

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1309

September Term, 2013

STATE OF MARYLAND

v.

HERBERT STACY POTTER

Graeff,
Reed,
Sharer, J. Frederick
(Retired, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: August 4, 2016

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

In this appeal, the State of Maryland challenges the grant of post-conviction relief, in favor of Herbert Stacy Potter, appellee, in the Circuit Court for Talbot County. The post-conviction court granted appellee relief in the form of a new trial after finding that both his trial counsel, and his counsel in an earlier post-conviction proceeding, were ineffective for failing to object to unconstitutional jury instructions.

On appeal, the State raises a single question for our review:

Did the post-conviction court err when it granted appellee post-conviction relief?

For the reasons set forth below, we shall reverse the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

Because it was undisputed at trial, and on appeal, that appellant murdered the victim, we will set forth only a brief summary of the facts for purposes of appeal. On September 5, 1985, as Carolyn Brice was leaving work at approximately 11:00 p.m., she saw appellant in the parking lot of the nursing home where she worked.

Other employees heard Ms. Brice tell appellee: “Herbert, please don’t hurt me. Let me go home. I want to go home.” One co-worker saw appellee grab Ms. Brice and throw her “across the hood of the car,” and then she saw Ms. Brice’s uniform covered in blood.

Another co-worker, Patricia Retallack, called 911 after she heard a scream and saw that Ms. Brice had a large dark stain on the back of her uniform. Ms. Retallack went to Ms. Brice’s aid. She found Ms. Brice on the ground with a knife protruding from her forehead. Ms. Brice told the police that “Herbert Potter” stabbed her.

The police approached a nearby wooded area and saw appellee, whose clothes and hands were covered in blood. They thought that he was the victim of the stabbing. When

they asked him whether he had been stabbed, appellee responded: “Me, me, I did it. I did it. I’m the one that did it.”

Ms. Brice, who had been stabbed thirty-four times, died from her injuries. Six of the wounds were rapidly fatal, including a wound to her heart and additional stab wounds to her lungs and liver.

On December 12, 1986, appellee was convicted by a jury, in the Circuit Court for Talbot County, of first degree murder and carrying a weapon openly with the intent to injure. The court imposed a sentence of life imprisonment for the conviction of first degree murder, and three years, consecutive, for the conviction of carrying a weapon openly with intent to injure. On appeal, this Court affirmed the convictions in an unreported opinion. *Herbert Stacy Potter v. State of Maryland*, No. 979, Sept. Term, 1987 (filed Feb. 25, 1988). Appellee’s Petition for Writ of Certiorari subsequently was denied. *Potter v. State*, 313 Md. 8 (1988).

On November 25, 1994, appellee filed his first Petition for Post-Conviction Relief in the circuit court, which was denied on September 13, 1995.

On August 24, 2012, appellee filed a second “Petition for Post Conviction Relief or in the Alternative to Re-Open a Closed Post-Conviction Proceeding in the Interests of Justice.” In the petition, appellee asserted:

- a. Counsel was ineffective for not objecting when the trial court unconstitutionally and erroneously instructed the jury that “[m]y role as judge is merely to advise, and yours is the duty to judge the law and the facts of the case as you find them to be”

b. The trial court unconstitutionally instructed the jury that “where there are conflicting interpretations of the law, . . . the jury may choose between and the jury shall decide whether the law should be applied . . .”

c. Trial counsel was ineffective for failing to object to the trial court erroneously instructing the jury that “the law presumes all homicides to be committed with malice aforethought, and to constitute murder” and “[u]nless there is evidence presented to the contrary, the law presumes that a person intends the natural and probable consequences of his acts.”

Appellee also asserted that his post-conviction counsel was ineffective for failing to raise any issue regarding the improper jury instructions or trial counsel’s failure to object to the improper instructions. He asserted that the cumulative effect of the errors by his trial counsel and post-conviction counsel deprived him of a fair trial and of fair post-conviction proceedings.¹

On August 8, 2013, the post-conviction court granted appellee post-conviction relief. The court found that appellee’s trial counsel rendered ineffective assistance of counsel in failing to object to: (1) “advisory instructions” that had “the same effect or substance” as those found to be improper in *Unger v. State*, 427 Md. 383 (2012); and (2)

¹ Appellee also argued that, despite an intervening change in the law that limited the number of post-conviction petitions that could be filed to one, that change was “prospective only and cannot be relied upon to extinguish the rights of Mr. Potter . . . to file two petitions for post-convictions” and, thus, his second petition should be “treated in the ordinary course of all petitions for post-conviction relief.” Following a hearing, the post-conviction court ruled that appellee was “entitled to *one* petition *after* October 1, 1995,” the date of the law limiting inmates to one post-conviction petition per case, with appellee’s one petition being the “instant Petition for Post Conviction Relief, without regard to how many were taken previously.” In the alternative, the court ruled that, “should the October 1, 1995 date limiting the number to a single petition be interpreted to apply retrospectively,” appellee’s original petition should be reopened “in the interests of justice,” pursuant to Maryland Code § 7-104 of the Criminal Procedure Article. The State is not challenging the court’s ruling in this regard.

the instruction “*the law presumes that a person intends the natural and probable consequences of his acts.*” On February 3, 2016, this Court issued an order granting the State’s application for leave to appeal and transferring the case to the regular appeal docket.

DISCUSSION

I.

The State contends that the post-conviction court erred when it granted appellee post-conviction relief. In support, it lists three reasons why this Court should reverse this decision:

First, with respect to both alleged instructional errors, the post-conviction court erred in finding [appellee’s] trial counsel was ineffective for failing to object to the instructions because [appellee] presented no evidence that counsel’s failure to do so was not a matter of trial strategy and, even if counsel was deficient in failing to object to the allegedly unconstitutional instructions, the court erroneously assumed that [appellee] was not required to prove prejudice. Second and third, the court erred when it concluded that the challenged instructions were unconstitutional because it viewed the instructions in isolation and applied the wrong test when it concluded that the instructions denied [appellee] a fair trial.

We shall address each of these contentions, in turn.²

Pursuant to the two-part *Strickland v. Washington*, 466 U.S. 668 (1984) inquiry, a defendant in a criminal case must prove the following elements to establish that his or her attorney provided ineffective assistance of counsel at trial: (1) “that counsel’s performance

² We are not persuaded by appellee’s argument that the State’s challenges to the rulings regarding ineffective assistance of counsel are not properly before the Court because the application for leave to appeal couched the question in terms of the propriety of the instruction. As the State notes, whether appellee “was entitled to post conviction relief based upon his counsel’s alleged ineffectiveness for failing to object to the instructions is inextricably intertwined with a consideration of whether the instructions ran afoul of *Stevenson* and *Montgomery* in the first instance.”

was deficient,” i.e., “counsel’s representation fell below an objective standard of reasonableness,” and (2) “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different,” i.e., “a probability sufficient to undermine confidence in the outcome.” *Coleman v. State*, 434 Md. 320, 340 (2013) (quoting *Strickland*, 466 U.S. at 687-88, 694). The defense must show both deficient performance and prejudice as a result of counsel’s deficient performance. *See In re Parris W.*, 363 Md. 717, 725 (2001) (both prongs of the test must be shown to establish ineffective assistance of counsel).

With regard to the first prong, the appellant must show that “counsel’s acts or omissions were the result of unreasonable professional judgment and that counsel’s performance, given all the circumstances, fell below an objective standard of reasonableness considering prevailing professional norms.” *Testerman v. State*, 170 Md. App. 324, 342 (2006), *cert. dis’d as improv. granted*, 399 Md. 340 (2007) (quoting *Oken v. State*, 343 Md. 256, 283 (1996)). To do so, the claimant must “overcome the presumption that the challenged action might, under the circumstances, be considered sound trial strategy.” *Oken*, 343 Md. at 283.

“Generally, the appropriate avenue for the resolution of a claim of ineffective assistance of counsel is a post-conviction proceeding.” *Washington v. State*, 191 Md. App. 48, 71, *cert. denied*, 415 Md. 43 (2010). In *State v. Peterson*, 158 Md. App. 558, 584-85 (2004), we explained:

On appellate review of a decision by a post-conviction court, we will not disturb the court’s first-level factual findings unless they are clearly erroneous. *Evans [v. State]*, 151 Md. App. 365, 374 (2003)]; *State v. Jones*,

138 Md. App. 178, 209 (2001). Whether trial counsel’s performance was deficient under the standard established in *Strickland* is a finding on a second-level mixed question of law and fact, on a constitutional issue. *Evans, supra*, 151 Md. App. at 374. *See also State v. Johnson*, 143 Md. App. 173, 190 (2002); *State v. Gross*, 134 Md. App. 528, 559-60, *aff’d*, 371 Md. 334 (2002). For that reason, we conduct our own independent appraisal of the issue, applying the law to the facts and determining *de novo* whether counsel’s representation in a particular case violated the defendant’s constitutional right to effective assistance of counsel. *Evans, supra*, 151 Md. App. at 374. *See also Cirincione v. State*, 119 Md. App. 471, 485 (1998). Likewise, the issue of prejudice is subject to *de novo* review. *Mendes v. State*, 146 Md. App. 23, 31 (2002).

(Parallel citations omitted).

A.

“Advisory” Instruction

1.

Parties’ Contentions

We address first the State’s contentions regarding the advisory instruction. Initially, the State asserts that the post-conviction court erred in finding that appellee’s trial counsel was ineffective for failing to object to the instructions because “the record is devoid of any explanation as to why counsel did not object to the instructions,” and “to the extent that the record contains any insight,” it shows that counsel’s failure to object was not a matter of trial strategy. The State further asserts that the “post-conviction court also erred in assuming [appellee] was prejudiced by counsel’s failure to object to the instructions.” In that regard, the State asserts that, under *Strickland*, “[a]bsent a showing that there was a substantial possibility that the outcome of his trial would have been different had the challenged instructions not been given, Potter was not entitled to post-conviction relief.”

With respect to the advisory instructions, however, the State asserts that appellee “offered no evidence or argument on the issue of prejudice.”

With respect to the substance of the instruction, the State argues that the post-conviction court “erroneously likened the instruction to those deemed unconstitutional in” *Unger v. State*, 427 Md. 383 (2012). It contends that the court was wrong in concluding that the instruction had “the same effect in substance” as the instructions given in *Unger*, asserting that, when the instructions are “viewed in context and as a whole, there is a stark difference between these instructions and those given in *Unger*.” At best, the State argues, the competing instructions were ambiguous, and therefore, the court should have reviewed them to determine whether there was a reasonable likelihood that the jury understood that it was bound to follow the court’s instructions on the law.

Appellee contends that, with respect to the advisory instruction, the court correctly found that he met the standard for establishing ineffective assistance of counsel under *Strickland*. He asserts that the advisory instruction delivered by the trial judge at the end of all instructions had the same legal effect as the instructions found erroneous in *Unger*, which decision was recently reaffirmed in *State v. Waine*, 444 Md. 692 (2015). Appellee contends that the giving of an advisory instruction is “structural error,” which requires reversal.

Although appellee agrees that, in post-conviction proceedings, there is a presumption that defense counsel acted reasonably, he asserts that, in this case, “the record by itself rebuts the presumption,” and the “State can suggest no sound trial strategy for permitting erroneous jury instructions undermining fundamental constitutional rights and

impairing the right to a fair trial.” Thus, he asserts, he was not required to present testimony of his trial counsel, as the State suggests, “because there can be no reasonably professional trial strategy in which a defense attorney for a client on trial for murder would intentionally decide not [to] object to jury instructions undermining the fundamental constitutional protections afforded to all criminal defendants.”

Moreover, with respect to the State’s argument that the court erred in presuming prejudice, appellee asserts that where, as here, a defendant meets his burden with regard to the first *Strickland* prong, and a structural error results from counsel’s deficient performance, a new trial is warranted. In any event, he asserts, even if he was required to prove prejudice, he did so in this case because, by “failing to object to the advisory instruction,” counsel did not “give the trial judge an opportunity to correct the error, thus depriving [him] of due process at his trial.” In addition, he argues, “trial counsel failed to preserve a valid legal issue, which could have been raised on direct appeal but was not.”

2.

History of Advisory Instructions

Article 23 of the Declaration of Rights provides that the jury in a criminal case “shall be the Judges of the Law, as well as of fact.” In 1980, the Court of Appeals addressed the propriety of “advisory rather than binding (jury) instructions,” and whether such an instruction “facially deprives a defendant of the federally secured right to due process of law” under the 14th Amendment to the U.S. Constitution. *Stevenson v. State*, 289 Md. 167, 169, 172 n.2 (1980), *overruled by Unger*, 427 Md. 383. The Court held that it is

incumbent upon a trial judge to carefully delineate for the jury the following dichotomy: (i) that the jury, under Article 23, is the final arbiter of disputes as to the substantive “law of the crime,” as well as the “legal effect of the evidence,” and that any comments by the judge concerning these matters are advisory only; and (ii) that, by virtue of this same constitutional provision, all other aspects of law (e.g., the burden of proof, the requirement of unanimity, the validity of a statute) are beyond the jury’s pale, and that the judge’s comments on these matters are binding upon that body. In other words, the jury should not be informed that all of the court’s instructions are merely advisory; rather only that portion of the charge addressed to the former areas of “law” may be regarded as non-binding by it, and it is only these aspects of “law” which counsel may dispute in their respective arguments to the jury. On the other hand, the jury should be informed that the judge’s charge with regard to any other legal matter is binding and may not be disregarded by it.

Id. at 180 (footnote omitted).

Subsequently, in *Montgomery v. State*, 292 Md. 84 (1981), *overruled by Unger v. State*, 427 Md. 383, the Court of Appeals vacated the appellant’s convictions after concluding that the trial judge erred by telling “the jury they could pay no attention to the instructions on the law which did not pertain to the elements of the crime but which were standard instructions invoked to preserve the integrity of the judicial system and to assure the defendant a fair and impartial trial.” *Id.* at 91. In reaffirming *Stevenson*, the Court explained that instructions on “certain bedrock characteristics . . . which are indispensable to the integrity of every criminal trial” -- specifically, that the (1) accused is presumed innocent until proven guilty by the State beyond a reasonable doubt; (2) “State has the burden to produce evidence of each element of the crime establishing the defendant’s guilt”; (3) “defendant does not have to testify and the jury may infer no guilt because of his silence”; (4) “evidence to impeach the defendant bears only on his credibility and may not be used to prove the substance of the offense”; (5) evidence is limited to the testimony

and reasonable inferences adduced from the testimony, and the exhibits admitted into evidence; and (6) evidence does not include the remarks of the trial judge or the arguments of counsel – “are not ‘the law of the crime;’ they are not advisory; and they cannot be the subject of debate by counsel before the jury. They are binding.” *Id.*

In *Unger v. State*, 427 Md. 383, 416 (2012), the Court of Appeals held that *Stevenson’s* and *Montgomery’s* prohibition on advisory jury instructions applied retroactively. It further held that Unger’s “defense counsel’s failure to object to the advisory nature of the jury instructions at Unger’s 1976 trial did not constitute a waiver.”

In *Unger*, after the jury was selected, the trial judge began to give the jury instructions, stating:

Now, Mr. Foreman, and Ladies and Gentlemen of the Jury, it is now the duty of the Court to instruct you on the law applicable generally to criminal cases. Under the Constitution of Maryland, the jury in a criminal case is the Judge of the Law as well as the facts. Therefore, *anything which I may say about the law, including any instructions which I may give you, is merely advisory and you are not in any way bound by it. You may feel free to reject my advice on the law and to arrive at your own independent conclusions.*

Id. at 392.

After the courtroom clerk realized that the jury had not been sworn, the trial judge interrupted his instructions so that the clerk could swear the jury. *Id.* Following the swearing of the jury, the court resumed its instructions, stating:

Mr. Foreman, Ladies and Gentlemen of the Jury, it is now the duty of the Court to instruct you on the law applicable generally to criminal cases. Under the Constitution of Maryland, the jury in a criminal case is the Judge of the Law as well as the facts. Therefore, *anything which I may say about the law, including any instructions which I may give you, is merely advisory*

and you are not in any way bound by it. You may feel free to reject my advice on the law and to arrive at your own independent conclusions.

You are to make the sole determination as to what the evidence is and what the law is

Id.

Shortly after giving that instruction, the court instructed the jury with regard to the burden of proof, reasonable doubt, and the presumption of innocence. *Id.* at 392-93. The court made no statement to the jury that those instructions were exceptions to the instruction that the jury was free to reject any of the judge’s instructions on the law. *Id.* at 393. The Court of Appeals concluded that, “under the trial judge’s instructions, the jury could place the burden of proof upon the defendant, could utilize a different standard than reasonable doubt such as preponderance of the evidence, and could adopt a presumption of guilt.” *Id.*

After the close of evidence, the court gave the jury final instructions, stating:

Mr. Foreman, Ladies and Gentlemen of the Jury, the time has now arrived for me to give you your final instructions on the law. These instructions are specific and pertinent to this case only, *but are advisory only. And are no more binding upon you than the preliminary instructions* that I have previously given you.

Id. In its final instructions, the court did state that in order to find the defendant guilty, the jury must be convinced beyond a reasonable doubt. *Id.* It did not, however, repeat the definition of reasonable doubt. In upholding the grant of post-conviction relief, the Court of Appeals stated that the trial judge’s instructions at Unger’s 1976 trial, “telling the jury that all of the court’s instructions on legal matters were ‘merely advisory,’ were clearly in error, at least as applied to matters implicating federal constitutional rights.” *Id.* at 417.

In 2015, in *State v. Waine*, 444 Md. 692 (2015), the Court of Appeals revisited the issue. In that case, the court’s instructions to the jury were as follows:

Under the Constitution and laws of the State, the jury in a criminal case is the judge of both the law and the facts and anything I say to you about the law is advisory only. It is intended to help you, but you are at liberty to reject the Court’s advice on the law and to arrive at your own independent conclusion on it, if you desire to do so.

Id. at 697. The court concluded its instructions with a reiteration of its opening instruction: “You are not partisans. You are judges, judges of the facts and the law. Your sole interest is to ascertain the truth from the evidence in the case.” *Id.* Petitioner’s counsel did not object. *Id.*

The Court of Appeals rejected the State’s request to overrule *Unger* and upheld the post-conviction court’s ruling granting post-conviction relief. *Id.* at 703. It rejected the State’s argument that “advisory only instructions be considered on a case by case basis to determine whether there is a ‘reasonable likelihood’ that the jurors understood the court’s Article 23 instruction as allowing them to convict a defendant on less than proof beyond a reasonable doubt,” stating:

The State’s reliance on the ‘reasonable likelihood’ test is misplaced, as this was the test adopted by the Supreme Court for review of jury instructions that are ambiguous. . . .

Ambiguity is not the issue in Article 23 advisory only jury instructions; rather, such instructions are clear, but erroneous, as they give the jury permission to disregard any or all of the court’s instructions, including those bedrock due process instructions on the presumption of innocence and the State’s burden of proving the defendant’s guilt beyond a reasonable doubt.

Id. at 703-04.

The Court further concluded that “harmless-error analysis does not apply.” *Id.* at 704. It stated that, because the denial of the right to a jury verdict of guilt beyond a reasonable doubt is a “structural defect[] in the constitution of the trial mechanism, the deprivation of that right, with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as ‘structural error,’” which is beyond the purview of the harmless error analysis. *Id.* at 704-05.

3.

Proceedings Below

With that backdrop in mind, we look to the instructions given in the present case. At the conclusion of the evidence, the trial court instructed the jury, in pertinent part, as follows:

The instructions that I give you about the law are binding upon you. In other words, you must apply the law as I explain it to you in arriving at your verdict. On the other hand, any comments that I may make about the facts are not binding upon you, and are advisory only. It is your duty to decide the facts and apply the law to those facts.

The jury shall be – the jury, where there are conflicting interpretations of the law, may have both interpretations argued to it, and the jury may choose between and the jury shall decide whether the law should be applied in dubious factual situations.

The State has the burden of proving, based upon the evidence introduced at trial, every fact necessary to convict the defendant of the crime with which he is charged. This burden remains with the State throughout the trial. The defendant does not have the burden of proving his innocence or of producing any evidence. If you are not convinced that the State has proved beyond a reasonable doubt each and every element of the offense with which the defendant is charged, you must find the defendant not guilty.

Every defendant in a criminal case is presumed to be innocent. You should not assume that the defendant is guilty because he's on trial. The presumption of innocence remains with the defendant throughout the trial. Thus the defendant is entitled to every favorable inference which can be reasonably drawn from the evidence. Unless you are satisfied beyond a reasonable doubt of the defendant's guilt, the presumption of innocence alone is sufficient to require you to acquit the defendant.

The State has the burden of proving every fact necessary to constitute the offense[s] with which the defendant is charged . . . so that you are convinced that the defendant is guilty of this offense or offenses beyond a reasonable doubt and to a moral certainty.

(Emphasis added).

The court then instructed the jury on the law of intent, specific intent, assault, wearing or carrying a weapon, first degree murder, and second degree murder. It reiterated that the jury had to “apply[] these definitions to the facts of this case,” and if, after giving “full and fair consideration of all the facts and circumstances in evidence,” e.g., the jury found that the State had proven the crimes charged beyond a reasonable doubt, then it should find appellee guilty, but if it found that the State had not proven the crimes beyond a reasonable doubt, it should find him not guilty. The court also instructed the jury that it was the sole judge of the credibility of witnesses, and that it was charged with resolving conflicting evidence.

At the end of jury instructions, the court stated:

Mr. Foreman, ladies and gentlemen, you have been chosen and sworn as jurors in this case to try the issues of fact and law presented by the allegations of the information, and in the denial made by the not guilty plea of the accused. You are to perform this duty without bias or prejudice to any party. You are not to be concerned with comments made during the course of the trial by the [c]ourt, or questions asked by the [c]ourt, or any such comments or questions or facial expressions which I may have made, should not be considered by you as any feeling that I – as any feeling that I have an

opinion one way or the other in this case. *My role as Judge is merely to advise, and yours is the duty to judge the law and the facts of the case as you find them to be.* The law does not permit jurors to be governed by sympathy, prejudice or public opinion. Both the accused and the public expect that you will carefully and impartially consider all the evidence in this case as to law and fact, and to reach a just verdict, regardless of the consequences.

(Emphasis added).

In granting appellee post-conviction relief on the instructions, the post-conviction court stated:

Taking these instructions one at a time, this [c]ourt does not find fault with the trial judge's explanation of the jury's role; the judge is clear that the instructions on the law are binding and that jury's purview in this area is limited "to dubious factual situations." Perhaps the concept of deciding between conflicting interpretations in such situations could have been further explained, but this [c]ourt does not believe the jury was under the impression at that juncture that it could simply disregard clearly established and undisputed principles of constitutional law. The truly problematic language, as Mr. Potter points out, comes at the end of all of the instructions when, notwithstanding previous instructions to the contrary, the trial judge stated: "My role as judge is merely to advise, and yours is the duty to judge the law and the facts of the case as you find them to be." . . .

By 1986 when Mr. Potter's case went to trial, the Court of Appeals had taken the view that Article 23 of the Maryland Declaration of Rights, which provides that "[i]n the trial of all criminal cases, the Jury shall be the Judges of Law, as well as of fact, except that the Court may pass upon the sufficiency of the evidence to sustain a conviction," limited jurors to deciding non-constitutional "disputes as to the substantive law of the crime as well as the legal effect of the evidence," and that "all other legal issues are for the judge alone to decide." *Stevenson v. State*, 289 Md. 167, 180 (1980). Therefore, according to Mr. Potter, when the jury was instructed in his trial that they were the judges of the law and that the judge's role was merely advisory, trial counsel should have objected and requested an instruction consistent with *Stevenson*. Because she failed to do so, Mr. Potter argues, the jury was at liberty to shift the burden of proof or disregard his presumption of innocence. Post conviction counsel likewise failed to raise the issue. This, Mr. Potter argues, satisfies the requirements of *Strickland* . . . that the defendant show (1) counsel performed deficiently, and (2) the deficient performance prejudiced the defense. 466 U.S. 668, 687 (1984).

[The State] argues that Mr. Potter’s “advisory instructions” do not rise to the level of those in *Unger* when viewed together with the other instructions. While the advisory instructions in *Unger* are slightly more direct in terms of inviting the jury to ignore the law as described by the judge, this [c]ourt finds that the import of the advisory instructions in this case have the same effect in substance. Furthermore, even reading them in context with others, as the State suggests, this [c]ourt finds it significant that the erroneous instructions were the last instructions given to the jury, thereby reducing the likelihood that any doubts might have been cured by a later correction. Since the instructions were objectionable and trial counsel had reason to raise the issue but failed to do so, this [c]ourt finds that counsel performed deficiently under *Strickland*. Her failure to do so was clearly prejudicial to Mr. Potter. . . . The same analysis applies to his post conviction counsel. Thus, this [c]ourt finds that Mr. Potter’s Petition should be granted on the basis of erroneous advisory jury instructions.

4.

Analysis

We agree with the State that the circuit court “erroneously likened the instructions to those deemed unconstitutional in *Unger*.” As the State notes, “[w]hen the trial court’s instructions in this case are viewed in context and as a whole, there is a stark difference between these instructions and those given in *Unger*.”

Here, the jury was instructed, consistent with *Stevenson* and *Montgomery*, that the court’s “instructions . . . about the law were binding.” In contrast, the jury in *Unger* was repeatedly told that the court’s instructions were non-binding. Moreover, here, the court never instructed the jury that it was the judge of the law. Rather, on the issue of the “law,” the court stated that “where there are conflicting interpretations of the law, the jury may choose between [the conflicting interpretations] and . . . shall decide whether the law should be applied in dubious factual situations.” In *Unger*, on the other hand, the jury was

instructed that it “may feel free to . . . arrive at [its] own independent conclusions” as to the applicable law. *Unger*, 427 Md. at 392.

Given the court’s clear instruction to the jury that its instructions on the law were binding, the court’s final statement, that his “role as Judge is merely to advise, and yours is the duty to judge the law and the facts of the case as you find them to be,” was not, as in *Waine* and *Unger*, an instruction giving the jury permission “to disregard any or all of the court’s instructions, including those bedrock due process instructions on the presumption of innocence and the State’s burden of proving the defendant’s guilt beyond a reasonable doubt.” *Waine*, 444 Md. at 704. Rather, the court’s reference to its role as “merely to advise,” plainly refers to the immediately preceding statement that the jurors should not be “concerned with comments made during the course of the trial by the [c]ourt, or questions asked by the [c]ourt, or any such comments or questions or facial expressions which” it may have made, as indicating its feeling “one way or the other in this case.”

Viewed as a whole and in context, the court’s instructions did not, as the circuit court found, have the “same effect in substance” as those deemed unconstitutional in *Unger*; they did not instruct the jury that it could disregard the binding nature of the court’s instructions on the law. And even if the “advisory” language caused some ambiguity, it was appellee’s burden to show that the failure to object was not a tactical decision, which appellee failed to do. Accordingly, we conclude that the post-conviction court erred in granting post-conviction relief on this ground.

B.

“Intent” Instructions

We turn next to the State’s argument that the post-conviction court erred in finding that counsel rendered ineffective assistance of counsel in failing to object to the intent instructions. At issue are the following instructions:

You are instructed that the burden is on the State to prove beyond a reasonable doubt not only that the offense was committed, but also that the defendant is the person who committed it. . . .

Intent has been defined as the exercise of intelligent will, the mind being fully aware of the nature and consequences of the act which is about to be done, with such knowledge and full liberty of action willing and electing to do it. General intent is where the defendant has the intention of performing a given act. The defendant must have done the act consciously and voluntarily, and not inadvertently or accidentally. *Unless there is evidence presented to the contrary, the law presumes that a person intends the natural and probable consequences of his acts. Thus the requisite criminal intent may be inferred from the defendant’s voluntary and knowing commission of an act which is forbidden by law, or from the defendant’s omission to do an act required by law. . . .*

You are instructed that you must find the element of intent in the defendant’s acts before the defendant can be convicted. If you find that the defendant did not have the required intent, then there can be no criminal violation and you must find the defendant not guilty.

Specific intent involves more than a general intention to perform a particular act. To establish specific intent the State must prove that the defendant knowingly did an act which the law prohibits, intending a result which is prohibited by the law. Since the defendant is charged with the violation of the law, an element of which is specific intent, you must find that the defendant specifically intended to violate the law in order to convict him. If the State fails to prove beyond a reasonable doubt that the defendant specifically intended the violation of the law with which he is charged, you must find him not guilty.

Intent is a subjective matter, which can seldom be proven with direct evidence. *Rather you may infer the defendant's intent from all the surrounding circumstances of the case. You may draw inferences from the facts proved which reasonably indicate under all of the relevant circumstances the existence of the required intent. You may presume that a person ordinarily intends the natural and probable consequences of his acts.*

Knowingly is generally defined as having knowledge. An act is done knowingly if done voluntarily and purposely, and not because of mistake, accident, inadvertence, or other innocent reason. The purpose of the word “knowingly” is to ensure that no one would be convicted for an act done where there exists a reasonable innocent explanation.

The burden is on the State to prove knowledge. Knowledge can be established from all the surrounding facts and circumstances of the case. A person may be found to have knowledge where he acts with an unlawful purpose and deliberately ignores the obvious.

Homicide is generally defined as the killing of one human being by another. There may be either excusable or justifiable homicide, which is not a crime, or unlawful and criminal homicide. An example of an excusable and noncriminal homicide is a killing which is entirely accidental, where the person causing the death had no intention of causing harm, and was not doing an illegal act, and was not acting negligently. An example of justifiable and noncriminal homicide is a killing which is necessary to save one's own life under certain circumstances, called justifiable self-defense.

Unlawful and criminal homicide is a killing where there is no legal excuse or justification. Unlawful criminal homicide is divided into two main classes, murder and manslaughter. . . . Evidence which will prove murder in the first degree is proof that the killing was in fact done willfully, deliberately and with premeditation, and without excuse, justification or mitigation. . . .

Murder in the first degree is the willful, deliberate and premeditated killing of a human being without excuse, justification or mitigation. Willful means that the act which caused the death was done intentionally and with purpose. . . .

The first element I have just defined, that the act of killing was intentional, may be proven by circumstantial evidence. Very important circumstantial evidence which you should consider is the act itself which

caused the death. *If you find that the death was caused by the defendant's use of a deadly weapon against a vital part of the body of the deceased, you may conclude that the defendant intended the natural result of such an act, that is, the death of the deceased.* Intention to kill, then, may be shown by proof that the act which caused the death of the deceased had as its natural result either death or such serious bodily injury as would naturally result in death.

Applying these definitions to the facts of this case, *if you find that the State has proven beyond a reasonable doubt and to a moral certainty that the defendant intentionally killed the deceased, without excuse, justification or mitigation, and that this intentional killing was done with deliberation and with premeditation, then your verdict should be guilty of murder in the first degree.* On the other hand, if you find that the State has failed to prove beyond a reasonable doubt that the defendant killed the deceased, the defendant must be found not guilty. However, *if you find that the defendant has proven beyond a reasonable doubt that the defendant killed the deceased, but has failed to prove beyond a reasonable doubt that the killing was done intentionally, and with deliberation and with premeditation, and has failed to prove beyond a reasonable doubt the absence of excuse, justification and mitigation, then your verdict should be not guilty of murder in the first degree.*

Murder in the second degree is the intentional killing of a human being without excuse, justification or mitigation, and also without deliberation and premeditation. *Here again, proof that the killing was intentional may be proven by circumstantial evidence, the same as in first degree murder, by considering the act itself which caused the death. If you find that the death was caused by the defendant's use of a deadly weapon against a vital part of the body of the deceased, you may conclude that the defendant intended the natural result of such an act, that is, the death of the deceased. Intention to kill, then, may be shown by proof that the act which caused the death of the deceased had as its natural result either death, or such serious bodily injury as would naturally result in death.*

However, if you find that the State has proven beyond a reasonable doubt that the defendant killed the deceased, but has failed to prove beyond a reasonable doubt that the killing was intentional, *and has failed to prove beyond a reasonable doubt the absence of excuse, justification or mitigation, then your verdict should be not guilty of murder in the second degree.*

Assault with intent to murder consists of the elements of an assault and an intent to murder. [T]he State must prove beyond a reasonable doubt that [] the assault was committed with the intent to murder the victim. [] The essence of the offense of assault with intent to murder is the term “intent to murder.” A specific intent to murder is not required. It is enough if you find that the accused intended to inflict grievous bodily injury. The intent cannot be inferred from the mere fact of the assault, or from the mere use of a deadly weapon, although the character of the assault, and the use of a deadly weapon, are factors to be considered.

(Emphasis added).

In granting appellee post-conviction relief on the instructions, the court stated:

According to Mr. Potter, the problem with the [intent] instructions is that the trial judge, in effect, shifted the burden of proving the element of intent from the State to the defense by suggesting that the jury could *presume* that he intended the natural and probable consequences of his actions. Mr. Potter argues that trial counsel should have objected to these instructions based on . . . *Sandstrom v. Montana*, 442 U.S. 510 (1979).

The State responds that the word “presume” means the same thing as “infer” in this context and that the jury would have interpreted it accordingly.
...

Upon consideration of the foregoing, this [c]ourt finds that the “presumption” instructions were erroneous and that trial counsel performed deficiently by failing to object. The Maryland Pattern Jury Instruction on proof of intent is a useful point of comparison to the instruction at issue in the present case. The pattern instruction provides:

Intent is a state of mind and ordinarily cannot be proven directly, because there is no way of looking into a person’s mind. Therefore, a defendant’s intent may be shown by surrounding circumstances. In determining the defendant’s intent, you may consider the defendant’s acts [and statements], as well as the surrounding circumstances. *Further, you may, but are not required to, infer that a person ordinarily intends*

the natural and probable consequences of [his] [her] acts [and/or omissions].^{3]}

MPJI-Cr 3:31 (emphasis added). This Court finds that there is a material difference between being instructed to *presume* a person intends the natural and probable consequences of his acts and being instructed that the same may or may not be *inferred*. The *Sandstrom* case confirms that the use of the term “presume” in this context is problematic because a reasonable juror might either interpret this language as conclusive, *i.e.*, that the defendant did in fact intend the natural and probable consequences of his acts, or as shifting the burden of proof to the defense. 442 U.S. at 517. The objectionable jury instruction in *Sandstrom* read, “[t]he law presumes that a person intends the natural and probable consequences of his voluntary acts,” *id.* at 513, which is substantially similar to those given to Mr. Potter’s jury. Though [] the case cited by the State reached a different result, the instruction at issue in that case involved the burden of proving mitigation as opposed to the element of intent and, therefore, is distinguishable. . . .

Thus, as an alternative ground for granting the relief requested, this [c]ourt finds that Mr. Potter’s trial counsel performed deficiently and that his case was prejudiced as a result. The same analysis applies to Mr. Potter’s post-conviction counsel.

The State contends that the court erred for two reasons. First, it argues, as it did with the advisory instruction, that appellee failed to present any evidence to permit the court to find deficient conduct or prejudice. On the merits, the State contends that the circuit court erred in granting a new trial based on *Sandstrom* because the instructions here were “fundamentally different” from those at issue in *Sandstrom*, and viewing the instructions in their totality, “there is no reasonable likelihood that the jury applied the

³ The Maryland Pattern Jury Instruction (“MPJI-Cr”) used for comparison by the post-conviction judge in August 2013 is the same as the pattern instruction effective December 1986. (MPJI-Cr (2013); MPJI-Cr (1986-87)).

instructions in a manner that relieved the State of its burden to prove each element of the offenses beyond a reasonable doubt.”

Appellee contends that the post-conviction court properly found, under *Sandstrom*, that the intent instructions were unconstitutional. Furthermore, he asserts, the State’s proffer that the impact of the erroneous instruction on his trial was insufficient is incorrect, as appellee’s intent was the “most critical issue in the case.” Moreover, contrary to the State’s argument that the post-conviction court applied the wrong standard, appellee asserts that there is no indication that the court did not view the effect of the instructions as a whole.

Appellee asserts that the circuit court was correct in finding that the instruction given here was “substantially similar” to that found unconstitutional in *Sandstrom*. He argues that the instructions here improperly “relieved the State of its burden of proof, permitted the jury to presume that the intent element of the offense had been proven, and clearly shifted the burden of proof to Mr. Potter to disprove the intent element of the charged offenses,” which was not harmless, as the only disputed issue was appellee’s intent.

In *Sandstrom v. Montana*, 442 U.S. 510, 512 (1979), the Supreme Court considered whether, “in a case in which intent is an element of the crime charged, the jury instruction, ‘the law presumes that a person intends the ordinary consequences of his voluntary acts,’” violated the requirement of the 14th Amendment that the State prove every element of a criminal offense beyond a reasonable doubt. In concluding that it did, the Supreme Court rejected the State’s argument “that the instruction merely described a permissive inference

– that is, it allowed but did not require the jury to draw conclusions about defendant’s intent from his actions – and that such inferences are constitutional.” *Id.* at 514. The Court noted that the jurors “were not told that they had a choice, or that they might infer that conclusion; they were told only that the law presumed it.” *Id.* at 515. It stated that the jury might have interpreted the instruction in either of two ways: “as an irrebuttable direction by the court to find intent once convinced of the facts triggering the presumption[, or] to find [guilt] upon proof of the defendant’s voluntary actions (and their ‘ordinary’ consequences), unless *the defendant* proved the contrary.” *Id.* at 517. The Court ultimately held that a conclusive presumption, in the context of that criminal trial, would be unconstitutional as it “would ‘conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime,’ and would ‘invade [the] factfinding function’ which in a criminal case the law assigns solely to the [trier of fact].” *Id.* at 523 (quoting *Morissette v. United States*, 342 U.S. 246, 275 (1952); *United States v. U. S. Gypsum Co.*, 438 U.S. 422, 446 (1978)).

In *Sandstrom*, however, there was a “bare statement that the law presumes that ‘a person intends the ordinary consequences of his voluntary acts,’” which jurors could have “taken as a mandatory instruction.” *Diaz v. State*, 129 Md. App. 51, 66 (1999), *cert. denied*, 357 Md 482 (2000). Here, by contrast, the instructions did not singly and unambiguously tell the jurors that they had no choice but to apply the presumptions. Indeed, when viewed in context and as a whole, the instructions in this case did not shift the burden to appellee, but rather, they left the determination of appellee’s intent to the jury. *See, e.g., Rosenberg v. State*, 129 Md. App. 221, 249 (1999) (“We are mindful that, in reviewing a jury

instruction, we look to the instruction as a whole, and not to the allegedly offensive part in isolation.”), *cert. denied*, 358 Md. 382 (2000). *See also Francis v. Franklin*, 471 U.S. 307, 315 (1985) (“If a specific portion of the jury charge, considered in isolation, could reasonably have been understood as creating a presumption that relieves the State of its burden of persuasion on an element of an offense, the potentially offending words must be considered in the context of the charge as a whole” because “[o]ther instructions might explain the particular infirm language to the extent that a reasonable juror could not have considered the charge to have created an unconstitutional presumption.”). As set forth above, the trial court’s instructions, some repeated several times, told the jury that the State had the burden of proving the absence of mitigation, that the jury had the option of finding appellee not guilty if the State failed to satisfy its burden of proving intent, that appellee had no burden to produce any evidence, and that the State had the burden to prove every element of an offense beyond a reasonable doubt. Thus, viewing the instructions as a whole, we conclude that the post-conviction court was wrong when it found the instructions on intent in this case to be “substantially similar” to the unconstitutional instructions in *Sandstrom*.

Moreover, even if the instruction was improper, appellee failed to show that the failure to object constituted deficient performance or resulted in prejudice. With respect to deficient conduct, appellee must show that counsel’s failure to object was the result of unreasonable professional judgment and fell below an objective standard for reasonableness. As stated above, to do so, appellee was required to “overcome the

presumption that the challenged action might, under the circumstances, be considered sound trial strategy.” *Oken*, 343 Md. at 283.

Here, as indicated, there was no explanation why counsel did not object to the challenged intent instruction. As the State points out, however, the record indicates that counsel may not have objected because she did not want to call the jury’s attention to the instruction. In response to a challenge to another instruction involving a presumption that a homicide constitutes murder, counsel did not ask for a corrective instruction, expressing concern that it would highlight the issue to the jury.

Thus, appellee’s counsel may not have objected to the instruction at issue here for a tactical reason, i.e., because curing it could have highlighted it for the jury. Under the circumstance of this case, given appellee’s failure to rebut the presumption that the failure to object was sound trial strategy, the circuit court erred in granting post-conviction relief.

JUDGMENT REVERSED. COSTS TO BE PAID BY APPELLEE.