

Circuit Court for Baltimore City  
Case No. 116099013

UNREPORTED  
IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND

No. 1842

September Term, 2017

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ANDRE MOSBY

v.

STATE OF MARYLAND

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Arthur,  
Friedman,  
Shaw Geter,

JJ.

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Opinion by Arthur, J.

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Filed: October 1, 2018

\*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

On the night of March 15, 2016, Andre Mosby drove his friend to a barbershop in Baltimore City; Mosby stood outside for a few minutes while his friend shot and killed Kenneth Collins; and then Mosby drove his friend away from the scene. The State accused Mosby of acting as an accomplice to the shooting. The State theorized that the motive for the shooting arose out of a transaction, months earlier, in which Collins had paid Mosby to hook up the electric power at Collins's home so that Collins could use electricity without paying for it.

After a jury trial in the Circuit Court for Baltimore City, Mosby was convicted of second-degree murder and two, related weapons offenses. The court sentenced him to an aggregate prison term of 50 years. In this appeal, Mosby contends that the State presented insufficient evidence to show that he was an accomplice to the shooting, that the court should have excluded evidence about his participation in the energy theft scheme, and that his trial attorney rendered deficient performance.

For the reasons explained in this opinion, the judgments will be affirmed. We conclude that the State presented sufficient evidence to sustain the convictions. We will not address the admissibility of evidence of Mosby's other crimes, because that issue was not adequately raised at trial. We decline to consider whether Mosby received ineffective assistance of counsel, because that matter should be decided after a full evidentiary hearing in a post-conviction proceeding.

#### **FACTUAL AND PROCEDURAL BACKGROUND**

The following summary describes the facts established at Mosby's trial. Because

Mosby is challenging the sufficiency of the evidence to sustain his convictions, we recite these facts in the light most favorable to the prosecution. *See, e.g., Davis v. State*, 207 Md. App. 298, 303 (2012) (citing *Moye v. State*, 369 Md. 2, 12 (2002)).

**A. The Prior Relationship Between Mosby and Collins**

In the months before his death, Kenneth Collins participated with Andre Mosby in a scheme to steal electric power for Collins’s home.

In the summer of 2015, Collins started renting a house for himself and his long-term girlfriend, Ms. Tonyale Manley-James. The owner of the house cancelled the electricity service from Baltimore Gas and Electric (BG&E). Instead of setting up a new account, Collins enlisted help from Mosby, who was a customer at the barbershop where Collins worked and who had worked for a BG&E subcontractor. Mosby offered to connect the electric power at Collins’s home so that Collins could use electricity without generating a bill from BG&E.<sup>1</sup>

Mosby visited Collins’s home on a day in August or September of 2015 when Collins was at work and Ms. Manley-James was at home. After Mosby worked for a few minutes outside, the electric power began functioning at the home. Collins arranged for his girlfriend to pay Mosby \$350 in cash for his services.

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<sup>1</sup> A BG&E security specialist explained at trial that a common form of energy theft involves bypassing the meters used to calculate a customer’s electricity usage. According to the security specialist, people sometimes remove the meters and insert “bridges,” such as “metal objects, corner bead, copper wire, knives [sic], butter knives [sic],” and the like. Inserting those foreign objects causes the house to receive electric power without the usage being recorded on a meter.

Around this time, Collins introduced his close friend, Emmett Edwards, to Mosby so that Mosby could give Edwards the same type of illegal electricity connection.

The connection at Collins's home functioned until BG&E shut off the electricity around the end of 2015. Mosby restored the power, and Ms. Manley-James later noticed that the entire energy meter had been removed. Ms. Manley-James was not involved in any payment at that time, nor did she know whether Mosby expected an additional payment or whether Collins made a payment to Mosby.<sup>2</sup>

Although the timing of events is unclear from the record, it appears that at some point BG&E required Collins to pay \$1800 to have the power restored. Collins informed Mosby that he had been required to pay BG&E to restore the power.

Meanwhile, in early 2016, a BG&E security specialist was investigating Collins for meter fraud. Based on information provided by Collins, the investigator began to look into Mosby. The investigator learned about Mosby's employment history with a BG&E subcontractor, but he made no direct contact with Mosby.

In February 2016, Ms. Manley-James noticed some changes in Collins's behavior. He would lock the front door to the barbershop in between customers. He started driving home using a route that was different from his normal route. After arriving home, he would shine bright lights at the house and look around while she waited in the car. Collins told her that he was doing those things because he was "afraid." During this time

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<sup>2</sup> In his brief, Mosby asserts that Ms. Manley-James testified that "there was *not* a payment that Mr. Mosby expected to receive from Mr. Collins." Both the question and answer, however, were limited to whether she had personal knowledge of a payment.

period, her sister observed that Collins became “cautious” and that he lost “at least 20 pounds.”

**B. The Fatal Shooting of Collins**

Collins was shot to death on the night of March 15, 2016, while he was at work inside Rod’s Barbershop in Baltimore City. It is undisputed that the shooter was Ignatius Lawrence, a friend of Mosby.<sup>3</sup>

Sometime after 8:00 p.m. on the evening on which the shooting occurred, Collins had called his friend Edwards to ask for a ride home from work. Edwards parked his car outside the barbershop and chatted with an acquaintance named “Travis” while waiting for Collins to finish working for the night.

During the conversation, Travis suddenly announced that “somebody” was “shooting at” Collins. Edwards looked inside the barbershop and saw a man in a teal hat firing shots at Collins, who was “trying to duck or dodge” from the shooter. Edwards heard Travis say: “They’re coming out.” Edwards and Travis walked away briskly and stepped into the J.J. Carry Out restaurant, located three storefronts away from the barbershop, on the corner of East Monument Street and North Port Street.

Edwards looked out the window and saw the shooter walking alongside Mosby, whom he recognized from prior interactions. Edwards saw that the shooter was leaning his head down and “trying to tuck the gun down in his waistband.” Edwards saw Mosby

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<sup>3</sup> In a separate trial, Lawrence was found guilty of first-degree murder of Collins, conspiracy to commit first-degree murder, and three, related weapons offenses.

move towards the shooter until they were side-by-side, close enough that their arms made contact.

After Mosby walked away with the shooter, Edwards went to the barbershop and called 911. Collins died from two gunshot wounds, one in the left temple and one in the upper back. Near the body, police found two nine-millimeter cartridge cases that had been discharged from the same handgun. The gun itself was never recovered.

Inside the barbershop, the police found Collins's cell phone, which had Mosby's cell phone number saved under the name "BGE Man Dre." The police also found a pair of eyeglasses near the front door of the barbershop. Skin cells on the eyeglasses matched the DNA profile for Ignatius Lawrence.

**C. Mosby's Actions Before, During, and After the Shooting**

Around the time that Lawrence killed Collins, Mosby stayed near Lawrence and interacted with him extensively.

A few hours before the shooting, Mosby and Lawrence ate dinner together at the Texas Roadhouse restaurant in White Marsh. Surveillance video shows that Mosby drove his Ford Expedition into the parking lot at 6:38 p.m. with Lawrence as a passenger. The two men walked into the restaurant, sat together near the bar, and ordered food and drinks. No one else joined them. Mosby drove away at 8:19 p.m., with Lawrence in the passenger seat.

Mosby and Lawrence travelled into Baltimore City to the area near Rod's Barbershop, which is located on East Monument Street between North Milton Avenue

and North Port Street. A closed-circuit television (CCTV) camera is positioned at the intersection of Milton Avenue and Monument Street. The camera rotates a full 360 degrees approximately every minute, and the storefront to Rod's Barbershop is in view for about 20 seconds during each minute of the recording. The recording reveals in substantial detail the conduct of Mosby and Lawrence on Monument Street around the time of the shooting.

The recording shows that Mosby and Lawrence arrived at the intersection at 8:52 p.m., wearing the same clothes they had been wearing earlier in the evening. Mosby's Ford Expedition was not in view. They arrived at the same corner on foot from different directions: Mosby walked on Milton Avenue, while Lawrence walked on Monument Street. As Lawrence walked past the barbershop (where Edwards and Travis were standing), he stopped momentarily and looked inside before he continued walking.

For the next few minutes, Mosby and Lawrence stood together on the corner of Monument Street and Milton Avenue, just outside of Panda Chinese & American Food, a takeout restaurant located four storefronts away from the barbershop.<sup>4</sup> Initially, Lawrence stood a few feet away from Mosby while Mosby was holding a cell phone to his ear. A minute later, they were standing closer together, leaning towards each other with their hands in their pockets.

At 8:55 p.m., Lawrence entered the barbershop alone, out of view of Edwards and

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<sup>4</sup> A camera at the Panda takeout restaurant also recorded images of Mosby and Lawrence. The recording was admitted into evidence, but the disc in the record is unreadable.

Travis. At the same time, Mosby remained at the street corner, looking in the direction of the barbershop. Mosby relocated to the opposite side of Monument Street, directly across from the barbershop. He stayed there for a minute, talking on his phone, and at one point stopped to turn and look in the direction of the barbershop. Mosby then walked back to the corner outside of the Panda takeout restaurant and again turned to look in the direction of the barbershop.

At 8:59 p.m., just as Edwards was fleeing from the barbershop, Mosby moved to the other side of the block and was walking away from the barbershop. Mosby, still holding his phone, turned twice to look back towards the barbershop. At that point, Lawrence walked out of the barbershop while tilting his head downward and holding one hand at his side. Mosby took a step backwards and looked directly at Lawrence before he continued walking. Lawrence followed behind him. The camera rotated away before it could record them passing the J.J. Carry Out restaurant on the corner of Monument Street and Port Street, where Edwards was inside.

Around the time of the shooting and shortly thereafter, Mosby made and received multiple calls on his cell phone. Cell site location data indicates that, between 8:51 p.m. and 9:15 p.m., Mosby travelled from the area near to the barbershop to an area in West Baltimore near where Mosby's stepfather lives.

Mosby's stepfather recalled that Mosby arrived after 9:15 p.m. in the Ford Expedition, accompanied by Lawrence. According to Mosby's stepfather, neither Mosby nor Lawrence were wearing the clothes or hats that they had been wearing earlier in the

evening, as recorded on the surveillance videos. Mosby told his stepfather that he and Lawrence were “going down to the casino” and asked to borrow his stepfather’s Corvette. He exchanged the keys to the Ford Expedition with the keys to the Corvette.

Two days later, police officers arrested Mosby’s stepfather while he was driving the Ford Expedition. Investigators recovered an unspent cartridge on the floor behind the driver’s seat of the vehicle. The cartridge had the same caliber (nine millimeter Luger) and manufacturer’s head stamp (“RP”) as the two spent cartridge cases that had been found in the barbershop.<sup>5</sup> Among other things, police also found a BG&E hard hat and a BG&E energy meter inside Mosby’s Expedition.

Later that same day, officers found the Corvette parked outside Mosby’s workplace. Lawrence stood waiting outside the Corvette for about 30 minutes. When Mosby arrived and entered the car with Lawrence, officers arrested both of them.

**D. Mosby’s Statement During Custodial Interrogation**

After his arrest, Mosby gave a statement to detectives at a police station without an attorney present. The statement was recorded on video and audio.

At the beginning of the interrogation, Detective Sandra Forsythe presented Mosby with an “Explanation and Waiver of Rights” form. The form advises a person that he has the right to remain silent, that anything he says or writes may be used against him in

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<sup>5</sup> Because the cartridge was never fired, it had no marks associated with any particular firearm. The State’s firearms expert explained that he was unaware of any method that could be used to determine whether the unspent cartridge came “from the same ammunition lot” as the bullets used in the shooting.

court, that he has the right to talk with an attorney before or during questioning, that he has the right to stop the questioning at any time and request an attorney, and that an attorney will be appointed if he cannot afford one.<sup>6</sup>

Mosby initially declined to waive his rights, but he continued to discuss his options with the two detectives. During that time, Mosby asked: “Can I get a phone call?” Detective Forsythe responded, “Oh no,” and told Mosby that he would be sent to “central booking.” A moment later, Mosby said: “But you said like you could talk to me, but I can’t talk to my lawyer first.” Detective Forsythe told Mosby that he could talk to his lawyer at “central booking.” Mosby also asked if he could “talk to [his] peoples and everything,” and the other detective responded, “you don’t get a chance to talk to your family and different stuff like that[.]”

For a few minutes, the detectives and Mosby continued their discussion just outside the interview room. Once they re-entered the room, Detective Forsythe reviewed the waiver form with Mosby. The final sentence on the form states that the suspect has freely and voluntarily waived his rights and has agreed to answer questions without an attorney present. After reading that sentence, Detective Forsythe told Mosby: “You’re not really waivin’ your rights ‘cause everybody here, you can decide at any time that you can use it. That’s just the way it’s worded for this one.” Mosby agreed to sign the form.

The detectives proceeded to question Mosby for more than 30 minutes, until he

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<sup>6</sup> A blank version of the form is available at <https://www.baltimorepolice.org/1105-custodial-interrogations>.

asked to stop the interrogation. Among other things, Mosby disclosed that he could read and write and that he had stopped his education in the twelfth grade. When the detectives asked whether he was “under the influence” of any substance, Mosby said that he had taken “Percocets and Molly” in some unstated quantity “a couple hours ago.”

During questioning, Mosby admitted to many facts that the prosecution would use against him at trial. He said that Collins had paid him “two hundred somethin’ dollars” to “cut his lights on” in 2015 and that he later learned that Collins “had to pay” BG&E to restore the power. Mosby admitted that he drove from the Texas Roadhouse in White Marsh with “Ignatius” on the night of the murder and that he spent time standing outside of a carryout restaurant at a corner on Monument Street later that same night. At one point, Mosby made a cryptic comment (“Why the fuck did I trust him for real?”) that suggested the existence of some type of conflict between himself and Collins.

Mosby also made several claims that the prosecution was able to discredit. He claimed that he had gone to the Texas Roadhouse to attend a “birthday dinner” for an unnamed female companion and claimed that he was standing “by [him]self” on Monument Street “ready to meet somebody, a female.” The surveillance videos show that Mosby had interacted with Lawrence, and Lawrence alone, at those locations.

**D. The Criminal Proceedings Against Mosby**

In the Circuit Court for Baltimore City, Mosby and Lawrence were each indicted for first-degree premeditated murder; conspiracy to commit first-degree murder; use of firearm in a felony or crime of violence; and wearing, carrying, or transporting a handgun

on or about the person. The court granted a joint motion from both defendants to sever the two cases.

Mosby was tried over three days in September 2017. The State's main theory was that Mosby had sent his friend Lawrence to kill Collins because of a dispute arising out of the energy theft scheme. During the opening statement, defense counsel conceded that Mosby connected the electricity at Collins's home, that Mosby had dinner with Lawrence at the Texas Roadhouse before the shooting, that Lawrence shot and killed Collins inside Rod's Barbershop, that Mosby was nearby on Monument Street during the shooting, and that Mosby went to his stepfather's house just after the shooting and traded cars. Defense counsel argued that the prosecution would be unable to prove that Mosby knew that Lawrence possessed a handgun or intended to use it to kill Collins.

The State's witnesses included Edwards, who identified Mosby as the man walking side-by-side with Lawrence immediately after the shooting; Ms. Manley-James, who identified Mosby as the man who had connected the electricity at Collins's home; Mosby's stepfather, who identified Mosby and Lawrence as the two men recorded on the surveillance videos; and Detective Forsythe, who testified about the interrogation of Mosby. Mosby called no witnesses in his defense.

At the end of the State's case, counsel for Mosby moved for a judgment of acquittal on the murder and conspiracy charges. Defense counsel argued:

[DEFENSE COUNSEL]: Your Honor, I would make a motion for judgment of acquittal as to each of the charges, specifically first degree murder, second degree murder, and conspiracy to commit first degree murder. I don't see any evidence whatsoever that links Mr. Mosby to the

actual killing in this case. I understand that he was there, I understand that the State has attempted to show some type of motivation; however . . . I think they've fallen short of that. There's no indication that he had any knowledge, motive, [or] intent[.] . . . [T]here's no evidence that he was in the barbershop. The only evidence is that he was seen leaving . . . with the co-defendant, he was with him before. He was never in the barbershop, they never showed them actually together outside on the street. Mr. Edwards says he saw them walking after the shooting and then of course they were together afterwards at the car. But again, I don't believe there's anything shown that he's involved in the actual[] killing, second degree murder, first degree murder, and/or the conspiracy to commit murder.

The circuit court denied the motion, expressing the following rationale for its decision:

THE COURT: I appreciate your argument but at this point the State clearly has made a prima facie case regarding both the murder and the conspiracy to commit murder. The evidence is that the defendant and the alleged shooter were together prior to this happening in the defendant's car. The evidence is also that the nine millimeter cartridge was located in the car afterwards. I believe that it is a logical inference that the two left in the defendant's car, so under an accomplice liability theory, I do respectfully consider and deny your motion.

Consistent with that ruling, the court delivered a jury instruction based on the pattern instruction regarding accomplice liability.

The jury reached its verdict after a few hours of deliberation. The jury found Mosby not guilty of first-degree murder and of conspiracy to commit first-degree murder. The jury, however, found Mosby guilty of second-degree murder; use of a firearm in the commission of a felony or a crime of violence; and wearing, carrying, or transporting a handgun on or about the person.

The court sentenced Mosby to a 30-year prison term for second-degree murder and to a consecutive 20-year term (the first five years without the possibility of parole) for the

use of a firearm in the commission of a felony or crime of violence. The court merged a sentence of three years for wearing, carrying, or transporting a handgun on or about the person into the 20-year sentence for the use of a firearm.

Thereafter, Mosby noted this timely appeal.

### **QUESTIONS PRESENTED**

Mosby presents four questions, which we will consider in the following order:

1. Without evidence that Mr. Mosby witnessed or perpetrated the killing, was the evidence sufficient to permit a rational jury to conclude that he had the criminal state of mind to commit second-degree murder or the firearms offenses as an accomplice?
2. Did the circuit court err by allowing the State, over objection, to elicit propensity evidence describing Mr. Mosby's irrelevant and prejudicial past criminal conduct?
3. Did Mr. Mosby's attorney render unconstitutionally deficient legal representation by describing excluded inculpatory motive evidence to the jury during closing argument?
4. Did Mr. Mosby receive ineffective assistance of counsel when his attorney, under the misimpression that he could wait to move for suppression until the middle of trial, failed to make a pretrial motion to suppress an intoxicated statement Mr. Mosby gave to police following an improper *Miranda* warning?

Answering the first question, we reject Mosby's contentions that the evidence was insufficient to support his convictions. For various reasons, however, the remaining three questions are not properly presented for our review. We conclude that the issue of the admissibility of evidence of Mosby's prior criminal conduct was not adequately raised at trial. We will not consider in this direct appeal the two questions concerning whether Mosby received ineffective assistance of counsel; Mosby is free to raise those issues in a

post-conviction proceeding.

## **DISCUSSION**

### **I. Sufficiency of the Evidence**

First and foremost in this appeal, Mosby contends that his convictions are based on legally insufficient evidence. He argues that the trial court erred when it denied his motion for judgment of acquittal and allowed the jury to decide the case.

The test for reviewing 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.” *Cox v. State*, 421 Md. 630, 656-57 (2011) (citations and quotation marks omitted). Evidence is sufficient to sustain a conviction if it “either showed directly, or circumstantially, or supported a rational inference of facts which could fairly convince a trier of fact of the defendant’s guilt of the offense charged beyond a reasonable doubt.” *Donati v. State*, 215 Md. App. 686, 718 (2014) (quoting *State v. Albrecht*, 336 Md. 475, 479 (1994)). Circumstantial evidence alone may be enough to prove a defendant’s guilt as long as “the circumstances, taken together, do not require the trier of fact to resort to speculation or conjecture[.]” *Smith v. State*, 415 Md. 174, 185 (2010) (citation and quotation marks omitted). The circumstantial evidence on which a conviction is based need not exclude every possibility of the defendant’s innocence. *Morgan v. State*, 134 Md. App. 113, 124-25 (2000).

Under this standard, the court must view not only the evidence itself “but also all

reasonable inferences deducible from the evidence in a light most favorable to the State.” *Smith v. State*, 415 Md. at 185-86 (citing *Allen v. State*, 402 Md. 59, 77 (2007)). The jury in its role as the finder of fact “has the ‘ability to choose among differing inferences that might possibly be made from a factual situation[.]’” *Smith v. State*, 415 Md. at 183 (quoting *State v. Smith*, 374 Md. 527, 534 (2003)). The jurors are entitled to “weigh the evidence given to them based upon [their] experience with people and events.” *Morgan v. State*, 134 Md. App. at 125. A court reviewing the sufficiency of the evidence does “not second-guess the jury’s determination where there are competing rational inferences available” (*Smith v. State*, 415 Md. at 183), nor does the court “decide whether the jury could have drawn other inferences from the evidence, refused to draw inferences, or whether [the court] would have drawn different inferences from the evidence.” *Id.* at 184 (citing *State v. Smith*, 374 Md. at 557).

Mosby contends that the evidence was insufficient to sustain his conviction for second-degree murder. Murder in the second degree includes the killing of another person with either the intent to kill that person or the intent to inflict such serious bodily harm that death would likely result. *See, e.g., Kouadio v. State*, 235 Md. App. 621, 627-28 (2018).<sup>7</sup> In this case, there was no dispute that Lawrence murdered Collins by shooting him inside the barbershop, while Mosby was standing outside. The prosecution

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<sup>7</sup> Other “kinds of malevolent states of mind that qualify for murder” are “the intent to do an act under circumstances manifesting extreme indifference to the value of human life (depraved heart),” and “the intent to commit a dangerous felony.” *Kouadio v. State*, 235 Md. App. at 627-28 (quoting *Harrison v. State*, 382 Md. 477, 488 (2004)). Those mental states are not at issue in this case.

accused Mosby of acting as an accomplice to that murder.

“It is well established in Maryland law that ‘[t]o be an accomplice a person must participate in the commission of a crime knowingly, voluntarily, and with common criminal intent with the principal offender, or must in some way advocate or encourage the commission of the crime.’” *Silva v. State*, 422 Md. 17, 28 (2011) (quoting *State v. Raines*, 326 Md. 582, 597 (1992)) (further citations and quotation marks omitted). The defendant may be found guilty as an accomplice if “the defendant, with the intent to make the crime happen, knowingly aided, counseled, commanded, or encouraged the commission of the crime, or communicated to a participant in the crime that [the defendant] was ready, willing, and able to lend support, if needed.” Maryland Criminal Pattern Jury Instructions (MPJI-Cr) 6:00 (2d ed. 2013, 2016 Supp.). An accomplice “is a guilty participant, and in the eye of the law is equally culpable with the one who does the act.” *Owens v. State*, 161 Md. App. 91, 100 (2005) (citations and quotation marks omitted).

The type of accomplice activity alleged here is that of a principal in the second degree. Whereas a first-degree principal is the actual perpetrator of the crime, a second-degree principal is one who is present during the crime and who participates by aiding, commanding, counseling, or encouraging the perpetrator. *See, e.g., Owens v. State*, 161 Md. App. at 99-100. A person who “keeps watch or guard at some convenient distance” is considered to be present even if that person is unable to actually see or hear the crime being committed. *State v. Sowell*, 353 Md. 713, 730-31 (1999) (quoting

*Williamson v. State*, 282 Md. 100, 103 (1978)). ““To be guilty as a principal in the second degree, a criminal intent is necessary.”” *State v. Raines*, 326 Md. at 596 (quoting *Pope v. State*, 284 Md. 309, 332 (1979)) (italics removed; further citation and quotation marks omitted). Where a specific intent is an element of the underlying offense, a defendant is not liable as a principal in the second degree “unless [the defendant] entertained such an intent or knew that the principal in the first degree entertained such intent.” *State v. Raines*, 326 Md. at 594.

Mosby contends that the State failed to establish that he was an accomplice to the murder because the evidence, in his assessment, merely showed that he “drove the shooter to and from the scene” and “was nearby when the shooting occurred.” Mosby contends that, “where a defendant’s participation in another’s shooting is simply driving the shooter to and from the crime scene, Maryland law required additional evidence that demonstrates the defendant’s culpable mental state.” Both the legal and factual premises of his argument are flawed.

Mosby favorably cites *Cooley v. State*, 157 Md. App. 101 (2004), *rev’d on other grounds*, 385 Md. 165 (2005), as an example of a case in which the evidence was sufficient to show that a defendant was an accomplice to a shooting committed by another.<sup>8</sup> In that case, a witness claimed that Cooley drove a car up to the victim while the victim was walking away from a location where Cooley and the victim had been

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<sup>8</sup> The Court of Appeals reversed this Court’s judgment on a ground that was unrelated to this Court’s holding on the sufficiency of evidence. *Cooley v. State*, 385 Md. 165, 168-69 (2005).

competing for drug sales. *Id.* at 106. The witness saw Cooley’s co-defendant step out of the vehicle and promptly shoot the victim. *Id.* at 106-07.

On appeal, Cooley argued that the evidence was insufficient to support his convictions for second-degree murder and wearing, carrying, or transporting a handgun. *Cooley v. State*, 157 Md. App. at 117. Cooley emphasized that “the only evidence linking him to the murder was [the witness’s] statement that, when [the witness] saw [Cooley’s co-defendant] get out of the [car], Cooley was in the driver’s seat” of the car. *Id.* at 117. This Court saw “no merit” to that argument and explained that the “[e]vidence that Cooley transported the shooter to the murder scene, and drove the shooter away after the shooting, was sufficient to establish that Cooley participated in the murder.” *Id.* In other words, Cooley “aid[ed], counsel[ed], command[ed], or encourage[d]” the shooter (*id.* at 117 n.9) through his acts of transporting the shooter to and from the shooting.

Despite the clarity of that holding, Mosby suggests that “additional evidence” beyond the eyewitness account was required to support the convictions. Mosby asserts that the State presented evidence that Cooley “owned firearms paraphernalia and ammunition” that the State had been able to connect “to the specific firearm used in the commission of the crime[.]” On that premise, Mosby claims that *Cooley* is “[u]nlike this case,” because the cartridge found in Mosby’s car “could not be traced” to the cartridge cases found at the crime scene.

In fact, the opinion says nothing about any evidence directly connecting Cooley to a specific weapon. The opinion notes that “drugs and *ammunition of the same caliber* as

those recovered from the victim were found during a search of the home of Cooley’s girlfriend.” *Cooley*, 157 Md. App. at 107 (emphasis added). The Court wrote that the items seized from the home “corroborated” the witness’s statement because “the ammunition recovered from the home was *identical to the caliber of bullet* recovered from the victim’s body[.]” *Id.* at 116-17 (emphasis added).<sup>9</sup> Thus, in Cooley’s case, the State simply showed that bullets used in the murder were of the same caliber as ammunition in possession of the defendant. In Mosby’s case, the State went a step further, by showing that the bullets used to kill Collins also had the same manufacturer’s head stamp as the unused ammunition found in Mosby’s car.

In any event, Mosby is mistaken when he asserts that “[e]ven in the light most favorable to the State, the evidence at best showed that the full extent of [his] participation in [Lawrence’s] criminal conduct was driving with [Lawrence] to and from” Monument Street. According to Mosby, he was simply “on the street using his cell phone” during the shooting, rather than rendering any assistance to the shooter.

To the contrary, the surveillance video showed that Mosby’s conduct was substantially different from the conduct of an innocent onlooker. At 8:52 p.m., Mosby walked to the street corner just as Lawrence was walking directly in front of the barbershop and looking inside. At 8:53 p.m., Mosby stood waiting on the street corner near Lawrence while talking on his cell phone. At 8:54 p.m., Mosby was standing next to

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<sup>9</sup> The Court did even not mention the ammunition when it determined that the evidence was sufficient to sustain the convictions. *Cooley v. State*, 157 Md. App. at 117.

Lawrence in a manner that suggested that they were talking to each other. At 8:55 p.m., Mosby peered around the corner, looking in the direction of the barbershop, just as Lawrence snuck into it. At 8:57 p.m., Mosby was repositioning himself so that he was directly across the street from the barbershop. At 8:58 p.m., Mosby was back on the street corner looking towards the barbershop entrance. At 8:59 p.m., once the shots had been fired, Mosby was walking away from the barbershop. He turned back to look as Lawrence exited the barbershop. According to the eyewitness, Mosby then moved towards Lawrence and walked alongside him, while Lawrence tucked the gun into his waistband.

Based on this evidence, the jury could reasonably conclude that Lawrence cased the barbershop and then conferred with Mosby in his preparation for entering it. The jury could also conclude that Lawrence had a particular need for a lookout, because two men (Edwards and his acquaintance Travis) were standing right in front of the glass window at the entrance. During the four minutes when Lawrence was inside the barbershop, Mosby stayed in locations where he could see the entrance, and he was constantly turning his head to look towards the entrance. Interpreting Mosby's conduct in light of the other evidence, the jury could reasonably conclude that Mosby acted as a lookout during the murder to ensure that Lawrence would succeed in killing Collins.

Serving as the lookout during the commission of a crime is a well-recognized example of participation in a crime as an accomplice. *See, e.g., Silva v. State*, 422 Md. at 31 (“someone serving as a lookout could be considered an accomplice to a crime”);

*Farmer v. State*, 5 Md. App. 546, 553 (1968) (“[a] person who serves as lookout is as guilty as a person who does the actual [offense]”). “One may . . . encourage a crime by merely standing by for the purpose of giving aid to the perpetrator if necessary.” *Jones v. State*, 173 Md. App. 430, 446 (2007) (quoting *Pope v. State*, 284 Md. at 332).

Evidence that a defendant “drove the actual perpetrators to the scene of the crime, was actually present in ‘close proximity or contiguity’ in a position to assist if necessary or to watch or prevent interference or detection or to encourage the commission of the crime at the moment of its commission[,] and drove the car in which the actual perpetrators departed from the scene of the crime” is sufficient to prove that the defendant participated in the crime as an accomplice. *Butina v. State*, 4 Md. App. 312, 324 (1968).<sup>10</sup>

Mosby insists that the jury had “almost no evidence . . . to show that he had a criminal state of mind” while he was standing on Monument Street. It would be more accurate to say that the jury had no *direct* evidence of Mosby’s mental state, but a great deal of circumstantial evidence. Because “intent is subjective and, without the cooperation of the accused, cannot be directly and objectively proven,” the existence of criminal intent ordinarily “must be shown by established facts which permit a proper inference of its existence.” *State v. Raines*, 326 Md. at 591 (citations and further

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<sup>10</sup> Mosby attempts to liken his case to *Howell v. State*, 62 Md. App. 278, 287-88 (1985), where this Court concluded that a defendant was not a principal in a murder (but merely an accessory after the fact) where the evidence showed that the defendant drove the killer to the victim’s house, stood outside working on his car, and then helped the killer dispose of physical evidence. In that case, this Court expressly explained that the defendant “was not a lookout or positioned to be of assistance to the perpetrator if needed.” *Id.* at 287.

quotation marks omitted). In determining a defendant’s intent, “the trier of fact may infer the existence of the required intent from surrounding circumstances such as ‘the accused’s acts, conduct[,] and words.’” *Smallwood v. State*, 343 Md. 97, 104 (1996) (quoting *State v. Raines*, 326 Md. at 591).

Here, the evidence indicating that Mosby acted as a lookout for Lawrence supports the inference that Mosby knew of and shared Lawrence’s criminal intent. *See Cottman v. State*, 165 Md. App. 679, 693-94 (2005) (reasoning that testimony that defendant acted as a lookout supported the inference that the defendant knew of the impending crime, because “otherwise, [the defendant] would have had no reason to . . . act as a ‘lookout’”), *vacated on other grounds*, 395 Md. 729 (2006); *McGhee v. State*, 4 Md. App. 256, 260-61 (1968) (reasoning that defendant’s close “involvement” with the perpetrator and his “actions at the scene of the crime, including the fact that he was observed walking . . . in such a manner as to suggest that he was a lookout are evidentiary factors giving rise to an inference that [the defendant] shared a common criminal purpose” with the perpetrator). The evidence indicating that Mosby was speaking with Lawrence “just prior to the crime . . . indicates a degree of identification and companionship with [Lawrence] from which, in light of [Mosby’s] subsequent actions, it may properly be inferred that he shared a common criminal intent” with Lawrence. *Coleman v. State*, 4 Md. App. 386, 392 (1968).

Other surrounding circumstances were consistent with the inference that Mosby shared in Lawrence’s malevolent intent. Although there was ample evidence that Mosby knew the victim, there was no evidence that Lawrence had any kind of relationship with

the victim through which he might have had the opportunity to develop any motive to harm the victim. The evidence showed that Mosby and Lawrence left together as soon as the murder was complete, mere minutes after they arrived, which confirms that they arrived with a singular purpose. After the murder, Mosby apparently helped Lawrence to conceal evidence by changing clothes and trading vehicles, and he continued to associate with Lawrence in the days after the shooting. In his statement to detectives, Mosby tried unsuccessfully to conceal the fact that he had eaten dinner with Lawrence just before the murder. Mosby eventually admitted to detectives that he travelled to Monument Street with Lawrence, but he offered no explanation of why he brought Lawrence with him. The jury could consider these and other circumstances as it determined the significance of Mosby's conduct on Monument Street during the murder.

As a separate argument, Mosby contends that the evidence was insufficient to support his convictions for the use of a firearm in the commission of a felony or crime of violence and for wearing, carrying, or transporting a handgun on or about the person. As the State correctly points out, Mosby failed to preserve any challenge to the sufficiency of the evidence regarding those two offenses.

“In a jury trial, the only way to raise and to preserve for appellate review the issue of the legal sufficiency of the evidence is to move for a judgment of acquittal on that ground.” *Starr v. State*, 405 Md. 293, 303 (2008) (quoting *McIntyre v. State*, 168 Md. App. 504, 527 (2006)). When a defendant makes a motion for judgment of acquittal, the defendant must “state with particularity all reasons why the motion should be granted.”

Md. Rule 4-324(a). This requirement means that “a defendant must ‘argue precisely the ways in which the evidence should be found wanting and the particular elements of the crime as to which the evidence is deficient.’” *Arthur v. State*, 420 Md. 512, 522 (2011) (quoting *Starr v. State*, 405 Md. at 303). A defendant is not entitled to challenge the sufficiency of evidence based on “‘reasons stated for the first time on appeal.’” *Arthur v. State*, 420 Md. at 523 (quoting *Starr v. State*, 405 Md. at 302).

At the close of the State’s case here, defense counsel announced an intention to move for a judgment of acquittal “as to each of the charges,” but the argument included mention only of three charges: “first degree murder, second degree murder, and conspiracy to commit first degree murder.” Counsel asserted that the State had failed to present evidence “that links Mr. Mosby to the actual killing” and that there was no evidence that he was “involved in . . . second degree murder, first degree murder, and/or the conspiracy to commit murder.” The trial court ruled that the evidence was legally sufficient as to the charges for “the murder and the conspiracy to commit murder.” The court was not required to “imagine all reasonable offshoots of the argument actually presented” by the motion (*Starr v. State*, 405 Md. at 304), such as whether the evidence adequately connected Mosby to the handgun.

In any event,<sup>11</sup> even if Mosby had raised at trial the argument that he now makes

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<sup>11</sup> “Ordinarily,” this Court will not decide an issue that is neither “raised in” nor “decided by the trial court[.]” Md. Rule 8-131(a). This Court may decide an unpreserved issue if the decision is “necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.” *Id.* For example, in *Bible v. State*, 411 Md. 138, 148-52 (2009), the Court of Appeals exercised its discretion to consider a sufficiency

on appeal, the circuit court would have been correct in rejecting it. Mosby acknowledges that the State accused him of acting as an accomplice to Lawrence’s carrying of and use of the handgun. To convict Mosby of the use of a firearm in the commission of a felony or crime of violence, the State only needed to show that Mosby knowingly aided or encouraged Lawrence’s use of the firearm in the shooting. *See Bellamy v. State*, 403 Md. 308, 335 n.26 (2008). Similarly, a factfinder could convict Mosby of wearing, carrying, or transporting a handgun if it found that Mosby was in joint possession of Lawrence’s handgun when he was travelling with Lawrence to and from the scene. *See State v. Williams*, 397 Md. 172, 195-96, 199 (2007), *abrogated on other grounds by Price v. State*, 405 Md. 10 (2008).

We agree with the State that the same evidence that sufficed to show Mosby’s knowing participation in the murder also sufficed to show his knowledge of the murder weapon. Contrary to Mosby’s argument, the jury was not asked to “choose from equally plausible inferences” about whether Mosby knew that Lawrence was carrying a handgun and intended to use it. The jury could reject as implausible the possibilities that Lawrence had somehow managed to keep the handgun hidden from Mosby inside Mosby’s car or that Lawrence somehow managed to acquire a loaded handgun in the minimal amount of time that he was apart from Mosby. The presence of the nine-

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challenge that had not been specifically raised at trial, where the trial attorney had argued generally that the intent requirement was not satisfied, where it appeared inevitable that the defendant would raise the issue in a post-conviction proceeding, and where the State made no showing of prejudice to its ability to address the issue.

millimeter cartridge in Mosby's vehicle, with the same caliber and manufacturer as the bullets used in the shooting, is more compatible with the State's theory that Lawrence loaded the weapon inside the vehicle than with Mosby's theory that the cartridge may have been in the car for an indefinite time for reasons unrelated to the shooting.

Furthermore, the jury could find it to be implausible that Mosby remained ignorant of Lawrence's intentions while he was speaking with Lawrence immediately after Lawrence cased the barbershop and immediately before Lawrence snuck inside. The jury could find it to be implausible that Mosby positioned himself where he could see the barbershop entrance without knowledge of what Lawrence intended to do. Finally, Edwards's eyewitness testimony, that Mosby moved towards Lawrence as Lawrence was tucking the handgun into his waistband, is consistent with the inference that Mosby already knew that Lawrence was carrying a gun.

In sum, this is not a case where the convictions must have rested on speculation. The evidence tied Lawrence to the killing and tied Mosby to Lawrence. Considering all the evidence of Mosby's close association with Lawrence before, during, and after the shooting, the jury could find beyond a reasonable doubt that Mosby helped or encouraged Lawrence in using the handgun to kill Collins with the intent to help Lawrence succeed.

## **II. Evidence of Other Crimes, Wrongs, or Acts**

Mosby contends that the circuit court "wrongly allowed" the State to elicit evidence that he committed crimes other than those with which he was charged.

Specifically, the State presented evidence that, several months before the murder, Mosby

accepted cash in exchange for connecting the electricity at Collins’s home in a way that would bypass the BG&E energy meters. The State theorized that Mosby developed a motive to kill Collins in the fallout from that criminal transaction.

As a general rule, “[e]vidence of other crimes, wrongs, or acts . . . is not admissible to prove the character of a person in order to show action in conformity therewith.” Md. Rule 5-404(b). Nevertheless, evidence that a defendant committed other crimes ““may be admitted if the evidence is substantially relevant to some contested issue in the case and is not offered to prove guilt based on propensity to commit crimes.”” *Winston v. State*, 235 Md. App. 540, 562 (quoting *Hurst v. State*, 400 Md. 397, 407 (2007)), *cert. denied*, 458 Md. 593 (2018). The Rule specifies that “[s]uch evidence . . . may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident.” Md. Rule 5-404(b). In a criminal trial, the court may admit evidence of a defendant’s prior crimes if it concludes: (1) that the evidence fits one of the recognized exceptions or otherwise has special relevance to a contested issue; (2) that the defendant’s involvement in the other crimes is established by clear and convincing evidence; and (3) that the need for and probative value of the other crimes evidence is not substantially outweighed by the danger of unfair prejudice. *See, e.g., Gutierrez v. State*, 423 Md. 476, 489-90 (2011); *Thomas v. State*, 213 Md. App. 388, 410-11 (2013).

Although the State purported to offer other-crimes evidence here as proof of motive, Mosby argues that the evidence did not fall within that exception. For evidence

of other criminal conduct to be admissible as proof of motive, “the prior conduct must be ‘committed within such time, or show such relationship to the main charge, as to make connection obvious[.]’” *Snyder v. State*, 361 Md. 580, 605 (2000) (quoting *Johnson v. State*, 332 Md. 456, 470 (1993)) (further quotation marks omitted). Mosby argues that the evidence ultimately failed to establish the necessary connection between his prior criminal acts and any of the State’s theories of motive.

Mosby correctly notes that the State offered “copious testimony” about his involvement in the scheme to steal electricity at Collins’s home. Any review of the trial record, however, shows that nearly all of the testimony on that matter came in without objection. Mosby cites just two portions from the transcript in which defense counsel sought to exclude some of the evidence related to his prior crimes: an oral motion in limine at the beginning of trial, and an objection during the testimony of one of several witnesses who discussed the energy theft scheme. Neither request was adequate to raise or preserve the issue of whether the State had adequately connected Mosby’s prior criminal acts to the alleged motive to kill Collins.

On the first day of trial, defense counsel made several motions in limine. One such motion sought to exclude evidence that Mosby “was fired from Baltimore Gas and Electric for some type of wrongdoing” as evidence of “a prior bad act.” Defense counsel argued that it would not be “appropriate” for the court to permit “any mention that [Mosby] was dismissed for doing something wrong.”

In response, the prosecutor argued that the evidence about Mosby’s participation

in illegal utility hookups would be relevant to prove Mosby's motive to kill Collins. The prosecutor proffered that the court would hear evidence of the following facts: that Mosby "worked for a sub-contractor for BG&E"; that Mosby "was doing on the side, illegal hookups or circumventing meters" for Collins and others; that "BG&E learned of this illegal bypass and launched an investigation"; that Collins "cooperated in the investigation"; that the "investigation ultimately led to the termination of [Mosby] and [Mosby's] mother from . . . BG&E sub-contractors"; and that "a dispute" arose between Mosby and Collins when Mosby "re-did the connection, disputed the fact that [Collins] had not paid money, and made threats towards [Collins]."

Based on those proffers, the court told defense counsel:

THE COURT: So at this point from what I've heard so far, certainly [defense counsel], you can make your objection at the appropriate time but from what I've heard so far, I would believe that the other crimes evidence was admissible for the limited purpose of showing motive, if that's given the State's proffer that that's what it will be offered for.

Contrary to Mosby's suggestion, the trial court did not simply deny the defense motion on the merits. Rather, the court denied the motion without prejudice and, in effect, deferred its ruling until a later point in the trial. "Judges have discretion to defer a pre-trial ruling on a motion *in limine* and ordinarily do so where the issue can be better developed or achieve a better context based on what occurs at trial." *Clemons v. State*, 392 Md. 339, 348 n.6 (2006). The court acted reasonably here when it directed counsel to object "at the appropriate time" when the evidence would be offered at trial.

Even if the trial court had denied the motion in limine outright, Mosby still would

have been required to object when the evidence was actually offered in order to preserve the issue. Under Maryland Rule 4-323(a), an objection to the admission of evidence is considered to be “waived” unless the party objects “at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent.” Accordingly, ““when a motion in limine to exclude evidence is denied, the issue of the admissibility of the evidence that was the subject of the motion is not preserved for appellate review unless a contemporaneous objection is made at the time the evidence is later introduced at trial.”” *Morton v. State*, 200 Md. App. 529, 540-41 (2011) (quoting *Klauenberg v. State*, 355 Md. 528, 539 (1999)). Under this Rule, the failure to object “as soon as” the evidence is elicited “and on each occasion” when the evidence is elicited “constitutes a waiver of the grounds for the objection.” *Berry v. State*, 155 Md. App. 144, 172 (2004).

Defense counsel failed to object on many occasions when witnesses testified about Mosby providing illegal electricity connections. No objection was made when Edwards testified that Mosby provided him with an “illegal BG&E hookup” during the year before the shooting. Instead, on cross-examination, defense counsel elicited testimony that Collins had “introduced” and “recommended” Mosby to Edwards because Mosby had already done an illegal electricity hookup for Collins. No objection was made when Collins’s girlfriend testified that, around late August or early September of 2015, Mosby connected the electricity at Collins’s home in exchange for \$350 in cash. No objections were made to the portions of Mosby’s recorded statement in which he admitted that, in 2015, he had accepted around “two hundred some dollars” from Collins’s girlfriend to

“cut [Collins’s] lights on.” By failing to object to this extensive evidence of his involvement in the energy theft scheme, Mosby forfeited his objection to other evidence of his involvement in that same crime. *See Yates v. State*, 429 Md. 112, 120-21 (2012); *Williams v. State*, 231 Md. App. 156, 194-95 (2016).

During this sequence of unchallenged evidence, defense counsel did make one objection to certain testimony about the BG&E investigation into the energy theft at Collins’s home.<sup>12</sup> When the prosecution first called the BG&E investigator, defense counsel objected to testimony “relating to [Mosby] being fired, the complaints about . . . the gas and electric being taken, and any investigation” that the investigator conducted or knew about. Defense counsel offered two specific grounds: first, that any information learned during the investigation was “hearsay”; and second, that “in discovery” the defense had not received “any reports” made by the investigator.

At that time, the trial court undertook to consider whether to admit evidence of Mosby’s other crimes under Rule 5-404(b). Outside the presence of the jury, the BG&E investigator testified that he started to investigate Mosby in early 2016 as a result of information provided by Collins, and that, as a consequence of the investigation, Mosby’s mother was dismissed in March 2016 from her employment with a BG&E subcontractor.<sup>13</sup>

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<sup>12</sup> The BG&E investigator testified after Edwards but before Ms. Manley-James and before the introduction of the recorded statement through Detective Forsythe.

<sup>13</sup> At the beginning of the trial, the prosecutor had proffered that Mosby himself had been fired from a subcontractor as a result of the BG&E investigation. The

During the ensuing discussion, defense counsel said that he “d[id]n’t have any problem with that . . . aspect of it, that [Mosby] was stealing,” but argued that “the fact that Collins told” the BG&E investigator about Mosby’s involvement was “hearsay.” The court commented that defense counsel “very well might be right” on the hearsay issue and told counsel to renew the hearsay objection at the appropriate time. The court then concluded, based on the examination outside the jury’s presence and on the State’s proffers, that the evidence about the energy theft scheme could be offered as proof of motive. Ultimately, the court precluded the investigator from testifying in front of the jury that Mosby’s mother had been dismissed by a BG&E subcontractor, when it became apparent that the investigator lacked personal knowledge of the dismissal.

Citing this portion of the transcript, Mosby tells us that this objection to other-crimes evidence “fell on deaf ears.” To the contrary, the transcript shows that the court made an appropriate ruling about the grounds that defense counsel actually raised in support of the objection. The defense had every opportunity to argue that the other-crimes evidence did not fall under the motive exception, but defense counsel specifically identified the hearsay rule and an alleged discovery violation as grounds for the objection. Where, as here, a party offers specific grounds for an objection, the party will be limited on appeal to the grounds explicitly raised in the trial court. *See DeLeon v. State*, 407 Md. 16, 25 (2008); *Klaunberg v. State*, 355 Md. at 541. That principle is

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investigator testified that, in fact, Mosby last worked for a subcontractor in 2014, well before the investigation began.

particularly applicable here, given that defense counsel specifically disavowed any objection to evidence that Mosby “was stealing” electricity and narrowed his objection to the introduction of that information through one witness, the BG&E investigator. In fact, the court gave defense counsel what he requested by sustaining the hearsay objection.<sup>14</sup>

During the remainder of the State’s case-in-chief, defense counsel did manage to prevent the State from presenting much of the “motive” evidence that the prosecutor had previewed at the beginning of the trial. The jury heard no testimony that either Mosby or his mother had been dismissed from BG&E subcontractors as a consequence of the fraud investigation. The court precluded Ms. Manley-James from testifying that Collins told her one week before the murder “that the BGE guy came to the barber shop . . . asking for \$200, that the argument got real heated[,] and that [Collins] felt [that] his safety was in harm’s way and may need to get protection.” Without evidence on those matters, the prosecution was left with an incomplete sketch of what might have happened between Mosby and Collins in the fallout from the BG&E investigation. There was some evidence that BG&E had disconnected the power at Collins’s house, that Mosby removed the meter to reconnect the power, that BG&E required Collins to pay to have his power restored, and that Mosby knew that Collins needed to pay BG&E.

On appeal, Mosby asserts that the State was ultimately unable to adduce evidence in support of the theories of motive that it had initially set out to prove. Mosby contends

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<sup>14</sup> The court also concluded that the alleged discovery violation did not occur. Mosby does not challenge that conclusion.

that, in light of the evidence actually admitted, the fact of his participation in the energy theft scheme “had no tendency to show that [he] had a motive to harm Mr. Collins.” He argues: “Without any evidence that Mr. Mosby or his family suffered any consequences from the investigation—or that Mr. Mosby even knew about it—the introduction of this evidence failed to provide any probative insight into Mr. Mosby’s potential motive, and instead only served to unfairly prejudice him.”

Whatever merits this argument might have, the record shows that Mosby never made it, or any variant of it, to the trial court. As Mosby correctly recognizes, the relevance of his participation in the energy theft scheme depended on the admission of other evidence connecting that prior crime to a theory of motive. In the two instances where the court discussed the motive exception to Rule 5-404(b), the court relied on the State’s uncontested proffers about what the evidence would show. Only later did it become apparent that the State did not have admissible evidence to establish the foundational facts about some theories of motive. At that point, it was incumbent on the defense to raise the issue so that the court could decide whether to strike the other-crimes evidence on the ground that the actual evidence varied from the original proffers.

Under Maryland Rule 4-323(a), “[w]hen the relevancy of evidence depends upon the fulfillment of a condition of fact, the court may admit the evidence subject to the introduction of additional evidence sufficient to support a finding of the fulfillment of the condition.” *See also* Md. Rule 5-104(b). When the court admits evidence “subject to the introduction of additional evidence sufficient to support a finding of the fulfillment of the

condition,” any earlier objection to that evidence “is waived unless, at some time before final argument in a jury trial . . . , the objecting party moves to strike the evidence on the ground that the condition was not fulfilled.” Md. Rule 4-323(a). Thus, a motion to strike is “the correct procedural tool when it becomes apparent that inadmissible evidence has previously been received, and when evidence has been admitted on condition that the necessary foundation would be supplied later.” Joseph F. Murphy, Jr., *Maryland Evidence Handbook* § 103, at 18 (4th ed. 2010). “If the necessary foundation is not supplied by whatever evidence is later introduced, [the objecting party] must move to strike the conditionally admitted evidence ‘on the ground that the condition was not fulfilled.’” *Id.* (quoting Md. Rule 4-323(a)).

Under Rule 4-323(a), defense counsel could have moved “at some time before final argument” to strike the evidence about the energy theft scheme, on the ground that the conditions for admitting that evidence had not been met. In fact, an opportunity to do so presented itself during the discussion about jury instructions. The court announced that it would instruct the jury to consider evidence that Mosby “committed the bad act of an illegal BGE hookup . . . only on the question of identity or motive” and not “for any other purpose,” including Mosby’s “bad character” or “tendency to commit crime.”<sup>15</sup>

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<sup>15</sup> In addition to arguing about the motive exception, the prosecutor asserted that the evidence that Mosby connected Collins’s electricity was relevant to the issue of identity. Specifically, the prosecutor stated that Ms. Manley-James could identify Mosby only because she had interacted with him when he connected the electricity. Mosby’s brief does not acknowledge the trial court’s ruling that the jury could consider the other-crimes evidence as proof of identity as well as motive.

Defense counsel made no objection to that instruction, but instead affirmatively expressed satisfaction with its wording.

As a whole, the record shows that the court never ruled on, and was never asked to rule on, the admissibility of the other-crimes evidence in light of evidence that had been actually admitted (and excluded) by the end of the State’s case. Having failed to raise that issue in the trial court, Mosby cannot raise it for the first time on appeal.

### **III. Performance of Trial Counsel in Closing Argument**

The next issue is closely related to the previous one. Mosby begins with the premise that there was no admissible testimony to show that Collins owed him money. Most notably, the court had excluded hearsay testimony that Collins told his girlfriend that Mosby had demanded money a few weeks before the shooting.

In closing arguments, however, Mosby’s trial counsel encouraged the jury to consider the possibility that Mosby sent Lawrence into the barbershop for the purpose of “jacking [Collins] up and getting the money” that Collins owed to him, and not for the purpose of killing Collins. On appeal, Mosby argues that his trial counsel “failed to provide minimally adequate legal assistance by describing excluded inculpatory motive evidence to the jury” during closing argument. On that basis, he contends that his convictions violate his constitutional right to counsel.

Both the Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights guarantee a defendant the right to counsel in all criminal prosecutions. *See, e.g., Coleman v. State*, 434 Md. 320, 334 (2013). This right to counsel

includes “the right to the effective assistance of counsel.” *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (citation and quotation marks omitted). Courts employ the two-part test established by the Supreme Court in *Strickland v. Washington*, 466 U.S. at 687, to evaluate whether a defendant was denied the effective assistance of counsel. The inquiry is well-known:

The defendant who claims that he or she received ineffective assistance of counsel, as a general rule under the test announced in *Strickland* and followed ever since, must make two showings: First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. In regard to the first, “performance” prong of *Strickland*, the defendant must demonstrate that counsel’s alleged acts or omissions, based on the facts of the particular case, viewed as of the time of counsel’s conduct, fell outside the wide range of professionally competent assistance. In regard to the second, “prejudice” prong, the defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

*Shortall v. State*, 237 Md. App. 60, 72, *cert. granted*, 2018 WL 4245663 (2018) (quoting *Taylor v. State*, 428 Md. 386, 396-400 (2012)) (brackets, citations, and other quotation marks omitted).

Mosby appears to recognize that, ““under the settled rules of appellate procedure, a claim of ineffective assistance of counsel not presented to the trial court generally is not an issue which will be reviewed initially on direct appeal[.]” *Addison v. State*, 191 Md. App. 159, 175 (2010) (quoting *Johnson v. State*, 292 Md. 405, 435 (1982)). The trial record ordinarily lacks adequate information from which to assess the performance of

defense counsel, “because the character of counsel’s representation is not the focus of the proceedings and there is no discussion of counsel’s strategy supporting the conduct in issue.” *Smith v. State*, 394 Md. 184, 200 (2006) (citing *In re Parris W.*, 363 Md. 717, 726 (2001)). ““The evidence introduced at trial . . . will be devoted to issues of guilt or innocence, and the resulting record in many cases will not disclose the facts necessary to decide either prong of the *Strickland* analysis.”” *Mosley v. State*, 378 Md. 548, 561 (2003) (quoting *Massaro v. United States*, 538 U.S. 500, 505 (2003)).

The Court of Appeals has consistently held that the most appropriate method for litigating the issue of ineffective assistance of counsel is through a separate evidentiary proceeding under the Maryland Uniform Post Conviction Procedure Act. *See, e.g., Mosley v. State*, 378 Md. at 558-59. Unlike direct appeals, post-conviction proceedings “allow for fact-finding and the introduction of testimony and evidence directly related to allegations of the counsel’s ineffectiveness.” *Id.* at 560. ““By having counsel testify and describe his or her reasons for acting or failing to act in the manner complained of, the post conviction court is better able to determine intelligently whether the attorney’s actions met the applicable standard of competence.”” *Addison v. State*, 191 Md. App. at 175 (quoting *Johnson v. State*, 292 Md. at 435). There are only a few “rare instances” in which an appellate court may decide the issue on direct appeal “when ‘the critical facts are not in dispute and the record is sufficiently developed to permit a fair evaluation of the claim.’” *Mosley v. State*, 378 Md. at 566 (quoting *In re Parris W.*, 363 Md. at 726).

Mosby insists here that the issue of ineffective assistance is “ripe for review,”

because, in his assessment, “the record is sufficiently developed” that “[n]o collateral proceeding or further fact-finding is necessary.” He argues that “[t]here is no conceivable circumstance under which it would be sound strategy” for his trial counsel to describe “inculpatory” facts not in evidence.

The State disputes Mosby’s characterization of his attorney’s closing argument. The State theorizes that counsel’s strategy in highlighting the possibility that Mosby intended to collect money from Collins was to persuade the jury that Mosby did not intend to have Collins killed.<sup>16</sup> The State further argues that defense counsel succeeded in part, as the jury found Mosby not guilty on the charges of first-degree murder and conspiracy.

Without question, there is some factual dispute regarding trial counsel’s strategy during closing argument. Testimony from the attorney would be helpful, and perhaps essential, in resolving that dispute. Because the existing record does not explain why trial counsel decided to make the arguments that he made, it would be inappropriate for this Court to attempt to evaluate the issue in this direct appeal where there is no opportunity for further fact-finding. *See Crippen v. State*, 207 Md. App. 236, 251-55 (2012); *Tetso v. State*, 205 Md. App. 334, 379 (2012); *Alford v. State*, 202 Md. App. 582, 606 (2011); *Addison v. State*, 191 Md. App. at 175; *Washington v. State*, 191 Md. App. 48, 71-72 (2010). Mosby’s claim that his trial counsel rendered ineffective assistance during

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<sup>16</sup> The State did not advance an alternative theory of guilt, under which Mosby was an accomplice to a robbery (or assault) of Collins, that Lawrence killed Collins in furtherance of that crime, and that the killing was a foreseeable result of that crime.

closing argument will be reserved for an initial determination at a post-conviction proceeding, “where there can be a studied evaluation of a proper record should [he] choose to pursue the matter.” *Johnson v. State*, 292 Md. at 435.

#### **IV. Trial Counsel’s Failure to Make a Pretrial Suppression Motion**

Mosby contends that his trial attorney rendered ineffective assistance by failing to make a timely and proper pretrial motion to suppress Mosby’s statement to police. As with the previous contention about the performance of counsel, the record is inadequate for this Court to address that contention in this direct appeal.

As previously mentioned, upon his arrest Mosby gave a recorded statement to two homicide detectives without an attorney present. Mosby read a form explaining his rights, including the right to have an attorney present during questioning. The detectives refused Mosby’s request for “a phone call” and at one point told him that he could only talk to his lawyer at “central booking.” Mosby agreed to sign the waiver after Detective Forsythe said that he was “not really waivin’ [his] rights” by signing, because he could “decide at any time” to invoke his rights. During questioning, Mosby mentioned that he was under the influence of “Percocets and Molly,” which he had taken in some unstated quantity “a couple hours” before the interview. Mosby proceeded to make a series of damaging admissions, including admissions that he had accepted cash from Collins’s girlfriend to connect the power at Collins’s home and that he drove to Monument Street with Lawrence on the night of the murder.

Soon after entering his appearance, Mosby’s attorney filed a motion styled as

“Omnibus Motion Pursuant to Rule 4-252.” That rule establishes pretrial deadlines (*see* Md. Rule 4-252(b)) for raising certain matters in criminal cases, including the matter of an “unlawfully obtained admission, statement, or confession[.]” Md. Rule 4-252(a)(4)). A motion filed under this Rule must “state the grounds upon which it is made” and must include “a statement of points and citation of authorities.” Md. Rule 4-252(e). If a defendant fails to raise such an issue “by motion in conformity with this Rule[.]” the matter is deemed to be “waived unless the court, for good cause shown, orders otherwise[.]” Md. Rule 4-252(a).

The omnibus motion made a series of generic assertions, including the assertion that “all admissions, statements[,], or confessions of the Defendant” had been “obtained involuntarily, forcibly and in violation of the Defendant’s [c]onstitutional and other legal rights.” The motion included a list of authorities such as the United States Constitution and *Miranda v. Arizona*, 384 U.S. 436 (1966), but it made no attempt to apply those authorities to the facts of Mosby’s case. A “bare-bones suppression motion” such as this one, providing “no notice as to the evidence it seeks to suppress or the reasons for doing so” is insufficient to raise an issue of whether evidence should be suppressed. *Sinclair v. State*, 444 Md. 16, 35 (2015); *see Denicolis v. State*, 378 Md. 646, 660 (2003) (holding that an omnibus motion “seeking a panoply of relief based on bald, conclusory allegations devoid of any articulated factual or legal underpinning” cannot be granted). Nothing in the record indicates that Mosby’s attorney sought to cure these defects by making a supplemental suppression motion before trial.

Trial counsel first challenged the admissibility of the statement on the second day of trial, when the State offered the recording of the interrogation into evidence during the testimony of Detective Forsythe. At a bench conference, counsel stated that he wanted to “make the record clear” that he was “objecting to the statement.” Counsel admitted that he “didn’t do it pre-trial,” but said that he believed that he could “object to a statement coming in at any time,” and so it did not “matter whether [he] object[ed] pre-trial or not.” The court overruled the objection, noting that the defense had not filed a timely motion to suppress. A moment later, during a discussion about redacting certain information from the recording, defense counsel commented that, “to be honest[,]” he “didn’t know” that the prosecutor was going to “introduce the statement[.]”

At the request of defense counsel, the court later delivered instruction 3:18 from the Maryland Criminal Pattern Jury Instructions, which directs the jury to disregard a statement to police unless the jury determines beyond a reasonable doubt that the statement was freely and voluntarily made. During closing statements, the prosecution played several excerpts from the interrogation recording, but the defense made no specific mention of Mosby’s statement.

On appeal, Mosby contends that he received constitutionally inadequate representation because his trial counsel failed to make a timely pretrial suppression motion. He argues that the attorney’s decision to wait until trial to seek to exclude the statement was based on “ignorance” of the law, rather than any conceivably sound strategy. He further argues that a motion to suppress “would have been meritorious” if

his attorney had filed a proper motion. Finally, he argues that “the outcome of [his] trial would surely have been different” if the court had excluded the statement.

Although the State disputes the merits of Mosby’s argument, the State begins by arguing that this Court should not review this claim of ineffective assistance based on the existing record. Because we agree with that contention, we will not attempt to address whether the statement should have been suppressed.

Generally, “the failure to preserve or raise an issue that is without merit does not constitute ineffective assistance of counsel.” *Gross v. State*, 371 Md. 334, 350 (2002). The question of whether a defendant suffered prejudice from counsel’s failure to raise an issue necessarily involves an examination of the merits of the issue that counsel failed to raise. *See id.* at 349-50. To demonstrate prejudice from the failure to make a suppression motion, the defendant must prove both that the motion was meritorious and that there was a reasonable probability that the verdict would have been different if the evidence had been suppressed. *See Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986). Absent an “evidentiary hearing . . . on the merits” of the suppression issue, the record is “incomplete with respect to prejudice” resulting from the failure to make the motion. *Id.* at 390.

In the present case, the very source of the alleged prejudice (the failure to make a proper suppression motion) leaves the record incomplete for the purpose of evaluating potential prejudice. If trial counsel had filed a motion to suppress Mosby’s statement in compliance with Rule 4-252, then the circuit court would have held an evidentiary hearing. The court could have resolved factual disputes, such as the apparent dispute

about Mosby's level of intoxication. The court would have considered the entire recording, not the trial exhibit that was redacted to keep certain prejudicial information away from the jury. The court could have made findings about the things said in the interrogation that the trial transcript says were "indecipherable" in the courtroom but that may be audible in the recording itself. If the trial court resolved these or any other factual issues in deciding the motion, the court would have been required to state its findings on the record. *See* Md. Rule 4-252(g)(1). Without those factual findings, this Court is ill-equipped to make its own appraisal of the suppression issue. *See Perez v. State*, 155 Md. App. 1, 26 (2004).

The opinion of the Court of Appeals in *Perry v. State*, 344 Md. 204 (1996), shows why it would be improper to attempt to decide Mosby's claim of ineffective assistance based on the existing record. In the *Perry* case, a defense attorney moved for the first time at trial to exclude an audio recording, based on an alleged violation of Maryland's wiretap statute. *Id.* at 223-24. The trial court overruled the objection, deeming the issue to be waived under Rule 4-252 and finding no good cause to excuse the requirements of that rule. *Id.* at 224. On appeal, the defendant asked the Court of Appeals to rule that the trial court should have excluded the recording or, in the alternative, to rule that his counsel's failure to file a timely motion to suppress amounted to ineffective assistance of counsel. *Id.* at 225.

The Court declined to decide either issue on direct appeal, reasoning that "a full evidentiary hearing" was needed to resolve the contention that the recording should have

been suppressed. *Perry v. State*, 344 Md. at 225-26. The Court explained that, “in order to approach the . . . matter fairly, the parties should be given substantially the same opportunity to develop a factual record, and legal arguments based thereon, in presenting and responding to [the] belated suppression motion that they would have enjoyed in presenting and responding to a pretrial suppression motion.” *Id.* at 226. The Court reasoned that the defendant’s unilateral decision to offer the trial record as a substitute for the suppression hearing record could not “deprive the State of the procedure to which it is entitled.” *Id.* at 226-27.<sup>17</sup>

The *Perry* decision dictates our result here. Mosby’s claim that his trial counsel was ineffective in failing to make a pretrial suppression motion should be considered in the first instance at a post-conviction proceeding, “where a full, factual record can be made.” *Perry v. State*, 344 Md. at 227. Our decision here is entirely without prejudice to Mosby’s ability to raise the issue in a post-conviction proceeding. *Id.* at 228.

The foregoing reasoning on this issue focuses on the prejudice prong of the *Strickland* test rather than the performance prong. Despite the indications that Mosby’s trial counsel mistakenly believed that he could challenge the voluntariness of the statement at trial, the State also argues that “there may have existed a strategic reason” not to challenge the admissibility of the statement before trial. The State theorizes that

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<sup>17</sup> *Perry*’s case returned to the Court of Appeals three years later, on an appeal from the denial of his petition for post-conviction relief. *See Perry v. State*, 357 Md. 37 (1999). In that opinion, the Court noted that the post-conviction court had done what the Court had “directed it to do” in the earlier opinion by “hold[ing] a suppression hearing itself and rul[ing] on admissibility” of the challenged evidence. *Id.* at 56.

the defense attorney “may have chosen to roll the dice in order to paint the police in a negative light by making it appear as though they violated Mosby’s right to counsel.” The State remains free to pursue that argument if Mosby raises the issue in a post-conviction proceeding.

**CONCLUSION**

For the reasons stated above, the judgments are affirmed.

Mosby is not entitled to a judgment of acquittal on any of the charges against him, because the State produced sufficient evidence to support the inference that he knowingly aided or encouraged the fatal shooting of Collins.

Mosby failed to raise adequately at trial the issue of whether the State should have excluded the evidence of Mosby’s participation in the energy theft scheme.

Finally, Mosby is not entitled in this direct appeal to raise the contentions that his trial counsel rendered ineffective assistance during closing argument or by failing to make a pretrial suppression motion. He is fully entitled to raise those two contentions in a post-conviction proceeding.

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