UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1497

September Term, 2014

RUSHAD ADIB RUSHDAN

v.

STATE OF MARYLAND

Meredith,
Hotten,
Nazarian,

JJ.

Opinion by Meredith, J.

Filed: December 22, 2015

Following a jury trial in the Circuit Court for Prince George's County, Rushad Rushdan, appellant, was convicted of first-degree assault, second-degree assault, and use of a handgun in a felony or crime of violence. The court sentenced Rushdan to a 7-year period of incarceration for the first degree assault, and a concurrent term of 7-years for the use of a handgun. Rushdan appealed, presenting four questions for our review:

> 1. Did the circuit court err in denying defense counsel's motion to suppress evidence, to wit: a spent nine millimeter shell casing, recovered during the execution of a search warrant?
>
> 2. Did the circuit court abuse its discretion in admitting a spent nine millimeter shell casing because it was irrelevant evidence?
>
> 3. Did the circuit court abuse its discretion in excluding impeachment evidence that Mr. Rushdan's family paid an attorney to represent the complaining witness?
>
> 4. Did the circuit court err in its instruction to the jury regarding the use of circumstantial evidence to determine whether an item was a firearm or a handgun?

Finding no error, we shall affirm the judgment of the circuit court.

BACKGROUND

On April 12, 2009, Jermal Clinton was working as a tow truck driver, removing unpermitted vehicles parked at the Penn Landing Apartments in Forestville. At approximately 1:30 a.m., Clinton observed a white Toyota Camry that was parked in violation of regulations, and he hooked it up for towing. A man approached Clinton and indicated that the vehicle belonged to him. When Clinton informed the man of a fifty-dollar "drop fee" the man would have to pay for Clinton to release the vehicle, the man responded that he did not have fifty dollars but needed to retrieve something from the vehicle. The unidentified man entered the car and returned with a firearm that Clinton described as

looking like a nine-millimeter handgun. The man pointed the gun at Clinton's head. Clinton testified that two unidentified men who were with Rushdan pointed a second pistol at a second tow-truck driver working with Clinton at the apartment complex that night. The first man told Clinton to drop the Toyota Camry, and Clinton, fearing for his life, complied. As Clinton disconnected the vehicle, the man followed him with the pistol pointed at Clinton's head. The man drove away in the Toyota.

Clinton gave a statement to police and provided them with his camera, which he had used to photograph the vehicle prior to hooking it to his truck. The car Clinton had attempted to tow was registered to Rushdan's mother. The next day, Clinton identified Rushdan in a photo array.

Detectives investigating the crime applied for a search warrant for the address associated with the vehicle, and they executed the search warrant two days after the incident. Detectives recovered a nine millimeter shell casing from one of the bedrooms of the home.

Additional facts will be provided in the discussion below.

DISCUSSION

I.

Motion to Suppress Shell Casing

Prior to trial, Rushdan moved to suppress the spent nine millimeter shell casing, arguing that the search warrant should not have been issued. In the application and affidavit for a search and seizure warrant for evidence at 11932 Birchview Drive, Detective Cameron Harvey averred the following:

On April 12th 2009 at approximately 0140 hours . . . the Victim [Clinton] advised that the Defendant Rushdan, R[u]shad did assault him with a handgun. The Victims . . . who are employees of J&L Towing advised officers while impounding a 1997 Toyota Camry (White) bearing MD Tag# 9CMP48, [Rushdan] with two other unknown suspects approached [Clinton] and asked if [he] could get some of [his] property from the backseat of the Toyota Camry. [Rushdan] entered the Toyota Camry and retrieved a jacket from the backseat. [Rushdan] then produced a black semi-auto handgun and pointed the gun at [Clinton] and stated "Put the car down!" [Clinton] got out of the tow truck to drop the vehicle.

[Rushdan] followed [Clinton], pointing the gun at [Clinton's] head while [Clinton] released the vehicle. Suspect #1 & #2 also produced handguns and held [the other victim] at gun point. [Rushdan] got into the driver seat of the 1997 Toyota Camry (White) bearing MD Tag# 9CMP48 and Suspect #1 and #2 got into a Silver Suzuki SUV[.] Both vehicles fled the scene.

* * *

The owner of the Toyota Camry was identified as Sheila Ann Rushdan, Mother of Rushdan, R[u]shad. When the owner was asked if she knew who had her vehicle, she replied, "yes, my son Rushad has it." Rushdan, R[u]shad's identity and address was later confirmed through Department of Corrections records.

A photo array was compiled of six people matching similar descriptions and [Rushdan] was identified by [Clinton] as the person who held him at gun point and drove the Toyota Camry registered to Sheila Ann Rushdan.

* * *

Your Affiant knows through police investigative experience that persons who wear, carry and transport handguns keep these weapons and ammunition for these weapons in places to which they have ready access to them such as their place of residence. These items of evidence are often secreted within the residence to avoid police detection.

Based on the facts detailed in this affidavit, your affiant believes that there is probable cause to believe that the handgun and the ammunition for that handgun used in this said assault are within the residence.

At the suppression hearing, Rushdan asserted that the warrant was deficient for several reasons. He argued that the application failed to show a nexus between the crime and the address. He asserted the warrant (1) failed to show that Rushdan lived at the address; (2) failed to specify the areas in the home where Rushdan had access; (3) failed to describe with particularity the items sought; and (4) failed to explain what led officers to believe the gun would be found in the home.

The suppression court denied the motion, and explained:

> The Court is satisfied that it does not need to go outside of the four corners of the warrant for any type of clarification, for any type of information as to nexus or any type of information as to probable cause.
>
> First off, there is clearly sufficient probable cause . . . in the affidavit to connect Mr. Rushdan with the alleged crime in terms of being a suspect. On paragraph 3 on the second page of the application and affidavit, it reads the owner of the Toyota Camry was identified as Sheila Ann Rushdan, mother of Rushdan Rushad. When the owner was asked if she knew who had her vehicle, she replied, yes my son Rushad[.]
>
> * * *
>
> Rushad's identity and address was later confirmed through the Department of Corrections records. So we already have something that suggests that we know what the affiant suggesting what the address is. On the next page under rationale, your affiant knows through police investigative experience that persons who work, carry and transport handguns keep these weapons and ammunitions for these weapons in places to which they have ready access to them such as their place of residence. So that's another suggestion to the affidavit that the confirmed address is the place where there may be evidence of the crime.
>
> The next paragraph, once again based on the facts detailed in this affidavit, your affiant believed that there is probable cause to believe that the handgun and the ammunition for that handgun used in this said assault are within the residence. Once again, a reference to the residence. Skip one sentence, your affiant prays that a search warrant be issued for the said

> residence in order to seize the said items of evidence. The only said residence in the warrant number one is 11932 Birch View Drive, Clinton, Prince George's County, and it's clear from the other information set forth in the warrant that the place sought to be searched is the residence, the confirmed residence of Mr. Rushdan.
>
> The Court is satisfied that there is no reason to question whether or not there is in the warrant itself a sufficient basis to hold that the particularity requirement of the Fourth Amendment as to place to be searched and the alleged crime has been satisfied and the Court denies the motion to suppress evidence seized pursuant to the search warrant[.]

Rushdan presents us with largely the same argument that he presented to the suppression court. Before this Court, he contends that "the application and affidavit did not set forth probable cause to believe that property subject to seizure would be found at the address because the application and affidavit did not state that the address was appellant's or explain why the police believed that contraband would be found at that address."

When reviewing motions to suppress evidence seized pursuant to a warrant, we conduct a "substantial basis" inquiry:

> When evidence has been recovered in a warrant-authorized search, it is not the task of a court ruling on a motion to suppress, or an appellate court reviewing the suppression decision on appeal, to conduct a *de novo* review of the issuing judge's probable cause decision. Rather, those courts are to determine whether the issuing judge had a 'substantial basis' for finding probable cause to conduct the search.

State v. Faulkner, 190 Md. App. 37, 46–47 (2010) (internal citations omitted). *See also State v. Johnson*, 208 Md. App. 573, 586 (2012) ("Maryland case law has never varied in its commitment to a 'substantial basis' as the controlling standard for reviewing a warrant.").

We have described substantial basis as something less than probable cause. *See State v. Jenkins*, 178 Md. App. 156, 174 (2008) ("The caselaw overwhelmingly demonstrates that

finding a 'substantial basis' for the issuance of a warrant means something less than establishing probable cause in the context of reviewing warrantless police activity."). We bear in mind also that "reviewing courts must assess affidavits for search warrants in 'a commonsense and realistic fashion,' keeping in mind that they 'are normally drafted by nonlawyers in the midst and haste of a criminal investigation.'" *Faulkner*, *supra*, 190 Md. App. at 47 (quoting *United States v. Ventresca*, 380 U.S. 102, 108 (1965)).

Before this Court, Rushdan's argument focuses on the affidavit's failure to specify that he resided at the property to be searched or why there was probable cause to believe the gun would be located in the home. He misses the mark on both points. As to the affidavit's failure to expressly state that Rushdan resided at 11932 Birchview Dr., the affidavit specifically identified the address to be searched. It linked the Camry involved in the assault to the home address and stated that detectives had confirmed Rushdan's address through the Department of Corrections. Mindful of the commonsense manner in which affidavits must be viewed, the suppression court had little difficulty in reading the affidavit to describe the property to be searched as Rushdan's residence. We agree that that inference was a common sense conclusion. There is no doubt of the address to be searched, that it had an unquestioned link to the vehicle that gave rise to the assault, and that officers had "confirmed" Rushdan's address through Department of Corrections records. This provided a substantial basis for the judge to issue the warrant to search the house at that address.

With respect to the question of what led officers to believe the gun used in the assault would be found in the home, the affidavit unquestionably linked the crime to Rushdan,

averring that the car involved in the assault was in the possession of Rushdan at the time of the crime. The affidavit also represented that the investigators — based upon their experience — believed there was a reasonable likelihood that the person who used a gun to assault the tow truck driver two days earlier would have the gun and ammunition at the home where he resided. These facts are sufficient to provide a substantial basis for probable cause to search for a gun and ammunition. The suppression court did not err in denying the motion to suppress the shell casing seized during the search of Rushdan's residence.

II.

Admitting the Shell Casing in Evidence

Rushdan assigns error to the trial court's admission of the shell casing recovered from 11932 Birchview Drive, arguing that the State failed "to demonstrate that the bedroom in which the shell casing was found was Mr. Rushdan's bedroom," and the fact that two other individuals resided in the home rendered the evidence irrelevant. Rushdan contends also, that, even if the admitted evidence was relevant, its probative value was substantially outweighed by the danger of unfair prejudice.

In *Hopkins v. State*, 352 Md. 146, 158 (1998), the Court of Appeals described our standard for review of issues regarding admissibility of evidence: "Trial judges are afforded broad discretion in the conduct of trials in such areas as the reception of evidence. Accordingly, in our appellate review, we extend the trial court great deference in determining the admissibility of evidence and [generally] will reverse only if the court abused its

discretion." (Internal quotation marks and citations omitted.) The Court expounded upon the abuse of discretion standard in *Cooley v. State*:

> The abuse of discretion standard requires a trial judge to use his or her discretion soundly and the record must reflect the exercise of that discretion. Abuse occurs when a trial judge exercises discretion in an arbitrary or capricious manner or when he or she acts beyond the letter or reason of the law. . . . The conduct of the trial must of necessity rest largely in the control and discretion of the presiding judge and an appellate court should in no case interfere with that judgment unless there has been an abuse of discretion by the trial judge of a character likely to have injured the complaining party.

385 Md. 165, 175–76 (2005) (internal quotation marks and citations omitted).

Pursuant to Maryland Rule 5-402, "[e]vidence that is not relevant is not admissible." Rule 5-401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." But relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury[.]" Md. Rule 5-403.

The present trial was actually the fourth time the case had been presented; three prior trials had ended in mistrial. At this trial, the State made an oral motion *in limine* to have the shell casing admitted as evidence. Rushdan objected to the admission of the shell casing on the basis that the State could not link the use of a nine millimeter handgun to the alleged crime. After the State proffered that Clinton would be able to identify the gun pointed at him as looking like a nine millimeter, Rushdan's counsel argued:

> [T]he State's initial evidence was that this item was a, quote-unquote, black automatic. Now, the State is proffering new convenient testimony from

> Mr. Clinton that it was comparable to a nine millimeter. Not that it was, in fact, a gun, but it looked like a nine millimeter.
>
> * * *
>
> He [Clinton] said he was guessing that it was a nine millimeter, but he was making that after this — before this bullet surfaced, he had no evidence or testimony linking that particular item to any gauge whether it was a nine millimeter, a 30-yard [sic], a .45, a black automatic shoot-all-kinds-of-bullets.
>
> But after the bullet arises, he now, then, starts guessing. And eventually, he gets to the point where it's comparable, but there is no testimony from Jermal Clinton that Mr. Rushdan had a nine millimeter gun. That testimony does not exist.
>
> There has never been any evidence established that Mr. Clinton or anyone else places a nine millimeter weapon in Mr. Rushdan's hands.
>
> So what we have here is, the State developing testimony from a witness who has changed his testimony to bootstrap other evidence that the Court rightfully excluded because there was no connection[.]

Rushdan also objected to any mention of the casing being recovered from "his" bedroom — as noted on the evidence bag — because the State could not produce evidence that the bedroom where the shell casing was found belonged to Rushdan.

The State countered that Rushdan's argument did not present an accurate description of Clinton's testimony at previous trials; the State suggested that it had not changed since prior trials. Based upon the proffer of Clinton's expected testimony that a nine millimeter handgun was pointed at him, the trial court granted the State's motion, permitting the State to move to admit the shell casing "in terms of the address from which it came" but "preclude[ing] any mention [of the bedroom] until we know more of the bedroom being the

bedroom of [Rushdan]." Clinton later testified that the gun used in the assault was a black nine millimeter.

When the State later questioned Detective Williams regarding the shell casing, Rushdan's counsel objected again. After the State elicited testimony that Rushdan gave detectives an address of 11932 Birchview Drive, the court admitted the shell casing but redacted the reference to its discovery in Rushdan's bedroom.

Rushdan argued at trial that the probative value of the evidence was outweighed by its prejudice, stating:

> [T]he facts that we've established that there are other persons in that residence, that the prejudicial effect, there's no probative value. Because that should be suppressed based on the fact that it was not recovered from his bedroom and the prejudicial [e]ffect of it is that it suggests that he had a firearm. Certainly under [Rule] 5-403(b) [sic] it should not be admitted because of the prejudicial effect. There is no probative value.

The court concluded that "the probative value exceeds the prejudicial value," and admitted the casing.

Both Clinton's assessment of the handgun pointed at him and whether Rushdan had access to the room in which the shell casing was found are matters that go to the weight the evidence should be afforded. Rushdan was free to attack Clinton's credibility and to draw the jury's attention to the fact that two other individuals resided at the address. Indeed, he cross-examined Clinton on both his personal knowledge of the gun and his initial statement to police, in which Clinton did not identify the pistol as a nine millimeter. And, on cross-examination of Detective Williams, Rushdan elicited testimony regarding the two other residents of 11932 Birchview Drive.

The recovery of a nine millimeter shell casing in Rushdan's home would tend to make it more probable that Rushdan owned or had access to a nine millimeter — the same type of handgun Clinton testified was pointed at his head during the assault. It was within the province of the jury, as fact-finder, to weigh the credibility of Clinton's testimony and the likelihood that a bullet found in a home in which three individuals reside suggests that Rushdan had a handgun. *See Dionas v. State*, 436 Md. 97, 109 (2013) ("[The jury] is responsible for weighing the evidence and rendering the final verdict.").

As to prejudice, we fail to see what prejudice substantially outweighed the probative value of this evidence. That the shell casing "suggests that [Rushdan] had a firearm," as counsel for Rushdan argued below, is not unfairly prejudicial. *See King v. State*, 407 Md. 682, 704 (2009) ("'Evidence is prejudicial when it tends to have some adverse effect . . . beyond tending to prove the fact or issue that justified its admission.'" (quoting *State v. Askew*, 245 Conn. 351, 362 (1998))). Accordingly, the trial judge did not abuse his discretion in admitting the shell casing into evidence.

III.

Exclusion of Impeachment Evidence

Rushdan wanted to introduce evidence of interaction he and his parents allegedly had with Jermal Clinton after the conclusion of the preliminary hearing on May 13, 2009. Rushdan's father was permitted to testify that Clinton approached him in the hallway and expressed a desire to recant his accusations. According to the father, Clinton indicated that he needed an attorney to represent him, but could not afford one. The State objected when

Rushdan wanted to ask the father about the result of that interaction. Rushdan proffered that his father and mother would testify that they paid for an attorney to represent Clinton to help get the charges against Rushdan dismissed. The trial court prohibited the parents' testimony that they had paid for an attorney for Clinton. On appeal, Rushdan challenges the trial court's decision to exclude evidence that Rushdan's parents paid for an attorney to represent Clinton.

At trial, Clinton testified during the State's case that he did not recall talking to Rushdan's father or saying the changes were false. In the defendant's case, counsel for Rushdan elicited testimony from Rushdan's father regarding a conversation the father had witnessed between Clinton and appellant following a pre-trial hearing:

> [DEFENSE COUNSEL]: The hearing was concluded?
>
> [WITNESS]: Yes.
>
> [DEFENSE COUNSEL]: Then what happened?
>
> [WITNESS]: Rushad and I walked out into the hallway. We were standing in the hallway, the two gentlemen came out, Jermal Clinton and [the other tow-truck driver].
>
> * * *
>
> At some point, Jermal Clinton motioned to Rushad.
>
> [DEFENSE COUNSEL]: Okay.
>
> [WITNESS]: Okay. Now, I thought — I thought he knew them. I thought they were his friends. They looked about his same age. And they were in the courtroom. I thought they were his friends, or something, so I didn't pay any attention.
>
> * * *

I went over to talk with them.

[DEFENSE COUNSEL]: Okay. And did Mr. Clinton say anything to you?

* * *

[WITNESS]: Mr Clinton said that the charges were false and that he wanted to have those charges dismissed and that he wanted to know if you [*i.e.*, defense counsel] could help them.

* * *

[DEFENSE COUNSEL]: Now, when — when he was speaking with you, about the charges, just to be clear, do you recall his exact words, what he said about the charges?

[WITNESS]: He said the charges were false, it wasn't exactly what he reported, and that he wanted to have the charges dismissed.

Although the court permitted the father to testify about the conversation, the court did not allow Rushdan to elicit any testimony from either of Rushdan's parents to the effect that they paid for an attorney to represent Clinton. The court found that the

> production of evidence as it related to payment of an attorney by a member of the defendant's family [would not be permitted because] . . . its prejudicial effect would exceed any type of probative value, but to the extent that it might even be probative, it's probative of the credibility of Mr. Clinton but only slightly so.

Rushdan argues — as he did before the trial court — that the proffered evidence of payment was "a core aspect" of his attack on Clinton's credibility as a witness. He asserts that "[t]he importance of the evidence for impeachment purposes was to suggest that he [Clinton] was serious when he made the statements that his allegation was false and that he wanted to get the charges dismissed."

We conclude that the trial judge did not abuse his discretion in ruling that testimony about the parents paying for an attorney for Clinton was not helpful to the jury's evaluation of Clinton's credibility. Because Clinton had denied talking to the father, the testimony about payment of an attorney for Clinton introduced a collateral issue into the trial that did not directly impeach Clinton's testimony regarding the assault. Moreover, as the State argues, "evidence that Rushdan's parents paid for Clinton's attorney may have suggested to the jury . . . that Rushdan's parents were manipulating the system in order to get the charges dropped." The trial court reasonably concluded that the risk of unfair prejudice greatly outweighed any probative value, and did not abuse its discretion in limiting the scope of the impeachment evidence.

IV.

Jury Instruction on Circumstantial Evidence

Rushdan's final assignment of error relates to the jury instructions given for both assault in the first degree and use of a handgun in the commission of a crime of violence. The court instructed the jury with instructions based upon Maryland Criminal Pattern Jury Instructions 4:01.1 and 4:35.4A, but the court added the language italicized below:

> Mr. Rushdan is charged with first degree assault as to Jermal Clinton. In order to find Mr. Rushdan guilty of first degree assault, you must be satisfied that the State has proven beyond a reasonable doubt all of the elements of the second degree assault that I just gave to you and that Mr. Rushdan used a firearm to commit the assault or that he intended to cause serious physical injury in the commission of the assault.
>
> A firearm is a weapon that propels a bullet, shotgun pellets, a missile or a projectile by gunpowder or a similar explosive.

Serious physical injury means injury that creates a substantial risk of death; or that causes serious and permanent or serious and protracted disfigurement or loss or impairment of the function of any bodily member or organ.

Mr. Rushdan is charged with use of a handgun in the commission of a felony or a crime of violence. The crimes of violence in this case are second degree assault and first degree assault.

In order to find Mr. Rushdan guilty of use of a handgun in the commission of a crime of violence, you must be satisfied that the State has proven beyond a reasonable doubt that Mr. Rushdan committed the crime of second degree assault or first degree assault; and that Mr. Rushdan used a handgun in the commission of first degree assault or second degree assault.

A handgun is a pistol, a revolver or other firearm capable of being concealed on or about the person and which is designed to fire a bullet by the explosion of gunpowder.

Use of a handgun means that Mr. Rushdan actively employed a handgun.

Mere possession of a handgun at or near the crime without active employment is not sufficient.

Although the term use connotes something more than potential for use, there need not be conduct that actually produces harm, but only conduct that produces a fear of harm or a force by some means. Such means include brandishing, displaying, striking with, firing, or attempting to fire a handgun in the furtherance of the second degree or first degree assault.

A weapon's identity as a handgun can be established by testimony or by inference as opposed to tangible evidence in the form of the weapon. The State may prove operability solely using circumstantial evidence.

Circumstantial evidence may include but is not necessarily limited to things such as the victim's testimony as to his fear for his life, the victim's familiarity with firearms, description of a weapon, firing of a weapon, presence of bullets, proximity of bullets to a weapon and manner of its use.

Rushdan objected to the portion of the instruction that advised the jury that circumstantial evidence of operability could "include . . . the victim's testimony as to his fear for his life."

During deliberations, the jury sent a note requesting "clarification regarding the definition of firearm as used in the charge of first degree assault and whether this fact can be established by testimony or by inference, as opposed to tangible evidence as specified for the charge of use of a handgun." Over defense counsel's objection, the court responded "yes, whether an object is a firearm, can be established in the same manner."

The language the trial court added to the pattern jury instructions appears to be drawn from a long line of cases stating that "tangible evidence in the form of the weapon is not necessary to sustain a conviction; **the weapon's identity as a handgun can be established by testimony or by inference**." *Brown v. State*, 182 Md. App. 138, 166–67 (2008) (collecting cases) (emphasis added). "[C]ourts have also held evidence sufficient to conclude that a weapon was a handgun based on eyewitness testimony stating that a handgun was used." *Id.* at 168.

Rushdan focuses his argument on appeal — as he did at trial — upon one aspect of the instructions: that "the victim's testimony as to his fear for his life" may be considered circumstantial evidence of a firearm or handgun's operability. We perceive no error in the court's instruction and response to the jury note.

In *Mangum v. State*, 342 Md. 392, 398 (1996), Judge Irma Raker wrote for the Court of Appeals:

> It has long been the rule in Maryland that there is no difference between direct and circumstantial evidence. Neither policy nor logic supports a special evidentiary distinction when the issue is operability of a firearm. We hold that operability may be proved by circumstantial evidence.

(Quotation marks and citations omitted.) Similarly, MPJI-Cr 3:01 provides, in pertinent part:

> The law makes no distinction between the weight to be given to either direct or circumstantial evidence. No greater degree of certainty is required of circumstantial evidence than of direct evidence.

Accord *Wilder v. State*, 191 Md. App. 319, 336–37 (2010) ("Maryland has long held that there is no difference between direct and circumstantial evidence.") (internal quotation marks and citation omitted).

In an effort to distinguish *Mangum* — where the Court held that a defendant's own fear for his life could support a reasonable inference that a gun he was carrying was operable — Rushdan contends that the cases permitting "circumstantial evidence that a gun is real or operable" are "readily distinguishable from any notion that a victim's fear for his life [constitutes] circumstantial evidence that a gun is real or operable." We are not persuaded by the distinction he suggests.

Furthermore, with respect to the use of a handgun charge, Rushdan's argument about proof of operability is unfounded. Rushdan was convicted of Maryland Code (2002, 2008 Supp.), Criminal Law Article ("CR"), § 4-204, use of a handgun in the commission of a crime of violence. That statute expressly rejects an operability requirement: "b) A person may not use a firearm in the commission of . . . any felony, whether the firearm is operable or inoperable at the time of the crime." We have observed that "the requirement of operability does not apply to convictions for use of a handgun in a felony or crime of

violence; the requirement has been legislatively abrogated." *Brown*, *supra*, 182 Md. App. at 167–68 n.16.

Rushdan's argument regarding the jury's request for clarification suggests that he also believes the court's error extended to jury instructions related to the other count on which he was convicted, *i.e.*, assault in the first degree. CR § 3-202 defines that crime: "A person may not commit an assault with a firearm, including . . . a handgun, antique firearm, rifle, shotgun, short-barreled shotgun, or short-barreled rifle, as those terms are defined in § 4-201 of this article[.]" None of the relevant sections of the Criminal Law Article — § 3-202, § 4-201, § 4-204 — contain an operability requirement for this crime or for an item to meet the definition of a firearm or handgun. Rushdan's assault in the first degree conviction stands regardless of whether the jury found the firearm to be operable.

But, in any event, the court's instruction permitting use of circumstantial evidence to prove that a weapon was an operable handgun is consistent with Maryland law regarding proof of facts. We find no error in the court's instructions.

JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.