APPENDIX

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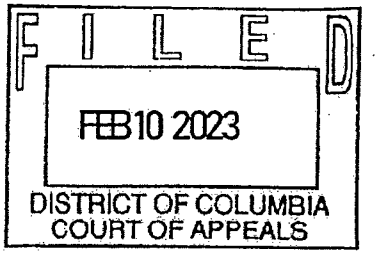
DISTRICT OF COLUMBIA COURT OF APPEALS

Nos. 18-CF-1060 & 18-CF-1067

JOSEPH D. BARBOUR & WILLIE GLOVER, APPELLANTS,

V.

UNITED STATES, APPELLEE.



Appeals from the Superior Court
of the District of Columbia
(2015-CF1-017872 & 2016-CF1-000264)

(Hon. Craig Iscoe, Trial Judge)

(Argued November 30, 2021 Decided February 10, 2023)

Before BLACKBURNE-RIGSBY, *Chief Judge*, BECKWITH, *Associate Judge*, and THOMPSON,* *Senior Judge*.

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: Following a multi-week jury trial, appellants Joseph Barbour ("Barbour") and Willie Glover ("Glover") were convicted of first-degree felony murder while armed; first-degree burglary while armed; attempted robbery while armed; assault with intent to commit robbery while armed; assault with a dangerous weapon ("ADW"); and several counts of possession of a firearm during a crime of violence ("PFCV"), all arising out of an incident that occurred on the evening of December 21, 2015.[1] In these consolidated appeals, appellants

* Judge Thompson was an Associate Judge of the court at the time of argument. She began her service as a Senior Judge on February 18, 2022.

[1] In addition, Barbour was convicted of unlawful possession of a firearm (felon in possession). The jury also convicted co-defendant Charles McRae ("McRae," a/k/a "Black") of an array of offenses. McRae filed a notice of appeal, but the court was advised that he died on January 6, 2021. We accordingly dismissed his appeal and remanded the case for the trial court to vacate his

challenge their convictions on a number of grounds. We affirm, but remand for vacatur of the convictions that merge.

I. Background

The government's evidence at trial established that on the evening in question, several people were gathered in an apartment ("apartment 81") located at 701 24th Street, NE, where crack cocaine and heroin were being packaged and sold and some people were indulging in drug activity. Multiple witnesses testified that at one point during the evening, McRae ("Black") and two gunmen entered the apartment, one or both wearing masks. The gunmen were identified by witness Lloyd Hill as appellants Barbour (nicknamed "Short") and Glover (nicknamed "Chill Will"), and by witness Edward Manning by those same nicknames. The jury heard evidence that the men told everyone to get down and to "empty [their] pockets" and that the gunmen then went straight to Lenard Wills, who sold drugs out of the apartment, to demand that he hand over his money. The two gunmen "descended on" Wills and began "tussling" with him, pistol-whipping him in the head when he refused to comply. Witnesses heard a gunshot. Wills pulled out a knife, inflicting stab wounds on the two gunmen. McRae took a knife from the kitchen and joined the fight. The incident culminated in Wills being fatally stabbed before the three assailants left the bloodied apartment. Manning testified that he saw McRae retrieve a knife from the kitchen and make a stabbing motion toward Wills. Hill testified that McRae, whom Hill encountered shortly afterwards at a bus stop, told him that he had stabbed Wills (saying, "I punished his ass").

II. Analysis

Appellants challenge their convictions on several grounds. Jointly or individually, they contend that (1) the trial judge erred by not recusing itself after learning that a judicial intern in his chambers had previously worked as an intern for the lead prosecutor; (2) the trial court erred in rejecting a challenge to the

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convictions. *See Howell v. United States*, 455 A.2d 1371, 1371-72 (D.C. 1983) (en banc). We nevertheless address the arguments in his brief that have been adopted by Barbour and Glover. We do not address McRae's severance argument.

competence of witness Hill and in allowing him to testify; (3) the court failed to remedy the prejudice to appellants from the testimony by witness Rhonda Gregory that having to testify made her fearful for her life; (4) the court abused its discretion in failing to grant a defense motion for a mistrial after one of the defense counsel revealed that appellant Barbour was being held in custody; (5) the court erred by retaining Juror 8 when he answered in the negative a voir dire question about ability to follow the court's instructions and to keep an open mind; (6) the court abused its discretion by precluding appellants' third-party-perpetrator defense; (7) the court abused its discretion by allowing a police detective to give "largely hearsay" testimony that appellants contend was designed to "bolster" the testimony of untrustworthy government witnesses; and (8) the court abused its discretion by failing to grant to replace two jurors (Jurors 5 and 14) who were sleeping during portions of the trial.[2] Appellants also argue (9) that the evidence was insufficient to prove that Barbour was one of the assailants and insufficient to establish that the stabbing of the victim was done in furtherance of a robbery; and (10) that certain of their convictions merge. We address each of these arguments in turn.

A. Recusal

Prior to the first witness being called in the case, the trial judge informed the parties that he had learned that an intern working in his chambers had spent the previous summer working at the U.S. Attorney's Office ("USAO") and, apparently, did some work there on the defendants' cases. The trial judge stated that he had instructed his law clerks, who had not discussed the case with the intern, that the intern was to have "no involvement in this case," was not to "talk to anybody about it," and was to have no communication with the USAO. The judge confirmed that the intern "never did any work on the case whatsoever" in his chambers and had not "contributed in anything" related the case and said that the issue seemed "minimal" and that he saw no basis for recusal, but he offered to seek ethics advice and to recuse himself if there was "any problem." The prosecutor represented that her office had not communicated with the intern since she went to work in the judge's chambers, other than by saying "hello" in the hallway. After a brief recess to enable the attorneys to consult with their clients, the lead prosecutor

[2] Glover argues in addition that the trial court should have granted his motion for judgment of acquittal as to the charge of carrying a pistol without a license ("CPWL"). However, both appellants were acquitted of CPWL. Accordingly, we do not further address that claim.

confirmed, after having checked her emails, that while interning at the USAO the intern had been asked to Shepardize a motion filed in the case by Barbour's counsel and also said that the intern had invited her (the lead prosecutor) to a careers program at the intern's law school, which was prosecutor's alma mater. The lead prosecutor also confirmed that she had written a letter of reference for the intern. The attorneys for Barbour and McRae said that their clients were not requesting recusal, but counsel for Glover, conveying that Glover was "not comfortable [with the situation]," said that he was not sure how thorough the court's investigation with his chambers staff had been and that he "guess[ed]" a hearing would be "appropriate." The trial court stated that it would want the parties to brief the issue by reference to the Code of Judicial Conduct (the "Code") and remarked that the commencement of trial might have to be delayed to permit them to do that.

After the trial judge said that he did not believe that recusal was required under the Code, Glover's counsel said that he "suspect[ed] [the court was] correct" that the intern's presence in chambers and her history would not have any "effect on what you do or what they do" (i.e., any effect on what the trial judge did or what the government did). The judge noted that it was easy to shut the doors in his chambers so that the intern would not be able to hear anything that she should not hear. After that discussion, the court took a recess. When court reconvened, the trial judge detailed that he had spoken with both of his law clerks to confirm that the intern had done "absolutely" no work on the case and they had had no discussions with the intern about the case. Glover's counsel conveyed Glover's continued insistence on recusal because "people talk and information leaks." Explaining that he had no reason to discredit his law clerks and citing the importance of proceeding to trial and the delay (a possible delay in the trial date of more than a year, given the judge's crowded calendar) that would be necessitated to deal with the issue further, the court denied the motion for disqualification, but told the parties that they were free to renew the motion. Nothing in the record indicates that they did so.

Glover now argues that the facts suggest "an appearance of []partiality" and asserts that "[t]here remain many other issues that need to be robustly evaluated through further evaluation to assess whether there was a risk of injustice[.]" We agree, however, with the trial judge's assessment that the issue was "minimal." We are not persuaded that the situation with the intern created either an appearance of partiality or a risk of injustice.

Rule 2.11(A) of the D.C. Code of Judicial Conduct (2018 ed.) provides that "[a] judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned[.]" The issue is "whether the facts would create a reasonable doubt about the judge's partiality in the mind of a person with knowledge of all the relevant circumstances." *In re D.M.*, 993 A.2d 535, 543 (D.C. 2010) (emphasis omitted). Given the prosecutor's unchallenged representations in the record about the intern's limited, non-substantive involvement in the case while at the USAO and the trial court's unchallenged representation that the intern was walled off from the case, made after the court had conducted a further inquiry of his law clerks, we do not think a person with knowledge of the circumstances would doubt the trial judge's impartiality. *Cf. Byrne v. Nezhat*, 261 F.3d 1075, 1100-02 (11th Cir. 2001) (concluding that the district court did not abuse its discretion by determining that a law clerk's prior employment with a law firm that represented the defendants, which included signing a brief on behalf of the defendants in a different but similar matter, did not call into question the judge's impartiality and did not warrant recusal where the trial judge confirmed that the law clerk had not played and would not play any part in the case or have any input and would be "totally separated from th[e] case"). Further, despite Glover's claim now that the potential for injustice was significant, he has not identified any actual prejudice from the situation that the judge and lead prosecutor disclosed or any specific information that might have been leaked based on the intern's work at the USAO. Moreover, it appears that none of the parties accepted the trial judge's invitation to brief the issue, and the court was appropriately concerned about delaying the trial date. For all these reasons, we are satisfied that the trial court did not err or abuse its discretion in denying the motion for disqualification without a hearing, and we conclude that no relief is warranted based on this issue.

B. Hill's Competence to Testify

Appellants filed a challenge to Hill's competence, asking the court to bar him from testifying. The trial judge, explaining that he would not rule on the motion without having seen Hill,[3] told the parties that he would conduct a voir dire

[3] The court also cited this court's case law cautioning against the unwarranted invasion of privacy that a court-ordered psychiatric evaluation could entail, *Mitchell v. United States*, 609 A.2d 1099, 1103 (D.C. 1992) ("Because . . . an examination [to determine competency to testify] has the potential to impinge upon a witness['s] right to privacy, there is a presumption against ordering one.");

of Hill when he was called to testify. During the voir dire, Hill answered questions (such as about who were the current and former Presidents) indicating that he was oriented to reality and testified that he understood the difference between truth and falsity and the obligation to tell the truth in court. He further testified he suffered from (and that day was experiencing symptoms of) PTSD and depression and also had suicidal ideation, and that he took medication, including that day, for his depression and racing thoughts. He testified that the conditions did not affect is ability to tell the truth and that the medication did not affect his memory or his ability to understand what was going on. He had not used alcohol on the day of his testimony. He told the court that, five days earlier, he had "heard voices," as he sometimes did. He explained, however, that the voices were not hallucinations, were "not something outside of [him]self," and were not "as if somebody else [was] putting thoughts into [his] head," but rather were "like me talking to myself." He testified that he was not able to predict or control when the "self-talking" would come on, but agreed to tell the court if "the self-talking comes on and if that's affecting [his] testimony."[4] Over the defendants' objections, the court found Hill competent to testify.

During his testimony before the jury, Hill acknowledged before the jury that at the time of the incident in apartment 81, he had been on a three-day drug binge. He testified that his memory was "cloudy" and failed frequently, that his ability to remember what occurred on the day of the incident was affected by his drug use, and that he could not recall whether any of his testimony was from memory or from what he had heard others say. Citing the foregoing, Barbour argues that the trial court's determination that Hill was competent to testify was "deficient."

We do not agree. "Competency depends upon the witness['s] capacity to observe, remember, and narrate as well as an understanding of the duty to tell the truth." *Hilton v. United States*, 435 A.2d 383, 387 (D.C. 1981). "The trial judge's

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see also id. ("[T]he decision whether or not to order a psychiatric examination of a witness to determine his or her competency is a matter within the trial judge's sound discretion."). It appears that the parties were able to obtain Hill's psychiatric-treatment records.

[4] Counsel for Glover told the court that, during a subsequent bench conference, Hill appeared to be "having conversation with himself." The lead prosecutor told the court that she had not seen that, either on June 28 or June 29. Glover's counsel then agreed that Hill did not seem to be "having an episode."

ruling on a witness['s] competency will not be disturbed unless the record provides 'unmistakable evidence that the trial court's impressions are defective.'" *Mitchell*, 609 A.2d at 1103 (quoting *Hilton*, 435 A.2d at 388). Here, as in other cases in which such an issue has arisen, Hill certainly "provided ammunition for challenging h[is] ability to recall and to tell the truth." *Dorsey v. United States*, 935 A.2d 288, 295 (D.C. 2007). But he "demonstrated an understanding of what it means to testify truthfully" and "was oriented in time and place," his "testimony at trial was responsive" and largely "consistent with the recollections of the other witnesses," and his identifications of appellants were "corroborated by other evidence." *Id.* To the extent that Hill's ability to perceive or his memory of what occurred on the day of the incident was impaired or that he lacked personal knowledge of the events about which he testified, those points were amply laid out before the jury during cross-examination. Jurors thus were "informed on all matters affecting [Hill's] credibility" that might have worked in appellants' favor.[5] *Bryant v. United States*, 859 A.2d 1093, 1103 (D.C. 2004). We are satisfied that the court did not abuse its broad discretion in finding Hill competent to testify.

C. Gregory's Testimony About Fear

During her direct examination, Rhonda Gregory agreed that it was fair to say that she did not want to be a witness in the case. Asked to explain why, she testified that this was because she assumed that she "would be killed." Subsequently, as Gregory's testimony continued, Gregory apologized to the court for saying (before the prosecutor was about to impeach her with her grand jury testimony to the contrary) that she did not recognize one of the gunmen, explaining that she had been "scared for a minute" by some movement in the back of the courtroom.

Citing this court's case law recognizing that evidence concerning a witness's fear tends to be extremely prejudicial, *see Murray v. United States*, 855 A.2d 1126,

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[5] What the jury did *not* hear about was the suggestion contained in the record that, after Hill's identity as "Witness 11" was disclosed to the defense during pre-trial discovery, Hill was assaulted and told not to testify (prompting the government to launch an obstruction-of-justice investigation). The prosecutor explained that after the assault, Hill became reluctant to testify and began saying that the information he gave to police was information that others told him about rather than information from his own memory.

1132 (D.C. 2004), Glover now argues that Gregory's testimony was prejudicial and that the trial court did not remedy the prejudice. McRae's brief cites as error the trial court's "[l]eaving [the situation] uncorrected" when, during closing argument, the prosecutor made comments about Gregory's fear and emphasized that Gregory had to "come before the defendants," comments that the brief contends "focused the jury on Ms. Gregory's fear in a prejudicial way." The brief cites in particular the prosecutor's reminder to the jury about Gregory's "bec[oming] skittish . . . when an individual got up from the audience in the middle of her testimony."

While the curative instructions in this case should have been broader in scope, we are ultimately unpersuaded that the trial court erroneously exercised discretion as to these matters. Immediately after Gregory's comment about her fear that she would be killed, the trial court gave the jury a curative instruction, telling jurors that while Gregory had expressed "a generalized fear," "[t]here's no reason that you should believe any of the three defendants in this case is in any way behind that fear." In addition, Gregory herself interjected, "No. They weren't the people that said it." Given Gregory's testimony and this follow-up comment from her, a better curative instruction would have made clearer to jurors not only that the defendants themselves were not linked to any threats, but that *the defendants' associates* were also not linked to any threats. *See Mercer v. United States*, 724 A.2d 1176, 1184 (D.C. 1999) (noting that fear evidence "tends to be prejudicial because it suggests the witness fears reprisal at the hands of the defendant *or his associates*") (emphasis added) (quoting *McClellan v. United States*, 706 A.2d 542, 551 (D.C. 1997)). While the curative instruction here too narrowly focused only on the defendants, we ultimately view it as not rising to the level of reversible error, given the totality of the record.

Further, after Gregory said what she did about being "scared," the prosecutor requested a bench conference to discuss how to remedy any suggestion that her reaction was "something about the defendants." During the bench conference, the court and the parties agreed that the prosecutor would be permitted to lead Gregory with questions that would elicit that she had changed her answer about recognizing one of the gunmen because she was distracted and startled by seeing some people getting up and leaving the courtroom. After the prosecutor did so, the trial court asked Gregory to confirm (which she did) that "[t]he people who . . . got up and left, they didn't do anything that frightened you, particularly. Nothing indicated toward you; right?" In addition, the court told the jury that there was "nothing at all to suggest that . . . any of the defendants had anything to do with the actions of people in the audience." The defendants did not request any other remedy, and we

are satisfied that the court sufficiently intervened. We reach this conclusion in part because jurors no doubt realize that "[i]t is not unnatural . . . for any witness to react self-protectively out of generalized fear for her own safety after witnessing a [crime], even though the witness may not have received a direct threat." *McClellan*, 706 A.2d at 551.

As to the prosecutor's statements during closing, the transcript shows that the remark about coming "before the defendants" was a comment not about Gregory's expression of fear, but about how difficult it had to be for Gregory and other witnesses like her to come before the jury, the defendants, and the court to answer questions about "intimate personal" matters. As to the ill-advised remark about Gregory's skittishness, we are satisfied that the prosecutor's agreed-upon leading questions that elicited Gregory's explanation of her reaction, Gregory's own interjected remark, and the trial court's curative questions adequately countered any danger that jurors would conclude that Gregory feared reprisal from appellants.

D. Counsel's Remark that Disclosed that the Defendants Were in Custody

During his cross-examination of Gregory about the height of one of the gunmen, Barbour's counsel stated, "At this time, with the Court's permission and the deputy marshal's permission I would like Mr. Barbour to stand" (so that Gregory could say whether Barbour is short). McRae's counsel, joined by all of the defense counsel (including Barbour's counsel himself), immediately moved for a mistrial, arguing that the statement by Barbour's counsel referring to "the deputy marshal's permission" revealed that the defendants were being held in custody. The trial court agreed that the comment should not have been made, but denied the motion and instead gave the jury a curative instruction that reminded them of the presumption of innocence and told them that it was "standard court procedure to have deputy marshals present during all trials" and that they "should not make any inference against the government or any defendant based on the presence of deputy marshals." Glover argues that the court erred in denying the motion for a mistrial and that the instruction the court gave did not cure the prejudice.

We agree with the trial court that the statement implying that permission of the deputy marshal was needed before defendant Barbour could stand would have been better left unsaid. Nevertheless, we discern no reversible error in the court's denial of the extreme remedy of a mistrial. "The decision to order a mistrial is

subject to the broad discretion of the trial court and our standard of review is deferential." *Gordon v. United States*, 783 A.2d 575, 583 (D.C. 2001). Where the trial court has denied a mistrial, we will reverse only "in extreme situations threatening a miscarriage of justice." *Wright v. United States*, 637 A.2d 95, 100 (D.C. 1994). We are unpersuaded that the reference to the marshal threatened a miscarriage of justice. The defendants were charged with murder, and we think it likely that jurors understood and expected that security precautions would be taken despite the legal presumption of innocence. Moreover, the court fashioned the curative instruction in a way that suggested that no inference could be drawn against the defendants *or* the government from the presence of the marshals, thus suggesting to the jurors that there were a variety of inferences that might otherwise be drawn.

E. Juror 8

Near the close of trial, several jurors spoke with the courtroom clerk to ask whether there was a procedure that would protect them from members of the audience after the verdicts were announced. After discussing the matter with counsel, the trial court assured the jurors that they would be able to utilize the courthouse secure corridors and that the court security officers could use procedures to assure that they would not have contact with the audience, but also told them that the court knew of no reason why they should feel threatened by the defendants, their family and friends, or the family and friends of the decedent. The court then questioned each juror, asking whether each could keep an open mind and not decide any issue until deliberations began. Juror 8 answered "No" to the second question below:

> THE COURT: I've got two questions. Given what we've been talking about, is there any reason you cannot be fair and impartial to all parties and decide the case based solely on the evidence presented during the trial and my instructions on the law?
>
> [JUROR 8]: No.
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> THE COURT: And given what we've been talking about, are you able to follow all of my instructions, including the one that you must keep an open mind and not decide any issue in the case until all of the evidence, the lawyers' arguments and my final instructions on the law

have been presented to you and your formal deliberations have begun?

[JUROR 8]: No.

At the conclusion of the court's inquiries, all counsel stated that they were satisfied. Juror 8 remained on the jury even though he had stated that he could not follow the court's instructions, including the instruction to keep an open mind and not decide any issue in the case until final deliberations. McRae's brief argues that Juror 8 "was not a fair and impartial juror."

Given the expressions of satisfaction by counsel, we review the claim about Juror 8 only for plain error. "[P]lain error consists of (1) error, (2) that is 'plain,' (3) that affects the appellant's 'substantial rights,' and (4) that 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *Smith v. United States*, 283 A.3d 88, 100 n.9 (D.C. 2022) (quoting *United States v. Olano*, 507 U.S. 725, 732 (1993)). Given Juror 8's answer, we can agree that the trial court erred in not following up to make sure that the juror intended his "no" answer to the court's second question or meant to say "yes." We cannot say, however, that the error affected appellants' substantial rights or adversely affected the fairness, integrity, or public reputation of the proceedings. The length and somewhat convoluted structure of the second question and the fact that appellants' attorney apparently heard and interpreted the juror's "no" answer as a satisfactory response makes us satisfied that the juror merely misspoke.

F. Preclusion of a *Winfield* Defense

We next address appellants' argument that the trial court abused its discretion in precluding the defendants from presenting a so-called *Winfield*[6] (third-party-perpetrator) defense, based on evidence that an individual with a kitchen knife (one John Conner) was arrested, shortly after the 911 call about the stabbing, in the area outside the apartment building that had been taped off by police.[7] "A third-party perpetrator defense requires 'proof of facts or

[6] *Winfield v. United States*, 676 A.2d 1 (D.C. 1996) (en banc).

[7] Appellants did have the benefit of using the testimony about Conner to cast doubt on the adequacy of the MPD's investigation, because the trial court allowed appellants to question MPD witnesses regarding the MPD's allegedly "sloppy

circumstances which tend to indicate some reasonable possibility that a person other than the defendant committed the charged offense.'" *McCraney v. United States*, 983 A.2d 1041, 1050 (D.C. 2009) (quoting *Winfield*, 676 A.2d at 4)). "To indicate such a reasonable possibility, the defense 'ordinarily' must have 'proof that [a third-party] had the practical opportunity to commit the crime, including at least inferential knowledge of the victim's whereabouts.'" *Atchison v. United States*, 257 A.3d 524, 534 (D.C. 2021) (quoting *Winfield*, 676 A.2d at 5). In order to present a *Winfield* defense, the defendant must proffer "a fact or circumstance, or a set of facts or circumstances, which, in the aggregate, establishes the necessary link, connection or nexus between the proffered evidence and the crime at issue." *McCraney*, 983 A.2d at 1050 (quoting *Boykin v. United States,* 738 A.2d 768, 774 (D.C. 1999)). "[T]he trial court should exclude *Winfield* evidence if it 'is . . . too speculative with respect to the third party's guilt.'" *Thomas v. United States*, 59 A.3d 1252, 1264 (D.C. 2013) (quoting *Resper v. United States*, 793 A.2d 450, 460 (D.C. 2002)). Our review of the trial court's determination as to the admissibility of third-party-perpetrator evidence is for abuse of discretion. *Hilton v. United States*, 250 A.3d 1061, 1072 (D.C. 2021). The trial court's determination "will be upset on appeal only upon a showing of grave abuse." *Id.* (internal quotation marks and citation omitted).

In this case, we cannot agree that the trial court abused its discretion in determining that Conner's potential connection to the stabbings was too remote and speculative to support a *Winfield* defense and that no "link, connection, or nexus" had been established between him and the crimes at issue. There was no proffer by anyone that Conner was present in apartment 81 where the stabbings occurred or that he knew the precise location of the apartment, knew the victim, or had any motive to stab him. And, as the trial court emphasized, there was no evidence of blood on Conner's clothing.

Further, even if we assume arguendo that it was error for the trial court to preclude argument that Conner stabbed Wills, we are satisfied, upon looking as we must "at the totality of the circumstances," *Hilton*, 250 A.3d at 1072, that the *Winfield* issue does not entitle Glover and Barbour to relief. When the trial court has declined to permit a *Winfield* defense, the issue on appeal is whether evidence

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police work" with respect to Conner and his knife. Defense counsel were also permitted to argue that there was no indication that the investigators took measurements of the Conner knife while they were conducting the investigation in order to determine whether it could have inflicted any of Wills's injuries.

of another plausible perpetrator "could have justified a reasonable doubt as to appellant's guilt." *Johnson v. United States*, 136 A.3d 74, 83 (D.C. 2016). Here, Hill testified that McRae admitted to stabbing Wills, and Manning testified that he saw McRae stab Wills with a knife he obtained from the kitchen of apartment 81. Both Hill and Manning knew McRae, and so there was no issue of mistaken identification. But even if Conner's presence with a knife outside the apartment building shortly after the stabbing could have created reasonable doubt as to *McRae's* guilt as the perpetrator of the stabbing, it would have done little if anything to negate the evidence supporting Glover's and Barbour's convictions of burglary, robbery, ADW, and felony murder. The evidence as to them was that upon entering the apartment with guns, they pistol whipped Wills, striking him repeatedly with their guns as they tried to get him to hand over his money, and causing Wills to begin swinging his knife. They were identified by Hill and Manning, the blood evidence/DNA analysis placed them in the corner of the apartment where Wills was assaulted, and — regardless of whether McRae or Conner (or both of them) stabbed Wills, and regardless which knife or knives were used to do so — Barbour and Glover were shown to have participated in the burglary and robbery attempt that foreseeably led to Wills's fatal stabbing (as we further discuss in section H *infra.*).

Appellants further contend that the trial court compounded its error by permitting the government to introduce evidence about the dimensions of the knife found in Conner's possession and to argue that the knife could not have been used to inflict the wounds found on Wills, while prohibiting the defense from arguing that the Conner knife could have been used to inflict the wounds. However, while the trial court precluded the defense from arguing that the Conner knife could have made some of the stab wounds on the decedent, we think that argument was implied by the defense argument that the court did permit: that the police should have further investigated the knife found in Conner's possession. We conclude for that reason that preclusion of the argument that the knife could have been used to inflict Wills's wounds was harmless error, if error at all.

G. Admissibility of Detective Weber's Testimony

Toward the end of trial, after cross-examination questioning suggesting that the police work in the case was sloppy, the prosecution called Detective Jeffrey Weber to testify about the Metropolitan Police Department ("MPD") investigation, how the detectives came to focus on the three defendants, and what was said by some of the government's trial witnesses (Johnson, Manning, and Hill) during their initial interviews by the detective. Appellants complain that, for the government,

the primary benefit derived from the detective's testimony was bolstering of the testimony of the purported eyewitnesses, whose accounts were untrustworthy and whose credibility was marred because of their drug use on the day of the incident, their addiction to heroin and/or crack cocaine, their mental health problems, and/or their criminal histories. Appellants contend that the detective's testimony was largely hearsay and that the trial court erred in admitting it.

Appellants focus first on Detective Weber's testimony about information he learned from sources he did not identify, including, inter alia, the detective's testimony that in the early morning of December 22, 2015, Glover was "a walk-in victim at Prince George's Hospital who had stab wounds"; that a trail of blood droplets from apartment 81 led officers to Barbour; and that such information led the detective "to be assured that [he was] on the right track" in focusing on Glover and Barbour. Appellants also take issue with the admission of Detective Weber's testimony about the witnesses' naming of other individuals who they said were present in apartment 81 during the incident. The detective testified, for example, that he heard that "Ed" [Manning] was present when the incident occurred. The detective testified in addition that Manning told him that he remembered the incident in apartment 81 "very clearly." These items of testimony were not hearsay because they were not admitted for their truth, but instead to explain — in the wake of suggestions by the defense attorneys that the MPD investigation had been inadequate — the investigative process, why the detectives pursued various leads, and why they credited the witnesses' accounts. *See Perritt v. United States*, 640 A.2d 702, 705 (D.C. 1994) (reasoning that detective's testimony was not hearsay because the statements in question were offered to explain the investigative steps that led to the eventual identification of the defendant by individuals who were present at the scene of the shooting). Moreover, the trial court repeatedly interrupted the flow of questioning to instruct the jury about the limited purpose for which Detective Weber's testimony was admitted.

Appellants further contend that the trial court erred by allowing Detective Weber to testify that Manning, during his initial interview by the detective in March 2016, identified the two gun men as appellants ("Chill Will" and "Short") and that Hill did the same. But these identifications were admissible as statements of prior identification under an exception to the rule against hearsay, *see* D.C. Code § 14-102(b)(3),[8] because both Manning and Hill had testified at trial

[8] Section 14-102(b)(3) provides that a "statement is not hearsay if the declarant testifies at the trial . . . and is subject to cross-examination concerning the

regarding their identifications of appellants and were subject to cross examination regarding the identifications.

Appellants also contend that the trial court erred by allowing Detective Weber to testify in detail about his March 2016 interview of Manning. Detective Weber relayed, for example, that Manning saw two men enter apartment 81 with guns, which they pointed at people before focusing on Wills, with whom they fought after telling him to "give the money up"; and that Manning heard a gunshot.[9] Appellants argue that the trial court's rationale for admitting these statements by Manning — that they were prior consistent statements made before Manning had the motive to fabricate that surfaced after his interview — was flawed because, from the outset of the interview by Detective Weber, Manning had that same motive to fabricate.[10] Appellants point out that even though Manning did not mention to the detective that he was facing possible revocation of his

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statement" and the statement is "an identification of a person made after perceiving the person." D.C. Code §14-102(b).

"Whether a prior consistent statement is properly characterized as admissible because it is not considered hearsay under the statute or comes within an exception to the hearsay rule 'presents a question of law that this court considers *de novo.*'" *Mason v. United States*, 53 A.3d 1084, 1090-91 (D.C. 2012) (quoting *Brown v. United States*, 881 A.2d 586, 599 (D.C. 2005)).

[9] While appellants' hearsay arguments focus on Weber's account of statements by Manning, they also assign as error the admission of Detective Weber's testimony relaying statements made by Hill, such as Hill's statement that he heard Glover say that Wills was stabbing his assailants.

[10] *See* D.C. Code § 14-102(b)(2) ("A statement is not hearsay if the declarant testifies at the trial . . . and is subject to cross-examination concerning the statement" and the statement is "consistent with the declarant's testimony and is offered to rebut an express or implied charge against the witness of recent fabrication or improper influence or motive."); *Hagans v. United States*, 96 A.3d 1, 33 (D.C. 2014) ("A trial court has broad discretion to permit a party to introduce a witness's prior consistent statement to rebut a suggestion that the witness's testimony at trial is a recent fabrication, provided the court finds the prior statement was made when the asserted or implied motive or other reason for the alleged fabrication did not exist." (internal quotations marks omitted)).

parole until the conclusion of the interview, and even though the prosecutor did not mention the possibility of writing a letter on Manning's behalf to the parole board until sometime after March 2016, Manning had, at all relevant times, a motive to curry favor with the government by fabricating an account of what occurred.

There is merit to appellants' argument about when Manning's motive to curry favor arose. After all, it was Manning who raised the possibility of a favorable parole letter after answering the detectives' questions regarding the incident, and there is nothing to suggest that the possibility of a letter occurred to him only after the interview was completed. However, assuming without definitively deciding that the trial court erred in admitting the foregoing hearsay testimony,[11] we are satisfied that the error "did not have a 'substantial and injurious effect or influence in determining the jury's verdict.'" *Daye v. United States*, 733 A.2d 321, 323 (D.C. 1999) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). Not only was much of Manning's account as relayed by Weber cumulative of the information testified to by others who were in apartment 81 at the time of the incident, but the jury also heard Manning's sworn grand jury testimony about two men with guns entering the apartment, which was admissible, as a prior inconsistent statement, for its truth, without regard to where it fell on the motive-to-fabricate timeline. *See* D.C Code § 14-102(b)(1); *see also Thomas v. United States*, 978 A.2d 1211, 1231 n.57 (D.C. 2009) (finding no prejudicial effect on the outcome of the trial where improperly admitted testimony was "entirely duplicative of . . . properly admitted grand jury testimony"). As for Weber's testimony about Hill's statement that he heard Glover say that Wills was stabbing his assailants, see *supra* note 9, it was cumulative of the non-hearsay testimony that Barbour was bleeding from stab wounds when MPD officers encountered him outside the apartment building when they responded to the scene, and that Glover, too, was treated for stab wounds in the hours after the incident.

H. Sufficiency of the Evidence

Barbour contends that there was insufficient evidence to prove that he was one of the gunmen. Both Barbour and Glover argue that the evidence was

[11] *But see Mason*, 53 A.3d at 1093 ("Where the jury has been exposed to the witness's motive to fabricate both before and after the prior consistent statement was made, the better rule is to allow counsel to argue their inferences to the jury and let jurors weigh the evidence.").

insufficient to prove felony murder — specifically, insufficient to prove that the fatal stabbing of Wills was done in furtherance of a robbery or burglary.

In analyzing appellants' insufficiency-of-the-evidence claims, we view "the evidence in the light most favorable to sustaining the convictions, 'giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact.'" *Williams v. United States*, 859 A.2d 130, 140 (D.C. 2004) (quoting *White v. United States*, 714 A.2d 115, 118 (D.C. 1998)). We will determine that the evidence is insufficient only if we conclude, as a matter of law, "that no reasonable juror . . . could convict on the evidence presented." *Beatty v. United States*, 544 A.2d 699, 701 (D.C. 1988). "[T]he testimony of a single witness is sufficient to sustain a criminal conviction[.]" *Gibson v. United States*, 792 A.2d 1059, 1066 (D.C. 2002).

Barbour concedes that he was present in the apartment, and the physical evidence supports that concession.[12] But Barbour argues that the government failed to present sufficient evidence that he was not someone who merely was "swept into a melee in which he was not an initial participant." We disagree. There was, to be sure, testimony about initial "chaos" in the apartment after McRae and the gunmen entered, but witnesses also testified that the group of people who were already in the apartment when the gunmen entered were kept from interfering with the robbery. Cheryl Johnson testified that McRae was "holding everybody at bay so nobody could come break up what was going on." Hill testified that McRae told him to "[g]et out of the way" because "[t]his ain't got nothing to do with you."[13] Johnson and Hill testified that the armed assailants descended on Wills in the living room corner where Wills was sitting against a wall — i.e., not in a section of the apartment where others not involved in the attack might have been passing through. The record does not support that anyone was "swept" into the fight.

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[12] The physical evidence includes the DNA evidence that Barbour's blood was found on the living room floor and on Wills's jeans. There was also a blood trail leading from the apartment to a nearby basketball court, where Barbour's cellphone was found on the ground next to a drop of blood. The blood trail continued to Barbour's girlfriend's apartment.

[13] According to Hill, McRae also "smacked" people down, including Patricia Ingraham and Lisa Harrison. Ingraham thought that McRae did this to protect her, and Gregory testified that McRae was not trying to hurt Harrison.

In support of his claim regarding the insufficiency of the identification testimony, Barbour highlights issues regarding the credibility of Hill and Manning, the two eyewitnesses who identified him as one of the two gunmen. Specifically, appellant Barbour points to the substances Manning and Hill admitted using on the day of the incident; both men's lengthy criminal records; Hill's testimony that his memory failed frequently, that he suffered from PTSD and mental illness, and that he sometimes was unable to distinguish between what he witnessed and what he heard from others; and the evidence that Manning was serving a term of incarceration at the time of his testimony and "wanted a recommendation to get some lesser time." However, the jury, though it had the prerogative to take such factors into account to make adverse credibility determinations, was also free to credit the testimony of both of these witnesses, which included Hill's in-court identifications of Barbour as one of the gunmen. *See Smith v. United States*, 175 A.3d 623, 628 (D.C. 2017) ("We afford the jury's credibility determination substantial deference on appellate review." (quoting *Tann v. United States*, 127 A.3d 400, 430 (D.C. 2015))). Moreover, Manning's and Hill's identifications of Barbour and Glover as the gunmen who tussled with the knife-swinging Wills was corroborated by the evidence that Barbour and Glover sustained knife wounds for which they were treated in hospitals in the hours after the incident. In short, we are satisfied that the evidence permitted jurors to find that Barbour and Glover participated in the robbery that culminated in the fatal stabbing.

As to the claimed insufficiency of the evidence to sustain their convictions of felony murder, appellants contend that the fatal stabbing of Wills was unrelated to the robbery, and instead was a result of an ongoing personal feud between appellant McRae and Wills.

Appellants rely on our case law establishing that "[w]hen one of the parties to a felony commits a killing outside the scope of the felonious crime which the parties undertook to commit, the aiders and abettors of the felony cannot be convicted of the felony murder." *Lee v. United States*, 699 A.2d 373, 375 (D.C. 1997) (internal quotation marks omitted); *see also In re D.N.*, 65 A.3d 88, 93 (D.C. 2013) ("[T]here is no criminal responsibility on the part of an accomplice if the homicide is a fresh and independent product of the killer's mind, outside of, or foreign to the common design."). An "accomplice who aids and abets is criminally liable for a killing by the principal [here, McRae] only if the killing is done in furtherance of the common design or plan to commit the underlying felony, or is the natural and probable consequence of acts done in the perpetration of the felony." *Id.* (internal quotation marks and alterations omitted).

Appellants point to the evidence that before the incident, and before returning to apartment 81 with the gunmen, McRae argued with Harrison, who was Wills's girlfriend; and also to Hill's testimony that Wills, who "appeared to be complying" with the gunmen's demands, started swinging a knife only after McRae struck Harrison, in response to which McRae grabbed a knife from the kitchen and stabbed Wills. Appellants further point to the testimony that McRae stated that he "punished" Wills. However, there was other evidence that permitted the jury not to draw the personal-feud inference that appellants urge. Although Hill testified that Wills looked as if he would comply with the assailants' demands for his money until he saw McRae hit Harrison, other witnesses testified that Wills all along resisted the gunmen's demands that he hand over his money. Further, multiple witnesses testified that Harrison was known to argue with everyone, including McRae, such that jurors could infer that her argument with McRae was not necessarily a motive for McRae to retaliate by stabbing Wills, and there was no other evidence of any personal animosity between McRae and Wills. In addition, Manning testified that in the days leading up to the incident, he heard McRae "[t]rying to persuade" appellant Barbour to participate in robbing Wills and Harrison. Appellants were still fighting with Wills when McRae stabbed him, and the evidence permitted the jury reasonably to find that McRae armed himself with a knife and came to assist the gunmen's efforts to rob Wills, thereby "punishing" Wills for resisting the robbery.

Glover contends, however, that there was no proof that he possessed a knife or "knew there was a knife." But Manning testified that Wills had a knife on the table where he was sitting and at some point began swinging it at his assailants, at which point Glover surely would have seen it. Thus, the involvement of a knife as appellants pursued their efforts to rob Wills was foreseeable, and it is of no moment that the knife McRae used to stab Wills apparently was a different knife. Moreover, the evidence that appellants beat Wills about the head repeatedly with their guns, bloodying him and causing at least one bullet to discharge, established that appellants knowingly participated in a brutal assault from which Wills's death was foreseeable. Thus, the evidence supported appellants' felony murder convictions.

That conclusion is consistent with our opinion in *D.N.*, where we upheld D.N.'s conviction of felony murder where D.N. and his accomplice beat the victim with their bare hands in furtherance of a robbery, and a third assailant ("Fat Sean"), who arrived before the robbers made off with the proceeds, thereafter beat the victim with bricks and concrete fragments, causing his death. 65 A.3d at 91-92.

Even though the trial court credited the evidence that D.N. wanted to "get out of there" and do no further damage to the victim, *id.* at 92, we held that "the death of [the victim] was a natural and probable cause of a robbery committed in this brutal fashion." *Id.* at 94. Observing that it was "entirely foreseeable that death might result from a 'whoopin'" inflicted by two men, even if they were not armed," we said "[t]he arrival of Fat Sean and the use of bricks and concrete fragments (readily available on the scene) d[id] not break the relatively seamless chain of events leading to [the victim's] death." *Id.* at 94, 95.

Glover further argues that the evidence was not sufficient to establish that he had formed an intent to commit any enumerated felony at the time he entered the apartment. But the evidence that he and Barbour entered the apartment with guns (and at least one of them with a mask) and went immediately to where Wills was sitting and demanded that he empty his pockets was evidence from which the jury could infer that both appellants entered the apartment with the intent to commit robbery.

I. Sleeping Jurors

Barbour argues that the trial court abused its discretion by not removing Jurors 5 and 14, whose sleeping, he asserts, was a "significant" problem. Barbour correctly notes that the issue of whether the two jurors were sleeping arose at various points during the trial.

The issue first arose on June 20, 2018, at a point when Manning had been cross-examined at some length about his record of criminal convictions. Glover's attorney approached the bench, told the court that Juror 5 was "falling asleep," and suggested that the court "take a break." The court said that it had not noticed any sleeping by the juror but responded by announcing an immediate ten-minute recess. The issue arose again on June 25, 2018, while Gregory was being cross-examined about her trip to the U.S. Attorney's Office to give testimony before the grand jury (which had to be rescheduled because she was "twisted" (i.e., high) on the first occasion). Glover's counsel again told the court that Juror 5 was "falling asleep" and that counsel did not "know what to do." The court responded again by announcing a stand-and-stretch break.

On June 26, 2018, the court itself raised an issue about Juror 5, noting that the rest of the jurors were looking at exhibits depicting the area outside the apartment building where the stabbing took place, but Juror 5 instead had her eyes closed. Stating that it could not tell whether the juror was "still asleep," the court

asked that everyone stand and stretch. On June 28, 2018, Barbour's counsel informed the court that there were "various jurors nodding off during this testimony [by one of the forensic DNA analysts called by the government] but not for a very long time for any particular one." One of the prosecutors added that she had "noticed people . . . closing their eyes," but did not think that anyone was asleep. The following colloquy ensued between the court and counsel for the parties:

> THE COURT: I'll solicit from the lawyers any suggestion of how I shall deal with Juror Number 5, where all parties have seen her with her eyes closed at various points. Never have I seen her for a prolonged period of time. The possibilities asking her to come forward and saying, "I note sometimes that you were listening with your eyes closed, and I'd like you to keep your eyes open, just so we know that you're following." We can hear proposals that she should be replaced.
>
> [GLOVER'S COUNSEL]: Our proposal is to see what happens without mentioning it. And when I do see her asleep, a couple of times I've come and asked you.
>
> THE COURT: And I know, and I immediately understand on my own on at least on one occasion.
>
> [GLOVER'S COUNSEL]: So my thought is that there's nothing to mention it now. If it persists, you know, at the end of the case.
>
> THE COURT: I'm happy to call her forward. Does anybody oppose my calling her forward?
>
> [GLOVER'S COUNSEL]: I don't think that you should do that.
>
> THE COURT: You join in that?
>
> [MCRAE'S COUNSEL]: I'm saying that, because I have noticed her. But what it looks like that when she's asleep

> and something you can tell that when she hears something that catches her ear, she opens her eyes.
>
> THE COURT: Right. Only one occasion when a witness was showing an exhibit and everybody else was showing the[ir] heads were up or the head was down and didn't move. And that I declared a stretch break at that point.
>
> [BARBOUR'S COUNSEL]: I was actually watching her earlier today throughout the testimony. And I saw her put her head down, and I thought that she was sleeping. But, in fact, she was looking down, and she was moving her head to the left and to the right and moving her head up. And so, I'd object at this point singling her out.
>
> THE COURT: You're not asking me to do that?
>
> [PROSECUTOR]: I take no position, Your Honor.
>
> THE COURT: You're taking no position? I have had several observations like [those of Barbour's counsel,] where I thought, "Okay. She has fallen sleep. I'm about to write down the time to see how long it will last." And then I realized, "No, she's just looking down."

The June 28 colloquy ended without the court inquiring of Juror 5.

On June 29, 2018, during the continued testimony of another of the government's DNA-analyst witnesses, one of the prosecutors told the court that Juror 5 was "asleep again." Noting that Juror 5 woke up as soon as the attorneys moved toward the bench, the court ordered another stretch break. At the end of the day, the prosecutor told the court that Juror 5 had been "falling asleep all day today" during "very important" DNA testimony, noted that Juror 7 had to awaken Juror 5 up at one point, and asked that the court "make [Juror 5] an alternate." Both the court and McRae's counsel stated that they had seen Juror 6 awaken Juror 5 at another point. The court remarked that Juror 5 had "regularly been falling asleep" and again suggested questioning the juror with an acknowledgment that she might have been "listening with [he]r eyes closed." All counsel agreed with the court's proposal to voir dire the juror. Glover's counsel specifically opposed making Juror 5 an alternate at that point.

On the next day of trial, July 2, the court inquired of Juror 5. The court mentioned to the juror, as it had suggested it would, that "like many people sometimes when you're listening to all of the evidence, you listen with your eyes closed." The court then asked the juror whether she had been "able to pay attention throughout the trial[.]" After Juror 5 answered in the affirmative, the court asked her to try to keep her eyes open as much as possible so that everyone would know she was paying attention.

On July 3, 2018, the sleeping-juror issue expanded to include Juror 14. During the prosecutor's questioning of Ingraham on re-direct, Barbour's counsel informed the court that Juror 14 had been sleeping. The court announced a stand-and-stretch break. On July 5, 2018, during appellant Glover's cross-examination of Detective Weber regarding the Conner knife, the court sua sponte called for a stretch break because Juror 14 "appeared to [the court] to be dozing off." Counsel for Barbour and Glover both confirmed the trial court's observation. Counsel for Glover at first agreed that the court should conduct a voir dire of Juror 14 similar to the one conducted with Juror 5, but then said he would "be happy to leave it" in favor of an "instruction . . . or something" the next morning. All counsel concurred.

On July 9, 2018, after the close of all the evidence, the trial court asked the parties whether they were "seeking to replace a juror." Counsel for appellants expressed the tentative view that there was no need to replace any jurors, but told the court that they would like to wait a day to decide. The court noted that it had carefully watched Juror 5 after the voir dire and had observed no problem; the juror seemed to be paying full attention. Regarding Juror 14, the court stated that the problem was only on July 5 and was not "protracted" or "extended."

On July 10, 2018, counsel for Barbour advised the court that Barbour wanted to replace Juror 14. The prosecutor opposed striking the juror, saying that the juror was like Juror 5 in that he appeared to be listening with his eyes closed and that the juror had been "very good about standing up when he needed to, moving around when he needed that particular break"; had been "engaged fully in the stretch breaks throughout the trial"; and was "engaged with each of the witnesses." The trial court noted that Juror 14, who the court agreed had "stood up and stretched on his own," "appeared to close his eyes very briefly, far less than Juror Number 5" (who, the court observed, had her eyes closed on "repeated occasions"), and that Juror 14 paid careful attention throughout the rest of the case. The court also observed that Juror 14 was a white male and Juror 5 an African-

American female, and commented that it did not know whether that was playing any role in the "singl[ing] out" of Juror 14, but that it saw no reason to single out Juror 14 over any other juror.

Glover's counsel acknowledged that he had wanted to strike Juror 14 in any event, and then told the court that Juror 14, who "had been asleep" "a couple of times," and Juror 5 were "in a very similar position" and that both jurors should be stricken (a request that the prosecutor charged was made only in light of the court's *Batson*-related comment).[14] Barbour's counsel joined that request and further asserted that there was "no factual basis for th[e] statement" that jurors were "listening with their eyes closed." The trial court asked whether the parties wanted further inquiry of Jurors 5 and 14. The prosecutor agreed to that, but Barbour's counsel objected. The court took the issue under advisement.

Later that day, the court decided to voir dire Juror 14. The court told juror 14 that the juror seemed to be listening with his eyes closed on July 5. The juror agreed, saying that he had been a little drowsy and had had a bad day that day, but that he did not think this had interfered with his ability to follow the evidence. The court said that it was satisfied with the juror's response and did not find that the two jurors' "brief lapses in attention . . . [had been] prejudicial in any way." The court found no "prolonged juror inattentiveness" even though it had been "watching very carefully throughout trial," and noted that no one had asked to have Juror 5 stricken "until the issue was raised [regarding Juror] 14." The court stated that given its "familiarity with the proceedings and [its] careful observation of the jurors and the witnesses and [its] opportunity to get a feel for the case," it would deny the motions to strike. The court told the parties that they could renew their motions should any juror fall asleep during the jury instructions or closing arguments.

During jury instructions, Barbour's attorney informed the court that a stretch was needed "because Juror 14 was nodding off," and one of the prosecutors made the same observation about Jurors 5 and 9. As to Juror 14, the prosecutor observed that the juror was "doing this thing where he tilts back his head and listens through his eyes – with his eyes slit." The court said that it had noticed what the prosecutor described, and soon granted a stretch break. Shortly thereafter, McRae's attorney informed the court that Juror 14 had "been struggling" and he and Glover's counsel both stated that the juror had been "leaning forward." The court responded that it

[14] *See Batson v. Kentucky*, 476 U.S. 79 (1986).

had been watching and that it did not appear to the court that Juror 14 was struggling. Rather, the court observed, it appeared to the court that Juror 14 was "listening and that he wants the instructions to end."

After dismissing the jury for the day, the court made an additional finding about juror 14:

> I was carefully watching Juror 14, and there are times when he looks down as if he's asleep. And I started watching his shoulder, it's moving. At least today he was taking notes. And his [countenance] would suggest that he might be sleeping, but he is staring impassively, and it turns out, at his notepad, and he looks up. And I watched his eyes each time he looks up, and he is definitely wide awake. Which the times I was concerned previously, I think he was leaning back and looking through his eyes with slits in them. But I just wanted to supplement my record today with additional observations.

This court has recognized that "[p]rolonged juror inattentiveness in a criminal trial . . . jeopardizes the defendant's Fifth and Sixth Amendment rights to a fair trial." *Samad v. United States*, 812 A.2d 226, 230 (D.C. 2002). "If sleep by a juror makes it impossible for that juror to perform his or her duties or would otherwise deny the defendant a fair trial, the sleeping juror should be removed from the jury." *Id.* However, "brief lapses in attention that are not prejudicial may be excused." *Id.* When a trial court receives a report of a sleeping juror, but its own observations are to the contrary, "the court may take judicial notice that the juror was not sleeping without further inquiry." *Lester v. United States*, 25 A.3d 867, 871 (D.C. 2011) (internal quotation marks omitted). "However, if the court notices, or is reliably informed, that a juror is asleep during trial, the court has a responsibility to inquire and to take further action if necessary to rectify the situation." *Id.* (internal quotation marks and alterations omitted). In conducting an inquiry, the trial court should "determine whether the juror had been asleep and, if so, whether the juror had missed essential portions of the trial," "result[ing] in substantial prejudice to the accused." *Samad*, 812 A.2d at 230-31. The trial court "has considerable discretion in deciding how to respond," and we "accord the trial court substantial deference in exercising its discretion because of the court's familiarity with the proceedings, its observations of the witnesses and lawyers and

jurors, and its superior opportunity to get a feel for the case." *Id.* at 230 (internal quotation marks and alteration omitted).[15]

In this case, we are satisfied that the trial court properly exercised its discretion when addressing the concerns expressed about Jurors 5 and 14. To begin with, the court responded to the reports about both jurors by announcing frequent stretch breaks and by directing its steady attention to both jurors after the issue of their sleeping was raised. The court also voir dired both jurors, and although appellants now suggest that the court's questions were too suggestive (offering each juror the opportunity to agree that the juror was merely listening with his or her eyes closed), the parties did not raise any such objection when the court described what it would ask when it proposed to question Juror 5. While the court did not undertake voir dire of each juror immediately after hearing the concern that the juror seemed to be sleeping, in each case the court's decision to wait was in response to the parties' expressed preferences or to the absence of any specific proposal by the parties.

Even after the close of the evidence, neither Barbour's counsel nor Glover's counsel nor McRae's counsel expressed a conviction that either juror's conduct had prejudiced the defendants. The DNA evidence that was being presented at some junctures when the sleeping juror observations were made – which, as noted, the prosecutor commented was "very important" to the government's case – favored the government, not defendants.[16] To the extent that Juror 5 was inattentive during Manning's cross-examination about his criminal convictions, we note that his testimony was repeated at several points during both his direct examination and his cross-examination, such that we cannot say that the trial court factually erred in concluding that defendants were not prejudiced by the juror's inattention. We similarly discern no prejudice to appellants from any juror inattention during Ingraham's testimony about being scheduled to testify before the

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[15] *See also United States v. Fernandez-Hernandez*, 652 F.3d 56, 75 (1st Cir. 2011) ("[P]ointing out that a single juror at one point in the trial fell asleep does not by itself establish . . . prejudice . . . .").

[16] Somewhat to the contrary, there was testimony on June 28 that both appellants could be excluded as contributors of the major component of DNA detected on a gun slide that was tested, but the analyst also testified that neither could be eliminated as a contributor of the minor component of DNA that was detected.

grand jury when she was "twisted" and Weber's testimony about the Conner knife, because points that might have been missed when counsel or the court suspected that Juror 5 or Juror 14 was sleeping were repeated at other points when no one observed either juror sleeping.

Further, both jurors expressed that they had been able to follow the evidence, the trial court found that neither juror appeared to have been inattentive for a prolonged period of time, and the court observed that Juror 5 seemed to stay awake after the voir dire. And, even if one or both of the jurors missed some of the jury instructions, any possible prejudice was mitigated by the jury's ability to refer to the written copies during deliberations.

Finally, the record support for striking Juror 5, about whom there were multiple observations of sleeping and being awakened by other jurors, was stronger than the record support for striking Juror 14, who had not needed to be awakened, was struggling against sleep at various points rather than sleeping, and about whom the court's own observations directly contradicted those of appellants' attorneys (about the juror leaning forward). Glover's counsel acknowledged that Juror 14 was a juror whom counsel had wanted to strike all along, and the trial judge raised the point about the defense attorneys' focus on striking Juror 14 (a white male juror) *and* Juror 5 only after the court had flagged a potential *Batson* issue as to the proposed removal of Juror 14. Those comments, rather than a concern about prejudice from juror inattentiveness, seem to better explain defense counsel's virtual last-minute insistence on striking Juror 5, whose conduct all counsel had earlier been willing to excuse, and Juror 14, whose conduct elicited far fewer requests by the lawyers for remedial intervention by the court. For all the foregoing reasons, we conclude that appellants' sleeping-juror claims do not entitle them to reversal of their convictions.

J. Merger

Each of the appellants argues (or adopts the argument) that his felony murder convictions should merge with the underlying felonies; that the felony murder convictions (one based on robbery, the other on burglary) should then merge into one felony murder conviction; that his conviction of assault with intent to rob (Wills) while armed merges with his conviction of attempted robbery (of Wills) while armed; and that all of his PFCV convictions should merge. The government agrees except as to the PFCV convictions. Our review of merger issues is de novo. *See Mobley v. United States*, 101 A.3d 406, 419 (D.C. 2014).

We agree with appellants. *See Lee v. United States*, 699 A.2d 373, 382 (D.C. 1997) ("All felony murder convictions relating to a single victim merge, and all of the felony murder convictions merge with their underlying felonies."); *Owens v. United States*, 497 A.2d 1086, 1096 (D.C. 1985) (assault and robbery merge where the "assault is committed in order to effect the robbery"); *West v. United States*, 866 A.2d 74, 84 (D.C. 2005) ("[M]ultiple counts of PFCV merge when only one gun was used and the incidents were not separated by time and location.").

The government argues that two of appellants' PFCV convictions should remain — the one that is associated with the one felony-murder conviction that remains after merger with the other felony murder conviction and after merger of the underlying felonies; and one that the government asserts is associated with the separate ADW conviction (based on each appellant's having threatened various people in apartment 81 with their guns upon entry into the apartment), which was distinct from the robbery and murder of Wills. However, it appears from the verdict forms that the jury did not convict appellants of a PFCV charge associated with the separate ADW, and the judgment and commitment orders appear to indicate the same. Accordingly, after merger, only one PFCV conviction remains.

* * *

For the foregoing reasons, the judgments of conviction are affirmed, and we remand for the trial court to vacate the merged convictions.

So ordered.

ENTERED BY DIRECTION OF THE COURT:

Julio A. Castillo
JULIO A. CASTILLO
Clerk of the Court

09-29-

Copies emailed to:

Honorable Craig Iscoe

Director, Criminal Division

Copies e-served to:

Sean R. Day, Esquire

Steven R. Kiersh, Esquire

Chrisellen R. Kolb, Esquire
Assistant United States Attorney

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