BRIEF FOR APPELLEE

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 23-CF-251

MICHAEL PATSCHAK, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

APPEAL FROM THE SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

MATTHEW M. GRAVES
United States Attorney

CHRISELLEN R. KOLB
ELIZABETH H. DANELLO
ALEC LEVY
JOSHUA HALL
* MARK HOBEL
D.C. Bar #1024162
Assistant United States Attorneys

* Counsel for Oral Argument
601 D Street, NW, Room 6.232
Washington, D.C. 20530
Mark.Hobel@usdoj.gov
(202) 252-6829

Cr. No. 2020 CF2 9368

TABLE OF CONTENTS

TABLE OF AUTHORITIES*

Cases

---

* Authorities upon which we chiefly rely are marked with asterisks.

Other References

ISSUES PRESENTED

I. Whether there was sufficient evidence to convict appellant Michael Patschak of robbery, where, after Patschak assaulted a police officer and the officer's body-worn camera to fell to the ground a few feet away, Patschak then quickly took the camera and walked off with it as the officer retreated to safety.

II. Whether, in response to jury notes about the relationship between the use of force or violence and the specific intent to steal in the robbery elements, the trial court plainly erred in instructing the jury that robbery requires the intent to steal occur "at the time" the force or violence is used—rather than the "exact" or "immediate" time.

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 23-CF-251

MICHAEL PATSCHAK, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

APPEAL FROM THE SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

BRIEF FOR APPELLEE

INTRODUCTION

During an unruly protest in December 2020, appellant Michael Patschak assaulted Officer Davon Todd by shoving him from behind as Officer Todd tried to assist his fellow officers in arresting another protester. Officer Todd attempted to detain Patschak, but Patschak grappled back, causing Officer Todd's body-worn camera to come free from his vest and fall to the ground. As Officer Todd began retreating to safety, Patschak took the camera, put it in his backpack, and walked

away. Police recovered the camera from the backpack 45 minutes later, after Patschak assaulted Officer Omar Forrester and was arrested.

A jury convicted Patschak of the robbery of Officer Todd's body-worn camera and the assaults on Officers Todd and Forrester. Patschak does not challenge his assault convictions, but he claims that the evidence was insufficient to convict him of robbery. The jury's verdict should stand. Viewed in the light most favorable to that verdict, the evidence showed that the camera remained in Officer Todd's immediate actual possession when it dropped a few feet from the officer after Patschak assaulted him, and that Patschak took the camera by a sudden seizure or snatching with the intent to steal when he scooped it up, put it in his backpack, and walked off with it as Officer Todd retreated to safety. Under well-established D.C. law, "such larceny from the person is classified as robbery." *Bailey v. United States*, 257 A.3d 486, 501 (D.C. 2021). *See also Leak v. United States*, 757 A.2d 739, 742-43 ("We have consistently and for many years given a broad meaning to the term 'immediate actual possession' and have recognized that any taking from the area encompassed by that term is a robbery—not simply larceny.").

Patschak also claims that the trial court abused its discretion in responding to three jury notes about the robbery charge. But Patschak explicitly told the court that he had "no objection" to the responses, and he has not shown that they were plainly erroneous, so he is not entitled to reversal on this basis either.

COUNTERSTATEMENT OF THE CASE

Procedural History

On August 29, 2022, a grand jury returned an indictment charging Patschak with robbery, D.C. Code § 22-2801, and two counts of assaulting a police officer (APO), D.C. Code § 22-405(b) (Record (R.) 23). Following a two-day trial, a jury convicted Patschak of all three counts on November 10, 2022 (11/10/22 Transcript (Tr.) 24-25). The Honorable Jason Park sentenced Patschak to 24 months of incarceration and three years of supervised release on the robbery count, but suspended the sentence in favor of one year of supervised probation (R. 44). The trial court also imposed sentences of 180 days of incarceration, suspended as to all but 15 days, on each of the APO counts, with the sentence on the Officer Todd APO count running concurrently with the robbery sentence and the

sentence on the Officer Forrester APO count running consecutively to the Officer Todd counts (*id.*). Patschak timely noticed an appeal (R. 45).

The Trial

The Government's Evidence

On December 12, 2020, Patschak attended a "chaotic" protest at Black Lives Matter Plaza in Northwest Washington, D.C. (11/8/22 Tr. 37-38, 75). Patschak wore a black helmet, a clown face mask, and a backpack with a GoPro camera attached to it (*id.* 46-48).

At approximately 4:30 p.m., Officer Todd and other Metropolitan Police Department (MPD) officers were ordered by a lieutenant to enter the crowd of protesters and make an arrest (11/8/22 Tr. 45). As the officers encircled the arrestee, Officer Todd saw another protester kick an officer on a police bicycle (*id.* 46). When Officer Todd attempted to arrest the kicking protester, Patschak shoved Officer Todd from behind, causing Officer Todd to fall to his knee (*id.* 46-47, 53, 83).

Officer Todd regained his footing and tried to detain Patschak, but Patschak fought back (11/8/22 Tr. 47, 61, 84). Officer Todd testified that the pair "tussle[d]" and "grapple[d]" (*id.* 47). During the struggle, Patschak grabbed Officer Todd's vest, where his body-worn camera was

mounted, and Patschak's hand briefly made contact with the camera (*id.* 62-63, 84; Government Exhibit (GX) 2 (Patschak GoPro video)). Officer Todd's body-worn camera came off its mount on his vest and fell to the ground a few feet away, still recording (11/8/22 Tr. 63; GX 1 (Todd body-worn camera video)). Officer Todd and Patschak separated, and Officer Todd began retreating toward his fellow officers as Patschak reached down and picked up the camera—as shown on overhead surveillance video (11/8/22 Tr. 63, 74-75, 87-88; GX 3 (surveillance video)). Officer Todd testified that he retreated for "safety" reasons: "It was very chaotic that day, very hectic, and 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 . . . I can't record exactly what's going on because I no longer have a [body-worn camera] attached to my person." (11/8/22 Tr. 75.) As Officer Todd retreated to safety, Patschak put the camera in his backpack and then walked in the opposite direction from the police line (*id.* 88-90; GX 3).

Patschak remained at the protest, however, and confronted officers a second time (11/8/22 Tr. 188-89, 196). Patschak approached a police line and kicked a smoke grenade at the officers, then threw a clear liquid on

them (*id.* 196). When Officer Forrester attempted to detain Patschak, Patschak punched Officer Forrester in the head repeatedly (*id.* 188-91, 194-96).

Patschak was arrested (11/9/22 Tr. 9). In preparation for transport, an officer looked inside Patschak's backpack and found Officer Todd's body-worn camera, which was still recording (*id.* 11; GX 1). The camera was returned to Officer Todd approximately 45 minutes after Patschak took it (*id.*). After police found the camera, Patschak stated that he had found it on the curb and had been trying to find someone to give it back to (11/9/22 Tr. 12).

Motion for Judgment of Acquittal (MJOA)

After the government rested, Patschak moved for judgment of acquittal on all counts (11/9/22 Tr. 18). As to the robbery count, Patschak argued that he did not knock the body-worn camera from Officer Todd's vest, because "[h]is hand touche[d] the camera for one single frame[,] . . . about one 30th of a second" (*id.* 19). Patschak added that, "when you see that camera fall, it's after Todd has pushed Patschak away and the two parties are disengaged" (*id.*).

The government responded that Patschak "caused that video camera to come off the officer's chest by engaging with him, by grappling with him, by physically fighting with him and shoving him. He started this physical interaction which resulted in the item of value coming free from the officer." (11/9/22 Tr. 22.) Moreover, "even [putting] that aside, when the body worn camera is sitting feet away from the officer who he knows it belongs to sitting there right by the officer, it is still within his wingspan and immediate possession, and thus, taking it from him is the same as taking someone's cell phone when it's sitting with him right at a bar snatching it away from him or snatching a purse that in the immediate possession of the victim" (*id.*). "[A]t the very least, [the camera] [was] still within [Officer Todd's] immediate wingspan and domain when the Defendant snatche[d] it" (*id.* 22-23). Patschak replied that Officer Todd, "for his safety, immediately retreat[ed] back to the police line," creating "distance . . . between the two parties when the camera falls. And the camera falls forward away from Todd towards Patschak as Todd moves back, so he's not within an arm's reach" (*id.* 24).

The trial court denied the MJOA (11/9/24 Tr. 24-28). The court characterized the robbery count as "a bit of a close call," but ultimately

sided with the government (*id.* 27). The court first explained that, "viewing the evidence in the light most favorable to the Government, it does seem there is some evidence to support the Government's viewpoint, which is that he reached out, he twisted the body worn camera, it falls to the ground, and Mr. Patschak immediately snatches it up and then takes it away" (*id.* 28). The jury thus "could infer the necessary intent" to steal when Patschak "grabbed," "twisted", and "loosened" the camera, causing it to fall from Officer Todd's vest (*id.*). The court also "t[ook] [the government's] point about whether or not the camera, even after it fell to the ground, was within a close enough distance to the officer that it could be found it had been taken from his immediate vicinity so as to satisfy the robbery statute. That is a question for the jury." (*Id.*)

The Defense Evidence

Patschak testified and claimed that he was "pushed by other cops" and "fell into" Officer Todd (11/9/22 Tr. 42). Patschak admitted that he put his hand on Officer Todd's body-worn camera while the pair were struggling—but for only one "frame" of his GoPro video, "a fraction of a second" (*id.* 53, 55). Patschak testified that he had "separated" from Officer Todd when the camera fell to the ground, and that the camera

"bounce[d] towards" Patschak (*id.* 57, 62). The camera landed near Patshak's helmet, and he picked these items up "in the same motion" (*id.* 63-64). Patschak testified that he was approximately "three to five feet" from Officer Todd when he picked up the camera (*id.* 64-65). Patschak estimated that he picked up the camera "[l]ess than four seconds" after he separated from Officer Todd, and that it was "very fast" (*id.* 65-66).

Patschak also presented additional video evidence, including a video taken by another protester (Defense Exhibit (DX 7)). A frame from that video appears to show Officer Todd's body-worn camera already twisted on its mount—the position from which it could be removed—before Patschak's hand made contact with it (*id.*).

Renewed MJOA

Patschak renewed his MJOA after the defense rested (11/9/22 Tr. 137). The trial court again denied the motion, but characterized the robbery count as "an even closer call" based on the "additional Defense video . . . [that] at least seems to show" that Officer Todd's body-worn camera was "at least partially in a twisted position" when Patschak touched it (*id.*). The court "[n]onetheless" explained that its "prior ruling stands for the reasons [the court] just talked about in denying the prior

motion, [which is] that the jury could, based on the totality of the evidence and viewing the evidence in the light most favorable to the Government, find sufficient . . . circumstantial evidence of his intent to steal, which is really the key issue" (*id.* 137-38). The court also denied the renewed MJOA based on "the arguments that the Government had made before about even after [the camera] having fallen, that it was close enough to be within the officer's immediate actual possession to satisfy the robbery statute" (*id.* 138).

SUMMARY OF ARGUMENT

There was sufficient evidence to convict Patschak of robbery. Viewing the evidence in the light most favorable to the jury's verdict, Patschak assaulted Officer Todd, causing Officer Todd's body-worn camera to fall to the ground and bounce a few feet away. As Officer Todd began retreating to safety, Patschak quickly reached down, picked up the camera, put it in his backpack, and walked off with it. The jury reasonably could find that when Patschak scooped up the camera, he suddenly seized or snatched it from Officer Todd's immediate actual possession, with the intent to steal it. That is robbery under well-established D.C. law. Patschak argues that he did not have the intent to

steal when he took the camera, and that, despite being only a few feet away from Officer Todd, the camera was no longer in his immediate actual possession; but these are quintessential factual questions, and the jury had sufficient evidence to resolve them against Patschak.

Patschak also claims that the trial court abused its discretion in responding to jury notes which, he argues, demonstrated the jury's "confusion about the necessary timing and sequence of (1) force or violence, and (2) intent to steal" in connection with the elements of robbery (Br. 36-42). Because Patschak failed to object—in fact, he affirmatively agreed—to the responses, his claim is unpreserved; but he has not even attempted to satisfy the "formidable burden" of demonstrating plain error. *Lowery v. United States*, 3 A.3d 1169, 1173 (D.C. 2010). Nor could he meet that burden. The trial court responded with "concrete accuracy" to the jury's "specific difficulties" about timing and sequence, *Lucas v. United States*, 240 A.3d 328, 343 (D.C. 2020), instructing the jury that a defendant must have the intent to steal "at the time" he used force or violence to take property. The jury's swift verdict after this instruction demonstrates that the court "convey[ed] an appropriate and effective response." *Id.* Patschak thus fails to show error,

much less plain error. He also cannot show that the court's response either affected the outcome or that any error affected the fairness, integrity, or public reputation of judicial proceedings.

ARGUMENT

I. Patschak Suddenly Seized or Snatched the Body-Worn Camera from Officer Todd's Immediate Actual Possession, Committing a Robbery under D.C. Code § 22-2801.

Patschak claims that there was insufficient evidence to support his robbery conviction (Brief (Br.) 23-36). Because he "has not carried his 'heavy burden' to show that the evidence was insufficient," the jury's verdict must stand. *Bruce v. United States*, 305 A.3d 381, 392 (D.C. 2023) (quoting *Dorsey v. United States*, 154 A.3d 106, 112 (D.C. 2017)).

A. Standard of Review and Applicable Legal Principles

This Court "reviews insufficiency-of-the-evidence claims de novo, but . . . view[s] the evidence in the light most favorable to the government, drawing all reasonable inferences in the government's favor, and giving deference to the jury's right to determine credibility and weight." *Bruce*, 305 A.3d at 392 (citations and internal quotation marks

omitted). "An appellant making a claim of evidentiary sufficiency bears the heavy burden of showing that the prosecution offered no evidence upon which a reasonable mind could find guilt beyond a reasonable doubt." *Id.* The Court "make[s] no distinction between direct and circumstantial evidence" in assessing sufficiency. *Id.*

To obtain a robbery conviction under D.C. Code § 22-2801, the government must prove that the defendant "(1) took property of some value, (2) from [the victim's] person or immediate actual possession, (3) against [their] will, (4) by force or violence, (5) and carried the property away, (6) without right and with the intent to steal it." *Bailey v. United States*, 257 A.3d 486, 499 (D.C. 2021).[1]

"[R]obbery can be committed by a 'sudden . . . seizure or snatching' of property," which is "enough by itself for the taking to satisfy the 'force or violence' element of robbery." *Bailey*, 257 A.3d at 499. "There need be no proof that the taking was also stealthy or against resistance, or that it put the complainant in fear. There need be proof of no more 'force or violence' than proof of a sudden seizure of property." *Id.* "[T]he

[1] In *Bailey*, Judge Glickman wrote for the majority in affirming the defendant's robbery conviction. 257 A.3d at 499-503.

government need only demonstrate the actual physical taking from the person or another, even though without his knowledge and consent, and though the property be unattached to his person." *Leak v. United States*, 757 A.2d 739, 742 (D.C. 2000) (quoting *Johnson v. United States*, 756 A.2d 458, 462 (D.C. 2000)).

"[A] defendant can commit a robbery by sudden or stealthy seizure or snatching even if the victim is not actually holding, or otherwise attached to, the object"—a "principle" with "broad contours." *Gray v. United States*, 155 A.3d 377, 386 (D.C. 2017) (internal quotation marks omitted). This Court "ha[s] consistently and for many years given a broad meaning to the term 'immediate actual possession,' and ha[s] recognized that any taking from the area encompassed by that term is a robbery—not simply larceny." *Leak*, 757 A.2d at 742-43. Immediate actual possession "has an elastic quality," and "'refers to the area within which the victim can reasonably be expected to exercise some physical control over the property.'" *Sutton v. United States*, 988 A.2d 478, 485 (D.C. 2010) (quoting *Head v. United States*, 451 A.2d 615, 624 (D.C. 1982)). "A thing is within one's 'immediate actual possession' so long as it is within such range that he could, if not deterred by violence or fear, retain actual

physical control over it." *Id.* (quoting *Rouse v. United States*, 402 A.2d 1218, 1220 (D.C. 1979)).

This Court has held repeatedly that a victim's immediate actual possession extends to property located a few feet away. *See Winstead v. United States*, 809 A.2d 607, 611 (D.C. 2002) ("When Winstead assaulted E.J. at the guard booth, her car was only a few feet away, near enough for it to be in E.J.'s 'immediate actual possession' then and there."); *Leak*, 757 A.2d at 743 ("A bicycle lying two feet away from the owner is, undoubtably, within the victim's immediate actual possession as our cases have applied the term, at least where, as here, the owner is aware of the attempted taking in a setting of force or violence."). Indeed, the Court held in *Sutton v. United States*, 988 A.2d 478, that a jury rationally could find that a car parked "forty-five to fifty feet" from the victim remained in the victim's immediate actual possession, because "at the time the [car] was taken, it was within such range that [the victim] could, if not deterred by violence or fear, have retained actual physical control over it." *Id.* at 489 (internal quotation marks omitted). *Cf. McKinney v. United States*, 299 A.3d 1283, 1288 (D.C. 2023) (referring to *Sutton* as "[t]he high water mark for what constitutes immediate actual possession"

and holding that a car parked 80 to 100 feet away from and out of view of the victim was not in his immediate actual possession, while noting that most precedents involved victims "ten feet away [or fewer] from their car").[2]

B. Discussion

1. The Evidence Was Sufficient.

Viewing the evidence in the light most favorable to the government, the jury reasonably could find every robbery element proven beyond a reasonable doubt. *See Bailey*, 257 A.3d at 499 (listing six elements).

Starting with the meaningfully contested elements at trial, the evidence was sufficient to prove that Patschak took Officer Todd's body-worn camera (1) by sudden seizure or snatching, (2) from Officer Todd's immediate actual possession, and (3) with the intent to steal it.

First, Patschak took the body-worn camera "by a sudden seizure or snatching." *Bailey*, 257 A.3d at 499. "In ordinary usage, to 'snatch' means 'to take or grasp abruptly or hastily.'" *Id.* Officer Todd testified that

[2] In enacting the carjacking statute, the D.C. Council "borrowed the term 'immediate actual possession' from the robbery statute on which the carjacking statute is patterned." *Winstead*, 809 A.2d at 610.

Patschak "reach[ed] down to the curb [with his left hand] and retriev[ed]" Officer Todd's camera after it fell off during the struggle, and the video exhibits show that Patschak grabbed the camera quickly (11/08/22 Tr. 63, 74, 88; GX 1 at 16:32:50; GX 2 at 00:20; GX 3 at 00:22). In his own testimony, Patschak admitted that he picked up the camera "[l]ess than four seconds" after separating from Officer Todd and that it was "very fast" (11/9/22 Tr. 65-66). *See Shepherd v. United States*, 905 A.2d 260, 262 (D.C. 2006) ("When the defense presents evidence, we consider the entire record, and not merely the evidence presented by the prosecution, in determining the sufficiency of proof." (internal quotation marks omitted)). The jury reasonably could find, in accord with this Court's precedents, that Patschak's hasty retrieval of the fallen camera was a sudden seizure or snatching. *See, e.g., Bailey*, 257 A.3d at 499 (defendant "abruptly" grabbed box from victim's lap and walked off with it); *Leak*, 757 A.2d at 741 (defendant "picked up" victim's bike from the street, "as it lay just a few feet from" victim, and rode away with it). And "a sudden seizure or snatching is enough by itself for the taking to satisfy the 'force or violence' element of robbery." *Bailey*, 257 A.2d at 499.

Second, Patschak took the camera from Officer Todd's immediate actual possession. After the camera fell from Officer Todd's vest, it bounced several feet to the curb before Patschak grabbed it (GX 3 at 00:20-00:25 (overhead surveillance video)). Patschak testified that he was "three to five feet" away from Officer Todd when he picked up the camera (11/9/22 Tr. 64-65). *See Shepherd*, 905 A.2d at 262 (Court considers defense evidence in assessing sufficiency). The jury reasonably could find that the camera was at most a few feet away from Officer Todd when Patschak took it. As a matter of pure distance, that is comfortably within the range this Court has held constitutes immediate actual possession. *See, e.g., Winstead*, 809 A.2d at 611 ("a few feet away"); *Leak*, 757 A.2d at 743 ("two feet away" is "undoubtably" within immediate actual possession); *Johnson*, 756 A.2d at 458 ("[E]ven if the jury believed that [defendant] did not take the wallet out of [victim's] pocket, but rather picked it up from the ground during their struggle, the evidence would be sufficient for robbery."). *Cf. McKinney*, 299 A.3d at 1288 (recognizing multiple carjacking precedents where Court held that vehicles were in immediate actual possession of victims located "ten feet [or fewer]" away).

Moreover, immediate actual possession is a "broad," *Leak*, 757 A.2d at 742, and "elastic" concept, *Sutton*, 988 A.2d at 485, reaching "such range that [the victim] could, *if not deterred by violence or fear*, retain actual physical control over [the property]." *Id.* (emphasis in original). Here, Officer Todd testified that, after Patschak assaulted him, causing his body-worn camera to fall to the ground, he retreated for "[s]afety" rather than attempting to recover his camera, although he kept "constant observation" as Patschak took the camera (11/8/22 Tr. 74-76). Officer Todd explained: "It was very chaotic that day, very hectic, and the last thing I want is for me to be surrounded by a group of protesters that were there fore a specific cause and [to] cause harm to myself[,] and . . . I can't record what's going on because I no longer have a BWC attached to my person" (*id.* 75). Although the camera fell only a few feet away from Officer Todd, it was not unreasonable under the circumstances for him to retreat to safety rather than risk another confrontation with Patschak and his fellow protesters, since Patschak had just assaulted him and Officer Todd had also witnessed another officer assaulted by a different protester moments before (*id.* 46). As *Leak* explained, property lying a few feet away from its owner "is, undoubtably, within the victim's

immediate actual possession as our cases have applied that term, at least where, as here, the owner is aware of the attempted taking in a setting of force and violence." 757 A.2d at 743. There was ample evidence for the jury reasonably to find that Officer Todd could have retained actual physical over the camera "if not deterred by violence or fear" of Patschak and other violent protesters, and thus that the camera remained in his immediate actual possession. *Sutton*, 988 A.2d at 485.

Third, Patschak intended to steal the body-worn camera. "The requisite intent, of course, is a state of mind particular to the accused and unless such intent is admitted, it must be shown by circumstantial evidence," including such facts and circumstances "as might lead reasonable people, based on common experience, to conclude beyond a reasonable doubt that the accused possessed the requisite intent." *Massey v. United States*, 320 A.2d 296, 299 (D.C. 1974). After assaulting Officer Todd and taking the camera, Patschak put it in his backpack and resumed his riotous conduct for 45 minutes until he was ultimately arrested after assaulting Officer Forrester. During that time, Patschak kicked a smoke grenade at officers, threw an unidentified liquid at officers, and punched Officer Forrester repeatedly to resist arrest

(11/8/22 Tr. 194-96). Patschak did not, however, attempt to return the camera to police, as he falsely claimed he had been trying to do after the camera was discovered at the bottom of his backpack by the transport officer (11/9/22 Tr. 11-12). The jury permissibly could draw the reasonable, commonsense inference that Patschak intended to steal the camera, as a trophy or out of anger at the police. *See Rivas v. United States*, 783 A.2d 125, 134 (D.C. 2001) (en banc) (jury "is entitled to draw a vast range of reasonable inferences from evidence," although it "may not base a verdict on mere speculation").

The remaining three elements were not meaningfully disputed at trial. Patschak "took property of some value." *Bailey*, 257 A.3d at 499. It was essentially undisputed that Officer Todd's body-worn camera was MPD-issued property with a "useful functional purpose," and therefore, "some value." *Jeffcoat v. United States*, 551 A.2d 1301, 1303 (D.C. 1988). *See, e.g.,* 11/08/22 Tr. 75 ("I can't record exactly what's going on because I no longer have a BWC attached to my person."). Patschak also took the camera "against [Officer Todd's] will" and "without [his] consent." *Bailey*, 257 A.3d at 502-03. Officer Todd retreated without attempting to recover the camera for "safety" reasons, so he would not "be surrounded" by

unruly and violent protesters, and because "[a] camera is just a camera, a device; my life is not" (11/8/22 Tr. 75). The taking, by the protester who had assaulted Officer Todd and caused him to lose the camera, was plainly against his will. Finally, because even "the slightest moving of an object from its original location may constitute an asportation," *Lattimore v. United States*, 684 A.2d 357, 360 (D.C. 1996), Patschak indisputably carried the property away when he put the camera in his backpack and walked off with it. *See also Newman v. United States*, 705 A.2d 246, 264 (D.C. 1997) ("[M]inimal movement of the property . . . satisfies both the taking and asportation requirements.").

In sum, the jury convicted Patschak of robbery based on legally sufficient evidence.

2. Patschak's Arguments Lack Merit.

Patschak has not carried his "heavy burden" to demonstrate that there was "no evidence upon which a reasonable mind could find guilt beyond a reasonable doubt." *Bruce*, 305 A.3d at 392.

Patschak first argues that he did not commit a robbery "during the tussle with Officer Todd" (Br. 25-32). We disagree that, when viewed in the light most favorable to the government, the evidence did not support

the reasonable inference that Patschak caused the camera to detach from Officer Todd (*id.* 26-30). It would be reasonable to infer from the sequence of events—Patschak shoving Officer Todd to the ground, Patschak touching the camera as he grappled with Officer Todd, and the camera falling off his vest as the pair separated—that Patschak's assault caused the camera to fall, even if that was not deliberate on Patschak's part. And because a robbery may be committed by "purposeful employment of *or at least knowing exploitation* of the force or violence," it would also be reasonable to infer that Patschak "consciously exploited" the fruits of the assault when he snatched the fallen camera from the ground. *Gray*, 155 A.3d at 384, 389 (emphasis added).

But even if no reasonable juror could find that Patschak "used force to dislodge the camera" (Br. 26)—according to the trial court, a "close call" on sufficiency (11/9/22 Tr. 27)—that would not help Patschak here. As Patschak acknowledges, the government had an "alternate theory" of robbery (Br. 32)—that the camera remained in Officer Todd's immediate actual possession after it fell to the ground, and Patschak suddenly seized or snatched it with the intent to steal. The government argued that theory to the jury (11/9/22 Tr. 189-90), and, as discussed above, the

evidence was sufficient to support Patschak's robbery conviction based upon it. Therefore, even if Patschak simply took advantage of an opportunity after the camera fell from Officer Todd's vest, Patschak still used "force or violence" within the meaning of the robbery statute when he suddenly seized or snatched the camera from the ground. *Bailey*, 257 A.3d at 499 ("[A] sudden seizure or snatching is enough by itself for the taking to satisfy the 'force or violence' element of robbery."); *Leak*, 757 A.2d at 742 (defendant committed robbery by taking bicycle lying in the street while victim was struggling with unidentified assailant, "[e]ven if . . . [defendant] did not act in concert with the assailant").

By the same token, even if Patschak did not have the specific intent to steal at the time he assaulted Officer Todd (Br. 25, 30), that would not undermine his robbery conviction. Patschak incorrectly asserts that the government "needed to prove not only that the 'defendant assaulted [the] complainant,' but also that—'at the time of the assault'—'the defendant acted with the specific intent to commit the offense of robbery'" (*id.*) (quoting *Singleton v. United States*, 488 A.2d 1365, 1367 n.2 (D.C. 1985)). Those are not robbery elements; they are the elements of a separate offense, assault with intent to commit robbery (AWIR), D.C. Code § 22-

401. *See Singleton*, 488 A.2d at 1367 ("[T]he government presented adequate probative evidence of each of the elements of *assault with intent to commit robbery*." (emphasis added)).

Patschak was not charged with AWIR, so the government was not required to prove that he assaulted Officer Todd with the specific intent to rob him. *Cf. Singleton*, 488 A.2d at 1367 n.2. Patschak was charged with robbery, so "[t]here need[ed] [to] be proof of no more 'force or violence' than proof of a sudden seizure of property," *Bailey*, 257 A.3d at 499, with the intent to steal manifesting at the point of the sudden seizure or snatching. *Id.* at 501. And that point was when Patschak scooped the camera from the ground after it fell, as it lay a few feet away from the retreating officer. The jury reasonably could infer that Patschak intended to steal the camera at that time—even if he did not yet have that intent "during his struggle with Officer Todd" (Br. 31).

Patschak next argues—more to the point—that he did not suddenly seize or snatch the camera from Officer Todd's immediate actual possession "when he took the camera from the ground," because Officer Todd was retreating to safety and "did not try to stop" Patschak (Br. 32-36). But, as already discussed, Officer Todd's immediate actual

possession included "such range that he could, if not deterred by violence or fear, retain actual physical control over" the camera. *Sutton*, 988 A.2d at 485. The jury reasonably could infer that Officer Todd could have retained control over the camera if not deterred by Patschak's violence and the fear that he would be "surrounded" if he did not retreat to "safety" (11/8/22 Tr. 75). Put another way, Officer Todd was not required to put himself at further risk to recover his camera for Patschak to be convicted of robbery. *See id.* ("A camera is just a camera, a device; my life is not.").[3]

Moreover, Patschak errs when he claims that the test for immediate actual possession is whether, "[i]f not for the defendant's sudden or stealthy seizure, the owner *would have* continued to exercise control" (Br. 34 (emphasis added). This Court has instead emphasized that "the legal

[3] This case is different from the scenario described by Patschak "in other cases" (Br. 36), in which "threatened violence occurred directly on the heels of a plainly conditional transfer of possession (conditioned on the return or purchase of the [property])." *Jacobs v. United States*, 861 A.2d 15, 20 (D.C. 2004). Here, by contrast, there was no consensual but conditional transfer; the taking itself was against Officer Todd's will. *See Bailey*, 257 A.3d at 503. Patschak appears to believe that *Bailey* was a conditional-transfer case like *Jacobs* (Br. 36), but he is wrong. *See Bailey*, 257 A.3d at 502 ("[A] reasonable jury easily could find beyond a reasonable doubt that Mr. Bailey snatched the shoe box from Ms. Reid's lap against her will."). The *Bailey* robbery was completed before an accomplice threatened the victim with a gun. *Id.* at 499.

test governing a sufficiency inquiry . . . is an objective one: immediate actual passion is retained if the [property] is 'close enough' or 'within such range that the victim *could*'—not would—have retained 'actual physical control' over the property." *Sutton*, 988 A.2d at 489 (emphasis in original)). So regardless of Officer Todd's "intent upon leaving" the camera, the jury reasonably could find that a few feet away was "close enough" for a police officer to retain physical control over his fallen body-worn camera "if not deterred by violence of fear." *Id.* Patschak does not appear to argue that the distance itself—which he testified was "three to five feet" (11/9/22 Tr. 64-65)—prevented the jury as a matter of law from finding that the camera remained in Officer Todd's immediate actual possession. *Cf. Sutton*, 988 A.2d at 489 (holding that "three car lengths—forty-five to fifty feet" was not "as a matter of law" too distant to constitute immediate actual possession).[4]

[4] Patschak criticizes the government for arguing in closing that the camera was within Officer Todd's "wingspan" (Br. 22), but that was fair argument. There were multiple videos from various perspectives in evidence, and the jury also saw Officer Todd in person when he testified, so the government permissibly could argue to the jury that it should draw reasonable inferences about relative distances. In any event, the jury did not need to agree that the camera was within Officer Todd's "wingspan" to find that it remained in his immediate actual possession. *See Leak*, 757

(continued . . .)

Patschak also briefly argues that he did not commit a "sudden or stealthy seizure or snatching" because he "did not behave like a pickpocket or purse snatcher" (Br. 33)—essentially, because the taking was not "stealthy." But *Bailey* squarely rejected this argument, finding it "untenable" and in "conflict[] with the plain words of the robbery statute" to "contend that the words 'sudden or stealthy seizure or snatching' should be read more narrowly, as encompassing only pickpocketing or other takings that used stealth or some prior force avert resistance to the taking." 257 A.3d at 499-500. Instead, the robbery "statute treats sudden seizures or snatchings as forceful or violent takings in their own right, even if they are neither stealthy nor against resistance." *Id.* at 500. Thus, the fact that "Patschak picked up the camera from the ground, and Officer Todd watched it happen" (Br. 33)—as he retreated to safety—did not preclude the jury from finding Patschak guilty of robbery.

A.2d at 742 (Court has "consistently and for many years given a broad meaning to the term 'immediate actual possession'").

Because Patschak has not carried his heavy burden to show that there was no evidence upon which a rational jury could find him guilty of robbery, his sufficiency challenge fails.[5]

II. The Trial Court Did Not Plainly Err in Responding to Jury Notes.

A. Additional Background

1. Robbery Instruction

The trial court used the "Red Book" jury instruction for the offense of robbery (11/9/22 Tr. 179-80). *See* Criminal Jury Instructions for the District of Columbia, Instruction 4.300 (2021 ed.). The court instructed the jury that the government had to prove beyond a reasonable doubt the following robbery elements: (1) "Patschak took property from Officer

[5] Even if this Court agrees with Patschak that the evidence was insufficient to convict him of robbery, it should remand for entry of judgment on the lesser-included offense of second-degree theft, D.C. Code § 22-3212(b). *See Robinson v. United States*, 100 A.3d 95, 110-12 (D.C. 2014). In finding Patschak guilty of robbery, the jury "necessarily, actually, and permissibly found all of the elements of" theft, *Bailey*, 257 A.3d at 497, and Patschak's sufficiency challenge is directed at elements of robbery—the use of force or violence, and immediate actual possession—that are not necessary to prove theft. Although Patschak certainly disputed at trial whether he had the intent to steal the camera, he has not claimed on appeal that there was insufficient evidence to infer such larcenous intent.

Todd"; (2) "he took the property from the immediate actual possession of Officer Todd or from Officer Todd's person; (3) he did so against the will of Officer Todd"; (4) "he used force or violence to take the property by taking the property by sudden or stealthy seizure or by snatching"; (5) "he carried the property away"; (6) "he took the property without right to it and intending to steal it; and (7) "the property had some value" (11/9/22 Tr. 179). The court further instructed the jury that "[p]ropery is in the immediate actual possession of Officer Todd if it is located on Officer Todd's person or close enough that one could reasonably expect Officer Todd to exercise physical control over it. Taking the property by sudden or stealthy seizure or by snatching can satisfy the requirement of force or violence if the Defendant used enough force to accomplish the actual physical taking form the person of Officer Todd even though Officer Todd did not know the property was taken, and even though the property was unattached to his person." (*Id.* 179-80.) The court also instructed the jury on the lesser-included offense of theft (*id.* 180-81).

2. Jury Notes and Responses

The jury began its deliberations on November 10, 2022, at approximately 9:30 a.m. (11/9/22 Tr. 233-34). At 10:51 a.m., the jury sent

its first note, asking in connection with the robbery count: "Does the use of force or violence have to be with the intent of taking property?" (11/10/22 Tr. 3). The government argued that the answer was "no," because "the specific intent is with respect to the stealing and taking away, and that as long as it is preceded by violence, that violence need not legally be intended to commit the theft itself" (*id.* 4-5). Patschak disagreed, arguing that "what makes a robbery different from theft, [the defendant] has this specific intent that's paired with the violence and force" (*id.* 6). The trial court sided with Patschak: "I have to say that's my understanding too . . . . [T]he intent must accompany the act which constitutes the criminal act." (*Id.*) The court proposed the following response to the first note: "The answer to the question is yes. 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." (*Id.* 11.) Patschak's counsel stated: "No objection. I think that's right." (*Id.* 12.) The court sent the response in writing to the jury at 11:20 a.m. (*id.*; R. 35).

At 11:53 a.m., the jury sent its second note, asking "Does the intent for robbery need to occur at the exact time of act of sudden and stealthy seizure?" (11/10/22 Tr. 13). The trial court observed that the "prior response to the earlier note addressed this," and proposed "that we respond essentially in the same way that we did previously," but stated that it was "happy to hear the parties' positions" (*id.*). After the government suggested different "phraseology" than "accompanied by," the court proposed "undertaken with" (*id.* 14 ("[W]hat if I said the act of sudden or stealthy seizure must be undertaken with the specific intent to steal?")). The court asked, "Does that make it clear for them, must be undertaken?" (*Id.*). Patschak objected to altering the first response, however (*id.* 15). Patschak's counsel stated that he was "just not confident enough that the distinction between 'accompanied' and 'undertaken' provides any additional clarity to the issue," and clarified that his "position here is . . . that the Court [should] give the original response to the jury"—"[t]hat it must be accompanied" (*id.*).

The trial court again adopted Patschak's position, explaining "that was my initial instinct . . . to give them that instruction again, so I'm fine with that" (11/10/22 Tr. 17). The court also stated, "If we get another note

asking about this, . . . we might respond differently" (*id.*). Patschak's counsel asked, "just thinking out loud here," whether the court should explicitly "address the situation if the intent to steal was formed after" (*id.* 17-18). The court replied that it did not "like the way this is being framed as a temporal thing," rather than drawing the specific connection between the act and the intent (*id.*). Patschak's counsel then reiterated that "the safest instruction is . . . the 'accompanied' language'" (*id.*). Without objection, the court responded in writing to the jury at 12:15 p.m.: "To constitute a robbery, the act of sudden or stealthy seizure must be accompanied with the specific intent to steal" (*id.* 18-19; R. 35).

The jury sent its third note at 1:04 p.m., asking: "Can accompaniment be a span of time other than the immediate taking of the property, or can the entire events be accompaniment?" (11/10/22 Tr. 20). Patschak's counsel stated, "The answer to that is no, right? . . . [W]e just have to direct them to the right way." (*Id.* 21.) Patschak's counsel added that "part of the issue is that they're just focusing on . . . the temporal aspect of it" (*id.*). Taking Patschak's suggestion about "the temporal aspect," the trial court proposed responding, "[A]t the time of the taking, the person must have had the intent to steal," because "that pretty

directly answers the question" (*id.* 22). Patschak's counsel replied, "[t]hat's good," but also asked "to include something about the force or violence" (*id.*). The court then modified the proposed response: "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 or stealthy seizure or snatching" (*id.* 23; R. 35). Patschak's counsel stated, "No objection" (11/10/22 Tr. 23). Thus, at 2:16 p.m., the court sent its written response to the jury's third note (*id.*; R. 35).

The jury reached its verdicts at 3:38 p.m., convicting Patschak on all counts (11/10/22 Tr. 24-25).

B. Standard of Review and Applicable Legal Principles

Where a defendant preserves a claim of error regarding jury note responses, this Court reviews "the trial court's decision on what, if any response to give to a jury's question for abuse of discretion," although "the accuracy or the instruction itself is a legal question [this Court] review[s] de novo." *Bruce*, 305 A.3d at 400. But "[w]hen a party fails to raise a timely objection to an instruction or to the court's response to a jury

question, the claimed error is not preserved, and [this Court] review[s] that claim of error under the plain error standard." *Id.* (internal quotation marks omitted). Under that standard,

> an appellant must show (1) error, (2) that is plain, and (3) that affected his substantial rights. To show that an error affected a substantial right, the appellant must show a reasonable probability that, but for the error claimed, the result of the proceeding would have been different. Even if all three of these conditions are met, this [C]ourt will not reverse unless (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.

Id. at 401 n.9 (cleaned up). "This is[,] and should be, a formidable burden." *Lowery,* 3 A.3d at 1173 (internal quotation marks omitted).

In responding to a jury's question, the trial court "must give the jury an accurate and fair statement of the law." *Lucas*, 240 A.3d at 343. "Moreover, the trial court should clear away the jury's specific difficulties with concrete accuracy," because the "jury's confusion as to an issue requires that the trial court convey an appropriate and effective response." *Id.* (internal quotation marks omitted).

"Where a jury asks no follow-up questions, the Supreme Court 'has presumed that the jury fully understood the judge's answer and appropriately applied the jury instructions.'" *Lucas*, 240 A.3d at 348 (quoting *Waddington v. Sarausad*, 555 U.S. 179, 196 (2009)). "This is

because, 'to presume otherwise would require reversal every time a jury inquires about a matter of constitutional significance, regardless of the judge's answer.'" *Id.* (quoting *Weeks v. Angelone*, 528 U.S. 225, 234 (2000)).

C. Discussion

1. Patschak's Claim Is Unpreserved.

Patschak failed to preserve his claim by timely objecting to the trial court's responses to the jury notes. *Bruce*, 305 A.3d at 400. In fact, Patschak affirmatively agreed to each of the responses.

Starting with the response to the first jury note, the trial court sided with Patschak and instructed the jury—contrary to the government's position—that the "act constituting the force or violence" must be "accompanied by the specific intent to steal" (11/10/22 Tr. 11). Patschak stated, "No objection. I think that's right." (*Id.* 12). Patschak does not dispute that he failed to preserve any objection to the first response (Br. 37).

As to the second note, Patschak explicitly took the "position here . . . that the [trial court] give the original response to the jury": that the act of sudden or stealthy seizure "must be accompanied" by the intent

to steal (11/10/22 Tr. 15). The court assented, noting that it was "fine with that" (*id.* 17), and it instructed the jury in accord with Patschak's "position" (*id.* 18-19 ("the act of sudden or stealthy seizure must be accompanied with the specific intent to steal")). *Cf. Bruce*, 305 A.3d at 400-01 ("Courts are especially reluctant to reverse for plain error when it is invited.").

Patschak's brief omits any mention of his own advocacy for the "accompanied" instruction in response to the second note (Br. 17-18, 38). He instead claims that he preserved an objection because, after the trial court agreed to give the "accompanied" instruction that Patschak himself requested, Patschak's counsel mused about whether "[we] should [also] address the situation if the intent to steal was formed after" (Br. 37). But Patschak's counsel clearly stated that he was "just thinking out loud here," and was "not even sure" about the suggestion (11/10/22 Tr. 18). When the court expressed initial skepticism, Patschak's counsel immediately clarified that he "just [thought] the safest instruction is . . . the 'accompanied' language" (*id.*).

Bruce, 305 A.3d 381, presented a similar scenario, in that defense counsel made offhand statements about a possible response to a jury

note, but ultimately "changed course and proposed" the response given to the jury. *Id.* at 401. This Court reviewed for plain error. *Id.* 401-02. Here, Patschak proposed the response to the second note. His counsel made clear that any additional suggestions were "just thinking out loud" and that he stood by his original request as "the safest instruction." Patschak failed to preserve any objection to the second response.

Patschak also failed to preserve any objection to the trial court's response to the third jury note. Here, upon receiving the note, Patschak's counsel remarked that "part of the issue" was that the jury was focusing on "the temporal aspect" (11/10/22 Tr. 21). Taking its cue from Patschak, the trial court proposed that it respond using the "at the time" language—to which Patschak's counsel replied: "That's good." (*id.* 22). Patschak's only additional suggestion—which the court adopted—was to include language about "the force or violence" (*id.*). After the court read the proposed response, Patschak's counsel clearly stated, "No objection" (*id.* 23).

Patschak claims that he "proposed to answer concretely and directly" (Br. 38) because his counsel initially asked: "[S]o the [question] is can the entire event be the accompaniment? That answer to that is no,

right?" (11/10/22 Tr. 21). But before the court interjected, Patschak's counsel added, "[W]e just have to direct them . . . towards the right way," and suggested that "part of the issues is that they're just focusing on maybe just the temporal aspect of it" (*id.*). It was only then that the court proposed—in response to Patschak's concern about "directing" the jury "towards" the "temporal aspect"—that the jury be instructed that "at the time of the taking, the person must have had the intent to steal" (*id.* 22). Patschak immediately stated that this was "good" (*id.*). Because the court's proposal directly responded to Patschak's concerns and resolved them to his satisfaction at the time, Patschak cannot claim that he preserved an objection. The plain error standard thus applies to Patschak's unpreserved claim. Super. Ct. Crim. R. 52(b).

2. Patschak Cannot Satisfy the Plain-Error Standard.

Although Patchak's brief clearly recognizes that preservation is an issue (Br. 37-40), he has not even attempted to argue that he could satisfy the "formidable burden" of plain error review. *Lowery*, 3 A.3d at 1173. Nor could he meet that burden. He cannot show that the trial court plainly erred, or erred at all. He also fails to meet his burden to showing

prejudice or that any error affects the fairness, integrity, or public reputation of judicial proceedings.

First, Patschak fails to establish any error, much less obvious error. Patschak does not argue that the court's responses misstated the law. He argues only that the court did not respond to the jury notes with "concrete accuracy," *Lucas*, 240 A.3d at 343, because it ultimately told the jury that, to commit robbery, a person must have the intent to steal "at the time" he used force or violence to take property—rather than at the "exact" or "immediate" time (Br. 41). The difference is pedantic. The court was not required to use the jury's "chosen words," as Patschak suggests (*id.*). The court simply needed to provide "an accurate and fair statement of the law" that constituted "an appropriate and effective response" to the jury's "specific difficulties." *Lucas*, 240 A.3d at 343.

Here, by the third note, the jury's specific difficulties related to "the temporal aspect," as Patschak's counsel put it (11/10/22 Tr. 21).[6] The court's response—the specific intent to steal must be present "at the time"

[6] Patschak does not claim that the responses to the first and second notes misstated the law, and any failure to adequately clear away potential confusion would surely be harmless because the jury sent the third note and provided a final opportunity to clarify the law.

of the act constituting force or violence—concretely, accurately, and fairly addressed those difficulties. And the response was surely and appropriate and effective one, because the jury reached its robbery verdict soon after receiving the response to its third note, and without asking for additional clarification. Therefore, it must be "presumed that the jury fully understood the judge's answer and appropriately applied the jury instructions." *Lucas*, 240 A.3d at 348.[7]

Second, Patschak fails to meet his burden on the third and fourth prongs of plain-error review. The jury had asked whether "accompaniment" could be "a span of time" or "the entire events," (11/10/22 Tr. 20). Patschak has not shown a reasonable probability of a different outcome had the jury been instructed that Patschak must have had the intent to steal at the "exact" or "immediate" time he used force or violence to take the property, rather than "at the time." The addition of these adjectives would not have changed the meaning, and it is hard to conceive of a rational juror who could find that Patschak had the intent to steal "at the time" he snatched the camera from the ground, but not at

[7] Even if Patschak had preserved his claim, the trial court did not abuse its discretion for the reasons discussed in the text.

the "exact" or "immediate" time. Moreover, Patschak has not carried his burden to show that the trial court's handling of the jury notes was so deficient as to "seriously affect[] the fairness, integrity, or public reputation of judicial proceedings." *Bruce*, 305 A.3d at 401 n.9. To the contrary, the record reflects that the court carefully and deliberately responded to the jury's questions, consulting Patschak and the government at every turn, and incorporated their suggestions into its answers. And even Patschak does not dispute that the court correctly instructed the jury on the law governing its deliberations. Patschak thus does not meet his burden to justify reversal under the plain-error standard.[8]

[8] Patschak argues that "[t]he judgment should be reversed" (Br. 43). Any error in responding to jury notes concerning only the robbery count would surely be harmless as to the two APO convictions, however.

CONCLUSION

WHEREFORE, the government respectfully submits that the judgment of the Superior Court should be affirmed.

Respectfully submitted,

MATTHEW M. GRAVES
United States Attorney

CHRISELLEN R. KOLB
ELIZABETH H. DANELLO
ALEC LEVY
JOSHUA HALL
Assistant United States Attorneys

/s/
MARK HOBEL
D.C. Bar #1024162
Assistant United States Attorney
601 D Street, NW, Room 6.232
Washington, D.C. 20530
Mark.Hobel@usdoj.gov
(202) 252-6829

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have caused a copy of the foregoing to be served by electronic means, through the Court's EFS system, upon counsel for appellant, Gregory Lipper, Esq., on this 21st day of June, 2023.

/s/
MARK HOBEL
Assistant United States Attorney