Circuit Court for Baltimore County
Case No. C-03-CR-22-002560

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1455

September Term, 2022

JEFFREY MICHAEL SCHATZ

v.

STATE OF MARYLAND

Beachley,
Shaw,
Killough, Peter K.
(Specially Assigned),

JJ.

Opinion by Shaw, J.

Filed: December 5, 2023

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

Following a bench trial, the Circuit Court for Baltimore County convicted Appellant, Jeffrey Michael Schatz, of both second-degree assault and wearing or carrying a dangerous weapon openly with the intent to injure. The court sentenced Appellant to an aggregate term of eighteen months' incarceration, suspended all but time served, and imposed an eighteen-month period of probation. Appellant timely appealed and presents the following questions for our review:

> 1. Did the circuit court err in admitting a recording of [a] 911 call pursuant to Maryland Rule 5-802.1(b)?
>
> 2. Is the evidence insufficient to sustain the conviction for second-degree assault where the defense of property by use of nondeadly force and self-defense apply?
>
> 3. Is the evidence insufficient to sustain the conviction for wearing and carrying a dangerous weapon openly with intent to injure pursuant to *Chilcoat v. State*, 155 Md. App. 394 . . . (2004)?

For the reasons set forth below, we affirm the judgments of the circuit court.

BACKGROUND

On May 16, 2022, Robert Zachary Judge drove Arthur Benjamin Judge, his younger brother and the alleged victim in this case, to Appellant's residence to retrieve Benjamin's personal belongings. Appellant had stored the items in his home while Benjamin was incarcerated.[1] Upon their arrival, Zachary remained in his minivan, while Benjamin exited the vehicle and walked to Appellant's porch. Appellant, who had been expecting

[1] For the sake of clarity and in accordance with their preferences, we shall refer to the Judge brothers by their middle names.

Benjamin, opened his front door and permitted him to enter. While Benjamin gathered his belongings, the two men started to argue. The verbal dispute escalated into a physical confrontation, which culminated in Benjamin suffering a machete-inflicted laceration to his left hand. At trial, Benjamin and Appellant gave different accounts of the altercation.

The State called Benjamin as its first witness. Benjamin testified that he received a telephone call from Appellant on May 15, 2022, requesting that he retrieve his belongings because Appellant "was sick of them sitting in his living room." Benjamin explained that he had been evicted from his former apartment while serving a one-year term of incarceration, and that his ex-girlfriend, Destiny Barnhill, had assured him that his belongings "would all be kept safe at [Appellant]'s house until [he] got released." According to Benjamin, after arriving at and entering Appellant's house on May 16, 2022, he began collecting his personal effects, moving them to the front porch, and "making small talk with [Appellant]."

During their conversation, Appellant asked to borrow Benjamin's two turntables, which were apparently among the items that had been stored at his home. When Benjamin refused, Appellant grew "kind of irritated or frustrated" and told Benjamin that he was "lucky that [he] ha[d] anything left because if it wasn't [sic] for him, [he] wouldn't have anything." Benjamin then suggested obtaining a police escort to supervise the retrieval of his property. In response, Appellant rose from the computer desk where he had been

sitting, "flipped out[,] started screaming, grabbed a machete, [and] came at [him]."[2] Benjamin called to Zachary for assistance. At some point, Appellant swung the approximately two-foot machete blade from over his head at Benjamin, while demanding—for the first time—that he "[g]et the f[***] out of [his] house." Benjamin blocked the machete "from striking [him] . . . in the head."[3] In so doing, Benjamin sustained a nearly two-inch laceration between the forefinger and thumb of his left hand. He then pushed Appellant "to give [him] space," grabbed the last of his belongings, and exited through the front door.

Once outside, Benjamin called 911 and asked Zachary to finish removing the items from the porch. Paramedics and police responded to the scene. Although the paramedics requested that Benjamin accompany them to the hospital "to get stitched up," he declined to do so for fear that he would be charged an ambulance fee.[4] Approximately thirty to forty-five minutes after the police arrived, Zachary drove Benjamin to Saint Joseph's Hospital, where he remained for the rest of the evening.

[2] According to Benjamin, the computer desk at which Appellant had been sitting was located in the dining room, which adjoined the living room from which Benjamin was retrieving his belongings.

[3] On cross-examination, Benjamin explained that in the course of blocking the blow, he "kind of pinched the blade[.]"

[4] The laceration to Benjamin's hand ultimately did not require stitches.

Zachary also testified for the State and corroborated much of Benjamin's account. According to Zachary, after driving Benjamin to Appellant's residence, he sat in his minivan for approximately five to ten minutes before he heard Benjamin "yelling for [him] to come up." Zachary exited the vehicle and, upon arriving at the front door, he asked Appellant for permission to enter, which he granted.

Upon entering Appellant's living room, Zachary observed Appellant and Benjamin "kind of going at it about getting his stuff," which was piled in the middle of the room. When he subsequently heard Appellant tell Benjamin to "get out of the house," Zachary urged him to comply. Rather than immediately leaving, however, Benjamin continued "grabbing things" and "said he was going to get a police escort[.]" Zachary then saw Appellant retrieve the machete "from the corner of the room" and watched as Appellant chased Benjamin "around the pile of stuff that he had on the floor" while brandishing the weapon and repeatedly demanding that he leave. After they had exited the house, Zachary noticed that Benjamin's finger was bleeding "down in the crease[.]" Zachary did not, however, witness how Benjamin had sustained the injury.

Baltimore County Police Sergeant Daniel Yeagley was among the officers who responded to Benjamin's 911 call. Sergeant Yeagley testified he was dispatched to the scene at 6:01 p.m. and arrived "[w]ithin five to ten minutes" thereafter. Once at the scene, Sergeant Yeagley spoke with Ms. Barnhill, who was inside Appellant's house. Sergeant Yeagley requested her consent to search the home, which Ms. Barnhill refused. While

awaiting a search warrant, Sergeant Yeagley received a report that a fellow officer had seen an individual, later identified as Appellant, "pop out of the . . . door of the garage and then go back in[.]" With his gun drawn, Sergeant Yeagley ordered Appellant out of the garage. After Appellant complied, Sergeant Yeagley handcuffed and arrested him.

The State's final witness was Baltimore County Police Detective Todd Wiedel. Detective Wiedel testified that he prepared the search warrant for Appellant's home and participated in the subsequent search thereof. During that search, Detective Wiedel recovered two machetes with estimated eighteen-inch blades, one of which was serrated.

After the State rested its case, the defense called Ms. Barnhill to the stand. Ms. Barnhill testified that she was "hiding in the upstairs bedroom" of Appellant's house when the altercation at issue occurred. Ms. Barnhill explained that she was hiding because the temporary protective order that she obtained against Benjamin had expired, and she "was fearful of him[.]" According to Ms. Barnhill, her fear of Benjamin stemmed, at least in part, from the incident that led to his incarceration, which, in turn, resulted in their eviction from the apartment that they had shared. During that episode, which Ms. Barnhill had previously relayed to Appellant, Benjamin purportedly tracked her phone and, upon finding her with an ex-boyfriend, "attacked him brutally."

Returning to the events of May 16, 2022, Ms. Barnhill recounted what she had heard from the upstairs bedroom after Benjamin entered Appellant's house, testifying:

> I heard the fumbling around of things being taken out of the house. I heard some talking and then . . . the talking turned into shouting[,] and I could

> hear [Appellant] saying just leave louder and louder and louder again until it was screaming. Get out, get out, get out.
>
> And I could hear [Zachary] saying let's just go. Let's just go, from the minivan out front.

Ms. Barnhill estimated that between five and ten minutes had elapsed between the first and last time she heard Appellant tell Benjamin to leave.

On cross-examination, Ms. Barnhill averred that Appellant left the house after the confrontation "because Ben[jamin] called the police and any time the police show up it doesn't ever seem to go well for [him.]" Ms. Barnhill acknowledged that she both refused the officers' request that she "call [him] back to the location" and withheld her consent to a search of the residence. She further conceded having warned the officers that syringes may have been in the home, but attributed their potential presence to her "sister's boyfriend," who, she claimed, "is a diabetic." Finally, although Ms. Barnhill denied having told the officers that she was "struggling with addiction," defense counsel stipulated that "during the hour or so that Ms. Barnhill [wa]s . . . detained in the living room of the residence[,] she d[id] make a statement indicating that . . . she is someone who has a drug habit."[5]

Appellant was the second and final witness for the defense. Appellant confirmed that he had been expecting Benjamin to arrive at his home on May 16, 2022, to retrieve

[5] On cross-examination, the State also impeached Ms. Barnhill with her 2013 conviction for robbery with a dangerous weapon.

personal belongings that had been stored at Appellant's home while Benjamin was incarcerated. After some small talk, Appellant sat at his computer table as Benjamin moved his belongings. Appellant acknowledged that he asked to borrow Benjamin's turntable "for a few more weeks[.]" Although Benjamin refused his request, Appellant persisted, reminding Benjamin that he had served as the warden of his property with the promise of receiving compensation for his trouble. Benjamin again refused.

According to Appellant, the "disagreement" over Benjamin's turntables ended when he relented in his request to borrow them, saying: "[O]kay, well that's fine." Then, however, Benjamin claimed ownership of and attempted to take Ms. Barnhill's MacBook computer. Appellant refused to relinquish the computer, urging Benjamin to direct any property disputes to Ms. Barnhill. According to Appellant, Benjamin responded: "[N]o, I'm taking everything that's mine and all this stuff is mine." Appellant testified that Benjamin "started moving through the house into other rooms outside of the front room," including his computer room. He further averred that Benjamin was "pulling open drawers" and had "pulled a picture down off the wall that he claimed was his."

Appellant testified that he responded to Benjamin's behavior by repeatedly instructing him to leave. Benjamin, however, did not comply. Instead, he purportedly declared: "I'm going to get the police involved. I'm going to get the police to come stand by." Appellant claimed to have replied: "[Y]ou know what, if you want to get police involved[,] go get them and . . . you can come back with a warrant." Appellant began

approaching Benjamin with his arms extended and his hands raised, thereby "backing him up towards the door[.]" When Benjamin had reached the threshold, he "pushed [Appellant] back into the house[.]"

According to Appellant, Benjamin "frantically started pulling stuff off" and called for Zachary. When Zachary had reached the porch, Appellant permitted him to enter the house and requested his assistance in removing Benjamin therefrom. Once inside the house, Zachary pled with Benjamin to leave, saying: "[P]lease get out of the house, Ben." Rather than acquiesce to his brother's pleas, Appellant testified, Benjamin continued "taking stuff" and "was pulling the turn[]tables out and . . . pulling out . . . cords and wires that were attached to [his] mixer[.]" When Appellant again began backing him up toward the front door, Benjamin pushed him a second time.

Appellant walked to his computer desk and retrieved a "very heavy gauge," "razor sharp" machete.[6] Gripping the machete's hilt tightly with both hands and raising the weapon above his shoulders, Appellant repeated: "Please get out of the house. Get out of the house." When Appellant approached Benjamin with the machete in yet another attempt to expel him from his home, Benjamin grabbed the weapon. A struggle ensued during which Benjamin attempted "to wrestle the machete out of [Appellant's] hands." When the struggle subsided, Benjamin was holding the machete's blade with both hands and "started

[6] According to Appellant, the machete he retrieved was not one of the two recovered by Detective Wiedel.

to try to yank it out of [Appellant's] hand by the blade[.]" Appellant testified that he "stepped backwards away from [Benjamin]," and "that's when . . . he sustained the injury[.]" Immediately after cutting his hand, Benjamin left the house. Once Benjamin had departed, Appellant immediately locked the front door, relayed the events that had transpired to Ms. Barnhill's niece (who also resided in the house), grabbed his cell phone, exited the house, and entered the garage, where he remained until he was arrested.

We will include additional facts as necessary in our discussion of the questions presented.

DISCUSSION

I. The Contentions

Appellant contends the court erred in admitting into evidence a recording of Benjamin's 911 call pursuant to Maryland Rule 5-802.1, which provides an exception to the rule against hearsay for prior consistent statements "offered to rebut an express or implied charge against the declarant of fabrication, or improper influence or motive[.]" Md. Rule 5-802.1(b). The charge of improper influence or motive at issue arose from the defense eliciting testimony from Benjamin confirming that he was on probation during his altercation with Appellant—the implication being that Benjamin fabricated his testimony to avoid being charged with a probation violation. Appellant asserts, however, that Benjamin's prior consistent statements were made after [Benjamin] formed the motive to fabricate the details of the incident involving [Appellant]." Because Benjamin's "motive

to downplay his culpability existed at the time he called 911," Appellant concludes that "the statements he made to the 911 dispatcher were not admissible pursuant to Md. Rule 5-802.1."

The State tacitly concedes the court erred in admitting the recording. It claims, however, that by failing to renew his prior objection to the recording when it was admitted into evidence and neglecting to raise "the specific grounds he is now asserting," Appellant waived his objection to its admissibility. Alternatively, the State asserts that "[a]ny error in admitting the 911 call was harmless" because the court neither listened to the recording nor referenced it when announcing its verdict.

With respect to the State's preservation challenge, Appellant rejoins that because defense counsel raised a "general hearsay objection" to the recording when it was initially offered into evidence, the issue is properly before us. Appellant maintains defense counsel was not required "to object again when the State suggested another possible hearsay exception where the court had not ruled on the initial general hearsay objection." In response to the State's harmless error argument, Appellant acknowledges that "the record does not clearly show that the trial court listened to the 911 call." He notes, however, that "[b]ecause the call was admitted as evidence, the State was allowed to argue in summation that immediately after the incident [Benjamin] gave 'a version of events[,]' a 'version of facts[,]' which [wa]s 'identical to what he ha[d] testified to.'" "Because credibility was

the critical issue in this case," Appellant concludes, "the error in admitting the 911 call was not harmless."

The Pertinent Procedural History

Following its direct examination of Benjamin, the State offered into evidence an audio recording of his 911 call. Defense counsel objected on the dual grounds that the recording was hearsay and cumulative of Benjamin's prior testimony. The State, in turn, argued that Benjamin's recorded statements were admissible as substantive evidence pursuant to the business records, excited utterance, and present sense impression exceptions to the hearsay rule. Defense counsel responded:

> I would argue against it being a present sense impression because it was five minutes later, I think that's what he says in the 911 call.
>
> * * *
>
> In terms of excited utterance, I would proffer that [Benjamin] is quite calm in the call and not at all excited. . . . I'm not sure the relevance . . . in that its duplicative of evidence that's already offered.

The court reserved ruling on the admissibility of the recording.

During defense counsel's cross-examination, Benjamin confirmed that he had been on probation "for two different cases" at the time of his altercation with Appellant. The following colloquy ensued:

> [DEFENSE COUNSEL:] In both cases you were ordered to remain law abiding as a condition of your probation?
>
> [THE STATE]: Objection.

> THE COURT: Sustained.
>
> [DEFENSE COUNSEL]: Your Honor, the witness'[s] credibility is at issue in every case. And the witness has indicated that he was at no fault in what took place on this incident.
>
> What I'm trying to bring out is potential motive that the witness would have for not testifying truthfully in terms of his own liability.
>
> THE COURT: So that the question that -- you agree to remain law abiding, you could probably say that to any witness because we all agree to remain law abiding.
>
> [DEFENSE COUNSEL]: That's fair. But I want to bring out the particular penalties that this witness would face if he were found to conduct himself otherwise.
>
> Because, again, it's relevant to his motive for everything he's making --
>
> THE COURT: This is a bench trial. I'll permit you leeway to develop that. We'll see where it goes and . . . if the State thinks that . . . hasn't connected up sufficiently[, it] can move to have it stricken. But I'll permit you to develop it.

Benjamin then acknowledged that the court could impose a minimum sentence of nine years' incarceration if it found that he had violated the terms of his probation by either assaulting Appellant or refusing to leave his residence after Appellant instructed him to do so.

After Benjamin finished testifying, the State proposed yet another potentially applicable hearsay exception, stating:

> Your Honor, if I could just mention one thing for the [c]ourt to consider in terms of the 911 call. If the [c]ourt were to consider that statement to be

> hearsay, there is a hearsay exception of a prior consistent statement to rebut an allegation of fabrication.
>
> *** * ***
>
> Based on this line of questioning, . . . [d]efense counsel is suggesting that this victim is lying . . . to garner some sort of favor in the future with a possible [violation of probation]. So[,] that is one other thing for the [c]ourt to consider.
>
> And it's my understanding that the prior consistent statement must predate the claim of fabrication and that's exactly what we have here.
>
> * * *
>
> So, I just want to make that argument now and obviously--

Interrupting the State, the court announced: "I'll rule on that right now." In overruling defense counsel's hearsay objection, the court reasoned, in pertinent part:

> [D]uring cross examination[,] it was elicited or suggested that the testimony of the victim here could be, I don't want to say fabricated, but was affected by the possibility of a favorable disposition . . . on any possible violations of probation, thus suggesting that he . . . had fabricated his story for purposes of this case.
>
> That triggers a different rule which permits the admission of a prior consistent statement when there is a claim of recent fabrication. So[,] the [c]ourt will admit on that basis the 911 call.

Defense counsel did not renew her objection when the court then admitted the 911 recording into evidence.

Harmless Error

For purposes of this opinion, we will assume that this issue is properly before us. On the merits, we agree with Appellant that the court erred in admitting the recording as a

prior consistent statement because the 911 call was placed after Benjamin's motive to fabricate had arisen.[7] For the reasons that follow, however, we are persuaded that the court's error in admitting the recording was harmless beyond a reasonable doubt.

In *Dorsey v. State*, 276 Md. 638, 659 (1976), the Supreme Court of Maryland articulated the following standard for assessing harmless error in a criminal case:

[7] Maryland Rule 5-802.1 governs the admissibility of prior consistent statements and provides, in pertinent part:

> The following statements previously made by a witness who testifies at the trial or hearing and who is subject to cross-examination concerning the statement are not excluded by the hearsay rule:
>
> * * *
>
> (b) A statement that is consistent with the declarant's testimony, if the statement is offered to rebut an express or implied charge against the declarant of fabrication, or improper influence or motive[.]

This exception to the prohibition against hearsay "'embodies the common-law rule requiring a prior consistent statement, introduced to rebut a charge of . . . fabrication or improper influence or motive to have been made before the alleged fabrication or improper influence or motive came into existence.'" *Thomas v. State*, 429 Md. 85, 102 (2012) (quoting *Holmes v. State*, 350 Md. 412, 418 (1998)).

As discussed in greater detail below, the defense impeached Benjamin's credibility by eliciting testimony that he was on probation—with a nine-year suspended sentence—at the time of his altercation with Appellant. Benjamin also acknowledged that he would have violated the terms of his probation if he had either assaulted Appellant or trespassed upon his property. Defense counsel thus intimated that Benjamin harbored an improper motive to fabricate his trial testimony so as to minimize his culpability. As Appellant correctly contends, however, that same motive "existed at the time [Benjamin] called 911." Because Benjamin's prior consistent statements were made after his motive to fabricate had formed, they were not admissible to rehabilitate his testimony pursuant to Rule 5-802.1(b).

> [W]hen an appellant, in a criminal case, establishes error, unless a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict, such error cannot be deemed "harmless" and a reversal is mandated. Such reviewing court must thus be satisfied that there is no reasonable possibility that the evidence complained of—whether erroneously admitted or excluded—may have contributed to the rendition of the guilty verdict.

Although this standard of review is equally applicable to jury and bench trials, this Court has explained that Maryland case law "on the issue of whether error was harmless . . . demonstrates a clear distinction between jury trials and bench trials." *Nixon v. State*, 140 Md. App. 170, 189 (2001). In a bench trial such as this, the critical question is "*whether or not the trial judge relied on improper evidence*." *Id.* (emphasis added). In making that determination, this Court will defer "to a trial judge's specific statement on the record that the court was not considering certain testimony or evidence." *Id. See also Simms v. State*, 39 Md. App. 658, 673 ("'The . . . proposition that judges are [persons] of discernment, learned and experienced in the law and capable of evaluating the materiality of evidence, lies at the very core of our judicial system.'") (quoting *State v. Babb*, 258 Md. 547, 550 (1970)), *cert. denied*, 283 Md. 738 (1978).

As the State correctly notes, and Appellant concedes, the record does not remotely reflect that the 911 call was played in open court. In deferring ruling on the recording's admissibility, the court expressly stated: "I will make a ruling before I review it at all or listen to it. . . . It's identified at this time and before I review it[,] I will make a ruling." Between the admission of the recording into evidence and the announcement of the verdict

from the bench, moreover, there was only one break in the proceeding after a fire alarm sounded. Again, the record does not suggest—and it would strain credulity to suppose—that the court conducted an *in camera* review of the 911 call during that eighteen-minute-long interlude.

Although Appellant acknowledges that "the record does not clearly show that the trial court listened to the 911 call," he maintains that "[h]ad the evidence been excluded, the court could not have permitted the State to use the 911 call to bolster [Benjamin's] credibility." Because the court erroneously admitted the recording into evidence, Appellant concludes, the State was permitted to argue: "I know Your Honor hasn't listened to it yet, but he calls 911. I would submit to the [c]ourt if you do listen to that, he gives a version of events that -- his version of the facts are identical to what he has testified to."

It is well-established that a "verdict must be based upon the evidence developed at . . . trial[.]" *Turner v. Louisiana*, 379 U.S. 466, 472 (1965) (quotation marks omitted). The principle "that closing argument is not evidence" is likewise so well established as to be beyond cavil.[8] *Baby v. State*, 172 Md. App. 588, 607 (2007), *rev'd on other grounds*, *State v. Baby*, 404 Md. 220 (2008). *See also Pulte Home Corp. v. Parex, Inc.*, 174 Md. App. 681, 754 (2007) ("Closing argument is not evidence[.]"), *aff'd*, 403 Md. 367 (2008);

[8] Rather, the purpose of closing arguments is to afford the parties "'an opportunity to creatively mesh the diverse facets of trial, meld the evidence presented with plausible theories, and expose the deficiencies in his or her opponent's argument.'" *Donaldson v. State*, 416 Md. 467, 487 (2010) (quoting *Henry v. State*, 324 Md. 204, 230 (1991)).

Maryland Pattern Criminal Jury Instructions ("MPJI–Cr") 3:00 ("Opening statements and closing arguments of lawyers are not evidence.").

Granted, remarks uttered during closing argument may be susceptible to impermissible inferences by jurors and thereby impair their collective impartiality. The Supreme Court of Maryland has, however, recognized "a fundamental distinction between a judge and a jury as the trier of fact." *Graves v. State*, 298 Md. 542, 546 (1984). As the Court explained in *Babb*, 258 Md. at 550-51, and reiterated in *Graves*, 298 Md. at 546:

> The assumed proposition that judges are men of discernment, learned and experienced in the law and capable of evaluating the materiality of evidence, lies at the very core of our judicial system. Such an assumption would be completely unwarranted with regard to a jury of laymen and the impact which evidence may have upon their deliberative powers.

Thus, while "many different occurrences might lead to a concern that a juror's impartiality is impaired, . . . the same events might not be deemed to affect a judge's impartiality. This is because a judge's training and experience render him [or her] less susceptible to influence by improper remarks or occurrences at a trial." *Cornish v. State*, 272 Md. 312, 322 (1974). In a bench trial, therefore, the long-standing principle that judges are "presumed to know the law and to apply it properly" entails the rebuttable presumption that when rendering a verdict, they rely exclusively upon relevant, material, and competent evidence. *State v. Chaney*, 375 Md. 168, 179 (2003) (quoting *Ball v. State*, 347 Md. 156, 206 (1997)). *See also United States v. Stinefast*, 724 F.3d 925, 931 (7th Cir. 2013) ("Judges often hear improper argument . . . that they are presumed to disregard when

deciding matters of importance. To overcome this presumption of conscientiousness on the part of [trial] judges, a party must present some evidence that the statement influenced the court's decision making."); *United States v. Edward J.*, 224 F.3d 1216, 1222 n.7 (10th Cir. 2000)

As the State correctly notes, "[a]t no time during its announcement of the verdict did the court reference the 911 call or give any indication that it had considered the recording's contents[.]" Appellant does not direct us to anything in the record that would otherwise tend to rebut the presumption that the court relied exclusively upon the evidence actually presented in arriving at its verdict. Absent any basis for rebutting the presumption of judicial propriety, we are persuaded that the State's fleeting and isolated reference to the 911 call did not influence the verdict, and that the recording's erroneous admission into evidence was therefore harmless beyond a reasonable doubt.

II. The Contentions

Next, Appellant challenges the sufficiency of the evidence to support his second-degree assault conviction. He does not deny that the State offered sufficient evidence to prove the elements of the crime. Rather, Appellant claims that "[b]ecause defense of property and self-defense were applicable and the State did not" disprove any of the elements of either defense, "the circuit court erred in convicting [him] of second degree assault." Specifically, Appellant asserts the court clearly erred in finding that (i) he

resorted to deadly force, and (ii) that the force he used exceeded that which was reasonably necessary to expel Benjamin from his home.

The State responds, when viewed in the light most favorable to it, Benjamin's testimony and the inferences reasonably drawn therefrom supported the court's finding that Appellant's use of the machete amounted to deadly force. "Since one cannot justifiably use deadly force to defend against non-deadly force," nor do so in defense of one's property, the State concludes "the court correctly found that neither self-defense nor defense of property applied."

Standard of Review

"[F]ollowing a bench trial, the test for sufficiency of the evidence is whether that evidence, if believed, directly or inferentially permits the court to be convinced, beyond a reasonable doubt, of the defendant's guilt." *Stephens v. State*, 198 Md. App. 551, 558 (2011). When reviewing a sufficiency challenge, appellate courts must 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.'" *Titus v. State*, 423 Md. 548, 557 (2011) (emphasis retained) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

The factfinder, here, the court, is "'free to believe part of a witness's testimony, disbelieve other parts of a witness's testimony, or to completely discount a witness's testimony.'" *Holmes v. State*, 209 Md. App. 427, 438 (quoting *Pryor v. State*, 195 Md.

App. 311, 329 (2010)), *cert. denied*, 431 Md. 445 (2013). Accordingly, in assessing the sufficiency of the evidence, we give "due regard to the trial court's finding of facts, its resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the credibility of witnesses." *State v. Albrecht*, 336 Md. 475, 478 (1994).

When reviewing a sufficiency challenge, our role is neither "to evaluate the credibility of a witness," *Molter v. State*, 201 Md. App. 155, 162 (2011), nor "to retry the case." *Smith v. State*, 415 Md. 174, 185 (2010). Rather, our sole concern is "with whether the verdicts were supported with sufficient evidence—that is, evidence that either showed directly, or circumstantially, or supported a rational inference of facts which could fairly convince a trier of fact of the defendant's guilt of the offenses charged beyond a reasonable doubt." *Albrecht*, 336 Md. at 479.

Self Defense and Defense of Property

Maryland courts "recognize two forms of self-defense: perfect and imperfect." *Porter v. State*, 455 Md. 220, 234 (2017). While the former is a complete defense to both first-degree and second-degree assault, *see Bryant v. State*, 83 Md. App. 237, 245 (1990) ("[T]he defense of self-defense applies to assaultive crimes generally[.]"), the latter can mitigate first-degree assault to second-degree assault. *See Christian v. State*, 405 Md. 306, 332-33 (2008). To establish a claim of perfect self-defense, an accused must satisfy the following four elements:

> (1) The defendant was not the aggressor or, although the defendant was the initial aggressor, he [or] she did not raise the fight to the deadly force level;
>
> (2) The defendant actually believed that he [or] she was in immediate or imminent danger of bodily harm;
>
> (3) The defendant's belief was reasonable; and
>
> (4) The defendant used no more force than was reasonably necessary to defend himself [or] herself in light of the threatened or actual harm.

MPJI–Cr 5:07 (cleaned up). *See also Porter*, 455 Md. at 234-35. To establish imperfect self-defense, an accused must satisfy the first and second criteria. He or she need not, however, satisfy the third and fourth. Accordingly, "[t]he prospect of imperfect self-defense arises when the actual, subjective belief on the part of the accused that he/she is in apparent imminent danger of death or serious bodily harm from the assailant, requiring the use of deadly force, is not an objectively reasonable belief." *State v. Smullen*, 380 Md. 233, 252 (2004) (quotation marks and citation omitted).

Under a defense of property claim,

> "[a] person may 'use reasonable force, not intended or likely to cause death or serious bodily harm, to prevent or terminate another's intrusion upon' his 'lands or chattels,' if
>
> > "(a) the intrusion is not privileged or the other intentionally or negligently causes the actor to believe that it is not privileged, and
> >
> > (b) the actor reasonably believes that the intrusion can be prevented or terminated only by the force used, and

> (c) the actor has first requested the other to desist, and the other has disregarded the request, or the actor reasonably believes that a request will be useless, or that substantial harm will be done before it can be made."

Dashiell v. State, 214 Md. App. 684, 701 (2013) (quoting *Vancherie v. Siperly*, 243 Md. 366, 371 (1966)). *See also* MPJI–Cr 5:02.1.

In Maryland, "[i]t is . . . well settled that the defendant bears the initial burden of producing 'some evidence' sufficient to generate" his or her defense(s). *In re Lavar D.*, 189 Md. App. 526, 578 (2009), *cert. denied*, *In re Ronald B.*, 414 Md. 331 (2010). "[W]here a defendant is able to generate a genuine . . . issue with respect to a defense . . . , the burden then shifts to the State to prove the challenged mental element as surely as the State is required to prove the routine physical elements of the crime. In effect, the burden shifts to the State to disprove the defense." *Herd v. State*, 125 Md. App. 77, 99-100 (1999). *See also In re Lavar D.*, 189 Md. App. at 578 (quoting *Dykes v. State*, 319 Md. 206, 217 (1990)).

The Verdict

In announcing its first-level factual findings in this case, the circuit court determined:

> [Appellant's] testimony was that he, after [Benjamin] didn't leave as quickly as he wanted him to, he approached the victim and as this is [Appellant]'s own testimony, that he raised his hands, extended his arms towards [Benjamin] with his palms out, was moving forward towards him. Although he didn't make contact, he was moving in what could reasonably [be] believe[d] to be a threatening position about to have -- make physical contact with him.

> And at which time the victim pushed [Appellant]. Again that same dance was repeated and after [Appellant] moved again towards the victim, [Benjamin] once again pushed him back. Now at that point I would say there's not a lot of criminal conduct that had taken place where there was technical assaults, mutual assaults or whether this was just what one might call a pushing and shoving.
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> But at that point [Appellant] makes a critical decision. He introduces into this little bit of pushing and shoving a machete, a machete he describes as razor sharp with a heavy gauge. His testimony was that he approached [Benjamin] with both hands on the machete in a baseball style grip and he demonstrated in court that he raised it over his head and was moving towards [Benjamin].
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> At some point in time there was certainly contact between [Benjamin], [Appellant] and this machete which resulted in the cut on [Benjamin]'s left hand. One of the things I've got to comment on in terms of credibility, it is simply incredible that this exchange[] happened in the way [Appellant] described it. If this was indeed a razor sharp knife with which – as to which [Benjamin] had both hands gripping firmly, that would have caused injury to both hand[s] of some kind and not simply to the area between the forefinger and thumb on the left hand.
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> It seems more likely given the nature of the injury that at some point as [Appellant] was threatening [Benjamin] he reached up to try and protect himself and came in contact with the edge of the blade causing the cut that he had suffered.
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> And the Court finds that's most likely what happened and finds that beyond a reasonable doubt that that was the course of events.

While the court acknowledged Appellant's privileges of self-defense and defense of property, it concluded that he used more force than necessary to protect his person and property, concluding that by wielding a "razor sharp" machete, Appellant "introduced

deadly force into th[e] fight and exceeded whatever permitted self[-]defense of home or self that he had." Accordingly, the court found Appellant guilty of second-degree assault.

Analysis

Appellant does not dispute the court's initial factual findings. In fact, he relies on the court's determination that "at some point as [Appellant] was threatening [him, Benjamin] reached up to try and protect himself and came in contact with the edge of the blade[.]" Appellant claims, however, that "[h]is act of using the machete to frighten [Benjamin] so that he would leave the home and the incidental injury [Benjamin] sustained as a result, do not add up to deadly force."

Appellant's reliance on the court's first-level factual findings is misplaced. As this Court explained in *Chisum v. State*, 227 Md. App. 118, 129-30 (2016):

> The issue of legal sufficiency of the evidence is not concerned with the findings of fact based on the evidence or the adequacy of the factfindings to support a verdict. It is concerned only, at an earlier pre-deliberative stage, with the objective sufficiency of the evidence itself to permit the factfinding even to take place. *The burden of production is not concerned with what a factfinder*, judge or jury, *does with the evidence. It is concerned, in the abstract, with what any judge, or any jury, anywhere, could have done with the evidence*. It is an objective measurement, quantitatively and qualitatively, of the evidence itself. It is a question of supply and not of execution.

(Emphasis added). *Accord Vanison v. State*, 256 Md. App. 1, 11-12 (2022). Our task, therefore, is not to assess whether the court's findings of fact were consistent with or contrary to an inference that Appellant used deadly force. Rather, our concern is with whether, when viewing the evidence in the light most favorable to the State, any rational

factfinder could have found that the State satisfied its burden of disproving, beyond a reasonable doubt, Appellant's defenses.

We hold the court was presented with sufficient evidence to support its determination that the State had proven that Appellant employed deadly force during his altercation with Benjamin, and that such force therefore exceeded the amount reasonably necessary to defend himself and/or his property. "Deadly force is that amount of force reasonably calculated to cause death or serious bodily harm." MPJI–Cr 5:02.1; MPJI–Cr 5:07. *See also Black's Law Dictionary* (11th ed. 2019) (defining "deadly force" as "[v]iolent action known to create a substantial risk of causing death or serious bodily harm."). Generally, the prohibition against "us[ing] deadly force in defending oneself against non-deadly force . . . '*precludes the use of a deadly weapon against an unarmed assailant*.'" *Lambert v. State*, 70 Md. App. 83, 93 (emphasis added) (quoting W. LaFave & A. Scott, *Criminal Law*, at 456–57 (2d ed. 1986)), *cert. denied*, 309 Md. 605 (1987). "[T]he trier of fact is permitted to determine whether the instrument constitutes a . . . deadly weapon, based on the circumstances." *McCracken v. State*, 150 Md. App. 330, 367 (2003). "[S]uch a determination requires a [factual] finding, based on all of the circumstances, that the person had 'at least the general intent to carry the instrument for its use as a weapon, either of offense or defense.'" *Id.* (quoting *Anderson v. State*, 328 Md. 426, 438 (1992)).

Benjamin's testimony indicated that he went to Appellant's house at his request and entered with his permission. According to Benjamin, Appellant and he engaged in a verbal

altercation shortly after his arrival. Benjamin testified the verbal dispute escalated when, after he suggested obtaining a police escort, Appellant retrieved a machete—which Appellant described at trial as "extremely heavy" and "razor sharp"—and wielded it while chasing Benjamin around the living room. Appellant then "swung the machete," and Benjamin "blocked [Appellant] from striking [him] with a machete in the head." On cross-examination, Benjamin demonstrated the way in which Appellant swung the machete at him, "indicating an overhead swing starting above his head somewhere and coming forward[.]" Finally, Benjamin averred that he had neither threatened nor touched Appellant before being struck with the blade.

This evidence not only clearly established a *prima facie* case of second-degree assault, but also sustained a finding that Appellant both acted as the initial aggressor and used deadly force, which (in the absence of any threat of violence by Benjamin) clearly exceeded the force reasonably necessary to defend his person or property. Thus, the incriminating evidence when viewed in the light most favorable to the State defeated both affirmative defenses. To the extent that Appellant's self-serving testimony supported contrary findings, the trial court, as factfinder, was entitled to disbelieve and disregard it.

III.

Finally, Appellant contends the evidence adduced at trial was insufficient to support his convictions for "both wearing [or] carrying a deadly weapon openly with intent to injure and second degree assault[.]" Relying on our holding in *Chilcoat v. State*, *supra*, he asserts

that "[t]o the extent that [he] was 'carrying' the machete, the 'carrying' was incidental to the assault," and, therefore, was not a separate crime. The State rejoins that "[b]ecause Appellant made an effort to retrieve the machete, there was sufficient evidence to sustain a separate conviction for carrying a dangerous weapon with intent to injure."

Maryland Code (2002, 2021 Repl. Vol.), Criminal Law Article ("CL"), § 4-101(c)(2) proscribes openly carrying a dangerous weapon with the intent to injure and provides, in pertinent part: "A person may not wear or carry a dangerous weapon . . . openly with the intent or purpose of injuring an individual in an unlawful manner." In *Chilcoat*, we addressed the sufficiency of the evidence to prove the "carrying" element of former Article 27, § 36, the statutory predecessor to CL § 4-101. The defendant in that case arrived at the home of his ex-girlfriend while she was entertaining another man. The men began to argue, "each telling the other to leave[.]" 155 Md. App. at 398. During that argument, Chilcoat walked to a table several steps away from where the man was standing, picked up a beer stein, and used it to strike him four or five times on the back of the head. *Id.* Chilcoat was charged with and convicted of first-degree assault and carrying a dangerous weapon openly with the intent to injure. *Id.* On appeal, we held "the evidence was insufficient to sustain Chilcoat's conviction . . . for carrying a dangerous weapon openly with intent to injure." *Id.* at 413. We reasoned:

> Chilcoat carried the beer stein only a short distance and he had no purpose other than to injure the victim. Indeed, most assaults of the battery type involve at least a few steps or other advancement toward the victim. Chilcoat's movement while holding the beer stein was necessary to commit

> the assault because the beer stein was located on a table several steps away from where Keene was standing. Although use of the beer stein did subject Keene to more severe injuries than he might otherwise have suffered, the seriousness of the injuries is redressed by Chilcoat's conviction for first degree assault. Applying the rationale of [*State v. Stouffer*, 352 Md. 97 (1998)], we see nothing in section 36(a) that suggests the legislature intended that moving toward the victim holding a beer stein in this incidental manner would constitute the additional crime of carrying a weapon openly with intent to injure. [9]

Id. at 412. *See also Thomas v. State*, 143 Md. App. 97, 123 (holding that to sustain a conviction for carrying a weapon openly with intent to injure, "the State [i]s required to prove more than mere use of the weapons by [the] appellant or recovery of them in his one-room residence, in the vicinity of the victim."), *cert. denied*, 369 Md. 573 (2002).

The State, in turn, relies on *Harrod v. State*, 65 Md. App. 128 (1985). In that case, a male friend visited Harrod's wife at her house when she believed that Harrod "had gone

[9] In *Stouffer*, 352 Md. at 113, the Supreme Court of Maryland held that the intentional asportation element of kidnapping is not satisfied if moving the victim is merely incidental to some other offense. The Court explained:

> We [align] ourselves with the majority approach that examines the circumstances of each case and determines from them whether the kidnapping—the intentional asportation—was merely incidental to the commission of another offense. We do not adopt, however, any specific formulation of standards for making that determination, but rather focus on those factors that seem to be central to most of the articulated guidelines, principally: How far, and where, was the victim taken? How long was the victim detained in relation to what was necessary to complete the crime? Was the movement either inherent as an element, or, as a practical matter, necessary to the commission, of the other crime? Did it have some independent purpose? Did the asportation subject the victim to any additional significant danger?

to work[.]" *Id.* at 131. During the visit, Harrod suddenly emerged from the bedroom "with a hammer in his hand, swinging it around, coming after me and my friend[.]" *Id.* Harrod threw the hammer with such force that it became lodged in the living room wall. He then "reentered the bedroom and returned with a five-inch blade hunting knife[.]" *Id.* After stabbing a banister near his wife's arm, Harrod "followed [her] out to [the friend]'s car and 'went after [the friend], going around and around the car.'" *Id.* On appeal, we affirmed Harrod's conviction for carrying a deadly weapon openly with intent to injure, holding:

> [Harrod]'s conduct is expressly proscribed in the statute: he carried a deadly or dangerous weapon—first the hammer and then the hunting knife—openly with the announced purpose in each case of injuring a person in an unlawful manner.
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> * * *
>
> The record provides ample evidence that appellant picked up the hammer, and then the knife, each with the express intent or purpose of putting [the friend] and then [his wife] in fear of an imminent battery. This is an unlawful purpose.

Id. at 139-40.[10]

[10] In *Chilcoat*, we distinguished *Harrod*, explaining:

> *Harrod* differs from this case because Harrod carried the hammer from the bedroom to the living room and then made another trip to the bedroom to retrieve the hunting knife and bring it back. These actions contrast with Chilcoat's action in merely picking up a beer stein that was convenient to him and walking a few steps with it to reach the victim.

155 Md. App. at 409.

The circumstances in this case more closely resemble the facts in *Harrod* than those in *Chilcoat*. Appellant did not merely happen upon the machete during his verbal altercation with Benjamin and immediately swing it at him. Viewed in the light most favorable to the State, the evidence reflects that, after Benjamin threatened to call the police, Appellant exited the living room, entered the dining room, walked to his computer desk, and retrieved the heaviest and sharpest of his three machetes, which, Appellant testified, he kept "for protection in the home." He then returned to the living room and brandished the weapon while standing, by Appellant's estimation, approximately ten feet away from Benjamin. Appellant testified that he proceeded to approach Benjamin with the weapon drawn. Zachary, in turn, averred that after retrieving the machete, Appellant "threatened [Benjamin] with it" and chased him "around the pile of stuff that he had on the floor." This evidence supported a determination that Appellant's act of carrying the machete was not merely incidental to the ensuing assault and was therefore sufficient to sustain a separate conviction for carrying a weapon openly with the intent to injure.

For the foregoing reasons, we affirm the judgments of the circuit court.

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