Circuit Court for Montgomery County
Case No. 131258C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 371

September Term, 2019

JOSE ZALDIVAR-MEDINA

v.

STATE OF MARYLAND

Nazarian,
Gould,
Wright, Alexander
(Senior Judge, Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed: June 3, 2021

Jose Zaldivar-Medina was convicted by a jury in the Circuit Court for Montgomery County of two counts of first-degree assault, two counts of conspiracy to commit first-degree assault, malicious destruction of property, conspiracy to commit malicious destruction of property, and participation in a criminal gang. After a postconviction proceeding, he was permitted to file this belated appeal. He argues that the trial court gave the jury legally erroneous jury instructions on accomplice liability and that the evidence was insufficient to support his convictions for first-degree assault and conspiracy. We affirm.

I. BACKGROUND

On April 7, 2016, Eric Madariaga-Chavez and his brother, Miguel, got into Eric's blue Nissan Altima and went to the Lakeforest Mall in Montgomery County.[1] Each wore clothing that contained the color red. After they went inside the mall to exchange a cell phone, they returned to their car to find all four tires slashed.

Eric looked around and saw five or six people coming towards them from the Cider Mill area near the mall. These individuals were saying "MS-13" and making hand signs as they approached.[2] Because he believed that the hand signs indicated that these people intended to kill him, Eric told Miguel to run for his life. They were chased towards the mall entrance where they encountered Jordi Sanchez Rodriguez, a person they knew from

[1] For sake of clarity, and meaning no disrespect, we shall refer to the Chavez brothers by their first names.

[2] The parties stipulated that MS-13 is a criminal gang and that its members "engage in a pattern of criminal gang activity as alleged," and that Mr. Zaldivar-Medina knew that MS-13 was a gang that engaged in said activity.

playing soccer in the area.[3] Mr. Rodriguez was armed with a knife and told Eric that his "time had arrived." Upon hearing that, Eric ran into the mall, followed by Miguel. He testified that Mr. Rodriguez stabbed Miguel during the pursuit.

Eric called 911 during the chase and the jury listened to the recording. During the 911 call, Eric described his attackers and indicated that he thought they were waiting for him near his car. He also told the dispatcher that he thought they all had knives, although he saw only two. He indicated as well that his brother had been cut. A video from the parking lot was admitted into evidence, and Eric identified himself, his brother, and Mr. Rodriguez in that video.[4]

Miguel corroborated his brother's account of the incident. He confirmed that they ran towards the mall after they saw the group chasing them, and that he recognized Mr. Rodriguez near the entrance. He also saw Mr. Rodriguez pull a knife on Eric, and after Eric escaped into the mall, Mr. Rodriguez came after him. According to Miguel, Mr. Rodriguez started "insulting" him and was making motions as if he was going to kill him. Mr. Rodriguez told Miguel that he was in MS-13 and that "this is the gang, son of a bitch," then stabbed him in the "rear end." Miguel sustained what one of the testifying

[3] Mr. Rodriguez testified at trial. Although he is referred to in the trial transcript primarily as Jordi Sanchez, the parties refer to him as Jordi Rodriguez in their appellate briefs and we too shall refer to him as Mr. Rodriguez as a matter of consistency.

[4] A video recording of the incident was admitted into evidence and played for the jury. The parties stipulated that the video surveillance was properly authenticated and depicted the events in question accurately. At various points during the trial, the State played portions of the video to illustrate the witnesses' live testimony. The prosecutor referred to this video during closing and argued that it corroborated other evidence admitted at trial.

officers described as a "superficial cut" to the left buttock.

Mr. Rodriguez testified for the State at trial. He stated that he knew Mr. Zaldivar-Medina and identified him for the record. Mr. Rodriguez acknowledged that he was incarcerated at the time of this trial for first-degree assault on Miguel. Mr. Rodriguez confirmed that he was at the Lakeforest Mall on the day in question and that he was photographed outside in the parking lot along with other individuals, including Mr. Zaldivar-Medina.

Mr. Rodriguez also confirmed that Mr. Zaldivar-Medina was with him, along with three other people, when the fight broke out in the parking lot. Mr. Zaldivar-Medina ordered Mr. Rodriguez to show up to the mall. He testified that Mr. Zaldivar-Medina told him that "we were going to do something to someone." Mr. Rodriguez did as he was told out of "fear."

Mr. Rodriguez testified that he met Mr. Zaldivar-Medina near the entrance to the mall, where he told him to "go stab a person," referring to Miguel. Mr. Rodriguez explained that Mr. Zaldivar-Medina told him to stab the victim because "[s]upposedly they were gang members" of a rival gang known as "Black 18." Mr. Rodriguez admitted that he was the one who slashed the tires of the Chavez brothers' vehicle.

Mr. Rodriguez then confirmed that when the brothers came out and saw that their tires had been slashed, he and his companions chased them. Mr. Rodriguez admitted that he stabbed one of the brothers during the pursuit. He later clarified that "I didn't stab him. I just scratch him over the clothes." Afterwards, Mr. Rodriguez met Mr. Zaldivar-Medina and told him that he stabbed one of the brothers, to which Mr. Zaldivar-Medina replied

"that's good."

Mr. Rodriguez testified that Mr. Zaldivar-Medina told him that he was in MS-13, and specifically the Coronado clique. Mr. Zaldivar-Medina told him that he was ranked a "homeboy" in the gang. Mr. Rodriguez agreed that he did "favors" for the gang members.

On cross-examination, Mr. Rodriguez admitted that he was in a separate section of the mall parking lot during the incident and that he was the only one who chased the victims. He testified that Mr. Zaldivar-Medina did not tell him to slash the tires of the Chavez brothers' vehicle. On redirect examination, Mr. Rodriguez maintained that he was afraid of Mr. Zaldivar-Medina "[b]ecause he's the boss of our gang or something."

Detective Hugo Salazar testified that he spoke to Mr. Zaldivar-Medina on June 8, 2016, after he was arrested. A redacted recording of that interview was admitted into evidence, as was a redacted transcript translated from Spanish to English.[5] During the trial, an interpreter, Marta Sophia Goldstein, read the entirety of the redacted interview, as transcribed in the trial transcript.[6] During that interview, Mr. Zaldivar-Medina agreed that he was a "homeboy" in MS-13. When asked who did the stabbing, he said that "[i]t was Jordi. He's the one who stabbed" and that it was "[j]ust to impress (unintelligible)."

[5] Neither the recording nor the transcript are included with the record on appeal.

[6] During that reading, the speaker during the interview was unidentified, so the interpreter's testimony does not differentiate between question and answer. In its brief, the State proffers that the speaker was Mr. Zaldivar-Medina. Mr. Zaldivar-Medina doesn't disagree, so we will follow suit. *See Commercial Union Ins. Co. v. Porter Hayden Co*., 116 Md. App. 605, 643 (1997) (observing that, as officers of the court, "if counsel makes a representation, . . . counsel's word is counsel's bond unless there is something to the contrary that the opponent can bring in").

Mr. Zaldivar-Medina confirmed he was there along with several other gang members from both MS-13 and its rival, 18th Street. Mr. Zaldivar-Medina stated that "Jordi," meaning Mr. Rodriguez, slashed the tires on the blue vehicle and that he was present when that happened. As recounted to the jury by the translator, Mr. Zaldivar-Medina described the encounter to the officers in detail:

> Just like they know who we are, we know who they are. Okay. You watched them. That's what I mean. And the Peruvian was one of the ones who was there that day? No. He wasn't there that day. How do you know who they were? That he runs with them? Well yeah. He hangs with them. Well, yeah. They have a friend who has three sixes on his head. The three sixes means 18. They have it fixed who has it like that with three sixes tattooed to his head.
>
> So what like we saw him there and after -- after we slashed the tires on his car it happened. We were walking. Jordi had a knife. And Jordi ran all the way that way. And we were coming this way and we were just coming practically just to look. And you ran what? Following them? Following them, you know. And they escaped? They ran from all of you? Yeah. When they saw us coming they don't know me. They don't know me. I don't know them either. The one they know is Insoportable. [sic] Or Psycho. But to tell you the only one I know is Montana.
>
> You know. Tony Montana. The one is who 35. 18 tattoos. Uh-huh. I do know him personally but he wasn't there. No. He wasn't there. So then when they saw us they took off running but I think Jordi stabbed of them you know. Okay. He followed him and threw him on the ground. You know. So that's what happened.

Mr. Zaldivar-Medina told the questioner that although he did not have a knife, he wanted to "scare him." When asked if they "ambushed him," Mr. Zaldivar-Medina replied affirmatively. He confirmed that he knew the victims had been inside the mall, but maintained that "Jordi was the one who did everything." He also agreed that "Jordi planned

all this to go up in the Coronado clique."

The questioner then asked Mr. Zaldivar-Medina if he ordered this assault to see if Jordi would "pass the test" to see if they could trust him, and he replied "I didn't want to do anything." He stated "[s]o well, if you want let's go. Let's go. Look. I told him until I see they are beating you up I'm not going to get involved because there are four of you. They are not two, three, four at the max. You don't need my help. But because I'm the homeboy. They're supposed to take care of me. Not me them." Mr. Zaldivar-Medina continued:

> The thing is I just told them what they could do but I didn't tell them -- I didn't tell them to go do it. I told them how to do things. Okay. So what did you explain to them? I told them look. What you can do here is look for the car. And when you look for the car slash the tires so they won't run in the car. Uh-huh.
>
> And then well [sic] fight it out then. Okay. Now don't do it you jerk if they have a piece or a gun in the car you're not going not get them that way.

Mr. Zaldivar-Medina agreed that his companions asked him what they should do, whether they should just "screw with his car," and he replied, "I said to them if you want. I said to them well then you know what they have to do and I had to do -- let them do it and I left." He apparently regretted giving this order, stating, "primarily in the place they did it was my mistake to tell them to do it. Because it's a mall. It's cameras. It's everything." He expressed further regret:

> That was stupid. So well, what's done is done and like what I'm telling you the one who was all hype to do that was Jordi. You know. And do you think -- you think for what? He didn't go up. Because he didn't go up. Okay. He didn't go up. To go up in the clique. He didn't go up. And when he didn't even kill

the guy of course. And what he did was get himself hot.

Asked whether Mr. Rodriguez "did it to be promoted?," Mr. Zaldivar-Medina replied, "I mean to show that he's capable? Yeah. Well, I know he did it for that but if he had been another person he would have thought it out better. He wouldn't have done that job." Mr. Zaldivar-Medina then stated that, although he knew one of his friends had a knife, he did not know that Mr. Rodriguez had a knife. He continued to point the decision-making finger at Mr. Rodriguez:

> The thing is I never had the plan to I'm going to go stab someone. Okay. And you were never the one who ordered nothing. I mean you gave your opinion. Like gave them a strategy. Uh-huh. But you didn't tell them to do it. The thing is we were practically doing it like a play from the clique. We weren't doing it because if it had been a clique move it would have been different. But that wasn't a move from the clique. That was just simply because they wanted to do it and they felt like it because like you said they've got to ask permission because they with their own on their feet and hands and wanted to go fool around they did. Okay.
>
> * * *
>
> They can't do that because they know why I would say no. They already know why they know I wasn't going to give myself away like that because I mean like I'm telling you they wanted to do that. If they had gone to something else what I would have done? Call Cabanas. Cabanas had something new. Like I'm telling you I didn't know he was going to go stab.
>
> If I'd known that to stab and things like that you call. You call the people in that side. You call the clique. And if there is no time to do it what happens? I mean you're telling me -- didn't I tell you I thought they were going there to fight. You know. That's what I'm telling you. You know. Because if they had gone -- but if they had gone to stab I would have called Cabanas. Hey Cabanas. Is this what they want to do here. Uh-

huh. Okay.[7]

Mr. Zaldivar-Medina maintained that he did not order the stabbing, but agreed that he authorized a fight with the victims. But he acknowledged that he knew that someone had a knife with them because he saw them slash the tires. And he acknowledged that he gave them "advice":

> So why I ask you it's the last time of course to make sure there's no confusion. At no time did you order Jordi or any of the other three. They did it there because they wanted to do it, man. You just -- you just gave them a plan. Gave them one. Yeah. Well, it's like you call it advice. You know. Yeah. I know.

Detective James Mathews, accepted as an expert in criminal street gang intelligence and gang activity, testified that a "gang" in Maryland is defined as "a group of three or more people who have some kind of common identifier like a sign or symbol or color who engage in a pattern in criminal activity and who have some kind of organizational command structure." A "validated gang member," he said, is someone "who meets two or more of our standardized validation criteria." That criteria consists of "self-admission," identification by a reliable informant, association with gang members, gang tattoos or attire, or display of certain "hand signs or any other documents or indicia of gangs," including social media and personal accounts.

Detective Mathews testified that the MS-13 gang had been active in Montgomery County since the 1990's, and that there were several hundred members in the county at the

[7] "Cabanas" appears to refer to either another individual or clique connected to MS-13. Mr. Zaldivar-Medina indicated that "Cabanas" ran the mall and sold drugs in the area.

time of appellant's trial. Blue and white were the primary colors for MS-13, and hand signs include "the gara" or "devil's horns," which can be done forward or backwards. He further noted that their attire includes the number "13" or anything with the "'76s jersey" (because seven plus six equals thirteen). They also might wear attire with symbols representing the letters "MM," such as "Marilyn Monroe," or even "Mickey Mouse," standing for the Mexican mafia gang out of California, as well as other symbols connected to MS-13.

Detective Mathews described the structure of MS-13 as including "ranking" and "cliques." Cliques are subsets "operating in a given area," and the lower ranks are made up of "paros" or "tira paro," who is a "hang around," or someone "doing favors for the gang." The next step up is the "chicayo" or "observation," meaning someone who has established some level of trust. Above that, a "full-fledged member" is also known as a "homeboy" or "home girl." This includes an initiation by being beaten by other members of the gang for thirteen seconds. There is also a leader above all of these positions, who is referred to as "the word or the first word or the poligraro (phonetic sp.) or the shot caller."

Detective Mathews explained that "MS-13 relies heavily on violence" to recruit and retain members for life. And, he said, it would be unlikely that lower ranking gang members would disobey orders from higher ranking members because of the structure of the gang, the importance of reputation to the gang, and the potential consequences of disobedience through violence. He also testified that a "chavala" means a rival gang, and in this area, "most commonly they are referring to a member of the 18th street [gang]." The 18th Street gang is known for wearing the color red around Montgomery County. As part of maintaining the reputation of MS-13, it would be common to challenge rivals. This, along

with criminal behavior, is a way for the gang to "announce their presence" and to gain "notoriety," "respect," and "power."

Turning to the facts in this case, Detective Mathews opined that, based on his review of the evidence, Mr. Rodriguez was a "para" in MS-13. This evidence included, but was not limited to, a photo from Mr. Rodriguez's Facebook page of him with other known members of MS-13. In the photo he was wearing a blue Chicago Bulls hat, with "the horns on the bull representing Devil's horns," which supported the expert's opinion.

Detective Mathews also relied on Mr. Rodriguez's testimony that he knew appellant to be a member in MS-13, specifically a "homeboy." Detective Mathews relied on Mr. Rodriguez's testimony that he did favors for the gang and that this "paro-homeboy relationship" supported a "junior senior relationship between Jordi and Jose with Jose being the senior ranking member." And he relied on evidence that Mr. Zaldivar-Medina called Mr. Rodriguez and that Mr. Rodriguez feared retribution because the call "demonstrate[d the] influence that a senior ranking member has over a junior ranking member and also the importance of following the rules of the gang."

The detective found Mr. Rodriguez's testimony significant because he indicated he was told by Mr. Zaldivar-Medina that Eric and Miguel were members of the rival 18th Street gang. He explained, "that's significant because if he doesn't know the people he stabbed and he thinks they're gang members then it's obviously a gang motivated incident," along with the fact that Lakeforest Mall and the Cider Mill area, near the mall, were known to be associated with MS-13.

Detective Mathews reviewed an earlier statement Mr. Rodriguez had made to

Detective Salazar in June 2016.[8] Detective Mathews testified (without objection) that Mr. Rodriguez stated that Mr. Zaldivar-Medina ordered him to come to the mall and that he needed to obey an order from a homeboy, like Mr. Zaldivar-Medina. According to this earlier statement, Mr. Zaldivar-Medina was going to promote Mr. Rodriguez after this assault.

Detective Mathews confirmed, again without objection, that he met Mr. Zaldivar-Medina on another occasion and who opined that he was a homeboy, nicknamed "Yahiko," in MS-13. Mr. Zaldivar-Medina met seven out of eight criteria for association with the gang—the only exception was that he did not have any gang-related tattoos. The detective based his conclusion on Mr. Zaldivar-Medina's admission, as well as photographs, his statement to police, and other evidence including information extracted from his cellphone and a Spanish-language music video.

Detective Mathews then connected the gang to the crime itself:

> [THE STATE]: Is there any significance in your opinion as to where this crime occurred that is indicia of being gang related?
>
> [DETECTIVE MATHEWS]: Yes. Lakeforest Mall and the Cider Mill area are both heavily controlled by MS-13.
>
> [THE STATE]: And in terms of the facts of what occurred, the stabbing in this case?
>
> [DETECTIVE MATHEWS]: Absolutely. I mean a stabbing of two guys that are, according to both the statements of Jose and Jordi, they are both alleged rival gang members and these guys both happen to be wearing red on the day of the incident.
>
> [THE STATE]: What about who was involved, if anything, is indicia of gang activity in terms of the participants Jose and the

[8] That statement does not appear to have been entered into evidence and is not included with the record on appeal.

> people Jose is associated with?
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> [DETECTIVE MATHEWS]: Sure. Jose -- Jose and Jordi both being documented gang members. Both arrested for this crime and they both name other -- three other individuals who we know as validated gang members as well.
>
> [THE STATE]: What about the alleged motive that has been given by Jordi and Jose for why the crime occurred?
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> [DETECTIVE MATHEWS]: The discussion of promotion either Jordi saying that Jose wanted him to get promoted or being ordered to do this or Jose's version that Jordi did it to get promoted but either way the concept of doing the crime to get promoted within a gang.

Detective Mathews testified that Mr. Zaldivar-Medina indicated in his statement that Mr. Rodriguez was "his paro and was given to him," indicating a "mentor mentee relationship," and that a homeboy was responsible in the gang for the actions of his paro. Detective Mathews concluded by testifying, again without objection, that Mr. Rodriguez would be compelled to obey:

> [THE STATE]: In your expert opinion, would a paro disobey a homeboy in front of him?
>
> [DETECTIVE MATHEWS]: Very unlikely because they know they would be punished for that.
>
> [THE STATE]: And a paro would know this custom?
>
> [DETECTIVE MATHEWS]: Yeah.
>
> [THE STATE]: And you've talked previously about committing crimes or putting in work as a way of promotion within the gang. Who gets to decide sort of the work that gets put in in your opinion? Is it the paro or the homeboy who decides when that promotion happens?
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> [DETECTIVE MATHEWS]: No. The paros don't decide. It's the homeboys that decide, you know, what crimes they're going to commit and when they're going to commit them.

The jury convicted Mr. Zaldivar-Medina of two counts of first-degree assault, two counts of conspiracy to commit first-degree assault, malicious destruction of property, conspiracy to commit malicious destruction of property, and participation in a criminal gang. He did not file a timely direct appeal but sought post-conviction relief alleging ineffective assistance of counsel. After a hearing, and with the consent of the parties, the post-conviction court granted his petition in part and ordered limited relief in the form of the right to file a belated appeal. We include additional details as appropriate below.

II. DISCUSSION

Mr. Zaldivar-Medina raises two questions on appeal.[9] *First*, he argues that the circuit court gave the jury legally incorrect instructions on accomplice liability. *Second*, he contends that the evidence was insufficient to support his convictions for first-degree assault and conspiracy.

A. The Circuit Court Did Not Err In Instructing The Jury On Accomplice Liability.

Mr. Zaldivar-Medina contends *first* that the court erred in instructing the jury on one of two different theories of accomplice liability. At issue are the following jury instructions:

> Accomplice liability: The defendant may be guilty of first degree assault, second degree assault or malicious destruction of property as an accomplice even though defendant did not

[9] Mr. Zaldivar-Medina phrased the Questions Presented in his brief as follows:

> 1. Did the trial court err in instructing the jury on accomplice liability?
>
> 2. Was the evidence insufficient to sustain the convictions for assault in the first-degree and conspiracy thereof?

> personally commit the act that constitute that crime. In order to convict the defendant of first degree assault, second degree assault or malicious destruction of property as an accomplice, the State must prove that the first degree assault, second-degree assault or malicious destruction of property occurred and that the defendant with the intent to make any of these crimes happen knowingly, aided, counseled, commanded or encouraged the commission of the crime or communicated to a participant in the crime that he was ready, willing and able to lend support if needed. A person need not be physically present at the time and place of the commission of a crime in order to be, in order to act as an accomplice. The mere presence of a defendant at the time and place of the commission of the crime is not enough to prove that the defendant is an accomplice. If presence at the scene of the crime is proven that fact may be considered along with all of the surrounding circumstances in determining whether the defendant intended to aid a participant and communicated that willingness to a participant. The defendant may also be found guilty of the accomplice of a crime that he did not assist in or even intent to commit. In this case, in order to convict the defendant of first degree assault, the State must prove beyond a reasonable doubt that (1) the defendant committed the crime of second degree assault either as the primary actor or as an accomplice, (2) the crime of first degree assault was committed by an accomplice and (3) the crime of first degree assault was committed by an accomplice in furtherance of or during the escape from the underlying crime of second degree assault. It is not necessary that the defendant knew that his accomplice was going to commit an additional crime. Furthermore, the defendant need not have participated in any fashion in the additional crime. In order for the State to establish accomplice liability for the additional crime, the State must prove that the defendant actually committed the planned offense or the defendant aided and abetted in that offense. And that the additional criminal offense, not within the original plan was done in furtherance of the commission of the planned criminal offense or the escape therefore.

Mr. Zaldivar-Medina doesn't challenge the court's instruction on the first theory, *i.e.*, that he aided and abetted Mr. Rodriguez in the first-degree assault (the stabbing and

attempted stabbing of the two victims). He argues that the court erred in instructing the jury on the alternative theory, *i.e.*, that he could be guilty of first-degree assault if they found that he aided and abetted Mr. Rodriguez in the second-degree assault *and* that Mr. Rodriguez committed first-degree assault in furtherance of the second-degree assault.[10]

Mr. Zaldivar-Medina recognizes, as he must, that the Court of Appeals approved the latter type of liability in *Sheppard v. State*: "[a]s a general rule, when two or more persons participate in a criminal offense, each is responsible for the commission of the offense and for any other criminal acts done in furtherance of the commission of the offense or the escape therefrom." 312 Md. 118, 121–22 (1988), *abrogated on other grounds*, *State v. Hawkins*, 326 Md. 270 (1992).

Nevertheless, he argues that: (1) "the court's instruction was improper because it erroneously allowed the jury to find [him] guilty of a specific intent crime based on the intent of another"; (2) *Sheppard* is distinguishable and does not apply because there was no "incidental" crime here, apart from the different levels of intent; and (3) *Sheppard* does not apply because of the Court of Appeals's holding in *State v. Jones* that "[f]irst-degree assault, either intent to inflict serious physical injury or assault with a firearm, cannot, as a matter of law, serve as the underlying felony to support felony murder." 451 Md. 680, 708 (2017). Mr. Zaldivar-Medina argues that, by "parity of reasoning," he could not have been

[10] Mr. Zaldivar-Medina was convicted of two counts of first-degree assault, one for each Chavez brother. In his second question presented, he challenges the sufficiency of the evidence as to both of those convictions and their accompanying *mens rea*, collectively. As a result, he does not contend that Mr. Rodriguez's intent differed as to either or both of the victims.

guilty of accomplice liability under *Sheppard* in light of *Jones* because the planned offense in this case, the second-degree assault, was "an integral element of the charged offense," the first-degree assault.

The State responds that Mr. Zaldivar-Medina did not properly preserve those arguments for appellate review because his objections to the instruction did not specifically raise these three grounds, so a little context is necessary. Before the court instructed the jury, the State asked the court to instruct on both forms of accomplice liability contained in the pattern instruction, and analogized the charge of first-degree assault to felony murder:

> So that the defendant under the accomplice liability theory would be liable for assault one even if he only intended an assault two to occur if the assault one occurred in furtherance of the assault two that he intended. And that is exactly what I believe has been generated by this case. In his statement he says his intent was to scare these people only. And that he didn't know Jordi had a knife and that he didn't order a stabbing. But he gave advice and consent for a scaring and fight. So if we believe the defendant's statement he gives advice and consent for a fight, a two, but a one occurs in furtherance of the two, just like felony murder. That's exactly what this intended and the State believes that that has been fairly generated.

See Maryland State Bar Ass'n, *Maryland Criminal Pattern Jury Instructions* 6:00 (2020) ("MPJI-Cr").

Defense counsel responded as follows:

> Part of my problem is actually just a little bit of confusion that I think Your Honor had initially. And I've decided I would -- it would wind up being my argument that what was intended was a slashing of the tires. Not an intent to frighten based on the -- based on the testimony. In fact, ultimately my argument

> would be that it was discouraged based on the statement. So I would defer to the court as to whether the court thinks that intent to frighten was generated and if so that's what it would be as [the State] -- I mean my argument to the jury are certainly going to be something different to this.

The State explained that it was relying on the theory of liability articulated in *Sheppard*:

> So if they believe he only intended a simple assault but that what Jordi actually did was assault one and they find that the assault one that Jordi perpetrated was in furtherance of the assault two that he intended then they can also find him guilty of an assault one even though he did not intend an assault one to occur. That's a secondary theory upon which he has criminal culpability for an assault one.

The court responded by observing that, unlike a situation where felony murder is at issue, no one here was killed and that that it thought the difference between first- and second-degree assault was only a matter of degree:

> I guess the problem I'm having with this is the example you gave about felony murder that's very different from this situation because for felony murder they just meant to rob somebody and then somebody got killed. So the additional crime is the murder as opposed to the robbing. But in this case the evidence was generated that they intended to assault. So it's just like a different degree. So I'm not sure if that's an additional crime or not.

The State replied by citing the elements in the pattern instruction:

> THE COURT: But the intent was to hurt these people and that's what happened.
>
> [THE STATE]: No. He said the intent was to scare, Your Honor. So Your Honor this would also be implicit if [Defense Counsel] and I agree to do a robbery and I have a gun and I turn that robbery into an armed robbery, [Defense Counsel] would still be on the hook for the fact that I upped the ante with a weapon because my armed robbery was done in furtherance

> of the robbery that we agreed to. And that's all the requirement is.
>
> You are on the hook for all other crimes. And there are two separate crimes. There are two separate standards of proof. There are two separate elements of proof. Two completely separate penalties. One is a felony. One is a misdemeanor. They are, indeed, separate crimes. All other crimes incidental thereto if done in furtherance of the commission of the planned offense. And then it goes on in order to establish complicity for the other crime committed during the course of the criminal episode the State must prove that the accused participated in the principal offense either as a principal in the first degree, a principal in the second degree or an accessory after.
>
> So a perpetrator, an aider or an abettor or an inciter. And in addition the State must establish that the charged offense, assault one, was done in furtherance of the commission of the principle offense, assault two. So that's all that requires. That's all that is requiring. That there be a crime and that one crime be in furtherance of the other. And that's sort of the point of this issue, Your Honor, is that it's done when someone ups the ante.
>
> The person who is doing the ordering, Your Honor, the person who is doing the inciting shouldn't able to wipe their hands because the person who went and did the crime upped the ante. They should still have criminal culpability for that. That's exactly what's in the instruction.

The court and counsel then looked at Mr. Zaldivar-Medina's statement. Defense counsel maintained that Mr. Zaldivar-Medina had intended only to scare the victims, and the court stated that was sufficient to generate the instruction for the alternative theory of accomplice liability under *Sheppard*:

> THE COURT: Show me in the transcript where he's only talking about scaring.
>
> [THE STATE]: Yes, Your honor. And it might take me a minute. I apologize, Your Honor.
>
> THE COURT: Okay. I see it. Page 119. The defendant talks about wanting to run after them to scare them. So based on that

> I think there has been generated that the additional crime would be first degree assault. And the attendant crime of second degree assault.
>
> [DEFENSE COUNSEL]: And Your Honor I would just add I mean if you go a couple lines up and a couple of lines down we weren't going to catch them. That's a lie. We were really to scare them. I don't think it was --
>
> THE COURT: Say that again?
>
> [DEFENSE COUNSEL]: I was going to say just if you go a few lines up and a few lines down like was there an intent to do something they didn't believe they were going to be able to do and I guess it comes down to argument as to whether or not it was an imminent threat and things of that nature.

Although the court remarked that "the jury is probably going to be confused by this," it ultimately agreed to give the modified version of the instruction as set forth above. At the end of that day, defense counsel noted its disagreement by stating, "as to the jury instructions if the court could just note an objection to the accomplice liability, specifically the intended -- the intended crime and additional crime. I would just -- we would just note that." The court replied that counsel should do that the next day, when instructions were given to the jury.

The next day, the final day of trial, the following transpired before jury instructions:

> [DEFENSE COUNSEL]: Oh, Your Honor, I thought before bringing the jury in we were just going to mention it. Just for purposes of the record, I would just note an objection as to the instruction as to accomplice specifically the first offense and additional (unintelligible), the offense and then the additional offense. I just want to put that on the record.
>
> THE COURT: All right the objection will be noted.
>
> [DEFENSE COUNSEL]: Thank you, Your Honor.

After the court gave the instruction, defense counsel renewed the objection, stating at a

bench conference, "That's right (unintelligible). You know my objections (unintelligible)."

Maryland Rule 4-325(e) requires parties objecting to jury instructions to object after the instruction is given and to state the grounds distinctly:

> No party may assign as error the giving or the failure to give an instruction unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection. Upon request of any party, the court shall receive objections out of the hearing of the jury. An appellate court, on its own initiative or on the suggestion of a party, may however take cognizance of any plain error in the instructions, material to the rights of the defendant, despite a failure to object.

"[T]he purpose of Rule 4-325(e) is 'to give the trial court an opportunity to correct its charge if it deems correction necessary.'" *Watts v. State*, 457 Md. 419, 426 (2018) (*quoting Gore v. State*, 309 Md. 203, 209 (1987)). Even so, appellate review may not be foreclosed if the defendant complies substantially with the preservation requirement:

> If the record reflects that the trial court understands the objection and, upon understanding the objection, rejects it, this Court will deem the issue preserved for appellate review. Instructions offered to the trial court, in writing, are preserved if the record demonstrates the trial court considered the requested instructions. Additionally, if the trial court recognizes that an effective objection has been made, the issue has been preserved for appellate review. In theory, if neither strict nor substantial compliance is found, the last refuge an appellant may seek is to ask for plain error review.

Id. at 428 (internal citations omitted).

We can see from this record that the trial court understood Mr. Zaldivar-Medina's challenge to the accomplice liability instruction, *i.e.*, that "the court's instruction was improper because it erroneously allowed the jury to find [him] guilty of a specific intent

crime based on the intent of another" and *Sheppard* does not apply because there was no "incidental" crime here, apart from the different levels of intent. The State cited the second part of the pattern instruction, the one concerning *Sheppard* liability, and the trial court considered whether it applied under the facts of this case, so Mr. Zaldivar-Medina's first two grounds were preserved. The third ground—that *State v. Jones* limits the applicability of *Sheppard*'s accomplice liability rule—is a closer call because defense counsel did not articulate that argument in so many words. As we observe above, *Jones* held that for a crime to serve as the predicate felony for a felony murder charge, it must be independent of the homicide. 451 Md. at 694. The reasoning behind the "merger" rule is to avoid the "usurp[ation] of most of the law of homicide," by "reliev[ing] the prosecution . . . of the burden" of proving a higher level of intent in order to obtain a murder conviction:

> In explaining the basis for the merger doctrine, courts and legal commentators reasoned that, because a homicide generally results from the commission of an assault, every felonious assault ending in death automatically would be elevated to murder in the event a felonious assault could serve as the predicate felony for purposes of the felony-murder doctrine. Consequently, application of the felony-murder rule to felonious assaults would usurp most of the law of homicide, relieve the prosecution in the great majority of homicide cases of the burden of having to prove malice in order to obtain a murder conviction, and thereby frustrate the Legislature's intent to punish certain felonious assaults resulting in death (those committed with malice aforethought, and therefore punishable as murder) more harshly than other felonious assaults that happened to result in death (those committed without malice aforethought, and therefore punishable as manslaughter).

Jones, 451 Md. at 702 (*quoting People v. Hansen*, 885 P.2d 1022, 1028 (1994), *overruled on other grounds, People v. Chun*, 203 P.3d 425 (2009)). Even though it is a closer call,

we find it preserved because the record indicates that the court understood it—the State and the court discussed the analogy to felony murder—and the substance of the *Jones* argument overlaps sufficiently with Mr. Zaldivar-Medina's argument at trial concerning different levels of intent.

On the merits, we start again with the Rules. Maryland Rule 4-325(c) provides that "[t]he court may, and at the request of any party shall, instruct the jury as to the applicable law and the extent to which the instructions are binding." "[T]he decision whether to give a jury instruction 'is addressed to the sound discretion of the trial judge,' unless the refusal amounts to a clear error of law." *Preston v. State*, 444 Md. 67, 82 (2015) (*quoting Gunning v. State*, 347 Md. 332, 348 (1997)). "Whether a jury instruction was a correct statement of the law is a question of law, which we review without deference." *Seley-Radtke v. Hosmane*, 450 Md. 468, 482 (2016). In determining whether a trial court has abused its discretion we consider whether (1) the requested instruction is a correct statement of the law; (2) the requested instruction is applicable under the facts of the case; and (3) the content of the requested instruction was not fairly covered elsewhere in the jury instruction. *Bazzle v. State*, 426 Md. 541, 548 (2012) (citation omitted). Whether an instruction applies to the case (or, put another way, was generated by it) depends on whether there was "some evidence" to support the instruction, a very low burden of production. *Id.* at 551.

"[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)). "The mere fact that

a person witnesses a crime and makes no objection to its commission, and does not notify the police, does not make him a participant in the crime." *Id.* (cleaned up). "Instead, the person must actually participate by assisting, supporting or supplementing the efforts of another, or, if not actively participating, then the person must be present and advise or encourage the commission of a crime to be considered an accomplice." *Id.* (cleaned up). This may be proved "by acts, words, signs, motions, or any conduct which unmistakably evinces a design to encourage, incite, or approve of the crime." *Pope v. State*, 284 Md. 309, 331–32 (1979); *see Moody v. State*, 209 Md. App. 366, 388–89 (2013) (concluding that evidence refuted the claim that appellant was a mere witness). An accomplice's intent to provide such assistance also may be inferred from his or her "acts, conduct and words," *Raines*, 326 Md. at 591, including "acts occurring subsequent to the commission of the alleged crime," such as flight. *State v. Coleman*, 423 Md. 666, 674 (2011).

And as the Court of Appeals recognized in *Sheppard*, accomplice liability may also reach incidental acts that further a crime. In that case, Mr. Sheppard and three other men, one of whom was armed, robbed two cash register clerks at a retail business. They fled in an automobile with police in close pursuit. The police were able to stop the vehicle by shooting out the rear tires and Mr. Sheppard was apprehended. 312 Md. at 120–21. The other occupants fled, and during the ensuing foot pursuit, one of them fired several shots at two police officers. *Id*. at 121. Mr. Sheppard was convicted of assault with intent to murder the two police officers, a specific intent crime. On appeal, he contended that he could not have aided and abetted the shooting because he was in police custody at the time.

Id. The Court of Appeals rejected that contention and held that he was responsible for criminal acts incidental to the principal offense:

> An accomplice is a person who, as a result of his or her status as a party to an offense, is criminally responsible for a crime committed by another. This responsibility, known as accomplice liability, takes two forms: (1) responsibility for the planned, or principal offense (or offenses), and (2) responsibility for other criminal acts incidental to the commission of the principal offense. In order to establish complicity for the principal offense, the State must prove that the accused participated in the offense either as a principal in the second-degree (aider and abettor) or as an accessory before the fact (inciter). In order to establish complicity for other crimes committed during the course of the criminal episode, the State must prove that the accused participated in the principal offense either as a principal in the first-degree (perpetrator), a principal in the second-degree (aider and abettor) or as an accessory before the fact (inciter) and, in addition, the State must establish that the charged offense was done in furtherance of the commission of the principal offense or the escape therefrom.

Id. at 122–23 (footnote and internal citations omitted).

The Court rejected Mr. Sheppard's claim that he was not an accomplice to the aggravated assaults against the police officers:

> [T]he principal offense was the armed robbery of the two women at the liquor store. The aggravated assaults against the police officers perpetrated during the escape from the commission of the robbery, were secondary or incidental offenses. Thus, contrary to Sheppard's contention that his responsibility for the aggravated assaults is dependent upon proof that he aided and abetted the commission of those offenses, Sheppard's complicity rests on the fact that he aided and abetted the armed robbery. Accordingly, we find no merit to this contention.

Id. at 123 (footnote omitted); *accord Raines*, 326 Md. at 598; *Owens v. State*, 161 Md.

App. 91, 106 (2005).

With respect to Mr. Zaldivar-Medina's legal arguments, the court's instruction was a correct statement of the law and *Sheppard* applies to the facts of this case. *First*, Mr. Zaldivar-Medina argues that application of *Sheppard* to this case "absolved the State of proving that appellant, himself, possessed the specific intent to cause serious physical injury." But that is precisely what *Sheppard* accomplice liability permits, and to the extent Mr. Zaldivar-Medina is urging us to disregard *Sheppard*, we decline to do so. *Second*, Mr. Zaldivar-Medina does not explain his assertion that first- and second-degree assault have different levels of intent and therefore he cannot be liable for first-degree assault based on a *Shepperd* accomplice liability theory. He cites no authority (other than *Jones*) supporting that assertion. And *third*, with respect to his *Jones* argument, he does not explain how, exactly, "the planned offense, *i.e.*, second degree assault, is an integral element of the charged offense, *i.e.*, first-degree assault." In short, we're not convinced that *Jones*'s holding limiting the predicate for a felony-murder charge applies to *Sheppard* accomplice liability in a case that does not involve a murder.

Finally, to the extent Mr. Zaldivar-Medina argues that the instruction wasn't generated, we disagree. Here, the principal offense was the assault on the Chavez brothers. The jury heard evidence that Mr. Zaldivar-Medina, a homeboy in MS-13, ordered Mr. Rodriguez to the Lakeforest Mall to slash the tires on the brothers' vehicle and to stab them. That suggests that he knew Mr. Rodriguez had access to a knife. Indeed, at one point during his interview with police, Mr. Zaldivar-Medina acknowledged that "Jordi had a knife." Although he contradicted himself later in that same interview, stating that "I didn't

know Jordi had a knife," the statement surmounts the "some evidence" barrier to generate the *Sheppard* instruction. *See Arthur v. State*, 420 Md. 512, 526 (2011) ("Some evidence is not strictured by the test of a specific standard. It calls for no more than what it says—'some,' as that word is understood in common everyday usage. It need not rise to the level of 'beyond reasonable doubt' or 'clear and convincing' or 'preponderance'"). In addition, Mr. Zaldivar-Medina acknowledged he wanted to scare the brothers and that he authorized a fight with them. From there, the jury could have found that the ensuing fighting and stabbing flowed from the original criminal directive. This is enough to generate the accomplice liability instructions and the court did not abuse its discretion in giving them.

B. The Evidence Was Sufficient To Support The Convictions For First-Degree Assault And Conspiracy.

Second, Mr. Zaldivar-Medina asserts that the evidence was insufficient to support his convictions for first-degree assault and conspiracy to commit first-degree assault because, he says, the evidence did not establish that he had a specific intent to cause serious physical injury or that he conspired with that requisite intent, during the assault on the Chavez brothers. The State responds that this issue is unpreserved and without merit. We agree with the State.

At the end of the State's case-in-chief, the court denied Mr. Zaldivar-Medina's motion for judgment of acquittal, which we reproduce here in its entirety:

> [DEFENSE COUNSEL]: Yes, Your Honor. Your Honor, at this time I would make a motion for a judgment of acquittal. Even in the light most favorable to the State, Your Honor, I don't believe that the State has shown that Mr. Zaldivar-Medina was a participant, played an active role, or any role as an accomplice in either the assault in the first degree or the

> second degree. I don't believe that there was an agreement that took place between the parties.
>
> The discussion doesn't necessarily mean an agreement. And so as to all conspiracy counts. And then finally participation in a criminal gang I don't believe the State has shown even in the light most favorable to the State that he was - that he ordered or participated in first degree assault or second degree assault.[11]

A motion for judgment of acquittal made at the close of the evidence is a prerequisite to a claim of evidentiary insufficiency on appeal. *Haile v. State*, 431 Md. 448, 464 (2013) (citations omitted). Maryland Rule 4-324 (a) provides, in relevant part, that "[a] defendant may move for judgment of acquittal . . . at the close of the evidence offered by the State and, in a jury trial, at the close of all the evidence. The defendant shall state with particularity all reasons why the motion should be granted." Because "[t]he language of [Rule 4-324 (a)] is mandatory," *Wallace v. State*, 237 Md. App. 415, 432 (2018) (*quoting State v. Lyles*, 308 Md. 129, 135 (1986)), "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*, 420 Md. at 522 (*quoting Starr v. State*, 405 Md. 293, 303 (2008)). "Rule 4-324(a) is not satisfied by merely reciting a conclusory statement and proclaiming that the State failed to prove its case." *Id.* at 524. "Accordingly, a defendant 'is not entitled to appellate review of reasons stated for the first time on appeal.'" *Id*. at 523 (*quoting Starr*, 405 Md. at 302).

[11] Mr. Zaldivar-Medina did not put on any evidence and renewed the motion without additional argument at the close of the case. That motion was also denied.

Mr. Zaldivar-Medina did not raise in his motion for judgment the argument that the evidence was insufficient to prove his intent to cause serious physical injury, either as to the first-degree assault or the conspiracy counts. As such, the issue is not preserved. And we decline his invitation to review it here as a claim for ineffective assistance of counsel. To the extent Mr. Zaldivar-Medina claims that his counsel's failure to raise this theory at trial rendered their representation constitutionally ineffective, that claim is more appropriately resolved in a collateral proceeding initiated under the Post Conviction Act. *See* Md. Code (2001, 2018 Repl. Vol.), §§ 7-101 through 7-301 of the Criminal Procedure Article; *see Robinson v. State*, 404 Md. 208, 219 (2008) ("[A] claim of ineffective assistance of counsel should be raised in a post-conviction proceeding, subject to a few exceptions"). This case is not like *Testerman v. State,* which featured a purely legal question; this case includes both legal and factual disputes over accomplice liability and factual disputes over whether a rational juror could conclude that Mr. Zaldivar-Medina intended to cause serious physical injury. 170 Md. App. 324 (2006). Under the circumstances, it is neither "appropriate [or] desirable" for us to reach the merits of an ineffective assistance claim on direct appeal. *Id.* at 336 (*quoting In re Parris W.*, 363 Md. 717, 726 (2001)).

Even were we to consider Mr. Zaldivar-Medina's insufficiency theory, it would fall short, in our view. In considering a challenge to the sufficiency of the evidence, we would ask "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." *Grimm v. State*, 447 Md. 482, 494–95 (2016) (*quoting Cox v. State*, 421

Md. 630, 656–57 (2011)); *accord Jackson v. Virginia*, 443 U.S. 307, 319 (1979). "[W]e defer to the fact finder's 'resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the credibility of witnesses.'" *Riley v. State*, 227 Md. App. 249, 256 (*quoting State v. Suddith*, 379 Md. 425, 430 (2004)). We recognize as well that a jury is free to "accept all, some, or none" of a witness's testimony. *Correll v. State*, 215 Md. App. 483, 502 (2013). And "[w]e 'must give deference to all reasonable inferences [that] the fact-finder draws, regardless of whether [the appellate court] would have chosen a different reasonable inference.'" *Cox v. State*, 421 Md. 630, 657 (2011) (quoting *Bible v. State*, 411 Md. 138, 156 (2009)). "[T]he limited question before us 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.'" *Smith v. State*, 232 Md. App. 583, 594 (2017) (emphasis in original) (*quoting Allen v. State*, 158 Md. App. 194, 249 (2004), *aff'd*, 387 Md. 389 (2005)).

Mr. Zaldivar-Medina was convicted of serious physical injury first-degree assault. The statute provides that "[a] person may not intentionally cause or attempt to cause serious physical injury to another." Md. Code (2002, 2012 Repl. Vol.) § 3-202(a)(1) of the Criminal Law Article ("Crim. Law"). Crim. Law 3-201(d) defines "Serious physical injury" as physical injury that:

> (1) creates a substantial risk of death; or
> (2) causes permanent or protracted serious:
> (i) disfigurement;
> (ii) loss of the function of any bodily member or organ; or
> (iii) impairment of the function of any bodily member or

organ.

That crime is consummated either by causing *or* an attempting to cause serious physical injury. The specific intent to cause serious physical injury may be inferred "from an individual's conduct and the surrounding circumstances, whether or not the victim suffers such an injury." *Chilcoat v. State*, 155 Md. App. 394, 403 (2004); *accord In re Lavar D.*, 189 Md. App. 526, 589–90 (2009); *Cathcart v. State*, 169 Md. App. 379, 393 (2006) (*quoting Chilcoat*, 155 Md. App. at 403), *vacated on other grounds*, 397 Md. 320 (2007). And an attempt "consists of a specific intent to commit a particular offense coupled with some overt act in furtherance of the intent that goes beyond mere preparation." *Spencer v. State*, 450 Md. 530, 567 (2016) (*quoting State v. Earp*, 319 Md. 156, 162 (1990)); *see also State v. North*, 356 Md. 308, 312–13 (1999) (cleaned up) (observing that the attempt "attaches itself to the substantive offense and is committed when a person, with the intent to commit that substantive offense engages in conduct which constitutes a substantial step toward the commission of that crime, whether or not his or her intention is accomplished").

Mr. Zaldivar-Medina also was convicted of conspiracy, a common law crime:

> A criminal conspiracy consists of the combination of two or more persons to accomplish some unlawful purpose, or to accomplish a lawful purpose by unlawful means. The agreement at the heart of a conspiracy need not be formal or spoken, provided there is a meeting of the minds reflecting a unity of purpose and design. The crime is complete when the agreement is formed, and no overt acts are necessary to prove a conspiracy.

Carroll v. State, 428 Md. 679, 696–97 (2012) (internal citations and quotation marks omitted); *see also Alston v. State*, 414 Md. 92, 114–15 (2010) ("[T]he defendant, to be

found guilty of conspiracy, must have a specific intent to commit the offense which is the object of the conspiracy"). As we discussed in Section A above, there was evidence from which a jury could find that Mr. Zaldivar-Medina ordered Mr. Rodriguez to assault the brothers and that he shared the same intent as the actual perpetrator. The evidence also permitted a fair inference that Messrs. Zaldivar-Medina and Rodriguez understood the nature of the incident and that there was an agreement between the two of them to assault the alleged rival gang members.

Mr. Zaldivar-Medina also contends neither victim sustained "serious physical injury" because Eric Chavez was uninjured and Miguel Chavez only sustained a "superficial cut." But it's intent that matters, not results:

> The question is whether the jury could have found that [the defendant] intended to cause permanent injury, without regard to whether such injury was in fact suffered. That more permanent injuries were not sustained is perhaps attributable to [the defendant's] bad aim or the victims' good fortune, but is not dispositive of [the defendant's] intent.

Ford v. State, 330 Md. 682, 705 n. 9 (1993). And we disagree that *Chilcoat*, 155 Md. App. at 397–402, or *Cathcart*, 169 Md. App. at 393–94, sets some sort of injury threshold that the victim must suffer, intent notwithstanding.

In any event, the jury in this case heard from the victims, the principal, and an expert on gangs. They viewed video surveillance of the attack and heard a statement from Mr. Zaldivar-Medina himself. A rational juror could conclude that he, a "homeboy," or a person of significance in MS-13, directed his "paro," Mr. Rodriguez, to assault two interlopers on their alleged territory, also known to the public as Lakeforest Mall. The jury

could fairly have inferred that he suggested that Mr. Rodriguez slash the tires on the victims' vehicle to prevent or impede their escape. The jury readily could have inferred from the evidence that the victims were chased towards Mr. Rodriguez, who possessed a knife, with the potential for serious physical injury. Both victims testified they feared for their lives and appellant told his interviewer that the attack was an ambush. Mr. Rodriguez testified that appellant ordered him to stab the victims. And the jury heard expert opinion testimony that MS-13 used violence to enforce its edicts. Considered alongside Mr. Rodriguez's testimony that he was told the Chavez brothers were from a rival gang, the jury could fairly and rationally have inferred that Mr. Zaldivar-Medina intended serious physical injury here. *See Correll*, 215 Md. App. at 502 (recognizing that the jury is free to "accept all, some, or none" of a witness's testimony). So even were we to consider this unpreserved claim, a rational juror could find that appellant caused or intended to cause serious physical injury. *See generally Cerrato-Molina v. State*, 223 Md. App. 329, 337 (2015) (*quoting Smith v. State*, 415 Md. 174, 200 (2010) ("These inferences are the very type of inferences that juries are charged with making—to make findings of fact based on the evidentiary facts and their common sense reasoning.").

JUDGMENTS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.