Circuit Court for Montgomery County
Case No. 126868C

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 850

September Term, 2024

LARRY ADESINA OLADIPUPO

v.

STATE OF MARYLAND

Berger,
Leahy,
Wright, Alexander, Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Berger, J.

Filed: March 20, 2026

* This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

This appeal arises from the August 2015 conviction of Larry Adesina Oladipupo, appellant, on charges stemming from two incidents involving alleged assaults upon his then-girlfriend, Thalia Alexis ("Ms. Alexis"). Oladipupo was convicted of first-degree assault and use of a firearm in the commission of a crime of violence for an incident occurring on February 3, 2015. Oladipupo was also convicted of second-degree assault and kidnapping for an incident occurring on February 5, 2015. Additionally, Oladipupo was convicted of illegal possession of a regulated firearm with a disqualifying conviction and illegal possession of ammunition. Oladipupo filed a timely appeal to this Court, alleging that the trial court erred in admitting evidence regarding Oladipupo's previous criminal history, and that the evidence was insufficient to sustain his convictions. This Court affirmed his direct appeal in an unreported opinion, *Oladipupo v. State*, No. 1959, Sept. Term 2015, 2016 WL 6664896 (Md. Ct. Spec. App. Nov. 7, 2016) ("*Oladipupo I*").

On October 18, 2023, Oladipupo filed a motion for postconviction relief, alleging that his appellate trial counsel had been ineffective for failing to raise an issue concerning the court's improper response to a jury note. Oladipupo alleged that because the court had not initially instructed the jury on intent-to-frighten second-degree assault, the court erred when it issued a supplemental instruction on intent-to-frighten assault in response to a note from the jury. The postconviction court agreed and granted Oladipupo partial relief in the form of the right to follow a belated appeal on the issue concerning the court's response to the jury question. This appeal followed.

QUESTIONS PRESENTED

Oladipupo presents one question for our review, which we have rephrased as follows:[1]

> Whether the trial court erred when it instructed the jury on intent-to-frighten assault in response to a jury question.

For the following reasons, we affirm.

BACKGROUND

The Alleged Assaults

Because Oladipupo's convictions were affirmed on direct appeal, we reproduce the relevant facts from *Oladipupo I* here:

> On February 5, 2015, Thalia Alexis called 911 on a cell phone borrowed from a stranger at a shopping center on Quince Orchard Boulevard, Montgomery County, to report that her boyfriend had tried to kill her and threatened to kill her family. Crying and out of breath, she explained to the operator that the boyfriend had told her he needed to speak with her in his car; when she entered the car, he punched, slapped, backhanded, and choked her to get her "to start telling the truth," although she did not know what he thought she had done. She refused to give the 911 operator the boyfriend's name for fear he would retaliate against her and her family.
>
> Gaithersburg City Police Corporal Jessica Duke and Officer Jonathan Bennett responded to Alexis's 911 call. When they arrived at the shopping center, Alexis was sitting on a curb, crying and visibly shaking—"utterly hysterical"—and repeating only that her boyfriend had beaten her up and she thought he was going to kill her. Although the officers did not initially see any injuries, Alexis said she had been choked and

[1] Oladipupo phrased the question as follows:

> Whether the trial court erred by giving the jury an improper response to a jury note?

that her face hurt. Duke later saw "a little bit of swelling on the side of her face." In addition, the officers observed that Alexis's shirt was inside out.

After much prodding from Duke, Alexis identified her boyfriend as Larry Oladipupo and relayed the details of the attack. She told Duke that on February 3, 2015, she had been at appellant's house. Suspicious of something he thought she had done, he pointed a silver handgun at her head and told her he was going to kill her.

The next day, appellant texted Alexis numerous times to try to get her to meet and talk with him. When he knocked on her window late that night, she went outside, and he asked her to enter his vehicle. She refused, but he pushed her to the ground and dragged her to the vehicle.

Appellant drove around for quite some time, "visibly upset" with Alexis. The pair argued, and appellant punched Alexis in the face, choked her, and banged her head against the car window.

At one point, appellant pulled into a gas station and instructed Alexis to disrobe, telling her she was going to walk home naked. She stepped out of the car and took her clothes off, and he revved the engine. Fearing that he would run her over, she grabbed her clothes and ran to the Quince Orchard Plaza shopping center, where she made contact with a man and used his cell phone to call 911. Later that night, Alexis completed a "Domestic Violence Supplemental," a document that is required when there is an allegation of assault by a person with whom the victim is in an intimate relationship. The supplemental detailed, on a diagram, where Alexis's injuries were, her demeanor as observed by the police officer filling out the form, and her comments and description of the abuse.

On February 6, 2015, Alexis was interviewed by Detective Corporal Everett Cammack at the Gaithersburg Police Department. During the interview, Alexis was calm and cooperative as she added details to the narrative that she had given to Duke.

Alexis told Cammack that on February 2, 2015, she had spent the night at appellant's parents' house, where he lived. When appellant did not receive an adequate explanation about an alleged incident, he got angry with her.

Early in the morning of February 3, 2015, Alexis was asleep on the couch in the basement where appellant slept; when she awoke, appellant was staring at her in the dark. He reached under a cushion on the couch and pulled out a silver gun that may have had a black grip, placed it against her forehead, and questioned her about a neighbor he had seen in his yard. He only stopped questioning her approximately 35 minutes later, when he heard his parents moving upstairs. Alexis was then able to leave the house.

Alexis did not respond to appellant's numerous calls or texts the next day. At approximately 1:00 a.m. on February 5, 2015, appellant appeared at Alexis's apartment and knocked on her ground floor window. She told her mother she was going outside to speak with him.

Although she was reluctant, appellant convinced her to get into his car. As soon as she entered the car, his wheedling demeanor changed to anger, and he told her she was going to die. Alexis tried to get out of the car, but appellant grabbed her by her jacket, choking her, and drove away. As he pulled away from her apartment, he hit her and threatened her and her family. He continued to drive and hit her and bang her head against the window.

When they arrived in Rockville, appellant ordered her to undress completely, after which he rolled down all the car windows, telling her she would freeze. He eventually pulled into a gas station in Gaithersburg and told her to get dressed. She did so hurriedly, putting her shirt on inside out . . . . She jumped out of the car and ran to the nearby shopping center, where she encountered Smith, the stranger who let her use his cell phone to call the police. Alexis identified appellant as her assailant from a "target sheet" the police had made when they were looking for appellant on outstanding warrants.

Cammack obtained a warrant to search appellant's parents' house. Upon execution of the warrant on February 6,

2015, appellant was the only person in the home. The police found a loaded black 9-millimeter handgun under a couch cushion in the basement. In addition, an iPhone and a pair of tan pants, with appellant's identification in the pocket, were found in the basement.

As appellant's trial date approached, Cammack received several emails stating that Alexis was afraid to testify against appellant. The State subpoenaed Alexis, but she informed the prosecutor that she would not testify. The State filed a motion to compel her testimony, with the proviso that anything she testified to "can't be used against her."

Upon being called as a witness by the State, Alexis immediately acknowledged that she did not want to be in court. She reluctantly agreed she had been involved in two incidents involving appellant in February 2015, which caused her to call the police and go to Shady Grove Hospital, but she claimed not to recall why she had called the police, spoken to the police, or filed out a domestic violence supplemental form. The court granted the prosecutor permission to treat Alexis as a hostile witness and admitted her statements to the police officers into evidence as prior inconsistent statements and excited utterances.

Alexis admitted that she told Detective Cammack that she had awakened at appellant's house on the morning of February 3, 2015, but that actually she had not been there, and she claimed not to remember the events that led to appellant putting a gun to her head. She further claimed not to remember the events of February 5, 2015, which ended with her call to 911.

During cross-examination, Alexis acknowledged she had told defense counsel, prior to trial, that she made the whole story up while drunk and high on marijuana because she was angry at appellant; she now claimed that everything she had told the State and the police was a lie. Instead, she said, the truth was that she had started a "very confrontational argument" with appellant about him cheating on her just prior to the incident that led to the 911 call. She had not rectified her lie to Cammack the day after her hospital visit, she said, because she was afraid she would get into trouble, having been

> charged previously with giving a false report to police. She claimed that she had tried to tell the prosecutor, during a face-to-face meeting, that her story was a lie but that the prosecutor would not listen to her.
>
> At the close of the State's case-in-chief, appellant moved for judgment of acquittal, disputing the sufficiency of the State's evidence[.]
>
> * * *
>
> The court denied the motion.
>
> * * *
>
> At the close of all the evidence, appellant renewed his motion for judgment of acquittal on the same grounds as previously asserted. The court again denied the motion.

Oladipupo I, 2016 WL 6664896, at *1-8.

Oladipupo had been charged with first-degree assault and use of a firearm in the commission of a crime of violence in relation to the February 3, 2015 incident. Oladipupo was additionally charged with first-degree assault[2] and kidnapping in relation to the February 5, 2015 incident. Finally, Oladipupo was charged with illegal possession of a regulated firearm with a disqualifying conviction and illegal possession of ammunition after the firearm and ammunition were recovered following a search of the basement of his parents' home.

The Jury Instructions and Proceedings

Following the close of evidence, the parties discussed the instructions that were to be provided to the jury. The following colloquy ensued:

[2] At some point, a charge of second-degree assault was also added in relation to the February 5, 2015 incident. This charge was included on the verdict sheet.

THE COURT: All right, any comments about the instructions or the verdict sheet?

[THE STATE]: Yes , Your Honor.

* * *

[THE STATE]: And then page 14, the first degree assault.

THE COURT: Yes?

[THE STATE]: I think it's an incomplete first degree assault instruction. And we do have two first degree assaults. And the first first degree assault is Count 1, and it would be under the theory of the firearm. And that, this actually would go to the verdict sheet as well. There's no lesser included second degree assault in the first count.

THE COURT: No?

[THE STATE]: No.

THE COURT: You don't want a second? All right. Okay.

* * *

THE COURT: So wait, let me, let's get back to the --

[THE STATE]: So I don't think the --

THE COURT: -- the issue on the instruction itself.

[THE STATE]: I don't think that what is printed on this sheet has the full --

THE COURT: No, the other one says part two, the defendant intended to cause serious physical injury in the commission of the assault. You want that one in there as well? I mean, he used the firearm to commit assault, and what the evidence it's believed will support. And I'll put the number two in as well. I mean, I'll put in the whole instruction. I just was taking some parts out that didn't seem to fit what the testimony was. I mean, I'd be glad to do the whole thing.

[THE STATE]: Well, I think the problem is, is that we don't have the full instruction for the second -- we don't have the full instruction for Count 3, which is the second first degree assault. Because we don't have --

THE COURT: I'm only going to read one instruction for --

[THE STATE]: I understand that.

THE COURT: -- first degree assault.

[THE STATE]: But we don't want --

THE COURT: You want this --

[THE STATE]: Really, the defendant used a firearm to commit assault, or the defendant intended to cause --

THE COURT: Right, I'll read the whole thing. You want the whole thing?

[THE STATE]: Yes.

THE COURT: Right. That's all needed to know.

[THE STATE]: Okay.

THE COURT: The whole thing. What else?

[THE STATE]: So then I think under second degree assault, I think we only need (b).

THE COURT: Only need what?

[THE STATE]: (b).

THE COURT: (b)? You just want battery?

[THE STATE]: Yes.

THE COURT: You don't want intent to frighten? Okay.

> [THE STATE]: Your Honor, we'll take both. We'll take both. We'll take -- I'm sorry. We'll take (a) and (b).[3]
>
> THE COURT: All right.

Defense had no additional comments on the instructions. The court then provided the following instructions to the jury:

> The defendant is charged with the crime of first degree assault. In order to convict the defendant of first degree assault, the State must prove all of the elements of second degree assault, and also must prove that the defendant used a firearm to commit assault, or the defendant intended to cause serious physical injury in the commission of the assault.
>
> * * *
>
> The defendant is charged with the lesser included crime of second degree assault. Second degree assault is causing offensive physical contact to another person. In order to convict the defendant of second degree assault, the State must prove that the defendant caused physical harm to [the victim], that the contact was the result of an intentional or reckless act of the defendant and was not accidental, and that the contact was not consented to by [the victim].

The court did not instruct the jury on intent-to-frighten assault.

The parties proceeded to closing argument. In its closing argument, the State urged the jury to disregard Ms. Alexis's recantation, stating: "Why did she come here and start saying that she doesn't remember and she made it up? Is it because she made it up? No. It's because she's scared. Why is she scared? Because this defendant, Larry Oladipupo, pointed a gun in her face, told her, I'm going to kill you. I'm going to kill your family.

[3] We understand the references to "(a)" and "(b)" to refer to subparts of the second-degree assault jury instructions. Based on the context, "(a)" appears to refer to intent to frighten assault, while "(b)" appears to refer to battery assault.

That's a pretty traumatic experience. . . . So fear is what motivates her." Emphasizing that it took time for the police to get Ms. Alexis to explain the incident, the State noted "she doesn't want to [tell police what happened] because she's scared of the defendant. I mean, who wouldn't be scared when they have a gun pointed in their face. And you know he's capable of doing it." The State's closing argument addressed the two counts of first-degree assault, noting that on February 3, Oladipupo "woke Ms. [Alexis] up and pointed a gun at her. And the instructions will tell you that pointing a gun at her, using a gun to commit this assault is a first degree assault. . . . This gun was used to assault [Ms. Alexis], while he's saying, I'm going to kill you, I'm going to kill your family . . . . Clear, apparent ability to use that gun, making the threats that he could kill her, this is first degree assault."

Oladipupo's closing argument was entirely focused on Ms. Alexis's recantation. Oladipupo repeatedly asserted that because Ms. Alexis claimed that she made the entire incident up, and there were no physical signs that she had been assaulted such as bruises, the State had not proven its case beyond a reasonable doubt. Furthermore, Oladipupo claimed that the silver gun recovered from the basement was not his, and even if it was, Ms. Alexis claimed that Oladipupo pointed a black gun at her, and therefore the silver gun that was recovered was not a match. Oladipupo presented no argument as to any of the actual elements of first- or second-degree assault, but instead repeatedly asserted that no assault ever took place.

The next day, at the beginning of proceedings, the following ensued:

> THE COURT: Good morning. All right, the defendant is present. There is a question from the jury which counsel has a copy of. Does second degree assault include causing fear of,

that's underlined, fear of, physical harm? In other words, if the jury believes the defendant brandished a weapon in the presence of Thalia Alexis on February 3rd but did not cause immediate, physical harm, is this element of the crime satisfied? The jury instructions that were given with respect to second degree assault only had the battery instruction. It did not include the intent to frighten or attempted battery instruction which also includes second degree assault. Anybody wish to be heard?

[THE STATE]: Your Honor, when we had talked about the second degree assault, we had asked for the intent to frighten also. But --

* * *

THE COURT: You withdrew it.

[THE STATE]: -- no --

* * *

[THE STATE]: -- we didn't. We actually didn't withdraw it. I don't know whether you read it, but we didn't withdraw it. But I think with respect to the first degree assault with the weapon, they can, they don't need the second degree assault with respect to the weapon. Maybe they need to be referred to, that there are two definitions of first degree assault. But we didn't withdraw the intent to frighten.

[DEFENSE COUNSEL]: Your Honor, my recollection is that the intent to frighten was withdrawn. I believe that's how it was, that's why the jury instructions were submitted --

[THE STATE]: We had initially said --

[DEFENSE COUNSEL]: - the way they were.

[THE STATE]: -- we were going to withdraw it and then you asked us if we wanted to and we changed our mind and said no --

* * *

[THE STATE]: -- we wanted both.

* * *

[DEFENSE COUNSEL]: Your Honor, that's not my recollection and --

THE COURT: It doesn't matter because that's what went back --

[THE STATE]: Well, anyway, I think that --

THE COURT: -- and I can tell you the reason it went back was because that was what was requested. I originally had intent to frighten in there.

* * *

[THE STATE]: -- I think that with respect to the first degree assault for the February 3rd, they should be referred to the full definition of the first degree assault instruction.

THE COURT: Well, the question relates to second degree assault.

[THE STATE]: I understand that, but I would ask that that they be referred to the full definition of the first degree assault instruction.

THE COURT: Well, I'm going to, I'm inclined to respond to their question by giving them a supplemental instruction that would include the intent to frighten definition.

[THE STATE]: That's fine.

[DEFENSE COUNSEL]: We would object to that, Your Honor. We believe that the instructions as requested were provided to the jury. We would have a problem with any response directing them back to the instruction. Their question centers on second degree assault and any response that would direct them back to first degree assault we think would be --

> THE COURT: I'm not going to refer them back to first degree assault.
>
> [DEFENSE COUNSEL]: Okay, good. And I also think the Court should be hesitant in answering the question, well I guess it would be considered kind of the second half of the question about whether the element of the crime is satisfied. The, the jury is really the only people who can decide whether --
>
> THE COURT: I just, the only thing I'm going to do is, is provide a supplemental second degree assault instruction which now has in it the intent to frighten instruction as contained within the pattern jury instruction.
>
> [DEFENSE COUNSEL]: And, I'll put my objection on the record that we believe that had previously been waived.
>
> THE COURT: Well, the evidence supports it and the jury question clearly is seeking clarification as to whether they can find second degree assault with intent to frighten. And, so it certainly is not, that instruction is not inconsistent with the, it's consistent with the evidence in the case and is not prejudicial to the defendant because the defendant's denying that any assault at any time took place or that he even possessed a gun in any event. So the, the intent to frighten supplemental instruction is not inconsistent with the defense theory and is supported by the evidence and clarifies the question that's being asked. So, we need to draft that and I'll just attach it to the note and say, "see attached", and we will give it to counsel before we send it, show it to counsel before we send it back. So, we will get this done in a couple of minutes.

The court returned after a brief recess and the following ensued:

> THE COURT: All right. My law clerk advises me that when we originally prepared, when I originally prepared the second degree assault and included intent to frighten and battery, that there was an indication by the State that you didn't want the intent to frighten. And apparently there was a, some kind of a conversation that took place which indicated, her recollection is, indicated that you did want it and apparently I didn't hear that.

> [THE STATE]: Thank you.
>
> THE COURT: I would have included it because the evidence supports it. But in any event, what I have -- I mean the record is going to reflect what the record reflects. I don't know, I just, my recollection was different and I am relying on younger ears to supplement my recollection. But in any event, this is what I am sending back. This is out of the pattern jury instruction and, and I am going to staple it to the note from the jury and you see my note at the bottom. "Members of the jury, see attached." And then they will have the second degree assault instruction that they can use.

Thereafter, the jury returned a guilty verdict of first-degree assault and use of a firearm in the commission of a crime of violence from the February 3, 2015 assault, and a guilty verdict of second-degree assault and kidnapping relating to the February 5, 2015 assault. In addition, the jury returned a guilty verdict of illegal possession of a regulated firearm with a disqualifying conviction and illegal possession of ammunition, both of which were recovered on February 5, 2015. Oladipupo was sentenced to a combined 25-year sentence, which was to run consecutively to a 17-year sentence he was serving at the time of sentencing for a probation violation.

Oladipupo timely filed his first appeal in 2015. In that appeal, Oladipupo raised claims that (1) the circuit court improperly admitted into evidence testimony that Oladipupo had been in jail prior to the February 2015 events; and (2) the evidence was insufficient to support Oladipupo's convictions. This Court affirmed on both issues in *Oladipupo I.*

In 2023, Oladipupo filed a petition for postconviction relief. After a hearing on February 16, 2024, the postconviction court ruled that Oladipupo was denied effective

assistance of appellate counsel on direct appeal in light of appellate counsel's failure to challenge the circuit court's response to the jury question. The postconviction court reasoned that there was a "substantial possibility" that the appellate court would have held that the response to the question was prejudicial to Oladipupo because he was unable to address intent-to-frighten assault in his closing argument, and his second-degree assault conviction would have been reversed. Accordingly, the postconviction court granted Oladipupo's belated appeal on the sole question of the court's supplemental jury instruction.

STANDARD OF REVIEW

"The court shall give instructions to the jury at the conclusion of all the evidence and before closing arguments and may supplement them at a later time when appropriate." Md. Rule 4-325(a). "The main purpose of a jury instruction is to aid the jury in clearly understanding the case, to provide guidance for the jury's deliberations, and to help the jury arrive at a correct verdict." *Chambers v. State*, 337 Md. 44, 48 (1994). "[W]hether to give supplemental instructions is within the sound discretion of the trial judge and will not be disturbed on appeal, absent a clear abuse of discretion." *Sidbury v. State*, 414 Md. 180, 186 (2010). "Trial courts 'must respond to a question from a deliberating jury in a way that clarifies the confusion evidenced by the query when the question involves an issue central to the case.'" *Cruz v. State*, 407 Md. 202, 210 (2008) (quoting *State v. Baby*, 404 Md. 220, 263 (2008)).

DISCUSSION

I. The circuit court did not err when it issued a supplemental jury instruction on intent-to-frighten assault.

Oladipupo claims that the circuit court erred when it responded to the jury's question by providing the supplemental instruction on intent-to-frighten second-degree assault. In response, the State contends that the court did not err. The State further maintains that Oladipupo's claim is not preserved for review since defense counsel lodged two specific objections to the court's supplemental instruction and neither objection alleged that the supplemental instruction resulted in prejudice to Oladipupo. In his reply brief, Oladipupo contends that the State's current argument that Oladipupo's claim is itself not preserved because the State did not raise such an argument during the postconviction proceedings which gave rise to this appeal.

Assuming without deciding that Oladipupo's claim is preserved for appellate review, we nevertheless conclude that it is without merit. Oladipupo argues that the trial court erred in giving the supplemental jury instruction on intent-to-frighten second-degree assault because (1) the State never requested the instruction; (2) it was not referenced in the State's initial closing argument; and (3) the supplemental instruction confused and prejudiced the jury. Oladipupo further argues that the instruction was in error because the jury question specifically concerned the February 3, 2015 assault, whereas second-degree assault was only an option on the verdict sheet for the February 5, 2015 incident.[4] In

[4] Oladipupo is correct in noting that the question related to the February 3 incident while second-degree assault was only charged for the February 5 incident. There is no

response, the State argues that (1) the evidence was sufficient to generate the instruction; (2) the court was sufficiently alerted that the State wanted the jury provided with the instruction; and (3) the State's closing argument sufficiently referenced the elements of intent-to-frighten assault.

In support, Oladipupo relies on *Cruz v. State*, *supra*, 407 Md. 202. In *Cruz*, the Supreme Court of Maryland considered a similar issue regarding supplemental jury instructions. Cruz was charged with first-degree assault following an altercation with two individuals, in which Cruz swung a baseball bat at one of the victims. *Id*. at 205. The victim fell down, and conflicting testimony was presented regarding whether the victim was hit in the head with the bat, resulting in a laceration, or whether the victim hit his head on the sidewalk when he fell and was not hit with the bat. *Id*.

During discussions with counsel regarding the jury instructions, the court inquired, "the second degree assault instruction has several parts. One of the parts is the intent to frighten, attempted battery, and, C, battery. Do all of those sub parts apply?" *Id*. at 206. The State specifically responded, "I think the applicable part of the second degree assault instruction is part C, which is the battery." *Id*. at 207. The court then instructed the jury

indication, however, that the jury considered intent-to-frighten assault in relation to the second-degree assault charge for the February 5 incident.

Rather, the instruction given for first-degree assault was that "the State must prove all of the elements of second degree assault, and also must prove that the defendant used a firearm to commit assault." Thus, it is our understanding that the jury's question is read to inquire whether, if the jury found that Oladipupo intended to frighten Ms. Alexis on February 3, 2015, and used a firearm to that effect, the jury could find Oladipupo guilty of first-degree assault.

solely on battery second-degree assault. *Id*. The parties proceeded to closing arguments, during which Cruz conceded that he swung a baseball bat in the direction of the victim that fell, but that the bat did not hit the victim, so the "offensive contact" requirement of battery was not met. *Id*. at 209.

After the jury began deliberations, the court received a note requesting clarification, asking, "[I]s Y falling on a sidewalk & hitting head while being chased by a bat by X, an assault by X on Y?" *Id*. at 207. The court informed the parties that it was "going to give another instruction on second degree assault, section B, of an attempted battery," over Cruz's objection. *Id*. Cruz was acquitted of first-degree assault but was convicted of second-degree assault. *Id*. at 208. On appeal, Cruz argued that the court's supplemental instruction was improper, and that Cruz was prejudiced by the inclusion of the instruction because he conceded during his closing argument "that he 'went after' [one victim] with the bat, thinking that attempted battery was off the table." *Id*. at 209. Had he known that the jury would be instructed on attempted battery as well, Cruz argued, "he would have focused his argument on Cruz's lack of intent to cause offensive physical contact." *Id*.

The Supreme Court held that the court's instruction on attempted battery was improper. *Id*. at 222. The court specifically focused on the prejudice faced by Cruz, because defense counsel specifically tailored her closing argument to address only the battery form of second-degree assault since it was the only theory promulgated by the State. *Id*. at 220. In doing so, "defense counsel essentially conceded the defendant's intent to make contact and walked into an attempted battery verdict." *Id*. at 221. The Court reasoned that "[h]ad Cruz known that the jury would be instructed on this assault theory

[attempted battery], his counsel would likely not have hinged his defense on the contact element of battery and, instead, would have emphasized that Cruz never intended to bring about harmful physical contact when he grabbed the bat and chased [the victim]." *Id*.

"The takeaways from *Cruz* and the cases upon which it relied are that a supplemental instruction should not be given if the accused 'was unfairly prevented from arguing his or her defense to the jury or was substantially misled in formulating and presenting arguments.'" *State v. Bircher*, 446 Md. 458, 472 (2016) (quoting *United States v. Gaskins*, 849 F.2d 454, 458 (9th Cir.1988)). "Factors considered in determining prejudice include: 'when the change in the instructions is substantial, when the judge's instructions repudiate counsel's argument, or when the judge's instructions impair the effectiveness of the attorney's argument.'" *Bircher*, 446 Md. at 472-73 (quoting *People v. Clark*, 556 N.W.2d 820, 828 (Mich. 1996)).

Oladipupo's case is more akin to *State v. Bircher*. Bircher was involved in an altercation, where he shot at an individual ("the instigator") in proclaimed self-defense, and instead hit and killed a bystander ("the bystander"). *Bircher*, 446 Md. at 473. In closing argument, Bircher argued that he did not intend to shoot the bystander, that he acted in self-defense, and that he did not intend to hit anyone at all. *Id*. During deliberations, the jury submitted a note, stating: "We are confused on the term 'intent.' Does it mean to kill a person or the specific person. Can you please clarify? Thank you." *Id*. at 474. Over defense's objection that "a transferred intent instruction would prejudice his previous argument that Bircher had no intent to shoot" the bystander, the court gave a jury instruction on transferred intent. *Id*. at 475. Bircher then presented an additional closing

argument, stating "to the same extent that [Bircher] did not intend to kill [the bystander], he did not intend to kill anybody. If the bullets ended up on [the bystander] they were unintended there and that is further emphasis for the position that we have taken that his—he was not aiming to kill." *Id*. at 476. Bircher was convicted of first-degree murder of the bystander and attempted first-degree murder of the instigator. *Id*.

The Supreme Court of Maryland affirmed Bircher's convictions. *Id*. at 482. In doing so, the Court concluded:

> [U]nlike in *Cruz*, Bircher's counsel did not concede that Bircher intended to shoot [the instigator] but not [the bystander], an argument that would have "walked into" the transferred intent issue. To the contrary, Bircher's counsel repeatedly emphasized that Bircher did not intend to shoot anyone, did not intend to shoot [the bystander] specifically and acted in self-defense. None of these arguments prejudiced Bircher with regard to the giving of a transferred intent instruction because Bircher, according to his counsel, "Did not have an intent to kill anybody."

Id. at 479. Rather, the court reasoned, "guilt of either a direct intent to kill [the bystander] and of transferred intent are 'so similar that the arguments to be made against guilt are essentially the same under both theories.'" *Id*. (quoting *United States v. Horton*, 921 F.2d 540, 547 (1990)). The Court noted that "[e]ssentially, under either theory, Bircher's argument was that he did not intend to shoot anyone, did not intend to shoot [the bystander] specifically and that he acted in self-defense." *Id*.

In our view, the instant case resembles *Bircher* far more than *Cruz*. In closing argument, Oladipupo's counsel solely presented the defense that Ms. Alexis had recanted her story and testified that she made the entire incident up because she was upset with

Oladipupo. Oladipupo's argument did not address any of the elements of second-degree assault. Accordingly, Oladipupo did not contend that he did not cause any offensive physical contact and merely sought to frighten Ms. Alexis. Instead, Oladipupo maintained that no assault of any sort occurred because Ms. Alexis had lied. Defense counsel urged the jury to find Ms. Alexis's version of events -- that she lied -- plausible, arguing "It is a reasonable explanation of what could have happened. Because none of us really know what happened. So if that's a reasonable explanation of what could have happened in this case, you must find Mr. Oladipupo not guilty."

The State argues in its brief that Oladipupo "makes no concrete showings of prejudice. He never argues that he: (1) tailored his summation assuming intent-to-frighten assault was off the table; (2) lost arguments because the supplemental instruction negated his summation; (3) would have crafted his summation differently; or (4) would have made additional arguments had he received advance notice." We agree.

Indeed, Oladipupo did not "walk into" any element of intent-to-frighten assault during his argument in defending against the battery charge, as defense did in *Cruz*. As the circuit court noted, the instruction "is not prejudicial to [Oladipupo] because [Oladipupo is] denying that any assault at any time took place or that he even possessed a gun in any event." Oladipupo has not demonstrated that his closing argument would have changed in any way if he had known that the jury would be instructed on intent-to-frighten assault. Rather, as in *Bircher*, Oladipupo's closing argument likely would have been precisely the same argument as it was before the supplemental instruction was given. As a result, Oladipupo has not demonstrated the requisite prejudice mandated by *Cruz*. The

circuit court did not err in providing the jury with a supplemental instruction on intent-to-frighten second-degree assault. We, therefore, affirm.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.