Circuit Court for Howard County
Case No. 13-K-18-058567

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2191

September Term, 2018

NORTEL MAURICE CLAYTON

v.

STATE OF MARYLAND

Arthur,
Shaw Geter,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Shaw Geter, J.

Filed: January 9, 2020

Nortel Clayton, appellant, was arrested and charged, in the Circuit Court for Howard County, with various crimes following a robbery that occurred at a Dollar Plus Store. Prior to trial, appellant filed a motion to suppress statements he made during an interview with the police. That motion was denied. A jury ultimately convicted appellant of robbery and second-degree assault. The court sentenced appellant to a total term of ten years' imprisonment. In this appeal, appellant presents five questions for our review:

1. Did the motions court err by denying appellant's motion to suppress his statements made during a police interrogation after he unambiguously invoked his right against self-incrimination?

2. Did the trial court err by admitting inadmissible hearsay?

3. Did the trial court abuse its discretion by admitting irrelevant and prejudicial prior bad acts evidence?

4. Did the trial court commit plain error by instructing the jury that the intent-to-frighten modality of second-degree assault was a lesser-included offense of robbery?

5. Is the evidence insufficient to sustain appellant's convictions of robbery and assault?

Finding no error and the evidence sufficient, we affirm the judgments of the circuit court.

BACKGROUND

At approximately 8:00 p.m. on October 23, 2017, an individual wearing a mask walked into the Dollar Plus Store on Whiskey Bottom Road in Laurel, approached the checkout counter, and told a store employee to open the cash register. After the store's employee complied, the individual grabbed some cash from the register, put the cash in his

pocket, and left the store. Appellant was ultimately arrested and charged with having committed the robbery.

Suppression Hearing

Prior to trial, appellant filed a motion to suppress statements he made to the police during an interview that was conducted following his arrest. At the hearing on that motion, the motions court accepted into evidence an audio recording of appellant's interview. During that interview, the police confronted appellant with some of the evidence implicating him in the robbery:

[DETECTIVE]: Between the fingerprint and –

[APPELLANT]: I'm saying that –

[DETECTIVE]: - finding the hoodies, the Urban Market –

[APPELLANT]: Right

[DETECTIVE]: - hoodie, the clerk's, the witnesses, them seeing you running back across the street to – towards your house. Like, putting all that together and then showing the photographs of a picture of you –

[APPELLANT]: All right.

[DETECTIVE]: - your mom even said it was –

[APPELLANT]: Okay.

[DETECTIVE]: - you. So I'm not –

[APPELLANT]: Well, see – I understand exactly what you're saying –

[DETECTIVE]: You know what I'm saying? I'm just – it's –

[APPELLANT]: - man, but I don't want to just say nothing like that. You know what I'm saying?

[DETECTIVE]: No, I get it. I get it.

[APPELLANT]: That's some clown ass shit.

[DETECTIVE]: I get it. It's just sometimes I just try to understand the mind set –

[APPELLANT]: I can't just –

[DETECTIVE]: - of some people that –

[APPELLANT]: I just, you know what I'm saying –

[DETECTIVE]: Okay.

[APPELLANT]: I got to plead the fifth, but I'm saying –

[DETECTIVE]: Okay.

[APPELLANT]: - I can't just tell you no clown ass – no shit like that. But I'm just saying, my mother, she do be trying to give the charges that aren't even me, man.

[DETECTIVE]: Uh-huh.

[APPELLANT]: My mother, she being doing that. But I'm saying I don't know. All right.

[DETECTIVE]: You think your mom would do that to you?

[APPELLANT]: It's the thing – man, she has done it before.

[DETECTIVE]: Uh-huh.

[APPELLANT]: She has done it in the past. See what I'm saying?

Appellant argued that his statement, "I got to plead the fifth," should have alerted the interviewing officer that appellant was asserting either his right to remain silent or his right to an attorney. Appellant maintained, therefore, that any statements he made following that statement should be suppressed. The motions court ultimately denied appellant's motion, finding that appellant's purported invocation of his right to remain silent and right to an attorney was "very ambiguous" and that "it was clear that he was just talking and rambling."

Trial

At trial, Gemechis Gudina, the owner of the Dollar Plus Store, testified that he was working behind the store's checkout counter on the night of the robbery. Mr. Gudina testified that, at approximately 8:00 p.m., "someone entered the store," walked up to the counter, and "told" Mr. Gudina to "open the cash register." Mr. Gudina, testified that he was "confused and scared." When Mr. Gudina asked the assailant to repeat himself, the assailant told him to "open the cash register and back off." Mr. Gudina testified that the assailant used "a command voice." After Mr. Gudina opened the cash register, the assailant took money from the register, some of which fell to the floor. The assailant then told Mr. Gudina to collect the fallen money and "hand it to him," and Mr. Gudina complied. The assailant then put the money in his pocket and fled the scene.

Video surveillance footage taken from the Dollar Plus Store at the time of the robbery was then shown to the jury. In that video, the assailant can be seen entering the store wearing a mask and a striped sweatshirt with the hood pulled up over his head. After

the assailant browses the store's merchandise for approximately one minute, he approaches the checkout counter where Mr. Gudina is standing. With both hands concealed in the front pocket of his sweatshirt, the assailant appears to say something to Mr. Gudina, who then opens the cash register. With his left hand still in the pocket of his sweatshirt, the assailant reaches into the register and removes some cash, and some of the cash falls to the floor. The assailant, with his hand still in his pocket, then motions toward Mr. Gudina, who picks up the fallen cash and hands it to the assailant. The assailant then puts the cash in his pants pocket and leaves the store.

Mr. Gudina testified that, after the assailant left the store, he called the police. Mr. Gudina's 911 call was played for the jury. In that recording, the 911 operator asked Mr. Gudina if the suspect had "any weapons," and Mr. Gudina responded that he thought the assailant "had something in his pocket."

Rashid Mahmood, a cashier at the All Saints liquor store located in the same shopping center as the Dollar Plus Store, testified that, following the robbery, he was shown a photographic array by the police and that he identified appellant as having been in the liquor store on the day of the robbery. Mr. Mahmood stated that appellant came into the liquor store to purchase a beer but that he left before doing so because he did not have any money.

The State, over objection, then introduced two surveillance videos. In the first video, which depicted the interior of the All Saints Liquor store, appellant can be seen walking into the liquor store a few hours before the robbery wearing clothing that was

virtually identical to the clothing worn by the person who committed the robbery at the Dollar Plus Store. The second video depicted the interior of another store, Urban Market, which was also located in the same shopping center as the Dollar Plus Store. In that video, which was taken approximately one hour before the robbery, an individual wearing a mask and a striped sweatshirt similar to the one worn by the robber can be seen entering the Urban Market store, browsing for a moment, and then leaving without purchasing anything.

Howard County Police Detective Danielle Ramsdell testified that, after appellant was developed as a suspect in the robbery, a search warrant was obtained and executed at appellant's residence, which was located a short distance away from the Dollar Plus Store. A striped sweatshirt matching the one worn by the assailant during the robbery was found at appellant's residence.

Howard County Police Detective Jose Marichal testified that, during his investigation into the robbery, he interviewed appellant. During that interview, which was the subject of appellant's motion to suppress, appellant stated that he was concerned about the level of crime near where he lived and that "he wished for more police presence in the area." When Detective Marichal asked appellant if the robbery at the Dollar Plus Store was "his way of bringing attention to the area," appellant told the detective "to come to the shopping center, sit, and see what's going on."

Appellant was ultimately convicted, as noted. Additional facts will be supplied below.

DISCUSSION

I.

Appellant first contends that the motions court erred in denying his motion to suppress. Appellant maintains that his statement, "I got to plead the fifth," was an unambiguous invocation of his right to remain silent and/or his right to an attorney. Appellant maintains, therefore, that any statements he made after that "invocation" should have been suppressed.

"In reviewing the denial of a motion to suppress evidence, 'we confine ourselves to what occurred at the suppression hearing,' which we view 'in a light most favorable to the prevailing party on the motion.'" *Ford v. State*, 235 Md. App. 175, 185 (2017) (quoting *Lee v. State*, 418 Md. 136, 148 (2011)), *aff'd* 462 Md. 3 (2018). Moreover, "[w]e extend great deference to the findings of the hearing court with respect to first-level findings of fact and the credibility of witnesses unless it is shown that the court's findings are clearly erroneous." *Daniels v. State*, 172 Md. App. 75, 87 (2006). We do not, however, defer to the hearing court's legal conclusions, which we review *de novo*. *Thornton v. State*, 465 Md. 122, 139–40 (2019).

In *Miranda v. Arizona*, 384 U.S. 436 (1966), the United States Supreme Court held that the police must "advise criminal suspects of their rights under the Fifth and Fourteenth Amendments before commencing custodial interrogation." *Lee*, 418 Md. at 149 (citations and quotations omitted). "These well-known *Miranda* warnings require an individual to be informed that 'he has a right to remain silent, that anything he says can be used against

him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.'" *Reynolds v. State*, 461 Md. 159, 178 (2018) (quoting *Miranda*, 384 U.S. at 479). "Once an individual is apprised of these warnings, the individual has the right to invoke the constitutional safeguards or waive them and engage with law enforcement." *Id.* If the individual invokes his privileges under the Fifth Amendment, all questioning must cease. *Williams v. State*, 445 Md. 452, 470 (2015). "In the event that officers continue to question [the] individual, any evidence flowing therefrom is illegally obtained and thus subject to exclusion as fruit of the unlawful conduct." *Reynolds*, 461 Md. at 178.

"The accused's invocation of [his *Miranda* rights], though, cannot be equivocal or ambiguous."[1] *Ballard v. State*, 420 Md. 480, 490 (2011). "If an accused makes a statement concerning [his *Miranda* rights] 'that is ambiguous or equivocal' or makes no statement, the police are not required to end the interrogation, or ask questions to clarify whether the accused wanted to invoke his or her *Miranda* rights." *Williams*, 445 Md. at 470–71 (citing *Berghuis v. Thompkins*, 560 U.S. 370, 381 (2010)). The test for determining whether an individual properly invoked his *Miranda* rights is an objective one. *Ballard*, 420 Md. at 490. If the invocation "is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, our precedents do not require the cessation of questioning." *Davis v. U.S.*, 512 U.S. 452, 458 (1994) (emphasis in original).

[1] "We apply the same standard for an invocation of silence as we do an invocation of counsel[.]" *Vargas-Salguero v. State*, 237 Md. App. 317, 343 (2018).

In *Williams v. State*, the Court of Appeals held that the defendant's statement, "I don't want to say nothing. I don't know," was too ambiguous to constitute a valid invocation of his *Miranda* rights. *Williams*, 445 Md. at 469, 477. As the Court explained:

> [A] reasonable police officer could have interpreted [the defendant's] statement as that of one who, in weighing his options, was deciding whether or not he wanted to talk. The "I don't know" statement could have been him weighing his options about wanting to talk or not knowing whether to speak. [The defendant] may have been unsure about whether to proceed with the interview and curious about why he was being interviewed. A reasonable police officer could have understood the statement "I don't want to say nothing. I don't know" to be an ambiguous request to remain silent.

Id. at 477.

Here, we hold that appellant's statement, "I got to plead the fifth," was too ambiguous to constitute a valid invocation of his *Miranda* rights. To begin with, the manner and context in which appellant made the statement permitted multiple, valid interpretations. Appellant, after being confronted with the evidence against him, could have been simply denying involvement in the crimes. Or, more colloquially, appellant could have been asserting that he had no knowledge of the matters about which he and the police were discussing. *See U.S. v. Rodriguez*, 518 F.3d 1072, 1076–77 (9th Cir. 2008) (holding that defendant's statement, "I'm good for tonight," in the context of a *Miranda* waiver was ambiguous because it "might have meant, 'I'm good to talk for tonight,'" or, "more idiomatically, that the speaker is declining or refusing an offer[.]"). Moreover, appellant made the statement in response to a specific inquiry by the police regarding the fact that appellant's mother had identified him in surveillance videos taken in the area of the robbery. Following that, appellant voluntarily continued talking with the police. Thus,

a reasonable interpretation could have been that appellant either did not want to talk about that particular issue or did not have anything to offer on the matter. *See U.S. v. Reynolds*, 743 F.Supp.2d 1087, 1090–91 (U.S.D.C., S.D. 2010) (holding that defendant's statement of "I plead the Fifth on that," combined with the fact that he did not refuse to answer additional questions, was a "selective invocation of his right to remain silent" and did not require the cessation of further questioning).

Even if we were to assume that appellant's statement, "I got to plead the fifth," was an unambiguous invocation of his *Miranda* rights, appellant's entire statement, "I got to plead the fifth, *but I'm saying*," was not. Like the defendant in *Williams*, appellant's inclusion of the qualifier "but I'm saying" rendered his invocation ambiguous. A reasonable police officer could have construed appellant's statement as indicating that he was weighing his options as to whether he should "plead the fifth." Appellant, by adding the phrase "but I'm saying," may have also been indicating that he intended to clarify his statement that he "got to plead the fifth." *See U.S. v. Adams*, 820 F.3d 317, 322–23 (8th Cir. 2016) (holding that defendant's statement, "I don't want to talk, man. I mean," was ambiguous because the phrase "I mean" signaled that the defendant "intended to clarify the statement, 'I don't want to talk, man[.]'"). That interpretation is even more reasonable when considered in conjunction with the fact that appellant voluntarily continued speaking without any provocation by the police and without any further clarification or reference to his *Miranda* rights. *Compare to Anderson v. Terhune*, 516 F.3d 781, 787 (9th Cir. 2008) (holding that the defendant unambiguously invoked his right to remain silent by stating "I

plead the Fifth" and then "surround[ing] that invocation with a clear desire not to talk anymore"). Under the circumstances, appellant's statement was not an unambiguous and unequivocal invocation of his *Miranda* rights. Thus, the motions court did not err in denying appellant's motion to suppress.

II.

Appellant's next contention concerns testimony given by Rashid Mahmood, the cashier at All Saints Liquor, regarding his identification of appellant from a photographic array:

[STATE]:	Where do you recognize that person? The last picture, where did you recognize that person from? Where?
[WITNESS]:	This guy come in my store. He my customer.
[STATE]:	Okay. He's a customer.
[WITNESS]:	Yes.
[STATE]:	And do you remember what day you saw him in your store?
[WITNESS]:	The same day they robbing the store.
[DEFENSE]:	Objection.
THE COURT:	No. Overruled.

* * *

[STATE]:	I think we're having a little trouble communicating here. What day did you see the person that you said is the last picture in your store at All Saints Liquors?
[DEFENSE]:	Objection.

[WITNESS]: He come in. He come in and stand there. Rob the Dollar Store Plus.

[STATE]: Hold on a second.

THE COURT: Overruled. All right.

[STATE]: Tell him to repeat –

* * *

THE COURT: Just repeat your answer again, sir.

[WITNESS]: Same guy come in same day they robbing the Plus Store.

[STATE]: Objection.

[WITNESS]: I think between eight to –

THE COURT: Overruled.

[WITNESS]: Eight to nine. He come in my store. He buy the beer, but don't have money. He left with the beer on the counter.

Appellant now claims that the trial court erred in permitting Mr. Mahmood to testify that appellant "was the person who robbed the Dollar Plus Store, when Mr. Mahmood had no firsthand knowledge of the event and his statement was clearly based on either hearsay or speculation."

Appellant is mistaken. Mr. Mahmood never testified that appellant was the person who committed the robbery. Mr. Mahmood testified, rather, that appellant had come into the liquor store on the day of the robbery. That testimony was based on Mr. Mahmood having actually seen appellant in the liquor store on the day in question. *See* Md. Rule 5-

602 ("Evidence to prove personal knowledge may, but need not, consist of the witness's own testimony."). Thus, the trial court did not err in admitting the testimony.

To be sure, at one point in Mr. Mahmood's testimony, when the State asked him what day he saw appellant in the liquor store, Mr. Mahmood responded, "He come in. He come in and stand there. Rob the Dollar Store Plus." To the extent that appellant is now claiming that that testimony should have been excluded, we note that appellant did not object to that testimony and thus did not preserve the issue for our review. Md. Rule 8-131(a). Even so, Mr. Mahmood's alleged "identification" of appellant as the robber was ambiguous at best. When the trial court asked him to repeat that testimony, Mr. Mahmood stated that appellant had come into the liquor store on the "same day *they* robbing the Plus Store." From that, it is clear that Mr. Mahmood was not identifying appellant as the robber but merely stating that appellant was in the liquor on the day of the robbery.

III.

Appellant's next contention concerns the admission of the Urban Market store's video surveillance, which depicted a masked individual matching the description of the robber entering and then leaving the Urban Market store approximately one hour before the robbery. Prior to the admission of that video, appellant filed a motion *in limine*, arguing that the video should be excluded as "prior bad acts evidence." The court denied the motion, finding that the video was not "what we consider prior bad acts" and that, even if it were, the evidence was admissible to show "preparation" or "scheme."

Appellant now claims that the trial court erred in admitting the video. Appellant maintains, as he did at trial, that the evidence constituted "prior bad acts" and should have been excluded as irrelevant and prejudicial.

Evidence is relevant if it makes "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." Md. Rule 5-401. Evidence that is relevant is generally admissible; evidence that is not relevant is not admissible. Md. Rule 5-402. We review the court's determination of relevancy under a *de novo* standard. *State v. Simms,* 420 Md. 705, 725 (2011).

Even if legally relevant, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]" Md. Rule 5-403. "We determine whether a particular piece of evidence is unfairly prejudicial by balancing the inflammatory character of the evidence against the utility the evidence will provide to the jurors' evaluation of the issues in the case." *Smith v. State,* 218 Md. App. 689, 705 (2014). "This inquiry is left to the sound discretion of the trial judge and will be reversed only upon a clear showing of abuse of discretion." *Malik v. State,* 152 Md. App. 305, 324 (2003).

In addition, Maryland Rule 5-404(b) prohibits the admission of a defendant's prior "bad acts" if that evidence is offered "to prove the character of a person in order to show action in conformity therewith." "Maryland Rule 404(b) prohibits other bad acts evidence to protect against the risk that a jury will assume that because a defendant committed other crimes, he is more likely to have committed the crime for which he is on trial." *Smith v. State*, 232 Md. App. 583, 599 (2017). "A 'bad act' is an act or conduct 'that tends to

impugn or reflect adversely upon one's character, taking into consideration the facts of the underlying lawsuit.'" *Stevenson v. State*, 222 Md. App. 118, 148 (2015) (citations omitted).

Evidence of a defendant's prior bad acts "may be admitted, however, if it is substantially relevant to some contested issue in the case and if it is not offered to prove the defendant's guilt based on propensity to commit a crime or his character as a criminal." *State v. Faulkner*, 314 Md. 630, 634 (1989). "Bad act" evidence has special relevance if it shows "motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident.'" Md. Rule 5-404(b). Whether "bad act" evidence has special relevance is a legal determination that we review *de novo*. *Stevenson*, 222 Md. App. at 149. "If we determine that the 'bad act' evidence in question has special relevance, then we balance the probative value of and need for the evidence against the likelihood of undue prejudice."[2] *Id.* (citations omitted). That analysis "implicates the exercise of the trial court's discretion, and we will only reverse the court's balancing determination if the court abused its discretion." *Id.* (citations and quotations omitted).

Here, we hold that the trial court did not err in admitting the Urban Market video. To begin with, we fail to see how the events depicted in the video could be construed as "bad acts." The video simply showed an individual wearing a mask and distinct clothing entering the Urban Market, browsing for a moment, and then leaving. The individual did

[2] Before admitting evidence of "other crimes," a trial court must also determine whether the defendant's involvement in the "other crimes" can be established by clear and convincing evidence. *State v. Faulkner*, 314 Md. 630, 634–35 (1989). Appellant does not challenge that aspect of the trial court's decision.

not do anything of note, much less anything "bad," while he was in the store. *See Burch v. State*, 346 Md. 253, 270–71 (1997) (unmarried defendant's testimony that he "got a girl and had sex" was not a prior bad act because there was no evidence that the "girl" was a prostitute or that she was an unwilling partner). And, other than the fact that he was in the same general area of the robbery and wearing the same clothing as the robber, the individual in the Urban Market video did not do anything to suggest that his being in the store was related to the robbery that occurred one hour later. *See Klauenberg v. State*, 355 Md. 528, 547–49 (1999) (noting that, when determining whether an act is "bad," courts generally will consider the act in relation to the charged crimes).

Even if the Urban Market video could be considered a "bad act," the trial court did not err in admitting it. As a preliminary matter, we must point out that appellant does not admit to being the person in the Urban Market video, instead referring to that individual as the "suspect" or the "man who robbed the Dollar Plus." It is axiomatic, however, that in order for evidence to be considered a "bad act" within the meaning of Rule 5-404(b), then the person committing the act and the person against whom the act is offered must be one in the same. *See Smith, supra*, 232 Md. App. at 599 ("Maryland Rule 404(b) prohibits other bad acts evidence to protect against the risk that a jury will assume that because *a defendant* committed other crimes, he is more likely to have committed the crime for which he is on trial.") (emphasis added). Thus, for the purposes of our Rule 5-404(b) analysis, we must assume that appellant was the person depicted in the Urban Market video.

That said, we hold that the evidence was substantially relevant and not unduly prejudicial. As noted, the video showed appellant, wearing a mask and a distinct sweatshirt, entering the Urban Market store, browsing the store's merchandise, and then leaving without purchasing anything. Approximately one hour later, an individual, donned in the same outfit and mask, entered the nearby Dollar Plus Store, browsed the store's merchandise, and then committed the robbery. Thus, the Urban Market video was relevant in establishing intent. *See Howard v. State*, 324 Md. 505, 514 (1991) ("Under some circumstances, where intent is legitimately an issue in the case, and where by reason of similarity of conduct or temporal proximity, or both, evidence of other bad acts may possess a probative value that outweighs the potential for unfair prejudice, the evidence may be admissible."). In addition, the video was relevant in establishing appellant's identity as the perpetrator. *Oesby v. State*, 142 Md. App. 144, 161–62 (2002) (noting that the "identity" exception outlined in Rule 5-404(b) includes "other like crimes by the accused so nearly identical in method as to earmark them as the handiwork of the accused.") (citations and quotations omitted). Finally, the trial court did not abuse its discretion in admitting the video, as the evidence's probative value was significant, whereas the likelihood of undue prejudice was slight given that, as noted, appellant did not do anything "bad" while in the Urban Market store.

On the other hand, if we assume that appellant was not the person in the Urban Market video, then any error the trial court may have made in admitting the video was harmless. Again, the individual in the video did not do anything other than enter the Urban

Market, browse for a moment, and then leave. There is no reasonable possibility that a video of an unidentified individual entering and exiting the Urban Market store could have contributed to the jury's verdict. *Dionas v. State*, 436 Md. 97, 108 (2013).

IV.

Appellant's next claim of error concerns an instruction given by the trial court to the jury. During its general instructions to the jury, the court set forth the elements of robbery and second-degree assault:

> The defendant is charged with the crime of assault. Assault is intentionally … frightening another person with the threat of immediate offensive physical contact. In order to convict the defendant of assault, the State must prove: that the defendant committed an act with the intent … to place Gemechis Gudina in fear of immediate offensive physical contact; that the defendant had the present ability, at that time, to bring about offensive physical contact; and that Gemechis Gudina reasonably feared immediate offensive physical contact.
>
> The defendant is charged with the crime of robbery. Robbery is [the] taking and carrying away of property from someone else, by force or threat of force, with the intent to deprive the victim of the property. In order to convict the defendant of robbery, the State must prove: that the defendant took the property from Gemechis Gudina; that the defendant took the property by force or threat of force; and that the defendant intended to deprive Gemechis Gudina of the property.

Following the trial court's instructions, the jury retired to the jury room to deliberate. The jury thereafter delivered a verdict of guilty on the charge of robbery and a verdict of not guilty on the charge of second-degree assault. When the court asked if the parties wished to have the jury polled, defense counsel requested a bench conference, at which the following colloquy ensued:

[DEFENSE]: I'd ask that the jury be told that they have to go back and deliberate and make their verdict consistent.

[STATE]: I have no objection to that.

THE COURT: And you – you agree?

[STATE]: The State would agree –

THE COURT: That the verdict is not consistent?

[STATE]: The State would agree with the request.

THE COURT: Okay. Alright thank you.

[DEFENSE]: Thank you.

The trial court then ended the bench conference and addressed the jury:

> Alright Ladies and Gentlemen, from the verdict that you have read, that verdict is not consistent. So I'm going to instruct you to go back and continue your deliberations until you come to a unanimous consistent verdict. So I'm going to send you back.

The jury then went back to the jury room to continue its deliberations. Shortly thereafter, the jury submitted two questions to the court. The first question asked, "What is the legal inconsistency?," and the second question asked, "Is second-degree assault a necessary condition for robbery." After sharing the questions with the parties, the court asked for the parties' input as to "what an appropriate response should be." The State began by suggesting that the court "advise the jury that second-degree assault is a lesser included offense of the charge of robbery." Defense counsel responded that she did not "have a problem with the jury knowing that it's a lesser included offense." Defense counsel added that the jurors should also be informed that "if [they] find [appellant] not guilty of

second-degree assault [they] must find [appellant] not guilty of robbery." Ultimately, the court called the jury back into the courtroom and gave the following instruction:

> Alright Ladies and Gentlemen … I'm going to tell you my response to the two questions that you have posed. Let me tell you, Ladies and Gentlemen a second-degree assault is a – is a lesser included offense to the charge of robbery. And that's why I've indicated to you that that's an inconsistent verdict and to go back and come back with a decision that contains a consistent verdict. But second-degree assault is a lesser included offense to the charge of robbery. Okay?

The jury thereafter retired to the jury room to continue its deliberations. Not long after, the jury returned verdicts of guilty on both charges.

Appellant now claims that the trial court committed plain error in instructing the jury that its verdict of not guilty on the charge of second-degree assault and its verdict of guilty on the charge of robbery were inconsistent. According to appellant, the Court of Appeals recently held, in *State v. Stewart*, 464 Md. 296 (2019), that such verdicts were not inconsistent because second-degree assault was not a lesser included offense to robbery. Recognizing that he failed to object to the court's instructions and that the Court's decision in *Stewart* was filed after his trial concluded, appellant contends that plain error review is nevertheless appropriate because "where the law changes while a case is on direct appeal, the appellant may raise an issue generated by the new state of the law for the first time in the appellate court."

Maryland Rule 4-325(e) provides, in relevant part, that an appellate court may "take cognizance of any plain error in the instructions, material to the rights of the defendant, despite a failure to object." "The appellate courts of this State have often recognized error

in the trial judge's instructions, even when there has been no objection, if the error was likely to unduly influence the jury and thereby deprive the defendant of a fair trial." *State v. Brady*, 393 Md. 502, 507 (2006) (citing *State v. Hutchinson*, 287 Md. 198, 202 (1980)) (quotations omitted). "The premise for such appellate action is that a jury is able to follow the court's instructions when articulated fairly and impartially." *Id.* at 507 (citations omitted). "It follows, therefore, that when the instructions are lacking in some vital detail or convey some prejudicial or confusing message, however inadvertently, the ability of the jury to discharge its duty of returning a true verdict based on the evidence is impaired." *Id.* (citations omitted).

On the other hand, where the error is "invited," appellate review is inappropriate. "The 'invited error' doctrine is a 'shorthand term for the concept that a defendant who himself invites or creates error cannot obtain a benefit – mistrial or reversal – from that error.'" *State v. Rich*, 415 Md. 567, 575 (2010) (citing *Klauenberg, supra*, 355 Md. at 544). The doctrine, applicable to jury instructions, "stems from the common sense view that where a party invites the trial court to commit error, he cannot later cry foul on appeal." *Id.* (citations and quotations omitted).

Assuming without deciding that the trial court's instruction was erroneous, we hold that said error was invited by appellant and thus affirmatively waived. When the jury returned its initial verdicts of guilty on the charge of robbery and not guilty on the charge of second-degree assault, the court was ready to accept those verdicts. At that point, appellant asked the court to inform the jury that the verdicts were inconsistent and to send

the jury back to the jury room to deliberate. The court agreed. Then, when the jury asked for clarification, the State proposed, and appellant expressly agreed, that the jury be told that second-degree assault was a lesser-included offense to robbery. Again, the court agreed. Thus, any error that the court may have made in giving that instruction was invited by appellant and is not reviewable for plain error. *See also Olson v. State*, 208 Md. App. 309, 365 (2012) ("Forfeited rights are reviewable for plain error, while waived rights are not.") (citations and quotations omitted).

V.

Appellant's final contention is that the evidence adduced at trial was insufficient to sustain his convictions of robbery and second-degree assault. Regarding the robbery conviction, appellant maintains that the State failed to prove that he took the money from Mr. Gudina by force or threat of force. Regarding his conviction of second-degree assault, appellant maintains that the State failed to prove that he threatened Mr. Gudina with immediate physical contact or harm.

"The test of appellate review of evidentiary sufficiency is whether, 'after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Donati v. State*, 215 Md. App. 686, 718 (2014) (citing *State v. Coleman*, 423 Md. 666, 672 (2011)). That standard applies to all criminal cases, "including those resting upon circumstantial evidence, since, generally, proof of guilt based in whole or in part on circumstantial evidence is no different from proof of guilt based on direct eye-witnesses accounts." *Neal*

v. State, 191 Md. App. 297, 314 (2010). Moreover, "[t]he test is 'not whether the evidence *should have or probably would have* persuaded the majority of fact finders but only whether it *possibly could have* persuaded *any* rational fact finder.'" *Painter v. State*, 157 Md. App. 1, 11 (2004) (citations omitted) (emphasis in original). In making that determination, "[w]e 'must give deference to all reasonable inferences [that] the fact-finder draws, regardless of whether [we] would have chosen a different reasonable inference.'" *Donati*, 215 Md. App. at 718 (citing *Cox v. State*, 421 Md. 630, 657 (2011)). In so doing, '[w]e defer to the fact finder's 'opportunity to assess the credibility of witnesses, weigh the evidence, and resolve conflicts in the evidence[.]'" *Neal*, 191 Md. App. at 314 (citations omitted).

"The hallmark of robbery, which distinguishes it from theft, is the presence of force or threat of force, the latter of which also is referred to an intimidation." *Coles v. State*, 374 Md. 114, 123 (2003). Because actual force is not at issue in the instant case, we must decide whether there was sufficient evidence of intimidation, or placing in fear, to support appellant's conviction. *Id.* at 125. The Court of Appeals has stated that, when intimidation is the essence of the action, the following objective test should be applied to determine the sufficiency of the evidence:

> Any attempt to apply the least force to the person of another constitutes an assault. The attempt is made whenever there is any action or conduct reasonably tending to create the apprehension in another that the person engaged therein is about to apply such force to him. It is sufficient that there is an apparent intention to inflict a battery and an apparent ability to carry out such intention.

Dixon v. State, 302 Md. 447, 458–59 (1985); *See also Montgomery v. State*, 206 Md. App. 357, 387 (2012) ("'The determination of whether there has been an intimidation should be guided by an objective test focusing on the accused's actions.'") (citing *Spencer v. State*, 422 Md. 422, 432 (2011)).

In *Spencer v. State*, for instance, the Court of Appeals held that the evidence was insufficient to support a robbery conviction where the defendant simply walked into a Jiffy Lube service center and told the cashier "not to say anything." *Spencer*, 422 Md. at 436. Similarly, in *West v. State*, 312 Md. 197 (1988), the Court held that the evidence of robbery was insufficient where the defendant took the victim's pocketbook from her hand without her knowledge and then ran away. *Id.* at 206–07. In each of those cases, the Court determined that the defendant's actions would not cause a reasonable person in the victim's position to fear that force was imminent. *See e.g. Spencer*, 422 Md. at 436 ("The statement to remain silent was simply not enough to create apprehension that force was about to be applied."); *West*, 312 Md. at 206–07 ("[T]he mere snatching or sudden taking away of the property from the person of another does not constitute sufficient force, violence, or putting in fear to support a robbery conviction.").

Conversely, in *Coles v. State*, the Court of Appeals held that the evidence was sufficient to support a robbery conviction where the defendant, "wearing a jacket in which he could have easily concealed a weapon, entered [a] bank, walked up to [the teller], and handed her a bag and a note that read, 'Put all the money in the bag no alarms thank you.'" *Coles*, 374 Md. at 130. Likewise, in *Dixon v. State*, the Court held that the evidence of

robbery was sufficient where the defendant, with a "cold, hard look in his eyes," approached a service station cashier "with a previously written demand for all her money" and while "carrying a newspaper tightly under his arm, folded in such a way that the cashier 'thought it was a weapon inside the newspaper[.]'" *Dixon*, 302 Md. at 464. In each of those cases, the Court determined that the requisite intimidation had been proven. *See e.g. Coles*, 374 Md. at 130 (concluding that "a rational fact finder could have concluded that the demand of, 'Put all the money in the bag,' and the command, 'no alarms,' were sufficient to create fear of bodily harm"); *Dixon*, 302 Md. at 459 ("The gravamen of the action … is whether intimidation has been shown.").

Here, the evidence showed that appellant walked into the Dollar Plus Store wearing a mask and a sweatshirt with the hood pulled up, approached the counter where Mr. Gudina was tending the register, and, with at least one hand in the front pocket of his sweatshirt, told Mr. Gudina to "open the cash register and back off." Mr. Gudina testified that he was "scared" and that appellant had used "a command voice." After appellant took the cash and left the store, Mr. Gudina called 911 and reported the incident. When the 911 operator asked Mr. Gudina if the suspect had "any weapons," Mr. Gudina responded that he thought the suspect "had something in his pocket."

From those facts, a reasonable factfinder could have concluded that appellant meant to "intimidate" Mr. Gudina into giving him the money. That is, appellant did not, like the defendant in *Spencer*, merely demand money, nor did he simply snatch the money away from Mr. Gudina, as was the case in *West*. Rather, like the defendants in *Coles* and *Dixon*,

appellant acted with the apparent intention to inflict a battery and the apparent ability to carry out that intention, such that an ordinary, reasonable person in Mr. Gudina's position would have feared bodily harm. Accordingly, the evidence was sufficient to sustain appellant's conviction of robbery.

Finally, in order to prove a second-degree assault, the State needed to show that appellant committed an act with the intention of placing Mr. Gudina in fear of immediate physical harm; that appellant had the apparent ability to bring about that harm; and that Mr. Gudina was aware of the impending harm. *Jones v. State*, 440 Md. 450, 455 (2014). "Assault of the intentional threatening variety is a fully consummated crime once the victim is placed in reasonable apprehension of an imminent battery." *Montgomery*, 206 Md. App. at 389 (citing *Hill v. State*, 134 Md. App. 327, 355–56 (2000)).

We hold that the evidence was sufficient to sustain appellant's conviction of second-degree assault. For all the reasons previously discussed, appellant's actions in effectuating the robbery placed Mr. Gudina in reasonable apprehension of an imminent battery.

JUDGMENTS OF THE CIRCUIT COURT FOR HOWARD COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.