No. 17-CF-[redacted]

(Superior Court No. CF2-[redacted]-16)

IN THE
DISTRICT OF COLUMBIA
COURT OF APPEALS

[redacted] APPELLANT ,

APPELLANT

v.

UNITED STATES,

APPELLEE

Appeal from the Superior Court of the District of Columbia
Criminal Division
(Hon. Juliet McKenna, Trial Judge)

BRIEF FOR APPELLANT

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STATEMENT OF INTERESTED PARTIES

Appellant [redacted] APPELLANT [1] and Appellee the United States are the only parties to this appeal. APPELLANT was represented at trial by attorney Craig Moore. APPELLANT was also represented for a period prior to trial by attorney Janai C. Reed. The United States was represented at trial by Assistant United States Attorney Lauren Bressach.

[1] According to the Court Services and Offender Supervision Agency's Presentence Report Appellants' "[t]rue name" is "[redacted] Davon APPELLANT ." Appellant's name is listed as "[redacted] APPELLANT " on this court's docket. In the trial court's docket and judgment, however, Appellant's first name is spelled "[redacted]." That spelling is also used in the Federal Bureau of Prisons' public database.

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

Appellant [redacted] APPELLANT presents the following issue for review:

- Whether the trial court's admission of an incriminating testimonial hearsay statement by an anonymous source constituted reversible error.

STATEMENT OF THE CASE

This is [redacted] APPELLANT 's appeal of his conviction after a jury trial in the Criminal Division of the Superior Court on the four offenses with which he was charged: unlawful possession of a firearm (having previously been convicted of a crime of violence) ("UPF"), in violation of D.C. Code § 22-4503(a)(1),(b)(1); Carrying a Pistol Without a License (Outside Home or Place of Business) ("CPWL"), in violation of D.C. Code § 22-4504(a), (2); possession of an unregistered firearm ("UF"), in violation of D.C. Code § 7-2502.01(a); and unlawful possession of ammunition ("UA"), in violation of D.C. Code § 7-2506.01(b).

On February 10, 2017, the trial court entered judgment against APPELLANT and sentenced him to 48 months incarceration for UPF, 20 months incarceration for CPWL and six months for each of the two UA offenses, with all sentences to be

served concurrently. R. 21.[2] The trial court's action constituted a final decision appealable to this court.

STATEMENT OF FACTS

The Events of May 17, 2016

The charges against APPELLANT arose from an incident on the afternoon of May 17, 2016 in the Southeast quadrant of the District of Columbia. Tr. 11-28-16 at 114-119.[3] On that date, officers affiliated with the Metropolitan Police Department's Gun Recovery Unit, acting on information provided by a paid police informant, approached "groups of individuals" congregated in a parking lot. *Id.* at 120-21. As the police approached, one of those individuals, Appellant APPELLANT, fled on foot into a nearby wooded area. *Id.* at 121-24. Officers pursued. *Id.* The chase lasted approximately "two minutes" and ended with APPELLANT' arrest. *Id.* at 125.

The police then searched the wooded area and found a handgun. *Id.* at 126. The government's trial theory was that APPELLANT had possessed the gun when initially approached but had thrown it away during the brief chase. The evidence was circumstantial: no witness saw APPELLANT with a weapon and DNA and fingerprint tests on the gun were negative. Tr. 11-29-16 at 252-53; 272-78. It was raining at

[2] Citations in the format "R. [item number]" refer to the Record in this appeal.
[3] Citations in the Format "Tr. [date] at [page number]" refer to transcripts of trial court proceedings.

the time and the officers who recovered the gun testified that it was drier than would have been expected if it had been in the area for a substantial period. *Id.* at 126-27. APPELLANT had a "belly band," a device often used for weight loss, under his shirt, which the government suggested might have concealed a firearm, but a picture taken by police indicated that, at the time of his arrest, APPELLANT 's shirt was tucked into his pants, which would be inconsistent with any effort by APPELLANT to quickly reach under his shirt to retrieve a weapon during the chase.[4] Trial Ex. 18 (post arrest photograph);[5] *see also id.* at 204-05 (testimony regarding Ex. 18).

The Trial and Use of Informant Evidence

Among the evidence introduced at trial was that, shortly prior to APPELLANT 's arrest, police had been told by a paid confidential informant that a person who matched APPELLANT 's description was carrying a gun and was located at the place where APPELLANT was subsequently detained. The prosecutor highlighted this evidence in her opening, telling the jury that when the officers initially arrived on the scene "[t]hey saw a group of men sitting or standing outside in that parking lot and among them

[4] According to one officer, after his arrest, but before the police mentioned that they were looking for a gun, APPELLANT asked if a gun had been found. APPELLANT 's attorney argued that it was unlikely that APPELLANT made this remark prior to hearing about a weapon from one of the officers or on the police radio. Tr. 11-29-16 at 200-01, 340.

[5] Exhibit 18 is attached to Appellant's Unopposed Motion to Supplement the Record, which is being filed in conjunction with this Brief.

was the defendant, [redacted] APPELLANT , perfectly matching the description that they were given." Tr. 11-28-16.

Subsequently, Michael Vaillancourt, an officer who participated in the arrest, testified that, when he had approached the group of men which included APPELLANT , he had "information about a location and a clothing description of a man that would be carrying a gun." Tr. 11-28-16 at 116. The prosecutor then asked Vaillancourt to tell the jury "specifically what that description was." *Id.* Defense counsel objected at the bench, on the grounds that

> this is hearsay.
>
> It is absolutely being offered for the truth and precisely because it does come from a confidential informant, I won't be able to cross-examine on it.
>
> This is exactly what I was getting at [in a prior discussion of the issue]….
>
> So, unless they are prepared to bring in the confidential informant so that I can cross-examine him, I think that it should be disallowed.

Id. at 116. The prosecutor countered that some detail about the description was necessary "because I don't want the jury to be left with the impression that that was like some guy with a white tee shirt and some blue jeans. This was a very detailed description that they were given in advance." *Id.* at 117. Defense counsel responded that "[y]our Honor, in some ways, that's exactly the problem." *Id.*

The trial court's subsequent ruling allowed the government to tell the jury that APPELLANT 's location and appearance matched that of the person the anonymous informant said had been carrying a gun. According to the court, the fact that the officers "received a description" was admissible because it was "relevant for understanding why the officers took the actions that they did." *Id.* at 118. But it instructed the prosecutor "not to go into details concerning the description." *Id.* at 117.

After the prosecution rested, APPELLANT presented a brief case to the jury, calling police sergeant Curt Sloan, the officer who had received the confidential informant's report. Tr. 11-29-16 at 300. APPELLANT argued that the government had not proven that the gun was his and that the reason that he ran was because he knew that there was an unrelated outstanding warrant for his arrest. Tr. 11-28-16 at 108; Tr. 11-29-16 at 334.

APPELLANT was convicted of all the charges against him.

SUMMARY OF ARGUMENT

The jury that heard this case was told that the police had arrested Appellant APPELLANT after they received information from an informant, who did not testify, that a person who matched APPELLANT 's description, located at the place where APPELLANT was found, possessed an illegal weapon. The trial court allowed reference to the informant's statement, purportedly not as evidence of guilt, but to explain why the

police acted as they did. But this was not how the statement was used—the government argued that the informant's report made it more likely that APPELLANT was the owner of the illegal weapon found near where he was arrested.

The admission of this out of court statement was a violation of both the rule against hearsay and the requirements of the Constitution's Confrontation Clause, as set out in the Supreme Court's decision in *Crawford v Washington*. This error was not harmless: as the other evidence against APPELLANT was limited and circumstantial, it likely substantially influenced the jury's decision to convict.

APPELLANT objected to this evidence on hearsay grounds, preserving the arguments he now makes on appeal. But even if his arguments were not preserved, the trial court's error was of such a nature and magnitude, and so affected APPELLANT 's fundamental rights, that reversal is merited even under the plain error standard.

ARGUMENT

I. THE COURT IMPROPERLY ADMITTED EVIDENCE BARRED BY THE CONFRONTATION CLAUSE AND THE HEARSAY RULE

A. The Rules of Evidence and the Confrontation Clause Exclude Testimonial Hearsay

"Hearsay evidence, the in-court testimony of an out-of-court statement offered to prove the truth of the matter asserted, is generally not admissible at trial." *Smith v. United States*, 26 A.3d 248, 257 (D.C. 2011). Furthermore, in certain circumstances the use of hearsay against a criminal defendant not only

violates the common law rules of evidence, but is constitutionally impermissible. The Sixth Amendment provides that in "[i]n all criminal prosecutions" the defendant has the right "to be confronted with the witnesses against him." U.S. Const. amend VI. "[T]he Confrontation Clause bars the government from introducing testimonial statements at trial against a criminal defendant without calling the declarant to testify in person, unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant, regardless of how reliable the testimonial evidence is perceived to be or whether it fits within a recognized hearsay exception." *Thomas v. United States*, 914 A.2d 1, 11 (2006) (citing *Crawford v. Washington*, 541 U.S. 36, 56 n. 6 (2004)); *accord Wills v. United States*, 147 A.3d 761, 766-67 (D.C. 2016).

B. The Confidential Informant's Statement Should Have Been Excluded as Testimonial Hearsay

The determination as to whether a statement is hearsay "is a question of law, as to which [this court's] review is *de novo*." *Young v. United States*, 63 A.3d 1033, 1044 (D.C. 2013). The same is true when it comes to the determination of whether such hearsay is "testimonial" for *Crawford* purposes. *Id.*

The trial court held that the confidential informant's statement was not hearsay because it was admitted not "to prove the truth of the matter asserted," but as context evidence, to permit the jury to understand "why the officers took the

actions that they did."[6] While it is true that statements which would be deemed hearsay if admitted to prove the truth of the matter they assert may sometimes be admissible when necessary to provide context to other evidence, *Wilson v. United States*, 995 A.2d 174, 182 (D.C. 2010), such "context evidence" is, not admissible when it is "not necessary to place [events] in an understandable context." *Gray v. United States*, 147 A.3d 791, 800-01 (D.C. 2016).

In this case there was no need for such context evidence. The police had approached a group of young men "standing outside in [a] parking lot," presumably to ask them questions. Tr. 11-28-16 at 104. There was nothing improper or unusual in their doing so and APPELLANT did not so argue. As the police approached APPELLANT ran and the police pursued. While it was true that APPELLANT matched the anonymous description, there was no need to tell that to the jury to explain why the police did what they did. Consequently, especially considering the government's argument to the jury that the informant's statement was affirmative evidence of guilt, the court's ruling that the that statement was not hearsay was wrong as a matter of law.

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[6] Hearsay evidence may be admissible "if it falls under an exception" to the hearsay rule. *Smith*, 26 A.3d at 257. The applicability of such an exception is not, however, at issue in this case—the trial court did not permit use of the confidential informant's statements because it deemed them admissible under a hearsay exception and the government did not claim that any such exception applied. The informant's statement was deemed admissible because it was supposedly not presented for the truth of the matter asserted and, consequently, was not hearsay.

Moreover, also as a matter of law, "[a] confidential informant's statements to a law enforcement officer are clearly testimonial." *United States. v. Lopez-Medina*, 596 F.3d 716, 730 (10th Cir. 2010) (citing *Melendez–Diaz v. Massachusetts*, 129 S. Ct. 2527, 2532 (2009)); *see also United States v. Cromer*, 389 F.3d 662, 675 (6th Cir. 2004) ("statements of a confidential informant are testimonial" because "[t]ips provided by confidential informants are knowingly and purposely made to authorities, accuse someone of a crime, and often are used against the accused at trial"). Consequently, the government is barred from using the testimony of an informant or other declarant "against a criminal defendant without calling the declarant to testify in person, unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant." *Thomas*, 914 A.2d at 11. The admission of the informant's statement violated APPELLANT 's rights under the Confrontation Clause.

C. The Error Was Not Harmless

When this court finds preserved, nonconstitutional error in a criminal case—such as improper admission of hearsay evidence—it must reverse the conviction unless it determines that the "non-constitutional error was harmless." *Washington v. United States*, 965 A.2d 35, 41 (D.C. 2009). Harmlessness in such cases can only be found if the court is

> able to say with fair assurance, after pondering all that happened without stripping the erroneous action from the

> whole, that the judgment was not substantially swayed by the error…. [T]he "burden" is not on the appellant to show that he has suffered prejudice; rather, the issue is whether the record eliminates the appellate court's doubt about whether the error influenced the jury's decision. We must find it highly probable that the error did not contribute to the verdict.

Id. (footnotes, quotations and alterations omitted). When the preserved error is constitutional—such as admission of hearsay evidence in violation of the Confrontation Clause—the conviction must be reversed unless the government is able "to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Zanders v. United States*, 999 A.2d 149, 156 (D.C. 2010). In this case, regardless of whether it is analyzed as constitutional or non-constitutional error, the admission of the informant evidence against Sales was not harmless.

The anonymous source's statement constituted highly incriminating evidence that may well have been determinative of the jury's verdict. Indeed, the prosecutor emphasized in her closing that it was a crucial piece of the mosaic of evidence the government had assembled against APPELLANT. Ridiculing the defense's challenges to the sufficiency of the prosecution's evidence as an effort to "throw… spaghetti … against the wall" the prosecutor explained that none of the defense's arguments

> change[d] ***the fact that the defendant matched the description of the person that they were looking for.*** He

> ran away from them as soon as he saw them coming. He ran into the woods of all places. He comes out pretty quickly thereafter.
>
> He got rid of what he needed to get rid of.

Tr. 11-29-16 at 327-28 (emphasis added).

The trial court's ruling allowed the government to improperly disclose to the jury an inadmissible statement by an unidentified informant that was highly probative of guilt. Certainly, there was evidence against APPELLANT: He ran when confronted by the police and a gun was found near the path he followed. But he had an explanation as to why he ran. And the mere fact that a gun was found near where he had been did not permit a finding beyond a reasonable doubt that he had possessed that gun. But the aggregation of those two pieces of evidence with the informant's statement allowed the government to present a devastating case to the jury. Any reasonable juror would likely have wondered at the odds that a man found at a place where a report placed a man with a gun, and who matched the description of the man with the gun, and who then fled from the police, was not connected to a gun found in the vicinity.

Because the anonymous informant was not a witness APPELLANT was unable to cross-examine him. This violated both the hearsay rule and the Sixth Amendment's Confrontation Clause.

II. THE ERROR WAS PRESERVED

APPELLANT 's objection to the confidential informant evidence preserved his hearsay rule and the Confrontation Clause arguments.

While APPELLANT 's specific objection was that the informant's statement was inadmissible hearsay—he did not explicitly mention the Confrontation Clause—in this case this was a distinction without a difference. If the trial court had agreed with APPELLANT that the statement was hearsay it would have excluded it. Whether the exclusion of this highly incriminating evidence was based on *Crawford* or the rules of evidence was of no practical significance. If the informant's statement violated the hearsay rule it was also necessarily barred by *Crawford*. *See, e.g., Wilson*, 995 A.2d at 182 ("A crucial aspect of *Crawford* is that it only covers hearsay, i.e., out-of-court statements offered in evidence to prove the truth of the matter asserted.") (brackets omitted).

This case is also distinguishable from *Wills v United States*. *Wills* held that a Confrontation Clause claim had not been preserved because, in that case, the defendant objected to testimony about an incriminating statement on hearsay grounds, not as a *Crawford* violation. 147 A.3d at 767. In *Wills*, however, there was no dispute that the challenged evidence was hearsay. The trial court had ruled that, although hearsay, the statement, which had been made in the immediate aftermath of an alleged crime, was admissible under the excited utterance

exception to the hearsay rule. *Id.* That ruling was not challenged on appeal. *Id.* Because there had been no objection on Confrontation Clause grounds, the trial court had never been asked to decide the Confrontation Clause issue, which was distinct from the question of whether an applicable exception to the hearsay rule applied. In the present case, however, the hearsay and confrontation clause issue were not separate. Because the trial court found that the admitted statement was not hearsay it necessarily held that there was no *Crawford* violation. In other words, APPELLANT ' failure to explicitly assert a *Crawford* violation did not affect the legal issue reviewed and (wrongly) decided by the trial court.

III. EVEN IF NOT PRESERVED THE ERROR WAS PLAIN ERROR

Although APPELLANT believes that his objection preserved the error he now asserts, even if this court thinks otherwise his conviction ought nonetheless to be reversed under a plain error standard. To establish plain error an appellant "must show error that is plain, that affected his substantial rights, and that seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Wills*, 147 A.3d at 767 (citing *Guevara v. United States*, 77 A.3d 412, 418 (D.C. 2013)). APPELLANT can make such a showing.

As discussed above, it is firmly established that the rules of evidence exclude out of court statements for the truth of the matter asserted when, as was the case here, no recognized hearsay exception applies. Moreover, at least since

Crawford, it has also been clear that admission of testimonial hearsay evidence against an accused, including statements by confidential informants, is unconstitutional. Consequently, the trial court's admission of the informant's statement was clearly erroneous.

Moreover, admission of this testimonial hearsay "seriously affected" APPELLANT 's "substantial rights." There was no direct evidence that APPELLANT had possessed a gun and the admissible circumstantial evidence was far from ironclad. Consequently, the informant's information—that APPELLANT was at a place where a person with a gun would be found and matched the description of that person—constituted compelling and entirely inadmissible evidence of guilt.

Finally, the error "seriously affected the fairness, integrity, or public reputation of the judicial proceedings." Determination of whether this prong of the plain error test has been established requires a "a case-by-case inquiry." *Wills*, 147 A.3d at 776. It is not established in cases in which, despite the error, "the evidence of guilt was 'essentially uncontroverted' and 'overwhelming.'" *Id.* at 776. It was, however, established in *Wills* where, as in this case, evidence of guilt, absent the improperly admitted evidence, was limited. *Id.* at 776-77. Moreover, in analyzing this aspect of plain error standard this court considers the fundamental importance of the Confrontation Clause. Because "the right to face-to-face confrontation ... 'ensur[es] the integrity of the fact-finding process,'" *id.* at 777 (quoting *Coy v.*

Iowa, 487 U.S. 1012, 1019–20 (1988))—courts are more inclined to find that violation of this right "seriously affect[s] the fairness, integrity, and public reputation of the proceedings" than they are in cases involving violation of less fundamental rights. *Id.* at 777.

CONCLUSION

For the foregoing reasons, the trial court's judgment should be reversed.

Dated: July 13, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the date indicated below the foregoing (including any appendix or other accompanying documents) was served on Elizabeth Trosman, Assistant United States Attorney for the District of Columbia by this court's electronic filing system.

/s/Matthew B. Kaplan
Matthew B. Kaplan

Date: July 13, 2017