Circuit Court for Prince George's County
Criminal Trial CT140938X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 783

September Term, 2017

THOMAS E. HOLLAND

v.

STATE OF MARYLAND

Eyler, Deborah S.,*
Friedman,
Alpert, Paul E.
(Senior Judge, Specially Assigned),
JJ.

Opinion by Alpert, J.

Filed: September 26, 2018

*Deborah S. Eyler, J., participated in the hearing and conference of this case while an active member of this Court; she participated in the adoption of this opinion as a specially assigned member of this Court.

On January 26, 2014, during a weekend visit with his father, appellant Thomas E. Holland, three-year-old Jayson Holland died. After an autopsy revealed that Jayson was poisoned by "the combined toxic effects of cocaine, codeine, diphenhydramine,[1] and acetaminophen[,]" appellant was charged in his son's death. A jury in the Circuit Court for Prince George's County acquitted appellant of first degree premeditated murder, second degree murder, and first degree assault, but convicted him of second degree assault, for which he was sentenced to ten years.

In this timely appeal challenging that conviction, appellant raises the following questions:

1. Was it error to refuse to give a missing witness instruction?
2. Was it error to exclude evidence of Robert McRay's criminal record for drug offenses?
3. Was it error to give an incomplete jury instruction on the elements of second degree assault?
4. Was the evidence insufficient to sustain a conviction for second degree assault?

Concluding there was no error and sufficient evidence to support the verdict, we shall affirm appellant's conviction.

[1] Diphenhydramine is the active ingredient in Benadryl and similar allergy medications.

FACTUAL AND PROCEDURAL BACKGROUND

Throughout appellant's nine-day trial, the State's prosecution theory was that in order to avoid paying child support, appellant killed his son by feeding him lethal amounts of four drugs. Appellant's defense focused on unanswered questions about how the drugs were administered to Jayson, pointing out that police failed to investigate the possibility that Jayson drank the fatal dose from a cup that had been sent with him when appellant picked the child up from his mother's residence.

It was undisputed that in 2009, appellant and Shinee Hicks met through a website that facilitates personal introductions. Although appellant thereafter began a long-term relationship with Vinita Edmonds, by that time, Ms. Hicks had become pregnant.

Jayson Holland was born on July 27, 2010. Appellant came to the hospital and visited Jayson regularly for his first months, while continuing his relationship with Ms. Edmonds.

Eventually, after DNA tests confirmed appellant's paternity, his visitation and financial obligations were resolved through a series of contested court proceedings that caused acrimony between appellant and Ms. Hicks. The court awarded appellant joint legal custody, with weeknight and weekend visits and required him to make child support payments biweekly. Although appellant made payments, at trial in May 2017, his child support arrearage was $4,551.58.

Appellant had previously "raised up" and paid support for another child whom he believed to be his. As a result of a child support-related paternity test, appellant learned

that the girl, then nine years old, was not his biological daughter. Eventually, when the child's mother married another man, appellant was no longer involved in the child's life.

In January 2014, Jayson Holland was living with his mother, Shinee Hicks, in a residence they shared with Carol Unger, Hicks's mother, and Robert McRay, who was Unger's "boyfriend at the time." At trial, Hicks and Unger complained that appellant "never picked up" Jayson "on his scheduled time"; that he rarely exercised his visitation rights; and that when he did, they "never knew when he was coming."

Appellant and Ms. Edwards disputed that claim, testifying that Jayson had regular visits with appellant, who furnished his townhome with furniture, clothing, and toys for Jayson. Appellant countered that it was Hicks who was "not honoring the visit agreement," causing him to file three contempt petitions between February 2012 and December 2013.

On Friday evening, January 24, 2014, appellant came to Ms. Hicks's door to pick up Jayson for a weekend visit. The boy was not ready because, Ms. Hicks claimed, she again did not know appellant was coming. While appellant waited in his car, Jayson was readied for the visit. Eventually, Robert McRay carried Jayson to appellant's car.

According to appellant, McRay handed him "a freezer bag with two slices of pizza in it and a sippy cup"[2] with "a bluish top" and "liquid in it." When appellant and Jayson

[2] Ms. Hicks and Ms. Unger disputed this, testifying that although they had ordered pizza before appellant came, it was not delivered until after Jayson left with his father and that appellant had been advised that Jayson had not yet eaten dinner.

got home, appellant gave his son the pizza, along with some French fries and drink from appellant's carryout meal. Jayson left the cup in the car.

The next day, appellant, Jayson, and Ms. Edmonds went to a buffet for dinner, then shopped at a store where appellant bought Jayson clothing, including matching pajamas and slippers. When Ms. Edmonds was dropped off at her home, Jayson was in his car seat.

According to appellant, he and Jayson arrived home around 10:30 p.m. Jayson had fallen asleep in the car. Appellant took off the boy's jacket, shirt, and shoes, then tucked him in on a pallet of blankets and a pillow that appellant had made on the floor the previous night, downstairs in front of the television.

Appellant testified that when he came downstairs around 8 a.m. on Sunday, January 26, Jayson was still laying on the pallet. Thinking his son was still asleep, appellant went straight into the kitchen and prepared their breakfast. Appellant then tried to wake Jayson, who "was unresponsive." Appellant immediately "scooped up" his son, put him in his car, and drove to the emergency room at United Medical Center/Children's National Hospital.

When appellant came in the door of the emergency room, calling out that his son was not breathing, a nurse went to appellant's car to remove the child. Although Jayson's body was "limp," "his extremities were all stiff with rigor mortis," which the medical examiner explained would start to appear four hours after death. Efforts at cardio-pulmonary resuscitation failed, and Jayson was pronounced dead at 9:01 a.m. that Sunday morning.

At the hospital, police interviewed appellant, as well as Vinita Edmonds and her mother, who came to the hospital after appellant called. Because the child's death triggered a routine police investigation, police obtained appellant's consent to search his car and home. Photographs of his vehicle interior, taken in the hospital parking lot, show a plastic bottle, with a lid equipped with a retractable straw, on the back seat near Jayson's car seat. But police did not seize or test anything from the vehicle before it was returned to appellant.

The search of appellant's townhouse later that day revealed Jayson's pallet and their uneaten breakfasts, as appellant had described. None of the drugs later found in Jayson's system were in appellant's home, nor was any other controlled dangerous substance. Likewise, there was no paraphernalia or "drug-related" material found in appellant's car or residence.

Police did not ask to search the Hicks household, either on the day Jayson died or thereafter. Nor was Robert McRay further investigated. At trial, McRay's whereabouts were unknown.

Autopsy results, including toxicology screens, revealed that "[t]he cause of Jayson's death" was the "combined toxic effects of cocaine, codeine, diphenhydramine and acetaminophen," which were found in Jayson's gastric contents and blood. According to the medical examiner, the concentrations for each of those drugs were extremely high and

must have been "taken together" orally.[3] The medical examiner testified that "if Jayson had consumed each one of them individually, after ingesting the first one, he would have had neither the desire nor the physical ability to ingest the other three."

The medical examiner also explained that Jayson suffered seizures and vomiting, resulting in aspiration of his own vomit. Given the concentrated amounts of each drug in Jayson's body, and the condition of his organs, the medical examiner estimated that the child lived "at least four hours after ingesting these drugs." She concluded that the manner of death was homicide, explaining that "the only way it would be an accident would be if Jayson had ingested these substances individually and I just don't think he did that. . . . [T]his is not something that he prepared on his own, something that was prepared for him."

[3] The toxicologist testified that the amount of drugs in Jayson's system was "very, very large" and unusual, explaining with respect to each of the four drugs:

- **Cocaine**: whereas the "majority" of over 2,000 positive cases he had tested had values between .02 and .03 mg/liter, Jayson's femoral blood sample had a "huge value" of 6.6 milligrams per liter.
- **Codeine:** whereas most positive values for an adult taking a Tylenol III would be around .03 milligrams per liter, Jayson's value was 1.6.
- **Diphenhydramine**: whereas "most adults can start experiencing toxic effects at one milligram per liter[,]" and the values of suicide victims "can be anywhere between six and twelve," Jayson's value was "18 milligrams per liter."
- **Acetaminophen:** whereas a value of "seventy-seven milligrams per liter would be a very high [value] for a child[,]" Jayson's value was "extremely high" at 588 milligrams per liter.

DISCUSSION

I. Missing Witness Instruction

Appellant contends that the trial court erred in refusing to give a missing witness instruction stemming from the State's failure to present testimony from Robert McRay, who carried Jayson and the cup to appellant's car on Friday evening. The State counters that because the defense failed to satisfy the requirements for giving such an instruction, the trial court did not abuse its discretion in declining to give it. For the reasons explained below, we agree with the State.

A. Standards Governing Missing Witness Instructions

In *Harris v. State*, 458 Md. 370 (2018), the Court of Appeals recently reviewed the standards governing missing witness instructions. Writing for a majority of the Court, Judge McDonald explained that "the missing witness rule" typically refers to an "adverse inference" that a jury may be asked to draw based on the "failure to call a witness peculiarly in the control of" one party, which is "that the witness would have testified unfavorably to" that party. *Id*. at 376-77. The

> related pattern jury instruction sometimes used by trial courts in Maryland [is] known as the missing witness instruction. In that instruction, the trial court instructs the jury that, if a witness likely could have given important evidence in the case and it was peculiarly within the power of one party to produce that witness but the witness was not called and the individual's absence was not adequately explained, the jury may infer that the witness would have testified unfavorably to that party.

Id. at 377.

The Court explained why a missing witness instruction has been disfavored when sought by the prosecution:

> In a criminal prosecution, the State bears the burden of proof beyond a reasonable doubt on all elements of the crimes charged and a defendant has no obligation to testify, to call witnesses, or to produce evidence. When a trial court gives a missing witness instruction at the behest of the prosecution against the defendant, the court essentially endorses the particular inference that the prosecutor asks the jury to draw against the defendant. In our system of justice, this should rarely—if ever—be done, as it may be at odds with the constitutional principles that govern a criminal case. Even in the limited circumstances in which a prosecutor may legitimately urge the jury to draw an inference adverse to the defendant under the missing witness rule, there is no need for the court to endorse that element of the prosecutor's argument.

Id.

The *Harris* Court set forth the following legal standards governing a decision on whether to give a missing witness instruction:

> In a criminal jury trial, the trial court "may, and at the request of a party shall, instruct the jury as to the applicable law and the extent to which the instructions are binding." Maryland Rule 4-325(c). **Instructions on the law may cover such things as the burden of proof, presumption of innocence, and the elements of the crimes charged. However, instructions as to facts and factual inferences are normally not required. A missing witness instruction, which concerns an inference to be drawn from evidence—or the lack thereof—is of the latter variety. Thus, a trial court has discretion not to give a missing witness instruction even if a party requests the instruction and the necessary predicate for such an instruction has been established. A trial court has no discretion to give a missing witness instruction where the facts do not support the inference.**
>
> We review a trial court's decision to give a jury instruction concerning inferences to be drawn from the absence of evidence for abuse of discretion. A trial court abuses its discretion if it commits an error of law in granting or denying a request for such an instruction. "Thus, while the trial court has

> discretion, we will reverse the decision if we find that the defendant's rights were not adequately protected."

Id. at 405-06 (citations and footnote omitted; emphasis added).

Synthesizing precedent limiting the use of missing witness instructions, the Court distilled the following principles, establishing an analytical framework for determining whether a missing witness instruction is warranted:

> • Basic prerequisites:
>
> (1) There is a witness
>
> (2) Who is **peculiarly available to one side because of a relationship of interest or affection**
>
> (3) Whose testimony is important and non-cumulative
>
> (4) Who is not called to testify
>
> • Whether a Witness is Peculiarly Available:
>
> An accomplice-defendant relationship does not necessarily mean that the accomplice is "peculiarly available" to the defendant given the possibility that the accomplice would assert the privilege against self-incrimination. A witness who will assert the privilege against self-incrimination is not "available" and cannot be the subject of a missing witness instruction. If a "missing" witness claims his or her privilege against self-incrimination, that claim may be tested outside the jury's presence.
>
> • Missing Witness Argument versus Missing Witness Instruction:
>
> In cases in which it may be appropriate for the prosecutor to ask the jury to draw a missing witness inference adverse to the defendant, the trial court should not necessarily give a missing witness instruction. A trial court should be "especially cautious" in considering whether to give a missing witness instruction adverse to a defendant in a criminal case.

> • Procedure:
>
> > When a party intends to ask the trial court to give a missing witness instruction, the party should give advance notice to the opposing party and raise the issue at a time when the opposing party has an opportunity to call the allegedly missing witness or provide proof that the witness is not peculiarly available to that party.
>
> • No–Inference Instruction:
>
> > In some circumstances in which a defendant has not called a witness that might be thought to be favorable to the defendant, the trial court may not give a missing witness instruction and, indeed, could be required to give, at the defendant's request, an instruction that no adverse inference should be drawn by the jury against the defendant.

Id. at 404-05 (citations and footnote omitted; emphasis added).

The issue in *Harris* was whether the trial court erred in giving a missing witness instruction against a defendant

> charged with various offenses arising out a home invasion and robbery at an apartment in Baltimore City. None of the victims of the crime identified Mr. Harris as a participant in the robbery; the only evidence linking him to the crime was a latent fingerprint examination that matched prints found on pill bottles at the apartment to prints on file for his left hand, which had previously been disabled in an industrial accident. Mr. Harris testified that he had been at his mother's home on the night of the robbery, but his mother did not testify. At the suggestion of the trial court, the prosecutor requested a missing witness instruction that advised the jury that it could infer from the mother's absence that she would have testified unfavorably to Mr. Harris. The trial court gave that instruction and, after a lengthy deliberation, the jury convicted Mr. Harris of some of the charges related to the robbery and acquitted him of others.

Id. at 377-78.

With respect to the "peculiarly available" requirement, the majority held that the mere existence of a parent-child relationship was not a sufficient factual basis for the trial court's determination that the defendant had control over his mother, reasoning:

> In considering whether to give the missing witness instruction as to [the defendant's mother,] Ms. Fallin, the Circuit Court understood that an absent witness must be "peculiarly available" to one side for the missing witness rule to be invoked. However, its consideration of that issue was limited. It was undisputed that Ms. Fallin was physically available to both the prosecution and the defense and could have easily been subpoenaed by the State as well as Mr. Harris. The question was whether she was unavailable to the State as a practical matter. The Circuit Court relied solely on the fact that she was the mother of Mr. Harris.
>
> Although courts have referred to relationships of "interest or affection" as supporting such a finding, a mother-son relationship does not *per se* render a mother "peculiarly available" to her son. *See Dansbury v. State*, 193 Md. App. 718, 748 (2010) (defendant's mother and aunt not peculiarly available to defendant when they were outside the courtroom during trial); *Hayes v. State*, 57 Md. App. 489, 499-500, *cert. denied*, 300 Md. 90 (1984) (defendant's brother-in-law not peculiarly available to defendant); *see generally* Annotation, *Adverse presumption or inference based on party's failure to produce or examine family member other than spouse—modern cases*, 80 ALR 4th 337, § 5. "The mere fact that a witness may personally favor one side over the other does not make that witness peculiarly unavailable to the other side." *Bereano*, 403 Md. at 744. In this case, the Circuit Court's analysis began—and ended—with the family relationship between Mr. Harris and Ms. Fallin: "It's his mother."

Id. at 407-08.[4]

[4] On this point, Judge Adkins dissented from the Majority's reasoning, explaining:

> Here, the trial judge had more than the naked parental status to support her instruction. Mr. Harris lived with his mother from November 2013 until January 2014 without paying rent; in 2008 or 2009 he gave his mother $75,000 from a workers' compensation settlement and had given her money

(continued)

This case differs from *Harris* and other missing witness cases because it was appellant, rather than the State, who requested the missing witness instruction. When a defendant asks for a missing witness instruction, as in this case, the trial court need not be

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at other times. She was absent the day the defense presented its case, even though defense counsel had told the jury she would offer an alibi. Mr. Harris testified that he had been at his mother's home on January 16, 2014, the night of the robbery. All of these facts support the trial judge's discretionary decision to grant the missing witness instruction.

The Majority discounts the closeness and strength of this parental relationship, citing Ms. Fallin's consent to the police searching her home. In doing so, I submit, the Majority improperly invades the province of the trial judge. A reasonable trial judge could certainly conclude that Ms. Fallin gave her consent for reasons other than disinterest in her son's welfare—such as fear of what the police would do if she refused. We should not reverse that decision based on our view of why she gave her consent.

In holding that the trial court erred in giving the missing witness instruction the Majority relies in large part on "developments in constitutional law, changes in the rules of evidence and discovery, and questions concerning the accuracy of the adverse inference promoted by the missing witness rule . . . ." Maj. Op. at 389. To be sure, the constitutional implications, and the policy concerns reflected in the abandonment of the rule in other states are fair reasons to question the wisdom of the missing witness rule. I do not disagree with these points, and maybe, eventually jettison of the rule will prove to be the correct course.

But the Majority does not abandon the missing witness rule—it only cabins the rule to "the rare criminal case in which a missing witness instruction adverse to a defendant may be appropriate . . . ." Maj. Op. at 413. In my view, if such a case exists, this is it. The parental bond, living arrangement, and prior financial dealings together with the opening statement promising Ms. Fallin as an alibi witness, combine to create a circumstance that more than justified the trial court's discretionary decision.

Harris v. State, 458 Md. 370, 418-19 (2018) (Adkins, J., concurring and dissenting op.).

concerned about protecting the defendant's constitutional right to confrontation. Yet the four-part test affirmed in *Harris*, including the requirement that the missing witness must have been "peculiarly available," provides the appropriate analytical framework for determining whether such an instruction was necessary to protect another constitutional right – the defendant's right to due process, which encompasses the right to have the jury instructed on applicable law. *Cf. id.* at 383-84 (defense counsel's initial request for a missing witness instruction against the State, based on prosecution's failure to call a particular witness, was later withdrawn); *Patterson v. State*, 356 Md. 677, 694 (1999) (addressing defendant's claim "that the trial court's refusal to give the missing evidence instruction denied him due process of law").

B. The Relevant Record

Appellant sought to establish that there were other possible sources for the drugs that Jayson ingested. In an effort to suggest that the lethal drugs may have been in the lidded cup that was brought to appellant's car when Robert McRay carried the child from the Hicks household to appellant's car on Friday evening, defense counsel elicited testimony that police not only failed to seize the cup from the back seat of appellant's car, they also failed to interview McRay, who had gone missing.

During the cross-examination of Detective Barnhardt, defense counsel indicated that he would seek a missing witness instruction based on these facts:

> [DEFENSE COUNSEL]: Now recently, and I mean in the past week or two, police have made efforts to find Mr. McRay; isn't that right?

[PROSECUTOR]: Objection.

THE COURT: Come on up.

(Counsel approached the bench, and the following ensued.)

[PROSECUTOR]: This is not relevant. . . .

[DEFENSE COUNSEL]: I think it is, Your Honor. **I mean I'm laying the foundation for a missing-witness instruction.** I mean this is a person who was the last individual to have contact with Jayson. [Sic] It's a critical question for the trial and I'm entitled to explore what efforts [the detective] made to produce evidence that would convince the jury beyond a reasonable doubt.

THE COURT: Is Mr. McRay here?

[DEFENSE COUNSEL]: No.

THE COURT: Overruled. We're not going to spend a lot of time on it.

(Counsel returned to trial tables, and proceedings resumed in open court.)

[DEFENSE COUNSEL]: Recently in the past couple of weeks, police have been making efforts to locate Mr. McRay; isn't that right?

[DETECTIVE BARNHARDT]: I believe investigators from here have, yes.

[DEFENSE COUNSEL]: And he has not been found; is that correct?

[DETECTIVE BARNHARDT]: Not to my knowledge.

At the close of evidence, when the court considered jury instructions, defense counsel asked for the pattern instruction on missing witnesses, which is as follows:

> You have heard testimony about (name), who was not called as a witness in this case. If a witness could have given important testimony on an issue in this case and if the witness was peculiarly within the power of the [State] [defendant] to produce, but was not called as a witness by the [State] [defendant] and the absence of that witness was not sufficiently accounted for or explained, then you may decide that the testimony of that witness would have been unfavorable to the [State] [defendant].

MPJI-Cr 3:29 MISSING WITNESS.

The trial court declined to give that instruction, explaining:

> I don't find that Mr. McRay is exclusively in the control of the State, and so I'm not going to give that because I don't think it's appropriate under the circumstances.

In closing argument, defense counsel nevertheless asked the jury to draw a missing witness inference against the State, maintaining that the prosecution's failure to present McRay's testimony warranted an adverse inference and reasonable doubt.

> [DEFENSE COUNSEL]: You absolutely have a right and, frankly, it's to be expected that you would like to know what was in that sippy cup. And when you find yourselves wanting that evidence and wishing the State had bothered to produce it, the answer is clear. You hold that lack of evidence against the State and you find Mr. Holland not guilty.
>
> The other things that you might like to know, what did Robert McRay give to Jayson Holland when he turned Jayson over to Thomas Holland? Shinee Hicks said I'm not sure what Jayson Holland left with. Her mother said he left with some clothes. We sent him with some clothes. There's two inconsistencies.
>
> Wouldn't you like to know what Robert McRay had to say about it? He was the last person to see Jayson Holland from the Hicks' home. Wouldn't you like to know what he says? Did he give him a sippy cup or not? Yes, you would like to know that, ladies and gentlemen.
>
> You have every right to demand to have that evidence. And when the State does not produce for you evidence that is convincing beyond a reasonable doubt, you hold that against the State and you find Mr. Holland not guilty.

C. Appellant's Challenge

Appellant argues that "it was error to refuse to give a missing witness instruction concerning McRay" because "'the State was in the best position to secure the witness's

presence at trial,' *Pinkney v. State*, 200 Md. App. 563, 578 (2011), [*aff'd*, 427 Md. 77 (2012)]" given that he "had a positive relationship with the other residents in the Shinee Hicks household, whereas, the State's witnesses repeatedly asserted that [a]ppellant had a very hostile relationship with the members of that household" and "the defense suspected that McRay was the one actually responsible for the child's poisoning, with food or drink in containers that McRay allegedly provided, a day before the child died." According to appellant, the State's response to the defense request "was, essentially, that [it] cannot be expected to make any effort to find anyone who is 'using drugs'" because "[s]uch persons are simply 'unfindable[.]'" Appellant contends that

> merely claiming that a person who is "using drugs" is "unfindable" is no substitute for showing: (1) that the State actually made reasonable efforts to find Mr. McRay; (2) that McRay, who had a record for drug "distribution" was, necessarily, "using drugs," himself; and (3) that the members of Shinee Hicks's household did not know where to find him.

The State responds that appellant "was not entitled to a missing witness instruction" because the trial court correctly ruled that "McRay was not exclusively within the control of the State" and appellant otherwise failed to establish all other conditions for such an instruction. We agree that the trial court applied the correct legal standards and did not abuse its discretion in declining to give a missing witness instruction.

A party is not entitled to a missing witness instruction "'when the witness is not available . . . or where he is equally available to both sides.'" *Robinson v. State*, 315 Md. 309, 321 (1989) (quoting *Christensen v. State*, 274 Md. 133, 134 (1975)). Moreover, the "mere possibility that a witness personally may favor one side over the other does not make

that witness peculiarly unavailable to the other side." *Bereano v. State Ethics Comm'n*, 403 Md. 716, 744 (2008).

Given that the missing witness instruction "looks toward addressing the bias engendered by feelings of love, friendship, or loyalty[,]" *Pinkney*, 200 Md. App. at 579, "[t]he inference to be drawn from the failure to call a witness will arise only if the relationship between" the witness and the party against whom the inference is to be drawn "is one of interest or affection." *Dansbury v. State*, 193 Md. App. 718, 742 (2010) (citation omitted). For that reason, the party seeking the instruction must establish that the missing witness is "peculiarly available to one side because of a relationship of interest or affection." *Harris*, 458 Md. at 404.

Here, the trial court correctly recognized that, by itself, the fact that McRay might have reasons to favor the prosecution did not make him available, much less "peculiarly available" to the State. *See id.* at 407; *Bereano*, 403 Md. at 744. In addition, the judge properly required appellant to establish a factual basis for his claim that McRay's relationship with Unger and Hicks created a bond of interest or affection from which the court could infer that McRay was peculiarly available to the State through those prosecution witnesses. *See Harris*, 458 Md. at 407-10.

We are not persuaded that the trial court abused its discretion in denying appellant's request for a missing witness instruction. Underlying that request was the premise that the State had a "bond of interest" with McRay because he was the former boyfriend of Jayson's grandmother, Carol Unger. Even if we were to assume for purposes of this appeal that Ms.

Unger had a familial interest in prosecuting appellant and that her interest was transferable to the State, as the agent of such prosecution, there was no evidence that Unger and McRay had a "bond of affection" at the time of trial, nearly three and a half years after Jayson's death, such that his whereabouts should have been discovered by the State through Unger or her daughter, Shinee Hicks. We agree with the trial court that this is at least one "bridge too far." Appellant did not proffer that McRay and Unger maintained a relationship warranting an inference that he would be available to her, and therefore to prosecutors. To the contrary, the court was entitled to credit the State's proffer that McRay was "doing drugs" and that police investigators were unable to locate him shortly before trial. Moreover, the court could reasonably infer from that proffer that the State's efforts to locate McRay included inquiries to Ms. Unger and Ms. Hicks.

If evidence of the mother-son relationship in *Harris* did not establish a sufficient factual basis to find a bond of affection for purposes of a missing witness instruction, then the court was not required to find, from the bare evidence that McRay was the former boyfriend of the victim's grandmother, that McRay still had a current bond of affection for her, which then translated into a bond of interest with the State, such that a missing witness instruction was warranted in this case. Based on this record, the court had sufficient grounds to conclude that McRay was missing – equally unavailable to both sides and therefore not "peculiarly available" to the State.

In any event, a finding of unavailability was not a prerequisite for the court's refusal to give a missing witness instruction. Whether or not McRay's interest aligned with the

prosecution, and whether or not the State made reasonable efforts to locate him, and whether or not McRay was peculiarly available to the State, we cannot say the trial court abused its discretion in refusing to give the missing witness instruction. As the *Harris* Court emphasized, a missing witness instruction risks placing the imprimatur of the court on what is, at most, a permissible inference. *See Harris*, 458 Md. at 404-05, 413. For that reason, "the abuse of discretion is a one-way street" in that "[i]t is sometimes an abuse of discretion to give a Missing Witness instruction[,]" but "[i]t is never an abuse of discretion not to give a Missing Witness instruction." *Colkley v. State*, 204 Md. App. 593, 621 (2012) (reviewing cases recognizing principle), *rev'd on other grounds sub nom. Fields v. State*, 432 Md. 650 (2013). *See Harris*, 458 Md. at 413. In this case, where the defense was permitted to argue a link between the missing evidence regarding the contents of the mystery cup and the missing McRay, as grounds for reasonable doubt about the source of the fatal drugs, the court did not abuse its discretion in declining to elevate the missing witness inference from an argument by defense counsel to a jury instruction by the trial judge. *See Harris*, 458 Md. at 413.

II. Exclusion of McRay's Drug Convictions

Appellant next contends that "it was error to exclude evidence of Robert McRay's criminal record for drug offenses." The State responds that "[t]he trial court properly exercised its discretion when it excluded" that evidence. We agree with the State and explain our reasoning below.

A. Relevance of Prior Crimes Evidence

Although Md. Rule 5-404(b) restricts the admission of evidence regarding a criminal defendant's prior convictions, that rule extends only to evidence of crimes committed by that defendant. *See Sessoms v. State*, 357 Md. 274, 287 (2000); *Coleman-Fuller v. State*, 192 Md. App. 577, 622 (2010). When, as in this case, the proffered "other crimes" evidence relates to an individual other than the defendant, "[t]he issue then becomes 'whether the evidence is relevant to the existence or non-existence of some fact pertinent to the defense.'" *Coleman-Fuller*, 192 Md. App. at 622 (quoting *Sessoms*, 357 Md. at 288).

Under Maryland Rule 5-401, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." "We have stated that a ruling on the relevancy of the evidence is 'quintessentially' within the wide discretion of the trial court" and reversible only for abuse of discretion. *Pinkney v. State*, 151 Md. App. 311, 324 (2003).

Even if relevant, evidence may be excluded under Maryland Rule 5-403 when "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury[.]" We review a decision to exclude evidence pursuant to this rule under a "highly deferential abuse-of-discretion standard." *Oesby v. State*, 142 Md. App. 144, 167 (2002). In doing so, we are mindful that the type of prejudice that may be considered so unfair as to warrant exclusion under this rule occurs when such evidence

"might influence the jury to disregard the evidence or lack of evidence regarding the particular crime with which [the defendant] is being charged." *Burris v. State*, 435 Md. 370, 392 (2013) (citation and quotation marks omitted).

B. The Record

During trial, defense counsel obtained and sought to use information about McRay's criminal history. On the fifth day of trial, defense counsel proffered to the court:

> [T]he State made mention that they've had difficulty finding Robert McRay, who is the last person to have seen Jayson from the Hicks' family home, and also made mention of a suspicion that he was off using drugs. So that caused me to make a Brady demand for whatever information the State possessed that Mr. McRay is either currently or in the past four years, the relevant time period, using drugs.
>
> I did have reason to suspect . . . that there was drug use in that family, but . . . . the most recent I knew of was 2000 or 2002 during [a] guardianship hearing.
>
> But to the extent that there's more recent indication of drug use, I believe that's Brady information under the circumstances of this case where there's no evidence as to how the substance, which is the cocaine, came to be in Jayson's possession. The information that I've been provided suggests much more recent drug use including up to 2008 for manufacturing and distributing narcotics.
>
> I understand that the State doesn't intend to call Mr. McRay because they can't find him, but I would like to ask Detective Barnhardt about what he knows of Mr. McRay's criminal history. Or else if the State would join me in a stipulation that it exists, I'd like to get the information before the jury because I do think it's exculpatory.

In response, the prosecutor proffered that she had:

> someone pull Robert McRay's NCIC and that was provided to the defense counsel this morning.

> According to the information that the State provided . . . , something happened in 2006 in reference to drugs and Mr. McRay, and there was another incident in November, 2008. Both of those things preceded January 25th, 26th of 2014 when Jayson was murdered. So as a result, . . . we would argue that it's not relevant. It's before this incident. . . .
>
> Also, it was in Montgomery County, not in Prince George's County where this incident happened.

Defense counsel pointed out that McRay's "rap sheet . . . commences in May, 1989 with possession of cocaine incidents and throughout 1989 through 2008 contains many other additional arrests and/or convictions for possession of drugs or distribution of drugs." She asserted "a good-faith basis to believe that a person who uses drugs for 20-some years isn't going to stop in four years, and the State believes he is currently using."

The trial court excluded the evidence of McRay's prior drug offenses, explaining:

> Well, I'm going to, I guess, sustain the State's objection. I find that there's little, if any, relevance to the conviction five-and-a-half years prior to this incident for distribution of drugs, whatever those drugs may be, and prior criminal activity relating to that. Moreover, any relevance of that is outweighed by the danger of distraction and unfair prejudice.
>
> A three-year-old child isn't merely was there a source that he could have gotten them. [Sic] I don't think it's at all reasonable to think that a three-year-old could have gotten them at his mother's house, hidden them for the 24 hours he was with his father before ingesting them causing his death. . . . So I'm going to exclude that evidence – or not permit you to inquire as to that evidence of the detective relating to Mr. McRay.

Responding to that ruling, defense counsel clarified that "[i]t would not be my argument that the child hid the drugs, but that perhaps they were contained in something that was sent with him." In addition, defense counsel requested leave "to cross-examine Detective Barnhardt with respect to what, if any, investigation he did into Mr. McRay's

criminal history, drug use, drug distribution simply for the purpose of exploring what, if anything, he did to investigate the Hicks family and specifically Mr. McRay." The State noted that it had "[n]o objection to that part."

On cross-examination, the State did not object when defense counsel asked Detective Barnhardt whether, on January 26, 2014, he investigated McRay's criminal history. The detective responded that he did not, later explaining that McRay "was interviewed, but I don't believe I ever specifically – getting a criminal history for him." When defense counsel requested permission to show the detective McRay's "rap sheet," however, the trial court sustained the State's objection.

C. Appellant's Challenge

Appellant argues that

> [b]y eliminating any evidence of Robert McRay's drug offenses, the Court below: (1) prevented the jury from learning a possible source for the cocaine in the child's system; and (2) prevented the defense from making a credible argument that the drugs came from someone other than [a]ppellant.

In appellant's view, the court's ruling violated his due process right to present evidence on the disputed issue of who was responsible for supplying the lethal drug cocktail to Jayson.

The State maintains that "McRay's two drug convictions more than five years before this incident" were so "tangential and potentially confusing" that the trial court did not abuse its discretion in excluding the evidence, as irrelevant and unfairly prejudicial in that it invited the jury "to make the logical leap" from "McRay's long prior drug use" to

this incident, distracting the jury from the issue of whether appellant was criminally responsible for Jayson's death.

Our decision in *Pinkney* is instructive here. In that case, the defendant was convicted of murder in the bludgeoning death of his six-month-old step-grandson, after the jury rejected his defense that the fatal injuries might have been inflicted by the child's father, who had a history of drug use and domestic violence. *See Pinkney*, 151 Md. App. at 314. On appeal, Pinkney claimed that the trial court erred in excluding evidence of the father's drug offenses and threats against the child's mother, to raise reasonable doubt about whether the defendant was responsible for the child's death. *Id*. at 323-24. We held that "the evidence was properly excluded pursuant to Maryland Rule 5-402, which provides that '[e]vidence that is not relevant is not admissible.'" *Id*. at 324. *See also Moore v. State*, 390 Md. 343, 383 (2005) (trial court did not err in excluding evidence of another individual's history of violence towards women, proffered to support defense theory that someone other than defendant killed the victim).

Here, as in *Pinkney*, the other crimes evidence was proffered to suggest that someone other than the defendant was responsible for the death of a child under the defendant's care. In contrast to *Pinkney*, where the proffered evidence included recent violent offenses committed by the father of a child killed by violent blows, the proffered evidence of McRay's drug convictions was far more attenuated in terms of both time and relationship. The drug convictions in question occurred more than five years before Jayson's death, by a mere resident of the child's household. Although defense counsel

maintained that the fatal drug cocktail may have been in the cup that McRay brought to the car with Jayson on Friday night, he had no evidence to support that theory because the cup was not seized or tested. Indeed, there was no evidence that it was McRay who filled that cup. Likewise, there was no evidence that at the time McRay brought the cup to appellant's car on Friday evening, he possessed all four drugs found in Jayson's system on Sunday. Nor was there any evidence that McRay had a motive to harm Jayson.

In these circumstances, the trial court did not abuse its discretion in determining that the evidence of McRay's drug offenses was either too attenuated to be relevant or unfairly prejudicial in that it would distract the jury. Significantly, the court's ruling did not prevent appellant from presenting his defense theory that the drugs could have been in the cup brought from Jayson's residence. Instead, it appropriately precluded the defense from inviting the jury to speculate, based solely on stale charges more than five years earlier, that McRay was the source of the drugs that killed Jayson.

III. Second-Degree Assault Instruction

In appellant's third assignment of error, he asserts that "it was error to give an incomplete instruction on the elements of second degree assault." The State responds that "the trial court properly declined to add unnecessary language" from the pattern instruction. We conclude that the court did not err in refusing to give the requested language.

A. Review of Instructions on Second Degree Assault

Appellant's complaints stem from the following highlighted portion of the pattern instruction and comment concerning the battery modality of second degree assault:

> Assault is causing offensive physical contact to another person. In order to convict the defendant of assault, the State must prove:
>
> (1) that the defendant caused [offensive physical contact with] [physical harm to] (name);
>
> (2) that the contact was the result of an intentional or reckless act of the defendant and was not accidental; and
>
> **(3) that the contact was [not consented to by (name)] [not legally justified].**
>
> "Reckless act" means conduct that, under all circumstances, shows a conscious disregard of the consequences to other people and is a gross departure from the standard of conduct that a law-abiding person would observe.
>
> **Notes on Use**
>
> Use this instruction if the defendant is charged with second degree assault, under Md. Code Ann., Criminal Law I § 3-203 (2012 & Supp. 2018) (hereinafter Crim. Law I or II § ___). . . . **Out of an abundance of caution, use (3) unless it is clear that there is neither justification nor consent.**

MPJI-Cr 4:01(C) SECOND DEGREE ASSAULT (emphasis added).

Under Maryland Rule 4-325(c), "[t]he court may, and at the request of any party shall, instruct the jury as to the applicable law[,]" but it "need not grant a requested instruction if the matter is fairly covered by instructions actually given." Whether evidence generates the need for a requested instruction "is a question of law for the judge." *Bazzle v. State*, 426 Md. 541, 550 (2012) (citation and quotation marks omitted). In the absence of legal error, we review the court's decision not to give a requested jury instruction for abuse of discretion. *See Preston v. State*, 444 Md. 67, 82 (2015).

B. The Record

The State's prosecution of the second degree assault charge was premised on "offensive physical contact" consisting of the administration of the drugs. According to appellant, "[t]he defense theory was that both [a]ppellant and his young son were unwitting victims in this case, when [a]ppellant caused his son to consume drug-laced food or drink provided by someone else."

Defense counsel asked the court to give subsection (3) of the pattern instruction, which we have highlighted above, so that "assault [would] be further defined . . . as the unjustified offense of non-consensual application of force by direct or indirect physical contact on the person of another." The court denied that request, explaining:

> I don't think that additional language from the comment is appropriate under the facts of this case. This was an application-of-force case.
>
> First of all, there's no issue of consent or legal justification, so I'm not going to give that portion because I think it's not generated by the evidence. That portion's not a part of these pattern instructions. I'm not going to give that addition to them. I think [that] that part isn't generated by the evidence and I think the part I am giving sufficiently covers it.

During deliberations, the jury sent the court the following note:

> [A]t this point, the jury has not been and may never come to a unanimous decision. We have deliberated for over six hours and many jurors are not comfortable with the severity of the charges as the State has left many questions unanswered. We, the jury, believe further deliberations will not result in a unanimous decision.

With consent of counsel, the trial court gave the "Maryland modified Allen charge."

After deliberations resumed, the jury sent another note, asking the trial court to "please provide an additional legal definition of physical harm." Defense counsel then renewed his request for an instruction that "common-law battery is the unjustified offensive and nonconsensual application of force by direct or indirect physical contact on the person of another."

C. Appellant's Challenge

Appellant argues that the trial court erred in refusing to give the requested language from the pattern instruction because that language would have made it "clear to the jurors that [a]ppellant was not charged with a strict liability offense[,]" so that "if the unsuspecting [a]ppellant unwittingly gave his child something poisonous that Mr. McRay had provided, which the child voluntarily ate or drank, [a]ppellant could not be guilty of the 'battery' form of assault." In appellant's view, because "[t]here was no evidence that consumption of the d[r]ugs was 'nonconsensual,' *i.e.*, that [a]ppellant forced the child to eat or drink anything[,]" the court should have given this instruction.

The State responds that "[t]he trial court correctly declined to insert the optional phrase in subsection (3) of the pattern jury instruction that pertains to a victim's consent or justification[,]" because this language applies only when "a victim allows a defendant to perform the act that constitutes the battery." *Cf., e.g., Elias v. State*, 339 Md. 169, 187 (1995) (defendant charged with sexual battery during medical examination); *King v. State*, 36 Md. App. 124, 134 (1977) (jury rejected claim that victim consented to defendant's sexual battery).

We agree that there was no issue of consent or justification warranting this portion of the pattern instruction. Indeed, appellant's argument that the defense theory was an "unwitting" poisoning indicates there was no issue regarding consent to or justification for the alleged battery. Because neither the State's prosecution theory, nor the defense theory generated any issue as to whether Jayson consented to drinking the drug cocktail, or whether appellant was justified in giving it to him, the court correctly declined to include this portion of the pattern instruction.

IV. Sufficiency of the Evidence

In his final assignment of error, appellant contends that "the evidence was insufficient to sustain a conviction for second degree assault" because "the State proved only that [a]ppellant was one of the people who could have poisoned his son." The State responds that "[t]he evidence supported an inference that that killer was [appellant], and his exclusive control of Jayson for the relevant time period meant that he was not just 'one of the people who could have poisoned his son' – he was the only person whom the jury could infer, under the State's theory of the case, poisoned his son." For the reasons that follow, we conclude there is sufficient evidence to support the conviction.

A. Sufficiency Review of Second Degree Assault Conviction

Appellate courts do not weigh the evidence, resolve conflicts in it, or judge the credibility of witnesses, "[b]ecause the fact-finder possesses the unique opportunity to view the evidence and to observe first-hand the demeanor and to assess the credibility of witnesses during their live testimony[.]" *Smith v. State*, 415 Md. 174, 185 (2010). Instead,

our task in conducting a sufficient review is to determine "'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.'" *Id*. at 184 (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)) (emphasis in original). *See Deese v. State*, 367 Md. 293, 305 (2001).

As court and counsel acknowledged at trial, the issue presented to the jury was whether Jayson's death was the result of a battery by appellant. In Part III, *supra*, we previously set forth the elements for that modality of second degree assault.

B. Appellant's Challenge

Appellant contends that the evidence is insufficient to support his assault conviction because

> [t]he autopsy found absolutely no evidence that anyone physically forced the child to eat or drink something.
>
> Police found no evidence of drugs in [a]ppellant's home, and did not test the contents of any container in his vehicle.
>
> There was no proof of jurisdiction, *i.e.*, that the poisoning actually happened in the county where the charges were filed.
>
> Appellant's trial counsel argued that, "particularly in light of the medical [examiner's] testimony," the "State just simply has not proven": (1) "that the substances were necessarily ingested during the time that Jayson was with Thomas Holland"; [(2)] "that it was Thomas Holland who gave the substances to Jayson"; or (3) "that the substances were intentionally given to" Jayson.
>
> Without question, the jury unanimously rejected the State's claim that it had proven, beyond a reasonable doubt, that [a]ppellant premeditated or

> intended to kill or even seriously injure his son. The jury wrote a note pointedly explaining that, "[T]he State has left many questions unanswered."

(Citations and emphasis omitted.)

In "cherry-picking" this evidence from the trial record, appellant ignores other evidence and inferences that support the jury's verdict, including the undisputed evidence that Jayson died of acute drug poisoning while he was alone with appellant. In *Deese v. State*, 367 Md. 293, 314 (2001), the Court of Appeals rejected a similar sufficiency challenge, holding that the evidence established that the defendant inflicted fatal head blows to a three-year-old in his exclusive care. After Deese's girlfriend put her son down for a nap, she left him in Deese's care. *Id*. at 297. When she returned two hours later, Deese told her the child was still sleeping. *Id*. When the toddler did not wake after another two hours, his mother found him "stiff" and dead. *Id*. The cause of death was impact injuries to the child's head. *Id*. at 307.

Deese challenged his conviction for felony murder in the second degree on grounds similar to those raised by appellant, arguing that the "'fact that [he] was the person last with him is without significance.'" *Id*. at 305. The Court of Appeals disagreed, reasoning that the jury could have rejected other explanations for the injury based on Deese's "exclusive control" over the victim at the time he suffered the fatal injury. *Id*. at 308-10. When viewed in the light most favorable to the State, the evidence permitted the following inferences in that case:

> (1) Kyle was alive on the morning of February 8, (2) Kyle was under Deese's exclusive supervision for a period of time on that day, (3) Kyle

> was found dead a few hours after that period, (4) death was due to blunt force injuries to the head and possibly due to shaking, and (5) no one had contact with Kyle after the period described in (2) and before the event described in (3). From these circumstances, a rational jury could have inferred, beyond a reasonable doubt, that Deese inflicted the fatal injuries.

Id. at 308.

The Court of Appeals held that "a rational jury could have inferred, beyond a reasonable doubt, that Deese inflicted the fatal injuries." *Id*. Pointing to the evidence that the child suffered his fatal injuries while in Deese's exclusive care, the Court explained that

> the evidence most favorable to the State is that Kyle was fine on February 8, that Deese had exclusive custody over Kyle for several hours on this day, that Faust found her son dead later that day, and that he died due to blunt force head injuries caused by force of a magnitude at work in car crashes and falls from significant heights. There was no direct evidence of how the force was applied. . . . Deese was alone with Kyle after Faust and Deese's mother left the apartment where Deese and Kyle remained. . . . [O]nce Deese's exclusive presence was established, and in the absence of any alternative explanation, a rational jury could infer beyond a reasonable doubt that Deese inflicted the blunt force head injuries that caused Kyle's death.

Id. at 314.

Similarly, in *Pinkney*, discussed *supra* in Part II, we held that the evidence was sufficient to convict the step-grandfather in the infant victim's death, explaining:

> The similarity between the facts in *Deese* and those in the present case support our application of the *Deese* Court's reasoning to hold that there was sufficient evidence from which the jury could have concluded beyond a reasonable doubt that appellant was the individual who inflicted the fatal blows to Ta'mar's head.

Pinkney, 151 Md. App. at 331.

Here, as in *Deese* and *Pinkney*, there is sufficient evidence from which the jury could find that appellant intentionally or recklessly caused physical harm to Jayson, causing his death. *See* MPJI-Cr. 4:01(C). Specifically, the record contains evidence that supports the following findings:

(1) Jayson was alive and healthy when he went to dinner and shopping with appellant and Vinita Edmonds on the evening of Saturday, January 25, 2014.

(2) After Ms. Edmonds was dropped off at her home, which was before 10:30 p.m., Jayson was alone with appellant until his death.

(3) Autopsy results established that Jayson died from orally ingesting a combination of cocaine, codeine, acetaminophen, and diphenhydramine.

(4) The drugs were ingested simultaneously, because the child would not have been able to consume each sequentially, given the high dosages and physical effects.

(5) The drugs caused Jayson to suffer seizures and vomiting. His vomit was found both on the pallet where appellant laid him and aspirated into his lungs.

(6) The medical examiner estimated that Jayson lived at least four hours after ingesting the drugs.

(7) When appellant took Jayson to the emergency room the next morning, January 26, the child's extremities were in full rigor mortis indicating he had been dead at least four hours. He was declared dead at 9:01 a.m.

From these circumstances, the jury could rationally infer that Jayson ingested the drugs and died while in appellant's exclusive care, so that appellant was not merely "one of the people who could have poisoned his son." As in *Deese* and *Pinkney*, the evidence supports a finding that Jayson was in appellant's exclusive care both when he ingested the drugs and when he died. Although appellant was free to argue that Jayson, while riding in his car seat as they drove home on Saturday night, consumed the drugs from the cup

brought from the Hicks household on Friday night, the jury was free to reject that theory based on the medical and toxicology evidence supporting the State's theory that the child ingested the drugs while he was with appellant in appellant's home. *Cf. Deese*, 367 Md. at 307 ("a rational jury may reject testimony regarding the alternative explanation and properly conclude, beyond a reasonable doubt, that the death was a homicide"). Given that timeline, and the manner and location of Jayson's death – on the pallet fixed by appellant after they returned to his home, via a powerful drug cocktail that induced seizures and vomiting before death – a rational jury could conclude that appellant was the only person who could have provided those drugs. That evidence, when viewed in light of appellant's child support obligations and acrimonious relations with Shinee Hicks, a rational jury could infer that appellant supplied the drugs to Jayson.

We are not persuaded otherwise by appellant's citation to factually inapposite cases involving stolen property to which others had access. *Cf. Wilson v. State*, 319 Md. 530, 537-38 (1990) (evidence insufficient to convict housecleaner of jewelry theft where other people could access jewelry box); *Warfield v. State*, 315 Md. 474, 491-92 (1989) (evidence insufficient to convict defendant of theft from garage that was accessible to others). Here, as in *Deese* and *Pinkney*, there was no analogous evidence that Jayson was accessible to other individuals at the time he ingested the drugs. To the extent appellant relies on Jayson's access to the cup from the Hicks household, the jury was entitled to find that was not the source of the fatal drugs. *See Deese*, 367 Md. at 307.

Moreover, as the State points out and defense counsel's lack of objection indicates, the jury's acquittal of appellant on the murder and first degree assault charges does not warrant reversal of his second degree assault conviction. *See generally McNeal v. State*, 426 Md. 455, 459 (2012) ("jury verdicts which are illogical or factually inconsistent are permitted in criminal trials"). *Cf. Givens v. State*, 449 Md. 433, 472-73, 476 (2016) (issue of legal inconsistency must be raised before the jury is discharged, but contemporaneous objection at a time when the inconsistency can be resolved "is the equivalent of the defendant's saying 'roll the dice, double or nothing'") (citation omitted); *Price v. State*, 405 Md. 10, 40 (2008) (Harrell, J., concurring) ("The jury may render a legally inconsistent verdict to show lenity to the defendant."); *Wallace v. State*, 219 Md. App. 234, 251-52 (2014) ("the touchstone for determining whether verdicts were legally inconsistent [is] whether '[t]he crime for which appellant was acquitted, and the crime for which he was convicted, each contained elements that the other did not'") (citation and footnote omitted); *Travis v. State*, 218 Md. App. 410, 453 (2014) ("[i]f the defendant objects to the inconsistent verdicts, the jury, given a second chance, may choose to remedy the error in a manner not in the defendant's favor") (citation and quotation marks omitted).

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.