Circuit Court for Wicomico County
Case No. C-22-CR-17-000481

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 305

September Term, 2018

JERRY WYDELL ALLEN

v.

STATE OF MARYLAND

Meredith,
Shaw Geter,
Alpert, Paul E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Alpert, J.

Filed: May 6, 2019

A jury sitting in the Circuit Court for Wicomico County convicted Jerry Wydell Allen, appellant, of robbery with a dangerous weapon; robbery; two counts of theft of goods valued at less than $100; first-degree assault; second-degree assault; reckless endangerment; and carrying a dangerous weapon openly with the intent to injure. He was sentenced to 16 years of imprisonment for armed robbery. His remaining convictions were merged for sentencing purposes. Appellant raises on appeal the following questions, which we have condensed and slightly rephrased:

I. Did the trial court err when it denied appellant's motion to suppress the show-up identification of him because it was impermissibly suggestive and not otherwise reliable?

II. Did the trial court conduct an inadequate inquiry under Md. Rule 4-215, when appellant asked to discharge his attorney?

III. Did the trial court err when it denied appellant's motion for judgment of acquittal on the charges of: A) carrying a dangerous weapon openly with the intent to injure; B) first-degree assault; and C) robbery with a dangerous weapon?

For the reasons that follow, we shall affirm.

FACTS

The State's theory of prosecution was that on the late evening of May 29, 2017, appellant and two young female accomplices assaulted and robbed Timothy Smith as he was delivering pizzas to a house. Testifying for the State, among others, was Smith and several officers with the Salisbury City Police Department. The theory of defense was lack of criminal agency. A fingerprint examiner testified for the defense. The following was elicited at appellant's trial.

On May 29, 2017, Smith worked as a delivery driver for the Pizza Hut located on Mt. Hermon Road in Salisbury, and around 11:00 p.m., he was directed to make a delivery of four pizzas to 1000 John Street. When he arrived at the house, it appeared vacant -- no outside lights were on but there was a light on inside the house. Smith walked up to the door. A man, identified by Smith in court as appellant, answered the door, and Smith noticed that his eyes were "unusual." The two spoke, and Smith handed appellant the pizzas.

As Smith waited for appellant to pay, Smith was hit on the head from behind. Smith turned and a saw a young woman wearing a "toboggan-type" face mask holding a wooden rod. Because of the blow to the head, Smith "started to see white[.]" He backed about 15 - 20 feet away and told them, "[W]e don't have to do it this way" and that he would "gladly give them some money[.]" Appellant responded, "[T]hat's right, you're gonna give us some money[.]" Around this time, Smith noticed another young woman lingering in the background.

Appellant approached Smith with the two broken rod pieces. Smith grabbed the tops of them, and he and appellant began to wrestle and hit each other. During the scuffle, Smith's glasses fell off. Panicked, Smith pulled out his wallet and handed a "wad of cash" to the other woman, without a mask, who took it. Appellant asked her, "[D]id you get the money?" and she replied, "[Y]es." The first woman entered Smith's jeep. Smith retrieved his glasses, got into the passenger seat, and yelled at her to "get out." She did. As all three of the assailants struck him and his car with their fists and the rod pieces, Smith drove away.

Smith called 911, and he met the police at the Pizza Hut. One of the responding police officers testified that when he arrived, Smith was "physically shaking[,]" "bleeding profusely" from the back of his head, and his shirt was "saturated" with blood. Smith told the police that he was attacked by two young females and one male. He described the male assailant, including that "something [was] wrong" with his eyes. Pictures taken by the police of Smith's bloodied head were admitted into evidence.

About twenty minutes after the police spoke to Smith, the police detained appellant and two 14-year-old females behind a commercial building about 150 yards from where the assault occurred. Appellant was wearing a red jacket, had blood on the knuckles of his hand, and four pizza boxes containing "fresh" pizza were found by the dumpster, about 15 feet from where appellant was detained. In the meantime, the police searched the area around the house where the robbery occurred and found a broken wooden closet rod, which was admitted into evidence, and a Pizza Hut warming bag. A K-9 unit responded to the house and the dog tracked a scent from the house to the area where appellant and the two young women were detained.

Smith was transported by police cruiser from the Pizza Hut to the area behind the commercial building for a show-up identification. From the back seat of the cruiser, Smith identified appellant, who was about 40 feet away, as the male assailant. Smith then went to the emergency room where he received medical treatment, including five staples, for the wound to his head.

Appellant was taken to a police station for questioning. The police noted that he had "an eye impairment" and a "large blood smear" on the backside of his left hand. The

police swabbed appellant's hands and sent the swab to a DNA lab. The swab tested positive for blood and contained Smith's DNA. A swab of the closet rod likewise tested positive for blood and contained Smith's DNA.

The defense called a fingerprint examiner who testified that appellant was excluded as a source of fingerprints on the four fingerprints found on one of the pizza boxes discovered in the area where appellant was detained. The defense introduced into evidence two medical examinations of appellant several months after the incident that indicated that he was legally blind in his right eye, and his left eye had been removed.

DISCUSSION

I.

Appellant argues that the suppression court erred when it denied his motion to suppress the show-up identification of him because it was impermissibly suggestive and not otherwise reliable. The State argues that the show-up was not impermissibly suggestive, but even if it was, there was no error because the identification was reliable. We agree with the State.

Law

"The practice of presenting single suspects to persons for the purpose of identification is not *per se* prohibited." *Green v. State*, 79 Md. App. 506, 514 (1989) (citation omitted). These type of confrontations, called show-ups, are justified by "the desirable objectives of fresh, accurate identification which in some instances may lead to the immediate release of an innocent suspect and at the same time enable the police to resume the search for the fleeing culprit while the trail is fresh." *Foster v. State*, 272 Md.

273, 290 (quotation marks and citations omitted), *cert. denied*, 419 U.S. 1036 (1974). *See also State v. Greene*, 240 Md. App. 119, 139 (2019) ("Many self-evidently suggestive one-on-one show-ups shortly after a crime has occurred are deemed to be permissibly suggestive, and therefore unoffending, because of the exigent need to take quick action before the trail goes cold."). Courts must exclude an out-of-court (extrajudicial) identification, however, when "the confrontation resulted in such unfairness that it infringed [the defendant's] right to due process of law" under the Fifth and Fourteenth Amendments of the United States Constitution. *Stovall v. Denno*, 388 U.S. 293, 297-99 (1967), *overruled on other grounds by Griffith v. Kentucky*, 479 U.S. 314 (1987).

The Court of Appeals has summarized the two-step inquiry to determine admission of an extrajudicial identification:

> The first question is whether the identification procedure was impermissibly suggestive. If the procedure is not impermissibly suggestive, then the inquiry ends. If, however, the procedure is determined to be impermissibly suggestive, then the second step is triggered, and the court must determine whether, under the totality of circumstances, the identification was reliable. If a *prima facie* showing is made that the identification was impermissibly suggestive, then the burden shifts to the State to show, under a totality of the circumstances, that it was reliable.

Smiley v. State, 442 Md. 168, 180 (2015) (quotation marks and citations omitted). "'Suggestiveness' exists where '[i]n effect, the police repeatedly said to the witness, *'This* is the man.'" *Jones v. State*, 310 Md. 569, 577 (1987) (quoting *Foster v. California*, 394 U.S. 440, 443 (1969) (emphasis in *Foster*)), *vacating judgment on other grounds*, 486 U.S. 1050 (1988). In determining whether the State has met its burden of showing that the identification was reliable despite the suggestiveness of the identification procedure, the

United States Supreme Court has suggested a court look to five factors: "'the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.'" *Wood v. State*, 196 Md. App. 146, 161 (2010) (quoting *Neil v. Biggers*, 409 U.S. 188, 199 (1972)), *cert. denied*, 418 Md. 192 (2011).

It is well-settled that when reviewing a lower court's ruling on a motion to suppress we look only to the record of the suppression hearing. *Owens v. State*, 399 Md. 388, 403 (2007) (citation omitted), *cert. denied*, 552 U.S. 1144 (2008). We "extend great deference to the findings of the motions court as to first-level findings of fact and as to the credibility of witnesses, unless those findings are clearly erroneous." *Brown v. State*, 397 Md. 89, 98 (2007) (citation omitted). We also "view the evidence and inferences that may be reasonably drawn therefrom in a light most favorable to the prevailing party on the motion[.]" *Owens*, 399 Md. at 403 (quotation marks and citation omitted)). "In determining whether a constitutional right has been violated, we make an independent, de novo, constitutional appraisal by applying the law to the facts presented in a particular case." *Williams v. State*, 372 Md. 386, 401 (2002) (citations omitted).

Suppression hearing facts

Two police officers with the Salisbury City Police Department, Ed Fissel and Isaiah Barkley, testified at the suppression hearing. Officer Fissel testified that he met Smith, the victim, at a Pizza Hut where Smith described the attack that had just occurred and those involved -- one black male and two younger black females. Smith described the male

assailant as dark-skinned, about 17-19 years of age, six feet three inches tall, chubby, wearing a hooded sweatshirt, and having an eye impairment, explaining that his assailant looked "cross-eyed."

A description of the incident and the assailants was broadcast over the police radio. Officer Barkley testified that within minutes of the broadcast he saw appellant and two younger black females behind a commercial building, about 150 yards from the house where the assault had occurred. The three were detained and the officer noted that appellant had an eye impairment and blood on his left hand. Smith was told that the police had detained "possible suspects," and he was driven to that area for a show-up identification.

When they arrived, appellant was handcuffed and, within several feet of him, were about five police officers and the two young females. Security lights from the building illuminated some of the area. The females and most of the officers were off to the side "in an area of comparative darkness," while one or two officers were next to appellant in the more well-lit area. About ten feet away from appellant was a Pizza Hut box. As Smith sat in the back of the police cruiser, Officer Fissel drove toward appellant with the cruiser's spotlight and headlights shining on him. When Officer Fissel stopped about 60 feet away from appellant, Smith asked him to drive closer. Officer Fissel drove about 20 feet closer and stopped, at which point Smith made a positive identification of appellant as the male assailant. About 20 minutes had elapsed from the time appellant spoke to Officer Smith at the Pizza Hut to the positive identification.

Appellant argues that the show-up identification was impermissibly suggestive because: Smith was told that the police had located possible suspects; appellant was

handcuffed; and multiple officers, two females that matched the description of the other assailants, and a pizza box were present. As to the unreliability of the show-up, appellant's primary argument is that Smith described the male assailant as between 17 and 19 years old when appellant was in fact 38 years old. Appellant also points out that Smith said his assailant was wearing a brown-hooded sweatshirt, but he was wearing a burgundy colored jersey when detained.

There is no evidence that the show-up here was impermissibly suggestive. Contrary to appellant's argument, the police did not tell Smith to identify appellant as his assailant nor did the police engage in any improper activity. Evidence that appellant was in handcuffs and surrounded by police officers and evidence of the crime at the time of the show-up does not rise to the level of improper suggestiveness. *Cf. Anderson v. State*, 78 Md. App. 471, 494 (1989) (where we held that the show-up was not "impermissibly" suggestive where the defendant was identified when face down on the ground surrounded by at least ten armed police officers while radio communications could be overheard describing the suspects as being transported to the scene of the show-up).

We agree with the suppression court that even if the show-up identification of appellant could be viewed as "impermissibly" suggestive, which we do not believe it was, a review of the *Biggers* factors demonstrate that there was no "substantial likelihood of irreparable misidentification." *Biggers*, 409 U.S. at 197. The suppression court noted that Smith had a "pretty good" opportunity to view appellant during the incident, noting the face-to-face interaction and exchange of words at the door of the house and during the altercation. The court also noted that although the accuracy of the description was not

"perfect," it was "pretty good" as appellant was in the range of 6'3" tall, had dark skin, could be described as chubby, and suffered from a visual impairment. The court also noted the relatively short period of time between the crime and the show-up, less than 30 minutes, and that the lighting during the show-up was good.

Given that an estimate of age can vary considerably, particularly where appellant was in the company of two 14-year-old females, and that a shirt can be easily changed, those two discrepancies do not make Smith's identification unreliable under the totality of circumstances. Accordingly, we are persuaded, particularly given the unusualness of appellant's eye impairment and the short period of time between the crime and the show-up identification, the suppression court did not err in ruling that the show-up identification was reliable and in denying appellant's motion to suppress.

II.

Appellant argues that the lower court erred under Md. Rule 4-215 by failing to make an adequate inquiry into his primary reason for wanting to discharge his attorney: that his attorney had failed to convey to him the terms of a plea agreement offered by the State when his attorney told him he would. The State argues that the lower court conducted an adequate inquiry and committed no error in ruling that appellant did not have a meritorious reason to discharge his counsel. We agree with the State.

A defendant in a criminal prosecution has a constitutional right to have effective assistance of counsel and the corresponding right to reject that assistance and represent himself. *See Powell v. Alabama*, 287 U.S. 45, 71 (1932) (recognizing the constitutional right to the effective assistance of counsel) and *Faretta v. California*, 422 U.S. 806, 807

(1975) (recognizing the constitutional right to defend oneself). *See also Snead v. State*, 286 Md. 122, 123 (1979) (recognizing that a defendant has both the constitutional right to the assistance of counsel and the right to proceed *pro se*). Md. Rule 4-215(e) was adopted to protect these constitutional guarantees and provides:

> (e) **Discharge of counsel - Waiver.** If a defendant requests permission to discharge an attorney whose appearance has been entered, *the court shall permit the defendant to explain the reasons for the request*. If the court finds that there is a meritorious reason for the defendant's request, the court shall permit the discharge of counsel; continue the action if necessary; and advise the defendant that if new counsel does not enter an appearance by the next scheduled trial date, the action will proceed to trial with the defendant unrepresented by counsel. If the court finds no meritorious reason for the defendant's request, the court may not permit the discharge of counsel without first informing the defendant that the trial will proceed as scheduled with the defendant unrepresented by counsel if the defendant discharges counsel and does not have new counsel.

(Emphasis added). Md. Rule 4-215(e) demands "'strict compliance.'" *Gonzales v. State*, 408 Md. 515, 530 (2009) (quoting *Johnson v. State*, 355 Md. 420, 451 (1999)). "The provisions of the rule are mandatory and a trial court's departure from them constitutes reversible error." *State v. Hardy*, 415 Md. 612, 621 (2010) (quotation marks and citation omitted).

At the end of the suppression hearing and more than a month before trial, defense counsel advised the court that appellant wished to discharge him as counsel. The court then conducted a six-page inquiry beginning with: "[Appellant], why do you want to discharge [defense counsel]?" The following colloquy occurred:

> THE DEFENDANT -- I presented [defense counsel] with all, all the, all the forms to represent me in a proper manner. I have given him all the doctors' names so he can subpoena them to court. I mean, so he ain't doing nothing that he told me. He told me in the last trial that I had on the 3rd of last month

> *I'll be to see you next week*. And the State on the record say that they gonna amend to the plea agreement, you know what I'm saying, and he was the one that brought the plea agreement to me, or whatever—
>
> THE COURT: I'm sorry, say this last part again?
>
> THE DEFENDANT: The State in open court . . . advised me that they was gonna send me an amended plea agreement, and they told me that on the 3rd, and I'm saying he told me I'm gonna come to see you and discuss that, you understand, because at one time he came to me and he discussed that the State was willing to drop the first degree assault, the weapon, and the robbery, they wanted me to cop out to a second degree assault, you know what I'm saying? So I turned down the ten years for the second degree assault. So they said, the State had said . . . we gonna amend to the plea agreement, and then, and *he told me in open court I'm gonna come and see you next week*. He ain't never come see me, this is the first time I seen, well, no, yesterday was the first time I seen him since he said that, after a month and some change. You know what I'm saying? So he not properly representing me. So if they was gonna put an amended plea agreement together that would've been lower than the ten years that they had offered me, you know what I'm saying, that's what amended means.

(Emphasis added). When the court asked the State about the amended plea agreement, the State advised the court of the terms of the offer. When the court asked appellant if what was described was the amended plea he was waiting for, appellant replied that it was but that he felt his attorney was "leav[ing] me in the blind." The following colloquy then occurred:

> THE COURT: Well, other than the fact that on November the 3rd [defense counsel] said I'll see you next week and you haven't seen him again until today, what other – is there any other reason why you want to discharge him?
>
> THE DEFENDANT: He's not filing none of them motions, you know what I'm saying, like, I mean, different motions could've been filed, you know what I mean?

When the court asked appellant to specify, appellant replied "motions" to challenge the identification of him by Smith. The court pointed out that his attorney had moved to

suppress the identification but the court had ruled against him. The court asked appellant why else he wanted to discharge his attorney. Appellant responded: "Because he not doing his job." When the court asked appellant again to specify, appellant responded that his attorney "don't even want to come see me . . . unless it's a trial." The court stated:

> THE COURT: Well, [appellant], I don't really find that that's a meritorious – the only specific thing that you've mentioned is his failure to file a motion to try to contest the identification that was made, which we just had the hearing on. Otherwise, you said that he hadn't come to see you as often as you would like, but you haven't said anything to cause me to think that that's going to jeopardize the manner in which he represents you at trial.

The court then denied appellant's request to discharge his attorney.

From the above exchange, it is clear that both defense counsel and appellant were aware of an amended plea agreement offered by the State, that defense counsel indicated to appellant an intention to meet with him and discuss the amended plea agreement, and that defense counsel told appellant that he would meet and discuss it with him the following week. Appellant does not claim that his attorney failed to discuss the plea agreement with him before trial, that the plea offer expired before he had a chance to discuss it with his attorney, or that he suffered any consequences because his attorney did not "come by" and discuss it with him when he said he would.

The lower court asked appellant, several times, why he wished to discharge counsel, provided appellant an opportunity to explain his reasons, and considered the given explanations. We agree with the State that the court's repeated inquiry into why appellant wanted to discharge counsel and its allowing appellant an opportunity to explain his reasons, combined with the fact that appellant was aware of the terms of the amended plea

agreement and his trial was more than a month away at the time he asked to discharge his attorney, was sufficient to comply with the requirements of Md. Rule 4-215. *See Pinkney v. State*, 427 Md. 77, 93 (2012) (stating that "[o]ur case law indicates that the process outlined in Rule 4-215(e) begins with a trial judge inquiring about the reasons underlying a defendant's request to discharge the services of his trial counsel and providing the defendant an opportunity to explain those reasons.") (citation omitted).

III.

Appellant argues that the trial court erred when it denied his motion for judgment of acquittal on the charges of: A) carrying a dangerous weapon openly with the intent to injure; B) first-degree assault; and C) robbery with a dangerous weapon. The State disagrees, as do we. We shall address each argument in turn.

The standard for appellate review of evidentiary sufficiency is "'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Taylor v. State*, 346 Md. 452, 457 (1997) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). "That standard applies to all criminal cases, regardless of whether the conviction rests upon direct evidence, a mixture of direct and circumstantial, or circumstantial evidence alone." *Smith v. State*, 415 Md. 174, 185 (2010) (citation omitted). "Where it is reasonable for a trier of fact to make an inference, we must let them do so, as the question is not whether the [trier of fact] could have made other inferences from the evidence or even refused to draw any inference, but whether the inference [it] did make was supported by the evidence." *State v. Suddith*, 379 Md. 425, 447 (2004) (quotation marks and citation

omitted). This is because weighing "the credibility of witnesses and resolving conflicts in the evidence are matters entrusted to the sound discretion of the trier of fact." *In re Heather B.*, 369 Md. 257, 270 (2002) (quotation marks and citations omitted). *See Owens v. State*, 170 Md. App. 35, 103 (2006) (observing that "a witness's credibility goes to the weight of the evidence, not its sufficiency") (citations omitted), *aff'd*, 399 Md. 388 (2007), *cert. denied*, 552 U.S. 1144 (2008). Thus, "the limited question before an appellate court is not whether the evidence *should have or probably would have* persuaded the majority of fact finders but only whether it *possibly could have* persuaded *any* rational fact finder." *Allen v. State*, 158 Md. App. 194, 249 (2004) (quotation marks and citation omitted).

A. Carrying a dangerous weapon openly with the intent to injure

Appellant argues that the trial court erred when it denied his motion for judgment of acquittal on the charge of carrying a dangerous weapon openly with the intent to injure. *See* Md. Code Ann., Criminal Law Article ("Crim. Law") § 4-101(c)(2) (providing that "[a] person may not wear or carry a dangerous weapon . . . openly with the intent or purpose of injuring an individual in an unlawful manner."). Citing *Chilcoat v. State*, 155 Md. App. 394, *cert. denied*, 381 Md. 675 (2004), appellant argues that the State failed to prove that he (or one of his accomplices) "carried" the closet rod within the meaning of the statute. The State disagrees, as do we.

In *Chilcoat*, a woman and her current boyfriend were at her home when her ex-boyfriend, Chilcoat, arrived. Chilcoat entered the home through the back door and began arguing in the kitchen with the new boyfriend, with each telling the other to leave. 155 Md. App. at 398. As Chilcoat walked toward the living room, he turned around and said,

"I'll show you who's going home." *Id*. He then walked to a small table, picked up a beer stein, walked back to where the new boyfriend was standing, and hit him on the back of the head with it four or five times. Based on that conduct, appellant was convicted of first-degree assault and carrying a dangerous weapon openly with the intent to injure. *Id*. at 396.

On appeal, we reversed Chilcoat's conviction for carrying a weapon openly with the intent to injure, holding that there was insufficient evidence that Chilcoat "carried" the dangerous weapon, the beer stein. *Id*. at 404-413. In reaching that conclusion, we first looked to several definitions of "carrying," writing:

> "Carry," taken in its plain meaning, is defined as "to move while supporting; convey; transport" or "to wear, hold, or have around one." *The Random House Dictionary of the English Language* 227 (1983). Similarly, "wear" is defined as "to carry or have on the body or about the person as a covering, equipment, ornament, or the like." *Id*. at 1616. Recently, the Supreme Court of the United States utilized *Black's Law Dictionary's* definition of "Carry arms or weapons" as "[t]o wear, bear or carry them upon the person or in the clothing or in a pocket, for the purpose of use, or for the purpose of being armed and ready for offensive or defensive action in case of a conflict with another person." *Muscarello v. United States*, 524 U.S. 125, 130 (1998). ... However, the Supreme Court in *Muscarello* also recognized another "form of an important, but secondary, meaning of 'carry,' a meaning that suggests support rather than movement or transportation, as when, for example, a column 'carries' the weight of an arch. In this sense a gangster might 'carry' a gun (in colloquial language, he might 'pack a gun') even though he does not move from his chair." The statute plainly states that it is a violation for a person to "wear or carry" a concealed deadly weapon. ... We hold that the Legislature ... intended that the weapon needed to be on the body or about the person and concealed. It is not necessary that the weapon actually be transported from place to place.

Id. at 407–08 (2004) (quotation marks and citations omitted). We also reviewed other "carrying" cases in our State and other jurisdictions. *Id*. at 408-12. In reversing, we

emphasized that the State was required to prove "more than the mere use of the weapon[]" and noted that Chilcoat "merely pick[ed] up a beer stein that was convenient to him and walk[ed] a few steps with it to reach the victim." *Id*. at 409. We noted that Chilcoat, in picking up the beer stein, had no other purpose than to injure the victim, and that "Chilcoat's movement while holding the beer stein was necessary to commit the assault[.]" *Id.* at 412.

If the facts here were limited to appellant advancing on Smith, after picking up from the ground two pieces of a broken closet rod, we might agree with appellant that there was insufficient evidence of carrying to sustain his conviction. The State, however, proceeded under an accomplice theory of liability. *See Diggs & Allen v. State*, 213 Md. App. 28, 90 (2013) ("[W]hen two or more persons participate in a criminal offense, each is responsible for the commission of the offense and for any other criminal acts done in furtherance of the commission of the offense[.]") (quotation marks and citations omitted), *aff'd*, 440 Md. 643 (2014). Appellant's accomplice "came to the party" armed and ready to inflict offensive contact to help effectuate the plan to rob Smith, making the facts of this case far different from those in *Chilcoat*. We emphasize that unlike the facts in *Chilcoat*, the purpose in using the rod was not to commit an assault, in isolation, but part of a larger plan to effectuate a robbery. Additionally, a closet rod is not an object one would expect to find lying about the outside of a house, but rather an item that a jury could infer was carried to the area to help achieve the robbery. Accordingly, we are persuaded that the trial did not err in denying appellant's motion for judgment of acquittal on the charge of carrying a

weapon openly with the intent to injure because there was sufficient evidence from which a jury could infer that appellant, under accomplice liability, carried the closet rod.

B. First-degree assault

Appellant argues that the trial court erred when it denied his motion for judgment of acquittal on the charge of first-degree assault because the State failed to prove that he (or his accomplice) intended to cause a "serious physical injury." Appellant makes light of the injury to Smith, pointing out that Smith was hit in the head a single time by a teenage girl, that Smith was not rendered unconscious, and that the injury needed only five staples to treat. To support his argument, appellant again cites the facts of *Chilcoat*, where the ex-boyfriend hit the new boyfriend on the head multiple times with a beer stein that was heavy enough to crush his skill and where the victim was knocked unconscious. Appellant intimates that this is the standard by which serious physical injury is measured. The State disagrees, as do we.

Criminal Law § 3-202 provides: "A person may not intentionally cause or attempt to cause serious physical injury to another." "Serious physical injury" is defined as physical injury that "(1) creates a substantial risk of death; or (2) causes permanent or protracted serious: (i) disfigurement; (ii) loss of the function of any bodily member or organ; or (iii) impairment of the function of any bodily member or organ." Crim. Law § 3-201(d). "[A] jury may infer the necessary intent from [the defendant]'s conduct and the surrounding circumstances whether or not the victim suffers such an injury." *Chilcoat*, 155 Md. App. at 403 (citation omitted). A jury may also "infer that one intends the natural and probable consequences of his act." *Id*. (quotation marks and citation omitted).

Examples of head trauma leading to death are abundant in Maryland case law. *See Gray v. State*, 107 Md. App. 311, 330 n.8 (1995), *rev'd on other grounds*, 344 Md. 417 (1997), *vacated*, 523 U.S. 185 (1998) (medical examiner testified that trauma to the head, such as hitting one's head on a hard surface, lead to death of the victim) and *Ledbetter v. State*, 224 Md. 271, 272–73 (1961) (decedent died several hours after being struck in the jaw, falling, and hitting the back of his head on the street or curb). Moreover, Crim. Law § 3-202(a)(1) prohibits not only causing serious physical injury but also "attempt[ing]" to cause serious physical injury and or "protracted serious . . . impairment of the function of any bodily member or organ."

As the State correctly notes, the specific facts of *Chilcoat* do not set forth the minimum amount of evidence required to sustain a first-degree assault conviction. A juror could infer that in sneaking up behind the victim, appellant's accomplice positioned herself for maximum effectiveness in her aim, and Smith testified that after he was hit he "saw white." In fact, she hit him so hard that the solid wooden rod broke in two. Smith testified that "I had felt my shirt and I thought it was, I thought it was all sweat, but then I looked at my hand and saw that I was completely covered in blood." He testified that he was scared and wondered "how much was a safe level of blood to lose[.]" The jury had before it Smith's and the responding police officer's testimony as to the injury, photographs of and medical records detailing Smith's injuries, and the actual rod from which to infer that appellant's accomplice attempted to cause serious physical injury. While the facts here are not as egregious as those in *Chilcoat*, we refuse to second-guess the jury's determination to convict appellant of first-degree assault under these circumstances. *See Veney v. State*,

251 Md. 182, 201 (1968) ("[T]he Court of Appeals does not weigh the evidence presented to the jury, but only determines its sufficiency to take a particular issue, or the entire case, to the jury. To set aside the jury's verdict we must be able to say there was no legally sufficient evidence from which the jury could find him guilty beyond a reasonable doubt.") (citations omitted), *cert. denied*, 394 U.S. 948 (1969).

C. Robbery with a dangerous weapon

Appellant argues that the trial court erred when it denied his motion for judgment of acquittal on the charge of robbery with a dangerous weapon because the State failed to prove that the closet rod qualified as a dangerous weapon. The State disagrees, as do we.

Criminal Law § 3-403(a)(1) provides that "[a] person may not commit or attempt to commit robbery . . . with a dangerous weapon[.]" The statute does not define the term "dangerous weapon" but the Court of Appeals has developed three objective tests, only one of which need be satisfied, in determining that an object is a dangerous weapon:

> [The object] must be (1) designed as anything used or designed to be used in destroying, defeating, or injuring an enemy, or as an instrument of offensive or defensive combat; (2) under the circumstances of the case, immediately useable to inflict serious or deadly harm (*e.g.*, unloaded gun or starter's pistol useable as a bludgeon); or (3) actually used in a way likely to inflict that sort of harm (*e.g.*, microphone cord used as a garrote).

Handy v. State, 357 Md. 685, 693 (2000) (quotation marks and citations omitted).

Appellant argues that the rod, which he admits was made of solid wood and not hollow, did not fall within any of the above three categories. Appellant explains that it was not sufficiently heavy to meet the first or second category, and it fails to meet the third category for the reasons he advanced above as to why he and his accomplice did not cause

serious physical injury to Smith, but rather merely gave Smith "a minor cut[.]" We can quickly dispose of appellant's argument. Positioning oneself behind a person and striking a blow with a solid wooden rod at the person's head, who is stationary and unaware of the impending blow, is using an object in a way to inflict serious or deadly harm under the circumstances presented. Because the closet rod was wielded and utilized in such a way as to cause serious or deadly harm, we find no error in the trial court's denial of appellant's motion for judgment of acquittal.

JUDGMENTS AFFIRMED.

COSTS TO BE PAID BY APPELLANT.