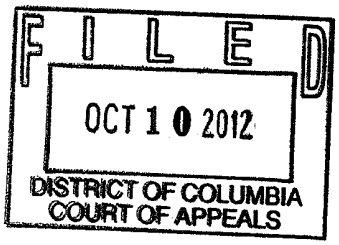
DISTRICT OF COLUMBIA COURT OF APPEALS



No. 08-CF-1405

DONNELL L. HARRIS, APPELLANT,

v. CF1-18801-07

UNITED STATES, APPELLEE.

Appeal from the Superior Court
of the District of Columbia
Criminal Division

(Hon. Harold L. Cushenberry, Jr., Trial Judge)

(Argued September 13, 2012 Decided October 10, 2012)

Before WASHINGTON, *Chief Judge*, BLACKBURNE-RIGSBY, *Associate Judge*, and REID, *Senior Judge*.

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: Following a jury trial, appellant Donnell L. Harris noticed an appeal. He challenges his convictions for second-degree murder, possession of a firearm during a crime of violence ("PFCV"), and carrying a pistol without a license ("CPWL").[1] We affirm.

FACTUAL SUMMARY

The government presented evidence showing that on June 29, 2007, around 2:00 a.m., Mr. Harris and two of his friends entered Joe's Steak and Egg Restaurant in the 1900 block of 9th Street, in the Northwest quadrant of the District of Columbia. The waitress at the counter, Marion Sesay, recognized Mr. Harris as a regular customer. She

[1] Mr. Harris was charged with first-degree murder while armed (premeditated), attempt to commit robbery while armed, first-degree murder while armed (felony murder), three counts of PFCV, and CPWL. At the conclusion of the presentation of all evidence at trial, the trial court granted Mr. Harris's motion for judgment of acquittal as to several charges but sent the charges of second-degree murder, one count of PFCV, and CPWL to the jury.

described him as a "tall" man with "short dreads." Mr. Harris asked to use the telephone. When Ms. Sesay denied his request, Mr. Harris and his friends left the restaurant. Soon, three other people came into the restaurant, Michael Richardson whom Ms. Sesay recognized, Thando Nongauza, and Nyja Lewis. Mr. Richardson and Mr. Nongauza were good friends. The three sat at the counter. A man confronted Mr. Nongauza and demanded marijuana and money. Mr. Nongauza claimed he had no marijuana and no money. After the man grabbed him, Mr. Nongauza "invited" the man outside; the two men left the restaurant. Mr. Nongauza ran away from the restaurant because he thought he was about to be robbed. On cross-examination, Mr. Nongauza said he was 5'8" tall, had shoulder length dreads; and then weighed 205 pounds, but at the time of the shooting, he weighed 180 to 185 pounds.

Within a minute or two of Mr. Nongauza's departure from the restaurant, Ms. Lewis saw two men enter and approach Mr. Richardson. Ms. Sesay identified one of the men as Mr. Harris. Steven Nejelski, another customer in the restaurant, and Ms. Lewis described one of the men in a manner that fit the description of Mr. Harris – thin or slim, tall or around 6'1" to 6'2," with dreadlocks, braids or short locks.

Ms. Lewis observed an altercation between Mr. Richardson and the two men who entered the restaurant. Ms. Sesay saw Mr. Richardson and Mr. Harris arguing. Both Ms. Sesay and Ms. Lewis noticed Mr. Richardson being pushed to the back of the restaurant near the bathrooms; Ms. Sesay only noticed Mr. Harris and Mr. Richardson in the back area of the restaurant. Mr. Nejelski heard yelling and looked in that direction. He heard "two muffled gunshots" and he "could see the gun being held and . . . most of the [shooter's] arm," but he could not see the shooter's face. Ms. Lewis heard two gunshots but could not see the shooter. Ms. Sesay, who had turned away from Mr. Harris and Mr. Richardson to serve a customer, heard three to four gunshots. Ms. Lewis witnessed Mr. Richardson running out of the restaurant. Everyone ducked down, and the customers and Ms. Sesay soon ran out of the restaurant.[2] Upon exiting the restaurant, Ms. Sesay and Ms. Lewis saw Mr. Richardson on the ground. He was dead. Dr. Marie-Lydie Pierre-Louis, the District's chief medical examiner, opined that Mr. Richardson was killed as a result of "[g]unshot wounds of [his] torso and lower extremity."

An MPD crime scene technician recovered two cartridge casings and a bullet from a bathroom floor in the back of the restaurant. One other bullet was retrieved during Dr. Pierre-Louis's autopsy on Mr. Richardson. The government's ballistics expert, Robert Poole, testified that both of the bullets were fired from the same gun and the cartridge casings were fired from the same gun; the gun would have been a .45 caliber semi-automatic weapon. The police never found the gun used in the shooting.

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[2] About twenty customers were in the restaurant at the time of the shooting.

ANALYSIS

Mr. Harris first contends that the trial court committed error by overruling defense counsel's objections to the government's closing and rebuttal argument. He focuses on two comments, (1) the closing argument that contrary to Mr. Harris's opening statement, two sides of the story were not presented to the jury; rather, the jury "heard one account of what happened that night"; and (2) the rebuttal statement that "[t]here is no evidence of innocence to undercut the United States' evidence." Mr. Harris maintains that the government's statements constituted an impermissible comment on his failure to testify. We disagree.

The government may indicate in closing argument that "the defense did not prove what counsel said he expected to prove in his opening statement." *Reed v. United States*, 828 A.2d 159, 164-65 (D.C. 2003). *See also Brewer v. United States*, 559 A.2d 317, 323 n.11 (D.C. 1989). Here, defense counsel told the jury in his opening statement that by the end of the trial it would "have heard both sides of the story"; that the jurors would "hear Mr. Harris'[s] side of the story." However, the defense presented no witnesses to recount Mr. Harris's side of the story, and hence, the trial court properly overruled defense counsel's objection because the prosecutor's statement was a permissible comment on what defense counsel had promised during his opening statement. Similarly, we reject Mr. Harris's claim that the prosecutor improperly stated that there was no evidence of self-defense. The prosecutor's statement responded to defense counsel's comment in his opening statement that "[t]he government has to prove that this was not done in self-defense, whether it's by Mr. Harris or someone else." *See Boyd v. United States*, 473 A.2d 828, 834 (D.C. 1984) (prosecutor's comment "constituted a permissible illustration to the jury that statements of counsel are not evidence").

With respect to the second comment, the record shows that defense counsel said during his closing argument, "the evidence of innocence is compelling. It is overwhelming and it is crying out for an appropriate verdict." In response, the prosecutor asserted during his rebuttal argument: "The defense said the evidence of innocence is overwhelming. They do not have to prove a thing and you can even consider that statement. There is no evidence of innocence to undercut the United States." In *Johnson v. United States*, 613 A.2d 888, 890-91 (D.C. 1992), a case involving charges that included rape while armed and malicious disfigurement, the victim testified that appellant burned her by placing a hot iron on her stomach and breasts. During closing argument, defense counsel declared that the victim received the injuries while fighting with the defendant. *Id.* at 896. In rebuttal argument, the prosecutor "in effect asked the jury to consider that there was no evidence of any injury sustained by appellant to support that inference." *Id.* We concluded that the prosecutor's rebuttal statement was proper because "it was not naturally and necessarily . . . a comment on [appellant's] failure to testify" since that evidence could have come from sources other than the defendant. *Id.* (internal quotation marks and citation omitted).

Moreover, in *Wright v. United States*, 387 A.2d 582, 584 (D.C. 1978), we made clear that: "[A] prosecutor's argument to the jury that the defense failed to contradict government evidence is forbidden only in cases where the defendant alone could possibly have contradicted the government's testimony." (citations omitted). In this case, Mr. Harris was not the only person who could have rebutted the government's evidence. There were other persons in the Steak and Egg restaurant at the time of the shooting who could have contradicted the government's evidence. Mr. Harris's citation to *White v. United States*, 248 A.2d 825 (D.C. 1969) is unavailing. Unlike Mr. Harris's case, only two individuals witnessed the assault charged in *White*, and they testified on behalf of the government. *Id.* at 826 n.2. Therefore, the defendant was the only person who could have contradicted the government's evidence. On that basis, we determined that the prosecutor's comments in *White*, about the absence of contradictory testimony, were improper and prejudicial to the defendant. *Id.* In short, here the prosecutor's comment responded to a statement in defense counsel's closing argument, and the defendant was not the sole person who could have contradicted the government's evidence. Furthermore, the trial court reminded the jurors during the government's rebuttal that they must start with the presumption of innocence and that the government had the burden of proof to establish the charges beyond a reasonable doubt.

Second, Mr. Harris argues that the trial court erred by giving an instruction to the jury about change in appearance because Mr. Harris wore glasses during his trial, but evidence, through the testimony of Ms. Sesay, and Francis Iwuh (a close friend who had known Mr. Harris since infancy), showed that he had not worn glasses before the shooting. The record reveals that the government requested the "attempted change of appearance" instruction, which defense counsel opposed.[3] Defense counsel asserted that: "The [attempted change of appearance] instruction . . . refers to doing things like shaving his head, as opposed to having dreadlocks; shaving his beard, as opposed to having facial

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[3] The trial judge gave the following instruction:

> You heard evidence that Donnell Harris attempted to change his appearance to avoid being identified. It is up to you to decide that he took these actions. If you find that he did so, you may consider this evidence as tending to show his feelings of guilt which you may in turn consider as tending to show actual guilt. On the other hand, you may also consider that he may have taken these actions for reasons fully consistent with innocence in this case. If you find that Donnell Harris attempted to change his appearance, you should consider such evidence along with all the other evidence in the case and give it as much weight as you think it deserves.

hair; and not having reading glasses, so he can read through voluminous material and write notes to his counsel during the course of the trial." The trial judge observed that that was defense counsel's "explanation" for why Mr. Harris wore glasses at trial, "but there's no evidence about that." After reviewing the requested instruction, the trial judge recognized that the change in a defendant's appearance must be significant and expressed doubt that "simply wearing glasses" constituted a significant change. Nevertheless, based on the evidence the judge concluded that the government was entitled to the instruction although the inference "is fairly weak." The court also believed that the wearing of glasses at trial had some probative value, and that the prejudicial effect did not outweigh the probative value. The judge ended by telling the prosecutor: "I think you're entitled to it, but I just don't think there's much of a strong argument you could make, but you can make an argument. I'll give it."

In his closing argument, the prosecutor pointed out that neither Mr. Iwuh, who had known Mr. Harris for life, nor Ms. Sesay, who recognized Mr. Harris as a regular customer, had seen him wear glasses before trial. He stated that the trial judge would tell them that they could "consider that change of appearance as a factor indicating the defendant's consciousness of guilt." Defense counsel asserted in his closing argument that the prosecutor could have requested that Mr. Harris remove his glasses before asking government witnesses to make an in-court identification of Mr. Harris, but did not do so. When defense counsel further referenced "a stack of paper that high to go through [during trial]," suggesting that Mr. Harris needed reading glasses for that purpose, the trial court sustained the objection and informed the jury, "there is no evidence in the record that Mr. Harris needs glasses to read or anything else. That would just be speculation."

Mr. Harris maintains that "[t]he instruction from the court, without an adequate factual foundation, that defendant changed his appearance at trial by wearing glasses was highly prejudicial and not harmless error." We review the trial court's decision to give the attempted change of appearance instruction for abuse of discretion. *See Wheeler v. United States*, 930 A.2d 232, 238 (D.C. 2007). "When supported by the evidence, we have recognized the legitimacy of" the change of appearance argument based on the attempted change of appearance jury instruction. *Lazo v. United States*, 930 A.2d 183, 187 (D.C. 2007). Generally, the jury may infer that a government witness did not identify a defendant because he changed his appearance; or, a jury may infer that the change in appearance "reflects an awareness of guilt and fear of identification." *United States v. McKinley*, 485 F.2d 1059, 1061 (D. C. Cir. 1973) (citation omitted).

Here, the trial court recognized that the change in a defendant's appearance had to be significant, but concluded that the government had introduced evidence supporting the requested instruction. As we determined in *Wheeler*, *supra*, "the central question . . . is whether [the instruction] [was] an adequate statement of the law, and whether it is supported by evidence in the case." *Id.* at 238 (citations omitted). In *United States v.*

Carr, 373 F.3d 1350, 1353 (D.C. Cir. 2004), the defendant gained weight, shaved his beard, and wore glasses at trial, in contrast to his appearance at the time of his arrest. The court concluded that the defendant could have anticipated that witnesses would be called at trial to identify him. *Id.* Just as the trial judge in Mr. Harris's case regarded the instruction as contemplating "significant" changes in appearance, the court in *Carr* referenced "profound alterations" in defendant's appearance. *Id.* Nevertheless, the *Carr* court declared: "Because there was independent evidence indicating that the defendant . . . changed his appearance, the jury could reasonably infer that he did so in order to avoid identification at trial and thereby evinced [a] consciousness of guilt. Therefore, the district court's instruction that the jury may consider evidence of the defendant's attempt to change his appearance was founded in the record and was not an error." *Id* at 1353 (internal quotation marks and citation omitted).

Similarly, in this case we cannot say that the trial court abused its discretion in giving the standard instruction as it then appeared in the CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA, No. 2.46 (5th ed. rev. 2008). Nor do we see anything in the record to indicate that the instruction was "highly prejudicial." Ms. Sesay, a key government witness, testified that Mr. Harris was a regular customer and she recognized him in court as the perpetrator, even though he wore glasses. In addition, Mr. Nejelski, did not see the shooter's face at the time of the shooting, but he described the shooter's height, build and hair style, which was consistent with how Mr. Harris looked at the time of the shooting. Moreover, Mr. Harris's eye glasses did not provoke any significant amount of attention at trial. Under these circumstances, we cannot say that giving the standard change of appearance instruction was highly prejudicial to Mr. Harris. Moreover, even assuming error, given the compelling evidence presented by the government, the error would be harmless under *Kotteakos v. United States*, 328 U.S. 750, 764-65 (1946).

Third, Mr. Harris appears to argue that the trial court erred by not instructing the jury that the "defense's theory is that someone else shot and killed Michael Richardson, and that Donnell Harris [is] not guilty, and had nothing to do with the shooting." He claims "[t]here certainly was ample evidence in the record to argue that there was a reasonable possibility that someone other than defendant committed the murder," and "[i]t was error for the trial court to exclude such an argument."

The trial court declined to give the requested defense instruction as to the theory of its case because "[t]here is no specific someone else who did it," the defense theory was that Mr. Harris "has been misidentified as the shooter." Defense counsel responded, "our theory is going to be [Mr. Harris] hasn't been identified at all." Although the defense never named another possible shooter, its trial strategy appeared to be to suggest that Mr. Nongauza was the shooter because his appearance, especially his hairstyle, resembled the

way Mr. Harris wore his hair.[4]

"We review a trial court's determination on the admissibility of a third-party perpetrator defense for abuse of discretion, and that determination will be upset on appeal only upon a showing of grave abuse." *Melendez v. United States*, 26 A.3d 234, 241 (D.C. 2011) (internal quotation marks and citations omitted). "Before a trial court will allow evidence of a third-party perpetrator defense, it must be confident that the evidence tend[s] to indicate some reasonable possibility that a person other than the defendant committed the charged offense." *Id.* (internal quotation marks and citation omitted). Here, assuming, without deciding, that Mr. Harris preserved his third-party perpetrator issue, our review of the record satisfies us that he did not meet the requirements of *Winfield* for that defense. Notably, the evidence shows that Mr. Nongauza was not in the restaurant at the time of the shooting; hence, the trial court's rejection of that defense was proper because "the trial judge ordinarily may exclude evidence of third-party motivation unattended by proof that the party had the *practical opportunity* to commit the crime." *Id.* (emphasis in original) (internal quotation marks and citation omitted). Moreover, defense counsel declared at the beginning of trial that he had "three witnesses that will testify and give a description of the individual that did the shooting, and indicate Mr. Harris was not that individual," but defense counsel never called such witnesses to testify. Furthermore, the trial court ruled that defense counsel could argue that Mr. Harris had been misidentified, or that he was not identified at all as the shooter. Under these circumstances, we see no abuse of discretion.

Finally, Mr. Harris maintains that that the evidence was insufficient to convict him beyond a reasonable doubt of second-degree murder, PFCV, and CPWL. Our review of the record persuades us that, viewed in the light most favorable to the government, and given the jury's province to make credibility determinations, weigh the evidence, and make reasonable inferences, the testimonial and circumstantial evidence presented by the government was sufficient to convict Mr. Harris of the remaining three charges beyond a reasonable doubt. For example, from a photo array, Ms. Sesay identified Mr. Harris, a regular customer, as the shooter, and she indicated that he and Mr. Richardson were the only persons in the back of the restaurant at the time the shots were fired that fatally wounded Mr. Richardson.

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[4] During his cross-examination of Ms. Lewis, defense counsel moved to admit into evidence a picture of Mr. Nongauza after asking her whether that was how Mr. Nongauza's hair looked on the night of the shooting.

Accordingly, for the foregoing reasons, we affirm the judgment of the trial court.

So ordered.
ENTERED BY DIRECTION OF THE COURT:

Julio A. Castillo
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Clerk of the Court

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