Circuit Court for Baltimore City
Case Nos. 109127079, 109127080, 109127081

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND**

No. 1286

September Term, 2022

DAVONNE SYDNOR

v.

STATE OF MARYLAND

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

JJ.

Opinion by Albright, J.

Filed: May 26, 2023

* 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.

** At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

In 2010, a jury sitting in the Circuit Court for Baltimore City found Davonne Sydnor, appellant, guilty of murder in the first degree and related offenses. The court sentenced Mr. Sydnor to an aggregate term of life imprisonment plus twenty years. Mr. Sydnor noted a timely appeal, and we affirmed the judgments in an unreported opinion. *Sydnor v. State*, No. 2288, Sept. Term, 2010 (Feb. 15, 2013), *cert. denied*, 432 Md. 213 (2013).

In 2021, Mr. Sydnor filed a postconviction petition, raising five claims, including an assertion that appellate counsel in his direct appeal rendered ineffective assistance "by not raising on appeal the issue of disclosure of the juvenile record of the [S]tate's main witness, Jermaine McCory."[1] The postconviction court denied this claim, finding that Mr. Sydnor's claim of ineffective assistance of appellate counsel was waived and that, in any event, he failed to demonstrate that appellate counsel had rendered deficient performance. Mr. Sydnor sought and obtained leave to appeal to this Court, and now raises the following questions:

> 1. Did the post-conviction court err in ruling that Mr. Sydnor waived his claim of ineffective assistance of appellate counsel when he did not raise this claim on direct appeal?
>
> 2. Did Mr. Sydnor's appellate counsel render ineffective assistance by failing to challenge the lack of disclosure of the juvenile record of the [S]tate's main witness, Jermaine [McCory]?

[1] Following a hearing, the postconviction court denied all but one of the claims in Mr. Sydnor's petition. The postconviction court granted Mr. Sydnor the right to file a belated motion for modification of sentence, and the State did not seek leave to appeal from that ruling.

Although we agree with Mr. Sydnor that the postconviction court erred in finding that his claim was waived, we uphold its ruling on the merits denying Mr. Sydnor's claim of ineffective assistance of appellate counsel. Therefore, we affirm the judgment.

BACKGROUND

On April 13, 2009, Russell Day was attempting to buy heroin in an alley in Baltimore City, when he was shot and killed during an armed robbery. Mr. Sydnor was one of several persons implicated in the crimes. The identification of him as the shooter was a central issue at trial.

In our unreported opinion in Mr. Sydnor's direct appeal, we summarized the facts:

> On the morning of April 13, 2009, the victim in this case, Russell Day, contacted his friend, Christine Brosky, and asked for a ride into Baltimore City from Westminster in order to purchase heroin. Brosky picked Day up in her car, and Day then drove into the city. Day was talking on the cell phone on the way into the city with a person named "Mike." Day spoke to "Mike" several times to inform him that he, Day, was driving to meet him in order to purchase heroin.
>
> After driving around various locations in the city, Day drove them to the area of Christian Street. Brosky remained in the vehicle while Day got out and walked into an alley. Day was out of her sight, for only a second or so, when Brosky heard "a really loud pop, pop." A moment later, Day came running back into view, and she heard him say he was shot. After Day fell to the ground near the end of the alley, Brosky saw an approximately six foot to six foot two inch tall African American male approach Day and go through his pockets. Brosky testified that she believed that the unidentified male was wearing a black Orioles fitted hat, blue jeans, and a black hoodie sweatshirt at the time. After rummaging through the victim's pockets, the male then ran back towards the alley.
>
> Brosky testified that Day told her to leave and she then drove away from the scene, but then turned around and

> returned. She then got out of the car and went to Day. Day repeated that he had been shot, and when he rolled over, a bullet fragment fell out from his side onto the ground. She remained with him until the ambulance arrived on the scene. Day died of a gunshot wound, and the manner of death was determined by the medical examiner to be homicide.

Sydnor, No. 2288, slip op. at 1-3 (footnote omitted).

Ms. Brosky told police that "one of the last phone calls Day made on his cell phone was to the person who was going to sell Day narcotics." *Id.* at 3. Police recovered Mr. Day's cell phone from the crime scene and "determined that the last phone number called from Mr. Day's phone matched that of the purported narcotics dealer, Jermaine McCory." *Id.*

Police investigated the location of the phone, arriving at a street corner close to the crime scene where they "encountered a group of four men," Mr. Sydnor, Kevin Ward (a co-defendant), Tyrone Baker, and Mr. McCory.[2] *Id.* at 1, 3, 8. An officer then dialed the phone number and determined that the cell phone that rang was in Mr. McCory's possession. *Id.* at 3-4 & n.3.

Mr. McCory initially provided police with a false identification, "in the name of Herbert or Hubert Rice," because, he claimed, he "had an outstanding juvenile warrant[.]" *Id.* at 5. Ultimately, he waived his *Miranda* rights and gave police a statement

[2] Ms. Brosky had described the clothing of a person she had observed going through the pockets of the victim, but none of the four men was wearing clothing matching that description. And only two of the men, Mr. Sydnor and Mr. Ward, matched the height estimated by Ms. Brosky; the others were approximately one-half foot shorter. *Sydnor*, No. 2288, slip op. at 7-8.

implicating Mr. Sydnor and, to a lesser extent, Mr. Ward. *Id.* He also identified Mr. Sydnor and Mr. Ward from photographic arrays. *Id.*

In his statement, Mr. McCory explained that he had spoken by phone with the victim, Mr. Day, on the morning of the murder, to arrange a drug sale. After Mr. McCory had agreed to meet Mr. Day, Mr. Sydnor pulled out a handgun and demanded that Mr. Day give him his money when he arrived. Mr. McCory claimed that he tried to dissuade Mr. Sydnor from robbing Mr. McCory, but when Mr. Day approached, Mr. Sydnor declared, "kick all that money out,"[3] and when Mr. Day retreated, Mr. Sydnor fired a single shot, killing Mr. Day. According to Mr. McCory, Mr. Ward "did not do nothing" and "was just standing there[,]" while Mr. Sydnor fired the shot. *Id.* According to Mr. McCory, all three of them split the proceeds of the robbery.

Mr. Sydnor was charged with murder in the first degree; two counts of use of a handgun in the commission of a felony or crime of violence; two counts of wearing, carrying, and transporting a handgun on his person; robbery with a dangerous weapon; assault in the first degree; assault in the second degree; and conspiracy to commit robbery with a dangerous weapon. Mr. Ward was charged with the same offenses. Mr. McCory was charged with murder in the first degree, robbery with a dangerous weapon, and related offenses. *Id.* at 6.

[3] This was understood as a demand to hand over money. *Sydnor*, No. 2288, slip op. at 4. Mr. McCory stated that the amount of the sale was $100.

In June 2010, Mr. Sydnor and Mr. Ward were tried jointly before a jury in the Circuit Court for Baltimore City. Mr. McCory reached a plea agreement with the State, agreeing to plead guilty to robbery with a dangerous weapon and use of a handgun in the commission of a felony or crime of violence, and in return for his testimony against Mr. Sydnor and Mr. Ward, he would be sentenced to eighteen months' detention in a juvenile facility.[4] *Id.* He then testified as a State's witness, and his recorded statement was played before the jury.

The jury found Mr. Sydnor guilty of murder in the first degree, two counts of use of a handgun in the commission of a felony or crime of violence, robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon.[5] The court sentenced Mr. Sydnor to life imprisonment for first-degree murder, a consecutive term of twenty years' imprisonment (the first five without the possibility of parole) for

[4] If, however, Mr. McCory refused to cooperate with the prosecution, he faced a twenty-year sentence (the first five without the possibility of parole) in the Division of Correction. At the time of the offenses, Mr. McCory was fifteen years old, and Mr. Sydnor and Mr. Ward were eighteen years old.

[5] The charges of wearing, carrying, and transporting a handgun on the person were not sent to the jury.

Mr. Ward was acquitted of murder, use of a handgun in the commission of a felony or crime of violence, and conspiracy to commit robbery with a dangerous weapon, but he was found guilty of robbery with a dangerous weapon and sentenced to twenty years' imprisonment. (No verdict was rendered for the assault charges and the charge of wearing, carrying, and transporting a handgun on the person was not sent to the jury.) We affirmed the judgment in an unreported opinion. *Ward v. State*, No. 2461, Sept. Term, 2010 (filed Feb. 8, 2013).

use of a handgun in the commission of a felony or crime of violence,[6] and two concurrent twenty-year terms for robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon.

Mr. Sydnor noted an appeal and was represented by counsel. In that appeal, he raised three claims:

> 1. Did the trial court err by failing to dismiss the charges against Mr. Sydnor because the 13[-]month period of pre-trial delay violated his constitutional right to a speedy trial as well as his statutory right to trial without undue delay [*Hicks*[7] rule];
>
> 2. Did the trial court err in re-instructing the jury during deliberations; and
>
> 3. Was the evidence legally sufficient to sustain Appellant's convictions.

Sydnor v. State, No. 2288, slip op. at 1-2. In an unreported opinion, we rejected those claims and affirmed the judgments. *Id*. The Court of Appeals (now the Supreme Court of Maryland)[8] denied Mr. Sydnor's ensuing petition for writ of certiorari. *Sydnor v. State*, 432 Md. 213 (2013).

[6] The court merged the remaining conviction for use of a handgun in the commission of a felony or crime of violence.

[7] The eponymous *Hicks* rule is named after *State v. Hicks*, 285 Md. 310, *on reconsideration*, 285 Md. 334 (1979), which held that the failure to commence trial within the statutory time limit (now 180 days after arraignment or defense counsel's initial appearance), unless good cause is established for re-scheduling trial on a later date, is grounds for dismissal.

[8] At the November 8, 2022, general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Appeals of Maryland to the Supreme Court of Maryland. The name change took effect on December 14, 2022. *See also*, Md. Rule 1-101.1(a) ("From and after December 14, 2022, any reference in these Rules or, in any (continued)

Seven years later, Mr. Sydnor filed a *pro se* postconviction petition, raising claims of ineffective assistance of trial counsel related to the voir dire. This petition was then supplemented in June 2021, when Mr. Sydnor, represented by counsel, raised the following claims:

> 1. Appellate counsel rendered ineffective assistance by not raising on appeal the issue of disclosure of the juvenile record of the [S]tate's main witness, Jermaine McCory.
>
> 2. Trial counsel rendered ineffective assistance by not objecting to the court's improper voir dire question.
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> 3. Trial counsel rendered ineffective assistance by failing to object to the court's jury instruction regarding flight and concealment of evidence that was damaging and not generated by the evidence.
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> 4. Trial counsel rendered ineffective assistance by failing to object to the court's failure to cure a mistake in jury instructions regarding felony murder.
>
> 5. Trial counsel rendered ineffective assistance by failing to file a motion to modify and/or reduce petitioner's sentence.[9]

In November 2021, the circuit court held a virtual hearing on Mr. Sydnor's supplemental petition and heard testimony from Mr. Sydnor, his trial counsel, and his appellate counsel. The following March, the postconviction court issued a memorandum opinion and order denying the petition in part and granting it in part. As is pertinent here,

proceedings before any court of the Maryland Judiciary, any reference in any statute, ordinance, or regulation applicable in Maryland to the Court of Appeals of Maryland shall be deemed to refer to the Supreme Court of Maryland[.]").

[9] It appears that Mr. Sydnor abandoned the claims in his *pro se* petition to the extent that they were not included in Claim 2 of his supplemental petition.

the postconviction court found that Mr. Sydnor "failed to rebut the statutory presumption of an intelligent and knowing waiver of" his claim of ineffective assistance of appellate counsel because he did not raise that claim "in any of the prior proceedings enumerated in" the waiver provision of the Uniform Post Conviction Procedure Act.[10] The postconviction court reasoned that, if Mr. Sydnor "believed that [a]ppellate counsel rendered ineffective assistance by failing to raise on appeal the issue of disclosure of the juvenile record of the State's main witness, he would have needed to raise that claim on appeal."

Nonetheless, the postconviction court reached the merits of Mr. Sydnor's appellate-ineffectiveness claim, finding that Mr. Sydnor failed to establish deficient performance by appellate counsel. The court reasoned that Mr. McCory had been adequately cross-examined and impeached about his credibility and that it was "reasonable to conclude" that appellate counsel "did not include the issue of disclosure of Mr. McCory's juvenile record because it would not be successful on appeal."

Mr. Sydnor filed an application for leave to appeal, which we granted. We will include additional facts in our analysis as necessary.

STANDARD OF REVIEW

"This Court reviews a post-conviction court's findings regarding ineffective assistance of counsel as a mixed question of law and fact. The factual findings of

[10] As we will discuss in more detail, waiver of claims in a postconviction proceeding is governed by Md. Code (2001, 2018 Repl. Vol.), Crim. Proc. ("CP"), § 7-106(b).

the post-conviction court are reviewed for clear error. The legal conclusions, however, are reviewed *de novo*." *McGhee v. State*, 482 Md. 48, 66 (2022) (quoting *Wallace v. State*, 475 Md. 639, 653 (2021) (cleaned up). We make our own "independent examination of the case[,]" [] "'re-weigh[ing] the facts as accepted in order to determine the ultimate mixed question of law and fact[.]'" *Coleman v. State*, 434 Md. 320, 331 (2013) (quoting *Harris v. State*, 303 Md. 685, 698 (1985)); *see also Strickland v. Washington*, 466 U.S. 668, 698 (1984) ("[B]oth the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact.").

DISCUSSION

I. Mr. Sydnor's Claim Of Ineffective Assistance Of Appellate Counsel Was Not Waived.

Mr. Sydnor contends that the postconviction court erred in concluding that his claim of ineffective assistance of appellate counsel was waived because it was not raised on direct appeal. The State agrees with Mr. Sydnor and concedes the issue.

Waiver of claims in postconviction is governed by Md. Code (2001, 2018 Repl. Vol.), Crim. Proc. ("CP"), § 7-106(b),[11] which provides that a rebuttable presumption of

[11] CP § 7-106(b) provides:

> (b)(1)(i) Except as provided in subparagraph (ii) of this paragraph, an allegation of error is waived when a petitioner could have made but intelligently and knowingly failed to make the allegation:
>
> 1. before trial;
>
> 2. at trial;

(continued)

waiver arises if a claim could have been raised in a prior proceeding but was not.[12] "By their very nature," however, claims of ineffective assistance of appellate counsel "generally cannot be presented until *after* the termination of direct appeal. . . . [and] they *necessarily* must be heard in collateral proceedings[.]" *Davila v. Davis*, 582 U.S. 521, 534 (2017) (emphasis in original). Mr. Sydnor's first opportunity to raise his claim of

> 3. on direct appeal, whether or not the petitioner took an appeal;
>
> 4. in an application for leave to appeal a conviction based on a guilty plea;
>
> 5. in a habeas corpus or coram nobis proceeding began by the petitioner;
>
> 6. in a prior petition under this subtitle; or
>
> 7. in any other proceeding that the petitioner began.
>
> (ii) 1. Failure to make an allegation of error shall be excused if special circumstances exist.
>
> 2. The petitioner has the burden of proving that special circumstances exist.
>
> (2) When a petitioner could have made an allegation of error at a proceeding set forth in paragraph (1)(i) of this subsection but did not make an allegation of error, there is a rebuttable presumption that the petitioner intelligently and knowingly failed to make the allegation.

[12] The rebuttable presumption of waiver applies only to a claimed violation of a right so fundamental that the knowing and voluntary waiver standard applies; as to any other rights, the failure timely to assert a right conclusively results in waiver. *See Curtis v. State*, 284 Md. 132, 147-50 (1978). The right to counsel is a fundamental right, so the knowing and voluntary waiver standard applies. *Id.* at 150-51.

ineffective assistance of appellate counsel was during the postconviction proceeding. As such, we agree that the postconviction court's waiver ruling was in error.

II. Mr. Sydnor's Appellate Counsel Did Not Render Ineffective Assistance.

A. Parties' Contentions

Mr. Sydnor contends that his appellate counsel rendered ineffective assistance by failing to challenge the trial court's denial of access to Mr. McCory's juvenile record for impeachment purposes. Mr. Sydnor argues that this claim "had the greatest chance of success on appeal[,]" because, he asserts, Mr. McCory was the State's main witness and the only witness to identify Mr. Sydnor, and Mr. McCory's juvenile record goes to "the heart of" Mr. McCory's credibility.

The State counters that Mr. Sydnor's appellate counsel did not perform deficiently and that Mr. Sydnor was not prejudiced. Although appellate counsel did not raise the issue of the trial court's refusal to grant access to Mr. McCory's juvenile record, the State contends that this claim would not have had a substantial probability of success on appeal because, even if the trial court had erred or abused its discretion in denying access to the juvenile records, the appellate court would have found the trial court's error to be harmless.[13]

[13] The State further contends that trial counsel failed to show good cause to order disclosure of Mr. McCory's juvenile records, which failure further supported appellate counsel's decision not to raise this claim on direct appeal.

B. Legal Principles Governing Claims of Ineffective Assistance of Appellate Counsel

Although there is no federal constitutional right to appeal, the United States Supreme Court has held that *if* a state provides for first-tier "appellate review of criminal convictions," then "the Due Process and Equal Protection Clauses" of the Fourteenth Amendment require the appointment of counsel for indigent defendants. *Halbert v. Michigan*, 545 U.S. 605, 610 (2005). That right is included in the right to effective assistance of counsel, *Evitts v. Lucey*, 469 U.S. 387, 396 (1985), and as such we apply the "the same framework" that we apply to claims of ineffective assistance of trial counsel: "the two-prong test of *Strickland*." *State v. Thaniel*, 238 Md. App. 343, 371 (2018). Under that framework, a claim of ineffective assistance consists of two elements: deficient attorney performance and prejudice. *Newton v. State*, 455 Md. 341, 355 (2017) (citing *Strickland*, 466 U.S. at 687). The defendant bears the burden to prove both elements. *Thaniel*, 238 Md. App. at 360.

First, to establish deficient performance, a "defendant must show that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. "Judicial scrutiny of counsel's performance [is] highly deferential," and, thus, there is a "strong presumption" that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 689-90. We "judge the reasonableness of counsel's challenged conduct . . . viewed as of the time of counsel's conduct"—not with the benefit of hindsight. *Id.* at 690.

Second, to establish prejudice, a defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been

different." *Gantt v. State*, 241 Md. App. 276, 288 (2019) (quoting *Strickland*, 466 U.S. at 694). A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." *Id.* "That standard is less demanding than proof by a preponderance of the evidence but requires more than merely showing 'that the errors had some conceivable effect on the outcome of the proceeding.'" *State v. Wallace*, 247 Md. App. 349, 359 (2020) (quoting *Strickland*, 466 U.S. at 693-94), *aff'd*, 475 Md. 639 (2021).

In the context of appellate counsel's performance, *Strickland*'s two prongs "naturally overlap because the questions of whether counsel's performance was adequate and whether it prejudiced the petitioner both will turn on the viability of the omitted claims, *i.e.*, whether there is a reasonable possibility of success." *Newton*, 455 Md. at 363 (quoting *Gross v. State*, 371 Md. 334, 350 (2002)). Appellate counsel need not "argue every possible issue" in order to render effective assistance. *Id.* "[A] brief that raises every colorable issue runs the risk of burying good arguments . . . . [and] appellate counsel need not (and should not) raise every nonfrivolous claim[.]" *Id.* (cleaned up) (alteration in original).

In sum, the *Strickland* analysis in this area focuses primarily on the omitted claim's probability of success: "the defendant must establish to a reasonable probability that but for his counsel's failure to raise an issue, he would have prevailed on his appeal." *Newton*, 455 Md. at 363. "Declining to raise a claim on appeal . . . is not deficient performance unless that claim was plainly stronger than those actually presented to the appellate court." *Davila*, 582 U.S. at 533.

C. The Request For Mr. McCory's Juvenile Records At Trial

In applying those principles to the omitted claim here, we turn to the underlying request for Mr. McCory's juvenile records. Mr. McCory was the only witness who identified Mr. Sydnor as the shooter,[14] and thus his testimony was important to the State's case. He testified pursuant to a plea agreement, the terms of which were fully disclosed to the jury. On the day that Mr. McCory was called as a witness, there was only time for direct examination. On direct, Mr. McCory testified that, when he first was detained by police officers, he provided a false name and date of birth to police because he "had a juvenile warrant."

On the morning of the next day of trial, Mr. Sydnor's trial counsel informed the court that, based upon that testimony, he had asked the prosecutor "to view Mr. McCory's juvenile record[.]" He then moved for a court order to that effect.[15] According to trial counsel, it had "become a discoverable issue" given Mr. McCory's testimony "that he was on juvenile probation." He therefore asked the court to provide "an

[14] Ms. Brosky heard the gunshot but did not observe the shooting. *Sydnor*, No. 2288, slip op. at 2. Nor was she able "to identify anyone" when shown a series of photographic arrays. *Id.* at 2 n.2. Although the murder weapon was recovered in a nearby alley, forensic examination was inconclusive and did not establish that Mr. Sydnor possessed the weapon. *Id.* at 7.

[15] At one point, Mr. Sydnor's trial counsel expressed surprise that the prosecutor could obtain those records, declaring, "If they're sealed then how is she able to get a copy of it?" The prosecutor at no time denied trial counsel's declarations that she possessed the juvenile records and appeared to acknowledge that she had them. Those records never were admitted into evidence (or proffered) in this case, either at trial or during the postconviction proceedings.

opportunity" to examine Mr. McCory's juvenile record "to see if the record confirms that."

The prosecutor replied that Mr. McCory "didn't say he was on probation" but, rather, said that "he had a warrant[.]" Trial counsel acknowledged that he had "no theory" about how the juvenile records could be admissible, but he argued nonetheless that he should be granted the right to examine them so that he could properly cross-examine Mr. McCory.

The prosecutor declared that "the State cannot turn over [a] juvenile record without an order" and reiterated that Mr. McCory had testified to his belief that there was a juvenile warrant for him, not that he was on probation. She further declared that "no part of his juvenile record comes in." In response, the court asked trial counsel that "if it's inadmissible and it can't be challenged on the basis of his juvenile record, what good --," and trial counsel interrupted, "He can be challenged based on his testimony."

Trial counsel then assured the court that he was not seeking to admit the juvenile records into evidence but, rather, he needed a chance to review them to determine whether Mr. McCory's testimony had been truthful. The court then asked whether juvenile records are discoverable, to which the prosecutor replied: "No. Unless an order is done by a juvenile judge." The trial judge replied, "Well, I'm a juvenile judge." The prosecutor further averred that the records she had did not "indicate whether there's a warrant or not." After hearing additional argument by the parties, the court denied the defense motion to examine Mr. McCory's juvenile record.

Counsel for both Mr. Ward and Mr. Sydnor then thoroughly cross-examined Mr. McCory. Mr. Ward's trial counsel concluded cross-examination by probing Mr. McCory's understanding of the plea agreement. In addition to drawing out the fact that Mr. McCory could have faced a life sentence in the absence of the plea agreement, Mr. Ward's trial counsel established that Mr. McCory was awaiting sentencing and that his "consistent" testimony was critical in determining whether he would be sentenced to eighteen months in a juvenile detention facility instead of the twenty-year sentence to which he was still exposed under the plea agreement.

Mr. Sydnor's trial counsel cross-examined Mr. McCory about inconsistencies between the statement he gave police, shortly after he had been arrested, and his in-court testimony and other evidence. For example, Mr. McCory initially had said that, on the morning of the murder, he had spoken via cell phone with the victim twice, but phone records indicated that, on the morning in question, there had been twelve calls.[16] Mr. Sydnor's trial counsel also probed inconsistencies between Mr. McCory's initial statements about whether he had fled the murder scene alone or with Mr. Ward or Mr. Sydnor and his subsequent trial testimony, as well as the false identification Mr. McCory initially provided to police when he was arrested. Mr. Sydnor's trial counsel also

[16] The number and timing of those calls was important because Mr. McCory had testified that Mr. Sydnor, accompanied by Mr. Ward, had given him the cell phone he was using on the day of the murder after Mr. McCory's phone had malfunctioned. That timing therefore established when Mr. McCory met Mr. Ward and Mr. Sydnor on the morning of the murder. Mr. McCory swapped out the SIM card in the phone Mr. Sydnor provided, enabling Mr. McCory to port his own phone number to the new handset.

examined Mr. McCory about his plea agreement and elicited Mr. McCory's acknowledgement that, by pleading guilty and testifying for the State, he faced substantially reduced charges.

D. Analysis

We need not decide whether the trial court was correct in denying defense counsel an opportunity to examine Mr. McCory's juvenile records. Even if we were to assume (without deciding) that the trial court erred or abused its discretion in so ruling, that does not necessarily mean that appellate counsel rendered deficient performance (or prejudiced Mr. Sydnor) by omitting the issue on appeal. If, for instance, the error was harmless, Mr. Sydnor would not have shown a reasonable probability that but for appellate counsel's failure to raise the issue, he would have prevailed on appeal. *See, e.g.*, *Hurst v. State*, 400 Md. 397, 418 (2007) ("[W]e will not reverse a lower court's judgment if the error was harmless. . . . [meaning] upon [our] own independent review of the record, [we are] able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict.") (cleaned up).

We begin with the observation that this claim was preserved.[17] Thus, this case boils down to a single issue—whether the assumed error in refusing to permit defense

[17] The State observes that, in requesting access to the juvenile records, trial counsel did not apprise the court of the relevant statute or the "good cause" standard, and the prosecutor misstated the relevant standard. Nonetheless, a fair reading of the record indicates that the "good cause" asserted by trial counsel was based upon his client's right to effective cross examination of an adverse witness, and the trial court considered and denied the motion. This satisfied both Md. Rule 4-323(c) (requiring "that a party, at the time the ruling or order is made or sought, makes known to the court the action that the party desires the court (continued)

counsel to examine Mr. McCory's juvenile records for impeachment purposes was harmless, or would have resulted in a reversal. This claim has a constitutional dimension as it implicates Mr. Sydnor's right to confrontation. On this record, however, we are convinced that any assumed error was harmless beyond a reasonable doubt.

Mr. McCory was thoroughly cross-examined, and his credibility was the central focus of that cross-examination. By Mr. McCory's own admission, the jury heard that, on the morning of the murder, he had been in phone contact with the victim and had arranged to sell him narcotics. The jury was fully aware, through both Mr. McCory's in-court testimony and his recorded statement to police, that he had given police a false name and date of birth when initially questioned. During cross-examination, Mr. McCory also acknowledged that his statements to police about the whereabouts of Mr. Sydnor and Mr. Ward during certain phone calls with the victim were inconsistent with his in-court testimony.

Moreover, the jury was fully informed about the existence and terms of Mr. McCory's plea agreement with the State. The parties stipulated that Mr. McCory and the State had entered into that agreement, and its terms were read in open court to the jury. Under that agreement, Mr. McCory, prior to Mr. Sydnor's and Mr. Ward's trial, pleaded guilty to robbery with a dangerous weapon and use of a handgun in the commission of a felony or crime of violence. In return for his testimony against Mr. Sydnor and Mr. Ward,

to take") and Md. Rule 8-131(a) (generally limiting appellate review to issues either "raised in or decided by the trial court"). As such, we reach the issue.

Mr. McCory would be sentenced to eighteen months' detention in a juvenile facility, and if Mr. McCory reneged on the agreement, he would still be exposed to a twenty-year sentence (the first five without the possibility of parole) in the Division of Correction.

During cross-examination, Mr. McCory acknowledged that he could have faced a life sentence in the absence of the plea agreement, that he was awaiting sentencing at the time of Mr. Sydnor's and Mr. Ward's trial, and that his "consistent" testimony was critical in determining whether he would be sentenced to eighteen months in a juvenile detention facility instead of the twenty-year sentence to which he was still exposed under the plea agreement. And finally, during cross-examination, Mr. McCory specifically acknowledged that he faced substantially reduced charges by testifying for the State.

The jury deliberated for slightly longer than a day, not an unusually long time for a murder trial involving multiple defendants. Early in the first day of deliberations, the jury asked a single question apparently unrelated to Mr. McCory.[18] And when the jury announced its verdicts, it appeared to find Mr. McCory to be credible, given that it acquitted Mr. Ward of murder but found Mr. Sydnor guilty.

To be sure, the United States Supreme Court has noted that an accused's "right to probe into the influence of possible bias in the testimony of a crucial identification witness" outweighs "[w]hatever temporary embarrassment might result to [the witness] or his family by disclosure of his juvenile record—if the prosecution insisted on using

[18] Specifically, the jury asked the court to clarify its instructions for first- and second-degree murder, unlawful use of a handgun, felony murder, and conspiracy. Appellate counsel explored this issue during direct appeal.

him to make its case[.]"[19] *Davis v. Alaska*, 415 U.S. 308, 319 (1974). But this case involves less of a limitation on cross-examination, and less importance of the juvenile record, than was present in *Davis*. There, a juvenile witness escaped all charges despite the recovery of stolen property near his residence. *Id.* at 310. During cross-examination, the witness flatly denied being concerned about possible police suspicion or being the target of similar law-enforcement questioning (a denial that the Court viewed as "highly suspect"). *Id.* at 313-14. Nonetheless, the defense could not challenge the witness's answer—including by cross-examining the witness about his probation status at the time—because of a trial court order shielding the juvenile witness's record. *Id.* at 314. Thus, the "witness was in effect asserting, under protection of the trial court's ruling, a right to give a questionably truthful answer to a cross-examiner pursuing a relevant line of inquiry; it is doubtful whether the bold 'No' answer would have been given . . . absent a belief that he was shielded from traditional cross-examination." *Id.*

Here, in contrast, the protection of Mr. McCory's juvenile record did not shield him from traditional cross-examination, and he could not boldly give "highly suspect" answers. Instead, Mr. McCory's initial attempt to deceive the police was quickly found out, and he admitted—both in his statement and on the witness stand—that he had given a false identification. His failed attempt at deception also did not directly inculpate either Mr. Sydnor or Mr. Ward. Mr. McCory's juvenile record simply did not have the same

[19] Likewise, the pertinent Maryland statute providing for presumptive shielding of juvenile records, Md. Code, Cts. and Jud. Proc. § 3-8A-27 (eff. Apr. 13, 2010), permits an exception if a court finds that "good cause" is shown. *Id.* § (a)(1).

import here as did the witness's record in *Davis*: regardless whether Mr. McCory was on probation at the time of his arrest, was subject to a warrant, or otherwise, those facts were only marginally relevant to the issues at trial, particularly considering everything else the jury heard that bore upon Mr. McCory's credibility.[20]

Accordingly, we are unpersuaded by Mr. Sydnor's assertion that the issue of Mr. McCory's juvenile records "went to the heart of the credibility of the sole witness to identify" him as the perpetrator of the offenses. Under these circumstances, we hold that, even if Mr. Sydnor's trial counsel had been allowed to examine the records and impeach Mr. McCory about whether or not there was a warrant out for him, there is no reasonable possibility that the jury's verdict in this case would have been different. *Dorsey v. State*, 276 Md. 638, 659 (1976). Any assumed error would have been deemed harmless beyond a reasonable doubt. *Dionas v. State*, 436 Md. 97, 118 (2013). Thus, Mr. Sydnor failed to show that appellate counsel's decision not to raise the issue of Mr. McCory's juvenile records was deficient performance or that it resulted in prejudice. As a result, Mr. Sydnor's claim of ineffective assistance of appellate counsel fails.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS ASSESSED TO APPELLANT.

[20] Mr. McCory did not escape all charges either, unlike the witness in *Davis*. And to the extent Mr. McCory was given a markedly lesser penalty than the others, the jury was made fully aware of that fact.