Circuit Court for Montgomery County
Case No.: 128483

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1184

September Term, 2020

STATE OF MARYLAND

v.

RICHARD WILLIAM MORSE

Nazarian,
Beachley,
Wells

JJ.

Opinion by Wells, J.

Filed: September 23, 2021

*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.

Appellant, the State of Maryland, appeals a decision from a post-conviction proceeding in the Circuit Court for Montgomery County, finding that Patrick Smith, Esq. performed deficiently as appellee Richard Morse's trial counsel. In this appeal, the State presents two questions, which we have rephrased for clarity:[1]

1. Did the post-conviction court err in determining that trial counsel should have (1) objected to a voluntary intoxication jury instruction which instructed the jury not to consider Morse's intoxication in their deliberations; (2) proposed his own jury instruction regarding voluntary intoxication; (3) objected or argued during closing argument regarding the relevance of Morse's intoxication; (4) investigated and developed evidence of Morse's intoxication; and (5) introduced an expert witness regarding the effects of Morse's consumption of alcohol and Klonopin at trial?

2. Did the post-conviction court err in determining that trial counsel committed cumulative error?

We conclude that the post-conviction court erred in holding Morse's trial counsel deficient. Accordingly, we reverse.

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[1] The State's original questions were:

1. Did the postconviction court err in concluding that trial counsel was deficient in failing to object to the pattern jury instruction on voluntary intoxication, where such a defense did not apply to the general-intent crime for which Morse was convicted, second-degree rape?

2. Did the postconviction court err in concluding that trial counsel was deficient in failing to investigate and develop evidence of Morse's intoxication?

FACTUAL AND PROCEDURAL BACKGROUND

On May 16, 2015, Morse gathered with a group of friends at a home in Bethesda, Maryland. While at the home, he consumed six beers and took a Klonopin.[2] At around 11:30 p.m., Morse and the group of friends went to a nearby bar where their friend G.M.[3] met them sometime after 12:00 a.m. When G.M. arrived at the bar, she consumed approximately six to eight drinks—consisting of beers and vodka-cranberry cocktails—in a two-hour period. Meanwhile, Morse also consumed additional alcoholic beverages, which consisted of beer and Jack and Coke cocktails. When the bar closed around 2:00 a.m., the whole group went to Charles Latimer's home in Potomac, Maryland.

When she left the bar, witnesses said that G.M. was visibly intoxicated: she was nonresponsive to questions, needed assistance getting out of a car, and became physically ill. Her friends, concerned about her wellbeing, decided to let G.M. rest in a bedroom located on the second floor of Latimer's home, while the rest of them, including Morse, were downstairs. By this point in the early morning, people were no longer drinking alcohol, and all were told of G.M.'s heavily intoxicated state**.** In fact, various people went upstairs to check on G.M. throughout the night, until around 5:00 a.m.

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[2] Klonopin, also commonly called Clonazepam, is a sedative that treats anxiety, panic disorders, and difficulty sleeping, among other indications. *Clonazepam (Klonopin)*, NAT'L ALL. ON MENTAL ILLNESS, https://nami.org/About-Mental-Illness/Treatments/Mental-Health-Medications/Types-of-Medication/Clonazepam-(Klonopin) (Jan. 2016).

[3] As the victim in this case, we use G.M.'s initials to protect her privacy.

At some point between 5:30 and 6:30 a.m., G.M. testified that Morse awoken her while holding her down and inserting his penis into her vagina. G.M. asked Morse to stop and called for help, but no one came to her aid. Eventually, G.M. was able to free herself and ran to the bathroom where she discovered she was bleeding from her vagina. After calming herself down and texting her friends, she went back to bed only to be awoken hours later by Morse again penetrating her. This time when G.M. freed herself she woke up her friends and left the house.

The next day, one of the people that G.M. confided in reached out to Morse regarding the encounter that took place the night before. This prompted Morse to contact G.M. through Facebook to apologize for the "stupidest blackout mistake that [he had] ever made." He pleaded with her not to report the incident to the authorities because it would "ruin" him because of "how close of friends [they] were." Despite his request, G.M. reported the incident to the authorities and the police charged Morse with two counts of second-degree rape.

THE CIRCUIT COURT TRIAL

Morse retained attorney Smith, who has practiced criminal law for roughly 41 years. Morse denied having any memory of the incident due to his intoxication and maintained his innocence. Prior to the commencement of trial, the State offered to allow Morse to plead guilty to the charge of third-degree sexual offense with a commensurate sentence. Morse rejected this offer and proceeded to trial.

In its opening statement, the State suggested that Morse's actions constituted second-degree rape because G.M. was incapacitated, but the prosecutor made no mention of the knowledge element in second-degree rape:

> And, what you are going to hear is that an individual cannot have sex with a mentally incapacitated person. A mentally incapacitated person is someone who is intoxicated and cannot therefore consent. So, when it starts out that way, when person [is] mentally incapacitated and cannot consent, and someone has sex with that person, that is also definition of rape.

Smith did not object to this statement.

During their case, the defense introduced evidence of Morse's alcohol intoxication and use of Klonopin through Morse's own testimony. However, at no point did counsel Smith introduce expert witness testimony to discuss the possible effects of the combination of alcohol and Klonopin on Morse's state of mind.

After all evidence was presented, the court instructed the jury regarding Morse's use of alcohol and prescription drugs:

> Now, you have heard evidence that the defendant may have acted at a time in question while intoxicated by alcohol or by prescription medication. Generally speaking, voluntary intoxication may be a defense to a specific-intent crime. However, it is not a defense to a general intent crime. Rape in the second degree is considered a general intent crime. Therefore, the voluntary intoxication of the defendant is not a defense and does not excuse or justify criminal conduct for a charge of second-degree rape.

Smith did not object to this instruction. Smith also did not argue voluntary intoxication as a defense in his closing argument or object to the following comment during the State's closing argument:

> [V]oluntary intoxication is not a defense in this case. The defendant doesn't get to say, well, I drank too much and I don't remember, but I'm

> really sorry if I did something that was really bad. It is not a defense ladies and gentlemen. It doesn't get to be considered.

The jury convicted Morse of one count of second-degree rape. The court sentenced him to 20 years, all but five years suspended, and five years of probation. Morse first appealed the conviction to this Court, but later voluntarily dismissed the appeal. Thereafter, Morse retained new counsel and filed a post-conviction petition in the circuit court.

THE POST-CONVICTION PROCEEDING

During the post-conviction proceeding, Morse alleged Smith rendered constitutionally ineffective representation, because of Smith's failure to argue and present evidence about the relevance of Morse's intoxication during the rape. Specifically, Morse took issue with the fact that Smith did not (1) object to the jury instruction regarding voluntary intoxication; (2) request or propose his own jury instruction regarding the relevance of voluntary intoxication to the knowledge requirement of second-degree rape; (3) argue that Morse's intoxication was relevant to his knowledge of G.M.'s incapacitation during his closing argument; (4) investigate and develop evidence regarding Morse's intoxication; and (5) consult or call an expert regarding the effects of alcohol and Klonopin and the effects of those substances on Morse.[4]

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[4] Morse presented a total of ten claims before the post-conviction court. The remaining claims not enumerated above assert that Smith did not:

> (1) Provide legally correct advice regarding the State's plea offer; (2) consult with or call an expert forensic nurse; (3) did not object to "were they lying

(continued)

Smith testified at this proceeding that he thoroughly prepared for trial by meeting with Morse numerous times. Smith also testified that he consulted with an expert regarding the effects of Morse's intoxication, but did not present the evidence at trial because it was not favorable. Lastly, Smith attributed his lack of objections to strategic decision-making and his belief that the jury instructions and prosecutor's closing statements were legally accurate.

After a two-day hearing, the post-conviction court held that Morse's claims warranted a new trial because Smith's performance was cumulatively deficient, prejudicing Morse. The crux of the judge's reasoning rested on Morse's assertion that while voluntary intoxication is not a defense to a general intent crime, it is nonetheless relevant to the "knowing" requirement in second-degree rape.

The State of Maryland timely appealed. Additional facts will be discussed later.

DISCUSSION

I.

PRESERVATION

> questions" posed by the State; (4) object to the nurse's testimony regarding antiviral drug protocol; (5) introduce victim's previous history of making an unsubstantiated rape claim and introduce evidence once the State "opened the door"; and (6) object to the state's commenting on facts not in evidence in closing argument and repeating those remarks in defense closing argument.

The post-conviction court did not grant relief upon any of these claims, and so they are not before this Court on appeal.

As a preliminary matter, this Court must decide which arguments were preserved for our review. For the reasons that follow, we hold that all of the State's arguments were preserved.

In its Application for Leave to Appeal, the State raised two questions:

1. Did the postconviction court err in concluding that trial counsel was deficient in failing to object to the pattern jury instruction on voluntary intoxication, where the postconviction [court] conceded that voluntary intoxication [is] not a defense to the general intent crime of second-degree rape?

2. Did the postconviction court err in concluding that trial counsel was deficient in failing to investigate and develop evidence of the defendant's intoxication?

On December 17, 2020, this Court granted the application for leave to appeal and transferred it to the Court's regular appeal docket. The order granting this transfer said, in relevant part:

> **ORDERED** that the captioned Application for Leave to Appeal is hereby **GRANTED** as to the issue(s) raised in the Application . . . .

In his brief, Morse asserts that the State failed to preserve many of the grounds on which the post-conviction court rested its finding of ineffective assistance of counsel. Consequently, according to Morse, even if we agree with the State's arguments, we would not be able to reverse the post-conviction court's grant of relief. Morse contends that the State only preserved the post-conviction court's grant of a new trial based on trial counsel's failure to object to the court's jury instruction on voluntary intoxication and trial counsel's failure to investigate and develop evidence regarding Morse's intoxication. Thus, Morse alleges that the State did not preserve the challenge of the post-conviction court's other findings that trial counsel was ineffective (1) for failing to object to the State's closing

argument that Morse's intoxication could not be considered; (2) for failing to request and craft a non-pattern jury instruction; (3) for failing to argue in closing that Morse's intoxication was relevant as to whether he "knew or reasonably should have known" of victim G.M.'s incapacitation; (4) for failing to call or consult with an expert regarding the effects of alcohol and Klonopin had on Morse; and (5) to the extent that these errors had a cumulative effect on Morse's trial that he was effectively denied his Sixth Amendment right to counsel. In response, the State argues that its application for leave to appeal properly encompassed all of these issues for our review.

The application for leave to appeal was granted pursuant to Maryland Rule 8-204. In accordance with Rule 8-204(g), this Court can order additional proceedings "as if the order granting leave to appeal were a notice of appeal filed pursuant to Rule 8-202."[5] Md. Rule 8-204(g)(1). This Court chose this option for the disposition of the State's application by transferring the case to our appeal docket.

Rule 8-204(b)(3) provides that "[t]he application shall contain a concise statement of the reasons why the judgment should be reversed or modified and shall specify the errors allegedly committed by the lower court." Notably, there is no language to suggest that "if an application is granted, only the points specified in the application may be argued on appeal." *Harding v. State*, 235 Md. App. 287, 294 (2017). However, this does not preclude

[5] Pursuant to Rule 8-202, notices of appeal do not have "to specify the points an appellant expects to argue on appeal, and, even if an appellant does set forth in a notice of appeal proposed points the appellant wishes to argue, we treat that language as surplusage and non–limiting." *Harding*, 235 Md. App. at 294; *Edery v. Edery*, 213 Md. App. 369, 377 (2013).

the Court "from placing conditions or substantive limitations on our grant of application for leave to appeal[.]" *Id.* at 295. If such limitation is placed, it should generally be treated as binding on the litigants and the appellate panel deciding the case. *Moultrie v. State*, 240 Md. App. 408, 416 (2019).

In *Moultrie*, the appellant raised in his application for leave to appeal whether the post-conviction court erred regarding his claims that counsel was ineffective in failing to request a hearing and a ruling on the motion for modification of his sentence, and for misinforming him that the panel could increase his sentence on an application for review. *Id.* at 415-16. When the appellant also sought to argue his counsel's failure to object at the reverse-waiver hearing or to request that the case be transferred to the juvenile court for sentencing, this Court treated the statement in its grant of leave to appeal— "the case is hereby transferred to the regular appeal docket of this Court *to address the two questions presented in Applicant's application for leave to appeal*"—as having limited the scope of appeal to the issues raised. *Id.* at 418–19 (emphasis added). This Court acknowledged though that there are exceptional circumstances where "the appellate panel, in its discretion, may permit an appellant to raise an issue that was not encompassed in the order granting leave to appeal." *Id.* at 418. There is no exhaustive list of these "exceptional" circumstances, but such a list would certainly include "a change in the controlling authority or a conclusion that the earlier decision 'was clearly erroneous and would work a manifest injustice.'" *Id.* (quoting *Turner v. Housing Auth. of Baltimore City*, 364 Md. 24, 34 (2001)); *see also Hawes v. Liberty Homes, Inc.*, 100 Md. App. 222, 231 (1994) (noting that a mere difference of opinion by the appellate panel should not be the basis for reconsidering

a prior decision). The *Moultrie* Court concluded that because it did not see any exceptional circumstances, it would not entertain the latter questions not expressly raised. *Moultrie*, 240 Md. App. at 419.

Although the language in this Court's grant of the State's application for leave to appeal—"GRANTED . . . as to the issue(s) raised in the Application"—is similar (but slightly less express) as that in *Moultrie*, the issues are distinguishable. Here, the two issues the State raises effectively encompass each of the grounds on which the post-conviction court based its finding of ineffective assistance of counsel. Although the State does not expressly mention in its questions Smith's failure to propose his own jury instructions or to object to the prosecution's statements to the same effect, each of these claims arises from the same legal issue that also underlies Smith's failure to object to the jury instructions: the legal correctness of the statement that voluntary intoxication is not a defense to second-degree rape, and the relevance, otherwise, of voluntary intoxication to the knowledge element of second-degree rape. We observe that the post-conviction court's order reflects the inherent relationship between these claims, as it addresses them as a single issue.

The State's second expressly raised issue regarding Smith's failure to investigate and develop evidence of Morse's intoxication encompasses the issue of whether it was deficient for Smith not to have called or consulted an expert regarding the effects of the alcohol and Klonopin on Morse. Resolving the two issues expressly raised by the State will necessarily resolve the other issues; it would seem arbitrary to only partially address these clearly intertwined claims. Thus, we hold the State's application adequately raised

all issues forming the basis of the post-conviction court's grant of relief, and we will address them.

II.

INEFFECTIVE ASSISTANCE OF COUNSEL

The focus of our analysis is in the context of the overarching ineffective assistance of counsel claim. We find this approach useful, if not necessary, since even a determination that the legal conclusions underlying trial counsel's strategy were incorrect will not necessarily render his performance deficient, as we shall explain.

A. Standard of Review

The ineffective assistance of counsel claim here arises from a post-conviction proceeding, rather than raised a direct appeal. *Mosley v. State*, 378 Md. 548, 558-62 (holding that an ineffective assistance of counsel claim can be brought in a post-conviction proceeding rather than on direct appeal); *see also Smith v. State*, 394 Md. 184, 200 (2006) ("[G]enerally, the trial record does not provide adequate detail upon which the reviewing court could base an assessment regarding whether counsel rendered ineffective assistance because the character of counsel's representation is not the focus of the proceedings . . . ."). Consequently, this Court's review will consist of questions of law and fact. *Strickland v. Washington*, 466 U.S. 668, 698 (1984); *State v. Syed*, 463 Md. 60, 73 (2019).

"[T]his Court is not a finder of facts; we do not judge the credibility of the witnesses nor do we initially weigh the evidence to determine the facts underlying the constitutional claim." *Harris v. State*, 303 Md. 685, 698 (1985). Rather, the findings of fact from the post-conviction court "will not be disturbed . . . unless they are clearly erroneous." *Wilson*

v. State, 363 Md. 333, 348 (2001). Conclusions of law, however, will be reviewed under a *de novo* standard. *Newton v. State*, 455 Md. 341, 351-52 (2017). Therefore, this Court will conduct its own "independent analysis to determine the 'ultimate mixed question of law and fact, namely, was there a violation of a constitutional right as claimed.'" *State v. Jones*, 138 Md. App. 178, 209 (2001), *aff'd*, 379 Md. 704 (2004) (citing *Harris*, 303 Md. at 699); *State v. Purvey*, 129 Md. App. 1, 10 (1999) ("Within the *Strickland* framework, we will evaluate anew the findings of the lower court as to the reasonableness of counsel's conduct and the prejudice suffered.").

B. Parties' Contentions

The State argues that the post-conviction court erred when it determined that Smith was ineffective because voluntary intoxication is not a defense to the general intent crime of second-degree rape. Therefore, when Smith did not object to the related instructions or arguments, present further evidence of Morse's intoxication, or the like, his actions were appropriate.

Morse disagrees with the State's reasoning. He maintains that while second-degree rape is a general intent crime, the fact of the perpetrator's voluntary intoxication is still relevant to the knowledge requirement of rape because intent and knowledge are distinct concepts. Thus, Morse argues, Smith was ineffective as counsel because he did not (1) object to jury instructions or the prosecutor's closing arguments; (2) investigate or produce evidence to show the effects of the ingestion of alcohol and Klonopin; or (3) argue that voluntary intoxication was relevant to the elements of second-degree rape.

C. Analysis

The right to the assistance of counsel is guaranteed by the Sixth Amendment to the United States Constitution and is applicable to the states through the Fourteenth Amendment. *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963). An accused is entitled to effective counsel to help ensure they receive a fair trial. *Strickland*, 466 U.S. at 685-86.

In order to succeed on an ineffective assistance of counsel claim, the petitioner must show that counsel rendered deficient performance, *and* that the petitioner suffered prejudice as a result of counsel's performance. *Syed*, 463 Md. at 75 (citing *Strickland*, 466 U.S. at 686-87) (emphasis added). The petitioner must prove both elements, or else "it cannot be said that the conviction [] resulted from a breakdown in the adversary process that renders the result unreliable." *Strickland*, 466 U.S. at 687; *Harris*, 303 Md. at 687 (noting that the petitioner bears "a heavy burden" of proof).

To establish deficient performance, a post-conviction petitioner must show that at the time of the challenged conduct, "counsel's performance was objectively unreasonable 'under prevailing professional norms.'" *State v. Thaniel*, 238 Md. App. 343, 360 (2018) (quoting *Strickland*, 466 U.S. at 688); *Strickland*, 466 U.S. at 689-90. This includes a showing that counsel's decisions "were not a result of trial strategy." *Syed*, 463 Md. at 75 (citing *Coleman v. State*, 434 Md. 320, 338 (2013)); *State v. Borchardt*, 396 Md. 586, 604 (2007) (defining trial strategy as a decision "founded upon adequate investigation and preparation"). "Judicial scrutiny of counsel's performance must be highly deferential," and we "strongly presum[e]" that counsel has "rendered adequate assistance and made all

significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 689-90.[6]

To establish prejudice, a petitioner in a postconviction proceeding "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. The probability of a different outcome must be more than merely conceivable—it must be substantial. *Harrington v. Ritcher*, 562 U.S. 86, 112 (2011).

To assess the grounds on which Morse claims Smith was deficient under the first prong of *Strickland*—that Smith failed to object to the jury instructions and the prosecutor's opening and closing statements regarding voluntary intoxication, and to investigate and develop evidence regarding the effects of the alcohol and Klonopin on Morse's mental state—we must evaluate whether "prevailing professional norms" would lead reasonable counsel to take exception to the premises that (1) voluntary intoxication is not a defense to the crime of second-degree rape, and that (2) voluntary intoxication is also irrelevant to the determination of whether the knowledge element of second-degree rape is satisfied.

1. Voluntary intoxication is not a defense to second-degree rape

We agree with both parties and the post-conviction court, that voluntary intoxication is not a defense to general-intent crimes, and second-degree rape is one such crime.

[6] Under three narrow exceptions, which are not applicable here, prejudice may be presumed. *See Ramirez v. State*, 464 Md. 532, 541 (2019). This would thereby relieve the petitioner of the burden of proving that element of his claim. *Id.*

Therefore, instructions and arguments made in the post-conviction court, insofar as they express this rule, were legally correct and not objectionable.

It has long been held in Maryland that voluntary intoxication, which includes intoxication by drugs or alcohol, neither excuses nor justifies criminal conduct. *Newman v. State*, 236 Md. App. 533, 564 (2018); *Frank v. State*, 6 Md. App. 332, 334 (1969); *Cirincione v. State*, 75 Md. App. 166, 175 (1988). Simply put, a defendant does not get to "blame it on the alcohol" in an effort to escape criminal liability after the defendant made the voluntary choice to become intoxicated. JAMIE FOXX, *Blame It*, *on* INTUITION (J Records 2008). But this rule, like most rules, has exceptions.

Voluntary intoxication may be a defense to a specific intent crime. *See Shell v. State*, 307 Md. 46, 59 (1986), *abrogated by Price v. State*, 405 Md. 10 (2008). A specific intent crime is a crime where the wrongdoer must not only have "the intent to do the immediate act but embraces the requirement that the mind be conscious of a more remote purpose or design which shall eventuate from the doing of the immediate act." *Smith v. State*, 41 Md. App. 277, 305 (1979). This concept is best illustrated by way of examples, which Judge Moylan provided in his analysis in *Smith*:

> Though assault implies only the general intent to strike the blow, assault with intent to murder, rob, rape or maim requires a fully formed and conscious purpose that those further consequences shall flow from the doing of the immediate act. To break and enter requires a mere general intent but to commit burglary requires the additional specific intent of committing a felony after the entry has been made. A trespassory taking requires a mere general intent but larceny (or robbery) requires the specific Animus furandi or deliberate purpose of depriving the owner permanently of the stolen goods. This is why even voluntary intoxication may negate a specific intent though it will not negate a mere general intent.

Id.

When the crime at issue is a specific-intent crime, the defendant must show more than the typical acts and behaviors associated with drunkenness in order to be permitted to use this defense. *Bazzle v. State*, 426 Md. 541, 555-56 (2012); *see also Stansbury v. State*, 218 Md. 255, 261 (1958) (holding that a defendant was not permitted to use the defense of voluntary intoxication when the court believed the defendant was not "too drunk to know what he was doing . . . ."). Rather, the defendant must show a significant degree of intoxication:

> [T]he degree of intoxication which must be demonstrated to exonerate a defendant is great. Evidence of drunkenness which falls short of a proven incapacity in the accused to form the intent necessary to constitute the crime merely establishes that the mind was affected by drink so that he more readily gave way to some violent passion and does not rebut the presumption that a man intends the natural consequence of his act.

State v. Gover, 267 Md. 602, 607 (1973); *see also Avey v. State*, 249 Md. 385, 387 (1968) (permitting a defense of voluntary intoxication in the prosecution for a specific intent crime for a defendant who "consumed a pint of moonshine and 18 to 20 cans of beer") (internal quotation marks omitted).

Contrary to a specific-intent crime, a general-intent crime is one in which the wrongdoer need only the intent to commit the immediate act. *Harris v. State*, 353 Md. 596, 604 (1999); *see also McBurney v. State*, 280 Md. 21, 29 (1977) ("A general mens rea or intent 'includes those consequences which (a) represent the very purpose for which an act is done (regardless of likelihood of occurrence), or (b) are known to be substantially certain to result (regardless of desire)'") (internal citations omitted). Voluntary intoxication is

ordinarily not permitted as a defense to a general intent crime. *Smith*, 41 Md. App. at 305; *Shell*, 307 Md. at 63 ("Maryland's view[] deem[s] voluntary intoxication relevant to 'specific intent' crimes but not 'general intent' crimes."); *see also Harris v. State*, 353 Md. 596, 615 (1999). Rather, it is only a defense when the intoxication of the defendant rises to the level of insanity. *Frank*, 6 Md. App. at 337; *Parker v. State*, 7 Md. App. 167, 175 (1969).

The Maryland Code defines second-degree rape as follows:

> (a) A person may not engage in vaginal intercourse or a sexual act with another:
>
> (1) by force, or the threat of force, without the consent of the other;
>
> (2) if the victim is a substantially cognitively impaired individual, a mentally incapacitated individual, or a physically helpless individual, and the person performing the act knows or reasonably should know that the victim is a substantially cognitively impaired individual, a mentally incapacitated individual, or a physically helpless individual; or
>
> (3) if the victim is under the age of 14 years, and the person performing the act is at least 4 years older than the victim.
>
> * * *

MD. CODE ANN., CRIM LAW ("CR") § 3-304(a).

Determining whether a crime has a specific or general intent can be complicated—this is especially true when the crime requires the mental state of "knowing" or "should reasonably know." *See Shell*, 307 Md. at 68 (noting that a knowledge requirement does not automatically make a crime one with a specific intent). In the case at hand, second-degree rape is a general intent crime. The Maryland statute does not provide any additional

conscious purpose that would convert second-degree rape to a specific intent crime. The insertion of the mental state of "knowingly" does not change this result, which is consistent with other general intent crimes that include this mental state. *Herd v. State*, 125 Md. App. 77, 92 (1999) ("The knowledge requirement is designed primarily to exclude from criminal liability both the inadvertent trespasser and the trespasser who believes that he has received an express or implied permission to enter or remain.") (citation omitted); *Shell*, 307 Md. at 69-70 (holding that in the general intent crime of transporting a handgun, the term "'knowingly' was included largely to prevent unwitting violations . . . by persons drunk or sober."); *United States v. Fuller*, 436 F. App'x 167, 168 (4th Cir. 2011) (knowingly possessing a firearm was a general intent crime).

In this case, the trial court's instructions to the jury were almost entirely qualified to refer only to the applicability of voluntary intoxication as a "defense to a specific-intent crime" but not to a "general-intent crime." These were correct statements of law. The final sentence—"Therefore, the voluntary intoxication of the defendant does not excuse or justify criminal conduct for a charge of second-degree rape"—merely summarizes the relevance of voluntary intoxication. Consequently, this sentence reasonably refers to voluntary intoxication in the context of an affirmative defense, given the court's use of the verbs "excuse or justify." These instructions were also a correct statement of law. The prosecution's statements to this effect—that "voluntary intoxication is not a defense in this case," and "[i]t's not a defense, ladies and gentlemen," are also legally correct. Therefore, recognizing the general rule that voluntary intoxication is not a defense to the general intent crime of second-degree rape, we hold that it was not deficient performance for trial counsel

to not object to the jury instructions and prosecutor's closing statements insofar as they were correct statements of law.

2. Maryland law has not established whether voluntary intoxication is relevant to the knowledge element of second-degree rape, even if it is not an affirmative defense

The point of divergence in the parties' positions is the relevance of voluntary intoxication to the knowledge element in second-degree rape. Morse argues that although voluntary intoxication is not a defense to the crime, it is still relevant to the knowledge requirement because intent and knowledge are distinct concepts. Thus, he contends, the trial court's instructions and prosecution's statements were legally incorrect. The State argues that this distinction makes no difference—voluntary intoxication is irrelevant both as a defense and to any elements of the crime of second-degree rape. This issue arises from the remainder of the prosecution's statements alleged to be in error: "The defendant doesn't get to say, well, I drank too much and I don't remember, but I'm really sorry if I did something that was really bad," and "it doesn't get to be considered." The first statement arguably, and the second definitively, convey that Morse's voluntary intoxication has no bearing on whether the elements of second-degree rape have been proved beyond a reasonable doubt.

We agree with Morse that under the modern trend, intent and knowledge are distinct concepts. *State of Maryland Central Collection Unit v. Jordan*, 405 Md. 420, 425 (2008). We further agree that the State has the burden of proving knowledge, since it is an element of § 3-304(a)(2). *See Carroll v. State*, 428 Md. 679 (2012); *see also* MPJI-Cr 2:02 (2nd ed. 2013). It follows from the knowledge element of CR § 3-304(a)(2) that "if the

defendant *objectively* did not understand that the sex partner was impaired, there is no crime." *Garnett v. State*, 332 Md. 571, 585-86 (1993) (emphasis added). Thus, the more difficult question is the extent to which (if at all) voluntary intoxication can or should be considered in assessing the knowledge a reasonable person in the position of the offender would have had of the victim's ability to consent.

To support his argument that voluntary intoxication is relevant to the knowledge element, Morse directs us to Massachusetts case law, where that state's highest court has held that voluntary intoxication is relevant to general intent crimes if there is a knowledge element in the offense. *Commonwealth v. Mountry*, 463 Mass. 80, 91 (2012). Indeed, the facts in *Mountry* are similar to this case: an intoxicated defendant was accused of raping an intoxicated female. 463 Mass. at 82.

The State, meanwhile, directs us to case law from others states that hold the contrary, and make no distinction between the irrelevance of voluntary intoxication to the knowledge element and as a defense to a general-intent crime. *E.g., People v. Braslaw*, 233 Cal. App. 4th 1239 (Cal. App. 2015) (rejecting the defendant's argument that the "know or reasonably should know" language in the statute meant that voluntary intoxication should have been presented to the jury as a defense, since the crime was one of general-intent). As can be seen, there is inconsistency on this issue across state jurisdictions.

Most important to our analysis, Morse has presented no Maryland case where voluntary intoxication was deemed relevant to the knowledge element in second-degree rape, and our research has likewise yielded none. *Frank*, 6 Md. App. at 335 ("We have

been unable to find any case in which a court has specifically ruled that voluntary drunkenness can constitute a defense to the crime of rape[.]"). Our research also has yielded no Maryland cases analyzing the knowledge requirement of CR § 3-304, so as to demonstrate what characteristics of the perpetrator, if any, should be considered. We did, however, find several cases with conflicting implications as to whether voluntary intoxication is relevant to the knowledge requirement of a general-intent crime. For instance, in *Shell*, the Court of Appeals appeared to treat the concepts as intertwined, such that where a crime was one of general-intent and voluntary intoxication could not be a defense, it necessarily followed that voluntary intoxication also was irrelevant to the crime's knowledge element:

> [W]here, as here, the knowledge element of the offense was included largely to prevent unwitting violations, and the purpose of the criminal provision as a whole is to curb the transportation of handguns in vehicles by persons drunk or sober, the General Assembly did not intend to create a specific intent crime. In this context, the word "knowingly" requires only awareness by the accused that he engaged in the prohibited conduct, and this cannot be negated by evidence of voluntary intoxication.

307 Md. at 69–70 (1986). However, in *Stansbury v. State*, a case surveyed in *Shell*, the Court of Appeals appeared to treat these concepts separately. 218 Md. 255 (1958). There, the court affirmed a conviction of felony murder, saying "[v]oluntary intoxication is not an excuse, justification or extenuation of a crime, *although it may be considered by the triers of fact as bearing upon the state of mind of the accused*." *Id.* at 261 (emphasis added). In light of these nuanced differences, we cannot say that Maryland law is conclusive as to whether voluntary intoxication is relevant to a knowledge requirement in a general-intent crime, including second-degree rape.

We decline to reach the merits of the relevance question, since it is not necessary to determine whether Smith rendered deficient performance as defense counsel.[7] Our conclusion that, at best, the relevance of voluntary intoxication to the knowledge element of section 3-304 is unsettled in Maryland, is all we need to hold that it was not unreasonable for Smith to refrain from objecting to the prosecution's arguments and the court's instructions, and from proposing alternative, novel jury instructions, or further investigating or developing evidence surrounding Morse's intoxication at trial. The standard for deficiency hinges on "prevailing professional norms." *Strickland*, 466 U.S. at 689-90. Thus, failing to raise a novel or unresolved legal argument does not rise to the level of a violation of the Sixth Amendment right to counsel. Given the language in cases such as *Shell*, it was not unreasonable for Smith to believe that, as a matter of law, Morse's voluntary intoxication was not to be considered in the fact finder's assessment of second-degree rape. If this Court cannot readily ascertain the state of the law on the relevance issue, we cannot expect that "reasonable" trial counsel in Smith's situation would have thought to advance that argument. This conclusion underlies, and therefore defeats, each of Morse's individual claims of deficiency at issue in this appeal: if it was not deficient for

[7] We do note, however, that the objective standard in CR § 3-304 would seem to indicate that the offender's subjective state, including whether he is temporarily impaired by some substance(s), should not be considered—particularly as it is difficult to fathom an analysis that asks what a reasonable, highly-intoxicated person would do or understand in a given situation. We further observe that adopting Morse's position could lead to results that counter the legislature's intent, and that of public policy generally: Essentially, if a perpetrator's voluntary intoxication could defeat the knowledge element of second-degree rape, a loophole would be created for voluntarily drunken offenders who deny having understood the inability of their victims to consent.

Smith to not have thought of or advanced this argument, then it also cannot have been deficient for Smith to have refrained from investigating or developing (including by introducing an expert witness) evidence regarding Morse's intoxication, objecting to the jury instructions offered and proposing his own, objecting to the prosecution's statements in closing, or raising the above argument in his own closing.

In sum, we find that at present, the law in Maryland is undeveloped, and is unsettled nationwide, as to whether voluntary intoxication—albeit not a defense—is relevant to the knowledge element of a second-degree rape statute such as Maryland's. Considering this, we hold that Smith did not perform deficiently by not having advanced this argument at trial. Further, concluding that Smith's performance was not deficient in any of these respects, it follows that his performance could not have been cumulatively deficient.

Since Smith's performance does not satisfy the first prong of the *Strickland* test, we need not reach the second prong of prejudice. Because we hold that the post-conviction court erred in determining that Smith was deficient, we reverse.

THE JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY IS REVERSED. COSTS TO BE PAID BE PAID BY APPELLEE.

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