Circuit Court for Harford County
Case No. 12-K-17-001106

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 315

September Term, 2018

ANTOINE SHELDON DAVIS

v.

STATE OF MARYLAND

Fader, C.J.,
Wells,
Alpert, Paul E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Alpert, J.

Filed: October 16, 2019

A jury sitting in the Circuit Court for Harford County convicted Antoine Sheldon Davis, appellant, of first-degree assault and conspiracy to commit first-degree assault.[1] Appellant raises two questions on appeal, which we have slightly rephrased for clarity:

I. Did the trial court err in denying appellant's motion to suppress evidence seized from his apartment pursuant to a valid search warrant but after a warrantless entry?

II. Did the trial court err in denying appellant's motion for judgment of acquittal?

For the following reasons, we shall issue a limited remand to the circuit court to determine whether the officers' decision to seek a warrant was a result of what they saw upon their earlier warrantless entry into appellant's apartment.

SUPPRESSION HEARING

It is well-settled that when reviewing a lower court's ruling on a motion to suppress we look only to the record of the suppression hearing. *Owens v. State*, 399 Md. 388, 403 (2007), *cert. denied*, 552 U.S. 1144 (2008). We do not engage in de novo fact-finding but "extend great deference to the findings of the motions court as to first-level findings of fact and as to the credibility of witnesses, unless those findings are clearly erroneous." *Brown v. State*, 397 Md. 89, 98 (2007) (citation omitted). We also "'view the evidence and inferences that may be reasonably drawn therefrom in a light most favorable to the prevailing party on the motion[.]'" *Owens*, 399 Md. at 403 (quoting *State v. Rucker*, 374 Md. 199, 207 (2003)). As to whether a constitutional right has been violated, we make "an

[1] The jury found appellant not guilty of attempted first- and second-degree murder. He was sentenced by the court to consecutive 25-year terms of imprisonment, all but 18 years suspended, and five years of probation upon his release from prison.

independent, de novo, constitutional appraisal by applying the law to the facts presented in a particular case." *Williams v. State*, 372 Md. 386, 401 (2002).

The State filed charges against appellant for savagely beating, with two cohorts, Ronald Coyner. Prior to trial, appellant moved to suppress the evidence seized from his apartment pursuant to a search and seizure warrant. Appellant did not argue that the warrant was in any way defective, but that an earlier entry into his apartment by the police tainted the evidence seized pursuant to the warrant because the police did not have exigency to enter the apartment, requiring suppression of the evidence.

Four police officers with the Howard County Sheriff's Office testified for the State at the suppression hearing: Deputy Buttion[2], Corporal Brian Potts, Detective Donald Kramer, and Detective Larry Defazio. Pictures of Coyner's injuries and surveillance video seized from appellant's home pursuant to the warrant showing events outside and inside of appellant's home before the beating and after execution of the warrant were also admitted into evidence. The following was elicited at the suppression hearing.

Around 9:15 p.m., on July 16, 2017, Deputy Buttion, Corporal Potts, and another officer responded to a call for a robbery and met Coyner near an apartment building in Edgewood, Maryland. Deputy Buttion and Corporal Potts noticed that Coyner was "actively bleeding" and had pronounced line-like red marks around his neck from an unknown object, blood on his head and arms, and more line-like red marks and swelling along his back and torso. Coyner reported that he had been assaulted at the rear of his

[2] Deputy Buttion's first name was not elicited in the transcript.

friend's ground floor apartment and pointed to 1303B Cedar Crest Court, about 100 feet away. He explained that his friend, appellant, had invited him over, and that when he arrived on his scooter, appellant invited him in through the back door. Appellant and others he did not know were inside the apartment. After some time, he exited the apartment through the back door and was "jumped" by unknown persons. He lost consciousness and woke up some time later. He did not say that anyone else was assaulted. Deputy Buttion took pictures of Coyner's injuries, during which time emergency personnel arrived. Coyner was subsequently taken by ambulance to a hospital.

Around 9:30 p.m., the three officers walked over to the apartment building where they observed Coyner's scooter. They knocked on appellant's front door multiple times, but no one responded. While one officer stayed in front, the others walked to the back of appellant's apartment where they observed fresh blood droplets on the concrete patio and a large blood spot, about six inches by three inches, less than two feet from the back door. The police also observed an outside surveillance camera pointed at the patio area. Although a light was on inside the apartment and there appeared to be the flickering of a television, no one answered the officer's repeated knocks on the windows and both back and front doors. Deputy Buttion photographed the area, and the photographs were admitted into evidence.

Because Corporal Potts observed that the blood spots went "[a]ll the way up to" the back doorway, he believed that the blood came from someone either entering or coming out of the back door. He was concerned that there were more victims and/or suspects inside, possibly armed, explaining that the silence coming from the apartment was equally

consistent with it being empty or having a victim/suspect inside. Nonetheless, because of an unrelated, contemporaneous police incident occurring nearby, he sent officers to that incident leaving only himself at the rear and another officer at the front of the apartment to "hold the perimeter[.]"

About 10:45 p.m., the other incident had resolved and officers involved in that incident were directed to the apartment. Detective Kramer, Sergeant Marzialli, and Corporal Potts convened by appellant's back door and after knocking and identifying themselves as police officers but getting no answer, they decided to make entry. Around 11:00 p.m., the officers kicked in the back door and with their guns drawn entered the apartment. A man, later identified as Robert Williams, was found under blankets on a couch in the living room and was detained. There was blood in the dinette area and it appeared items were damaged. The police noted in plain view a belt in the bathroom sink that could have left the distinctive wound pattern on the victim. They did not locate anyone besides Williams and did not move or collect any evidence.

After "clearing" the apartment, a call was placed to Detective Defazio, who was with the victim at the hospital. After being advised by Detective Defazio that the victim's cell phone was missing, Detective Kramer called the number and a phone rang in the apartment under some clothing. After confirming it was the victim's phone, Detective Kramer asked Detective Defazio to secure a search warrant.

On his way to the police station to draft a warrant application, Detective Defazio stopped at the apartment. He noticed blood and a video surveillance camera on the back patio, blood on the dining room area carpet, and a belt in the sink. He returned to the police station about midnight to draft the warrant. Detective Defazio admitted on cross-examination that while at the hospital, Coyner had indicated that he was the only victim, although he had also said that there were others present in the apartment when he arrived. He had also indicated that the assault took place outside the apartment on the patio. While Detective Defazio wrote the search warrant, Detective Kramer questioned Williams about what had happened. During questioning, Williams told the detective about the video recording system inside appellant's home that videotaped both the inside and outside of the home. This information was relayed to Detective Defazio, who included it in the search warrant application.

The warrant was signed about 4:00 a.m. and subsequently executed. The police seized from the apartment, among other things, a home surveillance video recording system, Coyner's cell phone, a tire iron, and a belt. The search concluded at 5:25 a.m. Two CDs of surveillance footage taken from the video recording system inside the house were admitted into evidence. The first disc contained videotaped events inside and outside the apartment from 8:00 p.m. to midnight, and the second disc contained videotaped events inside and outside the apartment from midnight to 4:13 a.m. The warrant application/ affidavit and the inventory return listing the seized evidence were also admitted into evidence.

Corporal Potts explained that the two or so hour delay between arriving and making entry was because "our manpower was stretched very thin due to other calls." He testified that had they had the manpower they would have made entry when they arrived, explaining that "the sooner we can make entry the better for anybody concerned." Detective Kramer testified that securing a warrant can take as little as an hour and a half or as long as four hours, explaining that he decided not to wait for a warrant because he thought "there was exigency. I felt we needed to go in immediately." He testified that because of the blood on the back porch in close proximity to the back door, he thought there could be someone inside that needed assistance. He elaborated:

> The fact that we didn't have all of the pieces to the puzzle. We simply didn't know exactly what we had. We were going off of very limited information. The information we were getting from the hospital wasn't all that certain. The victim did not seem to have a clear picture of what happened to him which in and of itself told me that there could have been other victims. And the way that the house was left with all of the lights on. Not knowing, quite frankly, where the other side of this altercation was. The other party could have been in there injured the same or worse as the victim at the hospital. We simply didn't know at that time.

After the above evidence was elicited, the State argued that the court should deny appellant's motion to suppress. The State argued that there were exigent circumstances that justified the police's initial warrantless entry into appellant's apartment because the officers reasonably concluded that someone was inside the apartment in need of immediate medical attention. The State asserted that the hour and a half delay between when the police arrived at and when they entered the apartment without a warrant was due to "manpower" issues and did not dampen the exigency. The State also argued that the court could deny the motion to suppress under the inevitable discovery exception. The defense

responded that no exigency existed, pointing out that the police waited nearly two hours to enter the apartment. Additionally, the defense argued that the inevitable discovery doctrine did not apply because the State had not put forth any evidence that the evidence seized pursuant to the search warrant would have been inevitably discovered.

The court then asked both parties whether they had reviewed *Kamara v. State*, 205 Md. App. 607 (2012), a case concerning the independent source exception. When both parties responded in the negative, the court ordered a brief recess for them to review the case. When the hearing reconvened, the defense argued that the independent source doctrine did not apply because the State failed to show the required two-prongs: that the officers' decision to seek the warrant was not prompted by the initial entry, and that the information obtained during the initial entry and presented to the magistrate did not affect the magistrate's decision to issue the warrant. The defense explained that the evidence showed that the police did not plan on getting a warrant until after the warrantless entry, and the warrant application lacked probable cause after excising from it the information obtained from the warrantless entry. In response, the State recognized that its argument was more accurately viewed under the independent source doctrine but believed that it had proved both prongs: Detective Defazio was already getting a warrant before he stopped by appellant's apartment, and the warrant contained probable cause when the information gained from the warrantless entry was excised from it.

After hearing the parties' arguments, the suppression court made findings of fact. The court found that the assault occurred around 9:00 p.m. and that about an hour and a half elapsed from the time the police arrived on the scene to when they entered the apartment without the warrant. Also, the court found the officers' testimony credible that they had "significant manpower issues" and that they had entered the apartment for the purpose of rendering aid, not to collect evidence.

The court determined not to resolve whether there was exigency to justify the warrantless entry, but instead, relying on *Kamara*, *supra*, found that after excising from the warrant the information the police obtained pursuant to the allegedly illegal entry, what remained was sufficient to support the magistrate's finding of probable cause and issuance of the warrant. That information consisted of: Coyner's statement to the police about being invited into appellant's apartment where appellant and others were present; that as he left the apartment Coyner was beaten and robbed of his cell phone; that there was a distinctive pattern to Coyner's wounds caused by some type of object; the officers' observations about the blood on the back patio, including a large blood stain in close proximity to the door; and that the police observed a surveillance camera on the patio. The suppression court believed that the warrant application was sufficiently circumscribed and connected to what the officers' observed and what they sought in the warrant: the victim's cell phone, any electronic equipment connected with the video system observed on the patio, and any objects that could have caused the injuries found on the victim's body. Finding that there was sufficient probable cause independent of the warrantless entry into the apartment to support the magistrate's issuance of the warrant, the court denied the motion to suppress.

DISCUSSION

I.

Appellant argues that the suppression court erred in denying his motion to suppress the evidence seized from his home pursuant to the search warrant because the seizure was tainted by the earlier unlawful warrantless entry. Appellant argues that the independent source doctrine did not apply and the police did not have exigency. The State responds that the suppression court did not err because the warrant provided an independent source justifying the seizure of evidence, and, even if it did not, the warrantless entry was justified by exigent circumstances.

The Fourth Amendment to the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated[.]" U.S. Const., amend. IV. The Fourth Amendment, which is applicable to the States through the Fourteenth Amendment, protects against unreasonable government searches and seizures. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961). "[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed[.]" *United States v. United States Dist. Court*, 407 U.S. 297, 313 (1972) (citations omitted). Except when pursuant to valid consent or exigent circumstances, "the entry into a home to conduct a search or make an arrest is unreasonable under the Fourth Amendment unless done pursuant to a warrant." *Steagald v. United States*, 451 U.S. 204, 211 (1981) (citations omitted).

"[T]he principal judicial remedy to deter Fourth Amendment violations" is the exclusionary rule, which "requires trial courts to exclude unlawfully seized evidence in a criminal trial[.]" *Utah v. Strieff*, ___ U.S. ___, 136 S.Ct. 2056, 2061 (2016) (citation omitted). The rule "encompasses both the primary evidence obtained as a direct result of the illegal search" and "evidence later discovered and found to be derivative of an illegality, the so-called fruit of the poisonous tree." *Id*. (quotation marks and citation omitted). "This judicially imposed sanction serves to deter lawless and unwarranted searches and seizures by law enforcement officers." *Kamara*, 205 Md. App. at 623 (quotation marks, citation, and ellipses omitted). The government bears the burden of overcoming the presumption that a warrantless search "that infringes upon the protected interests of an individual is presumptively unreasonable." *Grant v. State*, 449 Md. 1, 16-17 (2016). Because the United States Supreme Court has recognized "the significant costs" of the exclusionary rule, it is "applicable only . . . where its deterrence benefits outweigh its substantial social costs." *Streiff*, 136 S.Ct. at 2061 (quotation marks and citation omitted). Fourth Amendment jurisprudence additionally recognizes several exceptions to the exclusionary rule. *Id*.

A. Independent Source

One exception to the exclusionary rule is the independent source doctrine. *See Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920). This doctrine "allows trial courts to admit evidence obtained in an unlawful search if officers independently acquired it from a separate, independent source." *Strieff*, 136 S.Ct. at 2061 (citation omitted). Therefore, even if there is initial illegal conduct, evidence seized pursuant to a

subsequent warrant may be admissible pursuant to the independent source doctrine. *Murray v. United States*, 487 U.S. 533, 537 (1988). The underlying policy for this exception acknowledges that:

> while the government should not profit from its illegal activity, neither should it be placed in a worse position than it would otherwise have occupied. So long as a later, lawful seizure is genuinely independent of an earlier, tainted one . . . there is no reason why the independent source doctrine should not apply.

Id. at 542. *Murray* is directly on point.

In *Murray*, federal agents entered a warehouse suspected of containing marijuana and observed in plain view numerous burlap-wrapped bales, later found to contain marijuana. *Id*. at 535. They left the warehouse without disturbing the bales, kept the warehouse under surveillance, and reentered eight hours later, after obtaining a search warrant. *Id*. at 535-36. The agents seized 270 bales of marijuana and notebooks listing customers for whom the bales were destined. *Id*. at 536. The petitioners sought to have the evidence seized from the warehouse suppressed, but the trial court denied the motion and the First Circuit Court of Appeals affirmed. *Id*.

The Supreme Court stated that the ultimate question before it was "whether the search pursuant to [the] warrant was in fact a genuinely independent source of the information and tangible evidence" seized. *Id*. at 542. The Court noted two situations in which the independent source doctrine will not apply: (1) "if the agents' decision to seek the warrant was prompted by what they had seen during the initial entry" or (2) "if the information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant." *Id*. (footnote omitted). The petitioners argued that such a

rule would "remove all deterrence to, and indeed positively encourage, unlawful police searches" because the police would likely "routinely enter without a warrant to make sure that what they expect to be on the premises is in fact there[,]" to "spar[e] themselves the time and trouble of getting a warrant[.]" *Id*. at 540. The Court disagreed and said it saw:

> the incentives differently. An officer with probable cause sufficient to obtain a search warrant would be foolish to enter the premises first in an unlawful manner. By doing so, he would risk suppression of all evidence on the premises, both seen and unseen, since his action would add to the normal burden of convincing a magistrate that there is probable cause the much more onerous burden of convincing a trial court that no information gained from the illegal entry affected either the law enforcement officers' decision to seek a warrant or the magistrate's decision to grant it. . . . Nor would the officer *without* sufficient probable cause to obtain a search warrant have any added incentive to conduct an unlawful entry, since whatever he finds cannot be used to establish probable cause before a magistrate.

Id. at 539-40 (footnote omitted).

Applying the two-prong test to the facts before it, the Court found that the district court had failed to make findings on the first prong, i.e., whether the agents would have sought a warrant absent the prior entry into the warehouse. *Id.* at 543. The Court observed that "it is the function of the District Court rather than the Court of Appeals to determine the facts, and we do not think the Court of Appeals' conclusions are supported by adequate findings." *Id*. The Court explained that the district court failed to:

> *explicitly* find that the agents would have sought a warrant if they had not earlier entered the warehouse[and t]he Government concedes this in its brief. . . . To be sure, the District Court did determine that the purpose of the warrantless entry was in part to guard against the destruction of possibly critical evidence, . . . and one could perhaps infer from this that the agents who made the entry already planned to obtain that critical evidence through a warrant-authorized search. That inference is not, however, clear enough to justify the conclusion that the District Court's findings amounted to a determination of independent source.

Id. at 543 (quotation marks and citations omitted) (italics added). Because a finding on the first prong was integral to ensuring that the lawful seizure of the contents of the warehouse was genuinely independent of the earlier illegal search, the Court vacated the judgment and remanded to the District Court "for determination whether the warrant-authorized search of the warehouse was an independent source of the challenged evidence in the sense we have described." *Id.* at 543-44.

We recently applied the law of *Murray* in *Kamara*, *supra*. In *Kamara*, an undercover police officer purchased marijuana from a person, who had obtained the marijuana from someone inside a nearby house. *Kamara*, 205 Md. App. at 611-13. Several minutes later, another man approached the house and the officer observed a second man, later identified as Kamara, exit the house and engage in a "hand to hand drug transaction" in front of the house. *Id*. at 614. A few minutes later, officers approached the house to conduct a "'knock and talk.'" *Id*. While one officer spoke to Kamara and his brother at the door, another officer ran their identification and learned that the brothers had "cautions for being drug dealers [and] users" and the brother had "a caution for . . . being possibly armed." *Id*. at 615. A sergeant arrived and advised that he was going to get a search warrant for the house and had Kamara and his brother handcuffed. *Id.* The police then performed a protective sweep of the house, and although they saw marijuana in plain view, they did not disturb anything. *Id*. at 615-16. The police initially entered the house about 5:30 p.m. and the warrant was signed by a judge about 9:40 p.m. *Id*. at 616. Marijuana, money, and a digital scale were seized pursuant to the search warrant. *Id*. at 617.

At the suppression hearing, the State conceded that the initial entry into the house violated Kamara's Fourth Amendment rights. *Id.* The State argued however, that the evidence was nonetheless admissible under the independent source doctrine. *Id.* The suppression court agreed and denied the motion to suppress. *Id*. at 618-20.

We affirmed the suppression court's ruling on appeal. Applying the first *Murray* prong, we wrote that "[t]he evidence here established that the police planned to get a warrant prior to the protective sweep or the discovery of any contraband[,]" pointing out that when the sergeant arrived at the house, he announced that the police were going to detain Kamara while they sought a search warrant. *Id*. at 628. Turning to the second prong, we stated that a suppression court "need not consider the *actual* effect of the evidence on the individual judge" but shall employ the following objective test: "'[W]hether, after the constitutionally tainted information is excised from the warrant, the remaining information is sufficient to support a finding of probable cause.'" *Id.* at 628 (quoting *Williams v. State*, 372 Md. 386, 419 (2002)). After redacting the reference in the warrant to observations obtained by the police during the protective sweep, we concluded that the affidavit contained adequate facts from which the magistrate could have concluded that probable cause existed to support issuance of the warrant. *Id*. at 629-31.

Here, appellant argues that the suppression court erred when it denied his motion to suppress because the court failed to make a finding on the first *Murray* prong. According to appellant, the officers' decision to seek a warrant was "clearly prompted" by what they had seen during the initial entry. Appellant points out that the assault was reported to have occurred outside the home and there was no evidence that the responding officers attempted

or intended to procure a warrant before kicking in his door. The State concedes that the motions court did not "expressly" address the first *Murray* prong but argues that there was sufficient information from which we could find that the officers would have sought a warrant regardless of the illegal entry. Alternatively, the State argues that we should order a limited remand for the suppression court to make factual findings on the first *Murray* prong.

We find the facts of this case remarkably similar to those in *Murray*. In both cases, the police sought warrants after the warrantless entry and the suppression court failed to make an express finding that the police would have sought a warrant regardless of the illegal entry. Without first-level findings of facts, we are unable to review the constitutionality of the seizure. This is not a case where the officers initiated the warrant process before the warrantless entry. *Cf. People v. Morley*, 4 P.3d 1078, 1081 (Colo. 2000) (en banc) (holding that a remand was not necessary on the first *Murray* prong where officers initiated the warrant application procedure before the illegal entry). Accordingly, as in *Murray*, we believe that the appropriate disposition is a limited remand for the suppression court to determine whether the police would have sought a warrant regardless of the illegal entry. *Cf. United States v. Hill*, 776 F.3d 243, 252–53 (4th Cir. 2015) (remanding "to the district court to determine whether the information gained from the illegal walk-through and dog sniff affected [the officer's] decision to seek a warrant"); *United States v. Markling*, 7 F.3d 1309, 1317-18 (7th Cir. 1993) (where the district court made no finding on the first *Murray* prong, the court remanded to the district court to find whether the police would have applied for a warrant if the officer had not conducted the

earlier illegal search), *cert. denied*, 514 U.S. 1010 (1995); *United States v. Restrepo*, 966 F.2d 964, 971-72 (5th Cir. 1992) (because the "district court did not consider whether the results of the illegal search of [the car] prompted or motivated the officers' decision to seek the warrant" and because "motivation is a question of fact," the court remanded this issue to the district court), *cert. denied*, 506 U.S. 1049 (1993).

Md. Rule 8-604(d) provides for a limited remand, stating:

> If the Court concludes that the substantial merits of a case will not be determined by affirming, reversing or modifying the judgment, or that justice will be served by permitting further proceedings, the Court may remand the case to a lower court. In the order remanding a case, the appellate court shall state the purpose for the remand. The order of remand and the opinion upon which the order is based are conclusive as to the points decided. Upon remand, the lower court shall conduct any further proceedings necessary to determine the action in accordance with the opinion and order of the appellate court.

See also Southern v. State, 371 Md. 93, 103 (2002) (stating that Rule 8-604(d) "was designed to permit the appellate court, in the interests of justice and judicial expediency, to remand a case for further proceedings instead of entering a final order affirming, reversing, or modifying the judgment from which the appeal was taken.") (citation omitted).

Generally, remands are not allowed where the State fails to produce evidence on an issue. *Id.* at 110-12 (stating that we went astray on appeal when we afforded the State the opportunity to relitigate in the same case an issue it had failed to litigate and prove). Under the particular circumstances presented, however, a remand is appropriate. This is what the Supreme Court ordered in *Murray*. Moreover, the lower court may choose to proceed with a plenary hearing. Rule 6-604(d) allows for a plenary hearing. *See* Rule 6-604(d) ("Upon

remand, the lower court shall conduct any further proceedings necessary to determine the action in accordance with the opinion"). Additionally, although the language in *Southern* is strong that the State should not be allowed a "second bite at the apple," *see Southern*, 371 Md. at 110, the State did not get a first bite at the apple here because of the peculiar circumstances of this case. In fact, ordering a plenary hearing seems fair to both parties because neither got a bite at the apple. Lastly, a limited remand is particularly appropriate in the present circumstances because, contrary to appellant's one-sentence argument, we believe that the suppression court properly found that, after excising from the warrant the information obtained pursuant to the warrantless entry, the warrant contained probable cause to support issuance of the warrant.

Probable cause is defined as "a fair probability that contraband or evidence of a crime will be found in a particular place." *Patterson v. State*, 401 Md. 76, 92 (2007) (quotation marks and citation omitted), *cert. denied*, 552 U.S. 1270 (2008). Probable cause is a "practical, nontechnical conception" involving "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Illinois v. Gates*, 462 U.S. 213, 231 (1983) (quotation marks and citation omitted). Probable cause is "incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances." *Maryland v. Pringle*, 540 U.S. 366, 371 (2003). Probable cause "does not demand any showing that such a belief be correct or more likely true than false. A practical, nontechnical probability that incriminating evidence is involved is all that is required." *Texas v. Brown*, 460 U.S. 730, 742 (1983) (quotation marks and citation omitted).

Here, the suppression court found that, after excising information obtained from the warrantless entry, the warrant application contained the following information: appellant had invited Coyner over, and appellant and other men Coyner did not know had been in the home; Coyner reported that he was beaten as he was left appellant's home through the back door; Coyner fell unconscious after he was hit and when he awoke his cell phone was missing; Coyner was actively bleeding when the police arrived and his injuries included red marks bearing a distinctive pattern; the police observed a considerable amount of blood on the rear patio and what appeared to be a trail of blood leading to the rear door; and a surveillance camera was observed on the rear patio. The suppression court concluded that the above remaining information provided sufficient probable cause for the magistrate to issue the warrant on the belief that Coyner's missing cell phone, the weapon used to injure him, and/or video evidence of the crime might be contained inside appellant's apartment. We agree that under the circumstances it was reasonable for the suppression court to conclude that the State had satisfied the second *Murray* prong.

On remand we make some suggestions to the lower court in its consideration of the first *Murray* prong, i.e., whether the police's decision to seek the warrant was prompted by what they had seen during the initial entry. Courts that have explored this prong have recognized that even though it is subjective, the suppression court is "not bound by after-the-fact assurances of [the officers'] intent, but instead must assess the totality of the attendant circumstances to ascertain whether those assurances appear implausible." *United States v. Dessesaure*, 429 F.3d 359, 369 (1st Cir. 2005) (quotation marks and citations omitted). *See also Restrepo*, 966 F.2d at 972 ("unlike the objective test of whether the

expurgated affidavit constitutes probable cause to issue the warrant, the core judicial inquiry before the district court on remand is a subjective one: whether information gained in the illegal search prompted the officers to seek a warrant to search [the car]" and "in the usual case, in which direct evidence of subjective intent is absent, a court must infer motivation from the totality of facts and circumstances."). Therefore, in making the factual determination as to the officers' intent, the court should look to all the surrounding circumstances, including but not limited to, the timing of when the illegal entry occurred and when the warrant process began; what the officers said and did, if anything, relating to the illegal entry and the warrant process; whether it was a quickly unfolding situation; and the relative strength of the probable cause before the illegal entry occurred. *Cf. United States v. Jadlowe*, 628 F.3d 1, 10-12 (1st Cir. 2010) (stating that a requirement that the officers be actively pursuing a warrant at the time of the unlawful entry is "too rigid" and favored instead a "flexible standard" where "the officers had neither begun the process of securing a warrant nor even formed the intent to obtain one before the quickly developing events . . . unfolded") (quotation marks, citations and footnotes omitted), *cert. denied*, 563 U.S. 926 (2011) and *State v. Gaines*, 116 P.3d 993, 998 (Wash. 2005) (en banc) (where the Washington State Supreme Court held that the trial court's finding that the police would have found the items in the trunk "through the course of predictable police procedures," adequately supported the conclusion that the police would have sought a search warrant for the suspect's trunk based on facts gathered independent from the improper glance inside the trunk).

B. Exigent circumstances

Should we not affirm the suppression court's ruling under the independent source doctrine, the State argues that we should nonetheless affirm because exigent circumstances justified the officers' initial entry. The State acknowledges that the suppression court did not reach this issue. The State argues, however, that we can affirm the lower court's ruling where it is correct for the wrong reasons. *See Robeson v. State*, 285 Md. 498, 502 (1978), *cert. denied*, 444 U.S. 1021 (1980) (citations omitted). Appellant disagrees that exigent circumstances existed in the instant circumstances.

"Exigent circumstances exist when a substantial risk of harm to the law enforcement officials involved, to the law enforcement process itself, or to others would arise if the police were to delay until a warrant could be issued." *Williams v. State*, 372 Md. 386, 402 (2002) (citations omitted). The exigent circumstances exception "is a narrow one." *Id.* (citations omitted). "The meaning of exigency implies urgency, immediacy, and compelling need." *Stackhouse v. State*, 298 Md. 203, 212 (1983).

The government bears a "heavy burden" to demonstrate "exigent circumstances that overcome the presumptive unreasonableness of warrantless home entries." *Williams*, 372 Md. at 403 (citations omitted). In determining the reasonableness of a search and seizure based on exigent circumstances, we consider "the facts as they appeared to the officers at the time of the entry[,]" including "the gravity of the underlying offense, the risk of danger to police and the community, the ready destructibility of the evidence, and the reasonable belief that contraband is about to be removed." *Id.* (citations omitted). An officer must point "to some real immediate and serious consequences if he postponed action to get a

warrant." *Welsh v. Wisconsin*, 466 U.S. 740, 751 (1984) (quotation marks and citation omitted). "[N]o exigency is created simply because there is probable cause to believe that a serious crime has been committed[.]" *Id.* at 753 (citation omitted). Examples that have been held to "give rise to an exigency sufficient to justify a warrantless search" include "law enforcement's need to provide emergency assistance to an occupant of a home," "hot pursuit" of a fleeing suspect, putting out a fire, and "to prevent the imminent destruction of evidence." *Missouri v. McNeely*, 569 U.S. 141, 149 (2013) (quotation marks and citations omitted).

We disagree with the State that exigent circumstances existed to justify entry into appellant's apartment. Coyner reported that he went alone to the apartment where he was met by appellant and invited in; others he did not know were in the apartment; Coyner was assaulted as he left the apartment; an assault occurred on the patio; when the police arrived the officers did not see or hear anything coming from inside the apartment; there was blood droplets on the patio and a large blood stain about two feet from the back door; and the police waited almost two hours before forcibly entering appellant's apartment. Under the circumstances, there was no indication that anyone else had been assaulted and, had a suspect attempted to leave the apartment, he would have been promptly apprehended. For the above reasons, we do not believe that the evidence amounted to exigent circumstances to justify entry into appellant's home without a warrant.

We now turn to appellant's sufficiency of the evidence question. We note that should the suppression court, on limited remand, decide that evidence seized should not have been suppressed, appellant's convictions stand. Because the suppression court may

decide on remand that the evidence seized should have been suppressed, we must address appellant's sufficiency question on appeal because retrial is not permitted if the evidence is insufficient to sustain appellant's conviction. *Ware v. State*, 360 Md. 650, 708-09 (2000) (citing *Mackall v. State*, 283 Md. 100, 113-14 (1978)), *cert. denied*, 531 U.S. 1115 (2001).

II.

Appellant argues that there was insufficient evidence to sustain his convictions for first-degree assault and conspiracy to commit first-degree assault. Specifically, he argues there was insufficient evidence that he created a "substantial risk" of death or permanent/protracted disfigurement to support his first-degree assault conviction, and there was insufficient evidence of an agreement with others to support his conspiracy to commit first-degree assault conviction. The State disagrees, as do we.

The standard for appellate review of evidentiary sufficiency is "'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Taylor v. State*, 346 Md. 452, 457 (1997) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). "That standard applies to all criminal cases, regardless of whether the conviction rests upon direct evidence, a mixture of direct and circumstantial, or circumstantial evidence alone." *Smith v. State*, 415 Md. 174, 185 (2010) (citation omitted). "Where it is reasonable for a trier of fact to make an inference, we must let them do so, as the question is not whether the [trier of fact] could have made other inferences from the evidence or even refused to draw any inference, but whether the inference [it] did make was supported by the evidence." *State v. Suddith*, 379 Md. 425, 447 (2004) (quotation marks and citation

omitted) (brackets in *Suddith*). This is because weighing "the credibility of witnesses and resolving conflicts in the evidence are matters entrusted to the sound discretion of the trier of fact." *In re Heather B.*, 369 Md. 257, 270 (2002) (quotation marks and citations omitted). Thus, "the limited question before an appellate court is not whether the evidence *should have or probably would have* persuaded the majority of fact finders but only whether it *possibly could have* persuaded *any* rational fact finder." *Allen v. State*, 158 Md. App. 194, 249 (2004) (quotation marks and citation omitted).

Testifying for the State, among others, was Coyner, his wife, Robert Williams, and several police officers. Appellant testified in his defense. Viewing the evidence in the light most favorable to the State, the following was established.

Coyner testified that on the evening of July 16, 2017, appellant called and invited him to his ground floor apartment, saying that he wanted to place a crab order. Coyner had known appellant for several years, and they were friendly with each other. Coyner rode his scooter to appellant's home, which was about two blocks away. He went to the back door and knocked. Appellant answered and invited him inside where another man was present. About a minute later, appellant said he wanted to talk to him outside, and Coyner turned to leave out the back door. The next thing he remembered was waking up bloodied and bruised face down in the woods near the apartment with his shoes off. He returned home on his scooter and his wife called the police.

The police responded to the area of appellant's apartment where they spoke to Coyner, who said he had been assaulted by appellant. According to a responding police officer, Coyner appeared "out of it." He had blood all over his face, scrapes on his face,

neck, hands, and arms, and his back had so many large, swollen welts the police initially thought he had a deformity. A responding police officer took photographs of his injuries, which were admitted into evidence. Emergency personnel arrived and took Coyner to a hospital where he made a recorded statement.

The police eventually made a warrantless entry into appellant's apartment. A man, later identified as Robert Williams and appellant's roommate, was arrested on the couch, and he later told the police, that when appellant came home after work that evening he said, "[the] crab man set me up." The police subsequently executed a search warrant for the home during which they recovered the victim's cell phone; a tire iron; a leather belt from a bathroom sink; and surveillance video of the inside and outside of the apartment.

The video, which was played for the jury, shows appellant and a man arriving at the apartment shortly after 8:00 p.m. A second man arrives a few minutes later with a tire iron in his hands. All three are seen inside the apartment waiting by and facing the back door. Coyner arrives at the back door and enters the apartment at 8:15 p.m. While inside, appellant hits Coyner in the head with his fist, and Coyner falls to the floor, apparently unconscious. Coyner is punched and kicked by appellant and the two other men, one of whom repeatedly hits the victim with the tire iron. The three men drag Coyner outside where he is slammed headfirst into a pole and he falls inert to the ground where the three continue to hit and kick him. Appellant retrieves a belt from inside his apartment and he proceeds to repeatedly whip the victim's body and face, after which appellant and the two men leave.

Coyner testified he "instantly" lost consciousness when he was punched in the head, and when he woke up he experienced "extreme" pain on the left side of his head and that his face, cheekbone, eye socket, and ear hurt. As a result of the beating he spent three days in the hospital. He suffered three chipped teeth, a broken nose that did not heal properly and had to be reset, and broken ribs. He testified that his pain level was "above the scale of ten." After his release from the hospital, he was required to use a device that he had to blow into to keep his lungs inflated. He testified that he still suffers from blurry vision, headaches, and is unable to breathe through his right nostril.

Appellant testified in his defense and admitted that when Coyner arrived at his apartment, he told him, "you set me up" and then hit him, explaining that he believed that two days earlier the victim had tried to burglarize his apartment. Appellant testified that his home had been burglarized in December 2016 by an unrelated person, and that as a result he had bought the video surveillance system in January 2017. Appellant testified that he was upset and angry when Coyner came to his house. He testified that his two friends came to his house before Coyner arrived not to help beat up Coyner but to discuss the sale of tire rims.

First-degree assault

First-degree assault prohibits a person from "intentionally caus[ing] or attempt[ing] to cause serious physical injury to another." Md. Code Ann., Criminal Law ("Crim. Law"), § 3-202(a)(1). "Serious physical injury" is defined as an injury that "creates a substantial risk of death" or "causes permanent or protracted serious" disfigurement or loss or impairment of the function of any bodily member or organ. *See* Crim. Law § 3–201(d).

Citing *Chilcoat v. State*, 155 Md. App. 394 (2004), and *Cathcart v. State*, 169 Md. App. 379 (2006), *judgment vacated*, 397 Md. 320 (2007), appellant argues the State failed to prove that Conyer's injuries were "serious" because they did not rise to the level of the injuries presented in those cases where we upheld first-degree assault convictions. Additionally, appellant argues the State failed to prove that Conyer's injuries were serious because they did not present medical testimony or records to show the nature and degree of Coyner's injuries, which the State had presented in both *Chilcoat* and *Cathcart* to prove "serious physical" injury. We disagree.

In *Chilcoat*, a woman and her current boyfriend were at her home when her ex-boyfriend, Chilcoat, entered the home. 155 Md. App. at 397-98. The two men began to argue. *Id.* at 398. At one point, Chilcoat walked to a small table, picked up a beer stein, walked back to where the current boyfriend was standing, and hit him on the back of the head with the stein four or five times. As a result, the victim lost consciousness and was taken by ambulance to a hospital where he was diagnosed with two depressed skull fractures that required surgery to replace a portion of his skull with wire mesh. *Id*. at 400-01. The victim was released from the hospital six days later. *Id*. at 401. Photographs of the victim's injuries and his medical records were admitted into evidence. *Id*. at 400-01. We affirmed Chilcoat's first-degree assault conviction on appeal, holding that there was sufficient evidence from which a juror could infer that Chilcoat intended to inflict serious physical injury. *Id*. at 397, 402-04.

In *Cathcart*, Cathcart held his former girlfriend to the floor and punched her repeatedly in her face with his right hand while he choked her with his left. 169 Md. App.

at 393. She lost consciousness and was later taken to a hospital where she was found to have suffered bilateral fractures to her jaw, a broken nose, a dislocated chin, multiple hematomas to her face, and a swollen hand. *Id*. Photographs of her injuries and her medical records were admitted into evidence. *Id*. at 394. We affirmed Cathcart's conviction for first-degree assault on appeal, holding that the evidence, viewed in the light most favorable to the State, was sufficient for a juror to infer that Cathcart intended to inflict serious physical injury. *Id*.

As the State correctly notes, neither *Chilcoat* nor *Cathcart* set forth the minimum amount of injury required to prove serious physical injury to sustain a first-degree assault conviction. Additionally, neither case established a requirement for expert medical testimony or medical documentation of any injury to prove serious physical injury. We note that appellant did point out the absence of medical documentation in his closing argument, but ultimately, the determination of whether the victim sustained serious physical injury was for the jury to determine. Based on the facts stated above and elicited at appellant's trial, we are persuaded that a rational juror could find that appellant caused serious physical injury and shall affirm.[3] *Cf. Handy v. State*, 357 Md. 685, 699-700 (2000)

[3] To the extent appellant argues that the State failed to prove that he acted with the requisite specific intent to commit first-degree assault, we agree with the State that appellant has failed to preserve this argument for our review because he did not raise it below at the close of all the evidence. At the close of all the evidence, appellant moved for judgment of acquittal on first-degree assault, arguing only that there was insufficient evidence of "serious physical" injury. *See* Md. Rule 4-324(a) (providing that a defendant may move for judgment of acquittal "in a jury trial, at the close of all the evidence" and "shall state with particularity all reasons why the motion should be granted.") and *Bates v.* (continued)

(loss of vision for several hours and burning sensation in eyes due to use of pepper spray constituted "protracted loss or impairment of vision" to sustain first-degree assault conviction).

Conspiracy

Conspiracy, a common law crime, is defined as the "combination of two or more persons to accomplish some unlawful purpose, or to accomplish a lawful purpose by unlawful means. The essence of a criminal conspiracy is an unlawful agreement." *Mitchell v. State*, 363 Md. 130, 145 (2001) (quotation marks and citations omitted). "The agreement need not be formal or spoken, provided there is a meeting of the minds reflecting a unity of purpose and design." *Khalifa v. State*, 382 Md. 400, 436 (2004) (quotation marks and citation omitted). We have stated:

> In conspiracy trials, there is frequently no direct testimony, from either a co-conspirator or other witness, as to an express oral contract or an express agreement to carry out a crime. It is a commonplace that we may infer the existence of a conspiracy from circumstantial evidence. If two or more persons act in what appears to be a concerted way to perpetrate a crime, we may, but need not, infer a prior agreement by them to act in such a way. From the concerted nature of the action itself, we may reasonably infer that such a concert of action was jointly intended. Coordinated action is seldom a random occurrence.

Jones v. State, 132 Md. App. 657, 660, *cert. denied*, 360 Md. 487 (2000). *See also Alston v. State*, 177 Md. App. 1, 42 (2007) ("Conspiracy may be proven through circumstantial evidence, from which an inference of a common design may be shown.") (citation omitted),

State, 127 Md. App. 678, 691 (the particularity requirement is mandatory) (citation omitted), *cert. denied*, 356 Md. 635 (1999).

aff'd, 414 Md. 92 (2010). As to the State's burden of proof, we have explained: "It is sufficient if the parties tacitly come to an understanding regarding the unlawful purpose." *Dionas v. State*, 199 Md. App. 483, 532 (2011) (quotation marks and citation omitted), *rev'd on other grounds*, 436 Md. 97 (2013). We are mindful that the State is "only required to present facts that would allow [a] jury to infer that the parties entered into an unlawful agreement." *Acquah v. State*, 113 Md. App. 29, 50 (1996) (citation omitted).

Appellant concedes that there was sufficient evidence to show that he and others participated in the assault but argues that there was no evidence of any *agreement* between himself and the others to commit the assault. The State disagrees, as do we.

In denying appellant's motion for judgment of acquittal, the trial court recounted the testimony and noted:

> Mr. Carpenter and Mr. Anderson arrived; they lingered[.] . . . [Appellant] says that the reason for the gathering was to discuss the sale of the tire rims. However, once [the victim] arrives, it is clear that all three are acting in concert. They are all lingering by the door. They are attempting – I believe the other two were sort of waiting for [appellant] to make the first move, as it were. You can see that clearly on the video. But I believe the fact that the video gives evidence that these individuals were acting in concert is evidence of the fact that there had been a meeting of the minds here and that there was a conspiracy to inflict assault in the first degree.

Under the facts presented, there was more than enough evidence from which a rational juror could conclude that appellant acted in concert with the two other men in savagely beating Coyner. *Cf. Jones v. State*, 132 Md. App. at 661-64 (holding that there was sufficient evidence of conspiracy where, among other circumstances, the defendants emerged from an alley together and approached the victim).

In sum and as stated earlier, on limited remand, if the suppression court finds that the officers would have sought a warrant even if they had not entered appellant's apartment, appellant's convictions will stand. If the suppression court finds that the entry into and search of appellant's apartment prompted the police to seek a warrant, however, the court must suppress the evidence found in the search of appellant's apartment, but the State is permitted to retry appellant.

REMAND WITHOUT AFFIRMANCE OR REVERSAL TO THE CIRCUIT COURT FOR HARFORD COUNTY FOR PROCEEDINGS CONSISTENT WITH THIS OPINION.

PAYMENT OF COSTS TO ABIDE THE RESULT.