Circuit Court for Baltimore City
Case Nos. 207075043, 207075044, 207075045

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1415

September Term, 2019

EDWARD WILLIAMS

v.

STATE OF MARYLAND

Nazarian,
Beachley,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed: December 20, 2021

On January 22, 2007, Amanda Linthicum, a Baltimore City police officer, and her five-year-old daughter were walking toward the house of Officer Linthicum's mother in Baltimore City. A man walked up to them, grabbed Officer Linthicum's daughter, held a gun to her head, and demanded that Officer Linthicum give him her money. Officer Linthicum handed $150 in cash to the assailant and he walked away. Officer Linthicum later identified Edward Williams, Jr., in a photo array, as the man who robbed them.

After a trial on December 17–19, 2007, a jury in the Circuit Court for Baltimore City convicted Mr. Williams of armed robbery and other charges. The court sentenced him initially to eighty-five years' incarceration, but reduced the sentence later to forty years. On October 9, 2014, Mr. Williams filed a *pro se* petition for postconviction relief, and on March 31, 2015, filed a supplemental petition through counsel. After two hearings (before different judges about a year apart), the circuit court issued a memorandum opinion and order denying the petition, except with respect to his counsel's failure to file a motion for modification or reduction of sentence. We granted Mr. Williams's application for leave to appeal the denial of postconviction relief, and we affirm the judgment of the circuit court.

I. BACKGROUND

A. The Trial.

Officer Linthicum testified that on the morning of January 22, 2007, she drove from her home in Baltimore County to drop off her daughter, A, at her mother's house on Carrollton Avenue in Baltimore City, so that her mother could take A to school and Officer Linthicum could go to work. It was snowing and A's school, a private school in the neighborhood, was opening late. Officer Linthicum testified that she parked her car in the

700 block of Carrollton Avenue. As she and her daughter walked toward her mother's house, a man approached them with a gun in his hand and said, "give me the money." At one point, she testified that the man grabbed A by the hood of her coat and put a gun "to her face;" at another point, "[h]e held the gun to my daughter's head." Officer Linthicum testified that she reached into her pocket under her coat to retrieve her money, and in the process revealed her police uniform, handcuffs, and service weapon and magazine. When the man saw this, she said, his "eyes got real big, as to say oh-oh." She testified that she gave him $150 in cash and he "walked up the street." She described his pace as a "slow walk," and said that he walked north on Carrollton, then east on Lanvale. After the robbery, she "grabbed [her] daughter and walked to [her] mother's house because [she] couldn't find [her] cell phone to dial 911."

Once inside her mother's house, Officer Linthicum called the police, and that day went to the district police station and was interviewed by a detective, Darlene Early, and a sergeant. She described the process by which a computer sketch—she called it an "e-fit drawing"—of the assailant was made. She described how she was shown a single picture on the day of the robbery and later was shown a photo array. She said that she didn't recognize anyone in the initial photos, but made an identification a few days later (January 26), when she was shown another photo array.

She described the man who robbed her as a black man with a medium complexion, five feet eight inches to six feet tall, with a mustache, a light beard, and "like a protruding forehead and eyebrows." Officer Linthicum identified Mr. Williams in open court as the

man who robbed her. She testified that she had never seen him before the day of the robbery.

A, who was five years old at the time of the robbery and six at the time of trial, testified that she remembered a day the previous winter when she was with her mother, heading to her grandmother's house, so that her mother could go to work and her grandmother could take her to school. She testified that they were about three houses down from her grandmother's house when a man came up to them, said "hello, how are you doing," and "give me the money." She testified that her mother said, "all right, all right, I'll give you the money," and when the man put a gun to the back of her head, she "started screaming." She testified that her mother gave the man money, and then the two of them walked to her grandmother's house.

A described the man who approached her and her mother as a black man, taller than her mother, who was wearing a tan Dickies jumpsuit, boots, a black hat, and a black hoodie, "like a coat." She testified that she had seen her mother's gun before, and that the gun the man put to her head "kind of" looked like that gun.

Detective Darlene Early of the Baltimore Police Department, Western District Robbery Unit, testified that she investigated the robbery of Officer Linthicum and A. Detective Early testified that she responded to Officer Linthicum's mother's house to interview Officer Linthicum and A, asked Officer Linthicum to go to the district station and describe the man who had robbed her so that an "e-fit" composite drawing could be prepared, and then prepared fliers with the composite drawing and circulated them in the

neighborhood and within the police department. She showed Officer Linthicum a total of two photo arrays. She testified that Officer Linthicum did not identify anyone in the first array, but did identify Mr. Williams without any hesitation in the second. Finally, Detective Early testified that Officer Linthicum did not mention any "physical anom[a]lies" when describing the person who robbed her, and that the officer who responded first to the scene and took the primary report likewise did not indicate that Officer Linthicum had mentioned any "physical anom[a]lies."

Mr. Williams testified in his defense. He said that he lived at 730 North Carrollton Avenue and that he had an eight-year-old son who attended Harlem Park Elementary/Middle School, a five-minute walk from their home. He testified that he walked his son to school almost every day, including January 22, 2007, so that his son could get breakfast at the school at 7:00 a.m. He testified that he would have been home by 8:00 a.m. (There was no testimony from any witness about the exact time, or time range, when the crime occurred.) Mr. Williams also testified that at the age of sixteen, he sustained an injury, "a slipped disc of the hip," that required surgery, and that, as a result of this injury, he always walked with a limp.

In rebuttal, the State recalled Detective Early, who testified that she observed Mr. Williams at the police station after he was arrested, walking fifteen to twenty feet and getting in and out of a chair, and that she did not observe any kind of limp or "physical limitation[]."The State also called Erin Gross, Mr. Williams's probation agent. She testified that she met with Mr. Williams twice a month between March 2006 and October 2006 and

that she did not observe any limp or "physical abnormalit[y]." The fact that Ms. Gross was Mr. Williams's probation agent was not disclosed to the jury.

The jury convicted Mr. Williams of armed robbery, theft of property with a value under $500, first-degree assault, reckless endangerment, two counts of use of a handgun in the commission of a crime of violence, and wearing/carrying/transporting a handgun.

B. Postconviction Proceedings.

On October 9, 2014, Mr. Williams filed a *pro se* petition for postconviction relief. He argued that his trial attorney had rendered ineffective assistance of counsel.[1] On March 31, 2015, Mr. Williams, through counsel, filed a supplemental petition for postconviction relief. On March 10, 2017, the circuit court held a postconviction hearing. Trial counsel was not available to testify because she had passed away before the hearing. The defense presented testimony by trial counsel's supervisor, Angela Owens-Williams (Mr. Williams's wife), and Mr. Williams. The State presented testimony by the Assistant State's Attorney who had tried the case.

The supervisor testified that at the time of Mr. Williams's trial, he was a supervising attorney in the felony unit of the Office of the Public Defender and that trial counsel was one of the attorneys he supervised. In August or September 2007, there had been an increasing number of complaints about trial counsel. He testified that, as a result, he "received authority to review" her cases; he found that in nineteen of them, "there was little

[1] Mr. Williams filed a direct appeal, but later dismissed it when informed by the public defender that there were no appealable issues.

or no work done," and that in Mr. Williams's case, "[i]t was no work done" as of November 2007 (for a December 17 trial date).

The supervisor testified about the contents of Mr. Williams's file and the absence of items that he would have expected to be there. He testified that there was a note referencing a taped statement by the police, but neither the tape nor the transcript was in the file. Another assistant public defender had noted in the file that Mr. Williams "had been in a serious accident and the police report statement of charges said the person had ran at a very high rate of speed away from the robbery scene and he couldn't run." The police report itself is not part of the record. The fellow assistant public defender had written a note in the file to get the hospital records from Johns Hopkins, but there were no such records in the file. The supervisor testified further that he had called or arranged for someone else to call Johns Hopkins to request the records and he learned that it would take two weeks to get them.

The supervisor described how he informed trial counsel that he had taken Mr. Williams's case, as well as some others, from her. But he did not enter his appearance in Mr. Williams's case—his plan was to "go[] over and postpone the case on the idea of not to throw [trial counsel] under the bus or anything like that, but say [she] can't take this case." At some point, the supervisor gave the case files back to trial counsel, except for the file for Mr. Williams's case.

On December 17, the scheduled trial date, the supervisor indicated that he called the postponement court, "Part 45," to inform them that he "would be over to seek a

postponement," and that he "had to go to Part 46," the "Reception Court." When he came back "to get Williams' file," he asked someone there where trial counsel was, and he learned that she was in trial.

The supervisor then noted the State's intention to seek a postponement in the case, and indicated that trial counsel told him later that based on what "she read that as weakness on the part of the State," she had decided to go to the courtroom to try to get the case dismissed. The supervisor said that trial counsel told Mr. Williams "I'm going to walk you. You can walk right now."

The trial transcript reveals a version of those events. Trial counsel had represented to the trial court that, the day before the trial, an Assistant State's Attorney ("ASA") had asked her to agree to a postponement in Mr. Williams's case "because they wanted to investigate further since they weren't certain my client was the correct person charged." The trial court agreed to allow trial counsel to call the ASA, who then testified (outside the presence of the jury) that "because this case is a single eyewitness case," he had requested the postponement to "bolster" the State's case. But he also testified that "[t]here was nothing about the identification that I thought was improper or that I questioned specifically as to the identification." He stated that what he was expressing to trial counsel "was something that was kicking around in the back of my head that wasn't really supported by anything that was concrete." He continued, "I was being as cautious as possible in making an effort to exercise what I perceived to be my responsibilities" but that "there is nothing that took place that would indicate we have the wrong person."

The trial prosecutor testified at the postconviction hearing about the events surrounding the State's postponement request. She indicated that the postponement request was not her request. She explained that the other ASA got involved in the postponement proceeding because the attorney handling the postponement worked for him, although he was not supervising her in this case. She said that she was "furious" with the ASA when she learned that he had told trial counsel that the State might need to investigate the case more:

> He and I had not had conversations about the case so he only got involved because [the other ASA] worked for him and was handling the postponement. So when he came in and spoke to [trial counsel] and said, oh, well, you know, maybe we need to investigate this more, he hadn't talked to me about it at all. So obviously I was furious and said, "You never talked to the victims. You never talked to the witnesses. You've never looked at the case. You have no idea [a]bout this, and you're not a supervisor. You don't have the right to make representations about how I'm handling the case.

Back to the supervisor's testimony at the postconviction hearing—he indicated that the additional actions he would have taken to prepare for trial other than getting the medical records from Johns Hopkins included the following:

> I was going to talk to the people at the school, the breakfast place, the daycare, whatever it was he took the kids to. I was going to talk to his family. All right and I was going to talk to him since he could testify. He didn't have any impeachables. He presented a good appearance to me the one time I saw him. I was going to prepare him to testify. I was not going to cool the sting by asking him, introducing the defense introducing a second degree assault which it wasn't admissible in the first place.

The supervisor also testified on cross-examination that trial counsel's approach was

a "strategy that [he] didn't agree with," and pointed out that trial counsel didn't know the victim was a police officer:

> [SUPERVISOR]: I said that is no strategy. If you don't know anything about the case, you don't even know that the State's only identifying witness and victim is a police officer and the State asked for a postponement in the interest of justice, for you to conclude that the State doesn't have any witnesses, doesn't have any case, and you have not done anything on your case is stupidity. No lawyer will do that. No competent lawyer would do that.
>
> [THE STATE]: So, but she did and that was her strategy.
>
> [SUPERVISOR]: That was stupidity. Stupidity is not a strategy.

Finally, the supervisor testified that he made a formal referral for disciplinary action against trial counsel based on her handling of Mr. Williams's case. The postconviction record contains a two-and-a-half page letter dated December 28, 2007, that sets out the supervisor's version of events. Although it conflicts in minor ways with his testimony at the postconviction hearing, it generally supports the description of trial counsel's lack of preparedness that he provided at the hearing. The supervisor testified that trial counsel was transferred back to District Court as a result, and that this referral was his "first and [his] only referral for disciplinary action."

Angela Owens-Williams, Mr. Williams's wife, testified that she had been married to Mr. Williams since 1998. She testified that Mr. Williams walked with a limp, and that she had never seen him run anywhere. She also described the morning routine in their household. They got up at around 6:00 or 6:30 a.m. Mr. Williams would walk their youngest son to school so that he could get breakfast at the school, and she and

Mr. Williams would eat breakfast together after he got back home. She testified that she did not remember school breakfast being delayed for snow, even if school was delayed.

Ms. Owens-Williams testified that she spoke once with trial counsel about her husband's case; after "calling and calling" and not receiving a call back, Ms. Owens-Williams went to trial counsel's office and waited there "all day" to speak with her. She asked trial counsel about her husband's trial, but counsel did not subpoena her and stated to her "trust me, I've been doing this for 20 years and your husband will be home no matter what." Finally, she testified that she was not in court during Mr. Williams's trial because trial counsel "gave [her] the wrong court date."

Mr. Williams testified about his interactions with trial counsel. The only time he spoke with her during the eleven months he was detained was in the courtroom during his court appearances leading up to trial.[2] Trial counsel never came to the detention center to

[2] Mr. Williams also had the following exchange with the State about his contacts with trial counsel in the courtroom:

> [THE STATE]: And other than this one letter that you wrote to [trial counsel], what other contacts did you have with [her]?
>
> [MR. WILLIAMS]: About three times in the courtroom.
>
> [THE STATE]: Okay.
>
> [MR. WILLIAMS]: I asked her the same question. Cause she never asked me anything. She would just sit there and maybe have a flower book or something, about order some flowers to plant.
>
> [THE STATE]: What?
>
> [MR. WILLIAMS]: She had a flower book.
>
> THE COURT: She had a flower book.

Continued…

meet with him, and he never spoke with her by phone. He did write her a letter and trial counsel responded in a letter. There are some unexplained incongruities between Mr. Williams's letter and trial counsel's response. His letter, dated June 29, 2007, began by asserting his innocence: "I know and the victim knows that I did not commit this crime. Because like I told you this is a mistaken identity and we need to get this case dismissed." He continued by asking trial counsel to file a "Motion for Subpoena for tangible Evidence before [trial]" to request from Johns Hopkins medical records from his "surgery on [his] right hip" and "a slip disc of the hip," which caused him to walk with a limp and made him unable to run. He concluded by requesting that they meet to talk. No motion was attached to the letter in the record. Trial counsel's response, dated July 5, 2007, did not reference Mr. Williams's limp or medical records, and instead made the following comments:

> I have received your letter dated June 29, 2007. While you believe that the person you are accused of robbing is not going to testify consistently with the report given the police there is nothing to suggest that your belief is justified. The State's Attorney's office is responsible for prosecuting criminal cases; it is not up to the alleged victim to decide if the prosecution moves forward. I will not be filing your 'motion to dismiss' with the court as there is no legal basis for doing so.

The letter continued to address the defense of mistaken identity, and informed Mr. Williams that he would have to take the stand to testify if he wished to make that

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> [MR. WILLIAMS]: Yeah.
>
> THE COURT: A book about flowers.
>
> [MR. WILLIAMS]: She was ordering flowers. I guess she was into gardens.
>
> [THE STATE]: Okay.

defense:

> We have discussed the fact that you wish to assert the defense of mistaken identity; this is a defense that must be raised at trial not as a pretrial motion. You must take the stand to testify if you wish to raise this defense . . . .

(Emphasis in original.)

On one of the occasions when Mr. Williams saw trial counsel in court, he told her she needed to obtain his medical records. He testified that she told him, "oh, they won't, you know, they should see that you walk with a limp." At one of his court dates when another public defender stood in for trial counsel, he told that attorney that he needed his medical records. He explained that he wanted his records from 1982, when he was injured and when his surgery took place. Those records were entered into the postconviction record. He explained that between 1982 and the time of trial, he was not under the care of a doctor for his injury, and that in December 2007, two weeks before trial, he got an MRI. The MRI results were also part of the postconviction record.

Mr. Williams also told trial counsel that she should investigate his wife as an alibi witness, as she would be able to testify as to where Mr. Williams was at the time of the robbery. Mr. Williams testified that he planned to testify at his trial, but that trial counsel never met with him to advise him of the risks and benefits of testifying, to discuss what his testimony would be, or to prepare him for direct or cross examination.

Next, the State called the trial prosecutor to testify. The presiding judge disclosed that she had supervised the trial prosecutor at the Office of the State's Attorney. The judge decided to recuse herself from the matter.

About a year later, on March 16, 2018, a different judge presided over the continued postconviction hearing. The State called the trial prosecutor. She testified that she tried Mr. Williams's case and that she reviewed all of the evidence and interviewed the witnesses in the case. She testified that she had observed Mr. Williams walking over the course of the three days of trial, and that on the first day of trial, he was not using a cane and was walking slowly but without a limp, but that by the third day of trial he was using a cane and walking with an "extremely exaggerated" limp.

The prosecutor observed that trial counsel appeared to be attentive to the proceedings during the trial and conferred with her client, and that there were no indications that she was confused.

On October 30, 2018, the circuit court issued a written opinion and order denying postconviction relief. The court separately addressed eleven issues in a twenty-seven-page opinion and ultimately denied the petition for relief, except that it allowed Mr. Williams to file a belated motion for modification or reduction of sentence. Mr. Williams filed an application for leave to appeal. This Court granted the application and transferred the case to the Court's regular docket.

We supply additional facts as necessary below.

II. DISCUSSION

At issue is whether trial counsel's performance was constitutionally ineffective

under the standard set forth in *Strickland v. Washington*. 466 U.S. 668, 686 (1984).[3] Mr. Williams identifies six ways that, he contends, his trial counsel failed to meet this standard: (1) trial counsel failed to obtain and/or introduce medical records regarding Mr. Williams's limp; (2) trial counsel failed to investigate and/or call defense witnesses regarding Mr. Williams's limp; (3) trial counsel failed to investigate and/or call alibi witness(es); (4) trial counsel failed to request an alibi jury instruction; (5) trial counsel failed to object to prior bad acts evidence; and (6) even if trial counsel's respective failures considered individually don't satisfy the prejudice prong of *Strickland*, they do when considered collectively.

The right to the assistance of an attorney at a criminal trial is guaranteed by the Sixth Amendment to the United States Constitution and applies to criminal trials in state court via the Due Process Clause of the Fourteenth Amendment. *State v. Walker*, 417 Md. 589, 597–98 (2011) (*citing State v. Renshaw*, 276 Md. 259, 264 (1975)). "[T]he right to counsel is the right to the effective assistance of counsel," *Strickland*, 466 U.S. at 686 (*quoting McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)). "That a person who happens to be a lawyer is present at trial alongside the accused [] is not enough to satisfy the constitutional command." *Id.* at 685. "The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the

[3] Mr. Williams phrased the Question Presented in his brief as follows: "Did the circuit court err by denying Mr. Williams's petition for postconviction relief?" The State phrased it this way: "Did the circuit court properly deny postconviction relief as to the six claims of ineffective assistance of counsel raised in Williams's application for leave to appeal?"

ability of the adversarial system to produce just results." *Id.* at 685. In other words, "[a]n accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." *Id.*

To demonstrate that counsel was constitutionally ineffective, the petitioner bears the burden of proving both prongs of the two-prong test articulated by the Supreme Court in *Strickland*. 466 U.S. 668. *First*, the petitioner must establish that "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). But we "'indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance,'" *Cirincione v. State*, 119 Md. App. 471, 485 (1998) (*quoting State v. Thomas*, 325 Md. 160, 171 (1992)), because "[w]ith the benefit of hindsight, [] it is all too easy to mistake a sound but unsuccessful strategy for incompetency." *Id.*

Second, the petitioner must establish prejudice, which is required because "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland*, 466 U.S. at 691. "The specific burden is to show 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Cirincione*, 119 Md. App. at 485 (*quoting Strickland*, 466 U.S. at 694). A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. In other words, petitioner must show that "there was a substantial or significant possibility that the verdict would have been affected." *State*

v. Mann, 466 Md. 473, 491 (2019) (cleaned up). "A proper analysis of prejudice [] should not focus solely on an outcome determination, but should consider 'whether the result of the proceeding was fundamentally unfair or unreliable.'" *Oken v. State*, 343 Md. 256, 284 (1996) (*quoting Lockhard v. Fretwell*, 506 U.S. 364, 369 (1993)).

In evaluating a petitioner's claim, we need not approach the inquiry in any particular order, nor must we in every instance address both halves of the *Strickland* test. *Oken*, 343 Md. at 284. "The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will be often so, that course should be followed." *Strickland*, 466 U.S. at 697.

The standard of review of a postconviction court's findings "is a mixed question of law and fact." *Newton v. State*, 455 Md. 341, 351 (2017) (*citing Harris v. State*, 303 Md. 685 (1985)). "[W]e defer to the factual findings of the postconviction court unless clearly erroneous," but we review the court's legal conclusions "without deference." *Id.* at 351, 352. "We 're-weigh' the facts in light of the law to determine whether a constitutional violation has occurred." *Id.* at 352

For four of the five asserted failings of trial counsel, the postconviction court held that Mr. Williams did not establish that counsel performed deficiently. The only asserted failure for which the circuit court expressly considered prejudice was the failure to request an alibi instruction. In concluding that the other four asserted failures were the result of sound trial strategy, the postconviction court did not expressly consider the supervisor's

testimony that trial counsel had done little to no work on Mr. Williams's case, that he had taken Mr. Williams's case from trial counsel with the intention of postponing it, that he had recommended her for disciplinary action because of her lack of preparedness in Mr. Williams's case, and that she had been transferred to District Court at least in part due to that lack of preparedness.[4]

We agree with the circuit court that Mr. Williams failed to establish constitutionally deficient performance that deprived him of his right to counsel, but for a different reason: we hold that Mr. Williams did not meet his burden to show that counsel's failings—either individually or collectively—prejudiced his case under *Strickland*'s second prong. We are reluctant to agree with the circuit court that trial counsel's performance was objectively reasonable under the first prong—*i.e.*, that her performance was acceptable under prevailing professional norms—because of the evidence revealing that she did little to no actual preparation or investigation into Mr. Williams's case before taking it to trial, and that she took the risk of going to trial anyway when provided with the possibility to postpone it. We are reluctant to do so despite the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," and that "the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Gilliam v. State*, 331 Md. 651, 666 (1993); *see also State v. Gross*, 134 Md. App. 528, 552 (2000) (internal quotations and citations

[4] The postconviction court indicated during the March 16, 2018 hearing that it had read the March 10, 2017 postconviction hearing transcript.

omitted).

A. Failure To Obtain And/Or Introduce Medical Records Regarding Mr. Williams's Limp.

Mr. Williams argues that trial counsel was deficient for failing to obtain or introduce medical records to corroborate his testimony regarding his injury and limp. The records at issue were part of the postconviction record and include records of his 1982 surgery and the results of a 2007 MRI that he obtained shortly before trial. Mr. Williams argues that the postconviction court erred in determining that the failure to obtain or introduce the records was a strategic decision. The postconviction court made that determination based on Mr. Williams's testimony that trial counsel had informed him that the jury could see him walk with a limp:

> Petitioner testified at the post conviction hearing that he spoke with trial counsel prior to trial and requested that his medical records be obtained and used at trial. Trial counsel advised Petitioner that the jury seeing Petitioner walk with a limp would be the most effective way of getting that point across. Trial counsel had a clear and concise strategy about how best to proceed in this matter. Applying a "heavy measure of deference to counsel's judgment," this Court finds that trial counsel's strategy, simple as it may seem, was sound and therefore Petitioner's claim of error does not clear Strickland's first prong. Id. [at 691.]

As an initial matter, the record does not squarely support the postconviction court's finding that counsel informed Mr. Williams that "the jury seeing Petitioner walk with a limp would be the most effective way of getting that point across." Instead, Mr. Williams testified that counsel told him "oh, they won't, you know, they should see that you walk with a limp," and at another point testified that she did nothing in response to his requests for her to

obtain the records before the trial, and that during the trial, she said that they would notice he walked with a limp. The postconviction court did not acknowledge or address the supervisor's testimony about the other attorney's note to obtain the medical records.

But in spite of our concerns, we need not decide whether the postconviction court's factual findings were clearly erroneous because, for the purpose of our analysis, we assume, without deciding, that Mr. Williams met his burden to establish that counsel's performance "was objectively unreasonable 'under prevailing professional norms.'" *Thaniel*, 238 Md. App. at 360 (*quoting Strickland*, 466 U.S. at 688). Even so, we hold that Mr. Williams did not meet his burden to establish that counsel's failure to obtain the medical records caused prejudice, *i.e.*, "that there is a reasonable probability that, but for counsel's unprofessional error[], the result of the proceeding would have been different." *Strickland*, 466 U.S. at 669.

In his amended postconviction petition, Mr. Williams argued that counsel's failure to obtain or introduce the medical records "was prejudicial to [him] because the person who committed this crime was not reported by the victim to have a limp, whereas the petitioner walked with a limp." On appeal, he contends that the medical records would have corroborated his testimony about his limp, and that the medical records would have countered the State's assertion that he was "fak[ing]" his limp. The State responds that Mr. Williams was not prejudiced because introducing the records would not necessarily corroborate Mr. Williams's testimony—the records were twenty-five years old and there were no records of treatment since the initial incident, so there was not a reasonable

probability that the records would have had an effect on the outcome of the proceeding.

The failure to present cumulative evidence generally fails to satisfy either the prejudice or the deficiency prong of the *Strickland* test. *Cirincione*, 119 Md. App. at 489 (*citing Oken*, 343 Md. at 287–88 and *Gilliam*, 331 Md. at 679). And although the circuit court did not expressly analyze the prejudice prong, it did observe the double-edged nature of the records—the court recognized that while the records would have shown that Mr. Williams underwent surgery, introducing them would "draw[] attention to the fact the surgery happened when [Mr. Williams] was 16 years old," and that "[f]ollowing that up with introducing medical records that are only two weeks old could have drawn more skepticism from the jury" because Mr. Williams received no documented follow-up treatment in the intervening years.

Mr. Williams also failed to establish prejudice from a failure to investigate or introduce the medical records because the outcome of the case didn't turn on whether Mr. Williams walked with a limp. Although the supervisor testified that there was a note in the file about a police report in which Officer Linthicum reported the assailant running away from the scene at a high speed, that police report was never made part of the record.[5] And the evidence admitted at trial—Officer Linthicum's testimony that the assailant "walked away" and "walked slowly away" from the scene—was not inconsistent with the assailant's

[5] Although the supervisor testified that he saw a note in Mr. Williams's file that there was a police report indicating that the assailant "had ran at a very high rate of speed away from the robbery scene," there was no such police report in the record, and the undisputed testimony admitted into evidence was Officer Linthicum's testimony that the assailant walked away from the scene.

having (or not having) a limp. There was no evidence that the assailant walked with a limp. Officer Linthicum never said anything about the assailant limping or having a gait inconsistent with a limp when she reported the crime to the police, and we don't discern any prejudice from counsel's failure to obtain corroborating, but cumulative, evidence of a limp.[6]

B. Failure To Investigate Or Call Defense Witnesses About Mr. Williams's Limp.

Second, Mr. Williams argues that trial counsel's "failed to interview multiple potential witnesses to determine if they should have been called to testify to Mr. Williams's manner of walking." Mr. Williams's amended postconviction petition identified Mr.

[6] The circuit court also made the point that Mr. Williams having (or not having) a limp was not inconsistent with him having committed the alleged robbery, based on the evidence about the assailant's movements admitted during trial:

> What seems to get lost in the inquiry over whether Petitioner's limp is real or feigned is the fact that Ofc. Linthicum testified under direct examination that the assailant "walked away" after robbing her and under cross examination that the assailant "walked slowly away." At no time was evidence presented that the assailant ran away or performed any other physically strenuous act during or after the armed robbery. To be clear, there was no testimony from Ofc. Linthicum or her daughter that the assailant walked with a limp upon leaving the scene, but the testimony that was provided did not preclude the Petitioner from physically committing the acts in question. Petitioner testified that he walks his son from his home on North Carrolton Avenue to Harlem Heights Elementary/ Middle School, approximately two blocks west, ninety percent of the time his son attends school. Petitioner also states in his interview to police that he walks his son home from school. There is no evidence that precludes Petitioner from committing the acts as testified to due to the physical limitation he alleges.

Williams's wife, Angela Owens-Williams, and two other witnesses, Rufus Crest and Denise Kelly, as potential witnesses. Ms. Owens-Williams testified at the postconviction hearing that Mr. Williams walked with a limp and that she had never seen him run anywhere. Mr. Williams did not proffer what Mr. Crest or Ms. Kelly would have testified to, other than that Mr. Williams walked with a limp.

The circuit court held that Mr. Williams did not meet his burden to demonstrate that trial counsel's failure to investigate or call witnesses regarding Mr. Williams's limp met *Strickland*'s performance prong. As with the medical records, and whether or not the circuit court was correct, we find that Mr. Williams failed to establish that trial counsel's failure to investigate or call witnesses to testify about Mr. Williams's limp prejudiced his case. The reasoning here is the same as with the medical records. There was nothing inconsistent about Mr. Williams walking with a limp and Mr. Williams committing the crime that Officer Linthicum and her daughter described, especially since their descriptions of what happened did not include any observation that the assailant did (or didn't) walk with a limp. *See* n.6. above. So even if trial counsel's failure to investigate or call potential witnesses concerning the limp rose to the level of deficient performance, the error didn't result in any prejudice.

C. Failure To Investigate Or Call Alibi Witness(es).

Next, Mr. Williams argues that trial counsel was ineffective for failing to investigate and/or call alibi witnesses. Mr. Williams identified his wife and stepson as potential alibi witnesses and asserts that counsel "did not interview [his wife] or seriously consider calling

her to testify, merely telling her, 'trust me, I've been doing this for 20 years . . . .'" Ms. Owens-Williams testified at the postconviction hearing about her and Mr. Williams's routine during the period that the robbery took place—they awoke at around 6:00 or 6:30 a.m., Mr. Williams walked their son to school to arrive no later than 7:20 a.m. for breakfast, and when there was a snow delay, she didn't remember breakfast also being delayed. She did not testify whether she remembered the day of the robbery, and Mr. Williams later testified that she would have been able to testify as to his whereabouts on the day of the robbery based only on routine.

The postconviction court held that trial counsel's decision not to call Ms. Owens-Williams was "another instance of sound trial strategy used by trial counsel." As with the other alleged failings, we don't necessarily agree that trial counsel's decision not to call Ms. Owens-Williams was a "sound trial strategy" in light of the evidence that she did so little to prepare for Mr. Williams's case. We look first, then, at whether he established prejudice.

Mr. Williams argues that the failure to call his wife prejudiced his case because "Mr. Williams had nothing to corroborate his own testimony that he was at home at the time the robbery took place." He relies on *In re Parris W.*, 363 Md. 717, 727 (2001), in which the Court of Appeals held that counsel's failure to subpoena alibi witnesses due to a scheduling error fell below the standard of reasonable professional performance. The Court also held that the failure prejudiced the defendant's case because there was "a substantial possibility that, had the court heard the proffered testimony of the[] subpoenaed witnesses,

corroborating substantial portions of Mr. W.'s testimony, the court might have harbored a reasonable doubt as to Appellant's involvement." *Id.* at 729. The Court went on to observe that "[t]his is particularly true in a case such as this where the evidence linking Appellant to the crime was solely the victim's identification." *Id.*

But *Parris W.* is distinguishable from this case. There, the proffered testimony of the unsubpoenaed witnesses would have provided "independent corroboration that [Mr. W] accompanied his father on his delivery route on the day of the assault," and thus would have strengthened Mr. W's father's claim that Mr. W had been with him all day. *Id.* at 729–30. The Court gave particular weight to the fact that those three witnesses were less interested parties than Mr. W's father—the only witness to testify in Mr. W's favor—and that one of the witnesses might have been able to provide stronger alibi testimony about where Mr. W was at the time of the assault. *Id.* at 730. In contrast, the only proffered "alibi" witness to testify at the postconviction hearing in this case was Mr. Williams's wife, an interested party. And she didn't testify about where Mr. Williams was on the morning of the assault—she didn't remember that day, and could testify only about the family's general morning routine. That proffered evidence is not enough to create a substantial possibility that the outcome of the trial would have been different had counsel investigated or introduced testimony by Ms. Owens-Williams (or by Mr. Williams's stepson, for which no testimony was proffered).

D. Failure To Request An Alibi Jury Instruction.

Fourth, Mr. Williams argues that counsel's performance was deficient because she

didn't request an alibi instruction.[7] This is the only asserted failing that the postconviction court found to fail *Strickland*'s prejudice prong rather than the performance prong. The court concluded first, based on *Smith v. State*, 302 Md. 175, 181 (1985), that the instruction was generated by Mr. Williams's testimony that he was in his residence at the time the robbery was alleged to have taken place and that the trial court would have been required to give it if counsel had asked. But the postconviction court went on to hold that Mr. Williams failed to establish that counsel's failure to request the alibi instruction prejudiced Mr. Williams's case. The court reasoned that the content of the alibi instruction was covered in other jury instructions, particularly the instructions covering the fact that testimony constitutes evidence and should be given the same weight as any other evidence and that the State must prove Mr. Williams's guilt beyond a reasonable doubt. The court concluded that the failure to request the instruction was "not enough to make the result of the proceeding fundamentally unfair or unreliable."

We agree. As noted above, the defendant bears the burden to "affirmatively prove prejudice." *Harris*, 303 Md. at 699 (*quoting Strickland*, 466 U.S. at 693). In the context of

[7] The pattern jury instruction for "alibi" provides:

> You have heard evidence that the defendant was not present when the crime was committed. You should consider this evidence along with all other evidence in this case. In order to convict the defendant, the State must prove, beyond a reasonable doubt, that the crime was committed and the defendant committed it.

Maryland State Bar Ass'n, *Maryland Criminal Pattern Jury Instructions* 5:00 (2020) ("MPJI-Cr").

a failure to request a jury instruction, "[t]he question of whether prejudice resulted . . . involves a fact-specific analysis." *Mann*, 466 Md. at 500. Here, Mr. Williams's arguments are not fact-based and are mostly general: he argues that the failure to give the instruction was prejudicial "because the presentation of alibi evidence may cause jurors to believe that a defendant bears some burden of proof," and that "[t]here was a substantial possibility that, had the jury been instructed on alibi, they might have harbored a reasonable doubt as to whether Mr. Williams committed the robbery." In support of those more general arguments, Mr. Williams points out that "the only evidence linking Mr. Williams to the robbery was the identification by Officer Linthicum." But he doesn't explain *why* the absence of an alibi instruction, as applied to the facts of this case, created a reasonable possibility that the outcome would have been different. Indeed, given that there was no evidence about the precise time the crime occurred, the jury could have found Mr. Williams's testimony about walking his son to school credible and still found him guilty. *Mann*, 466 Md. at 502 ("Simply put, the jury could have found all of the purported alibi witnesses credible, and still found Mann guilty."). Accordingly, the "absence of an alibi jury instruction did not prejudice [Mr. Williams]." *Id.*

E. Failure To Object To Prior Bad Acts Evidence.

Mr. Williams's *fifth* claim of error is that trial counsel was deficient in failing to object to what he characterizes as "prior bad acts evidence," which is inadmissible under Maryland Rule 5-404(b). At the relevant time, that Rule provided that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show

action in conformity therewith." The evidence that Mr. Williams argues trial counsel should have objected to—Detective Early's use of the term "arrest viewer" when describing how she compiled the photo arrays that she showed to Officer Linthicum—was introduced during her direct examination:

> [THE STATE]: Detective Early, when you show someone a photo array, first off, how do you compile it?
>
> [DETECTIVE EARLY]: Well you go into the **arrest viewer** and you just pick similarities out. You pick your primary target photo and then you pick similarities and they'll punch up all of the pictures similar to the target photo.
>
> THE COURT: [] You are talking jargon here that not all of us -- back it up for us. What do you do?
>
> [DETECTIVE EARLY]: First we pick out a target photo.
>
> [THE STATE]: So to back you up just a little bit more, is this on a computer?
>
> [DETECTIVE EARLY]: This is computer generated.
>
> [THE STATE]: Okay. And when you did this one, what did you do?
>
> [DETECTIVE EARLY]: When I did this one, when I got the information . . . that he may be our possible suspect, I put his name in and his photo popped up with all information that I received, and once I received the photo of the defendant I checked off in the computer similarities and they will give you all of the similar photos of your initial picture that you're looking at.

(Emphasis added.)

The postconviction court held that counsel's failure to object to Detective Early's use of the term "arrest viewer" did not constitute ineffective assistance of counsel. The court found that in testifying about selecting a "target photo," Detective Early was "speaking generally about how photo arrays are generated" and did not testify "that she

picked out Petitioner's [photo] in arrest viewer." We question whether the jury would have made that distinction while listening to the exchange in open court. Nevertheless, we agree with the circuit court that the testimony wasn't clear about the source(s) for the database where Detective Early got Mr. Williams's photo, but that it was clear that Detective Early searched for Mr. Williams's name in particular in response to *other* information.[8] And on balance, counsel's failure to object to it doesn't qualify as *Strickland*-level prejudice—indeed, as the postconviction court observed, "objecting in this instance may [have brought] unnecessary attention to a fact the jury was not considering."

F. Cumulative Prejudice.

The heart of Mr. Williams's arguments about trial counsel's alleged deficiencies is that when considered collectively, their cumulative prejudicial effect deprived Mr. Williams of a fair trial.[9] Mr. Williams argues that counsel's deficiencies cannot and should not be considered part of a sound trial strategy because, by definition, a strategy cannot result from a failure to adequately investigate and prepare the case, and all of trial counsel's failures collectively prejudiced Mr. Williams's case:

> Zooming out, [counsel] tried a case that had been taken away from her by her supervisor, where she had been ordered to obtain a postponement, and that she had in no way prepared for. She failed to investigate either of the components of

[8] The detective got a tip from Mr. Williams's probation officer, who called in the tip after seeing the e-fit sketch.

[9] The circuit court didn't address this argument. Neither party identified, and we did not find, anywhere in the record that this argument was raised or directly addressed. Ordinarily, we do not consider arguments not raised below. Md. Rule 8-131(a). But the State doesn't argue that this argument was not preserved, and given the history of this case, we exercise our discretion to consider it.

> Mr. Williams's misidentification defense, his alibi or his physical inability to flee from the robbery, and, as a result, presented no evidence to the jury of either, beyond Mr. Williams's own uncorroborated testimony. At trial, she failed to object when the State introduced inadmissible prior bad acts evidence against her client, and she failed to request an alibi instruction. Viewing all of these instances of deficient performance together, it is clear that Mr. Williams has crossed the threshold of a showing of prejudice.

Although we recognize that there are numerous troubling aspects of counsel's performance in this case, we hold that Mr. Williams has failed to establish that the five asserted deficiencies here amounted to *Strickland* prejudice, even when considered collectively. Put another way, even if we were to assume that Mr. Williams had met his burden to prove that all five asserted deficiencies represented constitutionally ineffective performance, we find that Mr. Williams has failed to meet his burden to show that they were collectively prejudicial and together created a reasonable probability that the result of his trial would have been different.

"Even when no single aspect of the representation falls below the minimum standards required under the Sixth Amendment, the cumulative effect of counsel's entire performance may still result in a denial of effective assistance." *Cirincione*, 119 Md. App. at 506. So although claims of error often are analyzed on an individual basis (as we have done above), it is "incorrect," *Bowers v. State*, 320 Md. 416, 436 (1990), to approach on an individual basis the ultimate question of whether an attorney "play[ed] the role necessary to ensure that the trial is fair." *Strickland*, 466 U.S. at 685.

The cumulative effect analysis may be applied to either prong of the *Strickland*

analysis. *See, e.g.*, *Bowers*, 320 Md. at 435–36; *see Cirincione*, 119 Md. App. at 506; *Schmitt v. State*, 140 Md. App. 1, 48–49 (2001). Errors that don't amount to "a deficient overall trial performance" when considered individually may qualify when considered collectively. *Id.* at 46; *see, e.g.*, *Bowers*, 320 Md. at 436 (holding that numerous lapses—including failure to investigate physical evidence before trial, failure to present an opening statement, failure to put on defense witnesses, and commission of numerous errors of omission regarding cross-examination of witnesses—constituted inadequate performance when considered together). But mere allegations of error—as opposed to actual findings of error—are not sufficient to establish inadequate performance. *Gilliam*, 331 Md. at 685–86 ("This is more a case of the mathematical law that twenty times nothing is still nothing."). On the other hand, errors that are not prejudicial when considered individually may be sufficient to establish prejudice when considered together. *See, e.g.*, *Bowers*, 320 Md. at 436 (looking at trial as a whole, "the cumulative effect of [defense counsel's] actions and non-actions was enough to establish" prejudice); *see Schmitt*, 140 Md. App. at 47–48.

That said, the cumulative effect doctrine "has exceedingly narrow application." *State v. Wallace*, 247 Md. App. 349, 375 (2020), *aff'd*, 475 Md. 639 (2021). There, this court observed that "although adopted by the Court of Appeals and other courts," the cumulative effect theory "has been pursued successfully only once in a Maryland published decision." *Id.* at 375–76 (*citing Bowers*, 320 Md. 416). Our research similarly has revealed no Maryland case other than *Bowers* in which the theory has been pursued successfully, and Mr. Williams also cited none. We note as well that the portion of *Bowers* analyzing

the cumulative effect theory was dicta—the court held as an initial matter that the attorney's performance was deficient based on a single failure, *i.e.*, the failure to introduce evidence that hair from a second person was found on the victim's body, where the defendant claimed that the victim had been killed by an accomplice, and that holding was sufficient ground for reversal by itself. *Bowers*, 320 Md. at 430–31. And *Bowers* acknowledged expressly that its discussion of cumulative error was an "alternative ground" for its holding. *Id.* at 431.

Even so, we turn to the question of whether, assuming trial counsel's five alleged errors did indeed individually constitute deficiencies under *Strickland*'s first prong, Mr. Williams's case was prejudiced by the cumulative effect of the errors that they met *Strickland*'s second prong. As we have noted, counsel's overall performance left much to be desired. In addition to the failures upon which Mr. Williams relies, we have noted several troubling aspects of the trial in our review of the trial transcript and record that reinforce the notion that she was unprepared for this case. For instance, counsel suggested in her opening statement that Mr. Williams's and Officer Linthicum's children went to the same school, but Officer Linthicum testified later that that was not the case. Also, while cross-examining Officer Linthicum, counsel engaged in several lines of questioning that the trial court judge determined to be irrelevant, including questions about Officer Linthicum's decision not to use her weapon or mace to thwart the robbery or prevent the

assailant from escaping.[10] Another irrelevant line of questioning was counsel's attempt to ask Officer Linthicum about best practices when using photo arrays, a subject that the trial court pointed out was the subject of expert testimony and not appropriate for the victim in the case, a fact witness. On several occasions when counsel continued to pursue these irrelevant lines of questioning, the court called both sides to the bench and indicated that he would hold counsel in contempt if she continued. The contentious nature of the exchanges and the persistent lines of irrelevant questioning could be interpreted to support the conclusion that counsel had not prepared for cross-examination and generally was ill-prepared to try the case.

In addition, the circuit court ignored the supervisor's postconviction testimony that he had taken over the case and that trial counsel was disciplined and moved to another section in the office, in part because of her inadequate performance on the case. The

[10] For instance, counsel engaged Officer Linthicum in the following exchange:

> [DEFENSE COUNSEL]: He had a gun?
>
> [OFFICER LINTHICUM]: Yes.
>
> [DEFENSE COUNSEL]: He had threatened to use the gun?
>
> [OFFICER LINTHICUM]: He pulled the gun out.
>
> [DEFENSE COUNSEL]: You had a gun?
>
> [OFFICER LINTHICUM]: Yes.
>
> [DEFENSE COUNSEL]: Once he had his back to you, although your daughter was right by your side, he's got his back to you and he's a distance of what, ten feet, twenty feet? You could have dropped him with one shot couldn't you?
>
> [OFFICER LINTHICUM]: I'm not trained to shoot a person in the back.

postconviction court likewise did not discuss trial counsel's risky strategy to oppose the prosecution's motion to postpone the case.

But although we find trial counsel's performance sub-par, Mr. Williams has not met his burden to show that it was constitutionally prejudicial, even if we assume that all five of the failings asserted here meet *Strickland*'s deficient performance prong. Although the cumulative prejudice doctrine allows us to consider the collective effect of multiple errors, Mr. Williams has not met his burden to "affirmatively prove prejudice." *Harris*, 303 Md. at 699 (*quoting Strickland*, 466 U.S. at 693). In short, Mr. Williams has shown, at most, that the performance had "*some conceivable effect* on the outcome of the proceeding, or that the errors *impaired* the presentation of the defense," which is not enough. *Id.* at 700 (emphasis in original); *see also Gilliam*, 331 Md. at 665 ("The Sixth Amendment does not require the best possible defense or that every attorney render a perfect defense."). The evidence against Mr. Williams was primarily Officer Linthicum's identification, and we cannot say that the medical records, Ms. Owens-Williams's testimony about Mr. Williams's limp and their morning routine, an alibi instruction, and the "arrest viewer" comment would have created a reasonable probability that the outcome of the trial would have been different, or that their absence made the proceeding fundamentally unfair.

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