

Circuit Court for Baltimore City  
Case No. 119148010

UNREPORTED  
IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND

No. 2275

September Term, 2019

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MICHAEL O’SULLIVAN

v.

STATE OF MARYLAND

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Beachley,  
Wells,  
Harrell, Glenn T., Jr.  
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Harrell, J.

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Filed: December 18, 2020

\*This is an unreported opinion and therefore may not be cited either as precedent or as persuasive authority in any paper, brief, motion, or other document filed in this Court or any other Maryland court. Md. Rule 1-104.

Following a bench trial in the Circuit Court for Baltimore City, Michael O’Sullivan, appellant, an officer with the Baltimore City Police Department (“BPD”), was convicted of perjury and misconduct in office. The court sentenced him to two concurrent terms of fifteen months. In this appeal, O’Sullivan presents a single question for our review, which we have rephrased as: Was the evidence sufficient legally to sustain Officer O’Sullivan’s convictions? We hold that it was and affirm the judgments of the circuit court.

### **FACTS AND PROCEEDINGS**

The charges against O’Sullivan arose from his testimony as a State’s witness at a criminal trial in the District Court of Maryland, sitting in Baltimore City, held on 4 June 2018. The defendant, Yusuf Smith, was charged with illegal possession of a handgun and related charges based upon Officer O’Sullivan’s averment in his statement of probable cause that he observed Smith “remove[] a silver handgun from his waistband and thr[o]w same onto the ground as he attempted to flee the area” of an apartment complex.

Officer O’Sullivan was the sole witness for the State at Smith’s trial. He testified that, on 1 May 2018, he had received information about criminal activity at the Alameda Apartments in North Baltimore City. A little before 4 p.m. on that day, he and Sergeant Amy Streett, in an unmarked sedan, parked in the lot of that complex and walked through the courtyard on foot. Officer O’Sullivan testified that, as he walked into the courtyard, he observed a man later identified as Smith standing near a rear apartment with a second man. He observed Smith remove “an object” from the waistband of his pants, throw it,

and run. O’Sullivan located eventually a .32 caliber handgun on the ground. Smith was apprehended ultimately by other officers as he ran through an alley south of the apartment complex.<sup>1</sup>

On direct examination, after O’Sullivan identified the gun that he had recovered, the prosecutor asked him, “And you saw someone throw it?” O’Sullivan replied, “Yes.” In follow-up questioning, he clarified that the person he saw throw the gun was Smith.

On cross-examination, Officer O’Sullivan acknowledged that he could not see exactly where Smith threw the gun. In response, defense counsel challenged O’Sullivan, saying, “You didn’t see him throw the gun?” Officer O’Sullivan replied, “Yes, I did.”

The court convicted Smith. He noted an appeal to the circuit court. While that appeal was pending, the State dismissed the charges against Smith and began investigating Officer O’Sullivan.

On 28 May 2019, Officer O’Sullivan was indicted for perjury and misconduct in office regarding his testimony at Smith’s trial. He elected a bench trial, which went forward over two days in October 2019. The State’s theory at trial was that Sergeant Streett’s body camera footage revealed that it was impossible for Officer O’Sullivan to have seen Smith throw anything, making his testimony under oath at Smith’s trial false.

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<sup>1</sup> As we shall discuss, *infra*, Officer O’Sullivan was wearing a body-worn camera that day but did not activate it until he found a handgun on the ground and, thus, his camera did not capture the point in time when he testified that he had observed Smith throwing an object. Smith’s attorney sought to admit Sergeant Streett’s body camera footage during the district court trial, but the court sustained the State’s objection to its admission.

The State maintained that it was irrelevant whether Smith was, in fact, guilty of illegal possession of a handgun and the related charges.

The evidence adduced at trial, viewed in a light most favorable to the State, showed the following. In 2018, Officer O’Sullivan was assigned to the Northern Division District Action Team (“DAT”), which is a team that targets violent offenders with guns and narcotics. Sergeant Streett was assigned also to that unit.

In the early afternoon on 1 May 2018, Officer O’Sullivan and Sergeant Streett arrested a man at an Exxon station on the Alameda in North Baltimore City. The man ran from the police, tossing a satchel into a dumpster. Officer O’Sullivan recovered the satchel from the dumpster and found a handgun inside. The arrestee told Sergeant Streett and Officer O’Sullivan that another man with an illegal handgun was at the Alameda Apartments, which was across the street from the gas station. He provided a description of the man: African-American, wearing jeans, a white tee shirt, a red thermal shirt, and red shoes.

About two hours later, Sergeant Streett, Officer O’Sullivan, and several other officers assembled near the Alameda Apartments to attempt to apprehend the man described by the arrestee. Sergeant Streett was the ranking officer on the scene. She and Officer O’Sullivan, who were in uniform, parked their unmarked vehicle in a surface lot west of the apartments accessible from the Alameda. Other members of the team drove into an alley south of the apartment complex to wait, with the expectation that when

Sergeant Streett and Officer O’Sullivan entered the complex, the suspect would be “flush[ed] out to the back.”

The Alameda Apartment complex consists of two buildings of two-story townhouse-style apartments. The buildings face each other with a courtyard between them. The courtyard is at a higher elevation than the surface parking lot. A paved path with two sets of steps (separated by a landing) leads to the courtyard from the lot, as does a dirt path worn through the grassy hill by pedestrians. The dirt path meets the paved path at the top of the second set of steps and a paved sidewalk continues between the apartments.

At the rear of the courtyard, the path branches off into two paths, both of which veer to the right behind the southernmost apartment building. The path closest to the apartment buildings slopes downward toward three steps that run directly behind the apartment building, leading to exterior concrete basement stairs. The other branch of the sidewalk continues south and connects to an east-west sidewalk running across a large grassy area between the building and a second surface parking lot at the eastern end of the complex. To the south of the apartment complex, a chain-link fence separates the grassy area from an alley running in an east-west direction. A tall wooden fence begins near the rear surface lot, forming a barrier between it and the alley.

Sergeant Streett’s body camera footage was introduced into evidence and played for the court with Sergeant. Street providing a running narrative regarding the images. She explained that, once activated, the camera restores automatically thirty seconds of

backlogged footage, without audio, and then records forward with audio from the point of activation. The thirty seconds of backlog footage show that Officer O’Sullivan walked from the parking lot to the courtyard on the paved sidewalk, while Sergeant Streett walked up the dirt path on the right. Officer O’Sullivan is not always visible in Sergeant Streett’s body camera footage as they walk up the hill, but his shadow can be seen to her left. Upon cresting the hill, they both looked in the direction of two youngsters who were sitting at the top of the second set of steps. Officer O’Sullivan smiled and greeted them.<sup>2</sup>

As Officer O’Sullivan and Sergeant Streett entered the courtyard, their paths converged and Sergeant Streett’s body camera captured the entire area between the apartment buildings. Sergeant Streett and Officer O’Sullivan continued to walk next to each other along the sidewalk between the apartment buildings. As they walked, Officer O’Sullivan “pick[ed] up the pace” and took the lead.

About twenty seconds after Officer O’Sullivan reached the top of the steps leading into the courtyard, he neared the last apartment on the right. Sergeant Streett was about two to three sidewalk squares behind him. From her perspective, a man was visible running eastbound next to the tall wooden fence adjacent to the rear surface lot. According to Officer O’Sullivan’s testimony at Smith’s trial, an audio recording of which was introduced into evidence at the trial in this case, that man later was identified as a

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<sup>2</sup> Although the first thirty seconds of body camera footage do not capture sound, Officer O’Sullivan’s body language is consistent with him speaking to the young men. He confirmed this when he testified.

man with the surname Cozart.<sup>3</sup> Sergeant Streett testified that that man never was identified. In any event, there was no dispute that the man was not Smith.

Sergeant Streett activated her body camera as she neared the corner of the rear apartment, which is when she could see the man running. She testified that BPD policy required her to activate it, as pertinent, “at the start of an investigation.” When her body camera was activated, Officer O’Sullivan, who had turned the corner already, was speaking into his radio, saying, “they’re going eastbound.” A heavysset man was seen walking slowly away from the back of the building.

Officer O’Sullivan and Sergeant Streett followed the near path, walking to the right, around the back of the southernmost apartment building. Sergeant Streett commented, “Oh they were just playing a game of dice.” Officer O’Sullivan walked toward the exterior basement steps. As he did, two men running westbound appeared in the alley from behind the tall wooden fence. One of those men, later identified as Smith, made a sharp left turn into one of the yards abutting the alley.

Sergeant Streett continued south across the grassy area and climbed over the chain-link fence. **[State’s Ex. 1]** She then began running westbound through the alley toward officers who were chasing Smith through yards and yelling for him to get down. **[State’s Ex. 1]** The officers took Smith into custody as Sergeant Streett reached their

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<sup>3</sup> Cozart’s first name does not appear in the record.

location. Smith was wearing a white t-shirt, jeans, and red and white sneakers at that time.

Meanwhile, Officer O’Sullivan searched the exterior concrete steps. The backlog footage from his body camera began as he walked around the corner. The steps were bordered by a short brick wall and, just beyond that wall, a tall wooden fence. A cell phone and various other items were sitting on top of the brick wall and on the concrete path leading to the steps. When Officer O’Sullivan emerged from the stairway, he walked south along the wooden fence that bordered the stairs. As he did so, he activated his body camera and walked to the end of that fence, where a silver handgun was observed in the grass. Officer O’Sullivan radioed, “Got the gun” and leaned down to pick it up. In the background of his body camera footage, Sergeant Streett had just cleared the chain link fence and began running down the alley.

Officer O’Sullivan followed Sergeant Streett and climbed over the chain-link fence. As he approached the location where Smith was being detained, he radioed “Thirty.” Sergeant Streett testified that “Thirty” is a police code meaning that the subject is wanted and should be placed under arrest.

Sergeant Streett testified that Officer O’Sullivan did not communicate to her that he saw anyone, much less a man throwing an object, as they walked up the hill into the courtyard and along the path between the apartment buildings. She also did not hear him communicate that over his police radio. When Smith was apprehended, Sergeant Streett did not have any reason to believe he had committed a crime.



After the prosecutor and defense counsel finished questioning Sergeant Streett, the court asked her directly whether she had seen Smith “go to his waistband or throw an object?” She replied, “I never saw Yusuf Smith there, period. Me personally, I never saw him.”

Smith testified that he was at the Alameda Apartments that day to visit with his cousin, who lived there. He played craps and smoked marijuana with a large group of people. He denied that he had a handgun. He was behind the corner of the southernmost apartment building when someone yelled “Police,” causing everyone to scatter. He did not see the police before he ran. He went initially eastbound through the alley, but then confronted a police car and turned around and ran westbound. The State asked Smith to specify what Officer O’Sullivan testified to at his district court trial that was “inconsistent with the truth.” Smith replied, “He said that he saw me with a silver handgun and I removed it from my waistband and threw it on the ground and that was not true.”

On cross-examination, defense counsel played for the court and questioned Smith about an excerpt of a phone call made from his inmate account at Central Booking in which the caller could be heard saying that he was in possession of a gun, but that he doubted that he was caught on the police camera because “that shit happened so quick.” On redirect examination, Smith denied that he had made that phone call, claiming that he had let other inmates use his account to make phone calls. On re-cross examination, defense counsel played additional excerpts from the same phone call in which the caller referred to Smith’s district court trial date for the gun charge, a pending domestic

violence charge and acknowledged that he was arrested near the Alameda shopping center.

Two other officers who were positioned in the alleyway testified about their actions in apprehending Smith.

Detective Eric Geddis of the BPD's Public Integrity Bureau testified that he had reviewed the radio communications from 1 May 2018 for the Northern District. He reviewed the dispatcher channel (Channel A) and the lateral communications channel (Channel C). He did not hear any communications that mentioned a gun until after a K-9 Unit was called, which followed Smith's arrest. Detective Geddis also did not hear Officer O'Sullivan state "Got the gun" or "Thirty.".<sup>4</sup>

At the close of the State's case, defense counsel's motion for judgment of acquittal was denied.

In his case, Officer O'Sullivan testified that as he reached the first landing on the steps leading into the courtyard, he

observed the individual standing at the rear, the rear southern corner house. As I came around and I was watching him, that's when Mr. Cozart fled on foot, running eastbound through what would be like the back parking lot area. And that's when I observed Mr. Smith turn, his hand went up to leave his waistband area, tossed an object and then he took off running.

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<sup>4</sup> Both Sergeant Streett and Officer O'Sullivan referenced a third channel: "B Channel." Officer O'Sullivan testified that he communicated over B Channel on 1 May 2018. Sergeant Streett testified that she could not remember if she was on A Channel and the rest of her team was on B Channel, or vice versa.

He identified a photograph taken at the Alameda Apartments from the perspective of the first landing. In the photograph, Officer O’Sullivan is standing at the rear of the courtyard a few feet to the left of the support pillar for the rear apartment’s porch. He testified that this location was “approximately [at] the place where [he] saw [ Smith].”

Officer O’Sullivan continued walking and radioed a description of the men to the other units after he saw Smith throw an object and flee. He did not yell “Gun” because he did not realize it was a gun until he found it. After he located the gun and observed Smith being detained in the alley, he radioed “10-30” because he knew that Smith was the person he had observed throwing an object, which he now knew to be the gun he found.

On cross-examination, Officer O’Sullivan admitted that he violated BPD policy by not activating his body camera when he observed Smith and Cozart fleeing. He acknowledged that he turned it on only after he observed the gun in the grass. Officer O’Sullivan agreed that Sergeant Streett’s body camera footage did not corroborate that he began walking faster or running at the point in time when he claims to have observed Smith and Cozart. Officer O’Sullivan did not hear anyone yell, “Police,” but he acknowledged that it was common for lookouts to be present when criminal activity was afoot.<sup>5</sup> Officer O’Sullivan confirmed that Smith’s clothing and appearance was “consistent” with the “intel” received from the earlier arrestee.

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<sup>5</sup> The State theorized in closing argument that the two young men sitting at the top of the steps leading into the courtyard were lookouts and would have yelled police when Sergeant Streett and Officer O’Sullivan climbed out of their car in the parking lot.

At the close of all the evidence, Officer O’Sullivan’s renewed motion for judgment of acquittal was denied.

In closing, the State reiterated its position that it did not matter whether Smith was guilty of possession of a handgun. The prosecutor maintained that the body camera footage, coupled with the location where the gun was found, established beyond a reasonable doubt that Officer O’Sullivan perjured himself when he testified to having seen Smith throw the gun. The State emphasized that the “flight path” the gun would have had to take to land where it was found was “truly unbelievable.” This was so because the gun would have had to have been thrown with enough force to clear the tall fence bordering the exterior concrete steps, but then immediately stop its flight path and “fall straight down to the ground.”

Defense counsel focused in his closing on Smith’s credibility, arguing that Smith lied about not having possessed a gun on 1 May 2018, despite conclusive evidence to the contrary from the jail call and that he lied when he said he had only been at the Alameda Apartments for 15 minutes, despite the “intel” from the first arrestee placing him there 2 hours before the events that led to his arrest. In defense counsel’s view, the evidence supported an inference that Smith ran upon seeing Officer O’Sullivan, which was also when Officer O’Sullivan saw him throw the gun. **He described it as** a normal, direct throw, the trajectory of which was not impossible.

The court ruled, in pertinent part, as follows:

[T]he issue is whether the testimony of Officer O’Sullivan is whether he was telling the truth on the statement of charges [and] in his

testimony in front of the district court, and this Court finds that the detective did not tell the truth.

I sat and watched the body camera video of Sergeant Streett and the observations from that body camera of what was possibly the vision of two individuals approaching that area, and I took into great consideration that Officer O’Sullivan had a different angle, a different perspective in his testimony of what he saw of Mr. Smith being at the side of the building and discharging or [indiscernible] tossing.

Today what he said was it was an object that – under oath he said it was a gun and numerous times he was positive that it was a gun. The gun was found so far away that it could not have been tossed. It had to go around the corner, basically over a fence and that to me is inconsistent with the testimony of Sergeant Streett, the video, body-worn camera video, the testimony of all the other officers who didn’t observe any of it.

His lack of turning on his video, his stopping and talking with some kids when allegedly suspects are running off, his not even mentioning to his partner who was right beside him the possibility of something being tossed. I found the testimony of Detective O’Sullivan to be challenged and I find that his statements in district court, he perjured himself on direct examination from the State’s attorney and from cross-examination of the Defense attorney.

So this Court finds beyond a reasonable doubt that the Defendant is guilty of both perjury and misconduct in office.

This timely appeal followed. We will include additional facts in our discussion of the question presented.

### **STANDARD OF REVIEW**

“When an action has been tried without a jury, [this Court] will review the case on both the law and the evidence [and] . . . will not set aside the judgment of the trial court on the evidence unless clearly erroneous, . . . giv[ing] due regard to the opportunity of the trial court to judge the credibility of the witnesses.” Md. Rule 8-131(c). A finding of fact is not “clearly erroneous” “if there is competent or material evidence in the record to

support the court’s conclusion.” *Brown v. State*, 234 Md. App. 145, 152 (2017) (citation omitted).

As this Court has explained, “the ultimate appellate review of the sufficiency of the evidence, if triggered, is precisely the same in a jury trial and in a bench trial alike.” *Chisum v. State*, 227 Md. App. 118, 129 (2016). We ask “‘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.’” *McClurkin v. State*, 222 Md. App. 461, 486 (2015) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in *Jackson*)). We “view[ ] not just the facts, but ‘all rational inferences that arise from the evidence,’ in the light most favorable to the prevailing party[.]” *Smith v. State*, 232 Md. App. 583, 594 (2017) (citation omitted), giving “due regard to the fact finder’s findings of facts, its resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the credibility of witnesses.” *Potts v. State*, 231 Md. App. 398, 415 (2016) (cleaned up).

## DISCUSSION

Under Maryland law, “[a] person may not willfully and falsely make an oath or affirmation as to a material fact . . . if the false swearing is perjury at common law . . . .” Md. Code Ann., Crim. Law § 9-101(a)(1). “Common law perjury was and is the giving of a false oath in a judicial proceeding in regard to a material matter.” *Hourie v. State*, 53 Md. App. 62, 65 (1982), *aff’d* 298 Md. 50 (1983). False testimony that is “‘deliberate and not the result of surprise, confusion or bona fide mistake’” is willfully made.

*Palmisano v. State*, 124 Md. App. 420, 428 (1999) (quoting *State v. Devers*, 260 Md. 360, 372 (1971)). Such testimony is material if it is “capable of affecting the course or outcome of the proceeding[.]” *Id.* at 429-30 (emphasis omitted).

“In Maryland, misconduct in office is a common law misdemeanor.” *Duncan v. State*, 282 Md. 385, 387 (1978) (footnote omitted). The Court of Appeals has defined it to mean “corrupt behavior by a public officer in the exercise of the duties of his office or while acting under color of his office.” *Id.* (citing *Perkins on Criminal Law* 485 (2d ed. 1969)). There is no dispute that perjury by a police officer testifying in his official capacity at a criminal trial would amount to misconduct in office.

Officer O’Sullivan contends that the State “failed to present any evidence that [he] willfully made false statements at Smith’s trial.” Because the evidence was insufficient, in his view, to permit the trial court to convict him of perjury, it follows that the misconduct in office conviction predicated on perjury also must fall. His argument rests heavily upon the application of the two-witness rule in Maryland.<sup>6</sup>

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<sup>6</sup> Much of Officer O’Sullivan’s brief is devoted to an attack on a theory of perjury advanced by the State, in the alternative, at trial: that Officer O’Sullivan’s testimony at Smith’s trial that he saw Smith throw a gun was willfully false because he now acknowledges that he saw Smith throw an object that he later inferred was the gun he found. At oral argument in this Court and in its brief, the State abandoned that theory, emphasizing that the trial court found that Officer O’Sullivan perjured himself because the evidence showed that he could not have seen Smith throw *any* object. Thus, we shall limit our analysis of the sufficiency of the evidence to the only theory of the crime advanced by the State on appeal.

The two-witness rule, which dates from the Court of the Star Chamber, establishes a “special burden of production” unique to a prosecution for perjury. *See Hourie*, 53 Md. App. 65 (“Of all the crimes prosecuted at the common law, perjury was unique in this special burden of production.” (footnote omitted)). At common law, the rule required that “to warrant a conviction of perjury the falsity had to be shown by direct and positive testimony of two witnesses.” *Brown v. State*, 225 Md. 610, 616 (1961) (citing 7 Wigmore, *Evidence*, § 2040 (3<sup>rd</sup> ed. 1940)). “Maryland has relaxed the rule, and currently allows a perjury conviction to stand based on the direct testimony of two witnesses, *or* the testimony of one witness combined with other independent corroborative evidence.” *Mason v. State*, 225 Md. App. 467, 478 (2015) (emphasis added); *see also Brown*, 225 Md. at 616 (“[T]he rule has been relaxed so as to allow a conviction of perjury to stand if there are two witnesses, or one witness corroborated by circumstances proved by independent testimony.”).

If only one witness offers direct testimony in the State’s case, the “other independent corroborative evidence must be of such a nature so as to be of equal weight to that of at least a second witness, thus foreclosing any reasonable hypothesis other than the defendant’s guilt.” *Brown*, 225 Md. at 616-17. To be “independent,” the other evidence must come from “a source other than that of the direct testimony,” *Mason*, 225 Md. App. at 486 (citing *United States v. Diggs*, 560 F.2d 266, 268 (7th Cir. 1977)), and must be “inconsistent with the innocence of the accused without the help of the principal witness’s testimony.” *Id.* at 487 (quoting *United States v. Stewart*, 433 F.3d 273, 315



(2d. Cir. 2006)). To be “corroborative,” the independent evidence “need not be sufficient to support a conviction, but instead ‘is sufficient if it tends to substantiate that part of the testimony of the principal prosecution witness, which is material in showing that the statement made by the accused under oath was false.’” *Id.* (quoting *Stewart*, 433 F.3d at 316).

In the instant case, Officer O’Sullivan contends that the State failed to satisfy the relaxed two-witness rule because it presented direct testimony of perjury from one witness – Smith – and the independent evidence – the body camera footage – was not sufficiently corroborative of the material aspects of Smith’s testimony and, taken together, the direct testimony and the circumstantial body camera evidence did not foreclose any reasonable hypothesis of innocence. He pins his hopes in this regard on differences in visual perspective between himself and Sergeant Streett, due to their different locations at critical moments and because her camera was aimed at the ground at the beginning of the video footage.

The State responds that the two-witness rule has no applicability where the falsity of the defendant’s testimony may be established solely by circumstantial evidence. It maintains that because the body camera footage standing alone was inconsistent with any reasonable hypothesis of innocence, our inquiry should end. To the extent that we see fit to apply the relaxed two-witness rule, however, the State asserts that it satisfied the rule by Smith’s testimony that he was never standing where Officer O’Sullivan claimed to have seen him and fled before the police were in view, coupled with the body camera

footage from Sergeant Streett and Officer O’Sullivan, which confirmed that his vantage point at the critical moments would not have permitted him to see what he claimed to have seen.

We hold that, because a reasonable factfinder could conclude that Officer O’Sullivan testified falsely at Smith’s criminal trial based solely on the body camera footage, this was not an oath-against-oath case implicating the two-witness rule. In any event, if we were to apply the two-witness rule, it was satisfied here because the body camera footage also was “independent corroborative evidence” that substantiated Smith’s testimony that he ran from the courtyard before the police were in view and because the direct and circumstantial evidence was legally sufficient to foreclose any reasonable hypothesis other than Officer O’Sullivan’s guilt.

This Court and the Court of Appeals have held that perjury may be proved by circumstantial evidence alone. In *Brown*, 225 Md. at 617, the Court of Appeals affirmed a conviction for perjury upon circumstantial evidence that the defendant had testified falsely in a civil proceeding that her signature did not appear on a confessed judgment note. The State introduced into evidence the note, bearing the defendant’s signature and known exemplars of her handwriting. It presented also testimony from a handwriting expert who opined that the signature on the note matched the known exemplars. *Id.* at 614-15. The Court of Appeals recognized that Maryland applied the two-witness rule in perjury prosecutions but noted that courts in other states had held that “circumstantial evidence, including documentary evidence, springing from the defendant himself, may

take the place of a ‘living witness.’” *Id.* at 617 (citations omitted). Relying upon those authorities, the Court held that the circuit court denied properly the defendant’s motion for a directed verdict at the close of the evidence. *Id.* In its view, the jury was entitled to conclude, based on the circumstantial evidence and its assessment of the defendant’s credibility during her live testimony at the trial, that she had perjured herself in the earlier proceeding. *Id.*

Two decades later, in *Smith v. State*, 51 Md. App. 408, 426 (1982), *cert. denied*, 293 Md. 618 (1992), this Court held, in reliance on *Brown*, that “where the State produces and relies upon circumstantial evidence, that circumstantial evidence in and of itself may be sufficient for a conviction of perjury, and the two-witness rule is not applicable.” *See also Hourie*, 53 Md. App. at 68 (“It is only where the perjury is proved by circumstantial evidence, that the common law burden is inapplicable.”). In *Smith*, the perjury charge was premised upon the defendant’s testimony in a civil proceeding brought against her by the Consumer Protection Division of the Attorney General’s Office. That Office alleged that she collected money from customers for furniture but had not delivered the furniture or refunded the money. 51 Md. App. at 410. The defendant testified at that proceeding that she had sent refund checks to the customers. *Id.* at 411-12. At the subsequent criminal perjury trial, two customers testified that they never received refund checks from the defendant and that judgments they obtained against her for the amounts due, prior to the civil trial, remained unsatisfied. *Id.* at 411. Certified copies of the judgments were admitted in evidence. *Id.* The defendant testified in her

own case that she never had received the cancelled checks for her refunds, but that she had testified truthfully to the best of her recollection at the civil proceeding. *Id.* at 412.

On direct appeal following her conviction for perjury, this Court affirmed. We reasoned that the evidence that the judgments were unsatisfied created an inference that the defendant knew the refunds had not been made. *Id.* at 425. That evidence, coupled with the customers’ testimony that they did not receive checks and the defendant’s testimony, the veracity of which the jurors were permitted to assess, was sufficient for the jurors to conclude that the defendant lied when she testified that she sent the checks. *Id.*

Here, to be sure, the State introduced direct testimony from Smith of perjury, as well as circumstantial evidence, making this case more akin to a traditional oath versus oath case than in *Brown* or *Smith*. See *Mason*, 225 Md. App. at 480 (reasoning that when the State presents direct and circumstantial evidence of perjury, it is “well-suited for the application of the two witness rule”).<sup>7</sup> Nevertheless, the State’s case (and the trial court’s ruling) rested entirely upon the circumstantial body camera evidence, not upon Smith’s testimony that Officer O’Sullivan lied. The State is not held to a higher burden of production, in our view, by its decision to produce more evidence than necessary to meet its burden of production.

Sergeant Streett’s body camera footage, coupled with Officer O’Sullivan’s body camera footage, in combination with the trial court’s assessment of the credibility of

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<sup>7</sup> We note, however, that whereas in *Mason*, the direct testimony was necessary to explain the dashcam footage, here, the body camera footage speaks for itself.

Officer O’Sullivan’s testimony, supplied legally sufficient evidence to persuade the trial court to find him guilty of perjury. Officer O’Sullivan testified that he observed Smith remove an object from his waistband and throw it as he ran south behind the apartment building. The body camera footage showing Officer O’Sullivan and Sergeant Streett walking the path between the parking lot and where the gun was located established the physical impossibility of this version of events. The trial judge found both that the distance between the location where Smith would have been visible to Officer O’Sullivan and where the gun was found was too “far away that it could not have been tossed” and that the flight path the gun would have needed to take was impossible. Both of these findings were supported by the video evidence and were not clearly erroneous. Given the gun’s location at the base of a tall wooden fence, the trial court inferred rationally that it could not have been tossed from a location in front of and to the left of that fence.

Sergeant Streett’s body camera footage also established the timing of Officer O’Sullivan’s entry into the apartment complex relative to Smith’s flight through the alleyway south of the apartment buildings. About thirty seconds passed between Officer O’Sullivan reaching the first landing on the concrete path into the courtyard to the moment when Smith appeared from behind the tall wooden fence running westbound through the alleyway. This was an unreasonably short period of time for Smith to travel so far. Although Officer O’Sullivan emphasizes the lack of any evidence establishing the distances involved, we conclude that these contentions go to the weight, not the legal sufficiency, of the evidence. “[T]he finder of fact has the ability to choose among

differing inferences that might possibly be made from a factual situation[.]” *Smith v. State*, 415 Md. 174, 183 (2010) (internal quotation omitted), and this Court “defer[s] to any possible reasonable inferences the [trier of fact] could have drawn from the admitted evidence and need not decide whether the [trier of fact] could have drawn other inferences from the evidence, refused to draw inferences, or whether we would have drawn different inferences from the evidence.” *State v. Mayers*, 417 Md. 449, 466 (2010).

The trial court inferred rationally also from Officer O’Sullivan’s behavior, captured on Sergeant Streett’s body camera footage, that Officer O’Sullivan he did not observe anything nefarious while walking up the concrete steps. As the court found, Officer O’Sullivan walked at a steady, nonchalant pace; paused to smile and greet the two young men at the top of the steps; did not call out to his ranking officer; and did not activate his body camera. The trial court found incredible, with good reason, that Officer O’Sullivan would exhibit no reaction to the observations he testified to at Smith’s trial. This finding was bolstered by Sergeant Streett’s testimony that Officer O’Sullivan never communicated to her that he observed Smith in the courtyard or that he observed him throwing an object, either during or after the events.

For similar reasons, if the two-witness rule were applied, the body camera footage was independent evidence corroborating Smith’s testimony that he was behind the apartment building when he fled, not positioned where Officer O’Sullivan could have seen him on his way up the hill from the parking lot. The direction Smith was running when he first appeared on camera substantiates his testimony that he fled southbound to

the alley, ran eastbound, confronted police officers, and then turned and ran back westbound. That sequence of events lengthens the time between when Smith could have fled and when he emerged from behind the fence. Thus, Smith’s testimony, considered along with the body camera footage, is also sufficient legally to prove that Officer O’Sullivan’s testimony that he observed Smith throw a gun before fleeing from the courtyard was false.

Given that the trial court found that Officer O’Sullivan’s testimony was a total fabrication, “not the result of surprise, confusion or bona fide mistake,” it also was willful. *Palmisano*, 124 Md. App. at 428 (quoting *Devers*, 260 Md. at 372). There is no dispute that his testimony was material as it was the only evidence connecting Smith to the gun found at the Alameda Apartments. For these reasons, the evidence was sufficient legally to sustain Officer O’Sullivan’s convictions for perjury and for misconduct in office predicated on perjury.

**JUDGMENTS OF THE CIRCUIT  
COURT FOR BALTIMORE CITY  
AFFIRMED. COSTS TO BE PAID  
BY APPELLANT.**