2012 WL 8249577 (D.C.) (Appellate Brief)
District of Columbia Court of Appeals.

Jose G. PORTILLO, Appellant,
v.
UNITED STATES OF AMERICA, Appellee.

No. 11-CF-431.
February 17, 2012.

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

Brief for Appellee

Ronald C. Machen Jr., United States Attorney.

Roy W. McLeese III, Michael T. Truscott, Reagan Taylor, [a] Peter S. Smith, DC Bar #465131, Assistant United States Attorneys.

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In the opinion of appellee, the following issues are presented:

I. Whether the trial court erred in denying appellant's pre-trial request for replacement of one of his two trial attorneys, where the court's *Monroe-Farrell* inquiry showed that appellant's complaints about his counsel's performance were unwarranted.

II. Whether the trial court plainly erred in monitoring the government's initial closing argument, where none of the prosecutor's comments were impermissible and, in any event, appellant cannot show prejudice from any of the contested comments.

III. Whether appellant can satisfy the stringent plain-error requirements, where, even assuming the trial court's instruction to the jury on the offense of first-degree burglary while armed constructively amended the indictment, the evidence presented at trial and the government's argument to jury were fully consistent with the language of the indictment.

IV. Whether appellant's convictions for second-degree murder while armed and first-degree burglary while armed, and his associated convictions for possession of a firearm during a crime of violence, should be vacated, where those convictions merge with his convictions for first-degree (felony) murder while armed.

***1 COUNTERSTATEMENT OF THE CASE**

In connection with the November 20, 2008, robbery and murder of Michael and Virginia Spevak, a grand jury charged appellant Jose G. Portillo by indictment with one count each of: first-degree burglary while armed, in violation of D.C. Code §§ 22-801(a), 3601(a), and -4502; first-degree theft (of a senior citizen), in violation of D.C. Code S§ 22-3211, -3212(a), & -3601(a); and armed robbery (of a senior citizen), in violation of D.C. Code §§ 22-2801, -4502, & - 3601(a) (R. 7). [1] / Appellant also was charged ***2** with two counts each of: first-degree murder while armed (felony murder) (first-degree burglary while armed), in violation of D.C. Code §§ 22-2101, - 4502, & -3601(a); first-degree murder while armed (premeditated) in violation of D.C. Code §§ 22-2101, -4502, & -3601; and carrying a pistol without a license (CPWL), in violation of D.C. Code § 22-4504 (a) (R. 7). Appellant also was charged with six counts of possession of a firearm during a crime of violence (PFCV), in violation of D.C. Code § 22-4504(b) (R. 7).

On November 30, 2010, appellant proceeded to trial before the Honorable Michael L. Rankin. On December 10, 2010, the jury found appellant not guilty of the first-degree (premeditated) murder while armed of Michael and Virginia Spevak (R. 36). The jury found appellant guilty of two counts of second-degree murder while armed as a lesser-included offense of first-degree murder while armed (premeditated) (R. 36). In addition, the jury found appellant guilty of the remaining counts of the indictment, including the two counts charging appellant with the first-degree (felony) murder of the Spevaks (R. 36).

On March 11, 2011, the trial court sentenced appellant to a total term of incarceration of 137 years and six months (R. 44). ***3** Appellant also received five years of supervised release, and was ordered to pay $1500 to the Victims of Violent Crime Compensation Fund (R. 43, 44). On April 1, 2011, appellant timely noted this appeal (R. 45).

THE TRIAL EVIDENCE

The evidence showed that at approximately 1:30 a.m. on November 20, 2008, appellant, along with Peiro and Angela Hernandez, robbed and murdered an **elderly** couple, Michael and Virginia Spevak, in the Spevaks' home, located at 5320 Belt Road, N.W. At the time of the murders, Mr. Spevak was 68 years old and Ms. Spevak was 67 years old (11/3/10 Tr. 55, 104).

Appellant's former co-defendant, Peiro Hernandez, testified that at approximately 1:00 a.m. on November 20, 2008, he was driving his car with appellant and Angela Hernandez as passengers (12/7/10 Tr. 263).[2] Peiro had known appellant for six or seven months, and the two were members of the same street gang (12/7/10 Tr. 249). Angela was Peiro's girlfriend (12/7/10 Tr. 178). As Peiro was driving, Angela suggested a place where they could go and hang out and drink beer (12/7/10 Tr. 274). Angela directed Peiro to a house ***4** on Belt Road, N.W., and told him to park a few houses down (12/7/10 Tr. 274-75).

Before getting out of the car, appellant took out a .38-caliber handgun that he had stored in the car's glove compartment, and hid it in his clothing (12/7/10 Tr. 191, 198, 279-82). Appellant went first as they walked from the car toward the front door of the Spevaks' house (12/7/10 Tr. 201). All of the lights were off in the house (12/7/10 Tr. 201). As they were walking, Angela asked Peiro to return to the car to retrieve a black metal baton (12/7/10 Tr. 199).[3] However, Angela soon realized that she had the baton in her pocket (12/7/10 Tr. 200). Appellant and the others continued walking toward the Spevaks' front door (12/7/10 Tr. 200). At that point, it was clear to Peiro that they were not "going to the house to hang out" (12/7/10 Tr. 202).[4] /

Angela told Peiro to knock on the door and ask for Anna (12/7/10 Tr. 202).[5] / He did so (12/7/10 Tr. 203), and, after a ***5** minute or two, an **elderly** man in his 70s, with white hair and wearing only a pair of boxer shorts, came to the door (12/7/10 Tr. 204, 339). Peiro asked him about Anna, and he responded that Anna did not live there (12/7/10 Tr. 204). Appellant then asked about Anna, and the man again said that she did not live there (12/7/10 Tr. 204). Peiro then forced the door open, pushed the man inside the house (12/7/10 Tr. 205), and began choking him (12/7/10 Tr. 205).[6] As Peiro was choking Mr. Spevak, appellant did not say anything, nor did he attempt to stop Peiro (12/7/10 Tr. 205). After Peiro pushed Mr. Spevak farther inside the Spevaks' house, appellant and Angela walked in behind Peiro (12/7/10 Tr. 206).

An **elderly** woman, who appeared to be around 70 years old, whose hair was silver in color, and who was wearing only pajamas, opened an interior door and asked, "what was going on" (12/7/10 Tr. 207). Then Angela and appellant pushed the interior door open and appellant pointed the gun in the **elderly** woman's face (12/7/10 Tr. 207).

Appellant and Angela then forced the **elderly** woman to accompany them as they searched for valuables to steal (12/7/10 Tr. 209). They were heading to the second floor as Peiro dragged Mr. Spevak into the kitchen (12/7/10 Tr. 209). After about five minutes, ***6** appellant and Angela returned with Ms. Spevak, whom they forced onto a couch near the kitchen (12/7/10 Tr. 209). Peiro then started walking around the house looking for anything of value to steal (12/7/10 Tr. 209-10). Peiro found a wallet and a camera (12/7/10 Tr. 210), and Angela located two computers (12/7/10 Tr. 211).

Angela then grabbed two telephone cords, and Peiro tied the man with his hands behind his back while appellant tied the woman's hands (12/7/10 Tr. 211-12, 291). Peiro looked for additional items to steal, and then turned off the lights so that no one would suspect anything (12/7/10 Tr. 212).

Appellant waved his gun, pointed it at Ms. Spevak, and said that he felt like killing Ms. Spevak because she was acting tough (12/7/10 Tr. 213). Angela then "said [the Spevaks] would recognize her and that we needed to kill them" (12/7/10 Tr. 214). Angela took a knife from the kitchen, walked over to Mr. Spevak, who was bound and gagged, and began stabbing him (12/7/10 Tr. 218, 300, 337). After Angela stopped stabbing the man, Peiro hit him with the baton (12/7/10 Tr. 218).

Angela then approached Ms. Spevak, who was bound and gagged, and began to stab her (12/7/10 Tr. 219-20). After Angela repeatedly stabbed Ms. Spevak, Peiro hit her with the baton and then grabbed her wedding ring and put it in his pocket (12/7/10 Tr. 220). Peiro and Angela loaded Peiro's car with the computers and other items ***7** that Angela had gathered, while appellant stayed in the Spevaks' house (12/7/10 Tr. 225).

After that, appellant, Peiro, and Angela drove away in Peiro's car (12/7/10 Tr. 222-23). Appellant said that the Spevaks "had to be dead because if not we were going to end up going to jail" (12/7/10 Tr. 222). Appellant then took money from his pocket, which he split with Peiro and Angela (12/7/10 Tr. 223). [7]

Later, after stopping to buy beer, Peiro parked in an alley behind Angela's house and unloaded the car (12/7/10 Tr. 226). He burned some of the Spevaks' property, including a wallet and credit cards, in the alley (12/7/10 Tr. 226-27).

Peiro and Angela took appellant home (12/7/10 Tr. 228), and then returned to the Spevaks' home to make sure they were dead (12/7/10 Tr. 229). The doors to the house were locked (12/7/10 Tr. 229), but Peiro and Angela saw through a window that the Spevaks were not moving (12/7/10 Tr. 230-31).

Angela then used a set of car keys she found in the Spevaks' house to steal the Spevaks' blue Scion (12/7/10 Tr. 232). Peiro and Angela took the Spevaks' car, picked up appellant, and began driving to New York because appellant had never been there (12/7/10 Tr. 234). After reaching New Jersey, they returned to Washington, D.C., ***8** and took appellant home (12/7/10 Tr. 237). Peiro then parked the Spevaks' car in the alley behind Angela's house, and set it on fire (12/7/10 Tr. 237). [8]

After failing to see or hear from the Spevaks for approximately two days, the Spevaks' daughter and a concerned neighbor contacted the police (11/30/10 Tr. 177). On November 22, 2008, at approximately 9:00 p.m., the police entered the Spevaks' home using a key provided by one of the Spevaks' neighbors (11/30/10 Tr. 147, 178). There were no signs of forced entry (12/1/10 Tr. 12). The police discovered Ms. Spevak's body lying on a sofa near the kitchen, bound and gagged (11/30/10 Tr. 193; 12/6/10 Tr. 54). Mr. Spevak's body was lying a few feet away on the floor; a telephone cord was gathered loosely nearby (11/30/10 Tr. 199). There was a significant amount of blood spatter on the walls and furniture near the bodies (11/30/10 Tr. 191; 12/6/10 Tr. 48).

Dr. A. Wayne Williams, an Assistant Medical Examiner, performed the autopsies on the Spevaks' bodies (11/30/10 Tr. 91). Mr. and Ms. Spevak had been repeatedly stabbed in the neck, chest, and abdomen, ***9** most likely with the same knife, and also had suffered blunt-force injuries to their heads (11/30/10 Tr. 95, 114-18, 123, 163). The Medical Examiner's Office determined that the Spevaks' deaths were homicides (11/30/10 Tr. 93).

The Spevaks' daughter, Leah Kanach, testified that certain valuables were missing from the Spevaks' home, including computers, furniture, collectibles, cell phones, and Ms. Spevak's wedding ring (11/30/10 Tr. 67-70). In addition, the Spevaks' car was missing (11/30/10 Tr. 195; 12/1/10 Tr. 14).

That same day, the police found a burning Toyota Scion in an alley directly behind 622 Ingraham Street, N.W., where Angela Hernandez lived (12/6/10 Tr. 106-07). The vehicle identification number (VIN) indicated that it was the Spevaks' car (12/1/10 Tr. 35). Near the burning car, the police found a charred wallet, credit cards, an identification card, and other items belonging to the Spevaks (12/1/10 Tr. 39, 43, 49, 51; 12/6/10 Tr. 89-93; 12/8/10 Tr. 42).

Police crime-scene search personnel found Peiro's fingerprint in the Spevaks' first-floor bathroom (12/6/10 Tr. 155). They also found appellant's fingerprints on a doorjamb between the kitchen and another room (12/6/10 Tr. 156), and on a closet door in the Spevaks' second-floor bedroom (12/6/10 Tr. 157).

***10** The police searched Peiro's home and car pursuant to valid search warrants (12/6/10 Tr. 118). The police found various items belonging to Michael Spevak in Peiro's home, including a driver's license and credit cards (12/6/10 Tr. 126-28). The police analyzed a blood stain they found on the interior of one of the doors of Peiro's car (12/8/10 Tr. 109). The sample contained Mr. Spevak's DNA; the sample also likely contained appellant's DNA (12/8/10 Tr. 109). [9]

Appellant did not present any evidence at trial (12/8/10 Tr. 109).

ARGUMENT

I. The Trial Court Did Not Abuse its Discretion When, after Conducting an Adequate Monroe-Farrell Inquiry, it Declined to Replace Counsel for Appellant.

Appellant claims that he is entitled to reversal of his convictions because the trial court failed to adequately investigate his pre-trial allegations that one of his two trial attorneys had failed to: prepare for trial; provide him with documents; and adequately communicate with him (Appellant's Brief at 23-31) (citing *Monroe v. United States*, 389 A.2d 811 (D.C. 1978), and ***11** Farrell v. United States, 391 A.2d 755 (D.C. 1978)). Appellant's claim lacks merit.

A. Background

On or about September 30, 2010, Judge Rankin received a letter from appellant requesting replacement of appellant's trial counsel, Ferris Bond, and alleging that because Mr. Bond had displayed a lack "of interest in defending" appellant and had failed to communicate with appellant for "7 months," appellant did "not feel safe going to trial with" him (App. at 14). [10]

On October 7, 2010, approximately seven weeks before appellant's trial began, the trial court responded to appellant's letter by appointing John Machado, a Spanish-speaking attorney, as "second counsel" for appellant's trial (R. 24). That same day, the court held a hearing to further address appellant's concerns about Mr. Bond's performance. The hearing included the following colloquy:

Mr. Bond: Let me start by telling you that the letter... you received was not written by Mr. Portillo. Apparently, there are a group of prisoners at the jail that spend ***12** a lot of time in the law library[,] and they indicated to Mr. Portillo that they could help him by writing this letter. The signature on there is also not Mr. Portillo's. Mr. Portillo[,] as I think the court and the United States are aware[,] does not speak English. He has had some concerns. And I think we've straightened them out. But he can speak to that himself. And I can go into more detail about his concerns if the court would like....

The court: Well, let me defer to Mr. Portillo. And if I reach a point [where I'd] rather hear from you[,] I'll come back to you.

Mr. Bond: Very well.

Appellant: I want to tell him that I have requested some papers [in] Spanish from him. I don't know how to write or read in the English language. And I was never given those papers. I would like to request that each time I'm given a paper that it be written in English and in Spanish. Because I don't understand. I do have some papers, but I don't know what is written in them. I feel that this is an attorney who's very busy and he's not trying hard regarding my case.

The court: I'm not clear that I can have every document affecting your case provided to you in English and Spanish. What I have done is to take the unusual step of appointing you a second lawyer who's fluent in Spanish. (10/7/10 Tr. 5-7.)

Shortly thereafter, appellant claimed that although Mr. Machado "speaks Spanish," "he would not go visit me in jail" (10/7/10 Tr. ***13** 8). Appellant added, "I don't feel comfortable with what [Mr. Bond] tell's] me" (10/7/10 Tr. 8). The court replied, "I can't do anything about how comfortable you feel [with Mr. Bond]. See, my job among other things is to make sure that you have effective legal representation. Now for you I've multiplied that by two." (10/7/10 Tr. 8-9.) Later, the court asked Mr. Bond whether he had "investigators working on the case," and he responded, "[w]e do" (10/7/10 Tr. 10).

B. Standard of Review and Applicable Legal Principles

When a defendant raises a specific pretrial challenge "to the effectiveness of counsel... the trial court has a constitutional duty to conduct an inquiry sufficient to determine the truth and scope of the appellant's allegations," in a *Monroe/Farrell* inquiry. *Forte v. United States*, 856 A.2d 567, 574 (D.C. 2004) (citing Monroe, 389 A.2d at 820). "The nature of such inquiry is within the trial court's discretion." *Id.* (citing *Thomas v. United States*, 772 A.2d 818, 821 (D.C. 2001), and *Nelson v. United States*, 601 A.2d 582, 592 (D.C. 1991)). In addition, "the substance of the complaints about counsel's performance governs the nature of the mandated inquiry." *Id.* (quoting *Wingate v. United States*, 669 A.2d 1275, 1281 (D.C. 1995)). Indeed, the trial court's duty is merely "to elicit from counsel any information necessary to rebut or ***14** confirm a defendant's complaint of ineffectiveness, "without prying to a greater extent than necessary into the attorney-client relationship." Id. (citations omitted). *See also Mills v. United States*, 796 A.2d 26, 28 (D.C. 2002). The trial court need not replace counsel "any time a defendant makes such a request," and trial judges are not "obligated to tolerate dilatory and manipulative tactics on the part of defendants calculated to disrupt and to delay the trial process." *Monroe*, 389 A.2d at 820.

C. Discussion

On October 7, 2010, approximately seven weeks before trial, the court held a hearing to address appellant's concerns about his trial counsel. During that hearing, the court heard from appellant's counsel, as well as directly from appellant, and also appointed a Spanish-speaking lawyer to assist appellant's trial counsel during appellant's trial. That inquiry was sufficient to address appellant's conclusory complaints about defense counsel's performance.

During the hearing, appellant complained about his inability to communicate with counsel in English (10/7/10 Tr. 6). The trial court addressed that complaint by appointing Mr. Machado to assist with appellant's trial. [11]

***15** The trial court also heard and addressed appellant's complaint that Mr. Bond was not "not trying hard regarding my case" (10/7/10 Tr. 6). That complaint seemed to call into question counsel's pretrial investigation. In order to address that complaint, the trial court questioned defense counsel on the record about counsel's pretrial investigation, confirming that counsel had begun an investigation, and had "investigators working on the case" (10/7/10 Tr. 10).

Appellant also complained that Mr. Machado never visited him in jail. However, the court had appointed Mr. Machado on the day of the hearing (see R. 24) (October 7, 2010, order appointing Mr. Machado "as second counsel"), thus Mr. Machado had no opportunity to visit appellant in jail before the October 7, 2010 hearing. [12] In addition, the trial court implicitly recognized that, with trial scheduled to begin more than three weeks following the October 7 ***16** hearing, [13] appellant's experienced trial counsel had sufficient time to prepare for trial. *See Yancey v. United States*, 755 A.2d 421, 429 (D.C. 2000) (rejecting ineffective-assistance-of-counsel claim alleging that a week was insufficient for an experienced attorney to prepare for trial). [14]

As in *Forte*, 856 A.2d at 574, the trial court's inquiry into appellant's complaints was legally sufficient. In Forte, this Court rejected a claim "that the trial court failed to conduct a proper *Monroe-Farrell* inquiry because the court did not address [defendant] on the record about his complaints." The Court held that the trial court had adequately inquired into the defendant's concerns -- that defense counsel "had not visited [defendant] nor provided him with any information concerning [his] case" -- where the trial court "ascertained that" defense counsel had "consulted with [defendant]," "engaged in an investigation of the case," and "provided the results of that investigation to the" defendant, notwithstanding the "brevity" and "piecemeal" nature of the trial court's inquiry. Id. at 575-76 (internal punctuation omitted). [15]

***17** Appellant faults the trial court for failing to ask defense counsel "specific" questions during the October 7 hearing (Appellant's Brief at 16). That argument lacks merit. The trial court directed defense counsel to address the allegations set forth in appellant's letter to the court. See 10/7/10 Tr. 5 (court noting that it received "correspondence from Mr. Portillo" and inviting defense counsel to address "what the problems are and how best to resolve" them). In response, defense counsel represented to the trial court that appellant did not write the letter, and had not signed it, and that counsel believed that he had resolved each of appellant's concerns (10/7/10 Tr. 5) (appellant "has had some concerns. And I think we've straightened them out.").

This Court has repeatedly held that the manner of the court's inquiry falls within the court's discretion, and must be informed by the nature of the defendant's complaints. *Forte*, 856 A.2d at 574. *See also Monroe*, 389 A.2d at 821 (there are no specific "questions which trial judges must mechanically recite"). Given the conclusory ***18** nature of appellant's complaints, and defense counsel's representation that the complaints had been addressed to appellant's satisfaction, the court's colloquy with defense counsel and with appellant satisfied the court's obligation under *Monroe* and Farrell. [16]

McFadden v. United States, 614 A.2d 11, 15 (D.C. 1992), cited by appellant at 17, is distinguishable from this case. In McFadden, during a hearing on the day before trial was scheduled to begin, defense counsel stated that he was unprepared for trial. McFadden, 614 A.2d at 15. When trial began the following day, the trial court failed to raise this issue with defense counsel. Here, on the other hand, the court held a hearing approximately seven weeks before the start of appellant's trial, the trial court heard from both defense counsel and appellant during the hearing, and defense counsel represented to the court that appellant's concerns had been resolved.

Similarly, *Nelson v. United States*, 601 A.2d 582 (D.C. 1991), cited by appellant at 18, is distinguishable. In that case, unlike in this case, the trial court never heard from defense counsel at ***19** all. Here, by contrast, defense counsel represented to the trial court on the record that he had resolved appellant's concerns, and that he had begun an investigation.

Pierce v. United States, 402 A.2d 1237 (D.C. 1979), cited by appellant at 20, also is readily distinguishable from this case. In Pierce, unlike in this case, the trial court never heard from the defendant at all. *Id.* at 1240, 1243. Indeed, in Pierce, the defendant was not even present for the court's *Monroe-Farrell inquiry*. *Id.* at 1245 n.8. In addition, in Pierce, the trial court rejected defense counsel's request for appointment of additional counsel to assist in the defense without any discussion of or inquiry into that request. *Id.* at 1244. Here, on the other hand, defense counsel addressed appellant's concerns on the record, appellant addressed the court directly during the *Monroe/Farrell* inquiry in this case, and the trial court appointed additional counsel to assist in appellant's defense. [17] Accordingly, appellant's *Monroe/Farrell* claim lacks merit.

***20 II. The Trial Court Did Not Plainly Err in Monitoring the Government's Initial Closing Argument.**

Appellant claims that the trial court failed to intervene *sua sponte* to correct certain alleged inaccuracies in the government's initial closing argument (Appellant's Brief at 22-25). Appellant's claim lacks merit.

A. Standard of Review and Applicable Legal Principles

Appellant concedes (at 22) that the plain-error standard of review is applicable to his claim. Under that standard, appellant must show (1) "error," (2) that is "plain," and (3) that "affect[s] substantial rights." *United States v. Olano*, 507 U.S. 725, 732 (1993). If those conditions are met, the Court may then exercise its discretion only to avoid a miscarriage of justice, or to correct an error that "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* Appellant bears the burden of proving plain error, and that burden "is, and should be, a formidable one." *Hunter v. United States*, 606 A.2d 139, 144 (D.C.), *cert. denied*, 506 U.S. 991 (1992). Indeed, this Court has held that "reversal for plain error in cases of alleged [impermissible prosecutorial comments] should be confined to particularly egregious situations." *Daniels v. United States*, 2 A.3d 250, 263-64 (D.C. 2010) (quoting *Teoume-Lessane v. United States*, 931 A.2d 478, 495 (D.C. 2007)).

***21** In considering claims of error in closing argument, it is this Court's function to review the record "for legal error or **abuse** of discretion by the trial judge, not by counsel." *Daniels*, 2 A.3d at 263 (quoting *Irick v. United States*, 565 A.2d 26, 33 (D.C. 1989) (citations omitted)). In so doing, the Court first determines "whether the prosecutor' s challenged comments were [impermissible]." *Najafi v. United States*, 886 A.2d 103, 107 (D.C. 2005) (quoting *Irick*, 565 A.2d at 32).

During "closing argument the prosecutor ... may not present new evidence or rely on evidence that has not been presented." *Clayborne v. United States*, 751 A.2d 956, 969 (D.C. 2000) (internal quotations and citations omitted). Counsel may, however, "make reasonable comments on the evidence, and ... argue all reasonable inferences from the evidence adduced at trial." *Id.* *See also Washington v. United States*, *884* A.2d 1080, 1090 (D.C. 2005). "Deciding whether a comment made by counsel is a 'reasonable inference' or 'impermissible speculation, ... is usually a task best suited to the trial judge, who is 'on the spot' and has 'a vantage point superior to"' this *Court's. Gardner v. United States*, 698 A.2d 990, 1001 (D.C. 1997) (quoting *Mills v. United States*, 599 A.2d 775, 785 (D.C. 1991)).

***22 B. Discussion**

1. The Challenged Comments Were Not Impermissible.

Appellant claims, for the first time on appeal, that certain of the trial prosecutor's comments during the government's initial closing argument were unsupported by the record (Appellant's Brief at 22-23). On the contrary, each of the prosecutor's comments was permissible, and, in any event, there was no prejudice to appellant requiring reversal under the stringent plain-error standard of review.

During the government's initial closing argument, the prosecutor commented that, "Angela [was] looking for a place to rob, to burglarize, to steal" (12/9/10 Tr. 9). Appellant argues (at 23) that the prosecutor's comment was unsupported by the record because it conflicted with Peiro's testimony that Angela "said she knew of a house where [the co-defendants] could go and hang out" (Appellant's Brief at 23) (citing 12/7/10 Tr. 195). Appellant is mistaken.

Contrary to appellant's argument, the conclusion urged by the prosecutor -- that Angela directed appellant and Peiro to a house that they could rob -- was reasonably inferrable from the evidence at trial. *See Clayborne*, 751 A.2d at 969 ("counsel is entitled to make reasonable comments on the evidence, and to argue all ***23** reasonable inferences from the evidence adduced at trial"). Indeed, Peiro testified that Angela directed him to the Spevaks' house, and that she told him to park down the street, indicating an attempt to conceal their presence. As they approached the Spevaks' house, Angela told Peiro to return to the car to get a weapon -- a baton. Angela told Peiro to ask for Anna, the Spevaks' former foster daughter, presenting Peiro and appellant with a ruse designed to facilitate their entry into the Spevaks' house. Thus, the prosecutor's comment was a reasonable inference from that evidence, and was not based solely upon the prosecutor's "impermissible speculation." *See Matthews v. United States*, 13 A.3d 1181, 1189 (D.C. 2011) (holding that prosecutor's argument that victim rolled over after being shot was "supported by rational inferences from the evidence and did not extend into 'impermissible speculation"'); *State v. Anthony*, 145 P. 3d 1, 8 (Kan. 2006) (although "it was unclear exactly how the crime occurred, including "in what order the blows fell," prosecutor's argument positing "scenarios consistent with the evidence" was permissible).

Similarly, appellant challenges the prosecutor's comment that the robbery "was planned" and appellant "understood" that plan "all along" (12/9/10 Tr. 12). Appellant contends that the evidence showed merely that he and his former co-defendants were looking for a place to "hang out," and not that they had planned a robbery. On ***24** the contrary, even assuming that Angela, appellant, and Peiro initially were looking for a place to "hang out," the jury could have fairly inferred from the trial evidence that by the time they entered the Spevaks' house, they intended to steal from the Spevaks, not to "hang out" with them. [18] Indeed, as the prosecutor argued to the jury, appellant and his former co-defendants approached the Spevaks' darkened house at approximately 1:30 a.m. (12/7/10 Tr. 284), which gave rise to an inference that they entered with the intent to steal. *See Massey v. United States*, 320 A.2d 296, 299 (D.C. 1974) (jury could infer entry with intent to steal where defendant "made an early morning forcible entry," into darkened house, "attempted to conceal his actions inside the premises," and "attempted to carry away items of value").

Also as in *Massey*, 320 A.2d at 299, appellant and his former co-defendants forcibly entered the Spevaks' home, and attempted to conceal their actions once inside. Indeed, when appellant entered ***25** the Spevaks' home, he had just seen Piero force his way in by pushing Mr. Spevak backwards and choking him (12/7/10 Tr. 205). After appellant and his former co-defendants had located and collected certain valuables, Peiro attempted to conceal the presence of the intruders in the Spevaks' home by turning off the lights (12/7/10 Tr. 196).

In addition, appellant and Peiro armed themselves with a gun and a baton respectively before entering the Spevaks' home (12/7/10 Tr. 191, 198, 200), further supporting an inference that they entered with the intent to steal. *See McKinnon v. United States*, 644 A.2d 438, 442 (D.C. 1994) (citing *United States v. Kearney*, 162 U.S. App. D.C. 110, 113, 498 F.2d 61, 64 (1974) (authorized entrant convicted of burglary based on inference of intent where circumstances included admission to premises upon a pretext, carrying of concealed weapons, and flight from the scene subsequent to commission of robbery)). Indeed, Peiro testified that when he approached the Spevaks' front door, he knew that they were not there to "hang out," because they were armed (12/7/10 Tr. 204). [19] The jury could have fairly inferred that appellant drew the same conclusion.

***26** Furthermore, after Peiro forced his way into the Spevaks' house, appellant and Angela immediately searched for valuables, including in an upstairs bedroom (12/7/10 Tr. 208-09), a private portion of the house, later they gathered and removed valuables from the house (12/7/10 Tr. 225), and divided the cash that they had stolen (12/7/10 Tr. 223, 311-12). Those circumstances also supported the inference that appellant entered the Spevaks' home with the intent to steal. *See Hawthorne v. United States*, 476 A.2d 164, 168 (D.C. 1984) (jury could fairly infer defendant entered home with intent to steal where defendant knew valuables were present in home, home was "ransacked," and defendant possessed property stolen from home); *Massey*, 320 A.2d at 299; *Kearney*, 162 U.S. App. D.C. at 113, 498 F.2d at 64 (sustaining burglary conviction where circumstances supporting inference of entry with intent to steal included flight from the scene subsequent to commission of robbery).

Appellant also challenges the prosecutor's comment, during the government's initial closing argument, that the jury could infer that appellant entered the Spevaks' home with the intent to steal because both he and Peiro attempted to facilitate their entry by using a ruse (asking for Anna). See 12/9/10 Tr. 11 ("according to [Peiro] [appellant] knew exactly what was going on and [appellant] began to ask for Anna as well"). Appellant argues (at 23) that the prosecutor's passing comment was unsupported by the record, because ***27** Peiro did not testify specifically that appellant "knew exactly what was going on," but instead only that appellant repeated what Peiro had said to Mr. Spevak. Appellant's argument lacks merit.

The prosecutor's comment is reasonably understood as arguing that the jury could infer from Peiro's testimony that appellant "knew exactly what was going on" when he attempted to use a ruse to gain entry into the Spevaks' home (12/9/10 Tr. 11).- [20] Indeed, the prosecutor explained to the jury why this was a reasonable inference from Peiro's testimony, "Mr. Spevak is not letting them in. This wasn't a party. This isn't them coming over to have a good time to hang out and drink beer. What was planned and understood all along now happens." (12/9/10 Tr. 12.) That is, appellant asked for Anna because "they [were] not getting in" (12/9/10 Tr. 12). *See Kearney*, 162 U.S. App. D.C. at 113, 498 F.2d at 64 (authorized entrant convicted of burglary where defendant used pretext to enter premises).

As the trial prosecutor explained to the jury, the suggested inference also was supported by appellant's subsequent conduct, ***28** "[d]oes [appellant] take that opportunity to say, oh, I came here for a party to hang out. I came here to drink. No. Because that's not what this was about. It was never about that. What it was about was [appellant] and his two friends going to rob that house." (12/9/10 Tr. 12.) Indeed, the prosecutor's argument was consistent with Peiro's testimony that he understood that they were not "going to the house to hang out" (12/7/10 Tr. 202), and instead they went there to steal (12/7/10 Tr. 289).

2. Appellant Cannot Demonstrate That He Was Prejudiced by the Challenged Comments.

Appellant argues the challenged comments constituted prejudicial plain error (Appellant's Brief at 24). On the contrary, appellant cannot demonstrate that his "substantial rights" were affected, or that any error "seriously affect[ed] the fairness, integrity, or public reputation" of his trial. Olano, 507 U.S. at 732.

First, the trial court repeatedly instructed the jury that: the statements of the lawyers are not evidence (11/30/10 Tr. 28; 12/9/10 Tr. 64); the jury was to decide the case only on the evidence presented during trial (11/30/10 Tr. 27-28; 12/9/10 Tr. 63); and "[i]f any reference by me or the attorneys to the evidence is different from your own memory of the evidence, it is your memory that should control during your deliberations" (12/9/10 Tr. 63). ***29** The jury is presumed to have followed those instructions. *See Richardson v. Marsh*, 481 U.S. 200, 206 (1987) (it is "the almost invariable assumption of the law that jurors follow their instructions") (citation omitted). [21] Accordingly, the court's instructions mitigated any potential prejudice. *See Daniels*, 2 A.3d at 263. *See also Finch v. United States*, 867 A.2d 222, 227-28 (D.C. 2005) (judge's instructions regarding personal opinions of lawyers dissipated effect of impermissible remarks); *Clayborne*, 751 A.2d at 966 n.11 (same).

Second, defense counsel's failure to object to the comments during trial "constitutes some evidence that [the defense] did not immediately perceive the challenged [comments] as prejudicial." *Parks v. United States*, 451 A.2d 591, 613 (D.C. 1982) (citations omitted), *cert. denied*, 461 U.S. 945 (1983).

Third, the challenged comments occurred during the government's initial closing argument. Thus, defense counsel had an opportunity to respond to those comments, and did so (see 12/9/10 Tr. 39) ("Angela says I know a place where we can go hang out.... Nothing said about robbery, nothing said about anything like that."). *Cf. Clayborne*, 751 A.2d at 970 ("jurors do not accept ***30** uncritically everything a prosecutor says in argument ... and we do not see why they would have been blind to [any] gaps in the prosecutor's logic in this instance") (citation omitted).

Finally, appellant cannot show that he was prejudiced because the government presented overwhelming evidence of his guilt. *See Daniels*, 2 A.3d at 263 (even where challenged comments were either "close to the edge of propriety, or cross [ed] the line into impropriety," they did not require reversal under plain-error standard because jury was instructed that counsel's arguments were not evidence, and government had strong case); *Simmons v. United States*, 940 A.2d 1014, 1025-26 (D.C. 2008) (finding comments did not prejudice defendant where government's case was "strong").

Here, the overwhelming evidence against appellant included appellant's fingerprints on a closet door in the Spevaks' bedroom (12/6/10 Tr. 156-57). In addition, Peiro, an eyewitness, testified at length about appellant's participation in the offenses. Peiro's testimony was corroborated in important respects by the physical evidence. For example, Peiro's fingerprints were found in the Spevaks' home (12/6/10 Tr. 155). A search of Peiro's apartment showed that he had some of the items missing from the Spevaks' home (11/30/10 Tr. 67, 73; 12/6/10 Tr. 126-28). There were no signs of forced entry at the Spevaks' home (12/1/10 Tr. 12). The Assistant Medical Examiner's description of the Spevaks' injuries was ***31** consistent with Peiro's testimony, i.e., the Spevaks suffered blunt force and stabbing injuries (11/3010 Tr. 95, 105-10, 114-18), and they were bound with a phone cord (11/30/10 Tr. 127, 193, 199). The police found the Spevaks' car, which had been set on fire, in an alley behind Angela's apartment (11/30/10 Tr. 177; 12/1/10 Tr. 26-29, 35). Nearby, the police found Mr. Spevak's wallet and other items belonging to the Spevaks (12/1/10 Tr. 43, 49, 51). Finally, DNA testing indicated that appellant was in Peiro's car near time of murder (12/8/10 Tr. 109).

Relying on this Court's decision in *Warrick v. United States*, 528 A.2d 438, 442 (D.C. 1987), appellant argues that the government's evidence was weak because the fact that he armed himself before entering the Spevaks' home was insufficient to show that he did so with the intent to steal. However, for purposes of the charge of first-degree burglary, "a jury may infer that the defendant possessed criminal intent at the time of entry when unauthorized presence is aided by other circumstances." *McKinnon*, 644 A.2d at 441 (emphasis added). Such circumstances are those that "might lead reasonable people, based on their common experience, to conclude beyond a reasonable doubt that appellant intended to commit some crime upon the premises." *Id.* (citation omitted).

As discussed supra at pages 21-24, in addition to the fact that appellant armed himself before entering the Spevaks' home, the ***32** government's evidence included numerous "other circumstances" indicating that appellant entered the Spevaks' home with the intent to steal. *See, e.g.*, *McKinnon*, 644 A.2d at 443 (carrying weapon, use of ruse to gain entry, and locking of door supported inference that defendant entered home with intent to assault home's occupant). Thus, contrary to appellant's argument (at 25, 28), this case is unlike *Warrick*, 528 A.2d at 438, and *North v. United States*, 530 A.2d 1161, 1162 (D.C. 1987), where the government failed to prove that the defendant entered the home of another with the intent to commit a crime.

III. The Trial Court Did Not Plainly Err in Instructing the Jury on the Offense of First-Degree Burglary While Armed.

Appellant argues (at 29-33) that the trial court committed plain error in its instructions to the jury concerning the offense of burglary while armed. Specifically, appellant claims that the court's instructions to the jury constructively amended the indictment because they "allowed the jury to find that [appellant] had the specific intent to commit either an assault or theft" when entering the Spevaks' home, whereas "the indictment specified that [appellant] entered the Spevak home with the intent to commit a theft only" (Appellant's Brief at 30). Appellant cannot satisfy the demanding plain-error requirements.

***33 A. Background**

The first count of the indictment in this case (first-degree burglary while armed) provided that:

> On or about November 20, 2008, within the District of Columbia, Jose G. Portillo, ... while armed with a dangerous weapon, that is a firearm, a baton [,] and a knife, entered the dwelling of Michael Spevak and Virginia Spevak. with intent to steal property of another (R. 7 at 2).

The trial court instructed the jury that in order to find appellant guilty of first-degree burglary it must find, inter alia, that "at the time of the entry the defendant intended to steal property of another or to commit the crime of assault. That's important. At the time of the entry that the defendant intended to steal or to commit assault." (12/9/10 Tr. 76.) Appellant's trial counsel did not object to that instruction (see 12/9/10 Tr. 76, 107-08).

B. Legal Principles and Standard of Review

The Fifth Amendment provides that "[n] o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." U.S. Const. amend. V. After an indictment has been returned, "its charges may not be broadened through amendment except by the grand jury itself." *Stirone v. United States*, 361 U.S. 212, 215-216 (1960). This Court has explained that there are two types of alterations to an ***34** indictment that can violate the Fifth Amendment: an amendment and a variance. *Scutchings v. United States*, 509 A.2d 634, 636 (D.C. 1986). *See also Ingram v. United States*, 592 A.2d 992, 1005 (D.C. 1991).

A constructive amendment occurs "if, and only if, the prosecution relies at trial on a complex of facts distinctly different from that which the grand jury set forth in the indictment." *Peay v. United States*, 924 A.2d 1023, 1027 (D.C. 2007) (emphases in

original). *See also Baker v. United States*, 867 A.2d 988, 999 (D.C. 2005) (citing *Carter v. United States*, 826 A.2d 300, 303 (D.C. 2003) (same)).

Because appellant did not object to the trial court's burglary-while-armed jury instruction, as he concedes (at 29), his constructive-amendment claim is subject to review only for plain error. *Smith v. United States*, 801 A.2d 958, 962 (D.C. 2002) ("we now hold that plain error review applies to a claim that an indictment has been constructively amended if an objection has not been made at the trial level"). See also id. at 961-62 (citing *United States v. Cotton*, 535 U.S. 625 (2002), and *Johnson v. United States*, 520 U.S. 461 (1997)). [22]

***35 C. Discussion**

Appellant claims (at 12) that the trial court impermissibly expanded the indictment when instructing the jury on the offense of first-degree burglary while armed by stating that, "[a]t the time of the entry that the defendant intended to steal or to commit assault" (12/9/10 Tr. 76). Even assuming, *arguendo*, that the trial court's instruction constructively amended the indictment, and that any error was plain or obvious, appellant is not entitled to reversal because he cannot satisfy the third and fourth requirements of the plain-error test.

First, appellant argues that his substantial rights were affected because he "had no notice of the government's theory of burglary" (Appellant's Brief at 33). Appellant's argument is unsupported by the record. The government's theory was that ***36** appellant entered the Spevaks' home with the intent to steal, the same language used in the indictment. As discussed supra at pages 21-24, the evidence at trial overwhelmingly showed that appellant entered the Spevaks' home with the intent to rob the Spevaks, not merely to assault them in particular. Appellant did not know the Spevaks (see 12/7/10 Tr. 187-88), and they did not know him (11/30/10 Tr. 72, 75), indicating that he did not enter their home with the intent to assault them. See Warrick, 528 A.2d at 442. In addition, immediately after entry, appellant began to search for valuables to steal. Hawthorne, 476 A.2d at 168. Later, appellant helped to bind and gag the Spevaks but did not assault them. *See Lee*, 699 A.2d at 384 (jury could infer entry with intent to steal where home ransacked and victims bound and gagged). [23]

Moreover, the only theory the trial prosecutor argued to the jury was that appellant entered the Spevaks' home with the intent to steal, the same language used in the indictment. See 12/9/10 Tr. 26 ("The first charge is first degree burglary while armed. The ***37** evidence show[s] that [appellant] entered that house and began to steal things along with his friends."), 55 ("These three went in and burglarized that house, robbed those people and committed those murders."), 57 "[T]hey burglarize that house. They ransack that house. They have stolen from that house."). Because the evidence presented at trial and the government's argument to jury were fully consistent with the language of the indictment, there is no reason to suppose that the result of appellant's trial would have been different even if the trial court's instructions to the jury had tracked the language of the indictment verbatim. *Cf. United States v. Chan Chun-Yin*, 958 F.2d 440, 444, 294 U.S. App. D.C. 222, 226 (finding, on plain-error review, that defendant failed to show miscarriage of justice, where, despite jury instructions that erroneously expanded intent element of offense to include constructive knowledge, substantial evidence showed actual knowledge, both counsel focused closing arguments on actual knowledge, and error was mitigated because jury heard indictment, which contained actual-knowledge requirement), *cert. denied*, 505 U.S. 1211 (1992)

With respect to the fourth requirement of the plain-error test, appellant has not even attempted to establish that any error seriously affected the fairness, integrity, and public reputation of his trial. *Olano*, 507 U.S. at 734. Thus, appellant has abandoned ***38** any argument that he has satisfied that requirement. *See Roy v. United States*, 871 A.2d 498, 505 n.4 (D.C. 2005); *Smith*, 801 A.2d at 962 (following example of *Cotton*, affirming conviction where defendant failed to satisfy fourth requirement of plain-error test, without analyzing third requirement).

Further, any belated attempt by appellant to satisfy the plain-error test's fourth requirement, even if countenanced by this Court, would necessarily fail. The indictment identified in detail the specific date, location, and victims of the first-degree burglary.

Appellant has not identified any deficiency in the defense strategy at trial caused by proof at trial or instructions to the jury that did not conform to the charges in the indictment.

Finally, as discussed *supra*, the evidence overwhelmingly showed that appellant entered the Spevaks' home with the intent to steal. Thus, under the circumstances, "[t]he real threat ... to the 'fairness, integrity, and public reputation of judicial proceedings' would be if [appellant]," despite the strong evidence of his guilt, were to receive a new trial "because of an error that was never objected to at trial." *Cotton*, 535 U.S. at 634; *cf. Peay*, 924 A.2d at 1029-30 (affirming felony-destruction-of-property conviction despite failure of indictment to specify statutorily prescribed value of property, where, *inter alia*, Peay was on notice, at least from time of court's preliminary instructions, that he was being ***39** tried for felony offense; evidence demonstrated that value of property exceeded prescribed amount; and jury was instructed on requisite elements of felony offense); *Smith*, 801 A.2d at 962 (affirming conviction for aggravated assault where Smith failed to object at trial to purported constructive amendment; "there is no risk that the fairness, integrity, or public reputation of judicial proceedings will be affected where the indictment included a citation that encompassed both subsections of the aggravated assault statute, and the evidence amply supported appellant's conviction of aggravated assault"). Accordingly, appellant has failed to shoulder his heavy burden of establishing plain error.

IV. Certain of Appellant's Convictions Should Be Vacated.

We agree with appellant that his convictions for second-degree murder must be vacated because they merge with his convictions for first-degree felony murder of the same victims (Appellant's Brief at 49-50). *See Lester v. United States*, 25 A.3d 867, 872 (D.C. 2011); Baker, 867 A.2d at 1010; *Thacker v. United States*, 599 A.2d 52, 63 (D.C. 1991) (defendant may not be convicted of more than one murder where there is only one killing). [24]

***40** We also agree with appellant that his conviction for first-degree burglary while armed must be vacated because it merges with his conviction for first-degree (felony) murder (first-degree burglary while armed) (Appellant's Brief at 50). *See Baker*, 867 A.2d at 1010; *Whalen v. United States*, 445 U.S. 684, 694 n.8 (1980) (felony murder convictions merge with predicate offense); *Turner v. United States*, 684 A.2d 313 (D.C. 1996) (same); *Everetts v. United States*, 627 A.2d 981, 988 (D.C. 1993) (remanding with directions to vacate conviction for attempted robbery, which was predicate for felony murder), *cert. denied*, 513 U.S. 848 (1994).

Finally, the PFCV convictions associated with appellant's convictions for second-degree murder and first-degree burglary while armed should be vacated. *Lester*, 25 A.3d at 872 (citing *Morris v. United States*, 622 A.2d 1116, 1130 (D.C. 1993)). [25]

***41 CONCLUSION**

WHEREFORE, the judgment of the Superior Court should be affirmed except insofar as this case should be remanded in order to allow the trial court to vacate appellant's convictions for second-degree murder, and first-degree burglary while armed, and the PFCV convictions associated with those offenses.

Footnotes

a Counsel for Oral Argument, 555 Fourth Street, NW, Room 8104, Washington, DC 20530, (202) 252-6829.

1 Citations to the District of Columbia Code refer to the 2001 edition and its supplements. "R." refers to the Record on Appeal. "App." refers to the "Limited Appendix" filed with appellant's brief in this case. Transcript citations refer to date and page number for the trial of this case ("[date] Tr. [page]").

2 / Although Angela Hernandez and Peiro Hernandez share the same surname, they are unrelated (12/7/10 Tr. 178, 180). For the sake of clarity, we will refer to them by their first names. The surname "Hernandez" frequently appears as "Hernandes" in the trial transcripts.

3 / The baton weighed about two pounds (12/7/10 Tr. 200). It had a foam handle, expanded like an antennae, and had a metal ball on one end (12/7/10 Tr. 200).

4 He explained that "[s]omething else was going to happen because if we [were] going there to drink[,] we wouldn't need [any] weapons" (12/7/10 Tr. 202).

5 The Spevaks' daughter, Leah Spevak Kanach, testified that between 1999 and 2005 her parents had fostered Anna Alvarez, who was from El Salvador and spoke Spanish (11/30/10 Tr. 58-59).

6 Peiro entered the Spevaks' home at approximately 1:30 a.m. (12/7/10 Tr. 284).

7 Appellant had taken $300 in cash from the Spevaks' home, which he split equally with Peiro and Angela (12/7/10 Tr. 311-12).

8 Peiro was questioned about his drinking and drug use on the night of the murder (12/7/10 Tr. 262), his attempt to minimize his involvement in the murders when he initially spoke with police (12/7/10 Tr. 321-22), and his grand-jury testimony that, inter alia, appellant took his gun from the glove compartment of Peiro's car (12/7/10 Tr. 279-80), and that both victims were gagged (12/7/10 Tr. 299-300).

9 Appellant could not be excluded as a contributor of the blood sample (12/8/10 Tr. 109). However, DNA testing excluded appellant's former co-defendants as contributors to the sample (12/8/10 Tr. 109).

10 Appellant's letter also states that "it would verge on incompetence fo a lawyer to file an initial pleading without researching such issues as jurisdiction, venue, standing, exhaustion of remedies, proper parties plaintiff and defendant and types of relief available" (App. at 14). That statement does not constitute a specific complaint about counsel's performance falling within Monroe, 389 A.2d at 811, and appellant does not argue otherwise in this appeal.

11 To the extent that appellant's letter complains that his counsel had not communicated with him at all (App. at 14), that complaint was contradicted by the record. During the hearing, appellant conceded that he had received "some papers" from Mr. Bond, and his complaint instead was that he could not understand the documents because they were written in English (10/7/10 Tr. 6). The trial court addressed that complaint by appointing Mr. Machado.

12 The appointment of Mr. Machado, a Spanish-speaking attorney, on the day of the hearing, thus renders irrelevant appellant's argument (at 19) that the trial court failed to "elicit [from Mr. Bond] whether [before the hearing] Mr. Portillo's attorneys had visited him, whether they had communicated with him in a language he could understand, or whether they had advised him of the status of the investigation in his case."

13 / At the time of the hearing, trial was scheduled to begin on November 1, 2010 (10/7/10 Tr. 10).

14 Accordingly, appellant's assertion (at 16) that the trial court never addressed the foregoing concerns is unsupported by the record.

15 Also as in *Forte*, the adequacy of the court's response to appellant's complaints was evidenced by appellant's failure to raise any concerns about his counsel following the October 7 hearing. Indeed, appellant did not raise any concerns about his trial counsel during the pretrial proceedings held on October 28, November 19, and November 29, 2010. Even on appeal, appellant has failed to identify any deficiency in counsel's pretrial performance. For example, appellant has not identified any defense that counsel failed to pursue or any witness counsel failed to contact.

16 Indeed, although "the trial court must put to defense counsel (and to the defendant, if necessary) -- on the record -specific questions designed to elicit whether or not the criteria of professional competence have been met," *Monroe*, 389 A.2d at 821, "the court need not attempt to examine every conceivable deficiency in the representation." *Forte*, 856 A.2d at 574 (quoting *Wingate*, 669 A.2d at 1281).

17 If this Court were to hold that the trial court's inquiries did not satisfy the requirements of *Monroe/Farrell*, the appropriate remedy would be a remand to allow the trial court to conduct proceedings consistent with *Monroe/Farrell*, not a reversal of appellant's conviction. *See Nelson*, 601 A.2d at 585. As explained in note 15 *supra*, appellant suffered no prejudice, let alone "obvious prejudice" requiring reversal instead of remand for a Monroe/Farrell inquiry. *McFadden*, 614 A.2d at 18. Moreover, as explained in the text supra pages 13-17, the trial court's conclusion that appellant's complaints had been adequately addressed was supported by the record.

18 To the extent that appellant is arguing that the government failed to present any *direct* evidence of appellant's intent, and thus the prosecutor's comments were unsupported by the record, that argument lacks merit. It is well established that the government can argue any "rational" inferences from the record, *Matthews v. United States*, 13 A.3d 1181, 1188 (D.C. 2011). Indeed, in *Lee v. United States*, 699 A.2d 373, 383 (D.C. 1997), this Court noted that "[t]o prove burglary, the government must establish that the defendant entered the premises having already formed an intent to commit a crime therein." "Such intent, however, is rarely capable of direct proof, and, unless it is admitted by the accused, it typically must be shown by circumstantial evidence." *Id.*

19 Peiro also testified that he entered the house in order "to steal things" (12/7/10 Tr. 289).

20 It is well established that "a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." *Donnelly v. DeChristoforo*, 416 U.S. 637, 647 (1974). In addition, "[w]e are all mere mortals, and no prosecutor can spontaneously deliver a perfect closing argument." *Dixon v. United States*, 565 A.2d 72, 81 (D.C. 1989).

21 Moreover, both the trial prosecutor and defense counsel reminded the jury that the jury's "recollection controls" (12/9/10 Tr. 57). See also 12/9/10 Tr. 9 ("your recollection will control"), 44 ("use your own recollection").

22 In *Cotton*, the Supreme Court overruled the holding of *Ex Parte Bain*, 121 U.S. 1, 13 (1887), that a defective indictment warranted reversal per se because it deprived the court of jurisdiction; thus "freed from the view that indictment omissions deprive a court of jurisdiction," the Court applied plain-error review to a claim that the trial court had sentenced the defendant on the basis of a drug quantity not specified in the indictment. 535 U.S. at 627-31. In Johnson, the Supreme Court omitted constructive amendments from its list of errors that qualify as structural errors. 520 U.S. at 468-69. In light of these Supreme Court decisions, and *Arizona v. Fulminante*, 499 U.S. 279, 307-10 (1991) (explaining that "most constitutional errors can be harmless"), even preserved constructive amendments no longer should be considered per se reversible. In any event, as in *Baker v. United States*, 867 A.2d 988, 997 n.3 (D.C. 2005), the Court "need not reach that issue" because review in this case is limited to correcting plain error. *See Carter v. United States*, 826 A.2d 300, 303 n.7 (D.C. 2003) (rule that constructive amendment of indictment results in reversal per se is applicable only when "a defendant has preserved the issue in the trial court").

23 The trial evidence clearly showed that the assaults were undertaken in order to facilitate the robbery of the Spevaks, and to ensure that appellant and his former co-defendants were able to flee undetected with the proceeds of the robbery. See 12/7/10 Tr. 289 (appellant and former co-defendants entered Spevaks' home "to steal things"); 205 (Piero choked Mr. Spevak in order to gain entry into house); 211 (Spevaks bound and gagged during robbery); 208-09 (Spevaks forced to cooperate in search for valuables); 214, 222, 230 (Spevaks murdered in order to ensure Spevaks could not contact the police).

24 Leaving appellant's convictions for first-degree (felony) murder to stand "best effectuates the trial court's sentencing plan," *Lester*, 25 A.3d at 872, because the trial court made the sentences for appellant's convictions for first-degree (felony) murder consecutive to each other, and made the sentences for his convictions for second-degree murder while armed and first-degree burglary while armed *concurrent* with the sentences for first-degree (felony) murder (see R. 44). *See Lane v. United States*, 737 A.2d 541, 544 n.6 (D.C. 1999).

25 Although remand is necessary for the trial court to vacate the merged convictions and sentences, contrary to appellant's argument at 33-34, there is no need for resentencing, because the sentence for each of the merged convictions runs concurrently with the sentences imposed for appellant's other convictions. *See Lee v. District of Columbia*, 22 A.3d 734, 737 n.2 (D.C. 2011) (observing that because sentence for conviction subject to merger ran concurrently with sentence for other convictions, "there may be no need for re-sentencing"); *Briscoe v. United States*, 528 A.2d 1243, 1246 (D.C. 1987) (directing vacation of merging conviction, but not resentencing).

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