Circuit Court for Montgomery County
Case No. 74545C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2400

September Term, 2014

BRYAN LAMONT POOLE

v.

STATE OF MARYLAND

Nazarian,
Arthur,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Arthur, J.

Filed: September 13, 2017

After he failed to come into work on Saturday, April 29, 1995, David Dior was found dead, with a single bullet wound to the back of his head, in his apartment in Silver Spring. His red BMW convertible was missing from its parking place. Appellant Bryan Lamont Poole, age 18, was the last person who was known to have seen him alive.

At about noon the next day, Poole was arrested in Hillcrest Heights, in Dior's BMW. Poole denied any involvement in Dior's murder.

After a thorough investigation, in which the police found some of Dior's personal effects hidden in Poole's apartment and identified two witnesses who said that Poole had implicated himself in the killing, the State charged him with first-degree murder and the use of a handgun in the commission of a crime of violence.

On December 1, 1995, a Montgomery County jury convicted Poole of both charges. The court sentenced Poole to life imprisonment for murder and a concurrent 20-year term for the handgun offense. This Court affirmed his convictions on direct appeal.

In a petition for post-conviction relief, Poole contended that he was deprived of the effective assistance of counsel because, he said, his trial counsel:

a. failed to object to and move to strike testimony and cross-examination in which the State referred to his silence after his arrest and both before and after he had received *Miranda* warnings;

b. failed to object to and move to strike improper and prejudicial statements made by State's counsel during closing arguments; and

c. failed to preserve the record for appeal.

After a hearing, the Circuit Court for Montgomery County denied Poole's petition. He appealed. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Poole's trial took place over four days, from November 27 through November 30, 1995. During the State's case-in-chief, which took three full days, the State called 22 witnesses and introduced more than 70 exhibits. In the words of the post-conviction court, "[T]he State carefully built its case against [Poole] brick-by-brick." We shall discuss some of the key evidence, as well as aspects of the closing arguments.

Markeith Harris

Markeith Harris was Dior's friend, business partner, and co-worker at the Hair Port, a salon on Georgia Ave., N.W., in Washington, D.C. While working at the salon on the evening of Friday, April 28, 1995, Mr. Harris saw Poole walk in and wait for Dior. He had seen Poole at the shop twice before. Mr. Harris left at about 9:00 p.m., when Dior was doing a customer's hair.

Dior was supposed to be at work at about 9:30 or 10:00 a.m. the following morning, but when Mr. Harris came in at noon, Dior had not arrived. Mr. Harris called his apartment, but there was no answer. An hour later, he called again, but there was still no answer. He called Dior's sisters and asked them to check on Dior. Later, he learned from them that Dior was dead.

Mr. Harris said that Dior was "like a brother" to him, but that Dior never lent him his BMW. He testified that Dior did not lend his BMW to anyone, "[n]ot even to family members."

Denise Martin

Dior's sister, Denise Martin, testified that on the morning of Saturday, April 29, 1995, her sister called her to say that Dior had not shown up for work at the salon. Her sister was very concerned.

Ms. Martin went to her brother's apartment building in Silver Spring and spoke to the security guard, who said that he had not seen Dior that morning. She asked the security guard to call to see whether her brother was at home. There was no answer.

After going to the salon where her brother worked, Ms. Martin returned to her brother's apartment building with her sister Heather and her brother's co-worker, Mr. Harris. They asked the security guard to check Dior's parking spaces to see whether his cars were there. They learned that neither of his cars (the red BMW convertible and a Jeep Cherokee) were in their parking spots.

Ms. Martin became very concerned. She went up to her brother's apartment and found the door unlocked. She went into the apartment and saw nothing out of place. But when she went into the bedroom, she found him dead, on the floor, wrapped in a blanket.

Ms. Martin later learned that her brother's Jeep was in the shop. She was adamant that he never lent his BMW to anyone – not even to his closest friends.

Heather Thompson

Dior's other sister, Heather Thompson, testified that at about noon on Saturday, April 29, 1995, she learned from her brother's friend, Markeith Harris, that he had not shown up to work. She had a bad feeling. She called her sister, and they went to the

apartment together, but Ms. Thompson remained in the car with her sister's child. When her sister returned, Ms. Thompson learned that her brother was dead.

According to Ms. Thompson, Dior never let anyone drive his BMW.

Karen Moore

One of Dior's clients, Karen Moore, testified that she had an appointment with Dior on the evening of Friday, April 28, 1995. At about 9:20 p.m., while she was waiting for her hair to dry, she saw Poole come into the salon. She recognized Poole because she had seen him there about three weeks earlier.

When Poole arrived, Dior put him in a chair and trimmed his beard. When Ms. Moore left, she saw Dior drive away, up Georgia Avenue, N.W., toward Silver Spring, in his red BMW. Poole was with him.

Ms. Moore, who had known Dior for six years, said that she had never known him to lend his BMW to anyone.

Tanya Eastwood

Tanya Eastwood, the property manager at Dior's apartment building, testified that the only way to enter the building's parking garage was by using a magnetic key card or by being buzzed in by the front desk. Whenever the key card was used to enter or exit the garage, the time of use was electronically recorded. A person could exit the garage by using the key card, depositing a token or money into a cash machine, being buzzed out by the security guard, or tailgating another car. Ms. Eastwood stated that Dior's card was used to enter the garage at 10:25 p.m. on Friday, April 28, 1995. After that time, Dior's key card was not used to exit the garage.

Ms. Eastwood testified that she had seen Dior driving his BMW, but that she had never seen anyone else driving that car.

Officer Gregory Gill

Officer Gregory Gill arrived at Dior's apartment at a little before 3:00 p.m. on Saturday, April 29, 1995. He found Dior's body, covered by two comforters. Near the body was a tube of lubricant. Beneath the body was a spent shell casing. From Dior's right hip, the officer collected some white powder, which was later identified as cocaine. On the night table, the officer found an empty condom wrapper.

Leon Frazier

Leon Frazier, a 16-year-old friend or acquaintance of Poole's,[1] testified that on the night of April 28, 1995, Poole was driving a red BMW. Poole told him that he was going to buy the car from a "faggot" in Maryland for $15,000. He and Poole drove the car to a nightclub, where Poole showed the car to some young women.

Frazier said that Poole had a wallet, which apparently was Dior's. After the State refreshed Frazier's recollection by reading part of his grand jury testimony, he agreed that Poole showed him "the faggot's credit cards" and "the faggot's license."

Frazier testified that Poole asked him to "keep" a handgun for him. After the State refreshed his recollection again by reading part of his grand jury testimony, Frazier agreed that he had asked Poole why he wanted him to keep the gun and that Poole responded that "the police would probably come to his house looking for the gun."

[1] Frazier described himself as Poole's friend, but Poole testified that he had no friends – only "acquaintances."

Although Frazier told the grand jury that Poole had shown him the gun (a silver, .25 caliber automatic with a white handle), he backed away from that testimony at trial. Instead, he claimed that Poole had described the gun as a silver .25 with a white handle. Frazier insisted that he refused to hold onto the gun for Poole.[2]

Ryan Powell

One of Poole's acquaintances, Ryan Powell, testified that in the early afternoon of Saturday, April 29, 1995, he saw Poole driving a red BMW in their neighborhood in Northeast Washington. Poole was with Leon Frazier.

When asked about the car, Poole said that it was his "people's car," meaning that it belonged to someone in his family. Powell noticed that Poole did not park the car in front of his own apartment even though there was space to park it there.

Powell saw Poole again between 11:00 p.m. and midnight on that Saturday evening, when they arranged to meet two young women at the women's house in Hillcrest Heights. As they were driving to the house in the red BMW, Powell asked Poole where he got the car. According to Powell, Poole said that he was buying the car from a "faggot" and had put a down payment on it.

Powell noticed that Poole could have used a main avenue to get to their destination, but that he chose to take "a lot of side streets." Powell claimed to have believed that Poole was buying the car until he started taking the side streets.

[2] On cross-examination, defense counsel established that Frazier had been admitted to a mental hospital at least three times because of PCP abuse. Frazier agreed that he had been admitted because the PCP was "frying [his] brains," but he denied that the drug had affected his memory.

The following morning, when they were leaving the women's house, Poole reiterated that he was buying the car. He said that the seller's name was David. Powell asked Poole whether he had papers for the car, and Poole said that he did. Powell looked into the glove compartment and saw something that contained the name that Poole had given. Powell also looked into the backseat, where he said he saw credit cards.

Powell and Poole were arrested while they were sitting in the BMW outside of the women's house on Sunday, April 30, 1995. In a written statement that he gave after his arrest, Powell said that he did not believe that Poole was buying the car. He believed that Poole may have stolen the car.

Joseph Wright

Joseph Wright, Poole's cellmate for two weeks in the Montgomery County Detention Center, testified as a State's witness. At the time of trial, Wright was awaiting sentencing in the District of Columbia on a conviction for second-degree murder. He had pleaded guilty to that offense after the government had charged him with first-degree murder and sought a sentence of life without parole.

According to Wright, Poole told him that on the evening of the murder he had gone to Dior's salon, where Dior trimmed his beard. He and Dior left the salon together and stopped at a gas station, where Dior bought cigarettes and gas.

After they arrived at the apartment complex and went up to the apartment, Dior was arguing with someone on the telephone. When Dior got off the phone, they went to the bedroom, where Dior "offered things to [him] in exchange for sex." Poole said that he would have sex with Dior and told Dior to get a condom.

Dior got a condom and offered to put it on for him. Poole told Dior that he was shy and that he wanted to put the condom on by himself. He asked Dior to turn off the lights.

Dior turned off the lights and lay face down on the bed, on his stomach. Poole crumpled the condom wrapper to make it sound as though he was opening the package. While Dior thought that Poole was putting on the condom, he pulled a gun from his waistband and shot Dior from behind. When he heard Dior moan, he shot him again.

Dior had fallen from the bed onto the floor, dragging the sheets with him. Poole wrapped Dior in the sheets, took Dior's wallet and keys, and left the apartment.

Poole told Wright that he did not want to have sex with Dior. He was afraid that Dior would throw him out if he refused, and that he would have no way to get home.

Detective Brent

Detective Michael Brent, a 17-year veteran of the Montgomery County Police Department, testified that he entered Dior's apartment on the afternoon of Saturday, April 29, 1995, and saw Dior lying face up and wearing nothing but a t-shirt. Dior had suffered a single gunshot wound to the back of the head. There were no signs of struggle.[3]

[3] On cross-examination, Detective Brent confirmed that he saw only one bullet wound. In addition, he said that he found no bullet holes in the wall. Hence, despite Joseph Wright's testimony that Poole claimed to have fired two shots, it appears that the assailant fired only one.

Detective Brent found a shell casing from a small-caliber gun on the floor beneath Dior's body, but he did not learn that it came from a .25 caliber handgun until several months later, when he received a report from the Maryland State Police.

After Poole's arrest on Sunday, April 30, 1995, Detective Brent gave Poole his *Miranda* warnings. Poole executed a form indicating that he had received the warnings,[4] and he elected to give a statement.

During Detective Brent's testimony, he recounted the substance of his interview with Poole:

> [State]: What information did he have . . . regarding the nature of this offense, and what did he tell you?
>
> [Detective Brent]: We told him that we were investigating the theft of an automobile. I asked questions while Detective Hamill took notes:
>
> Basically he said that he had obtain[ed] . . . the car "from a fag named David" who he indicated lived in Maryland.
>
> He told me that David was a hairdresser. He said that he met David near the hair shop. He said that he met him about three weeks prior to that date, three or four weeks prior to the interview date. . . .
>
> He said he asked David about the BMW. He asked if it was his and asked to drive it. Mr. Poole said that David said, Let me get to know you first. He said that they exchanged numbers, or rather Bryan gave David his phone number.

[4] The form was the "MCP-50," the Montgomery County Police Advice of Rights form at the time. The form lists the four warnings that are given in compliance with *Miranda v. Arizona*, 384 U.S. 436 (1966): "1. You have the right now and at any time to remain silent; 2. Anything you say may be used as evidence against you; 3. You have the right to a lawyer before and during any questioning; 4. If you cannot afford a lawyer, one will be appointed for you."

Poole said over the next week or so the relationship grew. He said that David offered him jobs, befriended him. He implied that David wanted to start some sort of romantic relationship.

Poole says that he basically said no. "He did not go that faggy way." Poole said that David Dior denied, "being a fag" but Mr. Poole believed that he was gay.

Mr. Poole went on to say that -- well, he described the apartment, Mr. Dior's apartment as a highrise apartment. He said that he went inside the apartment, meaning the night of the 28th.

* * *

. . . And that they talk had [sic], watched television, but he denies having sex. We then went back and sort of asked him to retrace his steps that day.

* * *

. . . He basically said he woke. He met with a friend, a girlfriend. He said he went out to Silver Spring, and David told him to return because he had a few heads or a few customers. He did return at about 9:00 to 9:30 in Mr. Poole's estimation.

[State]: That is again Friday night, April 28th?

[Detective Brent]: Friday night that is correct. He said that he went into the shop and met with David. He said they left near closing. He thought it was about 10:15.

He said they first stop[ped] on Georgia Avenue or off Georgia Avenue for cigarettes, and he specified Newports. Again he said when they went to the apartment, they watched television for a while.

He said that David offered him food, but he said that he was afraid to take the food because he was fearful that David was going to put Spanish fly in the food and --

[State]: What is meant by Spanish fly?

[Detective Brent]: It is allegedly an aphrodisiac, I believe, and it is supposed to increase sexual desire, and I guess the implication was he did not want to get his sexual desire increased or weakened [sic].

I asked him, or he said that David asked him for sex. He says he refused. He says that David -- or he asked if he could borrow the car to go downtown, and David said basically if you have sex with me, you can. Mr. Poole refused.

He says that Dior then loaned him the car. *When we asked him about the conditions of the loan, he was vague. He did not provide a time that the car was supposed to be back, or what terms that Mr. Dior had made.*

We asked him several times, and in my estimation *he* was vague and *could not supply any real response to that question*.

[State]: All right. Let me ask you, you indicated that he said that in exchange for sex, Mr. Dior was going to loan him his BMW; is that correct?

[Detective Brent]: That is correct.

[State]: And Mr. Poole said that he did not go that way, so he did not have sex with him?

[Detective Brent]: That is correct.

[State]: But Mr. Dior loaned him the vehicle anyhow?

[Detective Brent]: That is what Mr. Poole said. That is correct.

[State]: Did he tell you anything about buying the car?

[Detective Brent]: No.

[State]: Did he tell you anything about test driving the car?

[Detective Brent]: There is no mention of pending sales, buying the car, nothing really.

[State]: Did he ever tell you when the car was supposed to be returned?

[Detective Brent]: No. We asked him several times, and again, *he was unable to give an answer.*

[State]: You specifically asked him when the car was supposed to be returned?

[Detective Brent]: Several times, yes.

[State]: And what did he indicated [sic]?

[Detective Brent]: *He just wavered in his answers and did not give any real direct answer.*

* * *

[State]: Did he tell you whether he got any other materials from David Dior? When I say, any other property, other than the BMW?

[Detective Brent]: No.

[State]: Did he tell you whether he got Mr. Dior's wallet?

[Detective Brent]: He did not.

[State]: Did he say anything about having Mr. Dior's license?

[Detective Brent]: No.

[State]: Just his car?

[Detective Brent]: Just his car.

[State]: And no --

[Detective Brent]: No other property, just the car.

(Emphasis added.)

Detective Brent went on to testify that pursuant to a District of Columbia search warrant, he and members of the Metropolitan Police Department searched Poole's

apartment on May 1, 1995. Under a couch in the living room, where Poole was said to have slept, the detective recovered a business card with David Dior's name on it and his phone number on the back. Detective Brent recovered nothing else of evidentiary value from that search.

After interviewing Leon Frazier on May 6, 1995, Detective Brent obtained a second warrant to search Poole's apartment. On May 11, 1995, Detective Brent searched Poole's apartment pursuant to the second warrant. On a table behind a stand-up mirror in Poole's bedroom, Detective Brent found a folding key case, containing Dior's driver's license, an electronic garage key, credit cards, and insurance documents, as well as the key to Dior's apartment. The key to the BMW was *not* in the key case; it had been found on Poole's own key ring, apparently at the time of his arrest.[5]

At the end of the direct examination, the State returned to Poole's statements to Detective Brent during the custodial interrogation:

> [State]: Again, in any of Mr. Poole's comments or statements to you on April 30th, did he indicate that he had in his possession [Dior's] wallet and keys and credit card?
>
> [Detective Brent]: No, sir. He did not.
>
> [State]: Or that he had had in his possession any of items [sic]?

[5] In part because the record no longer seems to contain the trial exhibits, including the affidavit in support of the search warrant, it is unclear exactly what Leon Frazier said to prompt Detective Brent to request the second warrant. The detective does not appear to have known about the .25 caliber automatic at that time, because Frazier testified that that he said nothing about the weapon until several weeks later, when he testified before the grand jury. By process of elimination, one could infer that the detective sought the second warrant because Frazier had told him that Poole had shown him Dior's wallet or key case, driver's license, and credit cards.

[Detective Brent]: No, sir.

Officer Donald Freitag

The State's final witness was Officer Donald Freitag, the officer who arrested Poole and transported him to the "Homicide Section." Officer Freitag recounted a conversation with Poole:

[State]: Did there come a point in time when Mr. Poole engaged you in conversation?

[Officer Freitag]: Yes.

[State]: And what did -- where was that?

[Officer Freitag]: That was in route to the headquarters at Rockville.

[State]: Okay. And what did he ask you?

[Officer Freitag]: He asked me what he was under arrest for.

[State]: And what did you tell him?

[Officer Freitag]: I told him that he was in a stolen vehicle.

[State]: Okay. *And at that point did he tell you anything, any response to you?*

[Officer Freitag]: *No, sir.*

[State]: *Did he tell you that he had had permission to have that vehicle?*

[Officer Freitag]: *No, sir.*

[State]: *Did he tell you he borrowed the vehicle from anybody?*

[Officer Freitag]: *No, sir.*

(Emphasis added.)

Officer Freitag was the State's last witness, and after his testimony the court recessed for the day.

Bryan Poole

Testifying in his own defense, Poole stated on direct examination that he had known Dior for approximately three weeks before April 28, 1995. He was interested in Dior's red BMW and asked whether Dior would let him drive it. Dior responded, in substance, that he would have to get to know Poole. They told each other their names, and Dior gave Poole a business card with his home telephone number on it.[6]

Poole testified that, on two occasions over the next couple of weeks, he allowed Dior to perform fellatio on him. One of these encounters occurred in Dior's apartment.

Poole kept asking Dior to let him drive the red BMW, but Dior demurred. On one occasion, Poole told Dior that he wanted to use the car to buy clothes for his newborn daughter. When defense counsel asked if that was really why he wanted to use the car, he admitted that it was not, and that he wanted to use the car "[t]o go to the club."

Poole said that, at some point after their second sexual encounter, Dior agreed to let him use the car. He said that he went to Dior's salon on the evening of Friday, April 28, 1995, with the expectation of borrowing the car.

Poole arrived at the salon at about 6:00 or 6:30 p.m., but Dior told him to come back later because he was doing his customers' hair. Poole returned at about 10:00 p.m., and Dior trimmed his beard.

[6] Presumably, this is the card that the officers found in the first search of Poole's residence.

Poole and Dior left the salon together. On the way to Dior's apartment, they stopped at a gas station to buy cigarettes. Poole said that when they arrived at Dior's building, he went up to the apartment only because he needed to use the bathroom.

When Poole finished using the bathroom, he said, Dior was talking to someone on the telephone. Poole said that he waited for 15 or 20 minutes, but Dior was still on the phone. According to Poole, he interrupted Dior, asked for the car key and the card to get out of the garage, and gave Dior a number at which Dior could page him when he needed to be picked up from work the following night. Poole claimed that he used the card to get out of the garage.

After driving the car back to his neighborhood in Washington, Poole told his acquaintances that the car belonged to "a gay guy," but that he was planning on buying it. At trial, however, he admitted that he had no money and was not planning to buy the car. He said that he told people that he was buying the car because it made him popular.

Although he was supposed to pick up Dior at the salon at about 10:00 or 10:30 p.m. on Saturday night, Poole did not go to the salon. He said that Dior did not page him and that he could not call Dior because he could not remember Dior's number. Instead, he went out to a club and, later, to the women's house in Maryland.

Poole denied that he had a gun and denied that he had shown Leon Frazier a gun.[7] He also denied that he confessed to his cellmate, Joseph Wright. He implicitly denied Ryan Powell's assertion that he had taken side streets to the women's house in Hillcrest

[7] On cross-examination, Poole also denied that he had shown Dior's wallet or key case and credit cards to Frazier.

Heights on Saturday night: he claimed that he did not know the way and had relied on Powell's directions.

Poole also denied that Dior had given him the entire key case with all of the keys. He said that Dior had given him only the key to the BMW. He denied that he had hidden the key case in his apartment. He offered no explanation about how Detective Brent found it there.[8]

Poole admitted, on direct examination, that he had not told Detective Brent of his prior sexual encounters with Dior. He said that he omitted those details because he was "embarrassed."

On cross-examination, the State questioned Poole about his failure to disclose his prior sexual encounters with Dior:

> [State]: [H]ow many times prior to Friday night, April 28th, had you met David Dior?
>
> [Poole]: I met him one, two, three, four -- like four or five.
>
> [State]: Four times. And on how many of those occasions did you engage in sexual activity with him?
>
> [Poole]: Twice.
>
> [State]: And when was that? Which of the times?
>
> [Poole]: I don't remember dates.
>
> [State]: Well, was it the first time you met him?
>
> [Poole]: The first time that he sucked my penis?

[8] In closing, however, his lawyer argued that Detective Brent had planted the key case and keys in Poole's apartment in order to falsely implicate Poole in the crime.

[State]: Yes

[Poole]: It was at his house.

[State]: Okay. When was the second time?

[Poole]: At Blair Park.[9]

[State]: Are you gay, and did you feel that you were gay?

[Poole]: I am not sure whether I am gay or not.

[State]: Were you attracted to David Dior?

[Poole]: He was an all right guy.

[State]: Why did you go back to him the second time? After he sucked your penis the first time, why did you go back the second time?

[Poole]: I don't know. I guess I liked it.

[State]: *You never, ever[], told any member of the Montgomery County Police when you were arrested about your prior activity with David Dior, did you?*

[Poole]: *No.*

[State]: *Even after you were charged with first degree murder, you never told them that, did you?*

[Poole]: *After I was charged with first degree murder, I didn't say anything.*

[State]: Okay. *Did you ever tell Montgomery County Police, Detective Brent, Officer Freitag, did you ever tell them about your sexual activity with David Dior?*

[Poole]: *No.*

* * *

[9] Jesup Blair Park is a public park that is located just off Georgia Avenue and just above the District of Columbia line in Silver Spring.

[State]: You do not recall that. Do you recall telling Detective Brent or any other detective how you exited the apartment that night?

[Poole]: I know how I exited, but I don't remember what I told them.

The State also cross-examined Poole, at length, about when he was supposed to return the car and what he told the police on that subject:

[State]: Did you have any conversation with David about buying the car?

[Poole]: No.

[State]: When were you supposed to return it, Mr. Poole?

[Poole]: I was supposed to go pick him up Saturday night from the Hair Port.

[State]: You were supposed to go pick who up Saturday night?

[Poole]: David.

[State]: On Saturday night. And you were going to what? Return his car to him or give him a ride?

[Poole]: I was supposed to return it.

[State]: Okay. And you told Montgomery County Police that, right?

[Poole]: I may have. I don't know.

[State]: I am asking you whether you know. You told Montgomery County Police that, didn't you?

[Poole]: I don't know.

* * *

[State]: When were you going to return the car?

[Poole]: I was going to return it to him when he called, when he, you know, paged the number.

[State]: And if he did not call?

[Poole]: I just told you. I was going to call, but I got arrested. I got arrested, and when I went in the house the phone rung.

[State]: Were you going to return it Sunday evening?

[Poole]: I was going to return it Sunday evening.

[State]: Did you tell police that?

[Poole]: I don't remember.

[State]: Do you remember telling Detective Brent specifically that there was no arrangement when you were supposed to return the car?

[Poole]: I don't remember telling Detective Brent anything.

The State went on to question Poole as to the extent to which he offered to show the police that he was telling them the truth:

[State]: After you met with Detective Brent and you were advised of your rights, do you remember that?

[Poole]: Yes.

[State]: And you elected to give him a statement, right? And he told you that they believed the car to be stolen, do you remember that?

[Poole]: He said that the car was reported stolen.

[State]: Did you tell him right away, that belongs to David. David let me borrow it?

[Poole]: I said, I didn't steal no car.

[State]: Did you tell them to call David and check it out?

[Poole]: No. He asked me – the dude, he said, Why is he reporting it stolen over there? I said, I don't know. He said, If I was to ride you to his house, do you know your way to his house or something? I told them, You get me to Georgia Avenue.

* * *

[State]: Did you tell Detective Brent that I didn't steal that car. Call David. David loaned it to me.

[Poole]: No. He offered to drive me to the house. I never had the number.

[State]: Did you know his [Dior's] number?

[Poole]: No. I didn't know his number. I had it in my house.

[State]: You were going to call him, weren't you?

[Poole]: Excuse me?

[State]: You were going to call David to return the car, weren't you?

[Poole]: Yes.

[State]: You did not say, Look it up in the phone book. David Dior can tell you I didn't steal this car? You did not tell them that, did you?

[Poole]: No. Because –

Here, Poole's answer was interrupted both by the prosecutor and by one of defense counsel's numerous objections that the prosecutor was not allowing Poole to answer. The court ordered the prosecutor to "just let him finish," as it had in the past. The questioning continued:

[State]: You did not tell Detective Brent, Call David Dior. He can tell you the car is not stolen. He let me borrow it?

[Poole]: No. Because he offered to drive me to his house or whatever.

Finally, Poole agreed that Dior's other car was in the shop. He admitted that he did not know how Dior was supposed to get to work the next morning once he had given the BMW to Poole. He also admitted that he had lied to Ryan Powell, Leon Frazier, and others when he said that he was going to buy the car. Although he had told Detective Brent that Dior wanted to have sex with him on the night of the murder, he denied that he and Dior had any conversation about having sex that night. He had no explanation for how Dior's key case, with all of Dior's credit cards and keys, had turned up in his bedroom.

Detective Brent's Testimony on Rebuttal

The State called Detective Brent in rebuttal and questioned him about Poole's response to questions during his police interrogation regarding the arrangements, if any, he had made to return Dior's vehicle:

> [State]: Did he tell you that David wanted to have sex with him?
>
> [Detective Brent]: Yes.
>
> [State]: That night?
>
> [Detective Brent]: Yes, sir.
>
> [State]: And what did he indicate to you?
>
> [Detective Brent]: That he did not want to have sex with him.
>
> [State]: And then did he tell you that David just loaned him his BMW?
>
> [Detective Brent]: Yes.
>
> [State]: Did he indicate to you that he was supposed to return David's BMW on Saturday night?

[Detective Brent]: No, sir.

[State]: Did he indicate to you that he was supposed to return David's BMW Sunday night?

[Detective Brent]: No.

[State]: Did he indicate to you at all when he was supposed to return David Dior's car?

[Detective Brent]: No, sir.

During the cross-examination of Detective Brent in his rebuttal testimony, defense counsel questioned him about Poole's plans to return Dior's car, or the lack thereof:

[Detective Brent]: No. He did not indicate at all when the car was supposed to be –

[Defense Counsel]: He said he was supposed to get beeped by David Dior, right?

[Detective Brent]: No, sir.

[Defense Counsel]: Do you remember testifying in this courtroom that he made – he gave you different explanations of when he was supposed to return the car, but you could not understand what he was saying. They did not make sense to you. Do you remember saying that?

[Detective Brent]: *He did not supply any specific information as to when the car was to be returned*.

[Defense Counsel]: He did not provide any specific information, so in your definition of specific information, *he did not answer the question; is that right?*

[Detective Brent]: *That is correct*.

[Defense Counsel]: *But, in fact, he did provide information about when the car was supposed to be returned; is that right*?

[Detective Brent]: *No, sir*.

[Defense Counsel]: Well, *exactly what did he say that was – exactly what was the non-specific information he provided to you?*

[Detective Brent]: *Poole was vague*.

* * *

[Defense Counsel]: Precisely, what did he say?

[Detective Brent]: I guess my point is *he had no precise answer*. *He was vague, did not supply any specific time frame, did not say, I was supposed to be back at X amount of time. I am supposed to bring the car back, Saturday, Sunday. He just –*

[Defense Counsel]: But he did discuss it?

[Detective Brent]: *– was unresponsive*.

* * *

[Defense Counsel]: You discussed it with him, right?

[Detective Brent]: Yes.

[Defense Counsel]: And *he provided you non-precise answers, right*?

[Detective Brent]: *That is correct.*

* * *

[Detective Brent]: We would have noted if he had said that the car is supposed to be back at a specific time, place.

Closing Argument

In the State's closing argument, the prosecutor included an attack on Poole's credibility, citing Poole's interview with Detective Brent:

When was the BMW to be returned? Now if you believe Bryan Poole, Saturday night. If you believe Bryan Poole because he did not

> return it Saturday night because he did not return it Saturday night like it was supposed to, Sunday night.
>
> What did he tell Detective Brent? It was never any response to that. Was he intending on returning it? The victim's car key was on Mr. Poole's key chain.
>
> * * *
>
> Bryan Poole told you that he was going to return the car on Saturday night. Detective Brent said he did not say that. Then he told you he was going to return it sometime on Sunday. He never told Detective Brent that.
>
> He is now engaged in sexual activity with David Dior. It is the first time we hear that.

Anticipating that the defense would attack Detective Brent, the State chronicled his thorough investigation:

> [Detective] Brent is charged with following up on this investigation. You know, we could have stopped on April 30th. Bryan Poole was found driving David Dior's BMW.
>
> We know that he was going back to the apartment because witnesses saw him going. He was in possession of a car that belonged to a person who had been murdered.
>
> A lesser person would have said, pretty cool, it sounds like first degree murder to me, give it to the State and let them prosecute it, and let's all go home.
>
> But that is not the way Detective Michael Brent works. That is not the way he worked in this case. He worked, and he worked, and he worked, and he interviewed, and he investigated, and he did not stop.

The State clearly foresaw a defense argument that the Montgomery County Police had planted Dior's key case and credit cards in Poole's apartment before the second search. After mentioning that such an argument might be on the way, the State argued:

> Michael Brent never stopped investigating this case. Michael Brent never stopped investigating this case until you heard Judge Pincus utter the words, You will hear no more evidence.

In Poole's closing argument, defense counsel argued, among other things, that Detective Brent had planted evidence and suborned perjury by intimidating Leon Frazier into giving false testimony. Counsel argued that after the first search of Poole's apartment yielded only Dior's business card, Detective Brent learned that Poole might have had Dior's credit cards. According to defense counsel, Detective Brent believed that Poole murdered Dior, but he had not been able to find the murder weapon or any of Dior's property, which elicited the temptation to plant evidence.

Defense counsel focused on Leon Frazier's drug abuse and his mental instability. Counsel insinuated that Detective Brent did something to manipulate Frazier into saying that Poole had shown him (or told him about) the gun, that Poole had asked him to hold onto the gun, and that Poole had a wallet or key case with credit cards that belonged to Dior. Armed with Frazier's false statements, counsel argued, Detective Brent planted Dior's key case and credit cards in Poole's apartment at the time of the second search. Defense counsel referred to Detective Brent's discovery of Dior's cards in Poole's room upon a second search as "sleight of hand," but on other occasions he explicitly used the words "lie" and "plant."

In rebuttal, the State vehemently defended the detective:

> I do not know if you are as tired as we are, but I assure you that [defense counsel] and I are tired. I am not going to address a whole lot of what [defense counsel] said because it really turns on if you believe that the police officer right there planted that evidence, there is nothing for you to discuss.

> Nothing to discuss. No counts to discuss. There is no evidence to discuss. There is nothing to discuss. Does that mean that a police officer cannot lie? No. We all have known that to be the case, haven't we?
>
> *I am proud of Detective Michael Brent.* And proud to be associated to prosecute this case. *If you want to indict him, indict me along with him*.
>
> I guess when there is nothing to argue, let's attack the police. Let's attack an outstanding police investigator who did a super job.

(Emphasis added.)

As the State concluded its rebuttal closing, it said:

> Ladies and gentlemen, I ask you to return a verdict of first degree premeditated murder and use of a handgun, and I asked you to speak loud through the verdict, and you *speak loud and tell the members of this community, we are not going to accept your behavior.*
>
> And *speak loud to the community so they can hear you down in Florida where David Dior's family is missing their brother and their son*. Speak loud and tell him, you are going to be held accountable.
>
> Speak loud so that they can hear you. Speak loud through your verdict and tell Bryan Poole, you are guilty of first degree premeditated murder and you are guilty of use of a handgun in the commission of a crime of violence. And *speak loud through your verdict so David Dior can hear you*.

(Emphasis added.)

The Verdict

The case went to the jury in the afternoon of November 30, 1995. The following day, the jury found Poole guilty of first-degree murder and use of a firearm in the commission of a crime of violence.

The Post-Conviction Proceeding

Poole's supplemental petition for post-conviction relief asserted that he received ineffective assistance of counsel. Poole specifically alleged that his trial counsel failed: "(1) to object to and move to strike impermissible testimony and cross-examination by the [S]tate referencing [his] post-arrest, pre-*Miranda* silence[;] (2) to object to and move to strike improper and prejudicial statements made by State's counsel during closing arguments[; and] (3) to preserve the record for appeal."

The court conducted a hearing on July 11, 2014. After considering testimony from Poole's defense counsel, the court denied Poole's request in a thorough, 23-page opinion. In brief summary, the post-conviction court concluded that counsel's errors, if any, did not amount to ineffective assistance. The court also concluded that, in light of what it called the "overwhelming case" against him, Poole did not prove that he had suffered the requisite degree of prejudice as a result of the alleged errors.

On January 8, 2016, this Court granted Poole's leave to appeal.

QUESTIONS PRESENTED

Poole presents two questions for our review, which we quote:

I. Did the post-conviction court err in concluding that trial counsel did not render ineffective assistance by failing to object to evidence regarding [Poole's] post-arrest, post-*Miranda* and pre-*Miranda* silence[?]

II. Did the post-conviction court err in concluding that trial counsel did not render ineffective assistance by failing to object to improper prosecutorial comments during closing and rebuttal argument?

Because the post-conviction court's ultimate conclusions were correct, we affirm.

DISCUSSION

The Sixth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, and Article 21 of the Maryland Declaration of Rights, guarantee a defendant the right to counsel in a criminal proceeding. To ensure that the right to counsel provides meaningful protection, the right has been construed to require the "effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)).

For Poole to make out a claim of ineffective assistance of counsel in violation of his constitutional rights, he must satisfy the two-prong test articulated in *Strickland*. The first prong requires Poole to show that his counsel's performance was deficient because he "made errors so serious that counsel was not functioning as the 'counsel' guaranteed [to Poole] by the Sixth Amendment." *Strickland v. Washington*, 466 U.S. at 687. The second prong requires Poole show that counsel's performance was so deficient that he was prejudiced by it. *Id.*

To satisfy the first prong, Poole must: (1) identify the acts or omissions of trial counsel that were not the result of reasonable professional judgment; (2) show that trial counsel's representation fell below an objective standard of reasonableness considering all the circumstances known to counsel at the time, including prevailing professional norms; and (3) overcome the strong presumption that trial counsel's identified acts or omissions, under the circumstances, are considered sound strategy. *Id.* at 690. In evaluating Poole's proof, a court must bear in mind that the Sixth Amendment does not guarantee perfect representation: for representation to be constitutionally deficient, trial

counsel's acts or omissions must have fallen "outside the wide range of professionally competent assistance." *Id.* at 690. The relevant question is not whether the representation merely "deviated from best practices." *Harrington v. Richter*, 562 U.S. 86, 105 (2011). "Because it is 'tempting' for both a defendant and a court to second-guess a counsel's conduct after conviction, courts must be 'highly deferential' when they scrutinize counsel's performance." *Mosley v. State*, 378 Md. 548, 557-58 (2003) (quoting *Strickland v. Washington*, 466 U.S. at 689); *accord Coleman v. State*, 434 Md. 320, 335 (2013).

To satisfy the second prong, Poole must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. at 694; *Harris v. State*, 303 Md. 685, 700 (1985). A "reasonable probability" means "a probability sufficient to undermine confidence in the outcome." *State v. Borchardt*, 396 Md. 586, 602 (2007). "It is not enough 'to show that the errors had some conceivable effect on the outcome of the proceeding.'" *Harrington v. Richter*, 562 U.S. at 104 (quoting *Strickland v. Washington*, 466 U.S. at 693). "Counsel's errors must be 'so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" *Id.* (quoting *Strickland v. Washington*, 466 U.S. at 687).

"'Surmounting *Strickland*'s high bar is never an easy task.'" *Id.* at 105 (quoting *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010)). "An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest 'intrusive

post-trial inquiry' threaten the integrity of the very adversary process the right to counsel is meant to serve." *Id.* (quoting *Strickland v. Washington*, 466 U.S. at 689-90).

Whether Poole received ineffective assistance of counsel is "a mixed question of fact and law." *State v. Purvey*, 129 Md. App. 1, 10 (1999). "[W]e will defer to the post conviction court's findings of historical fact, absent clear error." *Cirincione v. State*, 119 Md. App. 471, 485 (1998) (citation omitted). But we exercise our "own independent judgment as to the reasonableness of counsel's conduct and the prejudice, if any." *State v. Jones*, 138 Md. App. 178, 209 (2001), *aff'd*, 379 Md. 704 (2004).

I. Introductory Comments

In his challenge to counsel's competence, Poole faults his defense counsel for a handful of discrete omissions during the course of an intense and fast-moving four-day trial. Poole specifically faults counsel for failing to object when the State asked whether he said anything after Officer Freitag informed him that he had been arrested for being in a stolen vehicle; for failing to object when Detective Brent discussed and commented on his evasive, uninformative, and incomplete answers during the custodial interrogation; and for failing to object to several of the State's remarks in closing and rebuttal closing argument, most notably the comment, "I am proud of Detective Michael Brent. . . . If you want to indict [Detective Brent], indict me along with him."

As the post-conviction court observed, however, a "careful reading of the transcript shows that defense counsel properly objected on numerous occasions to a variety of questions and carefully protected [Poole's] rights." This was not, the post-

conviction court wrote, a "case where trial counsel was simply inept or otherwise 'asleep at the switch.'"

In fact, the transcript discloses that before trial, counsel attempted, unsuccessfully but by no means ineffectively, to suppress Poole's statement to Detective Brent. At trial he confined the State's case to its proper bounds through a number of successful objections.

Before the testimony of Joseph Wright, the jailhouse snitch, counsel obtained an order prohibiting him from mentioning Poole's gang affiliation. When Wright volunteered that he advised Poole to take a polygraph test, counsel immediately objected and obtained an order striking the testimony and a jury instruction that polygraphs are not only inadmissible but unreliable. Similarly, before Detective Brent testified about his custodial interrogation of Poole, counsel ensured that the detective would not mention that at some point Poole requested an attorney and invoked his right to remain silent.

Counsel devised a theory, based on only the slenderest thread of evidence, that Detective Brent had planted Dior's key case, credit cards, and keys in Poole's bedroom in the second search of Poole's apartment (the first search having turned up no such evidence) and that the detective had suborned perjury by manipulating the vulnerable Leon Frazier. Counsel also devised a theory to explain how Wright had access to details of the killing that were not known to the public – he suggested that Wright might have rifled through Poole's legal documents when Poole was out of their cell.

Counsel ably exposed why Wright had a motive to lie and how his account of Poole's alleged confession was inconsistent with the forensic evidence from the crime-

scene. He also exposed Leon Frazier's history of abusing mind-altering drugs and his multiple admissions to a mental hospital, thereby giving the jury a reason not to believe his damning testimony that Poole had shown him Dior's credit cards and had asked him to hide a gun. Ironically, when Poole argues that there is a reasonable probability that the result at trial would have been different but for counsel's alleged errors, he relies in large part on the specific shortcomings that his counsel identified in the State's case.

Finally, counsel aggressively defended Poole when the State went after him, hammer and tongs, in cross-examination – in fact, much of the cross-examination resembles the juridical equivalent of gladiatorial combat between the prosecutor and defense counsel, with defense counsel repeatedly objecting in order to protect his young client when the prosecutor interrupted his answers.

On the whole, therefore, Poole received a spirited and conscientious defense. The question in this appeal is whether the discrete errors that he has identified placed the representation "outside the wide range of professionally competent assistance" (*Strickland v. Washington*, 466 U.S. at 690) and whether they had such a "pervasive effect on the inferences to be drawn from the evidence" as to warrant a new trial. *Id.* at 695-96.

II. Poole's Right to Remain Silent

In decreeing that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself," the Fifth Amendment to the United States Constitution creates a right against compelled self-incrimination. By ensuring that a criminal suspect is informed of the right to remain silent in response to official questioning during a

custodial interrogation, the familiar *Miranda* warnings are designed, in part, to implement this Fifth Amendment protection against compelled self-incrimination.

This case does not concern the right to remain silent as such, but rather the State's ability to use a criminal defendant's silence itself as evidence against him. In particular, it concerns the State's ability to use the defendant's silence in two discrete instances: (1) after arrest but *before* the administration of *Miranda* warnings, and (2) after arrest and *after* the administration of *Miranda* warnings. It also concerns whether a suspect's omissions are the same as silence if he or she chooses to make a statement to the authorities, but leaves out important details that come to light only when the defendant testifies at trial.

In *Doyle v. Ohio*, 426 U.S. 610, 618 (1976), the Supreme Court held that if suspects choose to remain silent after they receive *Miranda* warnings, due process prohibits the prosecution from using their silence to impeach them when they testify at trial. After their arrest, the *Doyle* defendants had exercised their right to remain silent, but at trial they took the stand and denied the charges against them. *Id*. at 612-13. The trial court allowed the prosecution to impeach the defendants by establishing that they had not offered their exculpatory accounts when they were arrested. *Id.* at 614. The Supreme Court reversed, reasoning that it was "fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." *Id.* at 618. The Court explained:

> Silence in the wake of [*Miranda*] warnings may be nothing more than the arrestee's exercise of these *Miranda* rights. Thus, every post-arrest silence is insolubly ambiguous because of what the State is required to advise the

> person arrested. Moreover, while it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings.

Id. at 617-18 (footnote and citations omitted).

A year earlier, in *United States v. Hale*, 422 U.S. 171, 181 (1975), the Court had held that, as a matter of federal evidentiary law, the government could not impeach a criminal defendant by citing his invocation of the right to remain silent, because "[n]ot only is evidence of silence at the time of arrest generally not very probative of a defendant's credibility, but it also has a significant potential for prejudice." *Id.* at 180. In a concurring opinion, Justice White asserted that he would have placed the decision on constitutional, rather than evidentiary, grounds:

> [W]hen a person under arrest is informed, as *Miranda* requires, that he may remain silent, that anything he says may be used against him, and that he may have an attorney if he wishes, it seems to me that it does not comport with due process to permit the prosecution during the trial to call attention to his silence at the time of arrest and to insist that because he did not speak about the facts of the case at that time, as he was told he need not do, an unfavorable inference might be drawn as to the truth of his trial testimony. Surely Hale was not informed here that his silence, as well as his words, could be used against him at trial. Indeed, anyone would reasonably conclude from *Miranda* warnings that this would not be the case.

Id. at 182-83 (White, J., concurring) (citation omitted).

In holding that due process prohibits the prosecution from using a defendant's post-*Miranda* silence to impeach him when he takes the stand and testifies at trial, the

Doyle Court expressly endorsed Justice White's concurring opinion in *Hale*. *Doyle v. Ohio*, 426 U.S. at 618-19.[10]

Even before *Doyle*, the Court of Appeals of Maryland had held that, as an evidentiary matter, it was error to admit evidence that a criminal defendant had exercised his right to remain silent after he had been warned that he had the right to remain silent. *See Younie v. State*, 272 Md. 233, 245 (1974). In *Younie* the defendant answered several questions, but asserted his right to remain silent and refused to answer several others. *Id*. at 236-38. The trial court allowed the State to introduce Younie's response to each of the questions, including his response that he refused to answer several of them. *Id.* In reversing Younie's conviction, the Court agreed with his contention that "his silence was a permissible exercise of his privilege against self-incrimination and, since the only purpose the objected[-]to evidence served was to create the highly prejudicial inference that his failure to respond was motivated by guilt, its inclusion was reversible error." *Id.* at 238.

In *Grier v. State*, 351 Md. 241, 258 (1998), the Court of Appeals reiterated that "[e]vidence of post-arrest silence, after *Miranda* warnings are given, is inadmissible for

[10] In *United States v. Robinson*, 485 U.S. 25, 30, 32 (1988), the Supreme Court limited *Doyle* in holding that the federal Constitution does not prevent the prosecution from commenting on the defendant's silence as a "fair response" to a complaint that the government had not allowed him to tell his story. In *Doyle* itself, the Supreme Court had allowed that, if the defendant falsely claimed to have made a statement after his arrest, the prosecution could establish that he had actually exercised his right to remain silent. *Doyle v. Ohio*, 426 U.S. at 619 n.11. To date, no Maryland case has upheld the admission of a defendant's post-*Miranda* silence under this "fair response" doctrine. *See Lupfer v. State*, 420 Md. 111, 134-39 (2011).

any purpose, including impeachment." Citing *Doyle v. Ohio*, the Court recognized that it would violate due process to admit evidence of post-arrest, post-*Miranda* silence. *Id.* Citing *Younie*, the Court recognized that evidence of post-arrest, post-*Miranda* silence is inadmissible not just only constitutional grounds, but also "[a]s an evidentiary matter." *Id.* Citing *United States v. Hale*, the Court asserted that post-arrest, post-*Miranda* silence "carries little or no probative value, and a significant potential for prejudice." *Id.*

> On the subject of the probative value of silence, the *Grier* Court explained:
>
> > In the absence of an accusation, a defendant's failure to come forward does not constitute an admission, and lacks probative value. Citizens ordinarily have no legal obligation to come forward to the police. Failure to come forward to the police may result from numerous factors, including a belief that one has committed no crime, general suspicion of the police, or fear of retaliation. Such silence is simply not probative as substantive evidence of guilt. It is thus inadmissible in the State's case-in-chief.

Id. at 254-55 (citations omitted).[11]

More recently, in *Coleman v. State*, 434 Md. 320 (2013), the defendant submitted to a custodial interrogation, received *Miranda* warnings, answered some questions, but exercised the right to remain silent in response to others. At trial the defense attorney failed to object on approximately 30 occasions when a detective mentioned, commented

[11] In addition to holding that post-arrest, post-*Miranda* silence is inadmissible both as substantive evidence and for purposes of impeachment, the *Grier* Court held that *pre-arrest* silence is ordinarily inadmissible as substantive evidence of guilt, except when the silence amounts to a "tacit admission" of guilt. *Grier*, 351 Md. at 257. "A tacit admission occurs when one remains silent in the face of accusations that, if untrue, would naturally rouse the accused to speak in his or her defense." *Henry v. State*, 324 Md. 204, 241 (1991); *accord Grier v. State*, 351 Md. at 252. The Court subsequently held that if the pre-arrest silence occurs in the presence of a police officer, it is too ambiguous to be probative, even as a tacit admission of guilt. *See Weitzel v. State*, 384 Md. 451, 456 (2004).

on, and editorialized about the defendant's exercise of his right to remain silent. *See id.* at 326-28; *id.* at 342 ("not only was this silence mentioned when it should not have been, but also, in several instances, it was editorialized by Detective Childs"). Nor did the defense attorney move in limine to suppress the inadmissible references to post-*Miranda* silence. *Id.* at 328. Worse yet, the defense attorney admittedly did not know that the defendant could invoke the right to remain silent on a question-by-question basis (i.e., the attorney did not realize that his client retained the right not to answer some questions even though he had answered others). *Id.* at 337. The attorney said that he would object to inadmissible evidence that he thought was "important," but he plainly did not have an adequate understanding of the law to assess what was "important." *See id*. at 339. In these circumstances, the Court of Appeals held that counsel's representation was constitutionally deficient "because it fell below the range of competence demanded of attorneys in criminal cases and was not pursued in furtherance of sound trial strategy." *Id*. at 340.

A defendant's silence after an arrest but *before* the administration of *Miranda* warnings stands on a slightly different footing from silence *after* the administration of *Miranda* warnings. In *Fletcher v. Weir*, 455 U.S. 603, 607 (1982), the Supreme Court held that due process does not prohibit the prosecution from using a defendant's post-arrest, pre-*Miranda* silence for impeachment purposes if the defendant testifies at trial. The Court stated, however, that the admissibility of such evidence under state law shall be left for each state to determine according to its own rules of evidence. *Id.*

In *Kosh v. State*, 382 Md. 218, 220 (2004), the Court of Appeals held that "[p]ost-arrest silence is inadmissible as substantive evidence of a criminal defendant's guilt, regardless of whether that silence precedes the recitation to the defendant of *Miranda* advisements." *See also id.* at 227 ("[e]vidence of a defendant's post-arrest silence is inadmissible as substantive evidence of his guilt"). The Court declined to address whether post-arrest, pre-*Miranda* silence may be used for purposes of impeachment or rebuttal, as that issue was not presented in the case. *Id.* at 227 n.6; *see also Grier v. State*, 351 Md. at 258 (noting, but not deciding, the issue of whether "post-arrest, pre-*Miranda* silence is too ambiguous to be admissible, even as impeachment evidence").

In *Wills v. State*, 82 Md. App. 669, 678 (1990), however, this Court held that evidence of post-arrest, pre-*Miranda* silence is not admissible for impeachment purposes. Writing for this Court, Judge Karwacki reasoned that "evidence of an accused's post-arrest, pre-*Miranda* warning, silence for impeachment is inadmissible because the probative value, if any, of such evidence, is clearly outweighed by its potential for unfair prejudice." *Id.* In reaching that decision, Judge Karwacki observed that "an accused may remain silent solely because he is aware of his Fifth Amendment rights." *Id.* at 675-76. In addition, he pointed out that a contrary decision might "'encourage police to delay reading *Miranda* warnings or to dispense with them altogether to preserve the opportunity to use the defendant's silence against him.'" *Id.* at 676 (quoting *State v. Davis*, 686 P.2d 1143, 1146 (Wash. Ct. App. 1984)).

In summary, in Maryland, a defendant's post-arrest silence, whether before or after the administration of *Miranda* warnings, is generally inadmissible both as substantive evidence of guilt and as impeachment evidence.

If silence is inadmissible, the question then becomes, what is silence? If the record does not reflect that a suspect said anything at all after being arrested, he or she has been silent. *See Wills v. State*, 82 Md. App. at 672. If a suspect expressly invokes the right to remain silent during questioning, he or she has also been silent. *See Coleman v. State*, 434 Md. at 333 (quoting *Crosby v. State*, 366 Md. 518, 529 (2001)). If a suspect simply refuses to answer any question asked, he or she has been silent as well. *See id.* (quoting *Crosby v. State*, 366 Md. at 529). In none of those instances can the State use his silence against him.

If, however, the suspect chooses to speak, but omits material facts in responding to the questions that he chooses to answer, he or she has not been silent. *Anderson v. Charles*, 447 U.S. 404, 409 (1980). If defendants take the stand at trial and disclose details that they previously failed to disclose during a custodial interrogation, the State may impeach them by suggesting that the undisclosed details are a recent fabrication or that the prior statement is inconsistent with their testimony at trial. *See id*. at 407. "Such questioning makes no unfair use of silence because a defendant who voluntarily speaks after receiving *Miranda* warnings has not been induced to remain silent." *Id.* at 408. To the contrary, "[a]s to the subject matter of his statements, the defendant has not remained silent at all." *Id.* Hence, when the prosecution impeaches a defendant with inconsistencies between an earlier statement and the trial testimony, "[t]he questions [are]

not designed to draw meaning from silence, but to elicit an explanation for a prior inconsistent statement." *Id.* at 409; *accord Reed v. State*, 68 Md. App. 320, 328-30 (1986) (holding that court did not abuse its discretion in denying mistrial where State attempted to impeach defendant's trial testimony that he killed victim in self-defense by using his earlier statement that he had not seen the victim on the day of the crime).

A. Failure to Object to Evidence of Post-Arrest, Pre-*Miranda* Silence

Poole identifies two instances in which his trial counsel failed to object to references to his post-arrest, pre-*Miranda* silence. In our assessment, neither approaches the level of constitutionally deficient representation.

1. Direct Examination of Officer Freitag

Officer Freitag testified that, after he arrested Poole in Dior's BMW on Sunday, April 30, 1995, Poole asked him why had been arrested. The officer responded that Poole "was in a stolen vehicle." At that point, the following exchange occurred:

> [State]: Okay. *And at that point did he tell you anything, any response to you?*
>
> [Officer Freitag]: *No, sir.*
>
> [State]: *Did he tell you that he had had permission to have that vehicle?*
>
> [Officer Freitag]: *No, sir.*
>
> [State]: *Did he tell you he borrowed the vehicle from anybody?*
>
> [Officer Freitag]: *No, sir.*

(Emphasis added.)

Poole correctly observes that the officer's testimony concerned post-arrest, pre-*Miranda* silence, which is (and in 1995 was) inadmissible for any purpose, including impeachment. *See Wills v. State*, 82 Md. App. at 678. He contends that his trial counsel's performance was constitutionally deficient because counsel neither objected to this inadmissible testimony concerning post-arrest, pre-*Miranda* silence nor moved to strike it once it had been admitted.

We agree that, if counsel had objected, the trial court should not have permitted Officer Freitag to testify that, after being informed that he had been arrested for being in a stolen car, Poole said nothing and did not claim (as he later did) to have had Dior's permission to use the car. We disagree, however, that Poole was denied effective assistance of counsel as a result of his attorney's failure to object to this brief line of questioning or the failure to move to strike the three answers.

"A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland v. Washington*, 466 U.S. at 689. With the benefit of hindsight, we know what Officer Freitag would say when the prosecutor asked, "And at that point did he tell you anything, any response to you?" Because we have the transcript, we know that the officer's answer was, "No, sir." Yet we have no clear indication that, when the prosecutor asked whether Poole said anything in response, Poole's defense counsel knew (or even should have known) that the officer would say that Poole did not offer an exculpatory explanation, but instead said nothing.

At oral argument, we specifically asked whether trial counsel had any information, by way of grand jury testimony, pretrial disclosures of Poole's statements, or other discovery, that might have informed him about the substance of this exchange between Officer Freitag and Poole before the officer himself testified about it, but appellate post-conviction counsel could point us to nothing. Because counsel was not required to object to the first question without knowing that the answer would actually be objectionable, we cannot conclude that Poole received ineffective assistance of counsel as a result of the failure to object to the first question to Officer Freitag. "The effective assistance of counsel does not demand a crystal ball." *State v. Gross*, 134 Md. App. 528, 588 (2000), *aff'd*, 371 Md. 334 (2002).

On the other hand, once the officer answered the first question and disclosed Poole's post-arrest silence, trial counsel could have moved to strike the answer. Furthermore, counsel could have objected to the two, follow-up questions, in which the officer confirmed that Poole did not claim to have permission to use the car and did not claim to have borrowed the car. As the post-conviction court commented, however, "criminal trials are not bar exams on evidence," and we are "not here to grade counsel's performance." *Accord Commonwealth v. Spotz*, 970 A.2d 822, 832 (Pa. 2005) ("Review of the reasonableness of counsel's trial performance is not measured by an exercise in 'spot the objection,' as might occur in a law school evidence examination").

Once Officer Freitag had answered the first question, trial counsel had no more than an instant to spot the *Wills* issue and to assess whether he should move to strike the answer, or whether it might do more harm to flag the answer even with a successful

motion to strike. *See, e.g.*, *Kulbicki v. State*, 207 Md. App. 412, 452 (2012), *rev'd*, 440 Md. 33 (2014), *cert. granted*, *judgment rev'd*, 136 S. Ct. 2 (2015), *and aff'd*, 445 Md. 451 (2015) (recognizing that defense counsel's failure to object may have been "a strategic decision not to call further attention to what it considered a damaging piece of evidence"); *Charles v. Thaler*, 629 F.3d 494, 502 (5th Cir. 2011) (holding that counsel's decision not to draw undue attention to brief testimony through an objection was reasonable trial strategy); *Evans v. Thompson*, 881 F.2d 117, 125 (4th Cir. 1989) (holding that defense counsel's decision "to attack the credibility of the relevant witnesses during argument" rather than objecting and "draw[ing] further attention to the evidence" was "a judgment trial attorneys make routinely . . . [and did] not give rise to a claim under *Strickland*") (quotation marks omitted); *Walker v. United States*, 433 F.2d 306, 307 (5th Cir. 1970) ("[s]ince an objection may tend to emphasize a particular remark to an otherwise oblivious jury, the effect of objection may be more prejudicial than the original remarks"); *United States v. Benson*, 389 F.2d 376, 378 (6th Cir. 1968) ("We are not unmindful of the fact that lawyers hesitate to object to an argument because of a possible adverse effect on the jury"); *Shockley v. State*, 147 S.W.3d 189, 194 (Mo. Ct. App. 2004) ("[T]rial counsel often do not object to otherwise improper questions or arguments for strategic purposes because frequent objections might irritate the jury and highlight the statements complained of, resulting in more harm than good") (quotation marks omitted); *Commonwealth v. LaCava*, 666 A.2d 221, 230 (Pa. 1995) (holding that "trial counsel was

reasonable in not objecting" where "an objection would have served only to highlight [a] fleeting reference").[12]

Once the prosecutor had begun to formulate the first of the two follow-up questions, counsel had only a few additional seconds to decide whether to object. In explaining why he did not believe that trial counsel responded deficiently by not objecting in those circumstances, the post-conviction court quoted the former Chief Judge of this Court, Judge Joseph F. Murphy, Jr.:

> Every experienced trial lawyer can recall situations in which he failed to make a timely request for a ruling from the trial judge. Such "failures," however, are seldom attributable to bad lawyering. The hectic pace of most trials in combination with the continuous and intense pressure on trial counsel are the real reasons why many issues go "unpreserved."

Joseph F. Murphy, Jr., *Maryland Evidence Handbook* § 100, at 2 (4th ed. 2010); *accord Commonwealth v. Spotz*, 870 A.2d at 832 (stating that "[c]ounsel are not constitutionally required to forward any and all possible objections at trial, and the decision of when to interrupt oftentimes is a function of overall defense strategy being brought to bear upon issues which arise unexpectedly at trial and require split-second decision-making by counsel").

[12] At the post-conviction hearing, Poole's trial counsel testified that he could not remember why he did not object to Officer Freitag's testimony. Citing that testimony, Poole argues that trial counsel cannot claim to have made a strategic decision not to object. The post-conviction court persuasively disposed of that argument when it described itself as unsurprised that counsel "did not recall why he did not object to a small group of questions from a trial in 1995." "The court would have been more surprised if, nearly 20 years after-the-fact, trial counsel came up with some detailed rationale."

We agree with Judge Murphy's assessment. In a truly impeccable performance, defense counsel might have guessed where the prosecutor was going with the first question ("And at that point did he tell you anything, any response to you?") and forestalled the entire line of questioning with a timely objection. In a nearly impeccable performance, counsel might have moved to strike the answer after he heard it and interposed subtle objections to the two, follow-up questions. But the Constitution does not require impeccability: it requires only that counsel's performance fall within "the wide range of professionally competent assistance." *Strickland v. Washington*, 466 U.S. at 690. Counsel's performance exceeded that minimal standard notwithstanding the failure to object to three questions that elicited evidence of pre-*Miranda* silence or to move to strike the answers.

In this regard, it is important to put Officer Freitag's testimony into the context of the trial itself. The second and third questions were purely rhetorical and added nothing of substance: if Poole did not say anything in response to the officer's explanation of why he had been arrested, then he certainly did not say that he had permission to use the car or that he had borrowed it. Furthermore, the officer was, at best, a bit player whose testimony took up only four pages in a transcript that is over 600 pages long, and who went unmentioned in the State's closing argument. The next witness (the following day) was Poole, who was going to attempt to persuade the jury of his innocence (or at least raise a reasonable doubt about his guilt). It is understandable if Poole's counsel, focused

on readying his 18-year-old client to take the stand in a first-degree murder trial, would not get bogged down with the testimony of a relatively minor witness.[13]

2. Cross-Examination of Poole Regarding Relationship With Dior

On direct examination, Poole testified that when he spoke to Detective Brent, he did not disclose his prior sexual encounters with Dior. He explained that he withheld that information from the detective because, he said, he had been "embarassed."

Under *Anderson v. Charles*, 447 U.S. at 409, the State would have had every right to impeach Poole by citing his failure to disclose those material facts to Detective Brent. Hence, Poole undoubtedly volunteered that information on direct so that he could "draw the sting" by preemptively offering harmful evidence that the prosecution would use on cross-examination.

On cross-examination, the State did not ignore Poole's concealment of his prior sexual relationship with Dior:

> [State]: *You never, ever[], told any member of the Montgomery County Police when you were arrested about your prior activity with David Dior, did you?*
>
> [Poole]: *No.*
>
> [State]: *Even after you were charged with first degree murder, you never told them that, did you?*

[13] Neither party mentions that, during Poole's direct examination the following day, he himself brought up his interaction with Officer Freitag. According to Poole, he "didn't say nothing" when an officer told him that he was "driving a stolen car." On cross-examination, the State attempted to revisit the topic, but defense counsel intervened, pointing out that Poole had not been advised of his rights. Even though Poole had introduced the topic, the State demurred in the objection.

> [Poole]: *After I was charged with first degree murder, I didn't say anything.*
>
> [State]: Okay. *Did you ever tell Montgomery County Police, Detective Brent, Officer Freitag, did you ever tell them about your sexual activity with David Dior?*
>
> [Poole]: *No.*

Poole charges that those three questions highlighted both his post-*Miranda* silence in the interrogation that Detective Brent conducted and his pre-*Miranda* silence in the presence of Officer Freitag. He faults his trial counsel for failing to object.

To the extent that these questions concern Poole's interactions with Detective Brent after he had received *Miranda* warnings, however, they do not concern "silence" at all. Rather, they concern material omissions in Poole's statement to the police.

Poole gave a detailed and comprehensive statement to Detective Brent. In that statement, he talked at length about how he had met Dior, why he was at Dior's apartment on the night of the murder, and how he had come into possession of Dior's BMW. He even talked about Dior's alleged offer to lend him the car in exchange for sex, which he claimed to have declined. He did not, however, disclose that he had had previous sexual encounters with Dior. Instead, Poole first disclosed his prior sexual encounters with Dior when he took the stand in his defense.

"[A] defendant who voluntarily speaks after receiving *Miranda* warnings," as Poole did, "has not been induced to remain silent." *Anderson v. Charles*, 447 U.S. at 408. If such a defendant makes a statement, but leaves out material facts that come to light only when he testifies at trial, it is perfectly appropriate for the State to inquire into

those omissions and inconsistencies on cross-examination. *Id.* at 407-09; *Reed v. State*, 68 Md. App. at 328-30. Therefore, to the extent that the State's questions concerned Poole's failure to tell Detective Brent about his prior sexual encounters with Dior, Poole's trial counsel had no basis to object (and, accordingly, could not have rendered ineffective assistance of counsel by failing to object). *State v. Colvin,* 314 Md. 1, 21-22 (1988) (finding no ineffective assistance of counsel for the failure to object to testimony that was admissible).[14]

The State's questions, however, were not clearly confined to what Poole told Detective Brent. Two of the three questions referred generally to the "Montgomery County Police," one referred to Officer Freitag as well as Detective Brent, and a third referred to what Poole told "them" after he had been "charged with first-degree murder." In retrospect, defense counsel could have objected to these compound questions, which implicitly encompass both pre-*Miranda* silence and silence after Poole terminated the custodial interrogation and asserted his right to counsel. Had counsel objected, the State agrees that the trial court should have sustained the objection at least to the question about Poole's silence after he was charged with first-degree murder.[15]

[14] At oral argument, counsel for Poole appeared to concede as much when he said: "[I]n his statement to police, Poole denied, expressly denied having sexual activity with the victim. At trial, he admitted [it]. Those are inconsistent statements and perhaps under *Anderson* . . . that inconsistency could be exploited."

[15] The State writes: "the prosecutor's question as to whether Poole told police about the sexual nature of the relationship 'after you were charged with first degree murder' was improper because it implicated an ongoing period of time that would, by its nature, include the time period after Poole's affirmative invocation of his right to counsel."

Nonetheless, we cannot conclude that the failure to object to these three questions amounts to ineffective assistance of counsel.

As previously stated, counsel is not ineffective merely because, in the midst of a trial, he or she may not have spotted an issue that is more readily apparent to someone who has the time to examine the trial transcript in minute detail. Nor is counsel ineffective merely because he or she fails to pull the trigger on an objection in the fraction of a second (if there even is one) between the end of a question and the beginning of the witness's answer.

In this particular case, counsel was not ineffective, because the jury already knew the answer to the questions to which, Poole says, he should have objected. The jury knew that Poole had not told Detective Brent about his sexual relationship with Dior because Poole himself had said so, as had Detective Brent. Given Poole's failure to tell Detective Brent about the relationship during the lengthy interrogation, it would hardly have been a leap for the jury to infer that he never told any other officers about it either.

Furthermore, the defect in these questions is readily discernible only to lawyers and judges who have an adequate amount of time to reflect on the precise phrasing and to consider its implications. By their literal terms, these largely rhetorical questions do not expressly inquire into what Poole said or did not say before he had received his *Miranda* warnings or after he had invoked the right to counsel. It becomes apparent that the questions might extend to those subjects only if one reflects on the legal significance of the reference to Officer Freitag, or to any member of the Montgomery County Police Department (other than Detective Brent), or to what occurred after Poole was charged. It

is not at all clear that the jury (or even a defense lawyer in the heat of trial) would have understood these compound questions to encompass Poole's pre-*Miranda* silence or his silence after he had asserted his right to counsel. In that regard, this case is quite different from *Coleman v. State*, 434 Md. at 327-28, in which counsel failed to object to numerous, express references to the defendant's invocation of his right to remain silent, including gratuitous editorial commentary about his demeanor as he exercised his right.

Had defense counsel objected to any of these three questions, the court might have required the prosecutor to reformulate his questions to focus clearly on what Poole said or did not say to Detective Brent. But because it was perfectly appropriate for the State to cross-examine Poole about the belated disclosure of his sexual relationship with Dior, counsel ran the risk of being viewed as an obstructionist if he objected to questions that concerned (even if they did not precisely focus on) what Poole himself had just admitted on direct examination. For these reasons, the failure to object to the three compound questions did not, in our judgment, not fall "outside the wide range of professionally competent assistance." *Strickland v. Washington*, 466 U.S. at 690.

3. Direct Examination of Detective Brent

On direct examination, Detective Brent referred, on multiple occasions, to Poole's inability or failure to explain important details of his accounts. Poole complains that the detective commented inappropriately on his exercise of his right to remain silent and that his defense counsel rendered ineffective assistance by failing to object. He likens his case to *Coleman v. State*, 434 Md. at 340, in which the Court of Appeals held that a defendant received ineffective assistance of counsel because his attorney failed to object

when a detective made some 30 references to his invocation of his right to remain silent and offered editorial comments on the defendant's demeanor as he exercised his right.

Assuming for the sake of argument that this issue is even preserved,[16] it has no merit. Detective Brent did not comment on Poole's invocation of his right to remain silent; rather, he testified about Poole's vague, evasive, and uninformative answers.

For example, the detective testified that when he asked Poole about the conditions on which Dior had lent him the car, "he was vague." The detective added: "He did not provide a time that the car was supposed to be back, or what terms that Mr. Dior had made." In giving this testimony, the detective did not comment on Poole's silence; he talked about what Poole had actually said, and why it was uninformative.

[16] The supplemental petition for post-conviction relief alleged ineffective assistance of counsel only in the failure to object to the three questions about pre-*Miranda* silence that were posed to Officer Freitag, the failure to object to the questions posed to Poole on cross-examination about whether he ever told anyone in the police department about his prior sexual experiences with Dior (including whether he had said anything about them after being "charged with first-degree murder"), the failure to object to certain comments in the prosecutor's closing argument about Poole's vague and evasive responses to Detective Brent, and the failure to preserve the record for appeal by failing to make those objections. The supplemental petition did *not* allege ineffective assistance in the failure to object to Detective Brent's testimony on direct, or in any other evidentiary matter. Nor did Poole's post-conviction counsel question his trial counsel about the failure to object to Detective Brent's testimony on direct, or about other evidentiary matters. Furthermore, in its thorough and comprehensive opinion, the post-conviction court did not address any issues other than the three questions posed to Officer Freitag, the cross-examination of Poole about whether he had disclosed his prior sexual encounters with Dior, the prosecutor's comments in closing, and the failure to preserve the record. Hence, it is, in our view, quite clear that Poole has not preserved any issue other than those. *See* Md. Rule 8-131(a). We exercise our discretion to address the other issues for the sole purpose of forestalling any possibility of further proceedings, such as proceedings concerning whether post-conviction counsel rendered ineffective assistance of counsel.

A few moments later, the detective reiterated that he asked Poole "several times" about the alleged loan, but in the detective's estimation, "he was vague and could not supply any real response to that question." Again, the detective did not say that Poole had asserted his right to remain silent; he said that Poole had attempted to answer the question, but that his answer was so vague that it did not amount to a "real response."

The detective also testified that when he asked Poole about when he was supposed to return the car to Dior, "[h]e just wavered in his answers and did not give any real direct answer." As before, the detective did not tell the jury that Poole had declined to answer the question; he said that Poole, again, had attempted to answer the question, but that his answer was so evasive and equivocal ("[h]e just wavered") that it did not amount to a "direct answer."

On other occasions during Detective Brent's direct examination, he referred to things that Poole did not say during the custodial interrogation. For example, the detective reported that Poole said nothing about buying the car from Dior or about test-driving it. The detective also reported that Poole said nothing about having any of Dior's other belongings, such as his wallet, credit cards, or license. This testimony, however, did not involve unfair comment about Poole's assertion of his right to remain silent; rather it was a means of impeaching the statement that Poole actually made by referring to important details that Poole had omitted.

A suspect's answer, no matter how evasive, equivocal, incomplete, or incoherent, is not silence. The detective did not infringe on Poole's right to remain silent by describing his answers as vague and uninformative or by pointing out details that Poole

mentioned to others, but omitted to mention during the custodial interrogation. Hence, defense counsel could not have rendered ineffective assistance by failing to object to this admissible testimony. *See State v. Colvin*, 314 Md. at 21-22.

4. Cross-Examination of Poole

During Poole's cross-examination, the State questioned him about a number of omissions from his statement to Detective Brent. *See supra* pp. 17-22. Some of the questions inquired into whether Poole had had conversations with Dior about buying the BMW, whether he told the police that he was supposed to return the car to Dior on Saturday night, what he was supposed to do with the car if Dior did not call him on Saturday night, and whether he told the police that he was supposed to return the car on Sunday evening if Dior did not call him on Saturday night. Other questions inquired into whether Poole had told Detective Brent that Dior let him borrow the car, whether he told the detective to call Dior and ask whether he had given Poole permission to use the car, and whether he told the detective to look up Dior's number in the telephone directory.

As he did with Detective Brent's statements on direct examination, Poole contends that these questions impermissibly highlighted his silence. Assuming for the sake of argument that the issue is even preserved,[17] we reject Poole's contention. The questions at issue do not concern Poole's invocation of his right to remain silent; they concern omissions from the information that Poole voluntarily disclosed after he had waived his right to remain silent. The questions reflect the State's attempt to scrutinize the veracity

[17] *See supra* n.16.

of the statement that Poole gave to the police and to highlight ways in which the statement was inconsistent with his trial testimony. The questioning, and the testimony that it elicited, made no reference to Poole's exercise of his right to remain silent.

Under *Anderson v. Charles*, 447 U.S. at 407-09, those omissions and inconsistencies are fair game on cross-examination. Counsel, therefore, could not have rendered ineffective assistance by not objecting to that cross-examination. *State v. Colvin*, 314 Md. at 21-22.

5. Detective Brent's Rebuttal Testimony

The State called Detective Brent as a rebuttal witness. During his direct examination on rebuttal, the State asked whether Poole had said that he was supposed to return the BMW on Saturday night, whether Poole had said that he was supposed to return the BMW on Sunday night, and whether Poole had indicated anything at all about when he was supposed to return the car. To each of the questions, Detective Brent answered, no. *See supra* pp. 22-24.

As Poole did with Detective Brent's statements on direct examination and the questions that the State posed to him on cross-examination, Poole contends these questions too impermissibly highlighted his silence. Assuming, again, for the sake of argument that the issue is even preserved,[18] we reject Poole's contention.

When Poole took the stand, he testified about his alleged arrangements with Dior. Detective Brent's rebuttal testimony sought to compare what Poole said to the detective

[18] *See supra* n.16.

with what he said to the jury, and to highlight any inconsistencies or omissions. Neither the questions nor the responses made any reference to Poole's invocation of the right to remain silent, so the testimony was permissible under *Anderson v. Charles*, 447 U.S. at 407-09. Counsel could not have rendered ineffective assistance by failing to object to a series of unobjectionable questions. *State v. Colvin*, 314 Md. at 21-22.[19]

6. Closing Argument

Poole argues that the State improperly made use of his silence to attack his credibility during its closing argument. He complains that, in emphasizing his inability to articulate a clear answer to Detective Brent's questions about when he was supposed to return the car, the State said, "[w]hat did he tell Detective Brent? It was never any response to that."

Poole further complains that the State also highlighted his silence when it argued:

> Bryan Poole told you that he was going to return the car on Saturday night. Detective Brent said he did not say that. Then he told you he was going to return it sometime on Sunday. He never told Detective Brent that.
>
> He is now engaged in sexual activity with David Dior. It is the first time we hear that.

Again, these references focused on omissions and inconsistencies in Poole's police statement compared to his trial testimony. When the State said, "What did he tell

[19] When Detective Brent was cross-examined as a rebuttal witness, he made it clear that he was not discussing Poole's silence, but his vague and unspecific answers. He testified that Poole "did not supply any specific information as to when the car was to be returned." He said that "Poole was vague" and that "he had no precise answer." Poole, he said, "did not supply any specific time frame" as to when he was supposed to return the car. He characterized Poole as "unresponsive." He agreed with defense counsel that Poole gave "non-precise answers."

Detective Brent? It was never any response to that[,]" it did not refer to Poole's silence. This statement referred to Poole's inability to give a cogent response to Detective Brent's question of when the BMW was to be returned. In these instances, Poole was not silent; he spoke, but he spoke incompletely, evasively, or misleadingly.

In commenting on Poole's incomplete, evasive, or misleading statements, the State was not commenting impermissibly on his silence. Hence, Poole's defense counsel had no reason (and no obligation) to object.

B. Substantial Probability of a Different Result

Even if Poole's trial counsel had performed deficiently by failing to object to the questions to Officer Freitag concerning pre-*Miranda* silence and the questions to Poole concerning pre- and post-*Miranda* silence, Poole has not shown a reasonable probability that, but for the alleged errors, "the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. at 694.

In his effort to demonstrate prejudice, Poole contends that the alleged references to his silence were extremely damaging to his credibility, which, he says, was an integral part of his defense. Yet Poole's case already had little credibility, for reasons that had nothing to do with three questions posed to Officer Freitag and three questions posed to Poole.

To begin with, Poole's account was wildly implausible: in the statement to Detective Brent, he claimed that Dior proposed to lend him the BMW if they had sex together; that he refused to have sex with Dior; but that Dior inexplicably allowed him to use the BMW anyway. In fact, he claimed that Dior allowed him to borrow the car even

though Dior's friends and family members uniformly testified that he never let anyone drive the BMW – and even though his other car (the Jeep) was in the shop, which meant that he would not be able to drive to work the next morning. At trial, he contradicted his statement to Detective Brent and said that Dior had lent him the BMW even without any discussion of a sexual quid pro quo. It is unsurprising that the jury found his accounts unpersuasive.

Worse yet, Poole did not have a cogent explanation of the terms under which he had allegedly borrowed the car. He could not clearly explain when he was supposed to return the car, how long he was allowed to use the car, and why he did not call Dior to return the car on the night after the murder. The absence of an explanation destroyed what vestige of credibility might have adhered to his claim that Dior had lent him the car.

Poole omitted key details in his statement to Detective Brent: Poole did not tell the detective of his prior sexual encounters with Dior. Instead, Poole disclosed the prior sexual encounters for the first time during his direct examination. The jury had good reason not to accept Poole's explanation that he had withheld those important details from Detective Brent because he was embarrassed.

In addition to omitting important details, Poole's account was demonstrably false in at least one respect: he testified that he used Dior's key card to get out of the garage at the apartment building, but Ms. Eastwood, the property manager, testified that the card had *not* been used to exit the garage on the night when Dior was killed. Her testimony raised the inference that Poole left in a hurry, not realizing that he had the card in the key case that he had taken from Dior. Because Ms. Eastwood's testimony had proved Poole's

testimony to be false in at least one respect, the jury could have rejected other aspects of his testimony and could even have rejected his testimony in its entirety.

According to Joseph Wright, the jailhouse snitch, Poole confessed to the killing. The jury certainly had reasons not to credit Wright's testimony: he was an admitted murderer; he had a motivation to lie (he was awaiting sentencing and hoped for leniency); and his account was incorrect in at least one respect (he said that Poole claimed to have fired twice, but the police found only one bullet). But Wright recounted details that he could only have learned from Poole – he knew that Dior had trimmed Poole's beard at the salon (a detail confirmed by Dior's customer, Karen Moore); he knew that Dior and Poole had stopped to buy cigarettes after leaving the salon (a detail that Poole related to Detective Brent); he knew that Dior was supposedly talking with someone on the phone after they arrived at the apartment (a detail that Poole repeated in his testimony); and he knew about the empty condom wrapper, which, he said, Poole had crumpled up in order to lead Dior to believe that he was putting on the condom when he was actually pulling out his gun. Wright's account had the additional virtue of being consistent with at least some of the evidence at the crime scene: Dior was clearly expecting to have sex with someone when he was shot from behind; the empty condom wrapper was found next to his body; and there were no signs of a struggle, which suggests that Dior had no idea that he was about to be shot.

Poole's acquaintance, Leon Frazier, testified that on the night of the murder Poole showed him Dior's wallet or key case and credit cards[20] and asked him to hold a .25 because the police would come looking for it. Although the defense insinuated that Detective Brent had persuaded the mentally-fragile Frazier to give false testimony, it is undisputed that the detective did not learn that the murder weapon was a .25 until months after Frazier had told the grand jury of Poole's request. Poole had no explanation about how Detective Brent could have impelled Frazier to testify falsify that Poole had a .25 when the detective himself did not yet know that the assailant had used a .25.

During the approximately 36 hours in which Poole had possession of the BMW, he did not act as though he believed he had the right to use it. Ryan Powell testified that Poole parked the car at a distance from his apartment even though there were spaces in front of the apartment. More damningly, Powell testified that on the night after the murder Poole took side streets rather than the main avenue to get to the women's house in Hillcrest Heights.

Finally, Poole admitted that he had lied. He lied to Dior about why he wanted to borrow the car (saying that he wanted to borrow it so that he could buy clothes for his child, when he really wanted to borrow it to go to a club). He attempted to mislead Detective Brent when he omitted to mention his sexual encounters with Dior before the night of the murder. He lied to his acquaintances when he told them that he was buying

[20] Ryan Powell said that he saw credit cards as well. In closing, however, defense counsel pointed out that he could not have been correct, because the police found no credit cards in the car when they arrested Poole and Powell together on Sunday, April 30, 1995.

the car. Even his acquaintances did not believe him: Ryan Powell suspected that he had stolen the car.

In summary, Poole had little credibility. Hence, his credibility did not take a significant hit as a result of the five or six questions to which Poole now says his counsel should have objected. Poole has not shown "a reasonable probability" that, but for counsel's alleged errors, "the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. at 694.[21]

C. Failure to Preserve the Record

Although he did not include it in his questions presented, Poole briefly argues that his trial counsel rendered ineffective assistance by failing to preserve issues that would have had a substantial possibility of resulting in the reversal of his conviction on direct appeal. But "[o]f course, the failure to preserve or raise an issue that is without merit does not constitute ineffective assistance of counsel." *Gross v. State*, 371 Md. 334, 350 (2002). Consequently, Poole's "failure to preserve" argument can apply, at most, to (1) the failure to object to two or three questions to Officer Freitag that mentioned Poole's pre-*Miranda* silence and (2) and the failure to object to the three questions to Poole that touched on pre- and post-*Miranda* silence.

[21] We should add that, despite Poole's attempts to establish that the handful of references to his silence had a devastating effect on his credibility, the State itself put little emphasis on that evidence. By contrast, the omissions and inconsistencies in Poole's various accounts were central to the State's case. It is perhaps because of the State's emphasis on his omissions and inconsistencies that Poole attempts, unsuccessfully, to characterize them as examples of silence, rather than examples of incomplete or misleading speech.

For the reasons expressed in sections II(A)(1) and II(A)(2), we do not believe that trial counsel rendered ineffective assistance in failing to object to those questions in the first instance. For the reasons expressed in section II(B), we cannot conclude that there would have been a substantial possibility of a different result on direct appeal had counsel done more than what he was required to do and objected, as the State's case against Poole was so comprehensive and compelling. Because "[s]imply failing to preserve an issue for appellate review is not, *per se*, prejudicial or ineffective assistance of trial counsel" (*id.* at 355-56), we reject Poole's contention that he received ineffective assistance of counsel because of a failure to preserve the record for appeal.

III. Other Statements by the State in Closing Arguments

Poole asserts that his trial counsel rendered ineffective assistance by failing to object to statements during the State's closing arguments. Poole specifically asserts that the State engaged in improper "vouching" when the prosecutor aggressively defended Detective Brent against the charge that he had planted evidence and suborned perjury by telling the jury, "I am proud of Detective Michael Brent. . . . If you want to indict him, indict me along with him." *See supra* pp. 26-27. Poole also argues that the State made an improper "golden rule" argument when the prosecutor implored the jurors to tell the community that they would not accept Poole's behavior and to "speak loud" so that Dior and his family could hear their verdict against Poole. *See supra* p. 27. In our judgment, the failure to object did not fall "outside the wide range of professionally competent assistance." *Strickland v. Washington*, 466 U.S. at 690.

"[A]ttorneys are afforded great leeway in presenting closing arguments[.]" *Degren v. State*, 352 Md. 400, 429 (1999). "'The prosecutor is allowed liberal freedom of speech and may make any comment that is warranted by the evidence or inferences reasonably drawn therefrom." *Id.* at 429-30. "Generally, counsel has the right to make any comment or argument that is warranted by the evidence proved or inferences therefrom; the prosecuting attorney is as free to comment legitimately and to speak fully, although harshly, on the accused's action and conduct if the evidence supports his comments, as is accused's counsel to comment on the nature of the evidence and the character of witnesses which the (prosecution) produces." *Wilhelm v. State*, 272 Md. 404, 412 (1974); *accord Degren v. State*, 352 Md. at 430.

> While arguments of counsel are required to be confined to the issues in the cases on trial, the evidence and fair and reasonable deductions therefrom, and to arguments of opposing counsel, generally speaking, liberal freedom of speech should be allowed. There are no hard-and-fast limitations within which the argument of earnest counsel must be confined—no well-defined bounds beyond which the eloquence of an advocate shall not soar. He may discuss the facts proved or admitted in the pleadings, assess the conduct of the parties, and attack the credibility of witnesses. He may indulge in oratorical conceit or flourish and in illustrations and metaphorical allusions.

Wilhelm v. State, 272 Md. at 413; *accord Degren v. State*, 352 Md. at 430.

That said, the scope of what counsel may argue is not boundless. *See Donaldson v. State*, 416 Md. 467, 489 (2010). Counsel may not vouch for or against the credibility of a witness. *Spain v. State*, 386 Md. 145, 153 (2005). Nor may counsel engage in "golden rule" arguments, *Lawson v. State*, 389 Md. 570, 594-95 (2005), in which a litigant "asks the [jurors] to place themselves in the shoes of the victim, or in which an

attorney appeals to the jury's own interests." *Lee v. State*, 405 Md. 148, 160-61 n.6 (2008) (citations omitted).

"Vouching typically occurs when a prosecutor 'place[s] the prestige of the government behind a witness through personal assurances of the witness's veracity . . . or suggest[s] that information not presented to the jury supports the witness's testimony.'" *Spain v. State*, 386 Md. at 153 (quoting *United States v. Daas*, 198 F.3d 1167, 1178 (9th Cir. 1999)). "[V]ouching presents two primary dangers" (*id.*):

> "[S]uch comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence."

Id. at 153-54 (quoting *United States v. Young*, 470 U.S. 1, 18-19 (1985)).

In *Spain*, for example, the Court of Appeals held that a prosecutor improperly vouched for the credibility of a police officer when he implied that the officer "had a motive to testify truthfully because to testify falsely would expose him to the penalties of perjury and lead to adverse consequences to his career as a police officer." *Id*. at 154. Similarly, in *Donaldson v. State*, 416 Md. at 492, the Court held that a prosecutor improperly vouched for the credibility of two police officers when she argued that they would not lie, because they did not want to lose their jobs. In *Sivells v. State*, 196 Md. App. 254, 280 (2010), this Court held that a prosecutor improperly vouched for the credibility of two detectives when she told the jury that they would not lie, because they had "a lot to loose [sic] by making things up, pensions, credibility, livelihood."

"The rule against vouching[,]" however, "does not preclude a prosecutor from addressing the credibility of witnesses in its closing argument." *Id.* at 278. "'[W]here a prosecutor argues that a witness is being truthful based on the testimony given at trial, and does not assure the jury that the credibility of the witness [is] based on his own personal knowledge, the prosecutor is engaging in proper argument and is not vouching.'" *Spain*, 386 Md. at 155 (quoting *United States v. Walker*, 155 F.3d 180, 187 (3rd Cir. 1998)). Thus, in *Spain*, the Court of Appeals also held that the prosecutor did not engage in improper vouching when he implied that the officer had no motive to testify falsely. *Id.* at 154-55. The Court reasoned that, in commenting on the absence of any motive for the officer to lie, the prosecutor was merely pointing to a lack of evidence in the record to support the defendant's attack on the officer's credibility. *Id.* at 155; *compare Sivells v. State*, 196 Md. App. at 280 (holding that prosecutor violated the rule against vouching when she expressed her personal opinion that police detectives "told the truth").

In addition to the rule against vouching, prosecutors must also be mindful that they "should not implore jurors to consider their own interests in violation of the prohibition against the 'golden rule' argument." *See, e.g.*, *Lee v. State*, 405 Md. at 171; *accord Beads v. State*, 422 Md. 1, 11 (2011) (holding that exhorting jurors to "say enough" to violent crime implored them to "consider their own personal safety and therefore violated the prohibition against the 'golden rule'"); *Hill v. State*, 355 Md. 206, 225 (1999) (stating that "appeals to jurors to convict a defendant in order to preserve the safety or quality of their communities are improper and prejudicial"). Golden rule arguments are

impermissible because they encourage jurors to abdicate their neutrality and to decide the case on the basis of their personal interests, and not on the evidence. *Lawson v. State*, 389 Md. at 594.

"Not every improper remark, however, necessitates reversal[.]" *Lee v. State*, 405 Md. at 164; *accord Wilhelm v. State*, 272 Md. at 431 ("the mere occurrence of improper remarks does not by itself constitute reversible error"). "[U]nless it appears that the jury were actually misled or were likely to have been misled or influenced to the prejudice of the accused by the remarks of the State's Attorney, reversal of the conviction on this ground would not be justified." *Wilhelm v. State*, 272 Md. at 415-16. "[W]hether a prosecutor has exceeded the limits of permissible comment depends upon the facts in each case." *Lee v. State*, 405 Md. at 164; *accord Degren v. State*, 352 Md. at 430-31 (quoting *Wilhelm v. State*, 272 Md. at 415) ("'[w]hat exceeds the limits of permissible comment depends on the facts in each case'").

If the defendant objects to the prosecutor's comments, the "determination of whether the prosecutor's comments were prejudicial or simply rhetorical flourish lies within the sound discretion of the trial court." *Degren v. State*, 352 Md. at 431. An appellate court should not reverse the trial court's decision unless it clearly abused its discretion and prejudiced the accused. *Id.* "When assessing whether reversible error occurs when improper statements are made during closing argument, a reviewing court may consider several factors, including the severity of the remarks, the measures taken to cure any potential prejudice, and the weight of the evidence against the accused." *Spain v. State*, 386 Md. at 159; *accord Henry v. State*, 324 Md. 204, 232 (1991) (quoting

Collins v. State, 318 Md. 269, 280 (1990)) ("[i]n determining whether reversible error occurred, an appellate court must take into account '1) the closeness of the case, 2) the centrality of the issue affected by the error, and 3) the steps taken to mitigate the effects of the error'").[22]

We shall consider Poole's arguments in reverse order, taking the golden rule argument before the vouching argument.

A. "Golden Rule" Arguments

Poole argues first that the State made a "golden rule" argument when it told the jury to "speak loud through the verdict, and you speak loud and tell the members of this community, we are not going to accept your behavior." Poole also argues that the State violated the "golden rule" by telling the jury to "speak loud to the community so they can hear you down in Florida where David Dior's family is missing their brother and their son" and to "speak loud through your verdict so David Dior can hear you." We reject Poole's contentions.

Poole relies principally on *Beads v. State*, 422 Md. at 6, which concerned the murder of an innocent bystander, who died when one or more persons fired shots into a crowd during a gun battle. In closing argument, the State exhorted the jurors to "[s]ay enough" to senseless gun violence in the community. In reversing the conviction, the

[22] For example, in one instance, the Court of Appeals concluded that "the trial judge did not err" (*Degren v. State*, 352 Md. at 437) in permitting the prosecution to make a statement ("nobody in this country has more reason to lie than a defendant in a criminal trial") that the Court itself characterized as "inappropriate" and as "unprofessional and injudicious." *Id.* at 437 n.14.

Court wrote that "'appeals to jurors to convict a defendant in order to preserve the safety or quality of their communities are improper and prejudicial.'" *Id.* at 11 (quoting *Hill v. State*, 355 Md. at 225). "The 'say Enough!' exhortation implored the jurors to consider their own personal safety and therefore violated the prohibition against the 'golden rule' argument." *Id.*

The comments in Poole's case are quite different from the objectionable comments in *Beads* and other, similar cases.[23] In this case the prosecutor was not attempting to inspire the jury to enlist in an abstract battle against an offensive of criminal conduct. Nor was he asking the jury to convict Poole in order to combat crime in general or to address some broad societal malady. Rather, he was asking the jury to pronounce judgment that Poole's behavior itself was unacceptable. He specifically asked the jury to declare that "we are not going to accept *your* behavior" and that "*you* are going to be held accountable."

[23] *See, e.g.*, *Donaldson v. State*, 416 Md. at 494-96 (concluding that reference to drug dealers as "the root of all evil" was improper because it suggested that the jury "could combat drug dealing and drug use generally by convicting" the defendant); *see also Hill v. State*, 355 Md. at 212-13. Among the many violations of the prohibition on golden rule arguments in *Hill*, the prosecutor asserted that "Prince George's County is in a crisis." *Id.* at 212. He implied that the defense lawyer lived in a wealthy neighborhood in Montgomery County and did not care about the jurors' plight. *Id.* (The court sustained an objection to that statement.) He said, "People wonder why we can't get 4-star restaurants here." *Id.* (The court sustained an objection to that statement as well.) He told the jury to tell the defendant, "[I]t's not your community; it's our community." *Id.* At the end of the initial phase of his closing argument, he told the jury, "This is your turn to do something about it." *Id.* He ended his rebuttal argument by saying: "What message will you send Delton Hill? Is it, it's your community, do whatever you want . . . Or is it your community?" *Id.* at 213.

In short, the prosecutor did not ask the jury to convict Poole in order to protect the safety or quality of the community, but to hold Poole accountable for his behavior, because the State had proved beyond a reasonable doubt that he had murdered Dior. The argument may have been powerful, and it may have prejudiced Poole's case (as a well-delivered argument should). But the argument was not *unfairly* prejudicial, and it was certainly not unlawful. It was a permissible oratorical conceit or rhetorical flourish.

The reference to Dior and his family was also a permissible oratorical conceit or rhetorical flourish. In arguing that the jury should send a message (to Poole) that was metaphorically loud enough for Dior and his family to "hear," the State did not ask the jury to place itself in Dior's shoes or the shoes of his family members. *Compare Lawson v. State*, 389 Md. at 594 (finding that the State made an impermissible golden rule argument in a child sexual abuse case, when it asked the jurors to put themselves in the shoes of the alleged victim's mother in deciding whether to believe her contested account). The State did not ask the jury to imagine what Dior must have felt when his erstwhile sexual partner unexpectedly shot him in the back of the head, or how Dior's sister must have felt when she found her dead brother lying face-up in a pool of blood. Nor did the State encourage the jury to abandon its role as a neutral factfinder. The State stressed the significance of the jurors' decisions and encouraged them to hold Poole accountable, but it did not encourage them to consider matters beyond the evidence.

In summary, Poole's trial counsel had no obligation to object to arguments that were not objectionable. *Oken v. State*, 343 Md. 256, 294 (1996) ("[b]ecause the prosecutor's comments were not improper, *a fortiori* [the defendant] was not

prejudiced"). Poole, therefore, cannot base his post-conviction claim on the absence of an objection to the alleged golden rule arguments.

B. Vouching

In Poole's closing argument, his defense counsel launched a ferocious attack on Detective Brent, arguing to the jury that he had planted evidence, suborned perjury, and lied on the stand. Defense counsel did not merely allude to the prospect that Detective Brent engaged in these activities, which are criminal in nature. Counsel's comments were quite clear and left no room for interpretation: it was his theory that Detective Brent had hidden Dior's personal belongings in Poole's bedroom before he claimed to have found them there and that he had intimidated the young and addled Leon Frazier into testifying falsely. The theory was based on little more than the failure to find Dior's personal belongings during the first search of the apartment.

Poole contends that the State improperly vouched for Detective Brent when the prosecution responded as follows to the allegation that the detective had planted evidence and suborned perjury in order to frame an innocent man for an offense that he did not commit:

> I am not going to address a whole lot of what [defense counsel] said because it really turns on if you believe that the police officer right there planted that evidence, there is nothing for you to discuss.
>
> Nothing to discuss. No counts to discuss. There is no evidence to discuss. There is nothing to discuss. Does that mean that a police officer cannot lie? No. We all have known that to be the case, haven't we?
>
> *I am proud of Detective Michael Brent. And proud to be associated to prosecute this case. If you want to indict him, indict me along with him*.

> I guess when there is nothing to argue, let's attack the police. Let's attack an outstanding police investigator who did a super job.

(Emphasis added.)

It is completely understandable that the State would respond indignantly to the allegations against Detective Brent. Defense counsel almost certainly would have anticipated such a response. Still, if the italicized portions of the prosecution's argument do not amount to vouching, then they come very close to it.

The prosecutor did not tell the jury that *they* should be proud of Detective Brent because of the evidence of the detective's patient and thorough investigation of the case (which the State had detailed in the initial phase of closing). Instead, the prosecutor said that *he* himself was proud of the detective. By expressing his personal opinion, the prosecutor arguably placed the State's imprimatur on Detective Brent's contested testimony. *Sivells v. State*, 196 Md. App. at 280 (prosecutor violated rule against vouching by expressing her personal opinion that detectives were "honorable men" who "told the truth").

Furthermore, when the prosecutor argued, "If you want to indict him, indict me along with him," he may simply have meant that if the jurors believed or suspected that Detective Brent had planted evidence, they should reject everything that the prosecutor said: this is essentially what the prosecutor had argued a moment earlier, when he told the jury, "[i]f you believe that the police officer right there planted that evidence, there is nothing for you to discuss." But by phrasing his argument in such personal terms – by asserting that he himself should be "indict[ed]" along with the detective if the jury

disbelieved the detective's testimony – the prosecutor, again, arguably placed the State's imprimatur on Detective Brent's contested testimony.[24]

Nonetheless, we are unconvinced that counsel's representation fell "outside the wide range of professionally competent assistance" (*Strickland v. Washington*, 466 U.S. at 690) because of the failure to object to this isolated incident of arguable vouching. *See Spain v. State*, 386 Md. at 159.

As previously discussed, we must evaluate defense counsel's failure to object from his perspective at the time of trial (*Gross*, 134 Md. App. at 552-53), and Poole must overcome the presumption that the failure to object was sound trial strategy under the circumstances. *See Oken v. State*, 343 Md. at 295 ("[t]he decision to interpose objections during trial is one of tactics and trial strategy"). In the words of Judge Salmon (who was an accomplished trial lawyer and a trial judge before joining this Court):

> Even if, theoretically, a successful objection to any portion of the closing argument could have been made, it does not follow that an objection *should* be made. . . . "[M]any trial lawyers refrain from objecting during closing argument to all but the most egregious misstatements by opposing counsel on the theory that the jury may construe their objections to be a sign of desperation or hyper-technicality." Failure to object to this type of argument is usually a matter of trial strategy and certainly not indicative of sub-par performance. We note that most experienced trial lawyers know that it is oftentimes bad strategy to object during an opponent's closing argument.

Catala v. State, 168 Md. App. 438, 466 (2006) (quoting *United States v. Molina*, 934 F.2d 1440, 1448 (9th Cir. 1991)); *accord Middleton v. Roper*, 455 F.3d 838, 850 (8th Cir.

[24] The State does not argue that defense counsel's attack was improper and, hence, that an improper response was permissible under the "invited response" doctrine. *See generally Lee v. State*, 405 Md. at 168-69; *Spain v. State*, 386 Md. at 157 n.7.

2006) ("[o]ften, trial counsel will withhold objections during otherwise improper arguments – especially during closing arguments – for strategic purposes"); *Bussard v. Lockhart*, 32 F.3d 322, 324 (8th Cir. 1994) ("[c]ounsel's decision to object during the prosecutor's summation must take into account the possibility that the court will overrule it and that the objection will either antagonize the jury or underscore the prosecutor's words in their minds"); *People v. Unger*, 278 Mich. App. 210, 242 (2008) ("declining to raise objections, especially during closing arguments, can often be consistent with sound trial strategy").

In deciding whether to object to the State's comments in rebuttal closing, defense counsel had to be wary that any objections might antagonize the jury. After the defense's scathing assault on Detective Brent, an objection to the State's predictably vehement response might have come off as a pathetic bleat. If defense counsel were to cry foul amidst the State's entirely natural effort to rehabilitate Detective Brent, counsel would not have projected an image of stoic confidence in his client's case. The negative impact on counsel's credibility would have been even greater if the trial court resolved the close question of vouching against the defense and overruled the objection.

In any event, we see little likelihood that this one, isolated comment (or pair of comments) had any material effect on the outcome at trial. If counsel had objected, and if the court had exercised its discretion to sustain the objection, the jury would still have seen the tsunami of evidence against Poole – much of which came out of his own mouth. The court might have instructed the jury to disregard the prosecutor's comments, but the jurors would still have heard admissible evidence and permissible argument about

Detective Brent's patient and thorough investigation and would still have had the opportunity to evaluate the detective's veracity on the basis of his extensive testimony at trial. Accordingly, even if counsel rendered ineffective assistance in not objecting to the State's comments in rebuttal closing (which he did not), Poole has not shown prejudice – i.e., he has not shown "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. at 694.

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