Circuit Court for Baltimore City
Case No.: 117296009

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 958

September Term, 2019

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DEREK BLACK

v.

STATE OF MARYLAND

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Nazarian,
Wells,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Wells, J.

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Filed: November 23, 2020

Appellant, Derek Black, was indicted in the Circuit Court for Baltimore City and charged with first-degree murder and use of a firearm in the commission of a crime of violence. After a jury convicted him on both charges, the court sentenced him to life imprisonment for first-degree murder, with all but 45 years suspended, and a concurrent sentence of 20 years for use of a firearm, to be followed by five years' supervised probation. Appellant timely appealed and asks us to address the following questions:

> 1. Did the trial court err in admitting into evidence hearsay contained in the video recording of [State's witness Elijah] Strickland's police interview?
>
> 2. Did the prosecution make an improper argument in its closing argument and was it ineffective assistance of counsel for the defense attorney not to have objected to this improper argument?
>
> 3. Was the evidence insufficient to support Appellant's convictions?

For the following reasons, we shall affirm.

## BACKGROUND

This case concerns the shooting death of Greg Manuel on June 3, 2017, in the 1700 block of Rutland Avenue in Baltimore City. Manuel died of five gunshot wounds, one of which was immediately fatal, and the manner of death was ruled a homicide. As we will explain, eyewitnesses testified that appellant, Derek Black, shot Manuel at close range following an argument "over a couple dollars in a dice game."

The State's case relied on testimonial evidence from two eyewitnesses: Elijah Strickland, a friend to both Manuel and Black, and Eroctonya Easter, Manuel's mother. Both witnesses confirmed that several individuals, including Manuel and Black, were shooting dice on the night in question.

During the game, accusations of cheating passed between Black and Manuel. Strickland confirmed that he intervened and broke up the argument, at least momentarily, by taking the dice and throwing them away. However, an unidentified individual produced another set of dice and the game resumed over Strickland's objection.

As the game continued, so too did the argument between the young men, progressing from accusations to physical violence. Manuel struck the first blow, striking Black with a thin stick, later described as being akin to a switch. In response, and as explained later by Easter, Black went to his car, retrieved a gun, and "started shooting." Both Strickland and Easter testified at trial that they saw Black shoot Manuel. Black then fled the scene in a white minivan.

Both Strickland and Easter subsequently identified Black as the shooter in photo arrays prepared by the police. And, as part of the identification, both witnesses provided a brief written statement next to Black's photo. Strickland wrote: "He shot my home boy, Greg [Manuel], on Rutland Avenue." Easter wrote: "I saw Derek [Black] kill my son, Greg Manuel."

The police collected several .9 mm cartridge casings and a .9 mm bullet from the crime scene. The State's firearms expert, Christopher Faber, testified that the cartridge casings were all fired from the same unknown firearm.

We shall include additional details in the following discussion.

## DISCUSSION

### I.

Black first contends that the trial court erred by allowing the State to play Strickland's September 20, 2017 statement to the police on the ground that the statement was hearsay and inadmissible, even under the exception for prior consistent statements. The State responds that the statements at issue were admissible under several theories, including as: (a) a prior inconsistent statement; (b) a prior consistent statement because there was no motive to fabricate; (c) a statement of identification; and, (d) rehabilitative evidence. The State also asserts that any error was harmless beyond a reasonable doubt.

By way of background, Strickland's testimonial account of the shooting was somewhat equivocal. Notably, he not only testified that, "I seen it, but I didn't see," but also, in response to a question from the prosecutor asking, "who shot Greg Manuel," Strickland replied, "I guess, Derek."

Strickland also denied that he told a police detective that he saw an argument between Black and Manuel. When the State asked Strickland if he broke up an argument, the trial court sustained Black's counsel's objection.

In response, at a bench conference, the State then offered that Strickland's testimony was inconsistent with a prior statement he gave to police. The court responded that a proper foundation had not been laid for admission of the extrajudicial statement under the prior inconsistent exception for hearsay. After the State then briefly played a video portion of that recorded statement in court, without any sound, Strickland agreed that he was interviewed by police and told them that "Derek had shot Greg." Strickland also agreed

that he had been inconsistent about his location at the time of the shooting. Although he testified at trial that he was across the street, Strickland confirmed that he told the police that he was only five feet away when the shooting happened.

Another inconsistency was brought out on cross-examination. When defense counsel asked whether Strickland actually saw the shooting, he said that he was looking at his cell phone when he heard shots fired. He also denied that the victim's mother, Eroctonya Easter, brought him to the police station and told him to speak to the police.

The next day at trial, the State sought to admit Strickland's redacted September 20, 2017 statement. The State called Detective Steven McDonnell, who confirmed that he interviewed Strickland in an interview room at the police station, along with Detective Sergeant Vallair.[1]

[1] Detective Vallair's first name does not appear to be included in the record on appeal. In addition, Black asserts in his brief that Strickland's statements were made on Detective McDonnell's body camera and that admission of the statements is subject to the rules concerning double hearsay. *See* Md. Rule 5-805 ("If one or more hearsay statements are contained within another hearsay statement, each must fall within an exception to the hearsay rule in order not to be excluded by that rule"); *Paydar v. State*, 243 Md. App. 441, 455 (2019) ("When an officer hears and records the statement of another person, the statement constitutes second-level hearsay that should be excluded unless offered for a non-hearsay purpose or what was said falls within an independent hearsay exception") (citing *Ali v. State*, 314 Md. 295, 303-05 (1988), *abrogated on other grounds by Nance v. State*, 331 Md. 549 (1993). Although we agree with Black on this general point of law, contrary to his factual representation on appeal, the only body camera footage that appears in the appellate record was the recording from the officer responding to the scene moments after the shooting. The "statement" by Strickland at issue was the one obtained by these detectives, and recorded contemporaneously therewith, in an interview room at the police station on September 20, 2017.

(continued)

It was at this point that the State sought to admit Strickland's prior statement. After defense counsel objected, a bench conference ensued, and Black's counsel argued that the recording was hearsay because it was being offered as truth of the matter asserted. Defense counsel also argued that Strickland's testimony was not inconsistent with the statement, that any inconsistencies were addressed by the State during Strickland's trial testimony, and that the statement was consistent with his testimony. Counsel also asserted that her client would be prejudiced because she would not be able to cross-examine Strickland about any differences between the recorded statement and his trial testimony.[2]

The State responded that Black was not prejudiced because he had the opportunity to cross-examine Strickland about the recorded statement, which had been provided in pre-trial discovery. On the merits, the State argued that the statement amounted to a prior consistent statement that was admissible under that exception in order to counter any suggestion by Black that the victim's mother convinced Strickland to provide a statement to police. The court ruled:

> Okay. Well, I find that there are aspects of this that would be admissible as a prior consistent statement. And there are also aspects of it that, to clarify – not to clarify, but to – it's a recordation of a statement made by a witness who was subject to cross-examination by the Defense, available for cross-examination by the Defense. And it's relevant, above and beyond all of that, inasmuch as it's – there was some, how should I say again, equivocation by that particular witness, Mr. Strickland, when he testified on the stand, inasmuch as he at various times would say, I think it was Mr. Black, or I believe it was Mr. Black, about coming out and identifying as such. And, therefore, his earlier identification of Mr. Black and the circumstances of that identification are relevant here and do neatly fit within

[2] At the conclusion of his testimony as a State's witness on the prior day, the court informed Strickland that he was "released from this having to testify[.]"

(continued)

> certain hearsay exceptions that are allowed by the rules. And so I will overrule the objection.[3]

Strickland's redacted video-recorded statement was then played for the jury. As noted, in that statement Strickland informed the police that the shooting followed an argument between Black and Manuel during the dice game. He also confirmed that Manuel hit Black with a stick, and then Black shot Manuel:

> Then Derek somehow – I don't know if [he] had the gun on him or what. But somehow you just hear pop, pop, pop, pop. (Indiscernible) what the fuck. (Indiscernible) now everybody's scattered around trying to figure out where to go. So then he scurried off in his car. He jumped in his car and left.

Under the Maryland Rules, hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Md. Rule 5-801(c). A "statement" is "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." Md. Rule 5-801(a). A "declarant" is "a person who makes a statement." Md. Rule 5-801(b). Further, "[e]xcept as otherwise provided by these rules or permitted by applicable constitutional provisions or statutes, hearsay is not admissible." Md. Rule 5-802. Although review of the admission of evidence by a circuit court is usually considered under the abuse of discretion standard, "a circuit court has no discretion to admit hearsay

[3] Following this ruling, Black's counsel clarified that she was told, prior to Strickland's testimony, that Easter convinced him to provide a statement, and agreed that Strickland denied that was true. We note that, during his cross-examination a day earlier at trial, Strickland testified he did not remember who brought him to the police station when he gave his statement. He disagreed that Easter brought him and testified that he did not remember if she contacted him to ask him to provide a statement to police.

in the absence of a provision providing for its admissibility. Whether evidence is hearsay is an issue of law reviewed *de novo*." *Gordon v. State*, 431 Md. 527, 536 (2013) (quoting *Bernadyn v. State*, 390 Md. 1, 7-8 (2005)).

Based on our reading of the arguments at trial and the trial court's ruling, and as clarified by the arguments by both parties on appeal, three exceptions to the rule against hearsay are under consideration: (a) the exception for prior consistent statements; (b) the exception for prior inconsistent statements; and, (c) the exception for statements of identification. We shall address them in turn.[4]

(a) *Prior consistent statement*

Maryland Rule 5-802.1 provides, in pertinent part:

> The following statements previously made by a witness who testifies at the trial or hearing and who is subject to cross-examination concerning the statement are not excluded by the hearsay rule:
>
> * * *
>
> (b) A statement that is consistent with the declarant's testimony, if the statement is offered to rebut an express or implied charge against the declarant of fabrication, or improper influence or motive;

The Court of Appeals has explained the rule as follows:

[4] To the extent that these grounds were not sufficiently developed at trial, it is settled that we may affirm on legally correct grounds that are adequately supported by the trial record. *See Unger v. State*, 427 Md. 383, 406 (2012) ("[A]n appellee is entitled to assert any ground adequately shown by the record for upholding the trial court's decision, even if the ground was not raised in the trial court"); *Robeson v. State*, 285 Md. 498, 502 (1979) ("[W]here the record in a case adequately demonstrates that the decision of the trial court was correct, although on a ground not relied upon by the trial court and perhaps not even raised by the parties, an appellate court will affirm"), *cert. denied*, 444 U.S. 1021 (1980).

> As a general rule, prior out-of-court statements made by a witness that are consistent with the witness's trial testimony are not admissible to bolster the credibility of a witness. The general rule has an exception where a witness's credibility is attacked by an implication of fabrication or improper influence or motive; then, the witness's prior consistent statements are admissible if made before the alleged fabrication or improper influence or motive existed.

*Holmes v. State*, 350 Md. 412, 416-17 (1998); *accord Thomas v. State*, 429 Md. 85, 96-97 (2012); *see also Hajireen v. State*, 203 Md. App. 537, 553 (2012) ("[I]f a witness is attacked by a charge of fabrication or improper influence or motive, the prior consistent statement is relevant only if it was made *before* the source of the fabrication or improper influence or motive originated") (emphasis in original), *cert. denied*, 429 Md. 326 (2012).

This Court and the Court of Appeals have indicated that a motive to fabricate arises at the moment the crime is committed. *See Thomas*, 429 Md. at 103 (expressly adopting the view "that when the witness is obviously under investigation or has been arrested when the statements were made, [the witness' prior statements] are generally inadmissible because the motive to fabricate has already arisen"); *Blair v. State*, 130 Md. App. 571, 601 (2000) (finding that a witness, who pleaded guilty to accessory after the fact, had a motive to fabricate at the moment the victim was killed, if not earlier, and thus, the statement was inadmissible under Maryland Rule 5-802.1(b)); *McCray v. State*, 122 Md. App. 598, 609-10 (1998) (noting that the accomplice's motive to fabricate existed at the time of the crime).

Alternatively, even if some prior consistent statements are not admissible as substantive evidence, perhaps due to the aforementioned fabrication requirement, such statements can still be admitted for purposes of rehabilitation. *Holmes v. State*, 350 Md.

412, 427 (1998); *accord Thomas*, 429 Md. at 97. Maryland Rule 5-616(c)(2) provides, in pertinent part:

> (c) *Rehabilitation*. A witness whose credibility has been attacked may be rehabilitated by:
>
> * * *
>
> (2) Except as provided by statute, evidence of the witness's prior statements that are consistent with the witness's present testimony, when their having been made detracts from the impeachment.

In *Holmes*, the Court of Appeals explained this rule:

> Under Md. Rule 5-616(c)(2), a prior consistent statement is admissible to rehabilitate a witness as long as the fact that the witness has made a consistent statement detracts from the impeachment. Prior consistent statements used for rehabilitation of a witness whose credibility is attacked are relevant not for their truth since they are repetitions of the witness's trial testimony. They are relevant because the circumstances under which they are made rebut an attack on the witness's credibility.

*Holmes*, 350 Md. at 427; *accord Thomas*, 429 Md. 108.

This Court has explained that prior consistent statements admitted for the purpose of rehabilitation "are relevant not for their truth since they are repetitions of the witness's trial testimony. They are relevant because the circumstances under which they are made rebut an attack on the witness's credibility." *Blair*, 130 Md. App. at 595 (quoting *Holmes*, 350 Md. at 427). This Court has articulated three "prerequisites to admission of a prior statement as rehabilitation: (1) the witness' credibility must have been attacked; (2) the prior statement is consistent with the trial testimony; and (3) the prior statement detracts from the impeachment." *Hajireen*, 203 Md. App. at 555.

We have difficulty finding evidence that required either substantive rebuttal or

rehabilitation of Strickland's testimony by admission of his out-of-court statement. There were no allegations that he was involved in the murder, other than apparently being a participant/observer of a street dice game. And, the closest there is to a suggestion of improper motive is counsel's arguments that Strickland went to the police at the urging of the victim's mother, an allegation that is unsupported by the evidence admitted at trial. We are persuaded, based on the record before us, that there was nothing to rebut, and no motive to fabricate, and that the admission of Strickland's prior statement did not satisfy the standards applicable under the prior consistent statement exception. Accordingly, to the extent the trial court relied on this rationale, the court erred.

(b) *Prior inconsistent statement*

We come to a different conclusion about the prior inconsistent statement rationale. Maryland Rule 5-802.1(a) permits the admission of prior out-of-court statements by an available witness under the following circumstances:

> (a) A statement that is inconsistent with the declarant's testimony, if the statement was (1) given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding or in a deposition; (2) reduced to writing and signed by the declarant; or (3) recorded in substantially verbatim fashion by stenographic or electronic means contemporaneously with the making of the statement.

"Maryland courts have recognized that witnesses can be victim to memory loss and outside pressures, which may later affect their testimony." *Belton v. State*, 152 Md. App. 623, 631 (2003); *see also Corbett v. State*, 130 Md. App. 408, 421 (suggesting that victims may change their prospective testimony because of loss of memory, selective amnesia, or untruthfulness), *cert. denied*, 359 Md. 31 (2000). To be admitted as substantive evidence,

the prior statement must be "inconsistent." *Tyler v. State*, 342 Md. 766, 775 (1996). An inconsistency may contain "both positive contradictions and claimed lapses of memory." *Id*. at 777 (quoting *Nance v. State*, 331 Md. 549, 564 n.5 (1993)). Maryland courts have upheld a broad test to gauge whether a prior statement is "inconsistent":

> Flat contradiction between the witness' testimony and the version of the events given in his reports is not the only test of inconsistency. The omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony.

*Carr v. State*, 284 Md. 455, 460-61 (1979) (quoting *Jencks v. United States*, 353 U.S. 657, 667 (1957)).

Whether testimony is inconsistent for purposes of Rule 5-802.1 is not determined by whether the witness' testimony can eventually be brought into line with their previous statement. *See McClain v. State*, 425 Md. 238, 249-50 (2012) ("That initial testimony, though subsequently amended, could have influenced the jurors."). Rather, it is measured from the moment that it becomes inconsistent. *Id*.; *Wise v. State*, 243 Md. App. 257, 269 (2019), *cert. granted*, 467 Md. 693 (argued September 10, 2020). Once the jury has been presented with conflicting testimony, the inconsistency has been established and could influence the jury regardless of whether the testimony is subsequently amended. *McClain*, 425 Md. at 249-50; *Wise*, 243 Md. App. at 269.

And, admitting the witness' prior statement into evidence provides the jury with an additional source of information from which to evaluate the credibility of the testimony. *McClain*, 425 Md. at 250 (citing 6 Lynn McLain, *Maryland Practice: Maryland Evidence*

*State and Federal* § 613:1(a) (2d ed. 2001) (stating that, when a witness' testimony is inconsistent with a prior statement of the witness, "[t]he inference may then be made that the witness could not have been correct both times and may be wrong at trial, either because of faulty memory or deliberate prevarication")). "When determining whether inconsistency exists between testimony and prior statements, 'in case of doubt the courts should lean toward receiving such statements to aid in evaluating the testimony.'" *McClain,* 425 Md. at 250 (quoting Kenneth S. Broun, *McCormick on Evidence* § 34, p. 153 (6th ed. 2006)).

Here, Strickland was asked whether he saw the shooting and he responded that "I really didn't, but I did" and that "I seen it, but I didn't see" and that he was "across the street" at the time of the shooting. When the prosecutor asked Strickland who was the shooter, he replied, "I guess, Derek." When asked why he guessed, Strickland testified "I mean, I don't know, man. I just – that's what I think. I mean—" Strickland further testified that he did not remember seeing Black leave the scene. When asked why he did not speak to the police, Strickland replied "I don't really have an explanation why I did – why I didn't."

In addition, Strickland initially said he did nothing to stop the argument between Black and Manuel. However, after viewing a portion of the statement, he agreed that he told the detective what happened during the dice game, that he tried to break up the argument, that he was five feet away when the shooting occurred, and that Black left the scene in a minivan.

In comparison, in his recorded and redacted statement to police, Strickland stated that the argument that erupted during the dice game concerned an accusation between Manuel and Black that one had cheated the other out of $5.00 and that, as a result, Strickland took the dice and threw them away, stopping the game until an unidentified individual produced another set of dice. Strickland saw Manuel strike Black with a small stick. He then stated that he saw Black shoot Manuel multiple times then flee in a white minivan. Strickland stated that he was actually only five feet away when the shooting started. We are persuaded that Strickland's statement met the definition of an "inconsistent statement" under the hearsay exception and that it was admissible as substantive evidence at trial.

(c) *Statement of Identification*

The State also asserts that Strickland's statement was admissible as a statement of identification. *See* Maryland Rule 5-802.1(c) (providing a hearsay exception for a "statement that is one of identification of a person made after perceiving the person"). Although we need not address this alternative rationale, we concur with the State. The Court of Appeals has explained that:

> It is well settled in Maryland that a court may admit, as substantive proof, evidence of a third party testifying as to an extrajudicial identification by an eyewitness when made under circumstances precluding the suspicion of unfairness or unreliability, where the out-of-court declarant is present at trial and subject to cross-examination.

*Nance v. State*, 331 Md. 549, 560 (1993).

Here, Strickland made an identification of Black as the shooter after he was shown several photos in a photo array. A recording of Strickland's identification was admitted

into evidence over objection. Strickland also identified Black as the person who shot Manuel in his statement to Detective McDonnell. We are persuaded that Strickland's statements of identification were properly admitted at trial.

(d) *Harmless Error*

Finally, even if we were to conclude that Strickland's recorded statement was improperly admitted, there was evidence from the witness stand, namely from Strickland himself and Ms. Easter, that Black shot Manuel and that, as a result, Manuel died from his wounds. Accordingly, we agree with the State's argument that any error was harmless beyond a reasonable doubt. *See Dionas v. State*, 436 Md. 97, 108 (2013) ("An error is harmless when a reviewing court is 'satisfied that there is no reasonable possibility that the evidence complained of—whether erroneously admitted or excluded—may have contributed to the rendition of the guilty verdict'") (quoting *Dorsey v. State*, 276 Md. 638, 659 (1976)).

**II.**

Black next challenges the following statements made by the prosecutor in his initial closing argument to the jury:

> Have you heard of any dispute between Ms. Easter and Mr. Black, Mr. Strickland and Mr. Black? Have you heard anything, anything that would lead you to believe that they would both get together, come up with a story about Mr. Black committing this murder, even though he didn't do it?

Black recognizes that his trial counsel made no objection to this argument but asks us to apply *Testerman v. State*, 170 Md. App. 324, 335-36 (2006), *cert. dismissed as improvidently granted*, 399 Md. 340 (2007), and hold that his trial counsel provided

ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), on the grounds that this argument amounted to improper burden shifting, and reverse his convictions. The State responds that the closing argument at issue concerned the credibility of witnesses and did not amount to burden shifting and that collateral review at this time is unwarranted.

There is no dispute that defense counsel did not object to this argument and that it is not properly preserved for appellate review. *See Correll v. State*, 215 Md. App. 483, 515 (2013) (stating that "argument about [a] prosecutor's improper comments [are] not preserved for appellate review when 'counsel neither objected when the argument was made nor at any later point [and] did not request a mistrial or a curative instruction.'") (citation omitted), *cert. denied*, 437 Md. 638 (2014). Black seeks to circumvent this rule by couching it as ineffective assistance of counsel under *Strickland v. Washington*, cited previously. Pursuant to *Strickland*, a prisoner claiming that ineffective assistance of counsel rendered his conviction or sentence invalid must show: (1) "counsel's representation fell below an objective standard of reasonableness[;]" and, (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 688, 694.

As to the first prong, the defendant must show that his "counsel's representation fell below an objective standard of reasonableness, and that such action was not pursued as a form of trial strategy." *Coleman v. State*, 434 Md. 320, 331 (2013) (quoting *Strickland*, 466 U.S. at 687-89) (internal quotation marks omitted); *accord State v. Newton*, 455 Md. 341, 355 (2017), *cert. denied*, 138 S. Ct. 665 (2018). The second prong "requires the

defendant to show prejudice." *Syed v. State*, 463 Md. 60, 86, *cert. denied*, 140 S. Ct. 562 (2019). "A showing of prejudice is present where 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id*. (quoting *Strickland*, 466 U.S. at 694).

Ordinarily, an ineffective assistance 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; *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"); *accord Mosley v. State*, 378 Md. 548, 558-59 (2003); *see also Washington v. State*, 191 Md. App. 48, 71 ("[T]he appropriate avenue for the resolution of a claim of ineffective assistance of counsel is a post-conviction proceeding"), *cert. denied*, 415 Md. 43 (2010). In *Mosley*, the Court of Appeals reaffirmed that:

> When a defendant attacks a criminal judgment on the basis of denial of effective assistance of counsel, the [Post-Conviction] Act thus provides the defendant with the possibility of an evidentiary hearing, reflecting a recognition that "adequate procedures exist at the trial level, as distinguished from the appellate level, for taking testimony, receiving evidence, and making factual findings thereon concerning the allegations of error." Post-conviction proceedings are preferred with respect to ineffective assistance of counsel claims because the trial record rarely reveals why counsel acted or omitted to act, and such proceedings allow for fact-finding and the introduction of testimony and evidence directly related to allegations of the counsel's ineffectiveness.

*Mosley*, 378 Md. at 560 (citations omitted).

Nevertheless, Black relies on *Testerman* in an attempt to circumvent the ordinary course of collateral review. [Brief of Appellant at 24] In *Testerman*, this Court found that

the record was sufficiently developed to find ineffective assistance of counsel for failing to articulate the basis of his motion for judgment of acquittal, but in that case there was no significant dispute concerning the facts constituting the offense. 170 Md. App. at 336. The only issue was whether, as a matter of law, a driver switching seats with his passenger after a traffic stop constituted "fleeing and eluding by other means." *Id*. at 336-343.

After holding that Testerman's conduct did not meet the statutory definition, we concluded that, "[b]ecause switching seats did not constitute 'eluding' a uniformed police officer by any other means, Black's counsel should have moved with particularity for a judgment of acquittal on that charge." *Testerman*, 170 Md. App. at 342. This Court therefore opined that there was no "sound trial strategy" for the deficiency. *Id.* at 343. Further, Testerman suffered prejudice as a result of trial counsel's ineffective performance because, had the issue been preserved, this Court would have "directly reviewed and reversed the sufficiency of the evidence of appellant's conviction for eluding a uniformed officer." *Id.* Accordingly, we reversed Testerman's conviction for fleeing and eluding a uniformed police officer. *Id.* at 344.

Here, unlike *Testerman*, it is not so clear that Black's claim would pass the first prong of the *Strickland* test unless we were to conclude that the closing argument amounted to reversible error. As the Court of Appeals has explained, the scope of closing argument is broad, and "it is, as a general rule, within the range of legitimate argument for counsel to state and discuss the evidence." *Mitchell v. State*, 408 Md. 368, 380 (2009); *accord Degren v. State*, 352 Md. 400, 429 (1999) (Attorneys generally "are afforded great leeway in presenting closing arguments"). Closing argument not only permits the prosecutor to

speak harshly on the accused's actions, *see Mitchell*, 408 Md. at 380, but it gives counsel the opportunity to "expose the deficiencies in his or her opponent's argument." *Henry v. State*, 324 Md. 204, 230 (1992), *cert. denied*, 503 U.S. 972 (1992).

"Despite the leeway afforded to counsel in closing argument," however, "'a defendant's right to a fair trial must be protected.'" *Sivells v. State*, 196 Md. App. 254, 270 (2010) (quoting *Lee v. State*, 405 Md. 148, 164 (2008)). One type of argument that prosecutors may not make is one that "tend[s] to shift the State's burden to prove all the elements of a crime beyond a reasonable doubt," *Lawson v. State*, 389 Md. 570, 546 (2011), and therefore, the State generally may not "draw the jury's attention to the failure of the defendant to call witnesses, because the argument shifts the burden of proof." *Wise v. State*, 132 Md. App. 127, 148, *cert. denied*, 360 Md. 276 (2000). "'[W]hat exceeds the limits of permissible comment or argument by counsel depends on the facts of each case.'" *Mitchell*, 408 Md. at 380 (quoting *Smith and Mack v. State*, 388 Md. 468, 488 (2005)).

Black cites *Eley v. State*, 288 Md. 548 (1980), *Wise v. State*, 132 Md. App. 127, *cert. denied*, 360 Md. 276 (2000), and *Woodland v. State*, 62 Md. App. 503, *cert. denied*, 304 Md. 96 (1985), in support of his burden shifting contention regarding the prosecutor's argument that no dispute existed between Easter, Strickland and himself and that there was no evidence that these State's witnesses would fabricate a story to implicate him. In *Eley*, the Court ordered a new trial because the trial judge precluded the defense from arguing reasonable doubt based on the absence of an examination of the car for fingerprints. *See Eley*, 288 Md. at 555 ("We agree that, where there is unexplained silence concerning a routine and reliable method of identification especially in a case where the identification

testimony is at least subject to some question, it is within the scope of permissible argument to comment on this gap in the proof offered."). In *Wise*, we concluded that, under the circumstances of that case, the prosecutor did not make an impermissible closing argument by pointing out that the defense counsel had not kept the promise he had made to produce witnesses. *Wise*, 132 Md. App. at 148. And, in *Woodland*, *supra*, the prosecutor specifically called the jury's attention to the fact that witnesses who had been mentioned by the defense during *voir dire* were never called to testify. *Woodland*, 62 Md. App. at 506. The prosecutor also commented on defense counsel's failure to summons a particular witness who may have been able to corroborate Woodland's story. *Id.* at 507. This Court held that these remarks shifted the burden to Woodland to produce witnesses, a burden he did not have. *Id*. at 515-16.

We are not persuaded that the prosecutor's remarks in this case were as objectionable as in these three cases. As this Court explained in *Wise*, there is a critical difference between commenting on deficiencies in the defense presented by defense counsel and a lack of testimony by the defendant. We noted:

> [C]ourts since [*Griffin v. California*, 380 U.S 609 (1965)] have distinguished those comments by prosecutors about the failure to offer evidence regarding matters for which the defendant is the only witness and those for which the evidence is available from other defense witnesses as well. The decisions, in other words, have distinguished between those comments about a defendant's failure to explain by testifying and those comments about the failure of the defendant to explain through other witnesses. *U.S. v. Mayans*, 17 F.3d 1174, 1185 (9th Cir. 1994).

*Wise*, 132 Md. App. at 143; *see also Williams v. State*, 216 Md. App. 235, 256 ("The actual evidence in the case did not support many of the statements the defense made or the

counter-narrative that the defense was suggesting. The State was fully entitled to point that out. This was no shifting of the burden of proof."), *cert. denied*, 438 Md. 741 (2014).

Moreover, even were we to conclude that the remarks were improper, even then "reversal is not automatically mandated." *Sivells*, 196 Md. App. at 288; *accord Degren*, 352 Md. at 430. Rather, "reversal is only required where it appears that the remarks of the prosecutor actually misled the jury or were likely to have misled or influenced the jury to the prejudice of the accused." *Id.* (cleaned up); *accord Spain v. State*, 386 Md. 145, 158 (2005). The prosecutor's remarks in this case were fairly isolated and appeared to be a preemptive argument to refute any challenge by the defense to the credibility of its primary witnesses. More importantly, they were not remarks arguing that Black failed to produce exculpatory evidence. We are not persuaded that Black met the first prong of the *Strickland* test.

Additionally, we are not convinced that Black has shown prejudice as a result of the comments, *i.e.*, that if counsel had objected to the comments and the court had given a curative instruction, there is a reasonable probability that the result of the trial would have been different. The State had a strong case, with two eyewitnesses who both knew Black positively identifying him as the person who shot Manuel following a dispute over a dice game. As this Court has explained, "[i]f the State has a strong case, the likelihood that an improper comment will influence the jury's verdict is reduced." *Sivells*, 196 Md. App. at 289. We decline to consider this claim further.

**III**.

Finally, Black challenges the sufficiency of the evidence, but, again, recognizing that the issue is unpreserved, asks us to apply *Testerman* because defense counsel failed to move for judgment of acquittal with particularity at the end of the case. The State agrees that evidentiary sufficiency is unpreserved and that, even if addressed, the evidence was sufficient to sustain Black's convictions.

A motion for judgment of acquittal made at the close of all the evidence is a prerequisite to a claim of evidentiary insufficiency on appeal. *Haile v. State*, 431 Md. 448, 464 (2013) (citing Md. Code Ann., Crim. Proc. § 6-104 and Md. Rule 4-324). Rule 4-324(a) provides, in pertinent 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 v. State*, 420 Md. 512, 522 (2011) (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." *Arthur*, 420 Md. 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). Choosing to "submit" without articulating reasons justifying acquittal is a waiver of any complaint with respect to the sufficiency of the

evidence. *Garrison v. State*, 88 Md. App. 475, 478 (1991), *cert. denied*, 325 Md. 249 (1992).

At the close of the State's case-in-chief, the following ensued:

> THE COURT: And there's a motion.
>
> [DEFENSE COUNSEL]: Yes, Your Honor. I'll make a motion for judgment of acquittal. It's my understanding there are two counts, first degree murder and use of a handgun in the commission of a crime of violence. And I will submit –
>
> THE COURT: Submit.
>
> [DEFENSE COUNSEL]: -- without argument.
>
> THE COURT: I think there's credible, well, not credible, there's sufficient evidence that the State has surmounted, has met its burden as [sic] least as far as this portion of the trial goes. There's an eyewitness who at least in one version says that – or eyewitnesses, I should say, that say that there was a handgun, firearm, brandished, multiple shots fired by your client and the resulting death as verified by the ME. So I would deny the motion at this stage.[5]

We agree this issue was not properly preserved by a particularized motion for judgment of acquittal. Black directs our attention, once again, to *Testerman*. But we think the Court of Appeals' holding in *Mosley*, previously cited, is more compelling. There, the Court stated that "although there may be instances where failure to make a motion for judgment for acquittal with particularity might be determined to be ineffective counsel based on the trial record alone, we are unwilling to make such a failure per se ineffective assistance of counsel." *Mosley*, *supra*, 378 Md. at 572. In *Testerman*, there was no dispute over the critical facts. 170 Md. App. at 336. By contrast, in *Mosley*, a case involving a

[5] A similar motion was made and denied at the close of all the evidence.

conviction for robbery with a dangerous or deadly weapon, there was an actual dispute over the characteristics of the weapon at issue, an air gun. Because of that dispute, the Court was unable to conclude that the evidence was insufficient to sustain the conviction. *Id.* at 571. In that case, the Court stated:

> As long as the sufficiency of the evidence is at issue, the possibility remains that Mosley's counsel lacked grounds to make the motion in the first place. *See State v. Scalise*, 660 N.W.2d 58, 62 (Iowa 2003) (concluding that defendant's counsel was not ineffective because, even if his motion for judgment of acquittal was made without specificity, the jury had substantial evidence to find the defendant guilty). Given this possibility, under Strickland's two-pronged analysis, Mosley's counsel's failure to support the motion with particularity either may not have been ineffective assistance of counsel or may not have been prejudicial to the defendant. Therefore, we conclude that the issues presented are more appropriate for elucidation in a post-conviction proceeding.

*Mosley*, 378 Md. at 571-72.

Here, as evident by the cross-examination of the State's primary witnesses and the defense's closing argument, there was a dispute over Strickland and Easter's identifications and whether they actually saw Black shoot Manuel as well as whether the State proved its case beyond a reasonable doubt. Although it is clear that the evidence of an eyewitness, in this case, two eyewitnesses, may be sufficient to support a conviction, *see Archer v. State*, 383 Md. 329, 372 (2004) ("[i]t is the well-established rule in Maryland that the testimony of a single eyewitness, if believed, is sufficient evidence to support a conviction"), the core facts were in dispute and we therefore decline Black's invitation to apply *Testerman* in this case.

**JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. APPELLANT TO PAY COSTS.**