UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1264

September Term, 2015

CHARLES RICHTER

v.

STATE OF MARYLAND

Graeff,
Berger,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Berger, J.

Filed: July 19, 2017

Charles Richter ("Richter"), appellant, a retired police officer, was convicted of the second-degree murder of his next-door neighbor, Mark Xander ("Xander"). Richter admitted to shooting Xander, but Richter asserted that he had done so in self-defense. On direct appeal, we affirmed Richter's conviction in an unreported opinion. *Richter v. State*, No. 1153, Sept. Term 2012 (filed June 24, 2013). This case is before us on appeal from an order of the Circuit Court for Queen Anne's County granting in part and denying in part the petition for post-conviction relief filed by Richter.[1] Richter filed an application for leave to appeal, which this Court granted.

On appeal, Richter raises six questions for our consideration, which we have rephrased as follows:

> I. Whether the post-conviction court erred when it found that defense counsel was not constitutionally ineffective when he did not lodge an objection to the prosecutor's references to certain collateral matters during Richter's cross-examination.
>
> II. Whether the post-conviction court erred when it found that defense counsel was not constitutionally ineffective when he did not lodge an objection to the prosecutor's accusation that Richer was lying.
>
> III. Whether the post-conviction court erred when it found that defense counsel was not constitutionally ineffective when he did not lodge an objection when the prosecutor asked "were-they-lying" questions during Richter's cross-examination.

[1] The circuit court granted in part Richter's petition for post-conviction relief. The circuit court granted Richter's petition as it pertained to trial counsel's failure to file a motion for modification or reduction of sentence. The court ordered that Richter could file a belated motion for modification or reduction of sentence within ninety days of the court's order. The circuit court otherwise denied Richter's petition.

IV. Whether the post-conviction court erred when it found that defense counsel was not constitutionally ineffective when he did not object to police officer testimony about police training and experience.

V. Whether the post-conviction court erred when it found that defense counsel was not constitutionally ineffective when he did not object to testimony by a paramedic about the distance the victim could walk after being shot.

VI. Whether the post-conviction court erred when it found that defense counsel was not constitutionally ineffective by failing to rehabilitate Richter's wife with a recorded prior consistent statement on redirect examination.

Richter further asserts that even if any individual allegation is insufficient to warrant post-conviction relief, he is entitled to post-conviction relief based upon the cumulative effect of the alleged errors. For the reasons explained herein, we shall affirm the judgment of the Circuit Court for Queen Anne's County.

FACTS AND PROCEEDINGS

There were no eyewitnesses to the altercation between Richter and Xander that resulted in Xander's death.[2] After the shooting, Richter telephoned 911. Paramedics and police responded to the 911 call and found Xander deceased near the property line between the Richter and Xander homes. In our opinion addressing Richter's direct appeal, we summarized the facts of this case as follows:

> At trial, as a witness for the State, Deputy Steven Gore of the Queen Anne's County Sheriff's Office testified that on April 3, 2011, he was dispatched to 107 Emory Circle in Stevensville, Queen Anne's County, Maryland. On that property, Mark Xander was lying on his back, deceased, with

[2] Richter's wife testified that she overheard the altercation from inside the Richters' home.

> a pair of hedge trimmers in his hand. Deputy Gore walked onto the property of [Richter], Xander's next-door neighbor, who was sitting "on the corner of the garage" and was holding a .22 caliber Derringer. [Richter] said "that he was attacked from behind" and that the attack was on video. Deputy Gore seized a video "camera [that] was sitting on top of" a car in the garage. [Richter] said that the altercation with Xander occurred "near the back tire" of the car in the garage, where he and Xander "were struggling over the camera [because] Xander was trying to get the camera from him."
>
> As a witness for the State, Deputy First Class Christopher Schwink of the Queen Anne's County Sheriff's Office testified that on April 3, 2011, he was dispatched to Emory Circle, where he went to [Richter's] property and spoke with [Richter], who said that, on that day, Xander "came on his property and was cutting the bushes that were on his property and then . . . the Xander[s'] dog came onto [Richter's] property and [Richter] attempted to tie the dog into the garage and, at that point, [Richter] was attacked from behind by" Xander. [Richter] said that "he was attempting to put the dog in and [] Xander jumped on his back and they were wrestling . . . to the ground, and then [Richter] shot" Xander.
>
> As a witness on his own behalf, [Richter] - a retired law enforcement officer - testified that on April 3, 2011, while driving home from work, he thought that he saw Xander "urinating into [Richter's] bushes[.]" [Richter] parked his vehicle, "grabbed [his] video camera and [] was going to walk back and document whoever this person was." [Richter] saw the Xanders' dog on his property, and turned on the video camera "to document it." [Richter] "took the dog . . . to [his] garage." After [Richter] entered the garage, Xander "came flying past [him] over [his] left side." [Richter] and Xander - who "had hedge trimmers" - "got into [] a battle" [Richter] "got [his] pistol out, [] jammed it into [Xander] and pulled the trigger." Xander "ran out the door."

Richter, *supra*, slip op. at 1-3 (some alterations in original).

Richter was charged with first-degree murder, second-degree murder, voluntary manslaughter, first-degree assault, second-degree assault, and the use of a handgun in the

commission of a felony or crime of violence. Following a four-day jury trial in May 2012, Richter was convicted of second-degree murder and use of a handgun in the commission of a felony or crime of violence. The jury returned a not guilty verdict on the first-degree murder charge. The circuit court sentenced Richter to twenty years' imprisonment for second-degree murder and five years' imprisonment without parole for the handgun offense. The two sentences were ordered to run consecutively. Richter appealed to this Court. We affirmed, finding that the issues raised on direct appeal were unpreserved.

On December 19, 2014, Richter filed a petition for post-conviction relief in the circuit court, in which Richter alleged ineffective assistance of counsel. The circuit court held a hearing on Richter's petition on April 10, 2015. Richter's lead trial attorney, Gordon Tayback, Esquire, had passed away before the post-conviction hearing. The circuit court, however, heard testimony from Kenneth Mann, Esquire, who was a part of Richter's trial defense team.

Mr. Mann knew Mr. Tayback for approximately thirty years prior to Mr. Tayback's death. Mr. Mann acknowledged that Mr. Tayback had been suffering physical symptoms during Richter's trial. Specifically, Mr. Mann testified that Mr. Tayback had pain in his hips that made it difficult to walk. At the time, Mr. Mann was unaware of the cause of Mr. Tayback's symptoms, but he later learned that Mr. Tayback had cancer. Mr. Mann testified that Mr. Tayback was lucid and coherent "[until] the day he died." Mr. Mann explained that there was nothing wrong with Mr. Tayback's mental processing during Richter's trial. Richter himself testified that he was satisfied with Mr. Tayback's services until the jury returned its verdict.

On June 10, 2015, the circuit court largely rejected the allegations of error raised in Richter's petition for post-conviction relief.[3] The circuit court found that Richter had not demonstrated that certain alleged errors by trial counsel were deficient. The circuit court further found that Richter had not demonstrated that he was prejudiced by certain alleged errors. Richter filed an application for leave to appeal, which this Court granted on November 3, 2016. Additional facts shall be discussed as necessitated by our consideration of the issues on appeal.

STANDARD OF REVIEW

To prevail on a claim of ineffective assistance of counsel, the convicted defendant must satisfy the two-prong test set forth in *Strickland v. Washington*:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

466 U.S. 668, 687 (1984). *See also State v. Borchardt*, 396 Md. 586, 602 (2007) (reiterating the *Strickland* standard for ineffective assistance of counsel). There is a strong presumption that counsel rendered effective assistance. *State v. Thomas*, 325 Md. 160, 171 (1992).

[3] As discussed *supra*, the circuit court permitted Richter to file a belated motion for modification or reduction of sentence.

The deficiency prong of the *Strickland* test is defined by an objective standard and the defendant has the burden of demonstrating "that counsel's representation fell below an objective standard of reasonableness." *Evans v. State*, 396 Md. 256, 274 (2006) (citing *Strickland*, *supra*, 466 U.S. at 688). The deficiency prong "is satisfied only where, given the facts known at the time, counsel's choice was so patently unreasonable that no competent attorney would have made it." *Borchardt*, *supra*, 396 Md. at 623. Courts must apply a highly deferential standard "to avoid the post hoc second-guessing of [counsel's] decisions simply because they proved unsuccessful . . . ." *Evans*, *supra*, 396 Md. at 274. To establish the deficiency prong of the *Strickland* test, Petitioner bears the burden of: (1) identifying the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment; (2) showing that counsel's performance fell below an objective standard of reasonableness; and (3) overcoming the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *Strickland*, *supra*, 466 U.S. at 690.

Satisfying the prejudice prong under *Strickland* requires more than simply demonstrating that counsel's errors "had some conceivable effect on the outcome of the proceeding . . . ." *Evans*, *supra*, 396 Md. at 275. Rather, Petitioner must establish "that there is a reasonable probability that, but for counsel's professional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694 (emphasis added). The Supreme Court defined "a reasonable probability" as "a probability sufficient to undermine confidence in the outcome." *Id.* "The prejudicial effect of counsel's deficient performance need not meet a preponderance of the evidence standard." *Bowers v. State*,

320 Md. 416, 425 (1990). Rather, "the test is whether the trial can be relied on 'as having produced a just result.'" *Id.* (quoting Strickland, 466 U.S. at 686).

We have explained that the following standard of review applies when considering an appeal of a circuit court's denial of post-conviction relief:

> The standard of review of the lower court's determinations regarding issues of effective assistance of counsel is a mixed question of law and fact. We will not disturb the factual findings of the post-conviction court unless they are clearly erroneous. But, a reviewing court must make an independent analysis to determine the ultimate mixed question of law and fact, namely, was there a violation of a constitutional right as claimed. In other words, the appellate court must exercise its own independent judgment as to the reasonableness of counsel's conduct and the prejudice, if any. Within the *Strickland* framework, we will evaluate anew the findings of the lower court as to the reasonableness of counsel's conduct and the prejudice suffered. As a question of whether a constitutional right has been violated, we make our own independent analysis by reviewing the law and applying it to the facts of the case. We will defer to the post-conviction court's findings of historical fact, absent clear error, but we will make our own, independent analysis of the appellant's claim.

State v. Jones, 138 Md. App. 178, 209 (2001) *aff'd*, 379 Md. 704 (2004) (internal citations and quotations omitted, alterations from original).

DISCUSSION

I.

Richter's first allegation of error is that defense counsel rendered ineffective assistance of counsel when he failed to object to questions asked by the prosecutor that included references to facts not in evidence during Richter's cross-examination and

insinuated that Mr. Richter was lying.[4] Richter asserts that the prosecutor's questions amounted to an assertion of personal knowledge by the prosecutor and that defense counsel's failure to object was constituted deficient performance that prejudiced his defense. We are unpersuaded.

Richter asserts that trial counsel was ineffective when he failed to object to the prosecutor's comments and questions when Richter was cross-examined about (1) Richter's accusations regarding damage done to his home before he moved into the home in 1992, (2) Richter's claim that Xander's house fire occurred because Xander had a "meth lab," and (3) Richter's claim that he had been refused assistance from the State's Attorney's office after Richter complained that his wife had been injured by Xander's dog. Richter asserts that he was prejudiced by his trial attorney's failure to object to the prosecutor's allegedly improper comments and questions. We address each of these examples of allegedly deficient performance in turn.

A. The Alleged Burglary by Xander

First, we observe that in his statements to police, as well as in his trial testimony on direct examination, Richter raised multiple complaints about alleged mistreatment by Xander over many years. Richter further testified as to alleged corruption and dishonesty by various Queen Anne's County officials. In his initial videotaped conversation with Deputy Gore following the shooting, Richter complained about Xander, the sheriff's department, the State's Attorney's Office, the fire marshal's office, and the local

[4] We discuss the first two allegations of error raised by Richter in Section I.

dogcatcher.[5] Immediately after the shooting, Richter told Deputy Gore that Xander's dog had attacked his wife and that the Xanders had burglarized the Richter's home in 2005. Richter further commented that what he had "been through with the Queen Anne's County Sheriff's Department [was] an utter disgrace." Richter told Gore that Lieutenant Heddinger had told him that the Xanders burglarized the Richter home but "he wouldn't do nothing about it." Richter later acknowledged that the alleged burglary had occurred thirteen years earlier. After moving on to other topics, Richter returned to the issue of the burglary, commenting that the police report "contained over 65 mistakes in it," "35, 40 fingerprints and hand prints were never checked out." Richter continued to raise complaints until the video recording ended. At the end of the recording, Richter commented that cases were not properly handled in Queen Anne's County because the authorities are "all corrupt."

During direct examination, Richter testified to various grievances over the previous approximately sixteen years, including loud drumming by one of Xander's sons, the failure of the police and State's Attorney to prosecute Xander for an alleged burglary, and negative encounters with Xander's dog. During direct examination, Richter testified that his home was "burglarized and vandalized to the tune of over $22,000" shortly before Richter moved into the property. Richter testified that he reported the burglary to the police, but that nothing was ever prosecuted. Richter reiterated his grievances against the Queen Anne's

[5] Richter had a video camera in his garage which was set to record and did in fact record his initial conversation with Deputy Gore following the shooting. The video was played for the jury during Deputy Gore's testimony, without objection. The trial transcript notes that the video was played at trial but does not contain a transcription of the video itself. The quotations recounted herein are taken from a written transcript of the video that was prepared by the State for use at trial.

County authorities, testifying that "[t]he original police report was rewritten three months after the fact, had over 65 mistakes in it. Thirty five to 40 palm prints and fingerprints never analyzed. Witnesses have not been talked to until this day."

It was within this context that the prosecutor referenced certain facts relating to the alleged burglary during cross-examination:

> [THE PROSECUTOR]: You blame Mark Xander for burglarizing your home, for $22,000 worth of damages, right?
>
> [RICHTER]: Sheriff blamed him.
>
> [THE PROSECUTOR]: No, you blamed him.
>
> [RICHTER]: Because the sheriff blamed him.
>
> [THE PROSECUTOR]: You're saying the sheriff himself blamed him?
>
> [RICHTER]: Deputy Hofmann is the one that told me.
>
> [THE PROSECUTOR]: That's interesting. You told Deputy Gore it was Heddinger.
>
> [RICHTER]: Heddinger was the detective that was there in charge, but this was blurted out of Hofmann's mouth.
>
> ***
>
> [THE PROSECUTOR]: That investigation, the sheriff's department reviewed it, the state police reviewed their investigation, my office reviewed it, all those agencies found zero evidence pointing the finger at the Xanders, but now you're saying that the sheriff's brother told you that [the Xanders] did it and no one acted upon it?
>
> [RICHTER]: That's exactly what I'm saying. You mentioned the state police, Sergeant Mitch Park, I tried to get him to look into it and he did and he tried to get the reports from Sheriff Crossley and in a written letter I was advised by state police sergeant Mitch Park, the detective, that the sheriff told him they lost the reports.

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> [THE PROSECUTOR]: All those reports were turned over to the state police and you know it. Sergeant Ralph took possession of that file?
>
> [RICHTER]: What I'm talking about was the letter that I got from the state police that said the sheriff lost the reports and they're no longer available and this Amy Bonner, who was Paul Comfort's personal secretary, when he was the administrator, walked over to the police department, went in the file and found these missing reports.
>
> [THE PROSECUTOR]: Tell me, who is it that told you that Mark Xander was your burglar?
>
> [RICHTER]: Hofmann, I think his first name is Dennis.
>
> [THE PROSECUTOR]: But not Heddinger like you said to --
>
> [RICHTER]: No, Heddinger rolled his eyes like he couldn't believe he was saying it, like talking out [at] school.

This exchange demonstrates that the prosecutor was not asserting any personal knowledge on his part, but rather, was exploring the issues previously raised by Richter relating to the burglary and vandalism that Richter attributed to Xander. The prosecutor did not assert special knowledge, unknown to Richter. Indeed, Richter's allegation that Xander had previously burglarized his home, as well as Richter's claim that the case had not been properly investigated, had been presented to the jury during direct examination.

The record reflects an exchange between the prosecutor and Richter in which Richter fully answered the prosecutor's questions and even elaborated upon the issues raised by the prosecutor. When the prosecutor asked Richter if it was true that the burglary had been investigated and reports had been provided to the state police, Richter responded by discussing his theory of what had occurred during the investigation.

The Court of Appeals has explained that "a prosecutor may not ask a question which implies a factual predicate which the examiner knows he cannot support by evidence." *Elmer v. State*, 353 Md. 1, 13 (1999). In our view, however, the prosecutor in this case did not make himself a witness in this case by asking Richter questions, to which both the prosecutor and Richter knew the answer, and which Richter answered in detail. Indeed, in *Elmer*, the prosecutor asked questions that he knew were based on facts that could not be proven. In this case, the questions referencing facts not in evidence were not the type of "persistent, testimonial-like questions" which we have held to be improper. *Bell v. State*, 114 Md. App. 480, 496 (1997) (discussing our holding in *Hagez v. State*, 110 Md. App. 194, 222 (1996)). Rather, the questions posed by the prosecutor constituted an attempt to elicit information of which Richter had personal knowledge. Furthermore, Richter did in fact present his personal knowledge in response to the prosecutor's inquiry.

Furthermore, even if we were to assume that certain objections, if made, would have been properly sustained, defense counsel's failure to object does not necessarily render his performance deficient. Indeed, "[t]o show deficient performance, . . . the defendant must also show that counsel's actions were not the result of trial strategy." *Coleman v. State*, 434 Md. 320, 338, (2013). The circuit court found that defense counsel's failure to object to questions including references to facts not in evidence was "a valid tactic . . . so as to avoid giving the jury the impression that the defense is preventing the jury from receiving basic information." The circuit court further observed that "[i]t is also a valid tactic for counsel not to object to such improper questioning where the reason counsel does not object is to prevent the jury being unduly prejudiced by the facts not in evidence as a result

of being emphasized by the judge's curative instructions." We agree with the circuit court's finding that defense counsel possessed valid tactical reasons for declining to object to the questions posed by the prosecutor. Accordingly, defense counsel's conduct did not constitute ineffective assistance of counsel.

B. The Xander House Fire

In 2001, a house fire occurred at the Xander home. This fire and its alleged cause was discussed at some length at Richter's trial. After the shooting, Richter told Deputy Gore that the Xanders' home had "burnt down about six or seven years ago because they ha[d] a meth lab" in the house, which caused the house to "burn[] down in twelve minutes."[6] This information was presented to the jury during Deputy Gore's direct examination.

During Richter's cross-examination, the prosecutor asked Richter about the statements he had made alleging that the Xanders had a meth lab in their home. The following exchange occurred:

> [THE PROSECUTOR]: [Y]ou said that the Xander house burned down because they had a meth lab over there?
>
> [RICHTER]: That's what I was told by the fire investigator from the State of Maryland and the insurance investigator.
>
> [THE PROSECUTOR]: That's amazing, we reviewed the same report, I didn't see any meth lab in there. Mr. Richter, why do you make this stuff up?
>
> [RICHTER]: I don't make it up, I'm just telling you what was relayed to me. This house burned down in 12 minutes on a

[6] This conversation was recorded in the video of Richter's conversation with Deputy Gore.

> cool windy day and the fire investigator said they couldn't -- they won't be able to determine probably why it burnt down, but the way it burnt, it was consistent with chemicals to a meth lab.
>
> [THE PROSECUTOR]: Is that right?
>
> [RICHTER]: That's what the man told me.

Thereafter, the prosecutor showed Richter a flyer, on which was printed "drug lab burns, no more drugs are being sold from 105 Emory Circle."[7] The State attempted to prove that Richter was the author of flyer, but Richter maintained that he had "never seen this [flyer] before."

Similarly to the cross-examination about the 1997 burglary, the State was permitted to cross-examine Richter about his allegation that there was a "meth lab" in the Xander home. Richter, and not the State, introduced the fire investigator's report, and the prosecutor was permitted to inquire as to the discrepancy between Richter's "meth lab" allegation and the absence of any reference to a "meth lab" in the fire investigator's report.

Richter asserts that trial counsel's failure to object to the prosecutor's comment that Richter "ma[d]e this stuff up" amounted to ineffective assistance of counsel because the comment was objectionable and prejudicial. Richter contends that this comment by the prosecutor amounted to a personal belief that Richter was lying. Indeed, the Court of Appeals has held that by asserting that he or she knows a witness is lying, a prosecutor can engage in impermissible "reverse prosecutorial vouching." *Walker v. State*, 373 Md. 360, 404 (2003).

[7] The Xanders' address was 105 Emory Circle.

In this case, however, even if we were to assume *arguendo* that the comment was improper, Richter has not proved prejudice. The record reflects that the State and Richter presented vastly differing narratives throughout trial. It was more than apparent to the jury that Richter disbelieved the State and that the State disbelieved Richter, given that Richter's various conspiracy theories were a recurrent theme during his testimony. Accordingly, we hold that Richter has failed to demonstrate that there is a reasonable probability that, but for the alleged error, a different result would have occurred. *See Strickland*, *supra*, 466 U.S. at 694.

C. The Parties' Prior Involvement with the Justice System

Richter further asserts that defense counsel was ineffective when he failed to object to a question from the prosecutor relating to a prior complaint about the Xanders' dog. Richter testified that, immediately before the incident resulting in Xander's shooting, the Xanders' dog had come onto Richter's property and Richter had attempted to bring the dog into his garage. During cross-examination, the prosecutor asked Richter why he felt the need to take the dog into his garage when he had already recorded a video showing the Xanders' dog on his property. The following colloquy occurred:

> [THE PROSECUTOR]: Right. I mean, if the violation is the dog is on your property, wouldn't that video of the dog on your property be all the evidence you need?
>
> [RICHTER]: Not with the Queen Anne's County State's Attorney's Office because the reason I went to court the second time on the dog, the dog drew blood on my arm, was in my garage, when I went to court, your protégé that's not there anymore, [ex-State's Attorney] McDonald, never even talked to me prior to going to court and handled the case like he was the defendant's lawyer.

> [THE PROSECUTOR] Wasn't that because you said the dog had busted your wife's nose, but it was actually nasal surgery is why it was bleeding and when they found out you were lying, they decided not to prosecute?
>
> [RICHTER]: I wasn't lying, what are you talking about?

Thereafter, the prosecutor moved on to a different issue.

Maryland Rule 5-616(a)(2) provides that "[t]he credibility of a witness may be attacked through questions asked of the witness, including questions that are directed at . . . [p]roving that the facts are not as testified to by the witness." Richter would have had personal knowledge of whether his wife's injuries had, in fact, been caused by the Xanders' dog or caused by nasal surgery. This was, therefore, a proper line of questioning to impeach Richter's credibility on cross-examination. Although Richter observes that no testimony or evidence was offered to support the prosecutor's comment, extrinsic evidence of collateral matters is not generally admissible. Md. Rule 5-616(b)("Other extrinsic evidence contradicting a witness's testimony ordinarily may be admitted only on non-collateral matters. In the court's discretion, however, extrinsic evidence may be admitted on collateral matters."). Furthermore, to the extent that the question may have been improper because it referenced Richter "lying" in the past, we emphasize again that it was more than apparent to the jury that Richter and the State disbelieved each other. Accordingly, we hold that even if Richter could prove deficient performance with respect to defense counsel's failure to object to this question, Richter is unable to prove prejudice under *Strickland*.

II.

The next allegation of error raised by Richter is that defense counsel rendered ineffective assistance of counsel when he did not object to "were-they-lying" questions asked by the prosecutor. A brief discussion of the context of the alleged error is helpful to frame our analysis of the issue presented.

As discussed *supra* Part I, Richter testified that, in his view, various public officials including the fire marshal, dogcatcher, and members of the Queen Anne's County Police Department, among others, were corrupt and had falsified evidence at various times, including with respect to the 1997 burglary of Richter's home. It was within this context that the prosecutor asked Richter about the source of his believe that Xander was a burglar, when the following exchange occurred:

> [THE PROSECUTOR]: So you think of Mark Xander as a burglar, up to the day you shot him, in your mind, he's your home burglar, correct?
>
> [RICHTER]: According to the police he is, yes.
>
> [THE PROSECUTOR]: According to you, Mr. Richter, correct?
>
> [RICHTER]: The police told me he did it. What am I supposed to think?
>
> * * *
>
> [THE PROSECUTOR]: So if I bring Lt. Heddinger in here today and ask him if this was said in his presence, he's going to say, oh yeah, we told Mr. Richter that Xander[] did it and we're going to get him?
>
> [RICHTER]: No, I would expect him to lie.
>
> [THE PROSECUTOR]: These other deputies, Gore, Schwink, Hampton, Svehla, Stouffer, were they all lying, too?

> [RICHTER]: It depends -- they tell the truth when they want and they stretch the truth when they want. This Hampton, Sean Hampton, got up here and said a lot, but when I was talking to him at the hospital, he brought up the burglary report and said how terrible it was written, but I don't think he would say it here.
>
> [THE PROSECUTOR]: So did Hampton lie on the stand?
>
> [RICHTER]: Yes.
>
> [THE PROSECUTOR]: What about Deputy Gore, was he lying, too?
>
> [RICHTER]: About what? I mean, they stretch truths, we know that.
>
> [THE PROSECUTOR]: Well, was he lying about the fact that you said you never saw anything in the hands of Mark Xander on two occasions?
>
> [RICHTER]: I said that on the video because, one, you got to remember, ladies and gentlemen, when you're going through something like this, a million things go through your mind and the problems I've had with the sheriff's department down here and law enforcement, I was afraid that if I mentioned too much about those hedge trimmers that they wouldn't come in as evidence and me not saying it, they're here.

Richter asserts that these questions were improper "were-they-lying" questions to which defense counsel should have objected.[8] "Were-they-lying" questions are generally improper, and the Court of Appeals has commented that "[w]hen prosecutors ask

[8] In his brief, Richter asserts that the trial court did not analyze trial counsel's failure to object to these questions. Our review of the post-conviction court's memorandum opinion reflects that the post-conviction court did, in fact, address this issue, concluding that trial counsel "had a valid tactical reason for his actions and, hence, his actions [did] not constitute ineffective assistance of counsel."

'were-they-lying' questions, especially when they ask them of a defendant, they, almost always, will risk reversal." *Hunter v. State*, 397 Md. 580, 596 (2007).

A brief discussion of the facts of *Hunter* are helpful to our analysis. In *Hunter*, a detective testified that the defendant had confessed to a burglary. *Id.* at 584. At trial, the defendant denied committing the burglary and further denied having confessed to it. *Id.* During cross-examination, the defendant was asked whether the detective had been lying when he testified that the defendant had confessed to the burglary. *Id.* at 585. The Court of Appeals held that the questions were improper, explaining:

> These questions were impermissible as a matter of law because they encroached on the province of the jury by asking petitioner to judge the credibility of the detectives and weigh their testimony, i.e., he was asked: "And the detective was lying?" The questions also asked petitioner to stand in place of the jury by resolving contested facts. Moreover, the questions were overly argumentative. They created the risk that the jury might conclude that, in order to acquit petitioner, it would have to find that the police officers lied. The questions were further unfair because it is possible that neither the petitioner nor the police officers deliberately misrepresented the truth. These questions forced petitioner to choose between answering in a way that would allow the jury to draw the inference that he was lying or taking the risk of alienating the jury by accusing the police officers of lying. Therefore, the trial court erred in allowing the State to ask petitioner "were-they-lying" questions.

Id. at 595-96.

The circumstances of the instant case surrounding the "were-they-lying" questions differ greatly from those in *Hunter*. Unlike in *Hunter*, Richter's defense at trial focused significantly on Richter's assertions of corruption and dishonesty on the part of the police department. Richter had already accused the police of fabricating evidence, writing false

reports, and general dishonesty. The concerns raised by the Court of Appeals in *Hunter*, therefore, do not weigh as strongly towards a conclusion that the questions were improper. Furthermore, even if the questions posed the prosecutor were improper -- a question we need not fully answer in this appeal -- they were nowhere near as obviously improper as those in *Hunter*. We do not believe that the defense attorney's failure to object to this line of questioning constituted conduct that fell below an objective standard of reasonableness.

Nor can Richter prove prejudice with respect to the "were-they-lying" questions for the same reasons discussed *supra* in Part I. The jury had already been presented with evidence that Richter and the State each disbelieved each other, and that Richter believed that various witnesses testifying on behalf of the State were lying. Accordingly, we hold that Richter has failed to satisfy the prejudice prong of the ineffective assistance of counsel analysis under *Strickland*, *supra*, 466 U.S. at 694.

III.

Richter further contends that his trial attorney rendered ineffective assistance of counsel when he did not object to police officer testimony about police training and experience in the area of deadly force. Richter asserts that five witnesses provided improper lay opinion testimony under *Ragland v. State*, 385 Md. 705 (2005), when they testified as to their training in the use of deadly force.[9] As we shall explain, we agree with

[9] In *Ragland*, the Court of Appeals explained that expert opinion testimony is that which is "based on specialized knowledge, skill, experience, training, or education . . . [and] need not be confined to matters actually perceived by the witness," while lay opinion testimony is that which is "rationally based on the perception of the witness." 385 Md. at 718.

the post-conviction court that defense counsel's failure to object constituted valid trial strategy, and, as such, did not amount to ineffective assistance of counsel.

Five police officers, none of whom were qualified as expert witnesses, testified to some extent about their deadly force training: Deputy Steven Gore, Deputy Chris Schwink, Corporal Sean Hampton, Deputy Todd Svehla, and Detective Steven Stouffer. The prosecutor asked Deputy Gore, "As a police officer, what are you taught as far as the use of deadly force to shoot a suspect?" Defense counsel objected to this question and the objection was sustained. The prosecutor then asked, "In the use of deadly force, when is it to be utilized?" Again, defense counsel objected and the court sustained the objection. The prosecutor moved on but returned to the topic a few questions later, asking, "Deputy Gore, are you ever trained to shoot someone in the ass as a police officer?" Defense counsel did not object, and Deputy Gore answered in the negative. The prosecutor then asked, "Or in the back?" Again, no objection was lodged and Deputy Gore answered in the negative.

During other officers' testimony, defense counsel similarly did not object to questions relating to where on a person's anatomy a police officer is trained to aim a weapon, but did object to questions about why a police officer would decide to use deadly force. During the State's examination of Deputy Schwink, defense counsel did not object to the questions inquiring:

> (1) "In your training, knowledge and experience as a police officer, have you ever been trained to shoot someone in the buttocks or that area?"
>
> (2) "[W]hy not train to shoot someone in the buttocks?"
>
> (3) "How about the lower back?"

Indeed, during cross-examination, defense counsel elicited testimony from Deputy Schwink about "aim[ing] for center mass" in self-defense because "killing somebody" is "the only way to stop [a] threat." Defense counsel also asked Deputy Schwink whether "attempt[ing] to shoot somebody in the [buttocks] . . . would indicate that the person is attempting to hit a vital organ in the center mass."

During Corporal Sean Hampton's testimony, Richter did object to the question, "In your training as a police officer, have you ever been training to shoot someone in the buttocks or back?" By that point, however, similar testimony had been given twice by other witnesses, and had been elicited by defense counsel from Deputy Schwink. The objection was overruled.

During cross-examination of Deputy Svehla, defense counsel inquired as to the officer's training on use of firearms. Defense counsel asked Deputy Svehla about weapon caliber as well as about self-defense training. The following exchange occurred:

> [DEFENSE COUNSEL]: You indicated that you had never been trained to shoot someone in the buttocks area, is that right?
>
> [DEPUTY SVEHLA]: That is correct.
>
> [DEFENSE COUNSEL]: But your training, actually, is to shoot to kill, isn't that correct?
>
> [DEPUTY SVEHLA]: We are trained to shoot to neutralize the threat and, essentially, we are trained to ultimately shoot center mass, which is the chest area, vital organs.
>
> [DEFENSE COUNSEL]: If you're shooting a .45 caliber at center mass, isn't that to stop an individual from aggressive action and in all likelihood, you are going to kill that person?

> [DEPUTY SVEHLA]: There's a high probability of that. We're trained simply to identify a threat and neutralize the threat.
>
> [DEFENSE COUNSEL]: With respect to shooting someone in the buttocks area, that, based on your training at the police academy, your experience as a police officer, would not be something that you were trained to do because it would not have a killing effect, isn't that correct?
>
> [DEPUTY SVEHLA]: I don't know if it would have a killing effect. I can tell you that we do not train to shoot that particular body part.
>
> [DEFENSE COUNSEL]: If you intended to disable someone, but not to kill someone, would you shoot center mass?
>
> [DEPUTY SVEHLA]: We are simply trained to shoot to neutralize a threat. We are trained to shoot center mass.

Defense counsel also did not object to testimony about Detective Stouffer's training on the use of force. Again, on cross-examination, defense counsel asked Detective Stouffer about his training to shoot for "center mass" when intending to kill someone. Defense counsel further inquired of Detective Stouffer whether "center mass" included the buttocks.

In closing argument, defense counsel emphasized that the part of Xander's body where he was shot was indicative that Richter did not intend to kill when he fired his weapon:

> Now, we know that [Richter] shot one time. [Richter] thought he had shot [Xander] in the buttocks area. As it turns out, he was actually, approximately five to six inches, I believe [the assistant state medical examiner] said six inches, above the buttocks on the left-hand side of the back of Mr. Xander. Now, what occurred, obviously, was and this is what Mr. Richter indicated and he was, again, it's right on the tape that's in evidence, he didn't believe Deputy Gore that Deputy Gore indicated he thought that Mr. Xander had died. He just did not believe that.

> Again, because [Richter] wasn't trying to kill. He had no intent to kill. What he was trying to do was to hit Mr. Xander in the buttocks area with a bullet to get him, that is, Mr. Xander off of Mr. Richter, as Mr. Richter was fearful for his own life.
>
> Now, that, classically, is self-defense.

Defense counsel further emphasized that the portion of the body where Xander was shot did not suggest intent to kill, commenting that "Xander [was] shot one time in an area not typically designed to kill."

Our review of the record leads us to conclude that defense counsel did not render ineffective assistance of counsel by failing to object to the police officers' testimony. Rather, defense counsel made a strategic decision to present a defense theory that differentiated between shooting to kill and shooting to disable in order to argue to the jury that, because Richter did not shoot Xander's "center mass," he did not intend to kill Xander. Our examination of the record reflects that defense counsel specifically wanted evidence relating to police training on the topic of center mass to come into evidence. We agree with the trial court that this was a permissible trial strategy. Accordingly, it is not ineffective assistance of counsel under *Strickland*.

IV.

Richter's next allegation of ineffective assistance of counsel is based upon trial counsel's failure to object to certain testimony from Donald Giebler, a paramedic who responded to the scene of the shooting. Richter raises a similar allegation to that discussed *supra* Part III, arguing that Giebler's testimony constituted improper lay witness opinion testimony under *Ragland*, *supra*, 385 Md. 705. Because, as we shall explain, Richter has

not demonstrated prejudice as a result of the alleged error, he has not proved ineffective assistance of counsel under *Strickland*.

Although Giebler testified in this case due to his role as a paramedic who responded to the scene of the shooting, when summarizing his experience, Giebler explained that he also works as a forensic investigator for the Office of the Chief Medical Examiner on a contract basis. Giebler explained that a forensic investigator determines whether a body should be sent for an autopsy due to unusual circumstances or other reasons.

Most of Giebler's testimony was based upon his own personal observations. Giebler testified about his role as a paramedic and described what he saw when he pulled up to the scene shortly after Xander was shot. Giebler testified that he saw "a body lying in the grassy area to the left of the road and to the left of the tree line." He identified the location where Xander was found and described his actions after he approached Xander. Giebler explained that he and his team provided medical attention to Xander, including CPR, and that Xander had no heartbeat and was not breathing. Giebler explained that after discovering that there was an entrance wound where the bullet entered Xander's body, but no exit wound, it became a "dramatic arrest, which made it a load and go situation." Giebler and his team quickly loaded Xander into the ambulance, where they continued performing CPR while traveling to the hospital.

Giebler testified that there was not a large amount of blood around Xander's body, the most likely cause of which was that Xander was "bleeding out inside the body cavity." Giebler further explained that due to the lack of blood and the small caliber of the weapon, "it was probably a rapid injury" and Xander "went down fairly fast or we would have had

more pooling of blood." Near the end of Giebler's direct examination, the prosecutor inquired as to whether Giebler, based upon his "training, knowledge and experience," could "venture a guess how far a person could travel with a wound of this nature." Giebler responded:

> Well, depending on the shape of the person, for one, and what kind of vital organs it has hit, usually, a few yards to 30, 40 yards, maybe. If it hits directly into the heart and stops them, they're not going to travel that far.

Giebler estimated that thirty to forty yards "would be the outside max[imum]" and that a more likely distance would be "closer, probably, to 25 yards, if anything."

On cross-examination, defense counsel asked additional questions of Giebler relating to how long an individual could survive after suffering an injury like Xander's. Defense counsel asked if a person who suffered a gunshot that struck the left kidney, inferior vena cava, and abdominal aorta would "bleed out [in] less than five minutes" and Giebler answered, "yes." Defense counsel then asked Giebler if a realistic amount of time before a person bled out was "probably in the range of one minute to two minutes." Giebler responded, "Probably." Giebler qualified his testimony, commenting that he was "not a doctor" and "wouldn't be able to tell" what a normal range of survival time would be following this type of injury.

Assistant state medical examiner Dr. Zabiullah Ali also testified as to how long Xander could have survived following his injury. Dr. Ali explained that Xander's injury was "a rapidly fatal wound." He testified that after the wound was inflicted, Xander would have died "within minutes, two, three minutes, could be less." Dr. Ali explained that it

was "very difficult to determine how fast [Xander] would lose blood," but that anything that would increase the heart rate, such as a struggle right before he was shot, "would make the blood loss faster." With respect to how far a person can travel after suffering a particular injury, Dr. Ali testified to the following:

> [I]t is very difficult to determine the rate of blood loss. So based on that, I cannot tell how far he would be able to run or walk. I mean, I have injuries to individuals that are shot a couple of times and they are able to run for a block or two and then you have another case where the individual is shot one time and you're not able to walk for two steps. So it is difficult to determine.

The prosecutor asked Dr. Ali how likely it was that Xander would have been able to travel fifty yards after suffering the gunshot wound, but defense counsel objected. The objection was sustained.

In our view, assuming *arguendo* that Giebler's testimony constituted improper lay opinion testimony, Richter has failed to demonstrate that that there is a reasonable probability that, but for defense counsel's failure to object to Giebler's testimony, the result of the proceeding would have been different. Giebler qualified his testimony, explaining that he was "not a doctor" and commenting that Xander could have survived between one and five minutes. Dr. Ali, an expert in forensic pathology, explained why it is difficult to estimate time of survival after such an injury and why it was impossible to determine how far Xander traveled after being shot.

In closing argument, the prosecutor made no reference to either Giebler's or Dr. Ali's testimony. Defense counsel, however, did reference Dr. Ali's testimony when arguing that Xander could have run, after being shot, from Richter's garage to the place

where he was found. In rebuttal, the prosecutor argued that three to five minute estimate from Dr. Ali was the "far end of the spectrum" but did not reference Giebler's testimony about the distance Xander could have traveled. Furthermore, the actual location where Xander was found was fifty yards from Richter's garage -- a difference of only ten yards from Giebler's estimate.

Having considered the circumstances surrounding the alleged example of deficient performance, we are unpersuaded that Richter has demonstrated prejudice. We believe that the impact of Giebler's statement about distance traveled was minimal because it was qualified with the caveat that Giebler was "not a doctor," clarified by Giebler's statement that he "wouldn't be able to tell" how long a person could survive such an injury, and not referenced by either party in closing argument. Moreover, the jury was presented with much more specific and detailed testimony on this issue from Dr. Ali, an expert in forensic pathology. For these reasons, we reject Richter's claim that defense counsel's failure to object to Giebler's testimony constituted ineffective assistance of counsel.[10]

V.

Richter further alleges that trial counsel provided ineffective assistance of counsel when he failed to rehabilitate Richter's wife on redirect examination after her credibility had been attacked during the State's cross-examination. We are unpersuaded.

[10] In light of our determination that Richter has not satisfied the prejudice prong with respect to this allegation of attorney error, we need not address whether the error was deficient.

During direct examination by defense counsel, Mrs. Richter testified that she heard Richter yell "calm down" and "Mark" shortly before the shooting. During cross-examination, the prosecutor asked Mrs. Richter if she recalled initially telling Deputy Gore that she did not hear or see anything during the incident. Mrs. Richter answered in the negative. The prosecutor then inquired whether Mrs. Richter recalled that she "changed [her] story after [her] husband said that [she] heard something." Mrs. Richter answered, "No, I heard it . . . ." Mrs. Richter explained that she did not think that her story was different from what she had previously told Deputy Gore, and that, if she had told Deputy Gore that she had not seen anything, she meant that she did not see Richter actually shoot Xander.

In fact, the video recording made by Richter included Mrs. Richter's conversation with Deputy Gore. The video reflects that Mrs. Richter initially told Deputy Gore that she did not hear or see anything during the incident. Deputy Gore asked Mrs. Richter to confirm whether she was inside the house during the incident. In response, Mrs. Richter told Deputy Gore that she heard Richter yelling "calm down, calm down" from inside the house. Defense counsel did not use the video recording to rehabilitate Mrs. Richter's testimony, although the video had been played earlier for the jury during Deputy Gore's testimony.

Richter asserts that defense counsel's failure to use the video recording to rehabilitate Mrs. Richter's testimony constituted ineffective assistance of counsel. Our review of defense counsel's redirect examination indicates that although defense counsel did not play the video itself, he did reference the existence of the video recording when he

referred to Mrs. Richter's conversation with Deputy Gore being "on that videotape that was coming from the camera that was on top of your car." Defense counsel further developed with Mrs. Richter that she had actually told Deputy Gore that she heard her husband tell "Mark" to "calm down." Indeed, this was corroborated by Deputy Gore's testimony earlier. Deputy Gore testified that Mrs. Richter told him that she heard her husband "yelling calm down, calm down." In our view, defense counsel's professional conduct did not fall below an objective level of reasonableness when he did not use the video to rehabilitate Mrs. Richter on redirect, when the video had already been played for the jury.

Furthermore, even if were to assume *arguendo* that defense counsel's redirect examination was deficient, we agree with the post-conviction court that Richter has failed to meet his burden of showing prejudice as a result of the alleged deficiency. The jury was presented with corroboration of Mrs. Richter's testimony during Deputy Gore's testimony. We are not convinced that the introduction of the video recording would have been likely to result in a different verdict. Accordingly, we reject Richter's final allegation of ineffective assistance of counsel.

VI.

In addition to the specific allegations of error raised by Richter, Richter further asserts that even if any single error would not entitle him to post-conviction relief, he is entitled to relief due to the cumulative effect of the alleged errors.

In certain circumstances, a petitioner can be entitled to post-conviction relief based upon the cumulative effect of multiple errors. *Bowers v. State*, 320 Md. 416, 436 (1990)

("Even when individual errors may not be sufficient to cross the threshold, their cumulative effect may be."). The post-conviction court rejected Richter's cumulative effect argument, observing that this is a case similar to *Gilliam v. State*, 331 Md. 651, 686 (1993), in which the Court of Appeals commented:

> This is not a case where the cumulative effect of numerous interrelated errors in aggregate amount to inadequate representation. This is more a case of the mathematical law that twenty times nothing is still nothing.

We agree with the post-conviction court that Richter's claims amount to nothing more collectively than individually. As we explained *supra*, trial counsel's allegedly deficient conduct at times represented a sound strategic decision. We further observed that various circumstances led us to conclude that Richter was not prejudiced by certain allegedly deficient conduct. Our review of the record, as a whole, leads us to conclude that Richter received competent counsel at trial. Defense counsel presented a compelling defense consistent with his client's wishes and successfully persuaded the jury to acquit Richter of first-degree murder. We, therefore, reject Richter's assertion that he is entitled to post-conviction relief due to the cumulative effect of counsel's alleged errors.

JUDGMENT OF THE CIRCUIT COURT FOR QUEEN ANNE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.