In the Circuit Court for Prince George's County
Case No.: 14-1419B

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2478

September Term, 2015

MARCUS ANTHONY BENSON

v.

STATE OF MARYLAND

Meredith,
Leahy,
Beachley,

JJ.

Opinion by Meredith, J.

Filed: June 7, 2018

A jury in the Circuit Court for Prince George's County found Marcus Anthony Benson, appellant, guilty on sixteen charges stemming from the armed robbery of four victims at a GameStop store in District Heights. After Benson was sentenced, he noted this appeal, and presents three questions for our review:

> 1. Did the trial court abuse its discretion in denying a motion for mistrial?
>
> 2. Was the evidence insufficient to sustain the conspiracy convictions?
>
> 3. Must the convictions for robbery with a dangerous weapon be reversed because the jury rendered an inconsistent verdict?

Because we perceive no error, we shall affirm the convictions.

FACTS AND LEGAL PROCEEDINGS

On the afternoon of September 12, 2014, three males robbed a GameStop store in District Heights. They stole electronics, personal property from store employees and customers, as well as cash that the store had bundled with a tracking device that emitted a global positioning system ("GPS") signal. The GPS signal led to a residential street address in Anacostia, where the signal abruptly terminated 28 minutes after the robbery.

The robbery was recorded from multiple angles by security video cameras positioned inside and outside the GameStop. Time-stamped GameStop security footage shows three robbers enter the store, wearing dark clothing tied around their heads in a manner that partially masked their faces. The first robber, wearing a loose black t-shirt and pants, with no hair visible beneath his head garment, brandished a gun. The second robber wore a loose white shirt with baggy camouflage pants, and had braided dreadlocks that were tied back. The third robber had a slim, athletic build; he wore a close-fitting black shirt and dark jeans, and wore his hair in long

loose dreadlocks that extended down his chest. His head-covering exposed his distinctive hair, lower forehead, eyes, and nose.

One of the surveillance cameras recorded images of the first and third robbers just before the robbery, outside the GameStop store, without their faces covered; another recorded them as they exited the store. Visible in the images taken outside are both robbers' full bodies and uncovered faces from a distance; visible in the close-up images taken at the GameStop exit are both of their faces. There are multiple close-up images of the third robber's partially exposed face.

GameStop employees Elliott Duncan and Brittaney Jackson, as well as store customers Jihad Bruce and Jason Frederick, Jr., gave consistent accounts of the robbery but were unable to identify any of the robbers.

After the robbers instructed everyone in the store to get on the ground, the robbers worked as a team, without talking among themselves, leading Mr. Duncan to conclude that "this was planned." The second and third robbers went into the storeroom with Mr. Duncan and took approximately nine PlayStation 4 videogame consoles, each valued at $400 or $450. The third robber took personal electronics and valuables from Mr. Frederick, Ms. Bruce, and Ms. Jackson, including an iPad, cell phones, and a wallet. The robbers also took everything in the cash register, filling "bags" from the register with approximately $700 in cash.

Packaged with the cash was a tracking device that sent a GPS signal every few seconds, indicating an exact time, latitude and longitude, closest street address, direction of travel, and speed. Police used that information to track the stolen currency from the site of the robbery in

District Heights, into the District of Columbia, and ultimately to 411 Mellon Street, S.E., where the last signal was recorded at 6:11 p.m., 28 minutes after the first signal. Prince George's County Police Detective Timothy Woods, the lead investigator in the case, testified that, in his experience, the sudden termination of a currency tracking GPS signal indicates where and when that device was discovered and destroyed.

Investigators focused on the 400 block of Mellon Street in Anacostia but did not find any of the stolen property. On the day of the robbery, Detective Woods questioned Shammad Love, who lived nearby and whose appearance was consistent with preliminary descriptions and images of the first robber from the GameStop robbery. But Love was not arrested or charged because Woods wanted to review the complete GameStop security footage.

Twelve days later, on September 24, video surveillance recorded by Mellon Market, a convenience store located less than a hundred feet from where the stolen currency tracker stopped transmitting a GPS signal, showed Love present with Benson, whose appearance police believed was consistent with the third robber in the GameStop robbery. In the video recording from Mellon Market, Benson and Love walked next to each other, entered the store at the same time, left together, and retraced their route.

Police questioned both men later that day, and took photographs of each while they were in police interview rooms. Benson told Detective Woods that he frequented the Mellon Market regularly but that he was acquainted with Love only "in passing" from the neighborhood.

Benson was arrested and charged with 34 counts stemming from the GameStop robbery. Love was also charged, and the two were scheduled to be tried jointly, as codefendants. On the

morning of the first day of trial, after voir dire, a jury was selected and preliminary motions were decided. At that point, Love elected to plead guilty. Counsel for Benson asked the court to begin jury selection anew. But the trial judge declined, and instead, gave the jury a preliminary instruction that cautioned jurors that they were to draw no inference whatsoever regarding the absence of one of the defendants, and were to decide the case based only on the evidence presented against Benson. Trial continued that afternoon, with Benson as the only defendant.

The prosecution theory was that Love and Benson were the first and third robbers shown in the GameStop security footage, that the currency tracker tied the robbers to 411 Mellon Street, S.E., and that the Mellon Market video established Benson's connection to that location and to Love, contradicting Benson's claim that Love was merely a casual acquaintance. In the absence of eyewitness identifications or forensic evidence placing Benson at the scene of the robbery, the State relied on the images from GameStop, Mellon Market, and the police station, and asked jurors to make their own determination that Benson was the third robber by comparing those images to his courtroom appearance.

Benson argued that the GameStop images were not clear enough to permit a finding that he was one of the masked robbers. He maintained that his interaction with Love at Mellon Market twelve days after the robbery was both innocuous and irrelevant.

The jury was persuaded that Benson participated in the GameStop robbery, and returned the following verdicts of "guilty":

- Second-degree assault of Elliot Duncan;

- Robbery with a dangerous weapon, robbery, theft of property valued less than $1,000, and second-degree assault of Brittaney Jackson;

• Robbery with a dangerous weapon, robbery, theft of property valued less than $1,000, and second-degree assault of Jason Frederick, Jr.;

• Robbery with a dangerous weapon, robbery, theft of property valued less than $1,000, and second-degree assault of Jihad Bruce;

• Theft of property valued between $1,000 and $10,000 from GameStop;

• Conspiracy to commit armed robbery against GameStop employees; and

• Conspiracy to commit robbery against GameStop employees.

The jury also returned "not guilty" verdicts on the following charges:

• Armed robbery, robbery, first-degree assault, and conspiracy to commit first-degree assault against Elliot Duncan;

• First-degree assault and conspiracy to commit first-degree assault against Brittaney Jackson;

• First-degree assault and conspiracy to commit first-degree assault against Jason Frederick, Jr.;

• First-degree assault and conspiracy to commit first-degree assault against Jihad Bruce;

• Use of a firearm to commit a crime of violence; and

• Carrying a handgun on his person.

DISCUSSION

I.

Request for New Jury

Benson argues that "the trial court abused its discretion in denying a motion for mistrial" made after his codefendant pleaded guilty after jury selection. We disagree.

The Record

After the State charged Benson and Shammad Love with offenses stemming from the GameStop robbery, the case proceeded to a joint trial against the two codefendants. During the lunch recess after the jury was selected, but not yet sworn, Love decided to plead guilty pursuant to a plea agreement.

Defense counsel for Benson expressed concern that the jury would "be wondering what happened to [former codefendant Love]"; counsel asserted that a "typical" juror would guess "that this person [*i.e.*, Love] took a plea agreement." The following colloquy appears in the transcript:

> [DEFENSE COUNSEL]: Your Honor, this is a strange posture for the case to be in. The jury has been told that two men robbed GameStop.
>
> THE COURT: Allegedly.
>
> [DEFENSE COUNSEL]: Allegedly. That there is a conspiracy.
>
> THE COURT: They haven't been told there is a conspiracy.
>
> [DEFENSE COUNSEL]: That's one of the charges in the statement of what they were being charged with. Now Mr. Love is no longer here. So they are going to be wondering what happened to him. Obviously what happened, as in a typical jurors mind, would be that this person took a plea agreement.
>
> THE COURT: Maybe.
>
> [DEFENSE COUNSEL]: I think so. Because unless he died or something why else would he not be here. So I think that's a devastating taint on Mr. Benson.
>
> Also, Your Honor, during the plea litany the victims were in the courtroom and essentially the prosecutor was testifying as to what the evidence is.

THE COURT: Something he went over with them already. It's not what they are going to testify to. The plea litany has nothing to do with your client.

[DEFENSE COUNSEL]: But there was a rule on witnesses.

THE COURT: Not for the plea.

[DEFENSE COUNSEL]: Okay. [the Prosecutor] and I have discussed these could be some problems, also.

THE COURT: You said this is going to be a problem?

[PROSECUTOR]: I didn't say it was going to be a problem.

[DEFENSE COUNSEL]: Here is the other issue, Mr. Benson has another case coming up, which I haven't seen. [The Prosecutor] hasn't seen. So it's possible depending on what that case is about we could work out everything. So I don't think it's worth going forward with a jury that I think is tainted if we can possibly –

THE COURT: No. I will give them a curative instruction that they are not to consider anything about the absence of Mr. Love in terms of making a decision in this case. I have done it before, I will do it again. I have done that.

[DEFENSE COUNSEL]: Essentially, I'm just asking for a continuance. We already cleared a date.

THE COURT: You said you agreed?

[PROSECUTOR]: I said I would not object.

THE COURT: There is no continuance. That's why you are here.

* * *

THE COURT: There is no basis for a continuance, you do know that right? We have gone through the whole jury selection.

[DEFENSE COUNSEL]: It's a very nice jury.

THE COURT: Yes. And they are going to give you a fair and impartial decision. So are you ready?

[DEFENSE COUNSEL]: Yes.

THE COURT: Are you ready?

[PROSECUTOR]: Yes, Your Honor.

THE COURT: At what point do you want me to give the instruction?

[DEFENSE COUNSEL]: I would say give it now because they are going to be wondering.

THE COURT: I will.

When the jury returned to the courtroom and was sworn, the trial judge began her preliminary instructions by addressing Love's absence, as follows:

> Okay. Ladies and gentlemen, I'm going to give you some preliminary instructions. I'm also going to instruct you that, you know during the voir dire process there were two individuals, Mr. Love and Mr. Benson. You are to make no inference at all, whatsoever, as to the absence of one of the Defendants at this point. And deciding this case, it is not to become part of your deliberations or your process on anything with respect to this case. You have to decide this case against Mr. Benson based only on the evidence presented against Mr. Benson.

Trial proceeded against Benson. The State presented testimony from the four robbery victims and Detective Woods. Mr. Love did not testify or otherwise provide evidence used against Benson.

Benson's Challenge

In this Court, Benson renews his contention that he was entitled to a new jury, casting it as a request for a mistrial that should have been granted because jurors "could very well have inferred that Love pled guilty," and "the State did not oppose a continuance." He argues that the trial court abused its discretion in denying the request because

> a rational juror very likely would have suspected that Love's absence [from the courtroom] was due to his having pled guilty. Aside from sudden illness or death – circumstances that the trial court likely would have brought to the attention of the jury – [Benson] is hard-pressed to think of any other explanation a juror would have contemplated. Where the State alleged that Mr. Benson acted as either a principal or as an accomplice, and where Mr. Benson faced several charges accusing him of conspiring with Love, Love's sudden absence from the proceedings very likely loomed large in the minds of the jurors.

In Benson's view, the trial court's curative instruction "did not compensate for the harm, especially where the evidence connecting [him] to Love was exceedingly thin."

The State observes that defense counsel "did not make a proper motion for mistrial," and that the trial court did not abuse its discretion in denying the requested continuance and giving an appropriate curative instruction, rather than declaring a mistrial, dismissing the jury, or continuing the trial date.

Assuming arguendo that Benson's request for a new jury, and for a continuance so that one could be selected, was the functional equivalent of a motion for a mistrial, we conclude, for the reasons explained herein, that the trial court properly exercised its discretion in declining to dismiss the jury and in giving an appropriate jury instruction.

Standards Governing Mistrial

Appellate review of a decision to deny a mistrial is conducted "under the abuse of discretion standard." *Nash v. State*, 439 Md. 53, 66-67, *cert. denied*, 135 S. Ct. 284 (2014). Such an abuse "has been said to occur where no reasonable person would take the view adopted by the [trial] court," "when the court acts without reference to any guiding rules or principles[,]" and "when the ruling under consideration appears to have been made on untenable grounds" or "is clearly against the logic and effect of facts and inferences before the court[.]" *Id.* at 67

(internal quotation marks and citations omitted). Because "'a ruling reviewed under an abuse of discretion standard will not be reversed simply because the appellate court would not have made the same ruling[,]'" courts reviewing the denial of a mistrial generally afford trial judges "a wide berth." *Id*. at 67, 68 (citation omitted).

Because "declaring a mistrial is an extreme remedy not to be ordered lightly[,]" *id*. at 69, a mistrial is warranted "only when 'no other remedy will suffice to cure the prejudice.'" *Rutherford v. State*, 160 Md. App. 311, 323 (2004) (citations omitted). "The determining factor as to whether a mistrial is necessary is whether 'the prejudice to the defendant was so substantial that he was deprived of a fair trial.'" *Kosh v. State*, 382 Md. 218, 226 (2004) (citation omitted).

When a mistrial request stems from the exposure of inappropriate information or inadmissible evidence to the jury, "[t]he trial judge must assess the prejudicial impact . . . and assess whether the prejudice can be cured." *Carter v. State*, 366 Md. 574, 589 (2001). In many instances, a timely corrective instruction to the jury is a sufficient remedy. *Kosh*, 382 Md. at 226. Courts typically consider the following factors in evaluating whether to give a curative instruction or declare a mistrial:

> "whether the reference to [the inadmissible information] was repeated or whether it was a single, isolated statement; whether the reference was solicited by counsel, or was an inadvertent and unresponsive statement; whether the witness making the reference is the principal witness upon whom the entire prosecution depends; whether credibility is a crucial issue; [and] whether a great deal of other evidence exists[.]"

Rainville v. State, 328 Md. 398, 408 (1992) (quoting *Guesfeird v. State*, 300 Md. 653, 659 (1984)).

Rainville is oft-cited as an example of a case in which a corrective instruction was inadequate. In that case, the defendant was on trial for sexually abusing a seven-year-old girl. *Id*. at 409. When the prosecutor asked the victim's mother to describe the child's "demeanor when she told you about the incident[,]" the witness unexpectedly responded that her daughter "'was very upset'" but "'came to me and she said where [the defendant] was in jail for what he had done to [the victim's brother] that she was not afraid to tell me what happened.'" *Id*. at 401. The trial court denied a motion for mistrial and instead instructed the jury to disregard the mother's testimony regarding the alleged incident involving the brother. *Id*. at 402.

The Court of Appeals reversed. *Id*. at 411. Even though the prosecutor's question and the trial judge's curative instruction were "appropriate," the inadmissible information was not solicited or repeated by the prosecution, and the mother was not the State's primary witness, nevertheless, "informing the jury" about the defendant's incarceration for a similar crime against the alleged victim's sibling "almost certainly had a substantial and irreversible impact upon the jurors," so that "no curative instruction, no matter how quickly and ably given, could salvage a fair trial for the defendant." *Id*. at 410-11. *See also Parker v. State*, 189 Md. App. 474, 495-96 (2009) ("a case in which any curative instruction was likely to exacerbate the harm by re-emphasizing the information the jury was not supposed to have heard in the first instance").

Analysis

Benson argues that, "[a]s in *Rainville*, the harm in this case is not mitigated by the fact that the State did not elicit unfairly prejudicial information[,]" and "the decision by the trial judge to give a curative instruction did not compensate for the palpable potential for unfair

prejudice against Mr. Benson." Benson disputes the State's contention that "a juror could just as easily assume the trials had been severed, counsel for Love had been called away, or, frankly, the juror might not have noticed or cared." According to Benson, "unless a lawyer or judge was sitting on the jury, it is very unlikely any juror would have guessed that the trials had been severed" and "it strains credulity to suggest that jurors would not have 'noticed or cared' about Love's sudden absence."

We are not persuaded that the trial judge abused her discretion in proceeding with the jury that had been selected. Unlike *Rainville*, this case did not involve the inadvertent presentation of inadmissible and highly prejudicial "other crimes" evidence through a prosecution witness. Here, the issue is whether the absence of a codefendant who pleaded guilty after trial proceedings began was a development that prejudiced the remaining defendant so that he could not get a fair trial. We are not persuaded that it did.

Telling jurors that the charges against Mr. Love were not going to be heard by them did not inform them that Love pleaded guilty. Neither the court nor counsel referred thereafter to Love's absence, much less suggested that he had admitted his guilt in the GameStop robbery. To the contrary, as soon as the jurors entered the courtroom that afternoon, the trial court instructed them *not* to draw any inference from Love's absence and to decide the case against Benson based solely on the evidence relating to him.

We see no sound reason to conclude that, under the circumstances of this case, the jurors would not have been able to follow the judge's curative instruction. *See Dillard v. State*, 415 Md. 445, 465 (2010) ("Jurors generally are presumed to follow the court's instructions,

including curative instructions."). In our view, these circumstances differ materially from cases like *Rainville*, when a curative instructive asked jurors to "unring the bell" of having heard inadmissible "other crimes" evidence, as well as comparable cases involving highly prejudicial argument to the jury. *Cf. Whack v. State*, 433 Md. 728, 753-54 (2013) (instructions before and after improper closing prosecutorial argument regarding DNA evidence could not cure unfair prejudice from those remarks); *Carter v. State*, 366 Md. 574, 591 (2001) ("In instructing the jury to disregard the testimony about a prior arrest, the court mentioned the arrest four times. The instruction as given, rather than being curative, highlighted the inadmissible evidence and emphasized to the jury that petitioner had been arrested previously."); *Quinones v. State*, 215 Md. App. 1, 22-23 (2013) (Mistrial was manifestly necessary, after State dismissed charges against codefendant and jury was instructed "not to draw any inferences from [codefendant's] absence during the balance of the trial," because in closing argument, defense counsel "continually referred to codefendant['s] . . . absence and specifically asked the jury to make inferences from his absence—exactly what the jury was instructed not to consider"); *Parker*, *supra*, 189 Md. App. at 495 (prosecutor's reference to defendant's prior conviction).

We are not persuaded that, when jurors learn they will not be deciding charges against a codefendant, the same type of irremediable prejudice arises. Whereas the jurors in *Rainville* could not realistically be expected to disregard evidence of the defendant's similar crime, in this case, there is no "other crimes" evidence nor any comparable exposure of the jury to inadmissible evidence.

We see no reason why the jurors in this case – who had yet to hear any evidence – could not be expected to comply with the court's clear and simple instructions not to speculate about why Love's case was being handled separately and to consider only the charges and evidence against Benson. Jurors have been trusted to carry on their duties based solely on the evidence pertaining to the remaining defendant in circumstances much more likely to be prejudicial to a defendant, including when the absence of a codefendant occurs later in the trial. *See, e.g.*, *Quinones*, 215 Md. App. at 9 (Following second day of trial, when State dismissed all charges against codefendant, trial court instructed jury that "prior instructions on separate consideration of multiple counts as to multiple defendants and conspiracy are no longer applicable to this case," and directed jury "not to make any inferences or have any discussions as to this fact during your deliberations."); *cf. United States v. Herrera*, 832 F.2d 833, 835, 836-37 (4th Cir. 1987) (affirming denial of mistrial after codefendants pleaded guilty in midst of a joint trial, where jury was not told of codefendants' pleas and was instructed to "disregard any statements on cross-examination by counsel for the codefendants," and "that the case against the codefendants had been 'disposed of' and that absolutely no inferences were to be drawn from that disposition.").

In the circumstances presented here, the trial court's instruction to the jury was an appropriate and effective method of preventing unfair prejudice. The trial court did not abuse its discretion in refusing to dismiss the jury or declare a mistrial.

II.

Sufficiency Challenge to Conspiracy Convictions

Benson next challenges whether there is sufficient evidence to support his convictions for conspiring to rob GameStop employees (Count 34) and conspiring to rob GameStop employees with a dangerous weapon (Count 33). We conclude that there is.

Standards Governing Sufficiency Review of Conspiracy Convictions

Criminal conspiracy is a common law crime that

> "consists of the combination of two or more persons to accomplish some unlawful purpose, or to accomplish a lawful purpose by unlawful means. The essence of a criminal conspiracy is an unlawful agreement. The agreement need not be formal or spoken, provided there is a meeting of the minds reflecting a unity of purpose and design. In Maryland, the crime is complete when the unlawful agreement is reached, and no overt act in furtherance of the agreement need be shown."

Mitchell v. State, 363 Md. 130, 145-46 (2001) (citations omitted).

When reviewing the sufficiency of evidence supporting a conspiracy conviction, 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 (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979)), *cert. denied*, 443 Md. 735-36, *cert. denied*, __ U.S. __, 136 S. Ct. 564 (2015). "In applying that standard, we give '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.'" *Id.* (quoting *Harrison v. State*, 382 Md. 477, 488 (2004)).

Analysis

In moving for a judgment of acquittal on the conspiracy counts, counsel for Benson argued "there is no evidence that the person Shammad Love was involved in this robbery" and "no evidence [that] puts Mr. Benson or Mr. Love in a situation where you could infer or deduce that they are conspiring to commit any crimes." On appeal, Benson contends that there is insufficient evidence "to establish an agreement between Mr. Benson and Love" to commit these crimes because the evidence does not "show a criminal nexus between the two men."

As the trial court pointed out in denying Benson's motion for acquittal, the jury was entitled to infer a meeting of the minds among the three robbers based on their coordinated actions during the robbery. Before entering the store, all three donned head-coverings. After instructing the victims to get down on the floor, the robbers each took different roles that appeared well-planned, splitting up in order to steal items from the storeroom, the cash register, and three victims. From the robbers' silent and simultaneous execution of these apparently prearranged assignments, the jury could draw the same inference that victim Elliott Duncan expressed: "They were not talking amongst each other. We knew it was planned from that point."

Moreover, there was sufficient circumstantial evidence to generate a jury question as to whether Benson was one of the three robbers. We are not persuaded otherwise by the fact that the victims could not identify Benson and that there is no forensic evidence linking him to the crime scene.

The State relied on photographic evidence from the robbery on September 12, 2014; Mellon Market twelve days later, on September 24; and the police station on September 24. The prosecutor asked the jury to find that the images of the slim, partially-masked robber with long dreadlocks were clear enough to identify Benson, based on a comparison with his appearance in court and the known images of him twelve days after the robbery. Strengthening that inference was the uncontested evidence that the GPS tracker on the stolen money led to a location frequented by Benson and Love, and that the Mellon Market video impeached Benson's claim that he knew Love only "in passing."

Our limited task is to determine whether, when viewing this evidence in the light most favorable to the State, any juror could find beyond a reasonable doubt that Benson was one of the three GameStop robbers who conspired with one or both of the other two robbers to commit that crime. Because we agree that reasonable persons could reach that conclusion, the evidence is sufficient to support the challenged convictions.

III.

Allegedly Inconsistent Verdicts

In his final assignment of error, Benson argues that "[t]he convictions for robbery with a dangerous weapon must be reversed because the jury rendered an inconsistent verdict." The State responds that Benson failed to preserve the inconsistency objection he asserts in this Court and that, in any event, the verdicts are not legally inconsistent. We agree with the State in both respects.

Failure to Preserve Inconsistency Objection

The Court of Appeals has held that, "to preserve for review any issue as to allegedly inconsistent verdicts, a defendant in a criminal trial by jury must object to the allegedly inconsistent verdicts or otherwise make known his or her position **before the verdicts become final and the trial court discharges the jury**." *Givens v. State*, 449 Md. 433, 472–73 (2016) (emphasis added). "Under Maryland case law, a jury's verdict is final when the trial court accepts the verdict after the jury has hearkened to the verdict and/or been polled." *Id.* at 478 (citation omitted).

After the jury delivered its verdicts and was polled and hearkened, the trial judge thanked the jurors and dismissed them to return to the jury room, but did ask them to remain to speak with her. When the jury left the courtroom, defense counsel made the following motion:

> [DEFENSE COUNSEL]: Just a motion to set aside the verdict because of inconsistent verdict.
>
> THE COURT: There is no inconsistency. *You have to be very specific. What would be the inconsistency?*
>
> [DEFENSE COUNSEL]: *He is found guilty of some crimes of violence.*
>
> THE COURT: He was not found guilty. He was found guilty of crimes of violence, yes.
>
> [DEFENSE COUNSEL]: *Second-degree assault, armed robbery, robbery*.
>
> THE COURT: Right.
>
> [DEFENSE COUNSEL]: Found guilty of another second-degree assault, guilty of armed robbery, guilty of robbery.
>
> THE COURT: *What is the inconsistency?*

> [DEFENSE COUNSEL]: ***Because he was found not guilty of use of a firearm in a crime of violence.***
>
> THE COURT: *Because they don't believe he had the handgun*.
>
> [DEFENSE COUNSEL]: He was also found not guilty of –
>
> THE COURT: Where is it inconsistent? *You don't have to be guilty of use of [a] handgun simply because you are guilty of a crime of violence*.
>
> [DEFENSE COUNSEL]: I'm making the motion.
>
> THE COURT: Okay. But that's not the law.

(Emphasis added.)

Benson concedes that "the thrust of defense counsel's motion focused on the alleged inconsistency resulting from the fact that the jury acquitted Mr. Benson of use of [a] handgun in the commission of a crime of violence, but convicted him of crimes of violence." Nevertheless, he maintains that his inconsistency challenge in this Court --- which stems from an alleged discrepancy between the verdicts on the armed robbery and *first-degree assault* charges --- "is properly before this Court" because (1) "the trial court cut off defense counsel when it appears she was trying to provide additional arguments for her motion," and (2) "at sentencing the court commented that appellate review would consider 'whether or not it was an inconsistent verdict because of the first degree assault.'"

Neither of these reasons persuades us to disregard the argument raised at trial and consider an argument that was not made at trial. Remarks made by court or counsel during the sentencing hearing are not relevant because they occurred long after the jury was excused. *See Price*, 405 Md. at 42. The purpose of limiting appellate review to challenges that were actually

argued to the trial court is to "prevent unfairness and require that all issues be raised in and decided by the trial court[.]" *Peterson v. State*, 444 Md. 105, 126 (2015). As the excerpted trial colloquy shows, defense counsel had ample opportunity to identify the allegedly inconsistent verdicts but made no mention of the first-degree assault acquittals. Even when the court interjected a question as to how the verdicts involving crimes of violence could be inconsistent if the jury believed that Benson did not wield a "handgun," defense counsel did not argue that the armed robbery convictions were inconsistent with the first-degree assault acquittals. Instead, counsel simply responded: "I'm making the motion." Because defense counsel did not argue, at the time the verdicts were announced, that the guilty verdicts on charges of robbery with a dangerous weapon were inconsistent with the not guilty verdicts on first-degree assault, that claim of inconsistency is not properly before this Court.

Inconsistency Challenge

"We review *de novo* the question of whether verdicts are legally inconsistent." *Teixeira v. State*, 213 Md. App. 664, 668 (2013). In Maryland criminal cases, factually inconsistent jury verdicts "are illogical, but not illegal." *McNeal v. State*, 426 Md. 455, 458 (2012). "Factually inconsistent verdicts are those where the charges have common facts but distinct legal elements and a jury acquits a defendant of one charge, but convicts him or her on another charge." *Id.* (citation and footnote omitted). In contrast, legally inconsistent verdicts are not permitted. *Id.* "A legally inconsistent verdict is one where the jury acts contrary to the instructions of the trial judge with regard to the proper application of the law." *Id.* Such a verdict occurs when "a

defendant is convicted of one charge, but acquitted of another charge that is an essential element of the first charge[.]" *Id.* (citation and footnote omitted).

In this case, the guilty verdicts on the charges of robbery with a dangerous weapon (commonly referred to as armed robbery) were neither legally nor factually inconsistent with the not guilty verdicts on the charges of using a firearm in the commission of a crime of violence and carrying a handgun. For this purpose, a "firearm" has been defined to include enumerated weapons, all of which are capable of shooting projectiles by means of an "explosive similar to gunpowder." *See Douglas v. State*, 37 Md. App. 557, 559 (1977). This definition generally *excludes* weapons that fire projectiles by other means, such as compression. *See generally Wright v. State*, 70 Md. App. 616, 620 (1987) ("to be a 'firearm,' it 'must propel a missile by gunpowder or some such similar explosive' or 'be readily or easily converted into' a device capable of so propelling a missile. . . . [T]hat definition . . . serves to exclude entirely such weapons as starter pistols, CO_2 guns, and B-B guns, which are simply not designed or constructed to fire missiles by gaseous explosion and, because of their design and construction, are not capable of doing so."). *Cf. Walker v. State*, 192 Md. App. 678, 690–91 (2010) ("a starter pistol may only be considered to be a 'firearm' if the starter pistol expels, or is designed to expel, or may readily be converted to expel projectiles"). Consequently, the counts charging Benson with use of a firearm in the commission of a crime of violence[1] and carrying a handgun[2]

[1] CR § 4-204 provides that "[a] person may not use a **firearm** in the commission of a crime of violence, as defined in § 5-101 of the Public Safety Article, or any felony, whether the firearm is operable or inoperable at the time of the crime." (Emphasis added.) *See* CR § 4- (continued)

required the jury to find that the weapon wielded in the robbery was a firearm that operates via explosive propulsion.

But it was *not* necessary for the jury to find that the armed robbery was committed with a "*firearm*" in order to convict Benson of robbery with a "dangerous weapon." CR § 3-403(a)(1) provides that "[a] person may not commit or attempt to commit robbery . . . with a **dangerous weapon**[.]" (Emphasis added.) Accordingly, armed robbery has been defined to include a robbery committed with any weapon that is "inherently dangerous or deadly or may be used with dangerous or deadly effect[.]" *Brooks v. State*, 314 Md. 585, 599–600 (1989). In *Brooks*, the Court of Appeals explained:

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

Id. at 600 (citation omitted). *See, e.g., Grant v. State*, 65 Md. App. 547, 555-56 (1985) (Armed robbery with B-B gun, using "compressed air to propel its missile, much the same as compressed CO_2 is used in a pellet gun," did not support conviction for possession of firearm

(continued)
204(a)(1)(i) ("'firearm' means . . . a weapon that expels, is designed to expel, or may readily be converted to expel a projectile by the action of an explosive").

[2] CR § 4-203(a)(1)(i) provides that, with exceptions not relevant here, "a person may not . . . wear, carry, or transport a handgun, whether concealed or open, on or about the person[.]" *See* CR § 4-201(c)(1) ("Handgun" means a pistol, revolver, or other **firearm** capable of being concealed on the person.") (emphasis added).

but did support conviction for robbery with a dangerous weapon because '[i]t is not necessary that a gun be capable of discharging a lethal bullet to be a deadly weapon.'").

In accordance with the pattern instructions for these offenses, the trial court instructed the jury that "[a] firearm is a weapon that propels a bullet, shotgun pellet, or missile or projectile by gunpowder or similar explosive." *See* MPJI-Cr 4:01.1. With respect to robbery with a dangerous weapon, the court instructed the jury that "[a] dangerous weapon is an object capable of causing death or serious bodily harm." *See* MPJI-Cr 4:28.1.

Defense counsel then argued in closing:

> **Some of the counts talk about using a firearm or handgun**. **The victims** who were robbed, they said someone had a gun, handgun, et cetera. These people **are not experts in weapons**. It looked like a gun. It looked like a handgun. We know people have gotten killed over a toy gun. If it's a toy gun, if it's a BB gun, **if it's anything that fires a projectile without an explosive or gunpowder[,] then it's not a handgun or a firearm. All of these counts that talk about a handgun or dangerous weapon, firearm, those counts have not been proven. There is no proof that was a real gun.**
>
> As we know, people have gotten killed over fake guns. They look like real guns but **these crimes require a real gun**. All of those counts, you can just mark those not guilty right away, because those crimes have not even been proven.

(Emphasis added.)

In this case, the trial judge concluded that the jury may have been persuaded by defense counsel's argument regarding the sufficiency of proof that the weapon brandished by one of the robbers was, in fact, a firearm that was capable of firing a projectile with an explosive or gunpowder. When defense counsel first raised the issue of inconsistency with the acquittals for use of a firearm, the trial judge immediately responded that the jury likely acquitted Benson of

use of a firearm because the jury did not believe he had a handgun, which was a point that had been expressly argued by defense counsel in closing argument.

Even if the jury found that the State did not prove that the object wielded by one of the robbers was a "firearm," the jury could have rationally convicted Benson of robbery with a dangerous weapon on an accomplice theory based on testimony from victims and the store surveillance video, *i.e.*, that the weapon looked like a "real" gun and was used in that manner, but might not have been a "real gun" that met the statutory definition of a firearm. The jury could have found that Benson was the robber who took cell phones and other personal property from the victims; that although Benson did not have a weapon, his accomplice did brandish what appeared to be a black handgun during the robbery; and that the weapon that looked like a real gun was capable of inflicting serious or deadly harm (as described in *Brooks*) even if it was not an operable firearm. The jury could have determined that, even though there was insufficient evidence to establish beyond a reasonable doubt that the gun fired ammunition using the explosive means necessary to qualify it as a firearm, the weapon may have been capable of firing dangerous projectiles by compression or other means, or heavy enough to be used as a bludgeon, which was sufficient to establish that it was a dangerous weapon.[3] The description of the weapon and the manner in which it was used to commit a robbery at a busy retail store support an inference that the black gun used by Benson's accomplice was capable of inflicting "serious or deadly harm[.]" *Brooks*, 315 Md. at 600.

[3] Because Benson does not contend that the evidence was insufficient to establish that the weapon used in the robbery was a dangerous weapon, we shall assume that it is for purposes of this discussion.

As we explained in *Teixeira, supra*, 213 Md. at 681-82:

> As to the handgun use charge, the jurors could well have decided that [the defendant] had not employed a handgun that met the definition of "firearm," but instead another dangerous weapon or even an instrument that was not "capable of being concealed on or about the person and which is designed to fire a bullet by the explosion of gunpowder." *See* Crim. Law § 4–204(a)(1)(i). Use of a handgun that meets the statutory criteria is a sufficient, but not necessary predicate for a conviction of . . . armed robbery.[4]

As the verdicts indicated, the jurors apparently concluded that the State failed to prove that the weapon used to commit the robbery qualified as a firearm for purposes of the charges of assault in the first degree, using a firearm to commit a crime of violence, and carrying a handgun, but also concluded that the State did establish that the brandished weapon satisfied the broader definition of a "dangerous weapon" for purposes of armed robbery. Accordingly, the trial court did not err in accepting these verdicts despite Benson's inconsistency objection.

JUDGMENT AFFIRMED. COSTS TO BE PAID BY APPELLANT.

[4] For similar reasons, we would not have found the verdicts to be legally inconsistent even if Benson had preserved a claim that the guilty verdicts were inconsistent with the acquittals of the first degree assault. Based on this record, even if Benson's inconsistency challenge had extended to the verdicts on all counts involving a weapon, we would not be persuaded that they were factually or legally inconsistent.