Circuit Court for Worcester County
Criminal Case No. 23-K-11-000012

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 580

September Term, 2018

SKYLOR HARMON

v.

STATE OF MARYLAND

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

JJ.

Opinion by Arthur, J.

Filed: August 20, 2019

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

In 2010 a Worcester County grand jury indicted Skylor Dupree Harmon on one count of first-degree murder, one count of attempted first-degree murder, and two counts of reckless endangerment. His initial trial ended in a mistrial.

On October 20, 2011, after a second trial, the jury convicted Harmon of all charges. The court sentenced him to life imprisonment.

Harmon filed an untimely notice of appeal, and his appeal was dismissed. He petitioned for post-conviction relief, including the right to pursue a belated appeal; and the State agreed that he could pursue a belated appeal before the consideration of any other issues. *See Garrison v. State*, 350 Md. 128, 139 (1998) (holding that a defendant in a criminal case who is denied the right to a desired appeal through no fault of his or her own is entitled to a belated appeal, without the necessity of presenting any other evidence of prejudice). We affirmed the convictions in an unreported opinion, *Harmon v. State*, No. 0823, SEPT. TERM 2015, 2016 WL 706677 (Md. Ct. Spec. App., Feb. 23, 2016).

After the failure of his direct appeal, Harmon amended his petition for post-conviction relief. Following a two-day hearing, the Circuit Court for Worcester County denied the petition on July 17, 2017.

We granted Harmon's application for leave to appeal. For the reasons that follow, we reverse the judgment of the circuit court and remand the case for further proceedings consistent with this opinion.

BACKGROUND

I. THE EVIDENCE AT TRIAL

On the evening of May 26, 2010, Reginald Handy Jr., Torrance "Gator" Davis,

and Norman Crawley were standing together outside Crawley's home on Laurel Street in Pocomoke City when shots rang out. Handy was killed. Davis and Crawley were unharmed. Footage captured by a street camera showed Alexander Crippen firing a handgun at Handy, but ballistics evidence revealed that the fatal wound was not caused by the .380 caliber bullets that Crippen was firing.

The next day, acting on a tip, Officer Zina Means of the Pocomoke City Police Department observed a Bushmaster AR-15 assault rifle wrapped in a blanket in the corner of a fenced area next to a driveway approximately 65 yards from where Handy fell. She also observed a single shell casing of .223 caliber ammunition. The driveway, near where the rifle and shell casing were found, presented an unobstructed view of the crime scene.

Alexander Crippen's girlfriend, Shana Harmon,[1] lived on the property where the driveway was located, in the next block over from Laurel Street. Gator Davis and Crippen did not like one another and had gotten into a fight in the preceding week, apparently over Shana. Skylor Harmon, Crippen's 17-year-old nephew, attempted to assist Crippen during the fight.

At trial, the State called Gator Davis, who, it disclosed, was testifying under a grant of use immunity.[2] After giving an overview of the layout of the neighborhood, the

[1] To avoid confusing Shana Harmon with Skylor Harmon, we shall refer to her simply as "Shana." We mean no disrespect. Shana Harmon and Skylor Harmon have no direct familial relation to one another.

[2] Davis appears to have been wearing, carrying, or transporting a concealed weapon at the time of the murder. He testified that he was carrying .45 caliber handgun

relationships among the residents, and Crippen's animosity toward him, Davis testified about his recollection of the shooting and narrated a video of it. At the end of his testimony, the State marked for identification a number of text-messages between Davis and a neighbor, Rasheema Schoolfield, but did not move them into evidence. In response to questions posed by the State, Davis denied that he was getting any consideration from the State in return for his testimony. Davis agreed that he had been told to expect nothing in return for his testimony.

After Gator Davis, the State called Lorenzo Davis, who came onto the scene just before the shooting began.[3] He testified that he heard three or four pops and one loud bang. The pops came from the direction of a pole on Laurel Street, but the bang seemed to come from another area.

Next, the State called Rasheema Schoolfield, who testified that she and Shana had been hanging out with Crippen on the day of the shooting. Just before the shooting, Schoolfield had gone to get a cigarette from Crippen, who, she said, "was on the pole." As she began walking back to Shana's house, Schoolfield heard "probably" four shots. She ran to her van, which was parked in Shana's driveway. As she was getting in, she saw Harmon squatting behind the van, near the driver's side door, wearing a black hoodie. She could not see anything in his hands, and she said nothing to him. She denied telling Gator Davis that she had seen Harmon with a big gun, that Harmon had used her

and that he had fired at Crippen after Handy was shot. The law enforcement officers found .45 caliber shell casings at the scene.

[3] It is unclear whether Lorenzo Davis is related to Gator Davis.

as cover, or that Harmon had shot in the direction of the victim's house on Laurel Street.

At the end of Schoolfield's direct examination, the State read Gator Davis's text-messages to her and asked her to read her responses. In one of the messages, Davis had written: "So I'm the only one you told you seen Skylor by the house with a gun[?]" Although Schoolfield insisted to the jury that she had not seen a gun and that she did not see the reference to a gun in Davis's message, the State established that she had responded to Davis by saying, "yes, who else am I gonna tell?" Harmon's counsel neither objected to these questions nor requested a limiting instruction. In its instructions to the jury at the end of the case, however, the court did say that "[t]estimony concerning" Schoolfield's pretrial "statement" was permitted only to help the jury decide whether to believe her testimony.

After Schoolfield, the State called Gator Davis's cousin, Preston Townsend. Townsend testified that at the time of the shooting he saw "a bright flash" between Shana's house and the house next to it. He looked toward Shana's house and saw Harmon, with "something long" "pressed up against his leg." Townsend also testified that about a week before the shooting he had seen Crippen, in Harmon's presence, pick up a large item that was wrapped in a blanket or quilt and carry it into Shana's house.[4]

Apparently for the purpose of impeaching Schoolfield, the State re-called Gator Davis. Davis testified that Schoolfield had told him Harmon "had a big gun" on the night of the shooting; that he was "hiding behind her" during the shooting; and that he aimed

[4] Townsend did not testify in the first trial, which had resulted in a hung jury and a mistrial.

toward where Davis and the victim were standing. Again, Harmon's counsel neither objected to these questions nor requested a limiting instruction. Again, however, in its instructions to the jury at the end of the case, the court said that "[t]estimony concerning" Schoolfield's pretrial "statement" was permitted only to help the jury decide whether to believe her testimony.

Detective Dale Trotter of the Worcester County Sheriff's Office testified that he retrieved the AR-15 during the execution of a search warrant at Shana's house. The rifle had a bullet chambered, and the 10-round magazine had eight rounds remaining, suggesting that the rifle had been fired once. No usable DNA evidence was recovered from the rifle.

Detective Trotter testified that the DNA results for the shell casings were "not conclusive," which, he said, meant that the examiners "could not make a determination." "Any number of people," he testified, "could have touched the shell casings." On cross-examination, Detective Trotter reiterated that the DNA found on the casings was "not enough for a conclusive determination as to who the DNA belonged to." "That's why the test became no, no conclusion," he said.

Because the bullet that killed the victim had fragmented upon impact, the State's ballistics expert, Jaime Smith, could not testify that it had come from any particular weapon. He did, however, opine that the bullet shared "class characteristics" with the ammunition that is used in a Bushmaster AR-15 assault rifle and that it did not come from a .45 caliber automatic handgun or a .380 caliber handgun.

Trooper Kyle Clark of the Maryland State Police testified that after Harmon was

arrested he received *Miranda* warnings[5] and was interviewed at the State Police barracks. When asked who had guns on the night of the shooting, Harmon had responded that "everyone had guns." Harmon later explained that his comment "was just a joke."

During the cross-examination of Trooper Clark, defense counsel established that at some point in the interview Harmon "didn't want to speak anymore." The State took the position that Harmon had thereby opened the door to evidence that he had asserted his right against self-incrimination, and defense counsel agreed. On redirect, the State established that once Harmon requested the services of an attorney, the interview ended, and Harmon departed. In closing argument, the State mentioned that, when he was questioned by the authorities, Harmon had asked for a lawyer.

On the basis of this and other evidence, the jury found Harmon guilty of first-degree murder.

II. POST-TRIAL DISCOVERIES

1. The DNA Evidence

During the post-conviction proceedings, Harmon subpoenaed the case file from the State Police DNA laboratory. The file contained an email, dated November 9, 2010, from Julie Kempton, a DNA analyst, to another employee of the Maryland State Police, concerning the analysis of the DNA sample that was taken from the shell casings. In the email, Kempton reported that the DNA profile matched that of Jaime Smith, the State's ballistic expert, who had apparently handled (or mishandled) the casings. Kempton

[5] *Miranda v. Arizona*, 384 U.S. 436 (1966).

stated that she would "call this sample inconclusive in [her] report." Although the State's Attorney's Office would ordinarily receive copies of documents such as Kempton's email, the State did not disclose the document in discovery.

The formal DNA report, which was produced to Harmon in discovery, stated: "An identified profile was observed in the 5.58 mm shell casing [17][6] and the data was determined to be unreportable." The report did not disclose that the sample had been found to contain Jaime Smith's DNA or that the sample had been contaminated. Nonetheless, Kempton's notes recount that she told an Assistant State's Attorney that "all cartridge casings were negative, except for one which matched [a] staff member." The State did not produce those notes in discovery.

At trial, the State did not call a DNA analyst from the Maryland State Police to testify about the results of the DNA testing on the shell casings. Instead, the State called Worcester County Sheriff's Detective Trotter, who testified that ""[t]he DNA test was not conclusive" and that "they could not make a determination" about "whose DNA was on the casings." In closing argument, the State echoed the detective's testimony that the DNA analysis was "inconclusive." The State agrees (Brief at 16) that "Detective Trotter's lay testimony regarding an 'inconclusive' profile was technically incorrect."

2. The Plea Offer to Gator Davis

At the time of Harmon's second trial, Gator Davis was facing drug possession and drug distribution charges that could theoretically have resulted in up to 45 years of

[6] 5.58 millimeters is 3/100 of an inch less than .223 inches.

incarceration. The sentencing guidelines called for three to seven years.

During the post-conviction proceedings, Harmon's counsel discovered that the State had offered Davis a plea deal under which he would serve only one year in the local jail on the distribution charge, and all other charges would be dropped. The State did not specify that the plea deal was in exchange for Davis's testimony. According to Davis's attorney, however, the State's Attorney said that he would mention Davis's testimony at sentencing. The State's Attorney, on the other hand, said that he had told Davis's attorney only that Davis could attempt to use his testimony as a ground for mitigation at sentencing.[7] The State did not disclose the pending offer to Harmon in pretrial discovery.

Two days before Harmon's trial, Davis notified the State's Attorney's Office that he would invoke his Fifth Amendment privilege against self-incrimination. The State responded by serving him with a subpoena and granting him use immunity (*see* Md. Code (1974, 2013 Repl. Vol.), § 9-123 of the Courts and Judicial Proceedings Article) for anything he said at trial.[8]

At trial, the State established that Davis was testifying pursuant to a grant of use immunity. In response to the State's questions, Davis denied that he was getting any consideration from the State in return for his testimony.

At Davis's sentencing, the State recommended a one-year sentence and stated that

[7] The post-conviction court made no factual findings that would resolve the conflict between these two accounts.

[8] It appears that Davis's trial testimony was likely to implicate him in a handgun offense, if not other offenses as well. *See supra* n. 2.

Davis had "provided a great service to the community by testifying truthfully . . . with regards to Skylor Harmon . . . as well as testifying in the Alexander Crippen case."

3. The Internal Investigation of Officer Means

Before Harmon's first trial, the State disclosed "a potential *Brady* issue"[9] as to Officer Zina Means, who found the AR-15 and the shell casing after receiving an anonymous tip. The State specifically disclosed that Officer Means was the subject of an internal investigation by the Pocomoke City Police Department. Because the investigation was internal to the police department, the State said that it was unaware of the facts and circumstances.

On the next business day, the State filed a motion in limine, in which it informed the court of the internal investigation. The State asserted that the investigation was "under seal," but that it did not involve Officer Means's actions in Harmon's case. According to the State, the existence of the investigation was therefore irrelevant. The State asked the court to prohibit defense counsel from questioning witnesses concerning the internal investigation.

After Harmon's conviction, his post-conviction counsel discovered that Officer Means had been charged with filing a false police report and with defamation, slander, or lying about a co-worker. In fact, it appears that the first charge had been sustained a few days before the State disclosed the internal investigation to defense counsel.

[9] *See Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding that it is a violation of a criminal defendant's right to due process for the State to withhold evidence that is material to the determination of guilt or punishment).

III. THE POST-CONVICTION PROCEEDINGS

In his petition for post-conviction relief, Harmon raised, among other things, three alleged *Brady* violations and three claims of ineffective assistance of counsel.

The alleged *Brady* violations concerned (1) the State's failure to disclose the substance of Kempton's email and her internal notes regarding the DNA test on the shell casings; (2) the State's failure to disclose the plea offer to Gator Davis; and (3) the State's failure to disclose the substance of the allegations against Officer Means.

The allegations of ineffective assistance of counsel concerned (1) defense counsel's decision to open the door to questions concerning Harmon's post-*Miranda* silence through his invocation of his right against self-incrimination and his right to an attorney; (2) counsel's failure to object to Gator Davis's testimony that Schoolfield had told him that she saw Harmon firing a gun; and (3) counsel's failure to object to the State's use of the text-messages in which Schoolfield affirmed that she had seen Harmon with a gun.

The post-conviction court rejected these, and other, allegations. Harmon appealed.

QUESTIONS PRESENTED

Harmon presents the following questions for our review:

1. Whether the Post Conviction Court erred in ruling that the State did not violate *Brady* in failing to disclose that the DNA tests *excluded* Mr. Harmon as the person who deposited DNA on a critical piece of evidence?

2. Whether the Post Conviction Court erred in ruling that the State did not violate *Brady* in failing to disclose pending charges, a plea agreement, and promises of and expectations of leniency against its chief prosecution witness?

3. Whether the Post Conviction Court erred in finding the State did not violate *Brady* in failing to disclose that the primary homicide officer was found guilty of lying to a court, among other bad acts?

4. Whether the Post Conviction Court erred in ruling that trial counsel was not ineffective in introducing evidence of Mr. Harmon's post-*Miranda* silence and request for an attorney?

5. Whether the Post Conviction Court erred in denying relief on the ground that trial counsel was ineffective in failing to object to inadmissible hearsay?

6. Whether the Post Conviction Court erred in finding that trial counsel was not ineffective in failing to object to the introduction of text messages?

7. Whether the Post Conviction Court failed to address numerous allegations presented in the post conviction proceedings as required by Rule 4-407(a)?

DISCUSSION

I. *Brady* Violations

In the landmark case of *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." The category of "evidence favorable to an accused" includes both exculpatory evidence and evidence that that "the defense might have used to impeach the [State's] witnesses by showing bias or interest." *United States v. Bagley*, 473 U.S. 667, 676 (1985); *accord Kyles v. Whitley*, 514 U.S. 419, 433 (1995); *Conyers v. State*, 367 Md. 571, 606 (2002); *Wilson v. State*, 363 Md. 333, 345-46 (2001).

If favorable evidence is material, the State must disclose it "even though there has been no request by the accused." *Strickler v. Greene*, 527 U.S. 263, 280 (1999); *see United States v. Bagley*, 473 U.S. at 682. Evidence is "material," for purposes of *Brady*, "'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Id.*; *accord Conyers v. State*, 367 Md. at 610-11; *Wilson v. State*, 363 Md. at 347; *Ware v. State*, 348 Md. 19, 47 (1997). "[A] 'reasonable probability'" is "'a probability sufficient to undermine confidence in the outcome.'" *United States v. Bagley*, 473 U.S. at 682 (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)); *accord Conyers v. State*, 367 Md. at 611; *Wilson v. State*, 363 Md. at 347 n.3; *Ware v. State*, 348 Md. at 47.[10]

The *Brady* rule "encompasses evidence 'known only to police investigators and not to the prosecutor.'" *Strickler v. Greene*, 527 U.S. at 280-81 (quoting *Kyles v. Whitley*, 514 U.S. at 438); *accord Conyers v. State*, 367 Md. at 602 ("stating that [f]acts known to the police will be imputed to the State for *Brady* purposes"). "In order to comply with *Brady*, therefore, 'the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case,

[10] The ordinary test of materiality does not apply if "the undisclosed evidence demonstrates that the prosecution's case includes perjured testimony and that the prosecution knew, or should have known, of the perjury." *United States v. Agurs*, 427 U.S. 97, 103 (1976). In that event, "the conviction is "fundamentally unfair and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Id.* (footnote omitted); *accord Conyers v. State*, 367 Md. at 610. Because we do not have to decide whether the prosecution's case included perjured testimony and that the prosecution knew, or should have known, of the perjury, we shall apply the ordinary test of materiality.

including the police.'" *Strickler v. Greene*, 527 U.S. at 281 (quoting *Kyles v. Whitley*, 514 U.S. at 437). The State's failure "to disclose favorable, material evidence violates due process without regard to the good faith or bad faith of the prosecutor." *Ware v. State*, 348 Md. at 38.

"To establish a *Brady* violation, the defendant must establish (1) that the prosecutor suppressed or withheld evidence that is (2) favorable to the defense – either because it is exculpatory, provides a basis for mitigation of sentence, or because it provides grounds for impeaching a witness – and (3) that the suppressed evidence is material." *Ware v. State*, 348 Md. at 38; *accord Wilson v. State*, 363 Md. at 345; *see also Strickler v. Green*, 527 U.S. at 281-82; *Yearby v. State*, 414 Md. 708, 717 (2010).

A. The DNA Analyst's Email and Notes

Harmon complains that the State failed to produce two documents pertaining to DNA: (1) an internal email by the DNA analyst, Julie Kempton, in which she wrote that the DNA profile matched that of Jaime Smith, the State's ballistic expert, and that she would "call this sample inconclusive in [her] report"; and (2) Kempton's notes of a conversation with an Assistant State's Attorney, in which she wrote that "all cartridge casings were negative, except for one which matched [a] staff member."

Kempton's formal report, which the State did produce in discovery, did not disclose that the State's analysis had turned up the DNA of a State employee and of no one else. Rather, the report cryptically stated that "An identified profile was observed in the 5.58 mm shell casing [17] and the data was determined to be unreportable." Although Kempton had informed the State's Attorney's Office that "all cartridge casings

were negative, except for one which matched [a] staff member," the State's witness testified that "[t]he DNA test was not conclusive" and that the analysts "could not make a determination" about whose DNA was on the casings. The State referred to that testimony in closing, telling the jury that the analysis was "inconclusive." Everyone agrees that that testimony was, at a minimum, incorrect.

The post-conviction court concluded, however, that *Brady* did not require the State to produce Kempton's email and notes, because, it said, they were not favorable to the defense. In response to Harmon's contention that the undisclosed documentation had "excluded" him because it showed that Jaime Smith's DNA alone had been found on the shell casing, the court accused Harmon of "engaging in semantical wordplay." "The testing procedure," the court wrote, "was contaminated[,]" and "the attempted DNA analysis was botched." The court continued: "No one on the face of the earth could have been 'included' or excluded.'" [App. 14.]

On appeal, the State (Brief at 19 n.5) does not defend the post-conviction court's assertion that the DNA analysis did not "include" or "exclude" anyone. Instead, the State tacitly recognizes that the analysis included (or implicated) the firearms examiner, Jaime Smith, as the sole source of the DNA on the casing. The State also recognizes (*id.*) that the post-conviction court was "speaking imprecisely" when it wrote that "the testing procedure was contaminated" and that "the DNA analysis was botched." According to the State, "[i]t was the sample that was contaminated by Smith, and the analysis was botched only in the sense that it yielded a correct result based on the contaminated sample."

Rather than defend the post-conviction court's reasoning, the State posits that Kempton's email and notes were not exculpatory, because, it says, the presence of Jaime Smith's DNA "does not mean that Harmon did not also touch it." Brief at 17. We disagree. The absence of a defendant's DNA on a sample may not conclusively prove that he never touched the sample, but it is at least some evidence that he did not touch it. Just as it would have been harmful to the defense if the sample had contained Harmon's DNA, it would have been beneficial to the defense to show that the sample did not. For that reason, Kempton's email and notes were exculpatory.

Kempton's email and notes were also exculpatory because they would have allowed the defense to refute the detective's assertions that "[t]he DNA test was not conclusive" and that the analysts "could not make a determination" about whose DNA was on the casings. In that regard, Kempton's email and notes would have assisted the defense in dispelling the misleading impression that the "inconclusive" results meant that Harmon's DNA might have been on the shell casing, but the analyst just couldn't say for sure. In fact, it is doubtful that the State would even have elicited the inaccurate testimony about "inconclusive" results if the defense had been armed with documents showing that the analysts had made a conclusive determination about whose DNA was on the shell casing, and that it was the DNA of the State's own ballistics expert.

Finally, Kempton's email and notes were exculpatory because they might assist the defense in attacking the competence and professionalism of the State's investigation. The State recognizes that the sample was contaminated "during testing." [Brief at 17.] Moreover, unbeknownst to the defense, it was contaminated by the State employee who

testified as a ballistics expert at trial. It takes little effort to imagine how a zealous defense attorney could exploit that evidence in cross-examination, had the State disclosed it.

The State does not endeavor to explain why the prosecution failed to disclose Kempton's email or the note concerning her conversation with the Assistant State's Attorney. Instead, the State argues that the substance of those documents was discernible from the official report, when it stated that "[a]n *identified* profile was observed in the 5.58 mm shell casing [17] and the data was determined to be unreportable." Brief at 16 (emphasis added).

The State admits that the report did not actually "say that the identified profile was Smith's" or that it "excluded Harmon." *Id.* Nonetheless, the State insists that, "as a matter of common sense," a reasonable defense attorney should have understood that "if a profile was identified and not reported as matching Harmon's DNA's profile, it was not Harmon's DNA profile." *Id*. Of course, the report was not sufficiently clear to prevent the State's own witness, Detective Trotter, from testifying, incorrectly, that "[t]he DNA test was not conclusive" and that the analysts "could not make a determination" about whose DNA was on the casings.

In any event, with the benefit of the explanation in the State's brief, we understand that, in describing the sample as "an identified profile," Kempton was saying that she was able to identify the person whose DNA was in the sample. With the benefit of the Kempton's testimony at the post-conviction hearing, we also understand that, in writing that the results were "not reportable," she meant that they were not "pertinent" to "the

case" because they identified someone who was not a suspect. We are, however, unpersuaded that an average defense attorney could decipher the evasive bureaucratic jargon in the formal report and figure out what it really meant. For that reason, we disagree that the official report, in itself, was sufficiently comprehensible to inform a reasonably competent defense attorney that the "identified profile" was not Harmon's and to refute the detective's erroneous testimony about the supposedly "inconclusive" results.[11]

Whether alone, or in conjunction with the other evidence that we find to have been wrongly suppressed (*see infra* § I(B)),[12] the analyst's internal email and her notes of her conversation with the State's Attorney's officer were material. "DNA is a powerful evidentiary tool and its importance in the courtroom cannot be overstated." *Whack v. State*, 433 Md. 728, 732 (2013). By suppressing the email and the notes, the State was able to convey the false impression that the DNA evidence was "inconclusive." The State was thus able to avoid disclosing that the testing (on a key piece of evidence) did not implicate Harmon at all and that the investigation had (in the post-conviction court's

[11] Harmon argues that the State used perjured testimony to explain the DNA analysis. But although the testimony was certainly incorrect, we do not see an adequate basis to conclude that it was perjured. One could speculate that the State called Detective Trotter, a lay witness who was not involved in the analysis, precisely because he did not fully understand the report and did not know of the undisclosed documents that shed light on its meaning.

[12] "Materiality is assessed by considering all of the suppressed evidence collectively." *Wilson v. State*, 363 Md. at 347 (citing *Kyles v. Whitley*, 514 U.S. 419, 436 (1995)).

words) been "botched." Accordingly, we conclude that the post-conviction court erred in denying Harmon's petition.

B. The Plea Offer to Gator Davis

At the time of Harmon's second trial, Gator Davis was facing drug possession and drug distribution charges. The State offered him a plea under which he would serve considerably less than the maximum sentence, and considerably less than the recommended sentence under the sentencing guidelines. Moreover, he would serve his sentence in a local jail rather than a State prison. It is undisputed that the State did not disclose the pending charges against Davis or its pending offer to him.

"The failure to disclose evidence relating to any understanding or agreement with a key witness as to a future prosecution . . . violates due process, because such evidence is relevant to [the] witness's credibility." *Wilson v. State*, 363 Md. at 346 (citing *Giglio v. United States*, 405 U.S. 150, 154-55 (1972)); *accord Giglio v. United States*, 405 U.S. at 154-55 (holding that where the Government's case "depended almost entirely" on a witness's testimony, the witness's credibility "was therefore an important issue in the case, and evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it"); *Conyers v. State*, 367 Md. 571, 597 (2002). "Evidence that the State has entered into an agreement with a witness, whether formally or informally, is often powerful impeachment evidence and the existence of such a 'deal' must be disclosed to the accused." *Ware v. State*, 348 Md. at 41.

It makes no difference that Davis had only a plea offer, and not a formal plea agreement, when he testified. In *Wilson v. State*, 363 Md. at 350, the Court of Appeals held that, "[e]ven assuming, *arguendo*, that the terms of the plea agreements between the State and [the witnesses] were not finalized at the time of their testimony, that does not alleviate the State's obligation to disclose the material evidence." In *Conyers v. State*, 367 Md. at 603-06, the Court held that the State had a duty to disclose a witness's request for a benefit even though the detectives had told him that only the State's Attorney could grant his request. In *Ware v. State*, 348 Md. at 50–52, the Court held that the State had a duty to disclose what the Court variously described as a mere "implied promise of assistance" (*id.* at 37) or an "'expectation of leniency.'" *Id.* at 43 (quoting *People v. Cwikla*, 386 N.E.2d 1070, 1074 (N.Y. 1979)).

If *Brady* requires the State to disclose "implied promise of assistance" or an "'expectation of leniency,'" as *Ware* says it does, then it must certainly require the State to disclose an express offer for a below-guidelines sentence that is to be served in the local jail and not in a prison. Similarly, if *Brady* requires the State to disclose a witness's request for a benefit regardless of whether the request has been granted, as *Conyers* says it does, then *Brady* must also require the State disclose its own offer of a benefit even if the offer has not been accepted. In short, it seems undeniable that the State violated *Brady* by failing to inform Harmon of the lenient plea offer that it had made to Davis.

The post-conviction court disagreed. It reasoned that there was no causal connection between the offer and Davis's testimony, because Davis had refused to testify until he received use immunity. The State echoes the court's reasoning, asserting that

any expectation of leniency "was not potent enough to impel [Davis] to testify at all, much less favorably for the State." Brief at 23.

That line of reasoning, while superficially appealing, does not withstand scrutiny. Once the State had eliminated the obstacles to Davis's testimony by granting him use immunity, the pending offer gave him an incentive to testify favorably for the State. Because the offer was "relevant to [the] witness's credibility," it was a denial of due process for the State not to inform Harmon of the offer. *Wilson v. State*, 363 Md. at 346.

The Court of Appeals has identified several factors to use in assessing materiality for the purposes of suppressed impeachment evidence. They include the closeness of the case against the defendant and the cumulative weight of the other independent evidence of guilt; the centrality of the particular witness to the State's case; the significance of the inducement to testify; whether and to what extent the witness's credibility is already in question; and the prosecutorial emphasis on the witness's credibility in closing arguments. *Wilson v. State*, 363 Md. at 352 (citations omitted). These factors point in the direction of a finding of materiality.

The case against Harmon was strong, but not overwhelming. Harmon may have had a motive to assist Crippen, and Schoolfield put Harmon near where the rifle and shell casing were found and where one of the shots appeared to have been fired. But no one testified that he or she saw Harmon firing a rifle, and his DNA was not found on the rifle or the shell casing. Moreover, in Harmon's first trial, the jury had been unable to reach a verdict.

Davis's testimony was central to the State's case. Davis was the State's star witness,[13] who testified twice, narrated the video of the events, and recounted the statements in which Schoolfield allegedly implicated Harmon in the shooting. The State emphasized Davis's credibility in closing, arguing that he had testified with "complete honesty."

In short, whether alone, or in conjunction with the other evidence that we find to have been wrongly suppressed (*see supra* § I(A)), the plea offer was material. For this additional reason, therefore, we conclude that the post-conviction court erred in denying Harmon's petition.[14]

C. Officer Means's Internal Disciplinary Records

Harmon argues that the State failed to produce evidence of internal disciplinary charges against Officer Means, the Pocomoke City police officer who found the AR-15 and the shell casing. The charges included submitting a false report, which was sustained shortly before Harmon's first trial, and defamation or lying about a co-worker. It is clear

[13] *Wilson v. State*, 363 Md. at 348.

[14] In response to the State's questions, Davis testified that he was getting nothing in "return for his testimony" and that he had been told to expect nothing in return "for his testimony." In view of our disposition of the case, we need not decide whether that testimony was perjured or whether it "nimbly sidestepped" the issue of whether Davis had a general expectation of leniency by focusing on what he might get in return "for his testimony." *See Conyers v. State*, 367 Md. at 604. If the testimony was misleading but literally correct, it could not give rise to a charge of perjury. *Bronston v. United States*, 409 U.S. 352 (1973).

that the State did not produce records pertaining to the charges, but it is less clear that the State had the ability to produce them.[15]

The post-conviction court rejected Harmon's contention that the State violated *Brady* by not producing the records pertaining to the charges, giving two reasons for its conclusion. First, the court reasoned that Harmon had not shown that he was entitled to have access to the records. Second, the court reasoned that Harmon had not shown that the records contained admissible evidence, including evidence that he could use to impeach the officer.

The court's second conclusion is open to question, given that Officer Means had been found to have submitted a false report. Nonetheless, we are unpersuaded that the State violated *Brady* in failing to turn over the records, because Harmon has not established that the State had possession, custody, or control of what would appear to be the confidential disciplinary records of the Pocomoke City Police Department.

The State duly informed Harmon about the disciplinary proceedings against Officer Means. Harmon could have subpoenaed the records of those proceedings and explained his need for the information that they contained. *See, e.g.*, *Fields v. State*, 432 Md. 650, 667 (2013). If the records were confidential, the court would then have been required "to conduct some form of *in camera* review of the files." *Id.* at 669. In

[15] At the post-conviction hearing, the State objected to the introduction of Officer Means's disciplinary records on the ground that Harmon had not authenticated them. The post-conviction court sustained the objection even though the State itself had produced those very documents in response to Harmon's subpoena. The State, to its credit, does not defend that ruling on appeal.

conducting that review, the court could deny Harmon all access to the material "only if nothing in it, 'in anyone's imagination, [could] properly be used in defense or lead to the discovery of usable evidence.'" *Id*. at 670 (quoting *Zaal v. State*, 326 Md. 54, 88 (1992)).

In short, the State appears to have done what it could in informing Harmon of the existence of the disciplinary records, but Harmon failed to pursue the options at his disposal to obtain them. "*Brady* offers a defendant no relief when the defendant knew or should have known facts permitting him or her to take advantage of the evidence in question or when a reasonable defendant would have found the evidence." *Ware v. State*, 348 Md. at 39. Consequently, the post-conviction court did not err in rejecting the claim of a *Brady* violation based on the State's alleged failure to produce the disciplinary files pertaining to Officer Means.[16]

II. Ineffective Assistance of Counsel

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 criminal defendants the right to the assistance of counsel at critical stages of the proceedings against them. "To ensure that the right to counsel provides meaningful protection, the right has been construed to require the 'effective assistance of counsel.'" *Moultrie v. State*, 240 Md. App. 408, 419 (2019) (quoting *Strickland v.*

[16] We express no opinion about whether Harmon received ineffective assistance of counsel when his defense counsel failed to subpoena the disciplinary files, as that issue is not before us in this appeal.

Washington, 466 U.S. 668, 686 (1984)); *accord Duvall v. State*, 399 Md. 210, 220-21 (2007).

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

To satisfy the first prong, Harmon must show that the acts or omissions of counsel were the result of unreasonable professional judgment and that counsel's performance fell below an objective standard of reasonableness considering prevailing professional norms. *See, e.g.*, *Moultrie v. State*, 240 Md. App. at 419-20. To satisfy the second prong, Harmon must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 420 (quoting *Strickland v. Washington*, 466 U.S. at 694). A "reasonable probability" is "'a probability sufficient to undermine confidence in the outcome.'" *Coleman v. State*, 434 Md. 320, 340 (2013) (quoting *Strickland v. Washington*, 466 U.S. at 694). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. at 686.

Whether Harmon received ineffective assistance of counsel is "a mixed question of fact and law." *Moultrie v. State*, 240 Md. App. at 420 (quoting *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); *accord Moultrie v. State*, 240 Md. App. at 420. 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); *accord Coleman v. State*, 434 Md. at 331; *Moultrie v. State*, 240 Md. App. at 420.

Harmon asserts three claims of ineffective assistance of counsel. First, he argues that his defense counsel was ineffective because she introduced evidence of his post-*Miranda* silence and his request for an attorney. Second, he argues that counsel was ineffective because she failed to object to Gator Davis's testimony that Schoolfield told him that she saw Harmon in the driveway firing a gun, which he described as inadmissible hearsay. Third, he argues that counsel was ineffective because she failed to object to the text-messages in which Davis and Schoolfield discussed whether she had told "anyone else" that she had seen Harmon with a gun.

A. Post-*Miranda* Silence

After Harmon's arrest, Trooper Kyle Clark advised him of his *Miranda* rights and interviewed him at the State Police barracks. On direct examination, the Trooper testified that during the interview he asked who had guns on Laurel Street on the night of the shooting. According to the Trooper, Harmon responded, "Everybody had guns."

On cross-examination, defense counsel established that, "after saying that "everybody had guns," Harmon said that that "was just a joke." Counsel also established that Harmon said that he did not see Crippen with a gun. In the next question, counsel asked: "And then it was shortly after he told you he didn't want to speak anymore?" The witness agreed.

As redirect began, the State asked to approach the bench. At the bench, the State asserted that defense counsel had "opened the door" to Harmon's exercise of his *Miranda* right to discontinue the interview and to obtain counsel:

> [Defense counsel] in her cross-examination made reference to requests for an attorney, there did come a time when Mr. Harmon requested an attorney. I purposely stayed away from that, but when he did request an attorney all questions stopped. And I'd like to explore that with him, but I wanted to bring it to the Court's attention before, so that [defense counsel] can express any objection if she has any. My thought is she opened the door . . . .

Defense counsel responded: "I don't understand what you're saying. Do I want to object because . . . [?]"

The trial judge interjected to explain that the State was going to ask whether Harmon asked for an attorney and whether the questioning stopped when he did. Defense counsel responded: "Okay. Yeah, I don't have any problem with that." Consequently, on redirect, the State established that Harmon "requested the services of an attorney" and that no further questions were asked of him. In closing argument, the State reminded the jury that, when he was questioned by the authorities, Harmon had asked for a lawyer.

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. 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.

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 that right. *See Younie v. State*, 272 Md. 233, 245 (1974). 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 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 on 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*.

More recently, in *Coleman v. State*, 434 Md. 320 (2013), the defendant submitted to a custodial interrogation, received *Miranda* warnings, answered some questions, and

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 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 [the detective"). 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.

In Harmon's case, defense counsel arguably introduced inadmissible evidence of her own client's post-*Miranda* silence when she asked Trooper Clark whether Harmon had elected to end the interview. Worse yet, defense counsel acquiesced in the introduction of otherwise inadmissible evidence of post-*Miranda* silence when she agreed that she had (in the State's words) "opened the door" to that evidence. We must decide whether counsel's performance fell below an objective standard of reasonableness, considering prevailing professional norms.

The post-conviction court reasoned that defense counsel's conduct stemmed from a reasonable, strategic decision about how to explain Harmon's admission that "everybody had guns." Counsel wanted to show that Harmon, a 17-year-old youth, was only joking when he made that admission, but when he realized the gravity of the situation, he ended the interview. The State defends the post-conviction court's reasoning by invoking the strong presumption that trial counsel's identified acts or omissions, under the circumstances, are considered sound strategy. *See Strickland v.*

Washington, 466 U.S. at 690. We disagree that counsel made a reasonable, strategic decision when she agreed that she had "opened the door" to evidence of her client's post-*Miranda* silence.

"Under the 'opening the door' doctrine, otherwise irrelevant evidence may be admitted when the opposing party has 'opened the door' to such evidence." *Grier v. State*, 351 Md. at 260. The "opening the door" doctrine is "a rule of expanded relevancy that, under limited circumstances, 'allows the admission of evidence that is competent, but otherwise irrelevant.'" *Id*. (quoting *Conyers v. State*, 345 Md. 525, 545 (1997)). "[T]he 'opening the door' doctrine," however, "'does not permit the admission of incompetent evidence[]'" (*id.* at 261 (quoting *Conyers v. State*, 345 Md. at 546)), i.e., "evidence that is inadmissible for reasons other than relevancy." *Id.* "[E]vidence of [a defendant's] post-arrest silence [is] incompetent, not merely irrelevant[,]" and hence "it is not admissible under the 'opening the door' doctrine." *Id*

"Counsel makes a strategic trial decision when it is founded 'upon adequate investigation and preparation.'" *Coleman v. State*, 434 Md. at 338 (citing *State v. Borchardt*, 396 Md. 586, 604 (2007)). Counsel did not make a strategic decision when she acquiesced in the State's erroneous assertion that she had "opened the door" to evidence of post-*Miranda* silence. Instead, because of her apparent unfamiliarity with the rules of evidence and the law pertaining to post-*Miranda* silence, defense counsel agreed to allow the State to introduce highly prejudicial evidence that the State would never have had the ability to admit on its own.

At the post-conviction hearing, counsel still believed that she had opened the door to evidence of post-*Miranda* silence [Jan. 31, 2017, Pg. 265-66] even though it was legally impossible for her to do so. In addition, counsel expressed disbelief that the mention of post-*Miranda* silence was highly prejudicial ("I don't really see the damage in a person asking for an attorney") even though the Court of Appeals has said that "'[f]ew mistakes by criminal defense [counsel] are so grave as the failure to protest evidence that the defendant exercised his right to remain silent.'" *Id.* at 338 (quoting *Alston v. Garrison*, 720 F.2d 812, 816 (4th Cir. 1983)). We do "not see how trial counsel's failure to object because of [her] ignorance of the law could possibly be seen as sound trial strategy or a strategic choice." *Id.*

When defense counsel fails to oppose the admission of evidence of post-*Miranda* silence, her performance "'plainly falls beneath the range of competence demanded of attorneys in criminal cases.'" *Id.* at 338 (quoting *Alston v. Garrison*, 720 F.2d at 817) (further quotation omitted). Accordingly, the error in this case was sufficiently serious to warrant the conclusion that Harmon's trial counsel "was not functioning as the 'counsel' guaranteed [to Harmon] by the Sixth Amendment." *Strickland v. Washington*, 466 U.S. at 687. Harmon has satisfied the first prong of *Strickland*.

In our judgment, counsel's errors were also sufficiently serious to "'undermine confidence in the outcome'" and thus to satisfy the second prong. *Coleman v. State*, 434 Md. at 340 (quoting *Strickland v. Washington*, 466 U.S. at 694). "Because the improper admission of evidence of post-*Miranda* silence 'is so egregious and so inherently prejudicial, reversal is the norm rather than the exception.'" *Id.* at 345 (quoting *Alston v.*

Garrison, 720 F.2d at 817) (further quotation omitted); *see Grier v. State*, 351 Md. 241, 263 (1998) (quoting *Walker v. United States*, 404 F.2d 900, 903 (5th Cir. 1968)) (stating, in a direct appeal in which the harmless error standard applies, that "'[w]e would be naive if we failed to recognize that most laymen view an assertion of the Fifth Amendment privilege as a badge of guilt'").

It is no answer to say (as the State does) that the error in this case is not as shocking as the error in *Coleman*, where counsel failed to object to approximately 30 references to post-*Miranda* silence. In this case, defense counsel herself raised or almost raised the issue of her client's post-*Miranda* silence; and when the State attempted to capitalize on her blunder, she capitulated even though the evidence was categorically inadmissible. The State proceeded to establish that Harmon had asked for an attorney, which it would never otherwise have been able to do. Then, in rebuttal closing, the State argued that, after Harmon had received his *Miranda* warnings and given a couple of statements, he said, "I want a lawyer." According to the State's argument in rebuttal closing, Harmon's invocation of his right to counsel – his post-*Miranda* silence – refuted the defense argument that he was "*innocent* and unknowledgeable." (Emphasis added).

In these circumstances, there is, in our judgment, a reasonable probability that the outcome of the trial would have been different had counsel not allowed the State to make an issue of Harmon's post-*Miranda* silence. Harmon, therefore, has demonstrated that he received ineffective assistance of counsel.

B. Schoolfield's Text-Messages

In response to questioning by the State, Rasheema Schoolfield testified that, just after the shooting occurred, she saw Harmon squatting behind the driver's side of her car, but that she could see nothing in his hands. When asked whether she had told Gator Davis that Harmon "had a big gun" when she saw him, she replied, "No, I didn't tell him that." When asked whether she had told Davis that Harmon had used her as cover when he shot the gun, she replied (over a defense objection), "No, that's a lie." When asked whether she had told Davis that she saw Harmon shooting a gun in the direction of 503 Laurel, she replied, "No."

A few minutes later, the State questioned Schoolfield about text-messages that she had exchanged with Gator Davis, including a message in which Davis asked, "So I'm the only one you told you seen Skylor by the house with gun[?]." Rather than answer the question, Schoolfield responded: "And, for the record, I didn't see nothing with no gun, I don't know, I didn't see that part so I don't know." In response to another question concerning the same message, Schoolfield admitted that she had responded, "[Y]es, who else am I gonna tell." But she insisted that she "didn't see no gun" and did not see the reference to a gun in Davis's message.

In the post-conviction proceeding, Harmon argued that the text-messages were hearsay and that defense counsel was ineffective in failing to object to the State's use of them. Defense counsel agreed (erroneously, in our view) that the messages were hearsay, but offered the (erroneous) explanation that there were no grounds for a hearsay objection when both parties were available to authenticate the messages:

> It is hearsay, but if you've got both people there to say I said it, did you say it? You said this, I said that, I mean, when you got both people there to say I said this part and you said that part it's no longer hearsay because you've represented both sides of the conversation.

She added: "[B]ased on the fact that they [Davis and Schoolfield] were both present and the messages had been photographed by the police officers on the respective telephones, I didn't see – I figured they were coming in anyway."

According to the post-conviction court, defense counsel testified that she "probably should have objected" to the introduction of the text-messages.[17] Nonetheless, the court concluded that the error was not so serious as to deprive Harmon of a fair trial.

On appeal, Harmon argues that the text-messages consisted of inadmissible hearsay and that his trial counsel was ineffective because she failed to object to them. Harmon is correct that the text-messages would have been hearsay if they were admitted for the truth of the matters asserted therein – i.e., if they were admitted to prove that Schoolfield did in fact see Harmon by the house with a gun. *See* Md. Rule 5-801(c) (defining "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted").

The text-messages, however, could have been admitted for another purpose, namely, to impeach Schoolfield's trial testimony that she did not see Harmon with a gun by using her prior inconsistent statement that she did see Harmon with a gun. *See* Md.

[17] The record does not support the court's assertion. Defense counsel testified that she probably should have objected during closing argument, when the State asserted that Schoolfield told Gator Davis that she had seen Harmon with a big gun. Counsel did not testify that she should have objected to the introduction of the text-messages.

Rule 5-613; Md. Rule 5-616. The prior inconsistent statement would not have been admissible as substantive evidence that Schoolfield actually saw Harmon with a gun (*see, e.g.*, *Stewart v. State*, 342 Md. 230, 242 (1996)), but only as evidence that the jury should disbelieve some of her testimony at trial. Hence, even if Harmon's trial counsel had objected to the admission of the text-messages on hearsay grounds, the court could still have admitted them for the non-hearsay purpose of impeaching part of Schoolfield's trial testimony. *See Wallace-Bey v. State*, 234 Md. App. 501, 537 (2017) (quoting Md. Rule 5-801(c)). ("[e]vidence of a statement is not hearsay unless it is 'offered in evidence to prove the truth of the matter asserted'"). In fact, the court made some effort to limit the use of the evidence when it instructed the jury that it could consider "[t]estimony concerning" Schoolfield's pretrial "statement" only to help decide whether to believe her testimony.[18]

Evidently recognizing that the text-messages were prior inconsistent statements that impeached Schoolfield's trial testimony, Harmon argues that they were nonetheless inadmissible under a pair of cases that generally prohibit the State from introducing prior inconsistent statements as a subterfuge for putting what would otherwise be inadmissible

[18] The State argues that the text-messages would have been admissible as substantive evidence under Rule 5-802.1(a)(3), the exception to the hearsay rule for prior inconsistent statements that were "recorded in substantially verbatim fashion by stenographic or electronic means contemporaneously with the making of the statement." Rule 5-802.1(a)(3) is intended to allow for the admission of prior inconsistent statements in interviews or interrogations that have been recorded on audio or video or transcribed by a stenographer. It would be a vast and completely unwarranted expansion of the exception for a court to interpret it to extend to text-messages, email messages, and the like.

hearsay before the jury: *Spence v. State*, 321 Md. 526 (1991); and *Bradley v. State*, 333 Md. 593 (1994).

In *Spence v. State*, 321 Md. at 530, the State called a witness for the sole purpose of impeaching him with a prior inconsistent statement in which he had implicated Spence in a crime. The State knew that if the witness testified at trial, he would exonerate, rather than implicate, Spence. *Id.* at 528. Furthermore, the State admitted that it had called the witness "to get before the jury prior out-of-court statements [he] had made to police officers that, in fact, Spence was one of the perpetrators of" the offense. *Id.* The trial court permitted the State first to elicit the expected testimony from the witness and then to call a detective, who testified that the witness had previously implicated Spence in the crime. *Id.* at 529-30.

On appeal, the Court of Appeals rejected the State's contention that, although the prior inconsistent statements were not admissible as substantive evidence, they were admissible to impeach the witness. The Court wrote that the State's "sole reason" for calling the witness "was to get before the jury [his] extrajudicial hearsay statements implicating Spence." *Id.* at 530. "This blatant attempt to circumvent the hearsay rule and parade inadmissible evidence before the jury," the Court held, "is not permissible." *Id.* "The State cannot, over objection, have a witness called who it knows will contribute nothing to its case, as a subterfuge to admit, as impeaching evidence, otherwise inadmissible hearsay evidence." *Id.*

In *Bradley v. State*, 333 Md. at 604, the Court of Appeals extended *Spence* to cases in which "the State, with full knowledge that its questions will contribute nothing to

its case, questions a witness concerning an independent area of inquiry in order to open the door for impeachment and introduce a prior inconsistent statement." In *Bradley* the defendant was charged with, among other things, stealing a car. *Id.* at 596. The victim's telephone bill indicated that within 30 minutes of the theft, someone had used her car phone to call a telephone number that was associated with the defendant's cousin, Adrian Bradley. *Id.* at 597. The State called the cousin to establish that the number was his and that the defendant had placed the call. *Id.* Over objection, the State then asked the cousin whether the defendant had told him, during that conversation, that he had stolen a car. *Id.* After the cousin denied that the defendant had said that he had stolen the car, the State called a detective to testify that the cousin had said that the defendant had bragged about stealing a car. *Id.* The State had not been surprised by the cousin's trial testimony. *Id.*

On appeal, the State attempted to distinguish *Spence* on the ground that it had not called the cousin for the sole purpose of impeaching him with the prior inconsistent statement. *Id.* at 601. The State contended that, "if you call a witness for a proper purpose, you may inquire into any additional relevant area for the sole purpose of opening the door for impeachment by a prior inconsistent statement." *Id.* The Court rejected the State's contention. *Id.*

In the Court's formulation, the State had embarked on an "independent area of inquiry" when it turned from the question of whether Bradley had placed a call to the cousin's telephone number to the substance of the cousin's telephone conversation with Bradley. *Id.* After the cousin verified his telephone number and confirmed that he had spoken to Bradley, the Court wrote, "it was improper for the State to inquire about the

contents of the telephone conversation for the sole purpose of impeaching Adrian," the cousin, "regarding the entirely separate matter of whether or not the defendant bragged about the crime in the telephone call." *Id.* The Court explained:

> The State knew that Adrian Bradley would deny that the defendant confessed to the crime, yet still questioned him concerning the alleged confession. Thus, we are led to the "inescapable conclusion . . . that the State, over objection, [questioned a witness concerning an independent area of inquiry knowing it] would contribute nothing to the State's case, for the sole purpose of 'impeaching' the witness with otherwise inadmissible hearsay."

Id. at 601-02 (quoting *Spence v. State*, 321 Md. at 530) (bracketed material inserted in *Bradley*).

"In accordance with the *Spence* rationale," therefore, the Court held "that it is impermissible for a party in a criminal case, over objection, to venture into an independent area of inquiry solely for purposes of 'circumvent[ing] the hearsay rule and parad[ing] inadmissible evidence before the jury.'" *Id.* at 602 (quoting *Spence v. State*, 321 Md. at 530). The Court did not explain what it meant by an "independent area of inquiry" other than through the example of the facts of the *Bradley* case itself. The Court did, however, recognize that its formulation imposed greater restrictions on the State than the general rule in most other jurisdictions, which is "whether the witness was called to elicit substantive evidence or whether the 'primary purpose' in calling the witness was to place otherwise inadmissible hearsay before the jury through impeachment." *Id.*

The *Bradley* Court stressed that its holding was "a limited one." *Id*. at 604. "[I]n instances where a witness's testimony is not reasonably divisible into clearly separate areas of inquiry," the Court said, "the State may properly impeach any portion of the

witness's testimony that disfavors the government's case." *Id.* In addition, the Court expressed its "general agreement" with the proposition that "'[w]hen a government witness provides evidence both helpful and harmful to the prosecution, the government should not be forced to choose between the Scylla of foregoing impeachment and the Charybdis of not calling the witness at all.'" *Id*. at 605 (quoting *United States v. Kane*, 944 F.2d 1406, 1412 (7th Cir. 1991)).

The Court cautioned, however, that "the State is not faced with these two extremes" when it is "dealing with an independent area of inquiry." *Id*. In that event, "[t]he government can call the witness and inquire about any pertinent substantive testimony, and simply forego asking questions for the sole purpose of impeaching the witness in the clearly separate area." *Id*. Thus, "[w]hen it is completely unnecessary for the State to elicit neutral or unfavorable testimony, we ought not permit it to do so for the sole purpose of opening the door to the admission of otherwise inadmissible evidence under the guise of impeachment." *Id*.

On the other hand, the *Bradley* Court allowed that its holding did not apply if the "failure to inquire into a possibly independent area of inquiry could create a gap in the witness's testimony such that a negative inference may arise against the prosecution." *Id.* at 606. In addition, the Court said that the State may impeach a witness if the witness's testimony comes as a surprise (*id.*) or if the State did not create the need for impeachment – e.g., if a witness volunteers an unresponsive answer that contradicts an earlier statement. *Id.* at 607. The Court has since held that proof of surprise is not a prerequisite for impeaching one's own witness (*Walker v. State*, 373 Md. 360, 379 (2003)) and that a

showing of surprise is but one possible indication that a party did not have full knowledge that a witness would recant. *Id*. at 387-88.

Turning back to this case, there is no question that it differs markedly from *Spence*, in that the State did not call Schoolfield solely for the purpose of impeaching her. Schoolfield provided some favorable testimony to State, most notably that just after the shooting she saw Harmon crouching on the ground behind her car, near the location where the AR-15 and the shell casing were later found and where Preston Townsend saw a flash of light.

The more serious issue is whether the State embarked on an "independent area of inquiry" when it moved from questions about whether Schoolfield saw Harmon just after the shooting (she did), where he was (behind her car), what he was doing (squatting), and what he was wearing (a black hoodie) to a question about whether he had anything in his hands. In contending that the final question amounts to an "independent line of inquiry," Harmon offers little more than argument by assertion: he quotes *Bradley*'s statements about what the State is prohibited from doing, but he does not explain why a question about what else Schoolfield saw or did not see as she stood beside her car is "independent" from questions about the other things that she saw at the same moment. In our view, if the State had not asked Schoolfield whether she saw anything in Harmon's hands, it would arguably have "create[d] a gap in the witness's testimony such that a negative inference [might] arise against the prosecution." *Bradley v. State*, 333 Md. at 606.

Harmon charges that the State knew that Schoolfield would disavow the prior statements because she had denied making them during Harmon's first trial. On this record, however, we do not know whether Schoolfield might have recanted her disavowal between the end of the first trial and the beginning of the second. In other words, we cannot say whether the State had "full knowledge" that Schoolfield would disavow the prior statements or whether the State simply suspected or believed that she might. In any event, even if the State did have actual knowledge that Schoolfield would disavow the statements, *Bradley* permitted the State to question her and to impeach her if necessary as long as its questions did not involve a "clearly independent area of inquiry." *Id.* at 606; *see Walker v. State*, 373 Md. at 388.

In summary, we are unpersuaded that *Bradley* prohibited the State from asking Schoolfield whether she saw something in Harmon's hands and then impeaching her with her prior inconsistent statement after she said that she did not. Harmon, therefore, has not established that his trial counsel was ineffective in failing to object when the State impeached Schoolfield with her text-messages.

C. Gator Davis's Testimony about His Conversation with Schoolfield

After Schoolfield testified that she had not seen anything in Harmon's hands on the night of the shooting, the State impeached her not only by using the text-messages with Davis, but also by eliciting her prior inconsistent statements to Davis. According to Davis, Schoolfield had told him that Harmon "had a big gun" on the night of the shooting; that he was "hiding behind her" during the shooting; and that he aimed toward where Davis and the victim were standing.

Harmon contends that under *Bradley* his counsel was ineffective because she failed to raise a hearsay objection to those questions. For the reasons stated in § II(B), *supra*, we reject his contention.

III. Rule 4-407(a)

In his final assignation of error, Harmon complains that the post-conviction court did not comply with Md. Rule 4-407(a), which requires a court to make a record of its ruling "with respect to each ground" upon which the petition is based. Because we shall reverse and remand the judgment on the basis of several of the substantive issues raised by Harmon, we decline to address this alternative ground.

CONCLUSION

The State failed to comply with its obligations under *Brady* because it failed to disclose the DNA analyst's email and notes about the DNA analysis and because it failed to disclose its lenient plea offer to a key witness, Gator Davis. Furthermore, Harmon suffered prejudice as a result of constitutionally deficient legal representation when his defense counsel enabled the State to introduce inadmissible and highly prejudicial evidence of his post-*Miranda* silence. For those reasons, Harmon is entitled to a new trial.

JUDGMENT OF THE CIRCUIT COURT FOR WORCESTER COUNTY REVERSED; CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION; COSTS TO BE PAID BY WORCESTER COUNTY.