant, the officers had who denied having heard a gunshot, at a time the officers already knew Mr. [redacted] had been with Appellant. While Mr. [redacted] may well have been lying in hindsight, the Officers did not testify at the Motions hearing as to any factual basis to believe he

was lying at that time. All of these facts point to the Appellant's mere presence in the area without an individualized suspicion that he was the source of the gunshot.

Against this trove of innocent conduct was the testimony that Appellant: 1) looked over his shoulder, at the police activity going on behind him (Tr. 1/30/17 at 55); 2) changed his gait from a walk to a jog at some point (Tr. 1/30/17 at 55); and 3) walked without moving his right arm, with the arm bent at an angle, in a way Officer Whalen believed was characteristic of someone trying to hold a heavy object. (Tr. 1/30/17 at 106). These three factors alone[3] do not elevate the Appellant's innocent presence on a public street to individualized and reasonable articulable suspicion to surround him and then search him for weapons.

II. The Letters In Government's Exhibits 14, 15, and 16 Were Not Properly Authenticated And Constituted Inadmissible Hearsay

The handwritten letters presented to the jury at Government's Exhibits 14, 15, and 16 were some of the most damaging evidence admitted against the Appellant. However, the handwritten letters were inadmissible and extremely prejudicial hearsay unless the Government could authenticate them as statements made by the defendant and therefore non-hearsay. The Government failed to establish that the letters were statements made by the Appellant. Nonetheless, the

[3] The trial court also found, based on Officer Whalen's description of the area, that it was a "high crime area." Whether or not this occurred in a high crime area is inapposite in this case where the officers heard a shot and were of the belief that a crime had actually occurred.

trial court admitted the letters over the Appellant's objection. The erroneous admission was an abuse of discretion and prejudiced the Appellant's entire trial.

This Court reviews a trial court's decision to admit hearsay evidence for abuse of discretion; however, the determination of whether a statement falls under an exception to the hearsay rule is a legal conclusion, which it reviews de novo. Brown v. United States, 840 A.2d 82, 88 (D.C. 2004).

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Gardner v. United States, 898 A.2d 367, 374 (D.C. 2006); Mercer v. United States, 864 A.2d 110, 117 (D.C. 2004). A statement, though hearsay, will be admissible if it falls under an exception. Dutch v. United States, 997 A.2d 685, 688 (2010). One such exception permits the admission of the prior statement of a party-opponent and is also recognized by the Federal Rules of Evidence at Fed. R. Evid. 801(d)(2)(A). This rule excludes from the hearsay prohibition statements being offered by a party opponent that were made by the party. Id.; see also Powell v. United States, 414 A.2d 530, 533 (D.C. 1980) (per curiam) ("Ordinarily, a statement, other than one made by the declarant while testifying, is not admissible in evidence to prove the truth of the matter asserted. There is an exception, however, for admission of hearsay evidence of a party's prior statements when they are inconsistent with his or her position in the litigation."). In the context of

criminal cases, this exception is often referred to as "The defendant's own statement," as it was in this case. (Tr. 2/1/17 at 429).

Once [the] proponent [of a statement] identifies the hearsay exception in response to [an] objection, [the] trial court has obligation to ensure that the proper foundation has been laid for determination of whether an exception applies. Patton v. United States, 633 A.2d 800, 810 (D.C. 1993). An item may be admitted into evidence only after the proponent has offered some evidentiary foundation to show that the item really is what the proponent claims it to be. MCCORMICK ON EVIDENCE § 212 (6th ed. 2006). To lay a proper foundation, the Government would have to show that the statements, contained in letters, were authored by the Appellant. See Banks v. United States, 359 A.2d 8, 11 (1976) (Authentication [of a document] simply means proof of authorship). Ordinarily, documentary evidence possesses no self-authenticating powers; unaided by an operable presumption, its authorship and reliability is not automatically assumed. United States v. Sutton, 426 F.2d 1202, 1206-07 (D.D.C. 1969).

This Court has approved of authenticating a hand-written document through the testimony of a witness who has observed the purported author hand writing. See Smith v. Wells Fargo Bank, 991 A.2d 20, 31 (2010) (citing Rogers v. Ritter, 79 U.S. 317, 322 (1870) (stating that it is well-settled that a person who has seen someone write his or her name even once is qualified to testify to the genuineness

of a controverted signature); Bates v. Hogg, 251 S.W. 620, 622 (Ky. 1923) (stating that the personal knowledge a witness must have to prove the handwriting of a person includes prior experiences seeing the person write); Berg v. Peterson, 52 N.W. 37, 37 (Minn. 1892) (noting that personal knowledge of a person's handwriting can be acquired by having seen the person write); Storm v. Hansen, 124 A.2d 601, 604 (N.J. Super. Ct. App. Div. 1956) ("[T]o qualify to identify handwriting or a signature, a witness must have seen the person write, or by correspondence and other business transactions with him obtained personal knowledge of the party's handwriting")).

This Court has also approved of the use of a handwriting exemplar to authenticate a writing in Banks v. United States, 359 A.2d 8 (1976). In that case, the defendant challenged the admission of a handwriting exemplar taken by police approximately ten years before the trial, which was introduced at trial as a comparison with an exemplar taken after the defendant's arrest. In approving the admission of the historical exemplar, this Court noted that the Sergeant who took the exemplar testified that his initials were on the document to indicate that he had been present during its creation, although he could not specifically identify the defendant as having made the document, and the document was accompanied by information that the person who had written them had the same name, address, and date of birth as the defendant on trial. Id. at 10.

In this case, the trial court had an obligation to ensure that the statements being offered by the Government – the letters offered as Government's Exhibits 14, 15, and 16 – were supported by a proper evidentiary foundation to show that the letters were actually statements of the Appellant, as the Government claimed they were. The Government failed to lay this foundation and the trial court failed to ensure that the letters met the requirements of the hearsay exception before admitting them.

The Government assumed the letters were written by the Appellant, but offered no proof thereof. Ms. [redacted] testified that the letters were written in Mr. [redacted]'s handwriting, but offered no foundational basis for her belief. (Tr. 2/1/17 at 427 & 431). She testified that she had not seen the letters before (Tr. 2/1/17 at 429, 431, 433, 453), and did not read all of the letters she received that she believed were from the Appellant (Tr. 2/1/17 at 424). Conrad [redacted] testified that he briefly glanced at some of the letters, but did not even skim them. (Tr. 2/6/17 at 55). Yet he also testified that he recognized Government's Exhibits 14 and 15 as letters that Ms. [redacted] had shown him in her apartment. (Tr. 2/2/17 at 46). Importantly, neither Mr. [redacted] nor Ms. [redacted] testified to ever having seen the Appellant write and the Government offered no independent evidence of the Appellant's handwriting for the court to use in determining whether the letters were authored by the Appellant. The Government did not meet its burden to authenticate the

letters as having been authored by the Appellant and therefore failed to meet the predicate for admission as non-hearsay.

While "[p]roof of the authenticity of [a] writing . . . may be established by the nature and contents of the writing combined with the location of its discovery," Settles v. United States, 570 A.2d 307, 309 (D.C. 1990) (per curiam), the nature and circumstances of the writings combined with the location of their discovery weighed against authentication in this case. The nature and content of the letters and their location bore indicia of unreliability and reason to question their authenticity. No witness testified that these letters were the actual letters that Ms. [redacted] received or opened earlier in the year or the letters that Ms. [redacted] reportedly showed to Mr. [redacted] No witness testified to seeing a name or signature on the letters indicating who purportedly authored them and Ms. [redacted] testified that neither her name, the Appellant's name, nor Mr. [redacted] name appeared on the documents. (Tr. 2/1/17 at 454). Ms. [redacted] also testified that there were letters from several people in her apartment at the time of the search. (Tr. 2/1/17 at 452).

The location in which the letters were discovered also called their authenticity into question. The Government recovered the undated and unsigned letters from Ms. [redacted] apartment on December 15, 2016. (Tr. 2/6/17 at 129). It is unknown how long the letters remained in Ms. [redacted] apartment between April 13, 2016 and December 15, 2016. The complaining witness and then-

boyfriend of Ms. [redacted] Conrad [redacted] had notified the Government that it could find letters in Ms. [redacted] apartment on October 5, 2016. (Tr. 2/6/17 at 138). The Government went to retrieve the letters more than two months later and found letters where Mr. [redacted] said they would be.

The Government failed to lay a proper foundation for the admission of the letters through the Fed. R. Evid. 801(d)(2)(A) hearsay exception. Absent foundational proof that these letters fell within the exception, they constituted inadmissible hearsay. The trial court erred in admitting the letters and the error prejudiced the Appellant.

III. The Trial Court Permitted The Government To Introduce Inadmissible Hearsay Statements Made By Conrad [redacted]

On three occasions, the trial court improperly permitted witnesses to testify to hearsay statements made by Conrad [redacted] under an erroneous application of the hearsay exception related to identification testimony. (Tr. 2/1/17 at 416; 2/2/17 at 34-35; 2/6/17 at 123-124). Two of the instances concerned the same hearsay statement originally uttered by Conrad [redacted] regarding a description of his interaction with Appellant. Each witnesses' recitation of the erroneously admitted statement further bolstered its credibility to the jury. The second hearsay statement involved Mr. [redacted] October 5, 2016 statement to the lead detective indicating that Ms. [redacted] had told Mr. [redacted] that she had received letters from the

Appellant. The error was highly prejudicial to the Appellant and under the circumstances constituted an abuse of discretion.

This Court reviews a trial court's decision to admit hearsay evidence for abuse of discretion; however, the determination of whether a statement falls under an exception to the hearsay rule is a legal conclusion, which it reviews de novo. Brown, 840 A.2d at 88. D.C. Code § 14-102(b)(3) (2001) provides:

> A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is an identification of a person made after perceiving the person. Such prior statements are substantive evidence.

Section 14-102(b) mirrors the language of Federal Rule of Evidence 801 (d)(1). Only the last sentence of section 14-102 (b), "such prior statements are substantive evidence," is an addition to the language of the federal rule. Johnson v. United States, 820 A.2d 551, 557 (2003). Pursuant to Fed. R. Evid. 801(d)(1)(C), a statement that meets the following conditions is not hearsay: The declarant testifies and is subject to cross-examination about a prior statement, and the statement: identifies a person as someone the declarant perceived earlier.

The prior identification exception to the hearsay rule allows the admission of out-of-court statements through the testimony of either the identifier or a third party who was present when the identification was made." Brown v. United States, 840 A.2d 82, 88 (D.C. 2004) (citing Morris v. United States, 398 A.2d 333, 336

(D.C. 1978). The prior identification "exception applies to statements of identification, but not to detailed accounts of the actual crime; the declarant's 'description of the offense itself is admissible under this exception only to the extent necessary to make the identification understandable to the jury.'" Taylor v. United States, 866 A.2d 817, 822 (2005) (citing Brown, 840 A.2d at 89).

This Court has repeatedly upheld the demarcated boundaries of the prior identification exception to permit limited identifications without a description of the offense. See Taylor, 866 A.2d at 823 (admitting prior statements naming and describing the accused, where the statement was not detailed and the declarant was available for cross examination and noting that, "The record before us reveals that the trial court was careful in its application of the prior identification exception, and limited what the government could elicit from its witnesses with respect to that exception"); Lewis v. United States, 996 A.2d 824, 829-30 (D.C. 2010) (allowing statements made to police and prosecutors to be introduced as prior statements of identification where the statements provided names of the accused); Williams v. United States, 756 A.2d 380, 386-87 (D.C. 2000)(admitting a victim's statement to a friend, where the statement identified the accused); and Graham v. United States, 12 A.3d 1159 (2011) (affirming the admission of an out-of-court statement naming the shooter); and Sparks v. United States, 755 A.2d 394 (2000) (police officers

permitted to testify that assault victim identified two men by name as the perpetrators of the assault and provided their addresses and descriptions).

A. Mr. [redacted] Statement Describing His Interaction With Appellant

In the case sub judice, two witnesses were permitted to testify about an out-of-court statement made by Conrad [redacted] The trial court admitted the statement, over defense objection each time, reasoning that it fell under the prior identification exception to the hearsay rule. The statement contained a much more detailed description about the alleged criminal conduct than a simple identification of the Appellant and therefore exceeded the bounds of admissible evidence under D.C. Code § 14-102(b)(3).

The Government first elicited the statement from Ms. [redacted] on February 1, 2017. That exchange went as follows:

> GOVERNMENT: What did Mr. [redacted] say when he came back up?
>
> DEFENSE COUNSEL: Objection.
>
> THE COURT: Sustained.
>
> GOVERNMENT: Statement of identification.
>
> THE COURT: Ma'am, can you step down near the TV for me please.
>
> (Open bench conference).
>
> THE COURT: Can I have a proffer as to what you think she's going to say?

GOVERNMENT: Well, she said to the police on the body worn camera that Mr. [redacted] came up and said that Mr. [redacted] had hit him with a gun and fired off a shot.

THE COURT: Okay.

DEFENSE COUNSEL: It's hearsay.

THE COURT: How is it not identification?

DEFENSE COUNSEL: I guess it goes to identification. I don't think that it would be an exception. I mean I concede if the government was going to argue that because of what Mr. [redacted] told the witness, she then did something, like went downstairs looking for Mr. [redacted] and that's why she called. I just don't think that just because one witness tells another witness that someone did something to them, that that allows something to come in under identification.

THE COURT: Well, that witness is going to be available for cross examination, correct?

GOVERNMENT: Yes.

THE COURT: And it comes in under identification, but just to make sure that she's getting into really just identifying the person and what they did and not a lot of extraneous details. Thank you.

* * *

GOVERNMENT: Did he tell you anything about what had happened?

MS. [redacted] I can't recall.

GOVERNMENT: Did Mr. [redacted] say anything at all to you when he returned to the apartment?

MS. [redacted] I can't recall his exact words.

GOVERNMENT: Could you approximate his exact words?

MS. [redacted] He said that he had ran into Robert [redacted]

GOVERNMENT: What did he say happened?

MS. [redacted] That's all I recall him saying and that, yeah, he was, he said he was hit in his face with a gun.

(Tr. 2/1/17 at 415-417).

The following day, the Government elicited the same out-of-court statement from Conrad [redacted]

GOVERNMENT: What did you do when you got inside the apartment?

MR. [redacted] I told Ms. [redacted] what happened.

GOVERNMENT: What was that, that you told her?

DEFENSE COUNSEL: Objection.

THE COURT: Sustained.

MR. [redacted] That --

DEFENSE COUNSEL: Objection.

THE COURT: Come forward. Can you step down, please?

(Counsel approached the bench.)

THE COURT: This is the same issue from yesterday. If he is going to testify to identification, he can talk about the

identification and generally what happened, not details of what he said.

GOVERNMENT: Okay.

THE COURT: Thank you.

GOVERNMENT: Sir, could you briefly summarize in a sentence what you told Ms. [redacted]

MR. [redacted] That he pulled a gun out on me and hit me with it in my face, and fired a shot.

GOVERNMENT: I'm going to play back now -- when you say, "he," who do you mean?

MR. [redacted] Mr. [redacted]

(Tr. 2/2/17 at 34-35).

On the following day of trial, the Government attempted to have Detective Cornell Johnson testify about what Mr. [redacted] had said to him when he arrived at the scene, but upon Appellant's objection, the trial court prohibited the Government from eliciting the statement beyond identification of the Appellant and the Government terminated the line of questioning. See Tr. 2/6/17 at 124 ("THE COURT: I mean, the problem is you can't talk about what Mr. [redacted] said to him except in terms of the identification.").

Over defense counsel's repeated objection, both Ms. [redacted] and Mr. [redacted] provided a description of the statement that far exceeded identification. As to each witness, the Government could have limited its questioning to inquiring whether

Mr. [redacted] identified anyone as having had contact with him earlier. Instead, the Government asked the witnesses to relay Mr. [redacted] description of the precise nature of the contact rather in addition to the identity of the person. This description was outside of the hearsay exception and prejudiced the Appellant by collectively bolstering each witness' testimony in an improper manner.

The statements were especially prejudicial because moments before Mr. [redacted] apparently made these statements to Ms. [redacted] he failed to report the contact he had with Appellant to the police. The admission of these hearsay statements bolstered Mr. [redacted] consistent trial testimony without that testimony ever having been impeached.

B. Mr. [redacted] Statement To Detective Johnson That Ms. [redacted] Had Told Him That She Had Letters From The Appellant

The trial court permitted the Government to lead Detective Johnson to testify about another out-of-court statement made by Mr. [redacted] again under an improper application of D.C. Code § 14-102(b)(3) (2001). During Detective Johnson's testimony, the Government inquired, "What led you to conduct that search warrant [at Ms. [redacted] apartment]?" (Tr. 2/6/17 at 126). Detective Johnson responded, "A conversation that I learned of by talking to Mr. [redacted] who was advised by Ms. [redacted] that the defendant in the –"(Tr. 2/6/17 at 126). At which point defense counsel objected and a bench conferenced ensued.

DEFENSE COUNSEL: For one, that's double hearsay. Because he's saying that Ms. [redacted] told Mr. [redacted] something who told Detective Johnson something.

THE COURT: So the first layer of hearsay is the defendant's own statement, the second layer of hearsay is identification of Mr. [redacted] as the person who has the letter in which -- right? The corpus of the contempt of the obstruction.

(Tr. 2/6/17 at 126-127)

The trial court overruled the objection and the Government inquired:

GOVERNMENT: So you met with Mr. [redacted] on a later occasion?

DETECTIVE JOHNSON: Yes, ma'am.

GOVERNMENT: And he told you something that led you to feel that you needed to conduct the search warrant; is that right?

DETECTIVE JOHNSON: Correct.

GOVERNMENT: And what did he tell you?

DETECTIVE JOHNSON He stated that Mr. [redacted] was reaching out to the witness in the case, Ms. [redacted] and inquiring if Mr. [redacted] could possibly lie or not show up to court.

GOVERNMENT: And did Mr. [redacted] tell you how the defendant was contacting Ms. [redacted] to ask these things?

DETECTIVE JOHNSON: By letter.

(Tr. 2/6/17 at 127-128).

Detective Johnson's testimony about Mr. [redacted] statement was hearsay and the trial court's admission of that testimony was improper and an abuse of discretion. Initially, it is unclear which part of the testimony the trial court believed constituted the defendant's own statement. The testimony provided by Detective Johnson only included a statement made by Conrad [redacted] who claimed to be relaying a conversation he had with Ms. [redacted] It is equally unclear how the testimony could constitute a prior statement of identification as that term is interpreted in the caselaw. The trial court reasoned that the statement was, "identification of Mr. [redacted] as the person who has the letter…" (Tr. 2/6/17 at 126). However, no part of the statement identified Mr. [redacted] as someone who was in possession of a letter. Moreover, even if that were accurate, identifying someone who may possess evidence of a crime is not an identification of a person made after perceiving the person as D.C. Code § 14-102(b)(3) (2001) requires.

Detective Johnson's testimony about Mr. [redacted] conversation with him about the letters was hearsay that did not fall within any exception. The testimony was highly prejudicial to Appellant, as it served to bolster Mr. [redacted] credibility. The trial court erred in admitting this testimony.

IV. The Indictments Were Improperly Joined For Trial And The Appellant Suffered Prejudice Therefrom

The grand jury indicted Appellant on Assault with a Dangerous Weapon and related charges on April 22, 2016. On November 16, 2016, the grand jury handed

down a second indictment charging Appellant with two counts of Obstruction of Justice and one count of Contempt. Over Appellant's written opposition, the trial court joined the two indictments for trial. The trial court erred in joining these indictments as the prejudicial effect of the joinder far outweighed the probative value to the Government.

The appellate court will disturb a trial court's decision on severance if there has been an abuse of discretion. Haney v. United States, 41 A.3d 1227, 1230 (D.C. 2012). When a defendant "is prejudiced by a joinder of offenses, the court may order . . . separate trials of counts." Id. at 1230. In exercising discretion under Super. Ct. Crim. R. 14, "the trial judge must balance the possibility of prejudice to the defendant[] against the legitimate probative force of the evidence and the interest in judicial economy." Id.

In Appellant's case, the Government's evidence of the charges in the second indictment (charging Obstruction of Justice and Contempt) was highly prejudicial as it related to the charges Appellant faced in the first indictment. The Government introduced three jail calls (Gov. Ex. 26A, 26B, and 27) and three letters (Gov. Ex. 14, 15, and 16) to prove the Obstruction of Justice and Contempt counts. When that prejudicial impact is weighed against the limited probative value those items carried for the charges in the original indictment, the error of joinder is clear. The calls and letters did not prove that the events that occurred on April 13, 2016 had

occurred in the manner that the Government set out to prove. At best, they could be said to have gone toward the Appellant's consciousness of guilt. However, when the Court considers that the letters were not properly authenticated, never foundationally established to have been actually written by the Appellant, there probative value and therefore admission against him as it relates to the 1st indictment the probative value of that evidence diminished significantly.

Under the circumstances, the trial court abused its discretion in joining the indictments for trial over Appellant's objection and the error prejudiced the Appellant.

CONCLUSION

For the foregoing reasons, this Honorable Court should reverse Appellant's convictions.

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CERTIFICATE OF SERVICE

I certify that on the 16th day of January, 2018 a copy of Appellant's Brief in the case of Robert [redacted] v. United States, Appeal No., [redacted]; [redacted], was electronically filed with the Clerk of the D.C. Court of Appeals. Two (2) paper copies were hand-delivered to the court. A copy of the Brief was mailed postage-prepaid and emailed to [redacted]@usdoj.gov:

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