Circuit Court for Baltimore City
Case No. 117047038

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 2443

September Term, 2023

STATE OF MARYLAND

v.

WAYNE K. PARKER

Albright,
Kehoe, S.,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, James R., J.

Filed: February 11, 2025

* This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Maryland Rule 1-104(a)(2)(B).

In 2017, a jury in the Circuit Court for Baltimore City found appellee, Wayne K. Parker, guilty of sexual abuse of a minor and sexual offense in the third degree. The court sentenced him to terms of imprisonment totaling twenty-five years of active incarceration as well as five years of suspended time and a term of probation. We affirmed the judgments in an unreported opinion. *Parker v. State*, No. 240, Sept. Term, 2018 (filed Jan. 25, 2019) (hereinafter "*Parker I*").

In 2020, Mr. Parker filed a pro se petition seeking relief under the Uniform Postconviction Procedure Act. Two years later, with the assistance of counsel, he filed a supplemental petition,[1] raising, as pertinent here, two allegations of error:

> 1. Trial counsel rendered ineffective assistance by failing to object to and/or move to strike inadmissible testimony.
>
> 2. Trial counsel rendered ineffective assistance by failing to object to the State's improper statements in closing argument.

Following a hearing, the circuit court granted Mr. Parker's supplemental petition and ordered a new trial.[2] The court found that Mr. Parker's trial counsel performed deficiently in failing to object to certain testimony (which we shall set forth in greater detail *infra*), in failing to move to strike that testimony, and in failing to object to improper closing argument.

[1] At the postconviction hearing, Mr. Parker abandoned the claims in his pro se petition and proceeded only on the claims in his supplemental petition.

[2] The postconviction court also granted Mr. Parker's claim of ineffective assistance based upon trial counsel's failure to file a motion for modification of sentence. The State did not oppose that aspect of the postconviction court's ruling, and it is unaffected by our holding in this appeal.

The State filed an application for leave to appeal, challenging the postconviction court's ruling granting Mr. Parker a new trial. We granted the application and transferred the case to the regular appellate docket. The State now raises the following issues for our review, which we have rephrased and combined into a single question[3]:

> Did the postconviction court err in finding that trial counsel was ineffective, either for failing to object to and/or move to strike inadmissible testimony, or for failing to object to improper statements in the State's closing argument?

We shall reverse in part the postconviction court's judgment and reinstate Mr. Parker's convictions, leaving unchanged the court's unopposed grant of the right to file a belated motion for modification of sentence.

[3] The State presented the following questions in its brief:

> 1. In finding that counsel was ineffective for isolated failures to object, did the hearing court fail to consider counsel's overall highly effective performance in the face of substantial evidence of guilt?
>
> 2. Did the post conviction court err in finding that counsel was ineffective for his reportedly strategic decisions not to object and move to strike various testimony?
>
> 3. Did the post conviction court err in finding that counsel was ineffective for failing to register meritless and unwise objections to the State's closing argument?
>
> 4. Did the post conviction court apply the wrong standard for prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984), where the court found that Parker met his burden of proof by presenting a mere "possibility," rather than "reasonable probability," that the result of the proceeding would have been different?

BACKGROUND

Trial

We quote our unreported opinion in Mr. Parker's direct appeal for factual background:

> The victim in this case was an 11-year-old girl, whom we shall refer to as MM.[4] The child's parents were separated. MM lived mostly with her mother, Charis[s]e, but visited every other weekend with her father and stepmother Jasmine. On August 26, 2016, however, she and at least two of her sisters stayed at the home of her paternal grandmother, Elizabeth, which they did with some frequency. According to Elizabeth, they arrived at around 11:25 in the evening. [Mr. Parker] was in "a relationship" with Elizabeth and lived in her three-bedroom townhome. He occupied one of the bedrooms and Elizabeth occupied another, although, when her grandchildren visited, they occupied that room. The third bedroom was a computer room.
>
> Elizabeth had to work the night shift that evening and asked [Mr. Parker] to watch the children which, with some reluctance, he agreed to do. It was the first time he was alone with them.
>
> MM – the first witness – testified that, while she was in the computer room watching the TV program Boston Legal, [Mr. Parker] entered and asked her to come into his room, which she did. She was dressed in a short-sleeve shirt and her underwear. She did not have pants on. He told her to lie on his bed, forced her to open her legs, got on top of her, "pulled his thing out," defining "his thing" as his genitals, and laid it on the side of her leg. She said it was "wrinkly, old, and had slimy stuff in it." She added that she was frightened but unable to escape because he was on top of her. She said that there was pornography on the television and that he displayed a knife and threatened her if she told anyone what happened.
>
> Elizabeth testified that, when she returned home the next morning, everything seemed normal. Around 2:00 p.m., as she was preparing to take the children to her mother's house, MM emerged from the computer room and, in [Mr. Parker's] presence, told her what had occurred, adding that [Mr. Parker] "got between her legs [and] was rubbing all over her." Elizabeth

[4] In addition to shielding the victim's identity, and for consistency with our prior opinion in Mr. Parker's direct appeal, we shall identify other witnesses by their first names. *See* Md. Rule 8-125 (governing confidentiality in criminal appellate records).

> confronted [Mr. Parker], who denied everything. She did not call the police but instead took the children over to her mother's house (MM's great grandmother).
>
> Charisse confirmed that the events took place on August 26, when Elizabeth picked the children up around 5:00 p.m. Around noon the next day, she spoke with MM by phone. MM was crying and reported that [Mr. Parker] ha[d] sexually abused her. She immediately contacted MM's father and stepmother, who took her to Elizabeth's house, where the father called the police. They then got MM from the great grandmother's house and took her to the hospital. The stepmother testified that, in the early morning hours of August 27, she received a call from the cell phone that MM shared with one of her sisters and, when she answered, she heard MM screaming and yelling. She thought the girls were arguing and told them to calm down and go to bed. She later received the text message from Charisse.
>
> In his own testimony, [Mr. Parker] denied that he had abused MM. He agreed that the events took place on August 26. He said that, as he was coming out of the bathroom, fully clothed, he encountered MM, who was crying because she missed her grandmother. He tried to console her, but she ran into his bedroom and laid down on his bed. He pulled her off the bed and told her to go back to her room. When she left, he closed the door, and that was the extent of his interaction with her. He also denied that there was any pornography on the television in his room. A serologist testifying for the defense examined vaginal and cervical swabs taken from MM, along with her underwear, and found no signs of semen or seminal fluid.

Parker I, slip op. at 1-3 (footnotes omitted).

In addition, because it is relevant to the postconviction proceedings, we quote part of Charisse's testimony about the events of the night of August 26, 2016, when the assault occurred:

> [PROSECUTOR]: And were you aware of anything that happened out of the ordinary during that overnight time?
>
> [CHARISSE]: I wasn't.
>
> [PROSECUTOR]: Okay. When you woke up, what, if anything do you notice out of the ordinary?

[CHARISSE]: I noticed a missed call from my daughter's cell phone at 12:26 a.m.

[PROSECUTOR]: Was there a message left?

[CHARISSE]: No.

[PROSECUTOR]: Once you saw that you had a missed call, what did you do?

[CHARISSE]: I called her phone back and didn't get an answer, but I was contacted by her when she was able to contact me.

[PROSECUTOR]: Okay. So approximately what time did you -- well, what time was it in the morning of August 27th that you noticed that you had a missed call?

[CHARISSE]: When I woke up.

[PROSECUTOR]: What time was that?

[CHARISSE]: It was about 9:00ish.

[PROSECUTOR]: Nineish. And how soon after you noticed the missed call did you call your daughter back?

[CHARISSE]: Right away.

When Charisse called, MM's twin sister answered. Charisse "eventually" asked to speak with MM, who told her mother that Mr. Parker had sexually abused her "[t]he night prior."

Testimony of Jasmine, MM's stepmother, also is relevant to the same issue. She testified as follows about the events of that night:

[PROSECUTOR]: Okay. In the early morning hours of August 27th of 2016, did anything out of the ordinary occur?

[JASMINE]: Yes.

[PROSECUTOR]: What happened?

[JASMINE]: I received a phone call from --

[PROSECUTOR]: And whose -- who did that phone call come from?

[JASMINE]: It came from [MM's twin sister] and [MM].

[PROSECUTOR]: Okay. And [did the twin sister] have a separate cell phone than [MM]?

[JASMINE]: No, her and her sister both shared a phone.

[PROSECUTOR]: They shared a cell phone?

[JASMINE]: Yes.

[PROSECUTOR]: And you say you received a phone call. Approximately what time do you receive a phone call?

[JASMINE]: Around 1:30, 2:00 a.m., excuse me.

[PROSECUTOR]: And did you recognize the number that had called?

[JASMINE]: Yes.

[PROSECUTOR]: And you recognized it as what number?

* * *

[JASMINE]: It was [the twin sister's/MM's] shared cell phone.

[PROSECUTOR]: Okay. And did you answer the phone?

[JASMINE]: Yes, I did.

[PROSECUTOR]: And what did you hear when you answered the phone?

[JASMINE]: I heard screaming, yelling.

[PROSECUTOR]: And could you tell which of the children were screaming and yelling?

[JASMINE]: Yes.

[PROSECUTOR]: Who did you hear screaming, who did you hear yelling?

[JASMINE]: [MM].

After hearing this evidence, the jury deliberated over parts of two days and found Mr. Parker guilty of sexual assault of a minor and sexual offense in the third degree. *Parker I*, slip op. at 1. The court sentenced him to twenty-five years' imprisonment, with all but twenty years suspended, for sexual assault of a minor, a consecutive term of five years' imprisonment for sexual offense in the third degree, and a term of probation. *Id.* Mr. Parker then noted an appeal. *Id.*

Direct Appeal

In his direct appeal, Mr. Parker raised two claims: that the trial court erred in restricting his cross-examination of MM and Elizabeth, and that the trial court abused its discretion in denying his motion to postpone sentencing because of the State's tardy disclosure of information about a prior conviction. *Id.* at 1, 4-7. We held that the trial court did not err in restricting cross-examination because the evidence Mr. Parker sought to elicit was not relevant, *id.* at 8, and we further held that the trial court did not abuse its discretion in denying the request to postpone sentencing because the belatedly disclosed evidence "was never presented to the [sentencing] court." *Id.* at 10.

Postconviction Petitions, State's Response, and Postconviction Hearing

In 2020, Mr. Parker filed pro se a postconviction petition. After the appointment of counsel to represent him, Mr. Parker filed a supplemental petition, raising three claims of error:

1. Trial counsel rendered ineffective assistance by failing to object to and/or move to strike inadmissible testimony.

a. Counsel failed to move to strike MM's testimony that Mr. Parker was lying when he denied her allegations.

b. Counsel failed to object to and move to strike MM's testimony that the adults that she told "told her that she told the real truth" and that they were proud of her.

c. Counsel failed to object to the State's asking [Charisse] how she felt when she heard MM's allegations and whether she allowed her daughters to return to their grandmother's home.

2. Trial counsel rendered ineffective assistance by failing to object to the State's improper statements in closing argument.

3. Trial counsel rendered ineffective assistance by failing to file a motion for modification of sentence or to consult with Mr. Parker about filing a motion for modification of sentence.

The State filed a response, pointing out that "[w]hether counsel truly provided ineffective assistance of counsel rests not on the single errors alleged, but on the totality of counsel's representation." Thus, although the cumulative effect doctrine applies, "the converse is equally true: 'it is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy.'" (Quoting *Harrington v. Richter*, 562 U.S. 86, 111 (2011).)

Regarding Mr. Parker's assertion that trial counsel rendered ineffective assistance in failing to object to the cited testimony, the State replied that "Maryland Rule 4-325(e)[5]

[5] This appears to be an error in the State's response, which, unfortunately, the postconviction court repeated in its memorandum opinion. In context, it appears that the State intended to rely upon Maryland Rule 4-323, which governs the manner of making objections during trial, rather than Maryland Rule 4-325(e) (currently Maryland Rule 4-325(f)), which governs objections to jury instructions.

does not require counsel to make all possible objections." Indeed, the State asserted that the "'decision to interpose objections during trial is one of tactics and trial strategy.'" (Quoting *Oken v. State*, 343 Md. 256, 294 (1996).) The State claimed that trial counsel "had reason to believe that this testimony was not harmful and would not raise an issue for appeal." Furthermore, according to the State, "[t]here is no reasonable probability that had Trial Counsel objected to" the three instances of testimony relied upon by Mr. Parker, he "would have been acquitted."

Regarding Mr. Parker's assertion that trial counsel rendered ineffective assistance in failing to object to the State's purportedly improper comments during closing argument, the State repeated the same arguments it had made in opposing the claim of ineffective assistance for failing to object to testimony. In addition, the State asserted that, "'[a]bsent egregious misstatements, the failure to object during closing argument and opening statement is within the wide range of permissible professional legal conduct.'" (Quoting *Cunningham v. Wong*, 704 F.3d 1143, 1159 (9th Cir. 2013).) Furthermore, according to the State, there was "no substantial possibility" that Mr. Parker "would not have been convicted" had trial counsel objected to the prosecutor's closing argument.

A hearing was held pursuant to Section 7-108 of the Criminal Procedure Article and Maryland Rule 4-406 on Mr. Parker's supplemental petition. At the outset of that hearing, Mr. Parker abandoned the claims in his pro se petition, and, for its part, the State declared its intention not to oppose the grant of relief on the third claim in Mr. Parker's supplemental petition, seeking the opportunity to file a belated motion for modification of sentence.

Trial counsel was the sole witness called to testify at the hearing. When asked what his "overall" trial strategy was, trial counsel explained:

> It was, basically, that we had a relative of the alleged victims in the case who was completely supporting Mr. Parker's side.[6] So she was a witness for us. And then we had -- it was difficult, because there were two alleged victims for one incident, and there were inconsistencies in their stories. And so we had to attack that, and there were some motivating factors that may have caused them to fabricate their allegations against Mr. Parker.

Postconviction counsel then asked trial counsel a series of questions directed toward specific parts of Mr. Parker's trial transcript, attempting to elicit trial counsel's reasons for the actions he took or did not take. It is necessary for us to recite that examination in detail. In doing so, we shall divide postconviction counsel's examination of the witness into two categories, related to the two postconviction claims at issue in this appeal.

Failure to Object to or Move to Strike Purportedly Inadmissible Testimony

The first portion of the examination was directed to the claim that trial counsel rendered ineffective assistance in failing to object to or move to strike objectionable testimony. Postconviction counsel began by directing trial counsel's attention to the trial transcript for January 5, 2018, page 20, lines 14 through 19, where the prosecutor was examining the victim, MM[7]:

> [PROSECUTOR]: Who told you not to talk like that?

[6] Trial counsel was referring to MM's grandmother, Elizabeth. According to MM, Elizabeth "never believed" her when she said that Mr. Parker had abused her.

[7] For context, we begin at line 11.

[MM]: Momma B.[8]

[PROSECUTOR]: Momma B.

[MM]: And when Momma B asked him [i.e., Mr. Parker] did – did he touch me he just said no and he was straight up lying because from that night he done that to me. He was straight up lying.

[TRIAL COUNSEL]: Your Honor.

THE COURT: Sustained.

Postconviction counsel then asked trial counsel whether he recalled "any strategic reason" for not requesting the trial court to strike that part of MM's testimony. Trial counsel replied:

> Just seemed futile at that point. I think a lot of the rulings in this case I did not agree with, and when you start arguing back and forth with the Judge and you have a jury there, you're just going to highlight the fact that the statement from the witness is harmful to your client. So to continue to highlight the issue would -- it's just not a good strategy.

When pressed to answer whether it was "consistent with [his] strategy to have that testimony as evidence before the jury[,]" trial counsel replied, "No, that's why I objected."

Examination of trial counsel continued in this vein. Postconviction counsel pointed to the trial transcript for January 5, 2018, page 20, lines 21 through 25:

> [PROSECUTOR]: And what happened after you told people what happened?
>
> [MM]: They were upset, but they were happy that -- they told me and I told the real truth and they was so proud of me, but I don't deserve that kind of manner.

[8] "Momma B" referred to "Elizabeth," who was MM's grandmother and Mr. Parker's (erstwhile) female companion.

> [PROSECUTOR]: Okay. . . . I don't have any other questions, Your Honor.

Postconviction counsel asked trial counsel whether he could "recall any reason that [he] didn't object to that testimony[.]" Trial counsel replied that an objection would have been "futile." When pressed to answer whether it was "consistent with [his] strategy of pointing out the inconsistencies in the allegations to have that testimony before the jury[,]" trial counsel replied, "It did not matter what I was doing. The Judge was going to let it in." He further explained:

> So I mean, I guess it's inconsistent with my strategy overall, but the strategy becomes fluid once you have a judge that is [concentrating] on convicting your client. So, you know, you got to kind of adjust to the situation. With all due respect, Your Honor.

Postconviction counsel then directed trial counsel's attention to the trial transcript for January 5, 2018, page 143, lines 13 through 15, where the prosecutor was examining the victim's mother, Charisse:

> [PROSECUTOR]: What were your feelings when your daughter told you what had happened to her?
>
> [CHARISSE]: Rage, flat-out, pure, unadulterated rage.

Postconviction counsel asked trial counsel whether he could "recall any reason that [he] didn't object to that testimony[,]" and he replied, "No, there's no reason why I didn't object."

Postconviction counsel then pointed to the trial transcript for January 5, 2018, page 145, lines 18 through 25:

> [PROSECUTOR]: After this event occurred, did you allow your children to go back over to their grandmother's house initially?

[CHARISSE]: Not for a while.

[PROSECUTOR]: But since then, have you allowed your children to go over to her house?

[CHARISSE]: Yes. Once I knew that he was no longer in the home.

Again, postconviction counsel asked trial counsel whether he could "recall any reason that [he] didn't object to that testimony[,]" but this time, he replied, "I'm not sure that it's objectionable."

Failure to Object to Prosecutor's Comments During Closing Argument

Postconviction counsel then turned her attention to what she claimed were objectionable comments by the prosecutor during closing argument, to which trial counsel failed to object. She began by directing trial counsel's attention to the transcript for January 8, 2018, page 74, lines 22 through 24:

[PROSECUTOR]: . . . So the defendant's testimony himself [sic] gives us no reason why [MM] would come forward and say what she said to everybody.

Postconviction counsel asked trial counsel whether he could "recall any reason that [he] didn't object to that[.]" Trial counsel replied:

It's a strategic decision to object during an opposed closing argument, one that I take with great consideration, because it's a pretty good moment in the trial, and again, it's going to highlight the issue and show the jury that you have a problem with what's said, you know, [s]o, like, it's hard to unring a bell. The statement's been made. So a curative instruction from the judge, ideally, it's supposed to eliminate what they heard, but it doesn't work that way in the real world. So I'd rather not just keep highlighting the point.

Postconviction counsel then asked trial counsel whether he had "a policy of not objecting during closing argument[.]" Trial counsel replied:

> No. If it's egregious and it fits into the strategy, but you just can't -- I mean, there is so much prejudice with the nature of these charges, with the rulings in this case, that it gets to the point where you just look silly if you're objecting to every little thing, and I was objecting a lot. So you, kind of, have to pick and choose.

Postconviction counsel then asked trial counsel whether there was "any reason that [he] didn't approach at the end and ask for a curative instruction regarding the burden of proof[.]" Trial counsel replied, "No."

Postconviction counsel then directed trial counsel's attention to the transcript for January 8, 2018, page 71, line 18, to page 72, line 1[9]:

> [PROSECUTOR]: Those words, ladies and gentlemen, that voice, [MM's] testimony is powerful evidence proving that the defendant committed these crimes. But there's other evidence, there's corroboration, there's other evidence, there's other testimony that helps to show that [MM] is telling the truth here. The call to Jasmine . . . when she called her at about 12:30 or 1:00 o'clock in the morning. When she called and she was screaming and she was upset, but Jasmine . . . didn't understand what was going on. That's corroboration. Why would that child have called at 12:30 or 1:00 o'clock or 1:30 in the morning but to say that there was something wrong, but to report what had just happened? But unfortunately Jasmine didn't understand. There was the missed call at 12:26. It's from [MM's] mother. At 12:26, a time that is etched in her mind. She remembered that exact time. And you saw when she testified that that was the first time she got emotional because she missed a call from her baby girl who wanted to tell her that she had been sexually abused. And you saw her well up and the guilt that she had that she missed that call at 12:26 in the morning.

Postconviction counsel asked trial counsel whether he could "recall why [he] did not object to that statement from the State[.]" Trial counsel replied, "No."

Postconviction counsel next directed trial counsel's attention to page 75, lines 17 and 18:

[9] For context, we begin at page 71, line 5.

> [PROSECUTOR]: It's your turn to listen now, ladies and gentlemen. It's your turn to believe her.

Postconviction counsel asked trial counsel whether he recalled "why [he] did not object to that[.]" Trial counsel replied, "That doesn't seem objectionable to me."

Postconviction counsel next directed trial counsel's attention to page 75, lines 6 through 9[10]:

> [PROSECUTOR]: . . . She stood up to a man who thought, even if you she did tell [sic], she'd never be believed. But she tried to tell so many people who wouldn't initially listen. She tried to call her mom who didn't answer the phone at 12:26. She tried to call Jasmine at 12:30 or 1:00 o'clock[.]

Postconviction counsel asked trial counsel whether he could "recall any reason that [he] didn't object to that[.]" Trial counsel replied, "No."

Postconviction counsel then directed trial counsel's attention to page 69, lines 10 through 13:

> [PROSECUTOR]: . . . She [i.e., MM] would occasionally glance over her shoulder and look at him while she was testifying. Something that she'll be doing for the rest of her life, looking over her shoulder.

Postconviction counsel asked trial counsel whether he could "recall any reason that [he] didn't object to that[.]" Trial counsel replied, "That doesn't seem objectionable."

"And finally," postconviction counsel said to trial counsel, "take a look at [the transcript for January 8, 2018], page 91, lines 6 through 7"[11]:

> [PROSECUTOR]: . . . Now the Defense wants you to think that this was some whole orchestration. That when she [i.e., MM] came into the room

[10] For context, we begin at page 75, line 5.

[11] For context, we begin at line 2 and continue through line 9.

> that I was going to know that she was going to double over and start crying. What 12 year old girl can do that? What 12 year old can react in that way? Someone who was sexually abused reacts in that way.
>
> [TRIAL COUNSEL]: Objection.
>
> THE COURT: Sustained.

Postconviction counsel asked trial counsel whether he could "recall any reason that [he] didn't ask for a curative instruction after [his] objection was sustained[.]" Trial counsel replied:

> The same thing I've been saying. It's just -- when the objections are falling on deaf ears, or not, you're just highlighting the point and allowing the issue to be belabored, and I would rather have it out of their minds quicker than not. I thought an objection was -- would suffice at that point, and I don't think curative instructions necessarily work.

The State then cross-examined trial counsel. Among other things, trial counsel recalled that he "objected a lot" during trial, that some of the objections he declined to make "were due to trial strategy[,]" and that some of the objections he declined to make were because no objection was warranted. The parties subsequently presented legal argument, and the postconviction court concluded the hearing, stating that it would "issue its order in due course."

The Postconviction Court's Opinion and Order

Three weeks after the hearing, the postconviction court issued a Memorandum Opinion and Order, granting all three claims in Mr. Parker's supplemental petition. The court explained its reasoning thusly:

> This Court finds that Trial Counsel's failure to move to strike on the testimony in question [MM's assertion that Mr. Parker "was straight up lying"], under this section, resulted in ineffective assistance of counsel. Trial

> Counsel's strategy was not followed when this statement was not challenged with a motion to strike same, and his lack of due diligence caused [Mr. Parker] to be prejudiced as a result.

The postconviction court similarly determined that trial counsel rendered ineffective assistance in failing to object to or move to strike MM's testimony that, after she "told people what happened," "they told me and I told the real truth and they was so proud of me," declaring:

> [Mr. Parker's] argument as to the statement being hearsay suggests that Trial Counsel had a legal reason to object and had a reason for the above testimony to be stricken. However, Trial Counsel failed to object to this testimony of the witness. Because this case comes down to a credibility determination, Trial Counsel harmed [Mr. Parker's] case by failing to object to this testimony, and as importantly, failed to preserve the record for further review.

As for Mr. Parker's claim that trial counsel should have objected to and moved to strike Charisse's testimony about her "pure, unadulterated rage" and her refusal to allow her children to visit Elizabeth's home until Mr. Parker had moved out, the postconviction court declared:

> [Mr. Parker's] argument stands on the premise that Trial Counsel could not have relied on trial strategy by failing to object to the above testimony by MM's mother. [Mr. Parker] strongly argues that the mother's testimony was only relevant to express her belief that her daughter (MM) was telling the truth and that [Mr. Parker] was lying.

The postconviction court further declared:

> The several statements made by MM and her mother were objectionable to the facts of this case. Trial Counsel failed to object to the above testimony and thus resulted in deficient performance. The State made several attempts to lean into the bias of the jury with emotions that were not relevant to the case at hand. Therefore, [Mr. Parker's] argument is accepted by this Court that Trial Counsel's deficient performance resulted in ineffective assistance and caused prejudice to [Mr. Parker].

Turning to Mr. Parker's claim regarding trial counsel's failure to object to purportedly improper comments by the prosecutor, and to request curative instructions from the trial court, the postconviction court stated:

> The State has failed to address this argument [that trial counsel was ineffective in failing to object to the prosecutor's burden shifting argument during closing—"So the defendant's testimony himself [sic] gives us no reason why [MM] would come forward and say what she said to everybody"—and in failing to request a curative instruction] in its Response to this Court. Trial Counsel's failure to object to the State's attempt to shift the burden in this case amounted to deficient performance as the State's actions were impermissible. Therefore, [Mr. Parker] has shown how Trial Counsel's inaction to object to the State's attempt to shift the burden of proof, during trial, adds to ineffective assistance of counsel.

The postconviction court further stated:

> The State has failed to address this argument [that trial counsel was ineffective in failing to object to the prosecutor's appeals to juror bias during closing argument] in its Response to this Court. [Mr. Parker] has successfully made the argument that the above remarks mentioned in the State's closing statement was likely for the purpose of appealing to the juror and their feelings about the nature of the offense. Trial Counsel's reasoning for not objecting during closing included the theory that it is trial strategy. However, [Mr. Parker] has successfully emphasized Trial Counsel's lack of due diligence to object to remarks made which were impermissible and objectionable in court.

The postconviction court continued in this vein:

> The State has failed to address this argument [that trial counsel was ineffective in failing to object to the prosecutor arguing facts not in evidence and in failing to request a curative instruction] in its Response to this Court. Additionally, the testimony addressed in this section speak to the credibility of MM and her mother. Because this information mentioned above was not entered into evidence during trial, this caused significant prejudice to [Mr. Parker] and the outcome of the case. Trial Counsel failed to seek curative instruction from the trial judge because he did not believe those instructions would be useful and that was also part of Trial Counsel's trial strategy.

> However, [Mr. Parker] has successfully shown that arguing on facts not entered into evidence can be significantly harmful to the outcome of the case.

The postconviction court continued:

> The State has failed to address this argument [that trial counsel's failure to object to the prosecutor's improper arguments cannot be attributed to trial strategy] in its Response to this Court. The Court accepts [Mr. Parker's] arguments that Trial Counsel's inactions led to deficient performance in this case.

The postconviction court declared that Mr. Parker proved deficient performance for an additional reason:

> [Mr. Parker] mentioned that jurors were reporting that they had "strong feelings" regarding the charges in this case since they were caretakers of children. According to [Mr. Parker], ten of the twelve jurors that were selected harbored these feelings about the charges in this case since they were in caretaking roles for children.
>
> * * *
>
> [Mr. Parker] has made the argument that a curative instruction was a more effective and reasonable approach to avoiding juror bias in this case and Trial Counsel failed to see the need to request one. Therefore, failure to request a curative instruction with the knowledge that the State has encouraged the jury to be "nonobjective" amounted deficient performance.

(Footnote omitted.)

And finally, the postconviction court concluded that Mr. Parker established cumulative prejudice, declaring:

> [Mr. Parker] has made a compelling argument as to the cumulative effect of prejudice against him.
>
> * * *
>
> In the case at Bar, the State made improper statements during its closing argument regarding burden shifting, jury bias and facts not in evidence. Case law prohibits the State from stating to the jury, or even suggesting to the jury,

> that the burden of proof shifts from the State to the defense. Case law prohibits the State from appealing to jury bias. Case law prohibits the State from arguing facts not in evidence. Standing alone, these missteps by Trial Counsel not to challenge the State's presentation, may have been resolvable through other means. Cumulatively, the lack of challenge by Trial Counsel did not preserve the Record to the benefit of [Mr. Parker].
>
> The Court finds that the cumulative effect of Trial Counsel's errors prejudiced [Mr. Parker]. That is, there is a possibility that the verdict may have been different, but for the cumulative effect of these errors.

(Footnotes omitted.)

The postconviction court thus granted Mr. Parker the right to file a belated motion for modification of sentence and awarded him a new trial.[12] The State filed an application for leave to appeal, challenging the postconviction court's ruling, awarding Mr. Parker a new trial. We granted the application and transferred the case to the regular appellate docket.

DISCUSSION

Parties' Contentions

The State contends that the postconviction court committed multiple errors in granting Mr. Parker's supplemental petition and awarding him a new trial. According to the State, "[n]one of the purported errors identified by the court established ineffective assistance of counsel"; and the "court failed to view the perceived errors of counsel in the context of counsel's overall excellent trial performance[.]" The State asserts that the

[12] Initially, the postconviction court declared that Mr. Parker had the right to request a new trial. Mr. Parker thereafter filed a "Motion for Appropriate Relief" requesting the postconviction court to amend the remedy and to order a new trial. The postconviction court subsequently granted Mr. Parker's motion, vacated its Order dated May 12, 2023, and filed a new Order awarding Mr. Parker a new trial.

postconviction court failed to consider the trial record as a whole, and had it done so, it would have concluded that trial counsel's decision not to object to certain evidence and prosecutorial arguments fell within the wide range of competent advocacy. Part of the context the postconviction court ignored, according to the State, was the "strong evidence of [Mr.] Parker's guilt." Faced with that evidence, the State contends that trial counsel "mounted a strong defense."

The State also maintains that the postconviction court gave mere lip service to trial counsel's stated tactical reasons for objecting selectively. Not only, according to the State, did the postconviction court fail to give proper deference to trial counsel's tactical reasons for his actions, in several instances, the disputed testimony was "not objectionable[,]" and therefore, the postconviction court erred in finding deficient performance.

Likewise, the State contends that the postconviction court erred in finding that trial counsel was deficient in failing to object to parts of the prosecutor's closing argument. According to the State, the postconviction court ignored trial counsel's tactical reasons for objecting only selectively, and in one instance, trial counsel used the prosecutor's comment as a launching point for his own argument. And finally, the State maintains that the postconviction court applied the wrong prejudice standard, and that Mr. Parker failed to demonstrate, under the correct standard, that he suffered prejudice as a result of trial counsel's purported instances of deficient performance.

Mr. Parker counters that much of what the State asserts in its brief is not preserved because those points were not raised in the postconviction court. Specifically, according to Mr. Parker, the State "goes to great lengths to catalog [trial] counsel's otherwise competent

conduct[,]" but "[n]one of this was ever brought to the post-conviction court's attention." Because, according to Mr. Parker, the State failed to apprise the postconviction court of trial counsel's "purportedly" otherwise diligent advocacy, the postconviction court was deprived of an opportunity to make "explicit findings on this score, as it did for the portions of the record that were particularized by the parties[,]" and we, therefore, should not address that argument. In addition, Mr. Parker seizes on the postconviction court's repeated assertions that "[t]he State has failed to address this argument in its Response to this Court" to claim that the State's arguments on appeal are not preserved.

On the merits, Mr. Parker asserts that the State's contention that the postconviction court failed to consider the record as a whole is meritless. "The absence of an explicit finding regarding counsel's general competence, aside from the alleged errors," according to Mr. Parker, "is inconsequential."

Mr. Parker insists that the postconviction court correctly concluded that trial counsel failed to object to inadmissible evidence; failed to move to strike inadmissible evidence; failed to object to the prosecutor's burden-shifting and "Golden Rule" comments, as well as arguing facts not in evidence; and failed to move to strike the prosecutor's comment that "[s]omeone who was sexually abused reacts in" the way that MM reacted when she testified. And furthermore, Mr. Parker insists, the postconviction court correctly found that

those repeated shortcomings, cumulatively, caused prejudice.[13] Therefore, he maintains, we should affirm.

Standard of Review

We review for clear error the postconviction court's factual findings, but we review without deference its legal conclusions. *Blake v. State*, 485 Md. 265, 291 (2023). We exercise our "own independent analysis" in determining whether the petitioner has proven the elements of an ineffective assistance claim. *Id.* (quotation marks and citation omitted).

Ineffective Assistance of Counsel

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. The Sixth Amendment, including the right to the assistance of counsel, is applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Blake*, 485 Md. at 291 & n.15. Moreover, Article 21 of the Maryland Declaration of Rights provides a substantially similar guarantee. *Id.* at 291 & n.16.

"The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to

[13] In the introductory part of his brief, Mr. Parker usefully summarizes his argument: Trial counsel "made eight detrimental errors[,]" the "most egregious" of which "included failure to object to (i) the prosecutor's burden shifting remark in closing that Mr. Parker 'gives us no reason why [MM] would come forward and say what she said to everybody,' (ii) the prosecutor's golden rule argument that '[i]t's your turn to listen now, ladies and gentlemen. It's your turn to believe [MM],' and (iii) the prosecutor's suggestion of Mr. Parker's potential future criminality—that [MM] would be 'looking over her shoulder' 'for the rest of her life[,]"' as well as "five additional instances of deficient performance" identified by the postconviction court. (Record citations omitted.)

produce just results[,]" and therefore, the Supreme Court of the United States "has recognized that 'the right to counsel is the right to the effective assistance of counsel.'" *Strickland v. Washington*, 466 U.S. 668, 685-86 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)).

We employ "a two-part test to determine when counsel's actions violate a defendant's constitutional right to effective assistance of counsel." *Blake*, 485 Md. at 292. "First, the defendant must show that counsel's performance was deficient[,]" that is, "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. "Second, the defendant must show that the deficient performance prejudiced the defense[,]" that is, "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* The burden is on the defendant to "make[] both showings[.]" *Id.*

"A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Id.* at 690. The reviewing court "must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Id.* In making that determination, we "indulge a strong presumption that counsel's conduct falls within" that "wide range"; "that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). Our "scrutiny of counsel's performance must be highly deferential[,]" avoiding "the distorting effects of hindsight" by "reconstruct[ing] the

circumstances of counsel's challenged conduct" and evaluating that conduct "from counsel's perspective at the time." *Id.*

Generally, a defendant claiming a violation of his right to counsel because of attorney error "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Although the defendant's burden is not as great as preponderance of the evidence, it "is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693-94.

Analysis

We shall take Mr. Parker's suggestion and consider the State's claims together. We do so for two reasons: first, both claims of deficient performance allege essentially the same kinds of omissions—failure to object, failure to move to strike, and failure to ask for a curative instruction; and second, we are obliged, in any event, to consider the cumulative effect of all trial counsel's purported errors in determining prejudice.

Preservation

But before we do so, we briefly address Mr. Parker's non-preservation arguments. First, we agree with the State that the postconviction court erred in asserting that the State had failed to respond to several of Mr. Parker's allegations of error. Mr. Parker asserted three claims of error, and the State responded to all three. Specifically, Mr. Parker's assertion that the State failed to raise below its appellate contention that the postconviction court should have considered trial counsel's "overall" performance is belied by the record;

the State's response expressly stated: "Whether counsel truly provided ineffective assistance of counsel rests not on the single errors alleged, but on the totality of counsel's representation." (Citing *Harrington*, 562 U.S. at 111.)

Although the State's response was terse, it was sufficient to apprise the postconviction court of the contested issues. Moreover, Maryland Rule 8-131(a) states in relevant part that "[o]rdinarily, an appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court." By that criterion, all the issues raised in the State's brief are properly before us because they were decided by the postconviction court. Mr. Parker had a full and fair opportunity to develop a factual record in this case, and he suffers no unfair prejudice from our consideration of them.

Deficient Performance

The Supreme Court of the United States instructs that, in analyzing the deficient performance prong of an ineffective assistance claim, our "scrutiny of counsel's performance must be highly deferential." *Strickland*, 466 U.S. at 689. The Court further instructs that a reviewing court must make "every effort" to "eliminate the distorting effects of hindsight" by "reconstruct[ing] the circumstances of counsel's challenged conduct" and evaluating that conduct "from counsel's perspective at the time." *Id.* The postconviction court in this case failed to apply that standard.

We begin by considering the circumstances that faced trial counsel at the time of trial. As he explained during the postconviction hearing, "there [was] so much prejudice with the nature of these charges[.]" It was, in trial counsel's words, "difficult, because there

were two alleged victims for one incident, and there were inconsistencies in their stories." Trial counsel's problems were compounded because the trial judge was, in his view, unsympathetic if not hostile to the defense.

Faced with these hurdles, trial counsel presented a vigorous defense. He attacked MM's credibility, successfully persuading the trial court, over the State's objection, to permit him to question Charisse about pornography that she had discovered on MM's phone shortly after the assault because it was relevant to his theory of defense, that MM had fabricated the charges.[14] Trial counsel also vigorously cross-examined MM, highlighting inconsistencies between her testimony and the statement she had made during an interview at the Child Abuse Center, shortly after the assault, at one point ignoring the trial court's direction not to question MM about viewing pornography on Elizabeth's phone and insinuating that she had downloaded it, thereby highlighting this fact for the jury.[15] Trial counsel also elicited favorable testimony from Elizabeth: that Mr. Parker was reluctant to watch the children on the night of the assault; that, when she returned home the next morning, "[n]othing [was] out of the ordinary"; that MM "didn't say anything to [her] about a knife[,]" with which Mr. Parker purportedly had threatened MM; that there

[14] The defense theory was that MM had been exposed to pornography prior to and independently of her encounter with Mr. Parker and that MM had downloaded a pornographic application onto her phone.

[15] This was consistent with trial counsel's pragmatic view of jury psychology, focused on what evidence and argument the jury actually hears, without regard to legal niceties such as objections and curative instructions, which he regarded as having limited real-world effect.

were "[n]o other incidents like this" during the sixteen years she and Mr. Parker had been together; that she was not allowed to see her grandchildren until Mr. Parker moved out two months later (suggesting a motive for MM to fabricate her story—to compel Elizabeth to end her relationship with Mr. Parker, who was disliked by other family members); and that, even at the time of trial, she "[didn't] know what happened."

Trial counsel called a serologist to testify for the defense, highlighting that there was no DNA evidence implicating Mr. Parker. In addition, Mr. Parker testified on his own behalf, denying that he had abused MM.[16] Trial counsel also made motions for judgment of acquittal, and during closing argument, he highlighted inconsistencies in MM's testimony, argued forcefully that Mr. Parker had no motive to commit the offenses, strongly suggested that Elizabeth did not believe that a sexual assault had occurred (she permitted Mr. Parker to remain in her residence for several months after MM made her allegations, and the jury heard Mr. Parker say that the reason he moved out was so that she could see her grandchildren again), but that MM had motives to fabricate the account and that she did so with the encouragement of her relatives.

Juxtaposed against trial counsel's overall competent representation, Mr. Parker asserts cherry-picked instances where trial counsel either elected not to object or, having made an objection to preserve the record, elected not to move to strike or request curative instructions. We examine them now.

[16] Mr. Parker also testified that the reason he moved out of Elizabeth's home was because, otherwise, "she would not have a chance to see her grandkids." The trial court sustained the prosecutor's objection to that testimony, but the jury, nonetheless, was exposed to it, consistent with trial counsel's pragmatic view of jury psychology.

Failure to Object to or Move to Strike Purportedly Inadmissible Testimony

There were four specific instances where, according to Mr. Parker and the postconviction court, trial counsel performed deficiently in failing either to object or, having objected, to move to strike testimony: (1) MM's testimony that Mr. Parker "was straight up lying"; (2) MM's testimony that her relatives "were happy" that she had come forward, telling her that she "told the real truth" and that "they [were] so proud of [her]"; (3) Charisse's testimony that she felt "pure, unadulterated rage"; and (4) Charisse's testimony that she did not allow her children to visit Elizabeth's home until Mr. Parker had moved out.

Trial counsel's timely objection to the first remark ("straight up lying") was sustained by the trial court. Trial counsel explained that he did not want "to continue to highlight the issue" in front of the jury and that to move to strike MM's remark would have been "futile." Although the latter point is debatable,[17] it is hardly unreasonable for trial counsel not to want to highlight such a prejudicial comment before the jury and to attempt to direct their attention to other matters. We fail to see how this amounts to deficient performance.

Trial counsel testified that an objection to MM's comments that she "told the real truth" and that her relatives were "so proud of [her]" would have been "futile." The postconviction court dismissed that rationale out of hand, without any deference to trial

[17] The State further points out that, under Maryland Rule 5-103(a)(1), it was sufficient for trial counsel to object without also moving to strike. *Drake and Charles v. State*, 186 Md. App. 570, 592-94 (2009), *rev'd on other grounds sub nom. Charles v. State*, 414 Md. 726 (2010).

counsel's tactical reasons for doing so. Furthermore, it is hardly unreasonable for trial counsel not to want to highlight MM's testimony, preferring instead to attempt to direct the jury's attention to other matters.

Trial counsel gave no reason why he did not object to Charisse's comment that she felt "pure, unadulterated rage" upon learning that Mr. Parker had assaulted her daughter. But, as the State observes, trial counsel leveraged her testimony (as well as MM's testimony that her relatives were "so proud of [her]") in his closing argument, asserting that MM's relatives had "an admitted visceral response" to MM's account and that "it is likely that they spun their own account numerous times in front of [MM] so that she could testify and give you the story the way she did so that she could tell the police the way that she did." Mr. Parker has failed to rebut the presumption that this was a legitimate trial tactic.

As for Charisse's testimony that she did not allow her children to visit Elizabeth's home until Mr. Parker had moved out, trial counsel believed that it was not objectionable, and the State asserts that it was "highly relevant." We agree because that testimony explained why, in the State's words, there was such an "abrupt change in the family's routine[,]" which "len[t] credibility to MM's allegations against [Mr.] Parker." Mr. Parker has failed to rebut the presumption that trial counsel acted reasonably in electing not to object to this statement.

Failure to Object to Prosecutor's Comments During Closing Argument

There were five instances where, according to Mr. Parker and the postconviction court, trial counsel performed deficiently in failing either to object or, having objected, to

move to strike purportedly improper remarks during the prosecutor's closing argument: (1) the purported burden-shifting argument ("the defendant's testimony . . . gives us no reason why [MM] would come forward and say what she said to everybody"); (2) the prosecutor purportedly arguing facts not in evidence concerning the missed phone call at 12:26 a.m.; (3) the prosecutor's purported golden rule argument ("It's your turn to believe her"); (4) the prosecutor's purported reference to Mr. Parker's future dangerousness ("Something that she'll be doing for the rest of her life, looking over her shoulder"); and (5) the prosecutor's comment that "[s]omeone who was sexually abused reacts in" the way that MM reacted when she testified.

In finding deficient performance for failing to object to the prosecutor's remark that "the defendant's testimony . . . gives us no reason why [MM] would come forward and say what she said to everybody," the postconviction court failed to account for the fact that Mr. Parker testified on his own behalf. The defendant's right to silence is a shield, not a sword, and the prosecutor could properly comment about his testimony. But in any event, trial counsel elected instead to leverage the prosecutor's comment into his own closing argument, telling the jury that "we don't really have to prove any motive here" and that it is the "State's job . . . to prove the case against my client." Moreover, trial counsel suggested other motives for why MM testified as she did. That decision was a matter of trial tactics, which was entitled to deference, and the postconviction court erred in giving no weight to trial counsel's stated reasons for acting as he did.

In the factual background, we quoted extensively from the testimony of both Charisse and Jasmine to establish the factual predicate for the prosecutor's comments about

the missed phone call. The postconviction court clearly erred in determining that the prosecutor was arguing facts not in evidence, and trial counsel did not perform deficiently in failing to object to those comments.

The prosecutor's comment that "[i]t's your turn to believe" MM was, in trial counsel's view, not objectionable. In finding that it was and that trial counsel should have objected, the postconviction court relied solely upon *Walker v. State*, 121 Md. App. 364, 380 (1998), but the comments at issue in that case (referring to the defendant, on trial for child sexual offenses, as a "pervert" who "sexually molested babies" and "an animal") were drastically more inflammatory than the comment at issue here. Trial counsel acted reasonably in electing not to highlight the comment by objecting.

The prosecutor's comment that MM would be "looking over her shoulder" for "the rest of her life" did not require an objection because it is not necessarily a comment on Mr. Parker's future dangerousness. Trial counsel acted reasonably in deciding "not to call further attention" to this, at most, marginally objectionable comment. *Kulbicki v. State*, 207 Md. App. 412, 452 (2012).

Trial counsel did object to the prosecutor's comment that "[s]omeone who was sexually abused reacts in" the way that MM reacted when she testified. Trial counsel testified that by requesting a curative instruction, he was "highlighting the point and allowing the issue to be belabored," and he preferred to "have it out of their [i.e., the jury] minds quicker than not. I thought an objection was -- would suffice at that point, and I don't think curative instructions necessarily work." The postconviction court erred in

concluding that trial counsel performed deficiently in failing to move to strike the offending remark because his decision not to do so was a reasonable tactical decision.

We hold that Mr. Parker has failed to rebut the presumption that trial counsel acted reasonably. We therefore hold that the postconviction court erred in concluding that trial counsel performed deficiently, either in failing to object or move to strike testimony or in failing to object or move to strike the prosecutor's comments during closing argument.

Prejudice

The State seizes on a statement the postconviction court made near the conclusion of its memorandum opinion to insist that the court applied the wrong prejudice standard: "The Court finds that the cumulative effect of Trial Counsel's errors prejudiced [Mr. Parker]. That is, **there is a possibility that the verdict may have been different**, but for the cumulative effect of these errors." (Emphasis added.) Elsewhere in that opinion, the postconviction court set forth the correct standard, "'that there is a reasonable probability that, but for counsel's errors,' the result of the case would have been different." (Quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).) Whether the postconviction court applied the wrong standard, or applied the correct standard in a legally erroneous manner, ultimately does not affect our analysis because we conduct our own independent review in any event. *Blake*, 485 Md. at 291.

The postconviction court simply declared, ipse dixit, that trial counsel's purported errors caused prejudice to Mr. Parker. The court, however, appeared to make only a minimal effort to weigh the likely effects of trial counsel's purported errors within the context of the evidence adduced at trial. But in any event, because we have concluded that

the postconviction court erred in finding deficient performance, it follows ineluctably that Mr. Parker's cumulative prejudice claim fails. *See Wallace v. State*, 475 Md. 639, 673-74 (2021) (noting that the Supreme Court of Maryland "has rejected claims of cumulative ineffectiveness of counsel because 'twenty times nothing still equals nothing'" (quoting *State v. Borchardt*, 396 Md. 586, 634 (2007))).

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY REVERSED IN PART. CASE REMANDED TO THAT COURT FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COSTS ASSESSED TO APPELLEE.