Circuit Court for Baltimore City
Case No. 211307017

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1391

September Term, 2017

STATE OF MARYLAND

v.

ANTHONY HOOKS

Beachley,
Shaw Geter,
Fader,

JJ.

Opinion by Beachley, J.

Filed: October 23, 2018

*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 September 2012, Anthony Hooks, appellee, was tried by a jury in the Circuit Court for Baltimore City and convicted of possession of heroin with intent to distribute; possession of heroin; two counts of first-degree assault; possession of a regulated firearm by a prohibited person; possession of a firearm while drug trafficking; and unlawfully wearing, carrying, or transporting a handgun. The court sentenced appellee to an aggregate term of forty-five years' imprisonment. In an unreported opinion, this Court affirmed appellee's convictions, but remanded the case to the circuit court to correct an illegal sentence imposed with respect to the possession of a regulated firearm by a prohibited person.

On November 10, 2016, appellee, through counsel, filed an amended petition for post-conviction relief.[1] The post-conviction court held an evidentiary hearing in January 2017 and, on August 7, 2017, issued a written opinion and order granting the petition and ordering a new trial. We granted the State's application for leave to appeal that decision.

The State presents a single question for review, which we have rephrased:

> Did the post-conviction court err in finding that trial counsel's performance was constitutionally deficient because he failed to request a "missing evidence" jury instruction?

[1] Appellee filed a *pro se* petition for post-conviction relief on June 16, 2016. The claims raised in the *pro se* petition are not at issue on appeal.

(continued)

For the following reasons, we hold that the post-conviction court erred and accordingly reverse.[2]

FACTS AND PROCEEDINGS

On the evening of August 29, 2011, appellee assaulted Kevin Wilson over an outstanding drug-related debt. That night, at approximately 7:00 p.m., Wilson saw appellee walking toward him with a gun near the 1000 block of West Pratt Street in Baltimore, Maryland. Wilson ran into a house at 1110 West Pratt Street and called 911.

Officer John Clewell received the dispatch related to Wilson's 911 call. The dispatch described the suspect—an individual who had pointed a firearm at another person in the 1000 block of West Pratt Street—as a black male wearing a black shirt and blue jeans. Officer Clewell drove to the area and, within moments, saw a man on South Carey Street (later identified as appellee) matching the description from the 911 call. After circling the block, Officer Clewell exited his patrol vehicle and approached appellee. Officer Clewell told appellee to "come here," and appellee started to run. As appellee was fleeing, Officer Clewell claimed that appellee pulled out a silver handgun. Upon seeing the handgun, Officer Clewell drew his firearm and fired four shots at appellee, all of which missed. According to Officer Clewell, as he fired his weapon, appellee tossed his handgun into the street and threw himself to the ground. Officer Clewell stated that he found

[2] The State has not appealed the post-conviction court's decision to grant appellee leave to file a belated motion for modification or reduction of sentence. That decision remains undisturbed.

appellee's handgun in the street and another officer arrested appellee. As a result of a search incident to arrest, the police recovered twenty-three gel caps of heroin and $653 from appellee. A police crime lab technician at the scene retrieved the handgun that Officer Clewell asserted appellee threw to the ground.

A.

The Trial

At trial, appellee argued that the police planted the gun in order to justify Officer Clewell's use of his firearm. Appellee insisted that he did not have a gun that night and argued that Officer Clewell could not have seen a gun in the detail he described. An issue at trial, and now relevant in this appeal, was whether police had reviewed CitiWatch video surveillance footage to verify that appellee was carrying a gun when Officer Clewell confronted him. At trial, Officer Clewell testified that after the arrest, he did not check the camera at Pratt and Carey Streets because standard police procedure requires that detectives take over an investigation whenever an officer discharges a weapon.

Detective David Bomenka interviewed appellee after his arrest. Appellee confessed to possessing heroin, but was confused about why Officer Clewell shot at him. Regarding the use of street cameras during an investigation, Detective Bomenka only viewed the CitiWatch camera at Pratt Street and Monroe Street[3] in order to identify the suspect's and victim's modes of travel. Detective Bomenka confirmed that he did not check the

[3] This intersection is approximately four or five blocks from where Wilson reported the assault.

CitiWatch camera at Pratt and Carey Streets. According to him, investigators focused on getting statements from witnesses because the location was not in dispute and the primary focus was the Wilson assault. Neither party offered any further testimony concerning how the police department uses CitiWatch generally, or specifically, in investigating incidents where an officer discharges a weapon.

Appellee's trial counsel did not request a "missing evidence" instruction related to the CitiWatch footage. The circuit court judge instructed the jurors that they "should consider [the evidence] in light of [their] own experiences" and that they "may draw any reasonable conclusion from the evidence that [they] believe[d] to be justified by common sense and [their] own experiences." The jury was also instructed to "apply [their] own common sense and life experiences" and "carefully consider all of the testimony and evidence" to assess the witnesses' credibility.

During closing argument, appellee's trial counsel reminded the jury of the planted gun defense without objection from the State. He reminded the jury that "it all happened" at Pratt Street and Carey Street, yet the police only checked the camera at Pratt Street and Monroe Street. Drawing the jury's attention to the absence of camera footage for Pratt and Carey Streets, counsel argued:

> One thing they don't want to see is Officer Clewell firing any weapon at somebody who doesn't toss a gun. That's evidence that they had to establish. Now, nobody looked at [the footage]. They don't have anybody who came in and said they looked at them. Even Officer Clewell . . . said he . . . wasn't even sure. He walked into the room when they were looking at them. Somebody was looking at something. He doesn't know what they were looking at. It might not even have been [this] case; but . . . there's nobody here to say.

* * *

> We want to see: Hey, here it is; you decide if there's anything on those cameras. They didn't even do that[.] . . . They didn't even look at them. And, he . . . look[s] at the one at Monroe, and says: Nothing on that. Oh, I wonder why? . . . Of course there's nothing on there.

As stated above, on September 28, 2012, appellee was found guilty of possession with intent to distribute heroin; first-degree assault of both Wilson and Officer Clewell; wearing, carrying, and transporting a handgun on person; possession of a firearm while drug trafficking; and possession of a firearm by a prohibited person. The circuit court sentenced appellee to an aggregate term of forty-five years. Appellee appealed and on April 7, 2014, this Court affirmed the convictions, but remanded the case for resentencing as to illegal possession of a regulated firearm. *Hooks v. State*, No. 1994, Sept. Term 2012 (filed Apr. 7, 2014).[4] The circuit court resentenced appellee on December 20, 2014.

B.

Post-Conviction Proceedings

On June 15, 2016, appellee filed a *pro se* Petition for Post-Conviction Relief.[5] On November 3, 2016, the Office of the Public Defender filed an Amended Petition for Post-Conviction Relief on appellee's behalf. In the Amended Petition, appellee argued that he

[4] On direct appeal, appellee challenged the trial court's refusal to instruct the jury on the limited consideration it could give appellee's prior conviction; giving the jury "unfettered discretion" to consider an inculpatory statement when there was sufficient evidence to question the statement's voluntariness; and the legality of the sentence. *Hooks*, slip op. at 1-2.

[5] As previously noted, the claims raised in the *pro se* petition are not relevant to this appeal.

received ineffective assistance of counsel because of (1) counsel's failure to move for dismissal of the indictment or request a missing evidence jury instruction based on the State's bad faith destruction of evidence, and (2) counsel's failure to file a motion for modification of sentence contrary to appellee's request. Appellee's first argument was based on the failure of the police to preserve the CitiWatch camera footage from Pratt Street and Carey Street, the closest camera to the location where Officer Clewell shot at appellee and where appellee went to the ground. Because CitiWatch footage is automatically recorded over after twenty-eight days, appellee argued that the failure to preserve or even look at this footage was evidence of bad faith by the police. According to appellee, the camera footage for Pratt and Carey Streets was essential to his case because it would have shown whether he had thrown a gun when he went to the ground. He asserted that the State routinely uses camera evidence to prosecute cases, bolstering his contention that the police normally preserve such evidence. Furthermore, he asserted that the State was in the unique position to preserve the evidence that would have been destroyed after twenty-eight days. Appellee therefore claimed that trial counsel's failure to request a missing evidence jury instruction constituted ineffective assistance of counsel. Appellee also claimed that he received ineffective assistance because trial counsel failed to file a motion for modification of sentence pursuant to Md. Rule 4-345(e) despite appellee's "impression" that counsel would file such a motion on his behalf.

The post-conviction court held an evidentiary hearing in January 2017. At the hearing, appellee introduced the Baltimore Police Department's Video Surveillance

Procedures from March 27, 2015, into evidence for the limited purpose of demonstrating that, absent a request, footage is recorded over after twenty-eight days. Because the camera footage for Pratt and Carey Streets had been destroyed long before his trial in September 2012, appellee asserted that his trial counsel was constitutionally deficient by failing to request a missing evidence jury instruction.

In its August 2017 opinion, the post-conviction court agreed that counsel's failure to request a missing evidence instruction constituted ineffective assistance. The court stated that the destroyed CitiWatch camera footage satisfied the "exceptional case" threshold to warrant a missing evidence instruction as articulated in *Cost v. State*, 417 Md. 360 (2010), because the footage was "highly relevant and crucial to [appellee's] case" and destroyed by the State without being reviewed. In the post-conviction court's view, the footage was directly relevant because it could have shown whether appellee had a gun, a key element in most of the charges against him. The court determined that the camera footage "was reasonably available to the police at the time of arrest" and that "the police had control over the . . . cameras." Under these circumstances, the court opined that "the importance of this 'missing evidence' becomes almost a 'missing witness' to a crime." The court therefore concluded that trial counsel rendered ineffective assistance by failing to request a missing evidence instruction.

As part of its analysis, the court determined that the holding in *DeWolfe v. Richmond*, 434 Md. 444 (2013), applied retroactively. Accordingly, the court concluded that appellee's right to counsel attached at his initial appearance on August 30, 2011. In

the post-conviction court's view, had appellee been provided counsel at his initial appearance or shortly thereafter, counsel could have taken action to preserve the camera surveillance footage. The court therefore concluded that the failure to provide counsel resulted in "extreme prejudice" to appellee's case.

Notably, the post-conviction court did not find that the police had acted in bad faith. Instead, the court determined that, at most, the police were negligent in their handling of the investigation. Nevertheless, the court found that the destruction of the camera footage required counsel to request a missing evidence jury instruction. The court therefore granted appellee's request for post-conviction relief and ordered a new trial. In addition, the court granted appellee's request to file a belated motion for modification or reduction of sentence. The State filed a timely Application for Leave to Appeal on August 31, 2018, which we granted.

DISCUSSION

A.

Ineffective Assistance of Counsel

Maryland courts apply the *Strickland* standard to determine whether counsel's representation was ineffective. *Bowers v. State*, 320 Md. 416, 423 (1990). Under *Strickland*, a "defendant must show that counsel's performance was deficient" and, that "the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The errors made by trial counsel must be "so serious as to deprive the defendant of a fair trial" and "[u]nless a defendant makes both showings, it cannot be said

that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable." *Id*.

Strickland's first prong examines whether the attorney performed "reasonabl[y] under prevailing professional norms." *Id*. at 688. Maryland courts presume that trial counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *State v. Newton*, 230 Md. App. 241, 250 (2016), *aff'd* 455 Md. 341 (2017) (quoting *Strickland*, 466 U.S. at 690). Without evidence to the contrary, "the court presumes counsel's representation was professionally competent and 'derived not from error but from trial strategy.'" *Harris v. State*, 160 Md. App. 78, 99 (2005) (quoting *State v. Peterson*, 158 Md. App. 558, 584 (2004)). Counsel's performance is evaluated using the information available to him or her at the time of trial. *Strickland*, 466 U.S. at 689. The court should make every effort to "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. . . . [A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]" *Id*.

To satisfy the second prong, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. at 694. The error must have had more than a conceivable effect on the trial. *Bowers*, 320 Md. at 425. Maryland courts have defined the term

"reasonable probability" as "substantial possibility." *Id*. at 426-27. This standard requires that there be a "substantial or significant possibility that the verdict of the trier of fact would have been affected." *Id*. at 426 (quoting *Yorke v. State*, 315 Md. 578, 588 (1989)). The ultimate inquiry is whether "counsel's errors were so serious as to deprive [the petitioner] of a fair trial, a trial whose result is reliable." *Oken v. State*, 343 Md. 256, 284 (1996) (quoting *Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993)). A court should "consider the totality of the evidence before the judge or jury." *Strickland*, 466 U.S. at 695.

Questions concerning ineffective assistance of counsel are mixed questions of law and fact. *Newton v. State*, 455 Md. 341, 351 (2017) (citing *Harris v. State*, 303 Md. 685, 698 (1985)). The factual findings of the post-conviction court are upheld unless they are clearly erroneous. *Id*. Legal conclusions are subject to this court's independent analysis under a *de novo* standard. *Peterson*, 158 Md. App. at 585.

B.

Missing Evidence Instruction

A trial court must give a requested jury instruction when "(1) the instruction is a correct statement of law; (2) the instruction is applicable to the facts of the case; and (3) the content of the instruction was not fairly covered elsewhere in instructions actually given." *Cost*, 417 Md. at 368-69 (quoting *Dickey v. State*, 404 Md. 187, 197-98 (2008)); *see also* Md. Rule 4-325(c). However, "[i]nstructions as to facts and inferences of fact are normally not required." *Patterson v. State*, 356 Md. 677, 684 (1999). Evidentiary

inferences are "not based on a legal standard but on the individual facts from which inferences can be drawn" and do "not normally support a jury instruction." *Id*. at 685.

Resolution of the case at bar requires us to carefully examine *Patterson* and *Cost*. In *Patterson*, Patterson was charged with possession of cocaine with intent to distribute and various other driving offenses after the police, pursuant to a traffic stop, discovered 4.93 grams of cocaine in the pocket of a jacket recovered from the trunk of the car. *Id*. at 680-81. Because the police did not collect the jacket as evidence, the State introduced at trial a photograph of the jacket instead of the jacket itself. *Id*. at 681. Patterson's defense was that the jacket did not belong to him. *Id*. at 682. Patterson's attorney requested a missing evidence instruction that would allow the jury to infer that, because the State could not produce the jacket, the evidence would have been unfavorable to the State. *Id*. The State claimed that the jacket was "not the kind of evidence typically held" and it did not know the whereabouts of the jacket at the time of trial. *Id*. at 681-82. The trial court refused to give the instruction. *Id*. However, the jury was instructed to "draw any reasonable inferences or conclusions from the evidence that [it] believe[d] to be justified by common sense and [its] own experiences" and trial counsel was permitted to call the jury's attention to the missing jacket during closing argument. *Id*. at 689-90.

On appeal, the *Patterson* Court held that "regardless of the evidence, a missing evidence instruction generally need not be given; the failure to give such an instruction is neither error nor an abuse of discretion." *Id*. at 688. The Court further held that the failure to give the missing evidence instruction did not constitute a denial of due process. *Id*. at

699. The Court adopted the standard set forth by the Supreme Court in *Arizona v. Youngblood*, 488 U.S. 51 (1988), holding that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Patterson*, 356 Md. at 695-96 (quoting, *Youngblood*, 488 U.S. at 58). Bad faith cannot be shown by negligence alone. *Id.* at 697. The "intent or motive behind the destruction of the potential evidence is generally a determinative factor[.]" *Id*. at 698.

Eleven years later, the Court of Appeals again considered the necessity of giving a missing evidence instruction. In *Cost*, a jury found Cost guilty of reckless endangerment for stabbing a fellow inmate, Brown, at a Maryland correctional facility. *Cost*, 417 Md. at 368. At trial, the State relied on photographs of the victim's cell as well as photographs of a blood covered towel and mattress in the cell. *Id*. at 365-66. All of the photographs purported to show the victim's blood loss resulting from the attack. *Id*. Cost requested a missing evidence instruction based upon the undisputed fact that prison staff had cleaned the cell and had destroyed all physical evidence in the cell, including the towels and bedding. *Id*. at 366-67. Cost's defense was that the liquid in the cell was not blood, but rather red Jell-O, and, in furtherance of that defense, asserted that the wounds the victim sustained were inconsistent with the purported amount of blood loss. *Id*. at 365-66 n.1. Cost noted that no weapons or contraband were found on him, nor were any such items found in or near his cell unit. *Id*. at 365. Cost also challenged the severity of the alleged injuries, using the victim's medical records to show that the victim's wound was

"'approximately 1 inch long [and] only penetrated the skin' and was 'approximately 3 millimeters in length[,]'" and that the victim was treated with over-the-counter pain relievers. *Id*. The trial court refused to give a missing evidence instruction. *Id*. at 368.

On appeal, the Court of Appeals affirmed that "Maryland's *constitutional protections* do not extend beyond *Youngblood*, nor apply in cases where the defendant cannot show bad faith by the police." *Id*. at 378. The Court then turned its attention to Maryland evidence law. *Id*. It stated,

> Yet our holding in *Patterson* did not definitively establish the limits of *substantive Maryland evidence law*, the other theory which may support a missing evidence instruction. In addressing the requirements of our Maryland evidence law, we stated in *Patterson* that trial courts "need not instruct . . . [on] *most* evidentiary inferences," and that "a party *generally* is not entitled to a missing evidence instruction," the very constructions of which imply that this is not an absolute rule. . . . This case may constitute the exceptional circumstance that the *Patterson* Court foresaw, one which compels a missing evidence jury instruction relating to an evidentiary inference. The emerging consensus among the states which have considered the issue—that to insure a fair trial, the missing evidence jury instruction in a criminal case should not be limited to the *Youngblood* bad faith standard—persuades us that we should take a careful look through the door that *Patterson* left open.

Id. at 378-79 (internal citations omitted). After noting that the "unusual facts" in *Cost* were in "stark contrast" to those in *Patterson*, the Court held that a missing evidence instruction was required. *Id*. at 380, 382. The Court stated that the linens and clothing taken from the cell, as well as the allegedly blood-stained floor, were (1) highly relevant to the crime charged, (2) the type of evidence that would normally be collected and analyzed, and (3) were in the sole custody of the State. *Id*. at 380. The Court noted that the evidence was

not simply "cumulative, or tangential – it [went] to the heart of the case." *Id*. The Court stated:

> The evidence destroyed while in State custody was highly relevant to Cost's case. A factual issue at trial was whether Brown was, indeed, stabbed, and whether the alleged stabbing caused significant bleeding, as Brown insisted. While Cost was able to shed doubt on Brown's claim through Brown's medical records, he was prevented from supporting his case with laboratory analysis of Brown's clothing, towel, sheets, and the red substance on the floor of Brown's cell. Such evidence might well have created reasonable doubt as to Cost's guilt. This missing evidence could not be considered cumulative, or tangential—it goes to the heart of the case. We are persuaded that under these circumstances a "missing evidence" instruction, which would permit but not demand that the jury draw an inference that the missing evidence would be unfavorable to the State, should have been given.

Id. at 380-81. The Court held that, under the circumstances, merely allowing counsel to argue the adverse inference from the destruction of evidence was insufficient to protect the interests of justice. *Id*. at 382.

Nevertheless, the *Cost* Court was careful to limit its holding:

> Our holding does not require a trial court to grant a missing evidence instruction, as a matter of course, whenever the defendant alleges non-production of evidence that the State might have introduced. Instead, we recommit the decision to the trial court's discretion, but emphasize that it abuses its discretion when it denies a missing evidence instruction and the "jury instructions, taken as a whole, [do not] sufficiently protect the defendant's rights" and "cover adequately the issues raised by the evidence." *Fleming v. State*, 373 Md. [426], 433 [(2003)]. In another case, where the destroyed evidence was not so highly relevant, not the type of evidence usually collected by the state, or not already in the state's custody, as in *Patterson*, a trial court may well be within its discretion to refuse a similar missing evidence instruction.

Id. at 382.

C.

Parties' Contentions

The State contends that the post-conviction court erred in holding that trial counsel was ineffective for failing to request a missing evidence instruction because the circumstances of this case do not rise to the "exceptional" level required under *Cost*. The State argues that appellee failed to establish that the cameras were working at the time of the incident, that they were pointed at the scene, or that the cameras would have recorded the incident with enough clarity to determine whether the handgun was thrown or planted. Indeed, the State argues that appellee failed to satisfy his burden to show that trial counsel was ineffective because he provided *no evidence* that the cameras were working or would have recorded the incident.

Furthermore, the State contends that, contrary to the situation in *Cost*, the footage was not something the police routinely collected under the circumstances. According to the State, the police do not have a policy that requires them to keep CitiWatch footage, especially when an officer observes the incident firsthand. The State notes that, in this particular case, Officer Clewell was at the scene, negating the need to review the footage. The State further contends that the present case is easily distinguishable from *Cost*. In *Cost*, preservation of the allegedly blood-stained linens and clothing would have allowed the defense to conclusively determine the issue that went to the core of the defense, i.e. whether the scene depicted by the State was actually a blood-stained cell. The missing

camera evidence in this case, the State contends, would not have conclusively determined whether appellee had a gun.

Finally, the State contends that appellee did not establish that trial counsel's failure to request a missing evidence instruction was prejudicial under *Strickland*. The State asserts that, even without the instruction, appellee's trial counsel was able to "fully and robustly place the desired inference before the jury." The State points out that trial counsel vigorously argued, without objection, that the testimony of Officer Clewell was insufficient to convict appellee in light of the State's failure to produce video evidence from the CitiWatch cameras. The State therefore posits that the omission of a missing evidence instruction did not affect the outcome of appellee's trial.

Appellee contends that the post-conviction court was correct when it held that the circumstances in this case were "exceptional" enough to meet the *Cost* threshold, thus requiring a missing evidence instruction. According to appellee, that threshold was met because the CitiWatch footage was destroyed by the State, it was "reasonably available" at the time of arrest, and appellee had no way of accessing the evidence without counsel, which was not made available until after the evidence was destroyed.

Appellee claims that the lack of a missing evidence instruction was not compensated for by trial counsel's unrestricted ability to argue to the jury that it could make adverse inferences against the State due to the missing evidence. In appellee's view, closing argument cannot "correct the omission of the requested instruction." Because the video could have potentially captured the core issue in the case—whether appellee had a handgun

when confronted by Officer Clewell—appellee argues that a missing evidence instruction was required under *Cost*.

D.

Analysis

Appellee argues that the post-conviction court correctly determined that the CitiWatch camera footage satisfied the *Cost* requirements of being highly relevant, the type of evidence normally collected, and within the exclusive control of the State. Neither party disputes that the footage was in the sole possession of the State. However, "this fact alone is not sufficient to put [a] case in the category of *Cost*." *Gimble v. State*, 198 Md. App. 610, 632 (2011). We conclude that, because appellee failed to show that the camera footage in this case was *highly* relevant or the type usually collected by the State, this case falls within the general rule articulated in *Patterson*. Under that rule, a missing evidence instruction would not be required, if requested, under Maryland evidentiary law. We explain.

In *Gimble*, we concluded that a missing evidence instruction was not required. *Id.* at 632. There, the defendant crashed his vehicle while attempting to avoid a police traffic stop. *Id*. at 614. At the time of the crash, a police officer observed items falling from the defendant's vehicle. *Id*. At the scene, the police recovered a backpack containing illicit drugs, drug paraphernalia, and personal items. *Id*. The defendant was charged, *inter alia*, with possession with intent to distribute marijuana and cocaine. *Id*. at 613.

Before trial, the defendant sought access to the backpack, but he was advised that the backpack and the personal items contained therein had been mistakenly destroyed pursuant to a routine purge of the evidence room. *Id*. at 615-17. The police also stated that the property room never received the crash scene photographs taken by the officer, but asserted that it would be unusual for those types of photographs to be submitted for safekeeping. *Id*. at 617. The trial court declined to give the defendant's "missing evidence" instruction for those items. *Id*. at 626.

On appeal, the defendant contended that the destroyed evidence—the backpack, the personal items contained in the backpack, and the crash scene photographs—was central to his defense and therefore fell within the exception to the general rule that the court need not instruct the jury on evidentiary inferences. *Id*. at 630-31. We disagreed, concluding that while the missing evidence was "potentially useful" to the defense, it was not "central" to the defense case. *Id*. at 631-32. We further noted that the evidence was not of the type ordinarily "subjected to forensic testing." *Id*. at 631. We therefore concluded that the court did not abuse its discretion in declining to give a "missing evidence" instruction. *Id*; s*ee also Grymes v. State*, 202 Md. App. 70, 113 (2011) (holding that a missing evidence instruction was not required for a cell phone recovered from appellant's jacket pocket because it was "neither central to the defense case nor of the type ordinarily subjected to forensic testing.").

Here, appellee presented no evidence at either the trial or the post-conviction hearing to demonstrate what the CitiWatch footage, if preserved, would have definitively

revealed. Appellee presented no evidence that the camera at Pratt and Carey Streets was functional that evening or, even if it were, that it would have captured the incident. We do not know whether the camera was fixed or panning the area, nor do we know anything about the camera's resolution. As in *Gimble*, we acknowledge that footage from the camera at Pratt and Carey was "potentially useful" to the defense. 198 Md. App. at 632. However, appellee failed to meet his burden of demonstrating that the CitiWatch camera would have effectively and clearly captured whether appellee possessed a gun. Absent such evidence, we fail to see how the camera footage could be *highly* relevant as contemplated by *Cost* because, unlike *Cost*, it is uncertain whether the missing evidence would prove a point critical to appellee's defense, *i.e.* whether he threw a gun.

Appellee likewise introduced no evidence establishing that CitiWatch camera footage is the type of evidence generally collected by the State. In *Cost*, the linens, clothing and floor stains represented the type of evidence normally collected and analyzed by investigators. *Cost*, 417 Md. at 380. Later, in *Grymes*, this Court held that a missing evidence instruction was not appropriate because the defendant "did not present any evidence below that the [police] ordinarily would have preserved the phone or examined the voice mail and text messages prior to returning it to its rightful owner." *Grymes*, 202 Md. App. at 113. Here, Detective Bomenka testified at trial that he looked at the CitiWatch camera at Pratt and Monroe to determine the victim's and appellee's travel paths. However, he indicated that the investigation quickly moved to obtaining statements from witnesses. Neither party offered any further testimony concerning how the police

department uses CitiWatch cameras in their investigations generally, or more specifically, in investigating police shootings or crimes where there may be eyewitnesses. At the post-conviction hearing, appellee only offered the Baltimore Police Department's video surveillance procedures from March 2015 for "the limited purpose of showing that the Citywatch [sic] Camera . . . stores digital for up to 28 days and that can be stored for longer periods of time if the officer requests it." That the camera footage is only stored for twenty-eight days says nothing about whether the evidence is typically collected by the police.[6]

We therefore hold that the post-conviction court erred in determining that the destroyed CitiWatch camera footage fell within the *Cost* exception that mandates giving a requested missing evidence jury instruction. In our view, while the camera footage was potentially useful, appellee failed to establish that the camera at Pratt and Carey would likely exculpate appellee. Moreover, appellee failed to demonstrate that the CitiWatch camera footage is the type of evidence ordinarily collected by the State. Because the trial court, based on the record before us, would not have been required to give a missing evidence instruction even if requested, we fail to discern how trial counsel could have been

[6] We note that Plaintiff's Exhibit 3, which was admitted at the post-conviction hearing and titled "Policy 1014 Video Surveillance Procedures, 27 March 2015," provides directives for police officers to follow concerning use and preservation of CCTV footage. However, because Policy 1014 was issued in March 2015, more than three years after appellee's arrest, the document was offered for the sole purpose of establishing the storage capabilities of the camera system.

(continued)

deficient in failing to request such an instruction. The post-conviction court erred in concluding otherwise.[7,8]

Even if we were to assume that appellee satisfied the deficiency prong, he failed to introduce evidence sufficient to satisfy *Strickland*'s prejudice prong. In order to establish prejudice, appellee must "show that: (1) but for [the error], the outcome of [the] trial would have been different; or (2) that the [error] rendered his trial fundamentally unfair." *Newton*, 455 Md. at 357. During closing argument, defense counsel argued to the jury that the police placed a handgun at the scene of appellee's arrest in order to justify Officer Clewell's firing of his weapon. To bolster that argument, defense counsel was permitted substantial leeway to articulate the inference the jury should make based on the lack of camera evidence. In closing, defense counsel argued:

> Why is it that Officer Bomenka, the guy who takes the statement from [appellee], . . . looks at one camera. Cameras in the area? Yes. Cameras were checked? Yes. What cameras were checked? West Pratt and Monroe. Give me a break. Who -- who has that available to them? The police. Not us, not [appellee]. Why in the world would he look at a camera at Monroe and Pratt, when the incident occurred down here?

[7] Both parties agree that the sole issue for our review is whether appellee's trial counsel was deficient by failing to request a missing evidence instruction. Accordingly, though we doubt the correctness of the post-conviction court's ruling that *Richmond* applies retroactively to appellee's case, that determination is immaterial to our analysis. In short, even if we presumed 1) that counsel should have been appointed at appellee's initial appearance on August 30, 2011, and 2) that such counsel would have taken action to preserve the camera footage, we cannot conclude on this record that the camera footage would have clearly shown whether appellee had a gun.

[8] Because the post-conviction court expressly found that the police had not acted in bad faith, the failure to preserve the CitiWatch camera footage did not violate any constitutional due process protections afforded appellee. *See Cost*, 417 Md. at 378.

> One thing they don't want to see is Officer Clewell firing any weapon at somebody who doesn't toss a gun. That's evidence that they had to establish. Now, nobody looked at those. They don't have anybody who came in and said they looked at them. . . .
>
> Their burden to bring somebody in here and show -- in fact, they could've shown it. They had it for some period of time before they destroy it. They should have brought that in, regardless of what it showed. Oh, here it is, ladies and gentlemen; see, we tried to find it. It's not there. . . .
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> * * *
>
> They didn't even look at [the cameras]. And, he does look at the one at Monroe, and says: Nothing on that. Oh, I wonder why? The crime occurs in downtown in the inner harbor, and they go look at a camera at Fells Point. Of course there's nothing on there.

Defense counsel's argument unequivocally implored the jury to infer that the lack of camera evidence should be held against the State. Moreover, neither the trial court nor the prosecutor interfered in defense counsel's argument that the jury could make inferences favorable to appellee from the absence of camera evidence. Though we acknowledge that a court's instruction has "greater gravitas" than argument by counsel, *Cost*, 417 Md. at 381, we are unconvinced that giving a missing evidence instruction in this case would have led to a different verdict as required by *Strickland*.

Finally, we note that Wilson corroborated Officer Clewell's testimony that appellee had a gun, and in fact, a gun was recovered at the scene. Accordingly, we conclude that, even assuming satisfaction of *Strickland's* deficiency prong, appellee failed to establish a reasonable probability that, but for trial counsel's failure to request a missing evidence instruction, the verdict would have been different.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY GRANTING APPELLANT A NEW TRIAL REVERSED. COSTS TO BE PAID BY APPELLEE.