

No.

SUPREME COURT OF THE UNITED STATES

MILKIYAS BAYISA,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

APPENDIX

PETITION FOR A WRIT OF CERTIORARI

Steven R. Kiersh D.C. #323329
5335 Wisconsin Avenue, N.W.
Suite 440
Washington, D.C. 20015
(202) 347-0200

Attorney for Petitioner
Member of the Bar of the
United States Supreme Court.

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 18-CF-938

MILKIYAS BAYISA, APPELLANT,

v.

UNITED STATES, APPELLEE.



Appeal from the Superior Court
of the District of Columbia
(CF1-11684-15)

(Hon. Judith Bartnoff, Trial Judge)

(Submitted March 11, 2020)

Decided March 19, 2020)

Before GLICKMAN and FISHER, *Associate Judges*, and WASHINGTON, *Senior Judge*.

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: Milkiyas Bayisa appeals from his conviction of involuntary manslaughter.¹ On appeal, he argues he was entitled to a mistrial because the prosecutor made improper comments during his rebuttal argument by referring to “God” and the “Almighty,” causing substantial prejudice to the defense. We disagree and affirm.

I.

Appellant went to trial on a charge of second-degree murder arising from an assault he committed early on the morning of August 22, 2015, when he was with a group of women who were arguing on the sidewalk outside of the Peace Lounge in

¹ D.C. Code § 22-2105 (2012 Repl.).

Northwest, Washington, D.C. The decedent, Kassahun Edo, who was at the Peace Lounge that night with a separate group, approached appellant. Without provocation, appellant punched Mr. Edo in the face, causing him to fall backwards and hit the back of his head hard on the sidewalk. Mr. Edo died in the hospital.

Appellant's assault on Mr. Edo was captured on surveillance camera footage introduced at trial, and was described at trial by several witnesses of the attack. One of those witnesses was Hermela Bika, a Peace Lounge employee who knew appellant and had helped the police identify him as Mr. Edo's assailant.

Appellant did not dispute his identity as the person who punched Mr. Edo, but Ms. Bika's testimony, in which she described his hostile and aggressive behavior, was relevant to another issue that appellant did contest – whether he had the *mens rea* for second-degree murder, which, the trial judge instructed the jury, required that he “intended to kill or seriously injure” Mr. Edo or “acted in conscious disregard of an extreme risk of death or serious bodily injury to” him. The judge also instructed the jury on the lesser-included offense of involuntary manslaughter, which did not require such a *mens rea*.²

In closing argument, defense counsel attacked Ms. Bika's credibility in light of her testimony that she was outside the Peace Lounge with Mr. Edo and his friends for the purpose of ensuring they arrived at their car safely. That did not “make any sense,” counsel argued, because they were in a safe area of the District; Ms. Bika was “with a group of guys she had never met before,” whom she had just been “serving . . . in the bar”; and “[o]ne of the guys [had] his arm around her.”

On rebuttal, the prosecutor responded that it did not matter why Ms. Bika was outside or what she was doing there, but “thank God she was there. Thank God she was there.” Defense counsel objected to those comments, and after the judge overruled the objection, the prosecutor repeated, “Thank the Almighty she

² Rather, as the judge instructed, involuntary manslaughter required the government to prove only that appellant should have been aware that his conduct involved “a gross deviation from a reasonable standard of care” that “created an extreme risk of death or serious bodily injury.”

was there. Because she is the one who puts a face to that name [i.e., identified appellant to the police as Mr. Edo's assailant]. It doesn't matter what she was doing." After closing arguments, defense counsel renewed his objection to the prosecutor's references to the Deity and moved for a mistrial. The judge denied the motion, finding that the prosecutor's comments were not improper.

The jury could not reach a verdict on the charge of second-degree murder. It convicted appellant only of the lesser-included offense of involuntary manslaughter. Appellant filed a timely appeal.

II.

We review the trial judge's determination of whether a prosecutor's comments were improper for abuse of discretion.³ In making that determination, we assess "whether any or all of the challenged comments by the prosecutor were improper,"⁴ and whether, if so, those comments substantially prejudiced the defendant.⁵ For the latter determination, "the government bears the burden of showing that the verdict was not substantially swayed by the comment such that this court can say, with fair assurance, that the conviction is deserving of judicial confidence and should be affirmed."⁶ We have identified certain evidentiary benchmarks for that assessment, including: "(1) the 'gravity' of the improper comment, (2) its relationship to the issue of guilt, (3) 'the effect of any corrective action by the trial judge,' and (4) the strength of the government's case."⁷

³ *Lucas v. United States*, 102 A.3d 270, 276 (D.C. 2014).

⁴ *McGrier v. United States*, 597 A.2d 36, 41 (D.C. 1991).

⁵ *Lucas*, 102 A.3d at 279.

⁶ *Id.*

⁷ *Id.* (quoting *Turner v. United States*, 26 A.3d 738, 742 (D.C. 2011)).

Appellant argues that the prosecutor's expressions of thanks to "God" and the "Almighty" were improper because they "suggested to the jury that God was on the side of the government's witness." We disagree. The prosecutor's references were in response to defense counsel's attempt to discredit Ms. Bika's testimony and were nothing more than common idioms and expressions that many people – religious or not – use in everyday life.⁸ Such benign references are unlikely to prejudice or arouse a juror. They were not remotely comparable to the egregious arguments and remarks designed to arouse passion and prejudice that led this court and the D.C. Circuit to overturn convictions in the cases on which appellant relies.⁹ We also can say with more than "fair assurance" that the prosecutor's brief references to God and the Almighty did not prejudice appellant in this case, since the jury was not persuaded to convict him of second-degree murder; he was found guilty only of the lesser-included offense of involuntary manslaughter, the proof of which was strong and essentially uncontroverted.

We affirm appellant's conviction and the judgment of the Superior Court.

⁸ See *Bost v. United States*, 178 A.3d 1156, 1189, 1191-92 (D.C. 2018) (prosecutor's statements during closing argument that a witness was a "hero," should be "bless[ed]," and was doing "God's work" were not improper but instead were made in response to defense counsel's cross-examination of the witness); *State v. Calabrese*, 812 S.E.2d 408 (N.C. Ct. App. 2018) ("In this case, the prosecutor's references to God included the phrases 'Thank God' and 'God help those'" Such appeals are unlikely to pose a danger of distracting the jury from its sole and exclusive duty of applying secular law. As the State argues, such appeals and phrases are common idioms in standard usage. Moreover, four references to 'God' do not rise to the level of extensive references to religion." (citations and some internal quotation marks omitted)).

⁹ See, e.g., *Villacres v. United States*, 357 A.2d 423, 426 (D.C. 1976); *United States v. Hawkins*, 480 F.2d 1151, 1154 (D.C. Cir. 1973).

ENTERED BY DIRECTION OF THE COURT:



JULIO A. CASTILLO
Clerk of the Court

Copies served to:

Honorable Judith Bartnoff

Director, Criminal Division

Copies e-served to:

Steven R. Kiersh, Esquire

Elizabeth Trosman, Esquire
Assistant United States Attorney