Circuit Court for Prince George's County
Case No. CT071664X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1645

September Term, 2013

KEITH A. WASHINGTON

v.

STATE OF MARYLAND

Woodward, C.J.,
Arthur,
Leahy,

JJ.

Opinion by Woodward, C.J.

Filed: August 31, 2018

After a nine-day trial, Keith A. Washington, appellant, was convicted by a jury in the Circuit Court for Prince George's County of involuntary manslaughter (unlawful act), two counts of first-degree assault, and two counts of use of a handgun in the commission of a felony. Appellant was sentenced to a total term of incarceration of forty-five years. This appeal arises out of appellant's petition for post-conviction relief, which the court denied after a two-day hearing, with the exception of granting appellant the right to file a belated motion for review of sentence within ninety days. Appellant filed an application for leave to appeal, which was granted by this Court.

Appellant presents four questions for our review:

1. Did trial counsel provide constitutionally ineffective assistance by failing to call emergency medical technician David Jordan, Jr., as a witness?

2. Did trial counsel provide constitutionally ineffective assistance by failing to call an expert in the field of use of force?

3. Did trial counsel provide constitutionally ineffective assistance by failing to call an expert in the field of shell casing expulsion?

4. Did trial counsel provide constitutionally ineffective assistance by failing to offer in evidence White's convictions for violent crimes to prove his violent nature and that he was the aggressor in the incident?

For the reasons discussed below we conclude that appellant's trial counsel did not provide constitutionally ineffective assistance of counsel, and thus, shall affirm.

BACKGROUND

We adopt the statement of facts from appellant's direct appeal to this Court, as set forth in *Washington v. State*, 191 Md. App. 48, *cert. denied*, 415 Md. 43 (2010):

Appellant, who was, at that time, a Prince George's County police officer, and his wife, Stacey Washington ("Mrs. Washington"), purchased a bed from Marlo Furniture which was delivered to their Accokeek, Maryland residence in December, 2006. The bed rails, however, were defective and either appellant or Mrs. Washington requested replacements. Marlo agreed to do so and arrangements were made to deliver the new bed rails on January 24, 2007, between 2:30 and 5:30 pm. Appellant took off from work to be at home when the delivery arrived. When the bed rails were not delivered during the specified time frame, appellant called Marlo to inquire about the delivery. After several phone calls, appellant was notified that the rails would be arriving around 7:30 p.m. At about that time, Brandon Clark ("Clark") and Robert White ("White"), two furniture deliverymen [("the deliverymen")], arrived at the Washington residence with the bed rails. Appellant met Clark at the door. Unbeknownst to Clark or White, appellant had a handgun tucked into his waistband. White and Clark, accompanied by appellant, carried the bed rails to the master bedroom on the second floor. They were alone; Mrs. Washington and the Washington's [sic] six year old daughter were having dinner in the first floor kitchen. A few minutes later, appellant shot both Clark and White. White was severely injured and Clark died nine days later from complications related to his wounds.

After an investigation by the Prince George's County Police Department, a grand jury sitting in the Circuit Court for Prince George's County indicted appellant on twelve counts:

Count I	second degree felony murder (Brandon Clark)
Count II	second degree specific intent to kill murder (Brandon Clark);
Count III	second degree specific intent to do serious bodily harm murder (Brandon Clark);
Count IV	second degree depraved heart murder (Brandon Clark)[;]
Count V	voluntary manslaughter (Brandon Clark);
Count VI	involuntary manslaughter - grossly negligent act (Brandon Clark);
Count VII	involuntary manslaughter - unlawful act (Brandon Clark);
Count VIII	first degree assault (Brandon Clark);
Count IX	use of a handgun in the commission of a felony or crime of violence (Brandon Clark);

Count X	attempted second degree murder (Robert White);
Count XI	first degree assault (Robert White);
Count XII	use of a handgun in the commission of a felony or crime of violence (Robert White).

Prior to appellant's trial, White filed a civil action against appellant and Prince George's County seeking $400,000,000 in damages arising out of the shooting.

Appellant's trial was preceded by *in limine* motions filed by both the State and appellant pertaining to evidentiary matters. Several of the trial court's rulings on these motions are pertinent to the issues raised on appeal and we will discuss them below.

While a detailed description of the evidence presented at trial is not necessary for this opinion, we will summarize the testimony of White, on the one hand, and appellant and Mrs. Washington, on the other, to illustrate the contrast in their versions of events.

According to the State, the shootings were unprovoked and unjustified. The State introduced evidence from an employee of Marlo who had spoken to appellant earlier in the day to the effect that appellant was angry and hostile over the telephone. White testified that, upon arriving at appellant's residen[ce], Clark went up to the front door and talked to appellant, while White stayed in the delivery truck. White recounted that, when Clark came back to the truck to get the bed rails, he told White that appellant was "looking for a fight." White then testified as to his version of what then occurred:

> [THE WITNESS]: When we went inside, he direct [sic] us to a bedroom upstairs. I was walking first, in front of Brandon. Brandon was walking behind me. He was behind Brandon, and he directed us to a bedroom upstairs. We went in, we set the rails down, and then Mr. Washington started arguing with Brandon.
>
> [THE STATE]: And what was Mr. Washington arguing with Brandon about?

[THE WITNESS]: Because, I guess, we got to his house late, and he was upset because he was waiting to his house all day.

[THE STATE]: Go ahead and tell us what happened.

[THE WITNESS]: So, Brandon kneeled down--I'm standing on the other side, close to the railing, Brandon at the bed, and he ask [sic] Mr. Washington why you disassemble your bed, and he said-this was his words -- "Motherfucker, are you telling me what to do in my house?" I said, "Brandon, do you know Mr. Washington?" Brandon said no.

So it was a few seconds later he pushed Brandon and told Brandon to get the fuck out of his house. I said, "Brandon, I think we should go." Brandon said, "No, just let me do my job. It's only going to take ten minutes."

Brandon kneeling again -- he's still kneeling. Mr. Washington pushed him again, "Get the fuck out of my house," and the third time he pushed him, he pushed him until he was actually laying on his side. Brandon jump up. I told Brandon, "That's it; we out of here." I stepped between both of them, Mr. Washington and Brandon, Brandon going back out the door with his hands up. I got my back to Mr. Washington, and all I heard was shots after we got out of the room. He said, "I know how to get you the fuck out of my house."

[THE STATE]: After you heard the shots, what did you do; what did you see?

[THE WITNESS]: Brandon was going back towards the stairs, and I grabbed Brandon to keep him from falling down the stairs.

* * * *

I had to lay him down, and as I ask [sic] him where the cell phone at, when I turn around, I hear more shots. Then I realized I was hit. . . . [i]n the chest and in the stomach.

* * * *

> I didn't want to go down the stairs because he already shot me. So I moved up, to move away from Brandon, . . . and I laid down here [pointing to a diagram], down on this side. Mr. Washington went back in his room. I got back up because I knew I needed help. When I got back up, he comes out of his room and he said, "Motherfucker, didn't I told you to stay down," and he starts shooting again. That's when I realized I was hit in the knee. I went down.
>
> [THE STATE]: You went down. Then what happened?
>
> [THE WITNESS]: We laid there screaming, asking him to help us, to call somebody, and he said he wasn't calling nobody.

In contrast, appellant and Mrs. Washington testified that appellant had acted in self-defense. Appellant testified that when Clark and White arrived at appellant's home he instructed them to put the bed rails in the foyer, but they carried them to the master bedroom instead. Appellant led Clark and White to the master bedroom, but when he got there, he noticed that White was no longer following. When appellant asked Clark about White's whereabouts, Clark "backslapped" appellant twice in the chest and told him, "I got him, Shorty."[1] Appellant then saw White coming out of appellant's daughter's bedroom. When appellant told White to get out of his daughter's bedroom, Clark again responded with "I told you, Shorty, I got him." Appellant told Clark and White to leave his house. After appellant told Clark and White for the third time to leave his house, Clark responded that appellant needed to watch how he talked to people. Appellant again demanded that Clark and White leave. He testified:

> [APPELLANT]: Mr. White punched me on the side of the face.
>
> [DEFENSE COUNSEL]: What did Mr. Clark do?

[1] Appellant is 5'9". White is 6'2", and, at the time of the shooting, weighed 280 pounds; Clark was 6'7" and weighed 300 pounds.

[APPELLANT]: When he punched me, Mr. Clark punched me in the back of the head.

[DEFENSE COUNSEL]: What did you do after Mr. White punched you and Mr. Clark punched you in the back of the head?

[APPELLANT]: When he punched me, I swung around with my hand, and I just covered up because I couldn't stop them. They were on me.

[DEFENSE COUNSEL]: What position was your body in when you said you tried to cover up?

[APPELLANT]: I was like this, covering up my head and my face and I was-

[DEFENSE COUNSEL]: At this time, Your Honor, I'd ask Mr. Washington to step down.

[THE COURT]: Okay.

(Witness steps down from witness stand.)

[DEFENSE COUNSEL]: You can stand in front of the jury. Now, Mr. Washington, you said you attempted to cover up, and you described the position of your body. Can you let the ladies and gentlemen of the jury know, after Mr. Clark and Mr. White hit you, what you did physically?

[APPELLANT]: Yeah. I swung around, with my hand like that, and they were on me and they was -- I was covering up, like this, trying to protect my head and my face.

[DEFENSE COUNSEL]: And at that point, where is Mr. Clark and Mr. White?

[APPELLANT]: Mr. Clark is right here to my left, and Mr. White is right here to my right.

[DEFENSE COUNSEL]: And what are they doing at that point?

[APPELLANT]: They were hitting me and kicking me.

Appellant went on to testify that he shot Clark and White in self-defense.

Mrs. Washington testified that she heard appellant, White and Clark going upstairs with the bed rails. She continued:

> I didn't hear anything for a little while, and then I heard my husband say, "Get out of my house; leave my house; get out now," and that's the next thing I heard.
>
> [DEFENSE COUNSEL]: And once you heard your husband say those words, what did you do?
>
> [MRS. WASHINGTON]: I got up. I told [K.] [appellant's and Mrs. Washington's six year old daughter] -- I told [K.] to stay put, to don't move, and that's when I got up. And I got up to go see what was wrong, because I could tell something was wrong.
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> * * * *
>
> [DEFENSE COUNSEL]: Okay Ms. Washington. You stated that you were walking from the kitchen as you were peering up the stairs. What did you see when you looked upstairs?
>
> [MRS. WASHINGTON]: That's when I saw Keith bent over, and these two men were on either side of him and they were beating him.
>
> [DEFENSE COUNSEL]: And when you looked up and saw that, what did you do? And you can take your time, Mrs. Washington.
>
> [MRS. WASHINGTON]: I was walking into the hallway and, as I was coming around through the hallway, I looked up and then I could see them, him in the middle, and he was kind of bent over, and then there was one man on either side of him, and they were beating him. And I thought oh, my god; oh, my god; they're just going to beat him to death, because he was just kind of bent over and he couldn't do

anything. And I thought, okay, I need to help him; I need to help him. And so I was going to start up the steps. And as I was getting ready to start up the steps, I was thinking what if something happens to me, what is [K.] going to do? I didn't want her to come in here- (crying).

* * * *

[DEFENSE COUNSEL]: Ms. Washington, I think where we were, you were about to describe -- I'll just ask you the question.

As you looked upstairs, as you're leaving the kitchen, where were the deliverymen positioned with respect to where your husband, Keith Washington, was?

[MRS. WASHINGTON]: He was bent over, and there was one man on either side of him.

[DEFENSE COUNSEL]: I believe you said that you were at the bottom of the stairs. At that point, when you looked upstairs and you were at the bottom of the stairs, what did you say or do?

[MRS. WASHINGTON]: The first thing I thought was, my god; oh, my god, I need to help him.

* * * *

[MRS. WASHINGTON]: As I started to go up the steps, that's when I knew I couldn't help him. And then I was going to call 911. (Crying.)

After the shootings, Mrs. Washington called 911. Appellant joined in the call. The State played a recording of the call to the jury. The State introduced forensic evidence regarding the gunshots. The evidence could support the conclusion that at least one of the gunshots was fired from a distance of four feet or more, while the other gunshots were at closer range. A DNA analysis of appellant's handgun indicated that both appellant's and White's DNA was present on it. The State also presented the testimony of an emergency room physician who treated appellant on the night of the shooting. She did not observe any trauma to appellant's neck or face.

> She also testified that the X-rays taken of appellant were negative, indicating no fractures. The emergency room nurse who examined appellant that night gave similar testimony. To further corroborate the physician's testimony, the State also introduced a photograph of appellant taken before he was transported to the hospital, which did not reveal any indication of significant injury.
>
> Appellant called other witnesses who had been present at the Washington residence after the shootings. They testified that appellant's face appeared puffy or swollen on the night of the shooting and that appellant was holding an ice pack to his face before being transported to the hospital. The appellant called a forensic pathologist who testified that, in his opinion, White's testimony was not consistent with evidence regarding his injuries and Clark's autopsy.
>
> On February 13, 2008, the jury convicted appellant of involuntary manslaughter - unlawful act (Brandon Clark), two counts of first degree assault (Brandon Clark and Robert White), two counts of use of a handgun in commission of a felony or crime of violence (Brandon Clark and Robert White) . . . and acquitted him of all remaining counts.

Id. at 58-65. Appellant was sentenced on May 27, 2008, to a total of forty-five years of incarceration. *Id.* at 65. Throughout the trial and sentencing, appellant was represented by Vincent H. Cohen, Esquire; Michael Starr, Esquire; and Roland Patterson, Esquire, collectively "trial counsel."

On direct appeal, appellant raised ten issues for this Court to review. On January 29, 2010, this Court affirmed the judgments of the circuit court in *Washington*, 191 Md. App. 48.[2]

[2] On May 26, 2009, appellant filed a motion for a new trial on the ground of newly discovered evidence. On March 22, 2011, appellant filed an amended motion for a new trial and requested a hearing. Without holding a hearing, the court denied on the motion and request for hearing on September 26, 2011. Appellant filed an appeal to this Court asking whether the trial court committed error in denying the motion without holding a

On March 22, 2011, appellant filed a petition for post-conviction relief in the circuit court. In appellant's petition, he raised twenty-three claims for post-conviction relief. The State filed a response to appellant's petition on August 17, 2012. The circuit court held a two-day post-conviction hearing on March 20 and 21, 2013. In an Order entered on August 29, 2013, the circuit court denied each of appellant's twenty-three claims, with the exception of granting appellant ninety days to file a belated motion for review of sentence.

Appellant filed an application for leave to appeal in this Court on September 30, 2013. After receiving the State's response on February 24, 2016, this Court granted appellant's application for leave to appeal on May 6, 2016.

Additional facts will be set forth below as necessary to resolve the questions presented.

STANDARD OF REVIEW

We review without deference a trial court's resolution of questions of law. *See, e.g.*, *State v. Daughtry*, 419 Md. 35, 46 (2011). In *State v. Sanmartin Prado*, the Court of Appeals explained that

> "[t]he standard of review of the [trial] court's determinations regarding issues of effective assistance of counsel is a mixed question of law and fact. We will not disturb the factual findings of the post-conviction court unless they are clearly erroneous. But, a reviewing court must make an independent analysis to determine the ultimate mixed question of law and fact, namely, was there a violation of a constitutional right as claimed. In other words, the

hearing. This Court, in an unreported opinion, affirmed the circuit court's denial of the motion without holding a hearing. *Washington v. State*, No. 1981, Sept. Term 2011 (filed July 2, 2013), slip op. at 1-2, *cert. denied*, 435 Md. 270 (2013).

> appellate court must exercise its own independent judgment as to the reasonableness of counsel's conduct and the prejudice, if any . . . . [The appellate court] will evaluate anew the findings of the [trial] court as to the reasonableness of counsel's conduct and the prejudice suffered. As a question of whether a constitutional right has been violated, we make our own independent analysis by reviewing the law and applying it to the facts of the case."

448 Md. 664, 679 (2016) (some alterations in original) (quoting *State v. Jones*, 138 Md. App. 178, 209 (2001)), *cert. denied*, 137 S. Ct. 1590 (2017)); *see also Coleman v. State*, 434 Md. 320, 331 (2013) (stating that "components of the ineffectiveness inquiry are mixed questions of law and fact. Thus, in our independent examination of the case, we re-weigh the facts as accepted in order to determine the ultimate mixed question of law and fact, namely, was there a violation of a constitutional right as claimed") (internal quotation marks and citations omitted).

Under both the Sixth Amendment to the Constitution of the United States and Article 21 of the Maryland Declaration of Rights, the accused in all criminal cases is entitled to have the assistance of counsel. *Syed v. State*, 236 Md. App. 183, 240 (2018), *cert. granted*, ___ Md. ___ (July 12, 2018). When a defendant claims that this right has been violated, he or she must satisfy a two-step test set forth by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland's* two-step test requires a defendant claiming ineffective assistance of counsel to show *first* "that counsel's performance was deficient[,]" and *second* "that the deficient performance prejudiced the defense." *Id*. at 687.

Under *Strickland's* first step, commonly referred to as the "deficiency prong," "the proper standard for attorney performance is that of reasonably effective assistance[,]" *id.*,

and "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. In *Strickland*, the Court explained that the reasonableness of attorney performance must be considered under "prevailing professional norms," and under "all the circumstances." *Id.* at 690-91. The Court cautioned that "[j]udicial scrutiny of counsel's performance must be highly deferential," with "every effort [ ] made 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." *Id.* at 689. Otherwise stated, there is "a strong presumption that counsel's conduct falls within the wide range of professional assistance[.]." *Id.*

Under this first prong, "if counsel's acts constitute reasonable 'trial strategy' or 'trial tactic,' counsel's performance cannot be deemed 'ineffective.'" *Barber v. State*, 231 Md. App. 490, 515, *cert. denied*, 453 Md. 10 (2017). The Court explained in *Strickland*:

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

466 U.S. at 690-91. In sum, "[u]ntil proven otherwise, the court presumes that counsel's representation was professionally competent, and that it [was] 'derived not from error but from trial strategy.'" *State v. Peterson*, 158 Md. App. 558, 583-84 (2004) (quoting *Mosley v. State*, 378 Md. 548, 558 (2003)).

For *Strickland's* second step, or the "prejudice prong," there must be a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. 466 U.S. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. "An 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." *Id.* at 691. In order to constitute ineffective assistance of counsel, counsel's deficient performance must have been prejudicial to the defense. *Id.* at 692. Counsel's error must have been "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable", as opposed to claiming counsel's errors had some conceivable effect on the outcome of the proceeding or that the errors impaired the presentation of the defense. *Id.* at 687.

DISCUSSION

I. Failure to Call Emergency Medical Technician to Testify

At appellant's nine-day jury trial, appellant's trial counsel presented evidence regarding the injuries appellant sustained on the date of the incident. Appellant's trial counsel called a number of witnesses who testified regarding appellant's injuries, such as appellant himself; Clyde Washington,[3] the then volunteer EMS deputy chief of the Bryansville Fire Department who responded to the scene after the shootings ("EMS Washington."); and Lieutenant Daren Livingston of the Prince George's County Police Department, the shift commander on the scene.

[3] Washington is not related to appellant.

At trial, appellant testified that, after he told Clark and White to leave his house, White punched appellant in the side of the face, and Clark punched appellant in the back of the head. Appellant then attempted to cover his head and face with his arms for protection. Clark, on appellant's left, and White, on appellant's right, "were hitting [ ] and kicking" appellant. Appellant thought Clark and White would "beat [him] to death or knock [him] unconscious, and there[was] nothing [he could] do to stop them." Appellant stated that his gun was hidden from view under his shirt, on his back, and he was concerned that, if they knocked him unconscious, Clark and White would be in the house with appellant's wife and child. Appellant stated that Clark and White punched and kicked the "[b]ack of [his] head, [ ] neck, [and] back" while appellant was in a crouched position. Appellant stated that he thought Clark and White were going to beat him to death and that they were "much bigger and stronger" than he was and "there was nothing [he] could do." Eventually, to get them off of him, appellant pulled out his gun and shot them. Appellant then called 911.

Appellant stated that, when the paramedics arrived, he had swelling in his face, and had neck, shoulder, back, and head pain. The paramedics gave appellant an ice pack for the swelling, and later gave him a neck brace and placed him on a "collar board" to take him to the hospital. Appellant lastly identified the photograph of him taken at approximately 3:00 a.m. the following morning.

EMS Washington testified that, when he arrived on the scene of the incident on January 24, 2007, appellant's chief complaint was that he had "pain in the face and neck and back[.]" EMS Washington rated appellant's pain as a six on a trauma scale of one to

ten. According to EMS Washington, it appeared that appellant had "just a little swelling in his face." Due to appellant's claim of back and neck pain, EMS Washington immobilized appellant's spine for transport to the hospital. Lt. Livingston testified that appellant "had an ice pack up to the side of his face and it appeared that his face was swollen."

In addition, the State put on Corporal George Jones and Karen Dixon, M.D., who testified to appellant's injuries. Cpl. Jones was the first officer on the scene and testified on cross-examination that appellant's lip was bleeding. Dr. Dixon was the emergency room physician who treated appellant hours after the shooting. Dr. Dixon testified that she did not document any trauma to appellant's head or face. Dr. Dixon performed an x-ray of appellant and testified that the results of the x-ray indicated appellant did not have any fractures. On cross-examination, Dr. Dixon stated that she treated appellant for a contusion and prescribed medication for him based on his subjective reports of pain.

After the shooting and while appellant was still at home, photographs were taken of appellant's face and head. After appellant was taken to the hospital and treated by Dr. Dixon, appellant was again photographed by Lieutenant Charles Walls at approximately 2:00 a.m. Both photographs, which were admitted by the State at trial, did not depict any obvious signs of trauma or bruising to appellant's face or head. At trial, Lt. Walls testified that the photograph taken of appellant's face at approximately 2:00 a.m. did not accurately depict the redness that he observed on the right side of appellant's face.

At the post-conviction hearing, one of appellant's claims of error was "that trial counsel rendered ineffective assistance by not calling additional witnesses who would have

testified about [appellant's] injuries[.]"

Appellant called David Jordan, Jr., an emergency medical technician who did not testify at trial. Jordan testified that he responded to a call for a shooting at appellant's house on the night of the incident, and arrived at the house about five minutes after the police secured the scene. Jordan stated that appellant "had injuries to the face. [Appellant] had swollen cheeks and [a] swollen lip. It looked like [appellant] had been hit." According to Jordan, it appeared that appellant had swelling underneath his eyes, and it "[l]ooked like he had a ball under his eye and his [bottom] lip was also swollen[.]" Jordan also said that it looked like appellant had been punched "[a]t least three" times, and that appellant seemed shaken up, his hands were shaking, and he was very nervous.

Only one of appellant's trial counsel, Starr, testified at the post-conviction hearing. Starr explained that the defense theory of the case was that appellant "was acting in defense of himself, his family[,] and his home. That was the primary defense, and that's how we wanted to portray [appellant], as a man who had to defend himself and his family and his home first, [ ] and as a police officer second." According to Starr, appellant informed trial counsel that counsel's mandate was to seek an acquittal on all charges. Starr also testified that "[t]here was about as much testimony on his injuries as we thought we could elicit without becoming cumulative and focus[ ]ing the trial to a greater extent than necessary on the photographs that the State was relying on very heavily." Starr further explained that trial counsel did not want to turn the trial into a trial about whether the photographs showed the injuries sustained by appellant, because trial counsel had explanations for why they

would not be shown.[4] In addition, Starr stated that trial counsel felt that more testimony about appellant's injuries would cause the jurors to see the photographs more, and trial counsel "got to a point where, strategically, the effect was it was going to become cumulative and we passed the point of diminishing returns."

The post-conviction court determined that trial counsel was not required to call additional witnesses to testify as to appellant's injuries, because "repetitive testimony about the same injuries would not have made it more likely that the jury found [appellant] reasonably feared for his life." The court found that the photographs taken of appellant on the night of the incident would have shown a scratch or cut if present, and were the best representation of appellant's appearance following the shooting. As a result, the jurors could draw their own conclusions regarding appellant's fear and necessity to use deadly force. The court ultimately held that trial counsel did not provide ineffective assistance for failing to call additional witnesses to testify about appellant's injuries.

On appeal, appellant contends that trial counsel provided constitutionally ineffective assistance of counsel by failing to call Jordan as a witness. Appellant argues that trial counsel was deficient because Jordan would have testified that appellant had multiple facial injuries and appeared to have been punched, which would have shown that appellant was attacked by the two deliverymen.[5] According to appellant, he was prejudiced by trial

[4] As stated above, Lieutenant Walls testified at trial that the photograph taken of appellant's face did not accurately depict the redness that he observed on the right side of appellant's face.

[5] Appellant also contends that the post-conviction court was clearly erroneous in finding that "the only additional injury that the proposed witnesses describe is a 'cut' or

counsel's failure to present Jordan's testimony, because but for this failure, there was a significant possibility that the jury would have concluded appellant acted in self-defense. The State responds that appellant's trial counsel did not provide constitutionally ineffective assistance by failing to call Jordan to testify at trial, because trial counsel called other witnesses to testify about appellant's injuries, and any additional witness testimony would have been cumulative. The State contends that the photographs of appellant admitted at trial constituted the best representation of his appearance following the shootings. Moreover, according to the State, trial counsel knew that the State could have argued that appellant did not have injuries consistent with the type of assault he complained of, and thus trial counsel made a sound tactical decision by presenting as much evidence of appellant's injuries without focusing the trial on the photographs. We agree with the State and conclude that appellant's trial counsel did not provide constitutionally ineffective assistance by failing to call Jordan to testify at trial.

Reviewing courts must be highly deferential to counsel's strategic decisions. *State v. Borchardt*, 396 Md. 586, 614 (2007). The question of whether to call a witness is a question of strategy and is "ordinarily entrusted to counsel." *Id.* at 614. The decision to not call a witness "must be grounded in a strategy that advances the client's interests." *Id.* at 615. "[S]trategic choices made after thorough investigation of law and facts relevant to

'scratch' either to [appellant's] cheek, under-eye or forehead." We conclude that the post-conviction court was not clearly erroneous in determining that the only *relevant* testimony the additional witnesses could have provided would have been that appellant had a "cut" or "scratch" on his face, because this testimony would have gone to the issue of whether there was a physical altercation between appellant and the two deliverymen.

plausible options are virtually unchallengeable[.]" *Strickland*, 466 U.S. at 690.

Here, appellant's trial counsel testified that the more evidence trial counsel admitted regarding appellant's injuries, the more the State would counteract such evidence by refocusing the jury's attention on what was not shown by the photographs. The jury heard Lt. Walls' testimony that the photographs did not accurately depict the redness that appeared on appellant's face at the time the photographs were taken, and the swelling that appeared on appellant's face following the shooting. According to the record, trial counsel investigated the law and facts and then determined not to call Jordan to testify at trial. This decision was reasonable under prevailing norms because it advanced appellant's interests by limiting the jury's exposure to appellant's photographs. *See Strickland*, 466 U.S. at 691 (noting counsel owes a duty "to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary").

Further, Jordan's testimony would have had no effect on the outcome of the trial, because his testimony about a ball and swelling under appellant's eyes would have conflicted with the photographs, which did not show these injuries. The State then would have had the opportunity to refute the testimony by showing the photographs again to the jury. Therefore, we conclude that appellant's trial counsel did not provide ineffective assistance in failing to call Jordan to testify about appellant's injuries.

II. Failure to Call Use of Force Expert to Testify

At the post-conviction hearing, appellant raised the claim of error "that trial counsel rendered ineffective assistance by failing to call a use[ ]of[ ]force expert as a witness in order to establish that [appellant] employed a reasonable and necessary amount of force in

self-defense[.]"

To demonstrate the type of testimony a use of force expert could give, Charles Key, a use of force expert, testified at the post-conviction hearing. Key explained that a police officer can use deadly force when, after reviewing the totality of the circumstances, the officer has probable cause to believe there is an imminent threat of death or serious bodily harm. Key's expert opinion was that (1) there was a physical struggle between appellant and the two deliverymen in a confined area; (2) appellant reasonably feared for his life; and (3) appellant used reasonable force as a police officer.[6]

Sergeant William Gleason, a use of force expert employed by the Prince George's County Police Department, also testified as a use of force expert. Sgt. Gleason stated that, although not subpoenaed to testify by defense counsel, he believed that appellant was assaulted by the deliverymen, reasonably feared for his life, and employed reasonable force in shooting the deliverymen.

Starr testified at the post-conviction hearing that, although trial counsel considered calling a use of force expert to testify, there were a number of reasons why trial counsel opted not to call such expert:

> One is that the overarching theory and theme of our defense was not that [appellant] was acting as a police officer but that he was acting as a man and, as any man would under these circumstances, that he had to defend himself, his family[,] and his home. This isn't a case in which he was on duty. **This isn't an excessive force case. This**

[6] Key based his opinion on (1) the extraction malfunction of the chamber of appellant's gun; (2) White's DNA found on appellant's gun;(3) the muzzle-to-garment testing;(4) appellant's torn watch;(5) evidence of the fibers discovered in the trace analysis of Clark's pants onto appellant's shirt;(6) the swelling of appellant's face; and (7) the injury to Clark's mouth.

> **isn't a police brutality case. He was a man inside of his house. The evidence and the manner in which he described being assaulted and deciding to pull the trigger was not something that requires a police expert to explain.** If his testimony was credited, if our defense was credited that he was being beaten by two much larger men, then we believed that we would win . . . [T]o bring in a police expert when we are emphasizing that [appellant] was acting as a family man and as any human being would, not just a police officer, it detracted, we believe from that theme. [T]here was the issue that police procedures and police training, if those things became an issue at the trial, then . . . the expert . . . would be cross-examined with any violations of police procedure by [appellant].
>
> * * *
>
> [Trial counsel was] thinking constantly about opening that door [to prior instances on the job where appellant used improper force] and not doing anything to open that door . . . [W]hether the door would have been properly opened or not wasn't even the primary concern. **It was whether we risked a State's argument that the door had been opened and an argument that the Court may accept. Once it's in, it's in, and we were trying to win this trial.**
>
> * * *
>
> [O]ur defense was focus[ ]ed on narrowing the State's case to the credibility of [ ] White, and **if other people** who didn't know [ ] White and didn't know each other **testified** - - and I think someone did at the sentencing - - **that [appellant] had behaved violently or irrationally in random encounters with them, it would detract mightily from our defense.**
>
> * * *
>
> We were aware of [appellant's] entire history, professionally, and we were aware of these witnesses that the State was hoping they'd have the opportunity to call [regarding appellant's improper use of force on the job prior to the incident.]

(Emphasis added).

The post-conviction court held that appellant was unable to overcome the presumption that trial counsel's decision not to call a use of force expert was sound trial strategy. Specifically, the court determined that trial counsel made a sound strategic

decision, after discussion with appellant, not to promote appellant as a police officer, but rather to emphasize that he acted as any normal person would under the circumstances. Further, according to the court, trial counsel properly considered the defense's pervasive need to steer clear of harmful cross-examination or rebuttal testimony regarding appellant's prior abuse of force as a police officer. The court concluded that trial counsel's representation was not deficient under the prevailing norms.

Appellant contends on appeal that trial counsel provided constitutionally ineffective assistance of counsel by failing to call an expert in the field of use of force in order to show that (1) appellant and the deliverymen were involved in a violent struggle; (2) appellant was placed in reasonable fear for his life; and (3) appellant employed reasonable force in defending himself.[7] According to appellant, a use of force expert would have counteracted the State's suggestion that appellant used excessive force in shooting the deliverymen five times. Appellant argues that trial counsel performed deficiently by opting not to call a use of force expert without first obtaining the facts needed to make an intelligent decision. Appellant concludes that there is a significant possibility that, but for trial counsel's failure

[7] Appellant also contends that the post-conviction court's finding that appellant's trial counsel made a sound strategic decision by not calling the expert, in order to not promote the fact appellant was a police officer, was erroneous. Appellant asserts that this testimony would have provided support for the defense's case, because it would have shown that appellant, as a civilian, reasonably feared for his life and defended his home, but was unrelated to appellant's status as an off-duty police officer. Lastly, appellant claims that the court's finding that counsel did not perform deficiently for considering the need to steer clear of harmful cross-examination of appellant by choosing not to call the expert, was erroneous. Because these claims of error go directly to the issue of whether appellant's trial counsel provided ineffective assistance of counsel, we review these claims of error during our analysis.

to consult with and call a use of force expert, the result of appellant's trial would have been different, because a use of force expert would have helped the jury resolve the critical issue of whether appellant acted in self-defense.

The State responds that appellant's trial counsel did not provide constitutionally ineffective assistance of counsel, because trial counsel's decision not to call a use of force expert was in keeping with the trial strategy of showing that appellant acted as any normal person would have acted when confronted with a similar scenario. According to the State, appellant's trial counsel determined not to call a use of force expert after proper investigation, because counsel knew that the State had a number of witnesses who could testify as to appellant's irrational anger or violence on prior occasions. Trial counsel's main theory and goal was to narrow the State's case so that White was the only person accusing appellant of committing a crime or acting irrationally. We agree with the State and shall explain.

The decision to call a witness is ordinarily a question of trial strategy and is entitled to deference by a reviewing court. *Borchardt*, 396 Md. at 623. Conversely, the decision to not call a witness in order to save trial counsel labor, is not entitled to deference by a reviewing court. *Id.* Trial counsel's decision not to call a witness in order to further a trial goal is considered strategic if it serves a client's interests. *Id.* In addition, trial counsel is not required to "consult with experts on every tactical or strategic issue." *Id.* at 633. An appellant "must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *Strickland*, 466 U.S. at 869 (internal quotation marks and citation omitted).

As Starr testified, appellant's trial counsel considered and weighed the testimony of a use of force expert in determining not to call such a witness to testify during trial. Appellant's trial counsel had two main trial strategies for deciding not to call a use of force expert to testify: (1) calling an expert would be inconsistent with the defense theory of the case, which was that appellant was not acting as a police officer, but rather, as a normal man would act in defending himself, his home, and his family; and (2) to avoid cross-examination about appellant's prior excessive use of force as a police officer, and appellant's violation of police department policy of assuring that a handgun be secured in a holster while off-duty. Appellant's trial counsel wanted to normalize appellant, and they believed that calling a use of force expert would emphasize his job as a police officer. Further, trial counsel knew that if they made an issue of appellant's use of force, they could risk the State arguing for the admission of evidence of appellant's prior bad acts involving excessive use of force as a police officer, and the trial court could accept such an argument regardless of whether it was proper or not.

We conclude that trial counsel's decision is entitled to deference because whether to call a use of force expert in this instance was clearly a question of trial strategy. *Borchardt*, 396 Md. at 623. Appellant's argument that trial counsel did not know what opinions were held by a use of force expert or what would be the testimony of such expert would give is incorrect. At the post-conviction hearing, Starr stated that trial counsel knew a use of force expert would testify to whether appellant was in imminent danger during the incident, and that under the circumstances, appellant, as a police officer, used a reasonable amount of force in defending himself. Further, trial counsel stated that they chose not to

call the expert because there was "nothing about [the expert's testimony] that would have changed the fact that it could have triggered examination on [appellant] and the holster issue."

Appellant still argues, however, that the use of force expert could have testified to appellant's use of force as a civilian. Such argument, however, fails because, as trial counsel testified, the contemplated expert witness would have testified specifically to appellant's use of force as a police officer. Whether a civilian used reasonable force, on the other hand, is an issue that a jury can decide without the aid of expert testimony. *See Porter v. State*, 455 Md. 220, 236 (2017) (stating that "when a defendant…presents evidence of self-defense, a proper instruction enables the jury to reach [a verdict]). Therefore, appellant did not overcome the presumption that trial counsel's decision not to call a use of force expert was sound trial strategy. Accordingly, we conclude that appellant failed to demonstrate that trial counsel provided ineffective assistance of counsel by failing to call a use of force expert at appellant's trial.

III. Failure to Call Shell Casing Expulsion Expert to Testify

White, the State's eye-witness, testified in front of the grand jury that

> [w]hat I'm saying was when [Clark] went out of the room backwards, I'm behind him. I don't know if he was all the way out of the room or in the room because I didn't really look back at him. I was trying to get me and [Clark] out of there before anything escalated, you know, because that was our last stop. I was tired. I was ready to go home and all I heard was the shots.
>
> * * *
>
> When [appellant] shot me he was standing in front of his bedroom door and I was, on, like, the second step.

At trial, White's testimony about where appellant was positioned during the shooting conflicted with his grand jury testimony. White testified:

> [WHITE]: I got my back to [appellant], and all I heard was shots after we got out of the room . . . I think this is the room that we was in, right here, if I'm not mistaken. And when [Clark] was walking backwards, I see him going towards the stairs, and then when I heard the shots. I just seen him coming back, so I just catched [sic] him and I came down to like here, to lay him down so he won't fall down the stairs . . . when I turned around, I heard more shots. Then I realized I was hit . . . . So I moved up, to move away from [Clark], and I came down here and I laid down here, down on this side. [Appellant] went back in his room. I got back up because I knew I needed help. When I got back up, he comes out of his room and he said, 'Motherfucker, didn't I told you to stay down,' and he start shooting again. That's when I realized I was hit in the knee.
>
> * * *
>
> [STARR]: And at the time that you were shot, [White], and you were on that second or third step, according to you, where was [appellant]?
>
> [WHITE]: I couldn't really say.
>
> [STARR]: So you don't know where [appellant] was when he shot you and you were on that second or third step?
>
> [WHITE]: Not exactly.
>
> * * *
>
> [STARR]: So just to make sure I understand it correctly, Clark is walking out of the room with his hands up in a surrender position and you're facing [Clark], Correct?
>
> [WHITE]: Correct.

[STARR]: And [appellant] is behind you, correct?

[WHITE]: Somewhere. I don't know.

[STARR]: You don't know where he was?

[WHITE]: I don't know where he was.

[STARR]: **Well, you testified about this in the grand jury about where everyone was positioned, correct?**

[WHITE]: **Correct.**

(Emphasis added).

As previously stated, at trial Cpl. Jones testified that he was the first officer on the scene and discovered that White and Clark were lying in the upstairs hallway of appellant's house with gunshot wounds. Cpl. Jones testified that he arrived on the scene at 8:00 p.m. and stayed on the scene until 5:00 a.m. the next day. Cpl. Jones stated that medical personnel, police officers, the fire department, Fraternal Order of Police members, and appellant were on the scene walking through the upstairs hallway. Cpl. Jones explained that, although he was attempting to secure the scene, the hallway was narrow, and scene security sometimes gives way to trying to save lives.

At trial, Charles Nelson, a police officer in the Forensic Services Division of the Prince George's County Police Department, testified that three shell casings were found in the upstairs hallway area and a fourth shell casing was recovered downstairs next to the living room.

At the post-conviction hearing, appellant raised the claim of error "that trial counsel provided ineffective representation by failing to call an expert witness to testify about the

manner in which [appellant's] gun ejected spent shell casings and the significance of the locations where those spent shell casings were recovered[.]"

Lt. Walls testified at the post-conviction hearing that "[i]t didn't seem consistent to me, based on [ ] White's statement, that the shell casings would be in the hallway and not in the master bedroom." Lt. Walls believed the evidence showed that there was a "combat-type situation, a fight in the upstairs hallway, rather than [ ] White's version of events as he detailed in his statement."

Key testified that "the shell casing placement as it was was consistent with having occurred during a conflict wherein the shell casings were – their trajectory was stopped or interfered with by either clothing, [w]alls, and because of the carpets absorbing the energy, they would be close to where the struggle occurred."

Dr. William J. Bruchey, an expert in shell casing expulsion, testified that he replicated the dimensions of the crime scene and test fired one hundred and eighty shots from appellant's Beretta nine-millimeter pistol, which was the gun used on the night of the incident. Dr. Bruchey relied on the grand jury testimony of White that appellant was standing in the doorway of the master bedroom or held the gun in the master bedroom doorway. No casing out of the tested shots landed closer than six feet from an actual recovered casing. Dr. Bruchey stated that there was a "very high degree of certainty the recovered casings were not indicative of shots fired from the doorway or just behind the doorway."

On cross-examination, Dr. Bruchey testified that there is not much value of scientific testing on an unpreserved crime scene. The State asked him: "So with all the

people that were in the house trying to save the two victim's lives, carrying them around, having to turn them almost upright in order to get them down the staircase, that's not what you would call a preserved crime scene." Dr. Bruchey responded: "No, it's not a well-preserved crime scene, but it's one of an infinite number of possible scenarios . . . If it's true, it's not a well-preserved crime scene."

Starr testified that trial counsel considered calling a firearms expert, but noted that a lot of people were in and out of the crime scene, and there would have been some vulnerability on cross-examination. Starr explained that trial counsel ultimately decided against calling an expert witness to testify about shell casing expulsion, because

> we didn't think that the testimony was sufficiently clean or would advance our defense enough to justify calling the expert and subjecting him to that sort of cross-examination.
>
> * * *
>
> [Y]ou don't want to lose credibility by calling witnesses that don't advance the ball at all or by calling witnesses who are effectively cross-examined, particularly experts. I don't recall either the crime scene itself or the testimony about where [appellant] was at the time that he fired, I don't recall all of that being clean enough to present – for us to present that type of expert testimony.

Starr testified that instead,

> we did conduct cross-examination of at least one State's witness on issues relating to the shell casings. Because I recollect that [ ] White's DNA was on the gun and that there was a shell casing that wasn't ejected, and one of our theor[ies] was that [ ] White grabbed the gun. We cross-examined on that. So we were thinking about shell casing related issues.

The post-conviction court found that the only purpose for expert testimony would have been to impeach White's testimony, and the record and verdict overwhelmingly

showed that the jury had already discredited White's account of the events. The court found that appellant's location was unclear, and the crime scene was unpreserved. Further, according to the court, the proposed expert testimony would have shed little light on the determination of whether appellant was the initial aggressor and whether his use of force was proper. The court concluded that trial counsel's failure to call an expert to testify about the location of expelled shell casings was not ineffective representation.

Appellant contends before us that trial counsel provided constitutionally ineffective assistance of counsel by failing to call an expert in the field of shell casing expulsion. In particular, appellant argues that his trial counsel was unaware that Lt. Walls had observed discrepancies between the shell casing evidence and White's testimony, never considered whether to call a shell casing expulsion expert, did not recall consulting with an expert, and thus was unable to make an informed decision about whether to call such an expert witness. Further, according to appellant, testimony by an expert witness would have discredited White's account that appellant initiated the violent encounter and would have shown that appellant was not standing in the master bedroom doorway when he fired the handgun. Appellant concludes that failure to call such witness was deficient performance, and because there was a significant possibility that discrediting White with the expert testimony would have changed the outcome of the trial, he also suffered prejudice.

The State responds that appellant's trial counsel considered whether to offer expert testimony on shell casing expulsion and was aware of the particular testimony of the expert. According to the State, trial counsel did not consider the crime scene to be clean enough to offer expert testimony on shell casing expulsion, because many people rendering medical

assistance were going in and out of the crime scene, and thus any expert opinion would be vulnerable to cross-examination. The State concludes that the failure to call an expert to testify regarding the location of expended shell casings in a non-preserved crime scene did not constitute deficient performance by trial counsel, and appellant also failed to establish prejudice.

As previously stated, the decision to call a witness is ordinarily a question of trial strategy. *Borchardt*, 396 Md. at 623. Trial counsel's decision not to call a witness in order to further a trial goal is considered strategic if it serves a client's interests, and trial counsel is not required to "consult with experts on every tactical or strategic issue." *Id.* at 623, 633. There is also a presumption that counsel's performance "might be considered sound trial strategy." *Strickland*, 466 U.S. at 689 (internal quotation marks and citation omitted). "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable[.]" *Strickland*, 466 U.S. at 690.

Appellant's trial counsel considered calling a firearms expert to testify about shell casing expulsion, but concluded that because of an unpreserved crime scene, the expert's opinion would be vulnerable to cross-examination, and the defense would risk losing credibility with the jury. Appellant's trial counsel reviewed the evidence of the crime scene, the location of the shell casings, and various testimonies in concluding that the crime scene was not properly preserved. In our view, it was objectively reasonable for trial counsel to believe that the scene was not preserved, because the significant activity in the scene, in all likelihood, would have disturbed the location of the expended shell casings. Further, Dr. Bruchey testified that there would be little value in the results of a shell casing

expulsion test if the scene was not preserved. As a result, knowingly calling an expert to testify when his test results would be subject to substantial attack by the State would have hurt the credibility of the defense.

Lastly, because of the unpreserved nature of the crime scene and the lack of clarity as to appellant's position when he fired the gun, expert testimony regarding the location of the expended shell casings would not have shed light on the issue of whether appellant was the initial aggressor or whether appellant used a reasonable amount of force in self-defense. Thus appellant was not prejudiced by trial counsel's decision not to call a shell casing expulsion expert to testify. After reviewing the record and appellant's trial counsel's reasoning, we conclude that counsel's decision not to call an expert to testify was a tactical decision, which deserves deference. *See Borchardt*, 396 Md. at 623. Accordingly, we hold that appellant's trial counsel did not provide constitutionally ineffective assistance of counsel by failing to call an expert witness in shell casing expulsion to testify.

IV. Failure to Offer Evidence Regarding White's Prior Convictions

In appellant's direct appeal to this court, we considered whether "the trial court err[ed] in prohibiting appellant from introducing evidence of the State's only eyewitness's prior convictions for crimes of violence to demonstrate his allegedly violent propensities[.]" *Washington*, 191 Md. App. at 57. White, the State's only eyewitness, had numerous convictions for violent crimes, including pointing a firearm in 1994, assault and battery in 1995, assault with intent to commit sexual conduct in 1995, and domestic violence in 2005. *Id.* at 67-68.

Prior to appellant's trial, the State filed a motion *in limine*, which sought to exclude

all of White's eleven violent and non-violent prior convictions. *Id.* The State argued that the 1991 and 1994 convictions were more than fifteen years old and were not admissible for impeachment purposes under Maryland Rule 5-609(b), and that the convictions for domestic violence, first degree burglary, assault with intent to commit sexual conduct, and pointing a firearm were inadmissible for impeachment purposes because violent crimes "have little, if any, bearing on honesty and veracity[.]" *Id.* at 68 (internal quotation marks omitted). Appellant's trial counsel responded by seeking admission of White's prior convictions to impeach White's credibility and to show his bias. *Id.* There was no argument by trial counsel that the convictions should be admitted for the purpose of proving White's allegedly violent nature or that White was the initial aggressor. *Id.*

After holding a hearing on the motion *in limine*, the trial court issued an order excluding all of White's convictions, except "those for grand larceny, receiving stolen goods, and first degree burglary as relevant to White's credibility." *Id.* at 69. On appeal, this Court held that, because appellant's trial counsel did not argue the specific ground of admissibility of White's prior convictions for the purpose of proving White's violent nature or that White was the initial aggressor, the issue was waived for the purposes of appellate review under Rule 8-131(a). *Id.* at 70.

At the post-conviction hearing, appellant raised the claim of error "that trial counsel provided ineffective representation by failing to argue that [ ] White's convictions for violent crimes were admissible to show that he was the initial aggressor during the incident[.]" The post-conviction court held that trial counsel's decision not to introduce

evidence of White's dangerous character through prior criminal convictions did not amount to ineffective assistance of counsel.

Appellant contends on appeal that trial counsel provided constitutionally ineffective assistance of counsel by failing to offer White's convictions to show that he had violent propensities and that he was the initial aggressor in the incident. Appellant argues that, under the rules of evidence in effect at the time of trial and in *Sessoms v. State*, 357 Md. 274 (2000), Maryland law permitted the admission of a witness's other crimes if the evidence is relevant to the defendant's innocence. Appellant further asserts that there is a significant possibility that had trial counsel offered White's prior convictions for violent crimes to prove that he was the initial aggressor, the jury would not have rejected appellant's claim of self-defense. Finally, even if trial counsel did not seek to introduce White's prior convictions for fear that door would be opened to the introduction of appellant's prior violent or irrational acts, appellant claims that such trial strategy was not legally sound.

The State responds that appellant's trial counsel made a tactical decision not to seek admission of White's prior violent convictions for the purpose of showing that he had violent propensities and thus was the initial aggressor, because counsel did not want to open the door for the State to introduce evidence of appellant's character for violence.[8]

[8] The State also responds that appellant has not preserved for our review the issue of the admission of White's prior convictions for the purpose of showing White's violent propensities. We conclude that appellant raised such issue in the post-conviction court, and therefore, properly preserved the issue.

The State argues that appellant's trial counsel focused their attack on White's credibility by cross-examining him on his positive test for cocaine on the night of the incident, his admissible prior convictions, his media statement, and his pending civil lawsuit against appellant and Prince George's County.

As Starr testified at the post-conviction hearing, appellant's trial counsel's theory of the case was that appellant was acting in defense of himself, his home, and his family when he shot the deliverymen, as any normal man would have done. Appellant's trial counsel noted that its

> defense was focus[ ]ed on narrowing the State's case to the credibility of [ ] White, and if other people who didn't know [ ] White and didn't know each other testified . . . that [appellant] had behaved violently or irrationally in random encounters with them, it would detract mightily from our defense.

Starr stated that they were always concerned about opening the door or going anywhere near the door that would prompt a State's argument to admit appellant's prior bad acts, whether through a proper or improper ruling of the court.

Starr testified further that one of trial counsel's pressing concerns was that "the State had in its back pocket, so to speak, a number of witnesses who had had encounters with [appellant] and said that he had become either violent or irrationally angry under strange circumstances, and they were strangers to him; they didn't even know each other." When asked what the impact would have been on the defense if witnesses had testified that appellant had been irrational or violent on other occasions, Starr testified that

> it would have been devastating. It's a much different case – we believed very strongly in our attacks on [ ] White's credibility in [appellant's] testimony and the testimony of his wife and the

> inconsistencies between [ ] White's testimony and other evidence. So to throw into the mix other people saying that [appellant] had behaved violently or irrationally would have been devastating, and this is the defense that [co-counsel] and I and [appellant] came up with.

At the time of appellant's trial, Maryland Rule 5-404(a) permitted an accused to present evidence attacking a victim's character trait but prevented the prosecution from rebutting such evidence with evidence attacking the accused's same character trait. One Hundred Sixty-Fifth Report of the Rules Committee, Md. Reg. Vol. 37, Issue 19, at 1278-79 (Sept. 10, 2010). Professor Lynn McLain described Md. Rule 5-404(a):

> As the current Rule exists, there are two separate boxes, one for the victim's character and one for the accused's character. It is up to the defendant to open up either one of those issues. If the defendant offers evidence of the victim's pertinent character traits, **that opens the door to the prosecution to rebut that evidence, but only the evidence of the victim's pertinent character traits.**

See Minutes of the Standing Committee on Rules of Practice and Procedure, April 16, 2010, at 30. (emphasis added). Moreover, under Rule 5-404(b), evidence of appellant's prior wrongdoing cannot be admitted "for the purpose of persuading the jury that the defendant has a propensity for crime and is therefore likely to have committed the offense for which he stands trial." *Sessoms*, 357 Md. at 288. Consequently, trial counsel misinterpreted Rule 5-404 as permitting the admission of appellant's prior violent crimes or acts if appellant introduced White's prior convictions for the purpose of proving that he was the first aggressor.

To analyze whether trial counsel's misinterpretation of Maryland Rule 5-404(a) was deficient, every effort must be made "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." *Strickland*, 466 U.S. at 689. In addition, we "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690.

After reviewing the applicable law, the facts, trial counsel's theory of the case, and counsel's reasoning for not seeking admission of White's prior convictions on the grounds that they showed White had a violent nature and was the initial aggressor, we conclude that counsel did not provide ineffective assistance of counsel under prevailing professional norms. Although trial counsel sought admission of all of White's prior convictions, counsel argued that the convictions should be admissible only for the purpose of impeaching White's credibility, and not for showing that White had violent propensities. Counsel feared that such argument would cause the State to argue that appellant's prior violent acts should also be admitted. From our review of Rule 5-404(a) at the time appellant was tried, it is clear that trial counsel's fear of opening the door to evidence pertaining to appellant's character for violence was unjustified. Although the corresponding Federal Rule of Evidence, Rule 404(a) was amended in 2000, prior to appellant's trial to provide that, if a defendant admitted evidence of a victim's pertinent character trait, the prosecution could rebut said evidence by admitting evidence of the defendant's pertinent character trait, such was not the law of the State of Maryland.[9]

[9] It appears that counsel's fear actually became a reality shortly thereafter in 2011 when Maryland Rule 5-404(a) was amended to state that an accused who offers evidence of the character of the alleged victim opens the door to prosecutorial evidence of the same character trait of the accused. *See* Levy & Hornstein, Maryland Evidence Courtroom

Nevertheless, in our view, trial counsel's performance was not deficient. Counsel's trial strategy was to focus on attacking White's credibility, which was done in a variety of ways. Counsel had a fear that by attempting to show that White was the initial aggressor through the admission of his prior violent convictions, counsel would have opened the door for the State to argue for the admission of evidence regarding appellant's character for violence, and the court could have accepted such argument given that the State had a number of witnesses ready to testify for this very purpose. The admission of evidence of appellant's prior violent or irrational acts would have been, in the trial counsel's opinion, "devastating" to appellant's defense. We cannot say that trial counsel's desire to avoid even the possibility of the trial court admitting such character evidence regarding appellant was unreasonable.

Finally, even if trial counsel's performance was deficient, unless there exists a reasonable probability that, but for counsel's error, the result of the proceeding would have been different and warrants a setting aside of the judgments of the criminal proceeding, the reviewing court will find there was a lack of prejudice. *Strickland,* 466 U.S. at 691. We conclude there was no prejudice to appellant, because the jury's verdict largely showed

Manual, § 404.01 (2018). The purpose for the amendment to the Maryland rule was two-fold. First, Maryland sought to conform to the 2000 amendment to Federal Rule of Evidence 404(a). Second, it became clear in gang prosecution cases that the application of the rule prevented the jury from seeing the full picture, because a defendant could offer evidence of a victim's character for violence, but he himself was safe from the prosecution admitting evidence of his similar character trait. *See* Minutes of the Standing Committee on Rules of Practice and Procedure, April 16, 2010, at 29.

that it discredited White's testimony by acquitting appellant on the charges of second-degree murder and voluntary manslaughter. In other words, the jury's verdict indicated that it believed that White was the initial aggressor but found that appellant did not use a reasonable amount of force in defending himself. Thus there is not a reasonable probability that the admission of White's prior convictions to show his violent nature would have changed the result of appellant's trial.

For the foregoing reasons, we conclude appellant's trial counsel did not provide constitutionally ineffective assistance of counsel by failing to argue the grounds that White's prior convictions should be admitted for the purpose of proving that he had violent propensities and was the initial aggressor.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.