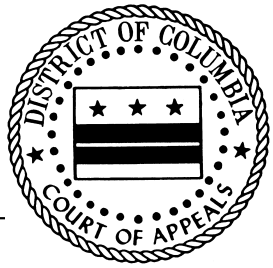
23-CF-251



IN THE DISTRICT OF COLUMBIA
COURT OF APPEALS

MICHAEL J. PATSCHAK,
Appellant,

v.

UNITED STATES,
Appellee.

On Appeal from the Superior Court of the District of Columbia
Criminal Division

OPENING BRIEF FOR APPELLANT

Gregory M. Lipper
LeGrand Law PLLC
1100 H Street NW, Suite 1220
Washington DC 20005
(202) 996-0919
glipper@legrandpllc.com

Counsel for Appellant

DISCLOSURE STATEMENT

The parties have been represented by the following counsel:

	MICHAEL PATSCHAK	UNITED STATES (USAO DC)
SUPERIOR COURT	Pretrial & Trial: Kevin L. Mosley (Lotze Mosley, LLP) Steven Ogilvie Sentencing: Gregory M. Lipper Rebecca LeGrand (LeGrand Law PLLC)	Charles R. Jones Ryan Sellinger Sarah R. Prins Joshua L. Hall Alec Levy
COURT OF APPEALS	Gregory M. Lipper (LeGrand Law PLLC)	Chrisellen Kolb

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF ISSUES PRESENTED

In this case, a Black Lives Matter protestor was convicted of robbery for taking the body worn camera of a police officer at a Black Lives Matter protest. The trial court described the conviction as "marginal" and deemed its evidentiary sufficiency to be "a close call." And the evidence showed that the protestor's hand touched the officer's camera for less than one-twentieth of a second, while the protestor was trying to stay on his feet, and that the camera was in the unlocked position before this incidental contact. Even then, the camera did not fall off the officer's body until after the officer had completed a "tactical takedown" of the protestor, who picked up the camera from the ground in "neutral territory" after the police officer had already started to walk away the from the scene.

In his appeal, the protestor presents the following questions about applying the D.C. robbery statute and addressing jury confusion about its requirements.

1. To convict a defendant of robbery, the government must prove that he used "force or violence" with the specific intent to take property from "the person or immediate actual possession of another." Given these requirements, may a defendant be convicted of robbery if (a) the alleged force or violence was not accompanied by a specific intent to steal, and (b) the alleged theft was not accompanied by any force or violence?

2. During deliberations, the jury thrice expressed confusion about whether and to what extent the alleged force or violence could be separated in time from the alleged intent to steal. In response, the trial court told the jury that force or violence must "be accompanied by" or "at the same time" as the specific intent to steal, but did not directly answer the jury's more specific questions about accompaniment means at "the exact time" or, instead, could be "a span of time"—such as "the entire events"—other than the immediate taking of the property." Did the trial court's responses alleviate the jury's confusion with the necessary concrete accuracy?

STATEMENT OF THE CASE & JURISDICTION

On December 12, 2020, Appellant Michael Patschak was arrested and charged with robbery. R1. On August 29, 2022, he was indicted on one count of robbery, in violation of D.C. Code § 22-2801, and two counts of assaulting a law enforcement officer, in violation of D.C. Code § 22-405(b). R23 at 1–2. Patschak's jury trial began on November 7, 2022, with Judge Jason Park presiding. RA at 18. On November 10, 2022, the jury convicted Patschak of all three counts. R36.

In a final judgment issued on March 10, 2023, the trial court sentenced Patschak to 24 months, all suspended, for the robbery conviction; 180 days, all but

fifteen days suspended, for each assault conviction; and one year of probation. R44. Patschak filed a timely notice of appeal on March 27, 2023. R45.

STATEMENT OF FACTS

After Ahmaud Arbery was murdered in February 2020, Michael Patschak began attending Black Lives Matter protests in Washington, DC. 11/9/22 Tr. 31:5–15. He attended one such protest, at Black Lives Matter Plaza, on the afternoon of December 12, 2020. 11/8/22 Tr. 38:2–9; 11/9/22 Tr. 30:2–9, 32:21–23. Patschak wore a helmet, reflective shoelaces, a distinctive black clown mask, and a GoPro camera. 11/8/22 Tr. 64:5–13. At the time, he was nearly thirty years old and had no criminal record. SR1 (Sealed Record) at 1.

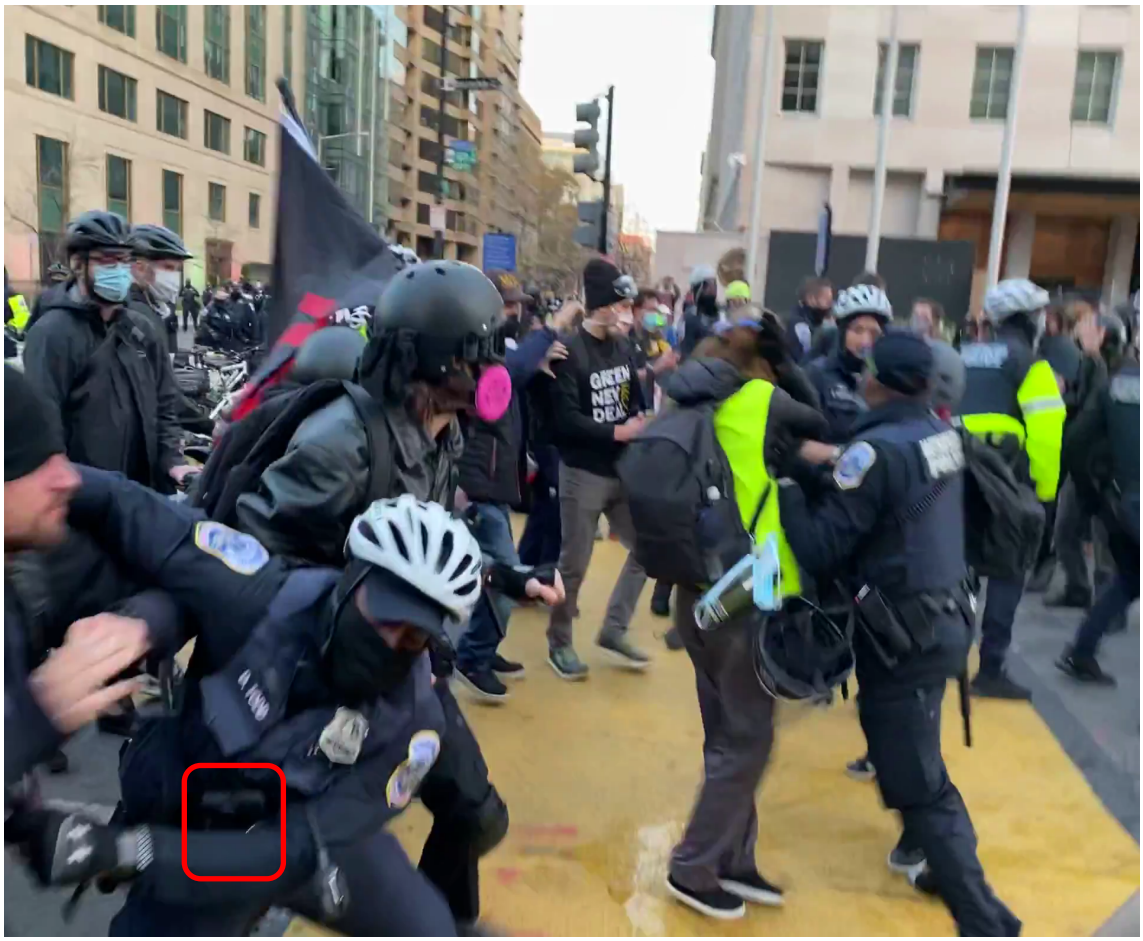
A. With Officer Todd's body worn camera already in the unlocked position, Officer Todd and Patschak begin to tussle.

Also attending the protest were police officers from the Fifth District's Civil Disturbance Unit. Those officers, including Officer Davon Todd, "did an encirclement" to arrest a protestor; the officers had been told, by someone "up the chain," that the protestor "was causing some sort of disorder in the crowd." 11/8/22 Tr. 40:6–11. Several protestors, including Patschak, walked towards the approaching officers in an effort to record their actions. Patschak activated his GoPro camera. 11/9/22 Tr. 41:10–11.

In his written report, Officer Todd claimed to have seen "kick Officer Lucas" another officer and then resist when the police tried to arrest him for the kick. R1 at 2 (Gerstein affidavit). That statement "wasn't true." 11/8/22 Tr. 131:6–9. Nevertheless, Officer Todd repeated this false claim, under oath, before the grand jury, even after having watched his own body worn camera recording. *See id.* at 117:8–24 (citing Def. Ex. 1). At trial, Officer Todd disavowed his prior testimony (that Patschak had kicked Officer Lucas) and instead claimed—for the first time—that Patschak had pushed him (Officer Todd) from behind. *Id.* at 46:15–47:1, 53:21–54:12. In any event, Officer Todd went to arrest Patschak and the two "began to tussle." *Id.* at 47:2–10.

Officer Todd was wearing his body worn camera, which was attached to his uniform on his chest. When worn by an officer, the camera is usually locked in place, but it can unlock if twisted. *See generally* 11/9/22 Tr. 188:14–22. Before Officer Todd began tussling with Patschak, however, the body worn camera already was "at least partially in a twisted position." *Id.* at 137:14–138:7 (trial court

statement during argument on motion for judgment of acquittal) (A15–A16); Def. Ex. 7, Frame 87.

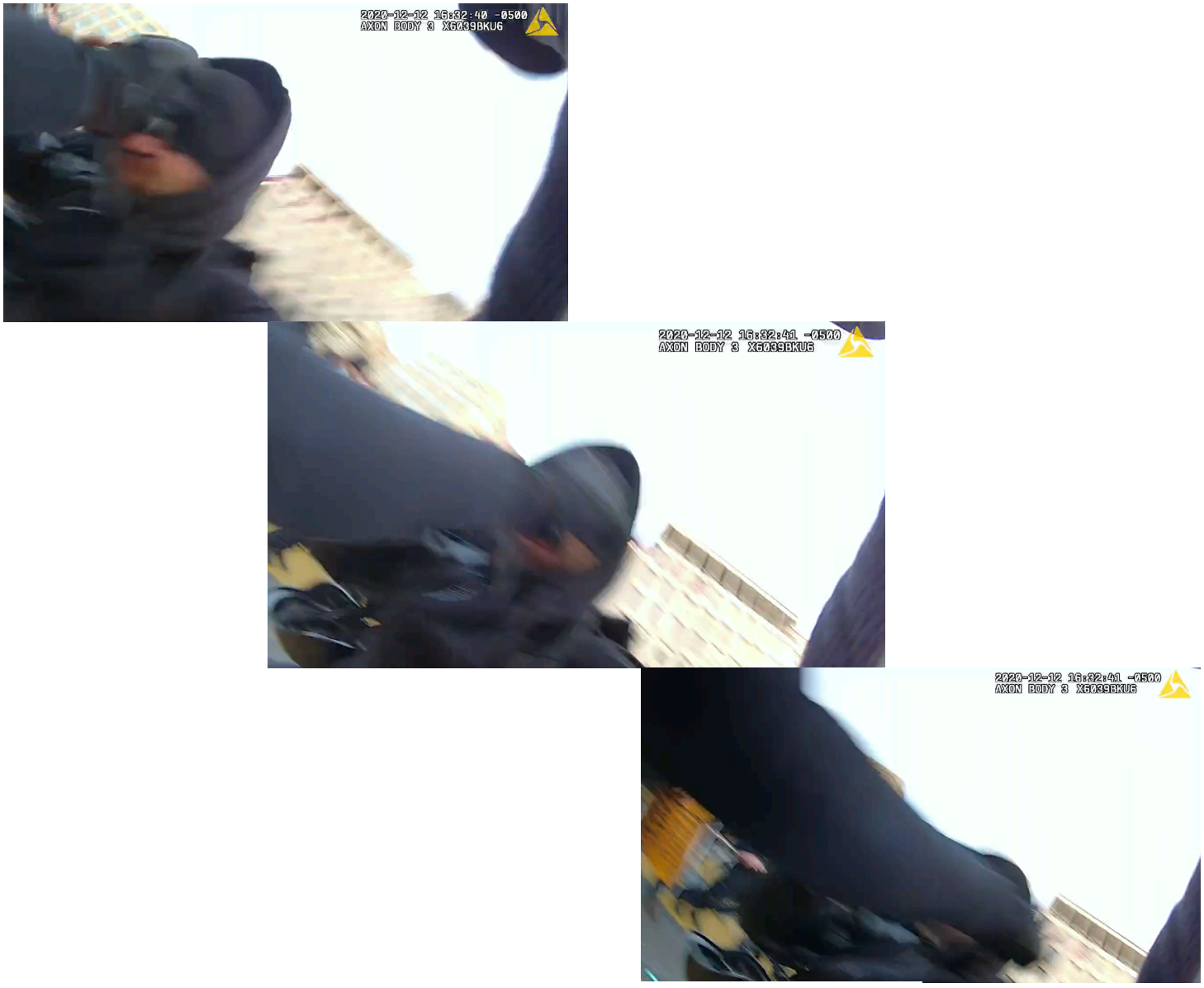


Def. Ex. 7, Frame 87 (Officer Todd with body worn camera partially twisted).

Patschak will be moving to supplement the record with the videos that were admitted as Government Exhibit 2 and Defense Exhibit 7.

B. While Officer Todd executes a "tactical takedown" of Patschak, his hand touches Officer Todd's body worn camera for less than a twentieth of a second.

With his body worn camera already twisted, Officer Todd began "grabbing" Patschak to "do a tactical takedown." 11/8/22 Tr. 84:18–85:1. Next, Officer Todd moved his closed fist toward Patschak's face; Officer Todd's closed fist made



Gov. Ex. 1 (Todd BWC) at 16:32:40–16:32:41.

contact with Patschak's face and then extended to the left of Patschak's face. *See* Gov. Ex. 1 at 16:32:40–16:32:41.

Officer Todd claims to not "recall" punching Patschak in the face or at least to "not recall punching [him] in the face purposely." *See* 11/8/22 Tr. at 162:20–21 ("I don't recall"); *id.* at 162:22–23 ("I don't recall"); *id.* at 163:6–7 ("I don't recall"); *id.* at 173:5–8 ("I do not recall punching the Defendant in the face purposely."). When shown the corresponding video clip from his body worn camera, Officer Todd insisted, "I don't throw a punch like that." *Id.* at 173:11–14; *see also id.* at 173:23–174:1–2 (repeating that answer two more times). After extending his closed fist into Patschak's face, Officer Todd "pushed [Patschak] towards the curb." *Id.* at 47:8–15. At trial, Officer Todd testified that as he was pushing Patschak down, Patschak "grabbed my camera, twisted it off." *Id.* at 46:10–15. The government's video exhibit, however, illustrates that Patschak's

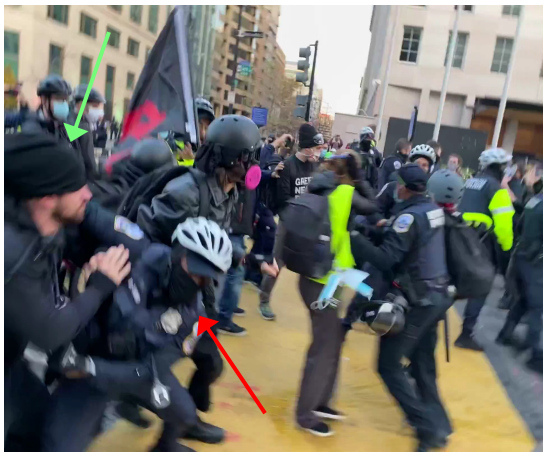
hand touched Officer Todd's body worn camera for a single video frame—approximately 1/30th of a second. *See* Gov. Ex. 2.

Gov. Ex. 2, Frame 524: Patschak's hand is not touching Officer Todd's body worn camera.

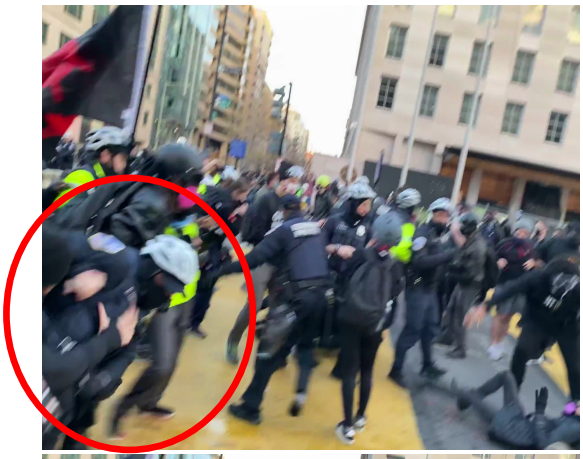
Gov. Ex. 2, Frame 525: Patschak's hand touches Officer Todd's body worn camera for 1/30th of a second (.03 seconds).

Gov. Ex. 2, Frame 526: Patschak's hand is no longer touching Officer Todd's body worn camera.

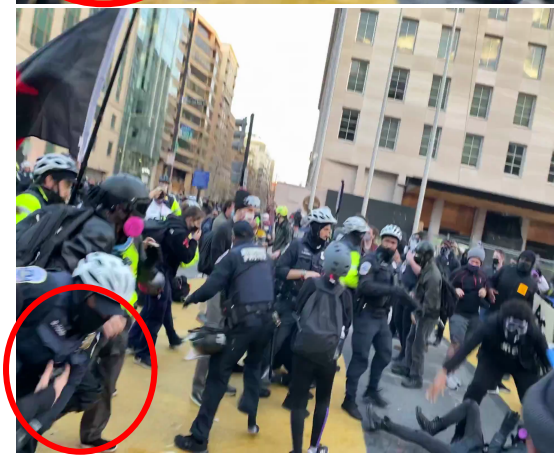
Other admitted footage revealed that this fleeting contact took place during the tactical takedown, while Patschak appeared to be trying to stay on his feet.



Def. Ex. 7, Frame 91: Officer Todd (red arrow) begins tactical takedown of Patschak (green arrow).

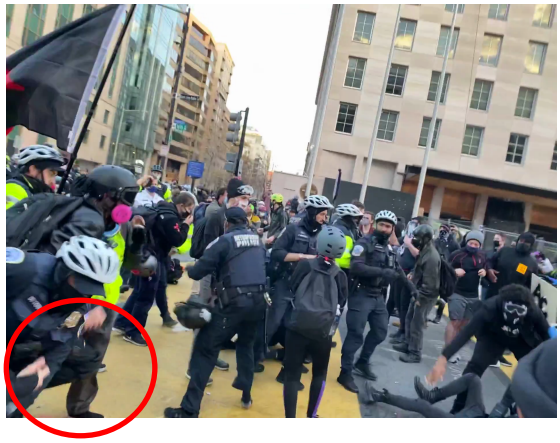


Def. Ex. 7, Frame 104: As Officer Todd tries to force Patschak to the ground, Patschak's hand grasps at Officer Todd's vest, away from his body worn camera.



Def. Ex. 7, Frame 107: As Officer Todd pushes Patschak closer to the ground, Patschak's hand touches Officer Todd's body worn camera for a single frame.

Even after that fleeting contact, and after Patschak's hand started to move away from Officer Todd, the camera remained attached to Officer Todd. *See* 11/8/22 Tr. 158:20–24 ("Q. And isn't it true that right here his hand is off the camera? A. Yes. Q. And where is the camera? A. The camera is attached to me still.") (discussing Gov. Ex. 2). The camera stayed attached even as Patschak's hand moved progressively further away. *See id.* at 158:25–159:4 ("Q. Okay. I'm going to move forward a frame. His hand is where? A. His hand is going away from the camera. Q. And the camera is still attached to your vest? A. Yes."); *id.* at 159:5–9 ("Q. Moving forward, forward, and forward, and forward. And now that camera is off the frame, correct? A. Yes. Q. And it was on your vest the entire time, right? A. From this angle it appeared to be so.").



Def. Ex. 7, Frame 108: In the next frame, Patschak's hand is no longer touching the body worn camera, which remains attached.

C. After Officer Todd begins walking away from his detached body worn camera, Patschak picks up the camera from the ground.

After Officer Todd finished taking down Patschak to the ground, the body worn camera detached from Officer Todd's body. *See id.* at 159:16–160:14 (citing Gov. Ex. 2). The camera hit the street, then bounced and landed near the curb, within arm's length of Patschak. *See, e.g.*, Gov. Ex. 2 (frames 558–69); *see also* 11/9/22 Tr. 63:19–64:2.

Clockwise, from top left: Frames 558, 559, 561, and 563. *See* Gov. Ex. 2

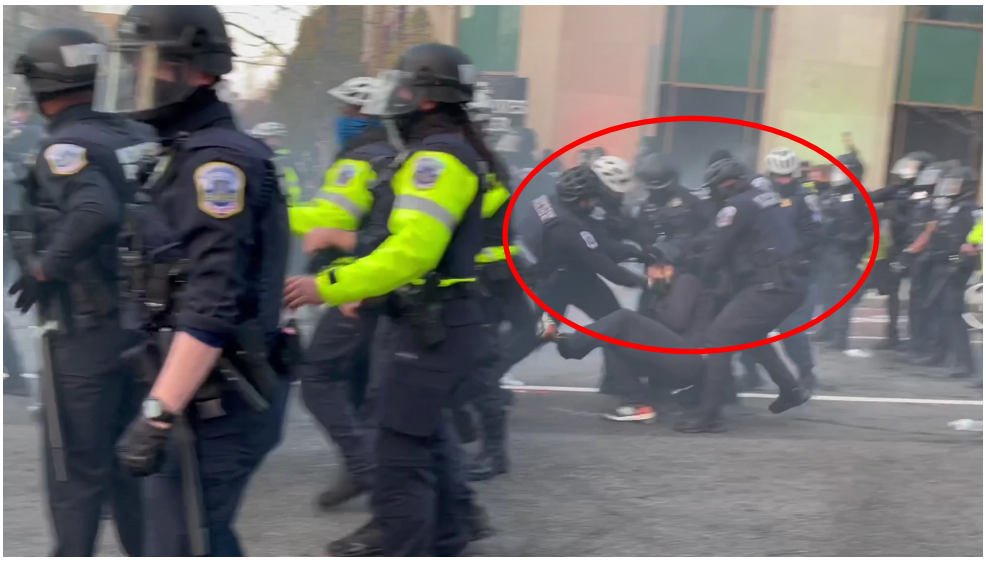
After his camera fell off, Officer Todd immediately began "retrieving back towards [his Civil Disturbance Unit] platoon." 11/8/22 Tr. 74:19–75:1. He did so because "the last thing I want is for me to be surrounded by a group of protesters

that were there for a specific cause and cause harm to myself" and because "I can't record exactly what's going on because I no longer have my BWC attached to my person." *Id.* at 74:2–75:9.

As Officer Todd was walking away from his body worn camera, and toward his platoon, the camera rested in what prosecutors called "neutral territory between" Patschak and Officer Todd. 11/10/22 Tr. 7:17–8:3 (A27–A28). While he walking back to his platoon, Officer Todd was "looking over [his] shoulder" and he watched Patschak pick up the camera and put it into his backpack. 11/8/22 Tr. 74:19–75:8. After he picked up the camera, Patschak did not run away or otherwise try to leave the scene. *Id.* at 167:10–15.

Five minutes later, Patschak approached a few other officers, gave them the middle finger, picked up a water bottle from the ground, and threw some bottled water in the direction of a police sergeant. *Id.* at 188:5–11, 192:16–22; 11/9/22 Tr. 69:16–70:1, 70:15–23. Another officer, Omar Forrester, yelled at Patschak, saying "Fuck you" or "Fuck you, punk." 11/8/22 Tr. 200:13–15 (quoting Def. Ex. 5). Officer Forrester then charged at Patschak. *Id.* at 188:16–25. Patschak hit the charging Officer Forrester in the head with the plastic water bottle, Officer Forrester accosted Patschak, and Patschak hit Forrester a few times with his left

hand. *See id.* at 188:16–25, 189:15–17. Soon, Patschak was surrounded, seized, and arrested by "a number of officers." *See, e.g.*, *id.* at 203:5–25 (discussing Def. Ex. 6).



Def. Ex. 6, Frame 9.

Patschak was hospitalized due to his injuries. *See* 11/9/22 Tr. 73:12–75:12. Another officer found Officer Todd's camera in Patschak's backpack. Forty-five minutes after it had fallen from his body, Officer Todd again had "possession of the camera." 11/8/22 Tr. 161:2–162:15; 11/9/22 Tr. 10:18–11:16.

D. The government acknowledges that robbery "may seem inapplicable here" and the trial court deems the sufficiency of the robbery evidence "a close call" and then an "even closer call."

Patschak was charged with misdemeanor assaults on Officers Todd and Forrester; although Officer Todd testified at trial, Officer Forrester did not. The government also charged Patschak with a felony: robbery of Officer Todd's body worn camera. In his opening statement, the prosecutor warned the jury that the

alleged conduct "might not be a robbery that, you know, you think of as grabbing a purse, grabbing a wallet and taking it for monetary gain." 11/8/22 Tr. 16:20–22.

After the government rested its case, Patschak moved for a judgment of acquittal on all counts. 11/9/22 Tr. 18:21–22 (A4). When addressing the robbery charge, defense counsel summarized the government's video exhibits: "Mr. Patschak's hand does not knock this body worn camera off Officer Todd's vest" and "touches his camera for one single frame" of video, which "shoots 30 frames per second." *Id.* at 19:24–6 (A5). Not only had Patschak touched the camera for only "one 30th of a second," but "when you see that camera fall, it's after [Officer] Todd has pushed Patschak away and the two parties are disengaged." *Id.* at 20:6–8 (A6). Because robbery is "a specific intent crime," defense counsel added, "[i]t's not enough if Patschak for the first time sees the camera on the ground and then decides to steal it." *Id.* at 24:3–5 (A10). Rather, any alleged force against Officer Todd "would have to be used with the specific intent to steal Officer Todd's body worn camera." *Id.* at 23:13–16 (A29).

The trial court denied the motion. But when addressing the legal sufficiency of the robbery case, the trial court conceded that "it's a close call as to whether or not the motion for judgment for acquittal should be granted." *Id.* at 27:5–9 (A13).

Patschak testified during the defense case, and defense counsel then renewed the motion for judgment of acquittal. Although again denying the motion, the trial court observed before Patschak touched Officer Todd's body worn camera, it was already "partially in a twisted position." *Id.* at 137:14–21 (discussing Def. Ex. 7) (A15). This additional evidence, said the trial court, made the already close call "even closer." *Id.*

During closing arguments, the government conceded that robbery "may seem inapplicable here"; the robbery charge "seems shocking" and like "an overly aggressive or crazy-type charge to bring." 11/9/22 Tr. 185:25–186:17, 210:19–22. To explain itself, the government clarified what it was not alleging:

- The government was "not asserting that the Defendant went to this protest with the intention to steal anything." *Id.* at 189:5–7.
- The government was "not saying that even once he started grappling with him he wanted to steal that BWC at that point." *Id.* at 189:9–10.
- The government was "not saying that he fought Officer Todd to steal that body worn camera." *Id.* at 205:18–23.

Instead, the government was alleging only that Patschak "was fighting with Officer Todd; because of his fight, it caused Officer Todd's possession—the body worn camera—to fall to the ground, and that's what he took." *Id.*

As an alternative, the government argued that "even if you don't think the Defendant twisted it off and it just somehow came off," after the camera fell

Officer Todd "was unable to pick it up because the Defendant took it from his immediate actual possession, which is right within his wingspan." *Id.* at 204:11–17.

E. Questions from jurors suggest that they are "struggling" to understand the temporal relationship between force and intent to steal.

The jury was instructed that a robbery conviction would require proof, beyond a reasonable doubt, that Patschak (1) took property "from the immediate actual possession of Officer Todd, or from Officer Todd's person," (2) "used force or violence to take the property, by taking the property by sudden or stealthy seizure or by snatching," and (3) "took the property without right to it and intending to steal it." *Id.* at 179:3–14 (A18). In addition, the jury was instructed on the lesser-included offense of theft. *See id.* at 180:18–181:3 (A19–A20).

As they started to deliberate, the jurors asked three questions about the relationship between intent to steal and the use of force or violence—and, in particular, the necessary timing of those acts.

1. *10:51 a.m.: The jury asks if "the use of force or violence" must "be with the intent of taking property."*

At 10:51 a.m., the jury asked if "the use of force or violence [has] to be with the intent of taking property." R35 at 6 (A57). The government asserted that "as long as [the theft] is preceded by violence, that violence need not legally be intended to commit the theft itself." 11/10/22 Tr. 5:11–15 (A25). But the

government's understanding, warned the trial court, was "contrary to the plain language of the statute." *Id.* at 5:20–24 (A25).

Instead, the trial court answered that "the act constituting the force or violence—whether it be the use of actual force or physical violence or the sudden or stealthy seizure or snatching—must be accompanied by the specific intent to steal in order to satisfy the elements of robbery." R35 at 5 (A56).

2. 11:53 a.m.: The jury asks about the necessary timing of the required specific intent.

Thirty-three minutes later, the jury posed its next question: Does "the intent for robbery need to occur at the exact time of the act of sudden or stealthy seizure?" *Id.* at 2 (A53). The trial court believed that the "prior response to the earlier note addressed this," and hence was "a little bit concerned about the—not concerned, but I just want to make it clear . . .—the question is does the intent for robbery need to occur at the exact time of the sudden or stealthy seizure." 11/10/22 Tr. 13:6–24 (A33). The jurors are "struggling with—not struggling with—but I think what they're asking about is if he picked up the property and at that point didn't know, just picked it up randomly, didn't know what he was going to do with it and then later on was like, oh, I'm not going to give it back." *Id.* at 16:6–13 (A36).

Despite the jury's potential struggles, the trial court wanted to answer "essentially in the same way that we did previously." *Id.* at 13:18–19 (A33). The government likewise wished to say only that "the act of sudden or stealthy seizure must be accompanied with the specific intent to steal." *Id.* at 17:14–16 (A37). Defense counsel, however, proposed a more specific response: "[S]hould we address the situation if the intent to steal was formed after. I think that's really, like, the crux of the question." *Id.* at 17:23–18:5 (A37). But the trial court "[did not] like the way this is being framed as a temporal thing." *Id.* at 18:6–11 (A38). After the trial court expressed its view, defense counsel added, "I just think the safest instruction is the one that—THE COURT: The 'accompanied' language. MR. OGILVIE: Yeah, the 'accompanied' language." *Id.* at 18:12–21 (A38).

Once again, the trial court instructed the jury that "the act of sudden or stealthy seizure must be accompanied with the specific intent to steal." R35 at 1 (A52).

3. 1:04 p.m.: The jury asks what it means for the specific intent to steal to have "accompanied" the use of force.

Less than an hour later, the jury again requested more specific guidance about what the trial court meant by "accompanied." Can "accompaniment be a span of time other than the immediate taking of the property," the jury asked, or "can the entire events be accompaniment?" *Id.* at 4 (A55). Defense counsel

proposed to answer directly, because "we just have to direct them, you know, towards the right way." 11/10/22 Tr. 21:10–16 (A41). And the "answer to [the question] is no, right?" *Id.*

The trial court rejected that approach. Instead, the trial court proposed to answer that "if at the time of the act of force or violence the person did not have the intent to steal, then that does not satisfy the intent requirement." *Id.* at 21:17–19 (A41). The government asked, in turn, to rephrase that answer, "perhaps not in the negative but just in the positive, like, just simply tell them at the time of the taking the person must have the intent to steal." *Id.* at 21:20–24 (A41). That was "not bad," said the trial court, which rephrased the answer to say that "at the time of the taking, the person must have had the intent to steal." *Id.* at 21:25–22:5 (A41–A42).

After initially agreeing to that revision (*id.* at 22:6; A42), defense counsel noted that "we were going to include something about the force and violence." *Id.* at 22:20–22 (A42). In particular, defense counsel wanted the jury to understand that if Patschak "had the intent to steal the property at the time he picked it up but it was outside of Officer Todd's immediate, actual possession, that wouldn't be a robbery, that would be a theft." *Id.* at 22:22–23:1 (A42–A43).

But the trial court believed that this was "a separate issue from what they're asking about," and offered a more limited solution: "[I]nstead of the taking we could use the force or violence language." *Id.* at 23:2–7 (A43). The trial court, then, proposed answering, "To constitute a robbery, the person must have had the intent to steal at the time he used force or violence to take the property, whether it be the use of actual force or physical violence . . . or sudden stealthy seizure or snatching." *Id.* at 23:10–15 (A43).

Both the government and defense counsel stated that they had no objections. *Id.* at 23:15–19 (A43). Contrary to defense counsel's proposals, the answer did not specifically address whether—when evaluating whether the government proved that force was used with the intent to steal—"the entire event" can be treated as "accompaniment." R35 at 3 (A54).

* * *

Patschak was convicted of all three charges, including felony robbery. R36. For the robbery conviction, the government sought a sentence of two months incarceration, consecutive to the sentences for the assault convictions. R43 at 6–7. Although robbery has a statutory minimum sentence of two years, the trial court suspended that sentence fully—because "this was a pretty marginal robbery." 3/10/24 Tr. 18:11–16.

SUMMARY OF ARGUMENT

Civil rights protestor Michael Patschak was wrongfully convicted of robbing an officer from the Metropolitan Police Department's Civil Disturbance Unit. The evidence was insufficient to prove, beyond a reasonable doubt, that he used force or violence with the intent to steal the body worn camera from Officer Davon Todd's person. And even if that evidence had been marginally sufficient to convict Patschak of robbery, the trial court failed to directly and specifically address the source of the jury's confusion—about whether or how much time could separate force from intent to steal.

First, no reasonable factfinder could have found Patschak guilty of robbery beyond a reasonable doubt. The evidence was insufficient to support either of the government's theories.

Multiple video exhibits refute the government's first theory: that during the struggle, Patschak intentionally twisted off Officer Todd's body worn camera to steal it. Those exhibits confirm that Patschak's hand touched the camera for about 1/30th of a second while Officer Todd was executing a tactical takedown, and that Officer Todd's camera was already in the unlocked position before he struggled with Patschak. Given this video footage (and the laws of physics), no reasonable jury could have concluded that Patschak caused Officer Todd's camera to fall off,

let alone that he used force to twist it off, let alone that he did so with the specific intent to steal it.

Officer Todd's testimony doomed the government's second theory: that after the camera fell to the ground, Patschak suddenly or stealthily seized or snatched the camera from Officer Todd's immediate actual possession. Patschak picked up the camera from the ground, not from Officer Todd's person or immediate possession. The government's "wingspan" theory was unsupported by any evidence about the size of Officer Todd's wingspan. More fundamentally, even if the camera had, in theory, been within his wingspan, the camera was not available to Officer Todd in practice. Before Patschak picked up the camera from the ground, Officer Todd began leaving the scene to rejoin his colleagues. And when Officer Todd began walking away, with his camera still on the ground, Patschak was not using or threatening force or violence. Because Officer Todd's testimony confirms that he would left the scene emptyhanded even if Patschak had promptly disappeared, Patschak cannot be deemed to have seized or snatched the camera from any person or person's possession.

Second, even if the evidence had been sufficient, the trial court failed to concretely and accurately alleviate the jury's confusion about whether and to what extent a robbery can take place if time separates the force or violence and the intent

to steal. The trilogy of questions evinced the jury's view that some amount of time had separated any use of force or violence and any intent to steal. Yet while the jury asked whether force must take place at the "exact time" of intent, or whether instead force could occur during "a span of time other than the immediate taking of the property," the trial court answered using broader and more general terms like "same time" and "accompanied." Especially when the government's evidence was marginally sufficient at best, these answers left an undue risk the jury would convict Patschak even without finding that he used force or violence with the intent to steal.

Robbery is a serious and stigmatizing felony, punishable by long prison sentences, because it is a crime against "possession by a person." *Rouse v. United States*, 402 A.2d 1218, 1220 (D.C. 1979). Yet both in fact and in practice, Patschak took a body worn camera from the ground, not from Officer Todd. With insufficient evidence, and inadequate attempts to address juror confusion, Patschak's robbery conviction cannot survive.

ARGUMENT

I. The evidence was legally insufficient to convict Patschak of robbery.

To convict Patschak of robbery, the government was required to prove, beyond a reasonable doubt, that (1) "by force or violence," (2) he took something

of value "from the person or immediate actual possession of another." D.C. Code § 22-2801. The "force or violence" element is satisfied if the property is taken "[a] against resistance or [b] by sudden or stealthy seizure or snatching, or [c] by putting in fear."

REQUIREMENT	WAYS OF SATISFYING
1. "by force or violence"	a. "against resistance" OR b. "by sudden or stealthy seizure or snatching" OR c. "by putting in fear"
2. "from . . . another"	a. from "the person" of another OR b. from the "immediate actual possession" of another

To satisfy this mens rea requirement, The government must further prove that the defendant performed these acts "with the specific attempt to steal." *(Earl) Johnson v. United States*, 756 A.2d 458, 462 (D.C. 2000). Although recently expressing "concern regarding the use of specific intent and general intent as categories of mens rea," the Court has nonetheless reiterated that "robbery is a specific intent crime." *Parker v. United States*, 249 A.3d 388, 397 & n.2 (D.C. 2021).

When evaluating sufficiency, the Court "view[s] the evidence in the light most favorable to the government, giving full play to the right of the fact-finder to determine credibility, weigh the evidence, and draw justifiable inferences of fact."

Cherry v. District of Columbia, 164 A.3d 922, 929 (D.C. 2017) (quotation marks omitted). That said, the Court does not settle for "rote incantation of these principles followed by summary affirmance." *Rivas v. United States*, 783 A.2d 125, 134 (D.C. 2001) (en banc). Rather, the Court "take[s] seriously the requirement that the evidence in a criminal prosecution must be strong enough that a jury behaving rationally really could find it persuasive beyond a reasonable doubt." *Id.* In this case, no reasonable jury could have concluded, beyond a reasonable doubt, that Patschak was guilty of robbery.

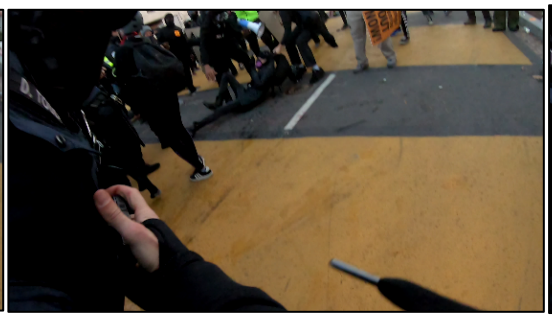
A. The evidence was insufficient to prove, beyond a reasonable doubt, that Patschak assaulted Officer Todd with the specific intent to steal his body worn camera.

The evidence was legally insufficient to convict Patschak based on the government's first theory of robbery, premised on Patschak's conduct during the tussle with Officer Todd. As is relevant to this theory, the government needed to prove not only that the "defendant assaulted complainant," but also that—"at the time of the assault"—"the defendant *acted with specific intent* to commit the offense of robbery." *Singleton v. United States*, 488 A.2d 1365, 1367 n. 2 (D.C. 1985) (emphasis added, quotation marks omitted). The government failed to prove, beyond a reasonable doubt, that Patschak assaulted Officer Todd with the specific intent to steal his property.

1. *The evidence was insufficient to prove, beyond a reasonable doubt, that Patschak used force to dislodge the body worn camera.*

Although the government need not prove that Patschak used heavy force, he must have used at least the "force necessary to lift a wallet from a pocket." *Jacobs v. United States*, 861 A.2d 15, 20 n.9 (D.C. 2004) (quotation marks omitted), *vacated & reissued* (2005). Here, no reasonable factfinder could conclude that Patschak "grabbed [Officer Todd's] camera" and "twisted it off." 11/8/22 Tr. 46:10–15.

As the government itself observed at trial, "everything relevant to this case is videotaped from multiple different angles." *Id.* at 10:10–18. The admitted video exhibits—including body worn camera footage and high-resolution GoPro footage capturing 30 frames per second—enable the Court "to visualize the events [at issue] in a way that would not be possible based on witness testimony alone." *Collins v. United States*, 73 A.3d 974, 981 n.4 (D.C. 2013). That footage confirms that Patschak did not twist off the body worn camera. Instead, he touched the camera for a tiny fraction of a second—a single video frame, which amounts to

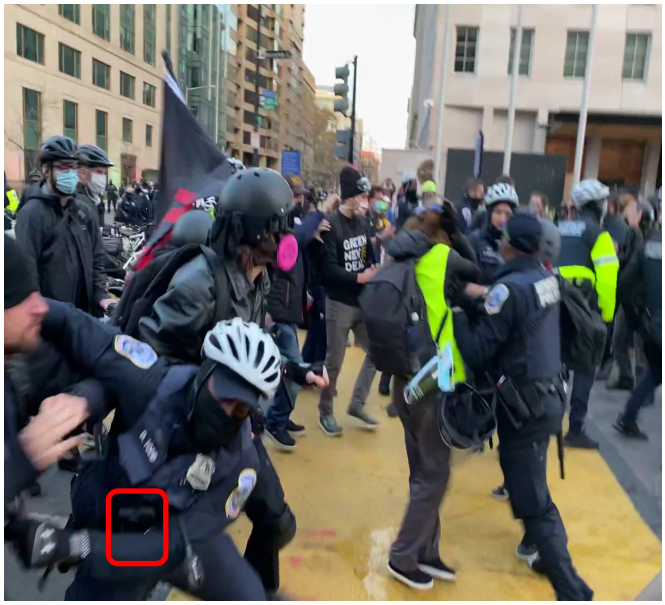

1/30th of a second. *See* Gov. Ex. 2, Frames 524–26; *see also* Def. Ex. 7, Frames 91–107.

Given this video footage, no reasonable factfinder could accept Officer Todd's testimony that Patschak "twisted [the camera] off." *Cf. In re D.P.*, 122 A.3d 903, 906, 909 & n.2 (D.C. 2015) (insufficient evidence of aggravated assault when video showed that the assaultive conduct "was brief, lasting approximately fourteen seconds"). It is well settled that "[d]ocuments or objective evidence may contradict the witness' story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable factfinder would not credit it." *Dorsey v. United States*, 60 A.3d 1171, 1206 n.120 (D.C. 2013) (quoting *Anderson v. City of Bessemer*, 470 U.S. 564, 575 (1984)). Most importantly, a factfinder "who has the benefit of reviewing objective and neutral video evidence along with officer testimony cannot be expected to ignore that video evidence simply because it totally contradicts the witness's recollection." *Wiggins v. Fla. Dep't of Highway Safety & Motor Vehicles*, 209 So. 3d 1165, 1172 (Fla. 2017).

The Court has already relied on video evidence to overturn convictions unsupported by sufficient evidence. In *Powell*, for instance, the defendant had been convicted of assault with intent to frighten, based on police testimony that the defendant had approached the officers with "her fists up" and that an officer

deployed her baton only "after" the defendant "started walking toward the officers." *Powell v. United States*, 238 A.3d 954, 956 (D.C. 2020) (quotation marks omitted). But that evidence was legally insufficient, given video footage revealing that "neither of [the defendant's] hands was in a fist" and that the officer took out her baton while the defendant "was still some distance away and not walking toward the officers." *Id.* (quotation marks omitted).

And notwithstanding the government's quip during closing arguments, a factfinder would not have needed to assume that Officer Todd's body worn camera "just somehow came off." 11/9/22 Tr. 204:11–17. The video evidence revealed that Officer Todd's body worn camera was twisted—and hence unlocked—before his encounter with Patschak. *See* Def. Ex. 7, Frame 87; 11/9/22 Tr. 137:14–138:7. The trial court recognized this too. *Cf. Roberts v. United States*, 216 A.3d 870, 883 (D.C. 2019) (not only could a reasonable factfinder have concluded that the defendant had made the images at issue, but "the trial court, although not the factfinder in this case, reached the same conclusion"). In sum,



video footage not only confirms that Patschak did not twist off the body worn camera, but also explains why the body worn camera fell off anyway. *See Wiley v. United States*, 264 A.3d 1204, 1215 (D.C. 2021) ("The locks were also lying on the ground for a few days after Wiley removed them and before Tandon discovered them, adding yet another plausible explanation for how they came to be damaged (somebody might have stepped on them).").

Even with the body worn camera already in an unlocked position, moreover, Patschak's fleeting contact was too weak to dislodge it. *See* 11/8/22 Tr. 159:16–160:14 (citing Gov. Ex. 2). After Patschak's hand moved away from Officer Todd, the already twisted camera stayed attached to him and left his body only after he had finished the tactical takedown. This sequence of events is confirmed by both the government's video evidence and Officer Todd's trial testimony. *See id.* at 158:20–24 ("Q. And isn't it true that right here his hand is off the camera? A. Yes. Q. And where is the camera? A. The camera is attached to me still.") (discussing Gov. Ex. 2). With video evidence this detailed, no reasonable juror could have concluded that Patschak dislodged Officer Todd's camera by force.

2. *Even if Patschak were deemed to have used force to dislodge the camera, the evidence was insufficient to prove that he did so with the specific intent to steal the camera.*

Even if Patschak's fleeting contact with the body worn camera had supplied enough force to dislodge it, no reasonable factfinder could conclude that he used force with the intent to steal that camera. In most cases, circumstantial evidence reveals that theft is the most logical or only motive for the defendant's use of force. *See, e.g.*, *Collins*, 73 A.3d at 982 ("The jury could reasonably infer a plan to rob from the boy's inquiry about the contents of the victims' pockets."); *Carter v. United States*, 957 A.2d 9, 15 n.5 (D.C. 2008) (the defendant "had never seen [the victim] before, so there was no evidence to suggest any other motive for [the defendant] to pull a gun" on the victim); *Long v. United States*, 687 A.2d 1331, 1347 (D.C. 1996) (noting that "there was no other discernible reason why [the defendant] would have approached" the victim). Here, the videos reveal that Patschak's fleeting contact with the camera took place while Officer Todd was forcing him to the ground, and Patschak was reaching for something that would help him stay on his feet. Given Patschak's manifest purpose, the government "failed to negate" the "most probable explanation." *Jones v. United States*, 516 A.2d 929, 933 n.3 (D.C. 1987).

As in other cases, then, the video evidence confirms that there was insufficient evidence of the necessary intent. In *Powell*, the intent-to-frighten assault case, the Court held that even if the defendant's acts had been objectively frightening, the video depicting the defendant's statements created "doubt that [she] understood that her own actions were menacing." 238 A.3d at 959 (alteration and quotation marks omitted). And "the closeness of the issue of whether appellant's conduct satisfied the actus reus element of assault" weighed "against an inference that appellant intended" to cause "the weapon-bearing officers' apprehension." *Id.*

Similarly, in *Solon*, video evidence undermined the inference that the defendant's physical ramming of other protestors led them to fear injury from other conduct. Because "the video shows that the 'ramming' incident occurred while the participants were standing with locked arms," that incident offered "no basis for inferring that the participants feared any similar injury from being stepped over (though they may well have feared that [the defendant] would get inside their semicircle)." *Solon v. United States*, 196 A.3d 1283, 1289 (D.C. 2018) (emphasis omitted).

During its closing, the government all but conceded that Patschak did not have the necessary intent during his struggle with Officer Todd. The government

stated that it was (1) "not asserting that the Defendant went to this protest with the intention to steal anything" (11/9/22 Tr. 189:5–7); (2) "not saying that even once he started grappling with him he wanted to steal that BWC at that point" (*id.* at 189:9–10); and (3) "not saying that he fought Officer Todd to steal that body worn camera" (*id.* at 205:18–23).

Instead, Patschak "was fighting with Officer Todd; because of his fight, it caused Officer Todd's possession—the body worn camera—to fall to the ground, and that's what he took." *Id.* Without specific intent, that is not enough. When even the government argues that "the intent to steal is no more than an afterthought to a previous assault, there is no robbery." *Commonwealth v. Moran*, 442 N.E.2d 399, 401 (Mass. 1982).

B. Given that Officer Todd was already leaving the scene and not attempting to recover his body worn camera, Patschak did not execute a "sudden or stealthy seizure or snatching" when he took the camera from the ground.

The evidence likewise was insufficient to support, beyond a reasonable doubt, the government's alternate theory: that Patschak's taking the camera from the ground was a "sudden or stealthy seizure or snatching." D.C. Code § 22-2801. When Patschak picked up the camera from the ground, Officer Todd was already walking away from the body worn camera and toward the MPD's Civil Disturbance Unit. Far from trying to pick up the camera, he watched Patschak pick up the

camera and did not try to stop him. Whether or not the camera sat on the ground within Officer Todd's unmeasured "wingspan," under these circumstances the camera was not within his "immediate actual possession."

By including the phrase "sudden or stealthy seizure or snatching" in the 1901 robbery statute, Congress evinced "a legislative intent to denounce pocketpicking and the like." *Turner v. United States*, 16 F.2d 535, 536 (D.C. Cir. 1926). Here, it is undisputed that Patschak did not behave like a pickpocket or a purse snatcher. *See, e.g.*, *Pelzer v. United States*, 166 A.3d 956, 960 (D.C. 2017) (defendant "grabbed [the object] from his hands and jogged away with it, while Mr. Mitchum called after him, 'sir, you have my phone'"). Instead, Patschak picked up the camera from the ground, and Officer Todd watched it happen.

The government also failed to prove, beyond a reasonable doubt, that the camera was otherwise in Officer Todd's "immediate actual possession." Sometimes the possession requirement can be met "even if the victim is not actually holding, or otherwise attached to[,] the object." *Leak v. United States*, 757 A.2d 739, 742–43 (D.C. 2000). But even then, the object must be in an "area within which the victim can reasonably be expected to exercise some physical control over the property." *Head v. United States*, 451 A.2d 615, 624 (D.C. 2002). Officer Todd testified, however, that he began walking away while his camera was

on the ground, and before Patschak picked it up. *See* 11/8/22 Tr. 74:19–75:8. Given his decision to walk away from his body worn camera, Officer Todd could not reasonably have expected to exercise any control over the camera, even if it happened to be within his wingspan.

The Court's cases reinforce that "immediate actual possession" requires more than physical proximity. In the leading case, *Leak*, the defendant took a bicycle while its owner and his attacker were struggling "approximately two feet away"; the owner, in turn, "broke free and gave chase, all the while yelling for help." 757 A.2d at 741, 743. After suggesting that a bicycle lying two feet away was "within the victim's immediate actual possession," the Court clarified: "at least where, as here, the owner is aware of the attempted taking in a setting of force and violence." *Id.* This bike owner "was being pulled away from it," and he "didn't want to be one inch away from that bike. I wanted to touch it. I wanted to have it. I didn't want to let it go." *Id.* at 733 n.3 (quotation marks omitted).

Earlier cases described the same circumstance: If not for the defendant's sudden or stealthy seizure, the owner would have continued to exercise control. In *Spencer*, the victim was in bed with a woman and had "removed his trousers and placed them on a chair at the foot of the bed"; while he was "on the bed, in the act of intercourse, defendant came into the room" and took ten dollars "from the

pocket of his trousers." *Spencer v. United States*, 116 F.2d 801, 801 (D.C. Cir. 1940). In concluding that the money was stolen from the victim's immediate actual possession, the Court observed not only that "the taking was within a very few feet of the victim, in the same room," but also that "had he known of it, he could have made effective efforts to retain his property." *Id.* at 802.

Leak and *Spencer* depended on more than a tape measure. Unlike the owners in those cases, Officer Todd was walking away from his property, not trying to retrieve it. Rather than attempt to pick up his body worn camera, Officer Todd decided to leave the scene to rejoin his unit. He already was walking away when Patschak picked up the camera, which rested in "neutral territory between the two of them." 11/10/22 Tr. 7:17–8:3 (A27). Patschak, then, did not commit a robbery when he picked up the camera from the ground, even if the government had proved that the camera happened to be within Officer Todd's "wingspan." 11/9/22 Tr. 22:14–21.

The government's evidence confirms that Officer Todd would not have exercised control over his dormant camera even if Patschak had promptly vanished into thin air. According to Officer Todd, he returned to his Civil Disturbance Unit because "the last thing I want is for me to be surrounded by a group of protesters that were there for a specific cause and cause harm to myself." 11/8/22 Tr. 74:2–

75:9. Officer Todd was not being threatened by Patschak; he was concerned about the Black Lives Matter protestors' writ large.

In other cases, the government has introduced evidence that the defendant intentionally used force or violence to prevent the owner from retrieving his property. *See, e.g.*, *Bailey v. United States*, 257 A.3d 486, 491 (D.C. 2021) (victim fled the scene after defendant's accomplice conveyed "that he had a gun"); *Jacobs*, 861 A.2d at 20 (defendant was handed rifle by the owner, but then "immediately he cocked the rifle, pointed it at [the owner], and ordered him outside while threatening to kill him"). But in this case, it was undisputed that while Officer Todd was walking away from the camera, Patschak was not yelling at Officer Todd, gesturing toward Officer Todd, threatening Officer Todd, or approaching Officer Todd. Patschak did not "use force to overcome the owner's efforts to take it back." *Jacobs*, 861 A.2d at 20.

II. The trial court failed to answer the jury's questions in a way that concretely and accurately cured the jury's confusion about the necessary timing and sequence of force and intent to steal.

Even if the evidence had been legally sufficient to convict Patschak of robbery, the jury's verdict resulted from confusion about the necessary timing and sequence of (1) force or violence, and (2) intent to steal. The jury's three questions highlighted their confusion; the trial court rejected defense counsel's proposals for

direct and concrete responses; and the ultimate answers were not specific enough to ensure that the jury understood the requirements clearly. Although the trial court's responses are reviewed for abuse of discretion, that discretion narrows when the questions reflect confusion. When, as here, "a jury sends a note indicating its confusion with the law governing its deliberations, the trial court must not allow that confusion to persist; it must respond appropriately." *Jordan v. United States*, 18 A.3d 703, 707 (D.C. 2011) (citation and quotation marks omitted). And if the jury has shared "its specific difficulties understanding the law, the trial court should clear them away with concrete accuracy." *Colbert v. United States*, 125 A.3d 326, 334 (D.C. 2015) (citation and quotation marks omitted). These answers failed to do so.

A. The trial court twice rejected defense counsel's proposals to address the jury's confusion specifically and directly.

Twice, the trial court rejected defense counsel's proposals to answer the jury's questions directly and clearly. In response to the jury's first question, the trial court had instructed the jury that "the act constituting force or violence"—whether "actual force or physical violence or a sudden or stealthy seizure or snatching"—"must be accompanied by the specific intent to steal." R35 at 5 (A56).

Uncertainty about the term "accompanied" prompted the jury to ask a second question: Does "the intent for robbery need to occur at the exact time of the act of sudden or stealthy seizure?" R35 at 2 (A53). So when the trial court proposed to answer "essentially in the same way that we did previously," defense counsel asked for a more direct response: "[S]hould we address the situation if the intent to steal was formed after. I think that's really, like, the crux of the question." 11/10/24 Tr. 17:23–18:5 (A37). Yet even though the jury had asked specifically about timing, the trial court disagreed with "the way this is being framed as a temporal thing." *Id.* at 18:6–11 (A38). Only then did defense counsel agree to repeat the word "accompanied." In response to a question asking whether "accompanied" meant "at the exact time," the trial court instructed the jury that "the act of sudden or stealthy seizure must be accompanied with the specific intent to steal." R35 at 1 (A52).

Needless to say, the jury remained confused, and soon asked a third question: Whether "accompaniment" comprises "a span of time other than the immediate taking of the property" such as "the entire events." *Id.* at 4 (A55). Again, defense counsel proposed to answer concretely and directly: "[T]he answer to jury question three is 'no.'" 11/10/22 Tr. 21:10–16 (A41). Defense counsel then began to explain what he believed to be the source of the jury's confusion about

"the temporal aspect of it." *Id.* at 21:10–19 (A41). Before he could continue, however, the trial court suggested a different response: "Why don't we say if at the time of the act of force or violence the person did not have the intent to steal, then that does not satisfy the intent requirement." *Id.*

During the questions about the jury's second and third questions, trial counsel articulated both his specific proposals and the reasons for them. By doing so, he "allow[ed] the trial judge fully to consider [the] issues and thereby avoid potential error." *Williams v. United States*, 966 A.2d 844, 847 (D.C. 2009) (quotation marks omitted). When the trial court rejected those proposals, defense counsel understandably continued to participate in the discussion about what the jury would be told, and, within that context, he did not object to the trial court's final answers to questions two and three. 11/10/22 Tr. 18:6–24, 23:10–25. But defense counsel never disavowed or withdrew his original requests for more specific answers. *See Preacher v. United States*, 934 A.2d 363, 369 (D.C. 2007) ("Although the court and counsel discussed various ways to respond to the jury's inquiry before the court repeated the self-defense instructions, defense counsel ultimately made clear the request for an instruction on assault and the reason for that request before the jury resumed deliberations."); *Lucas v. United States*, 240 A.3d 328, 345 (D.C. 2020) (rejecting the government's argument that the

defendants waived or forfeited their challenge by "agreeing to the trial court's ultimate decision to reiterate the jury instructions" in response to the jury's question). The trial court remained aware of defense counsel's explicit concerns and specific proposals and had every opportunity to address the jury's confusion more concretely.

B. The answers to jury questions two and three did not concretely resolve the jury's confusion about the necessary timing.

In the end, the necessary "concrete accuracy" was missing from the trial court's responses to the jury's successive questions—questions suggesting that the jury was flummoxed by whether and how much time was allowed to have passed between force or violence and the specific intent to steal. This confusion persisted even after the jury was once and then twice told that any force or violence must be "accompanied" by a specific intent to steal.

As each successive question reinforced, the jury likely believed that some amount of time separated (a) any use of force or violence and (b) any specific intent to steal. But the trial court's answers did not address the jury's precise question: Whether "accompaniment" (of intent and force) must be at the "exact time" (Question 2) or can be "a span of time other than the *immediate* taking of the property" such as "the entire events" (Question 3). R35 at 2, 4 (emphasis added) (A53, A55).

But in response to the jury's questions about the "exact" or "immediate" time, the trial court chose the more general phrase "at the time": The person "must have had the intent to steal at the time he used force or violence to take the property." *Id.* at 3 (A54). Because the jury's chosen words were not addressed directly, the jury likely viewed "at the time" to be longer than "immediately" (jury question 3) or "at the exact time" (jury question 2). Given the importance of timing and sequence, these answers left undue ambiguity. *See Sanders v. United States*, 118 A.3d 782, 784 (D.C. 2015) (reversing conviction for assault with intent to rob, because trial court failed to adequately address the jury's question "about the meaning of the 'at the time' requirement"). In addition, the answer's use of "at the time he used force or violence to take the property" raises the same or similar timing question: What if Patschak had not used force at the exact or immediate time he took property?

In sum, the trial court's answer to the jury's questions, including the third question, failed to mitigate the risk that the jury would mix and match force, theft, and intent in a manner that the robbery statute does not authorize. The failure to alleviate this jury confusion "on a central issue to the defense in a close case creates an unacceptable risk that the verdict stemmed from a mistaken understanding of the law." *Preacher*, 934 A.2d at 371.

This error was not harmless, much less harmless beyond a reasonable doubt. An answer that "is adequate to dispel jury confusion on a controlling issue of a case is such an important aspect of due process of law that [the Court] would have to be satisfied beyond a reasonable doubt that an omission to provide them was harmless." *Potter v. United States*, 534 A.2d 943, 946 (D.C. 1987) (citing *Chapman v. California*, 386 U.S. 18 (1967)); *see also Sanders*, 118 A.3d at 785 (same). Alleviating jury confusion was yet more important in this robbery trial, during which the trial court found even evidentiary sufficiency to be "a close call." *Preacher*, 934 A.2d at 371 (failure to address jury confusion was not harmless, even under *Kotteakos* standard for non-constitutional errors, given that "the trial court itself observed that it was a close case").

Given what the admitted videos documented about how Officer Todd lost his body worn camera and the circumstances under which Patschak picked it up, at best "the government's proof of guilt was marginal." *Porter v. United States*, 826 A.2d 398, 410 (D.C. 2003) (improper admission of prior consistent statement was not harmless). And as was apparent from its questions, the jury perceived a gap in time between any use of force and any theft of the camera. Ultimately, there is too great a risk that Patschak's robbery conviction resulted from juror confusion about the law of robbery.

CONCLUSION

The judgment should be reversed.

Respectfully submitted,

/s/ Gregory M. Lipper
Gregory M. Lipper (Bar No. 494882)
LeGrand Law PLLC
1100 H Street NW, Suite 1220
Washington DC 20005
(202) 996-0919
glipper@legrandpllc.com

Counsel for Appellant

CERTIFICATE OF SERVICE

On May 17, 2024, I served a copy of this brief, through the Court's electronic filing system, on:

Chrisellen Kolb
Assistant United States Attorney
555 4th St NW, Room 8104
Washington, DC 20530
(202) 252-6829
chrisellen.r.kolb@usdoj.gov

Counsel for Appellee

/s/ Gregory M. Lipper
Gregory M. Lipper