Circuit Court for Baltimore City
Case No. 117135014

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1915

September Term, 2023

STATE OF MARYLAND

v.

MAURICE R. WILKERSON, JR.

Ripken,
Kehoe, S.,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Ripken, J.

Filed: April 7, 2025

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

Maurice Wilkerson ("Appellee") was tried before a jury in the Circuit Court for Baltimore City in September of 2018 for offenses arising from events that occurred on April 8, 2017. Appellee was found guilty of first-degree assault, reckless endangerment, and various firearm offenses. Appellee appealed his convictions to this Court, contending that the trial court erred in not instructing the jury on self-defense as to the assault charges. We affirmed the convictions in an unreported opinion. *Wilkerson v. State*, No. 2896, Sept. Term 2018, slip op. (Md. Ct. Spec. App. Feb. 10, 2020) ("*Wilkerson I*"). Appellee then filed a Petition for Post Conviction Relief ("the Petition"), which he later supplemented, raising five issues of ineffective assistance of counsel. Following a hearing on the Petition, the circuit court issued a written order and memorandum in August of 2023, finding that trial counsel provided ineffective assistance in three instances. The trial court therefore vacated the convictions and granted Appellee a new trial. The State filed a timely application for leave to appeal, which this Court granted. For the reasons that follow, we shall reverse.

ISSUES PRESENTED FOR REVIEW

The State presents the following questions for our review: [1]

[1] Rephrased from:

1. Did the post conviction court err in finding that defense counsel was ineffective for not objecting to two *voir dire* questions where the questions were not improper, counsel rendered highly effective assistance throughout the trial, and there was no reasonable probability that a defense objection to the other question would have changed the result of the trial?
2. Did the post conviction court err in finding, in the absence of any evidence, that defense counsel was ineffective for abandoning his request

I. Whether the postconviction court erred in finding that defense counsel was ineffective for not objecting to two *voir dire* questions.

II. Whether the postconviction court erred in finding that defense counsel was ineffective for not requesting a self-defense instruction as to first- and second-degree assault.

III. Whether the postconviction court erred in finding that defense counsel was ineffective for not objecting to testimony regarding a prior investigation of Appellee.

FACTUAL AND PROCEDURAL BACKGROUND

In April of 2017, officers of the Baltimore Police Department ("BPD") responded to a report of gunfire at the intersection of North Avenue and Kennedy Avenue. Two gunshot victims were transported to the hospital for treatment. A third victim, Tion Jackson ("the victim"), was later discovered after having been dropped off at the hospital. At the crime scene, police recovered bullet casings, one live round, and suspected blood.

Video footage recovered from a local homeowner's private security system depicted a man in a blue Acura driving onto the block, getting out of the vehicle and speaking to people in the street. That man returned to the blue Acura, and then a second vehicle turned onto the block and parked. The victim exited the passenger side of the second vehicle. The man in the blue Acura opened the driver side door of the vehicle he was in and fired a gun

for a self-defense instruction as to first-degree assault where this was a reasonable trial strategy and there was no reasonable probability that the instruction would have changed the result of the trial?

3. Did the post conviction court err in finding that defense counsel was ineffective for failing to register a meritless objection to admissible evidence, where there was no reasonable probability that an objection would have changed the result of the trial?

at the victim, striking him several times. The individual who fired the gun then got back into the blue Acura and drove away. The driver of the car that the victim had been in then stepped out and fired a gun at the Acura as it was driven away. Two bystanders were also struck by gunfire during these events.

The primary detective investigating these events, Detective Alex Haziminas ("Det. Haziminas") circulated a picture of the blue Acura throughout the BPD. Sergeant Michael Mercado ("Sgt. Mercado") identified the blue Acura as one of two vehicles he had been surveilling in connection with an investigation of Appellee. Sgt. Mercado subsequently viewed the recovered security video and identified Appellee as the driver of the blue Acura. A search of the Motor Vehicle Administration database revealed that the vehicle was registered to Appellee's sister.

Appellee was tried before a jury and found guilty of first-degree assault, reckless endangerment, and multiple firearm offenses.[2] The trial court sentenced Appellee to an aggregate of thirty-five years of incarceration. Appellee noted an appeal to this Court, arguing that it was error for the trial court not to instruct the jury on perfect and imperfect self-defense as to assault. *Wilkerson I*. In an unreported opinion, this Court found that Appellee's argument was unpreserved and affirmed Appellee's convictions. *Id.*, slip op. at 7, 9.

[2] Appellee was charged with and found guilty of use of a firearm in the commission of a crime of violence; possession of a firearm by a prohibited person; wear, carry, or transport of a handgun; and unlawfully discharging a firearm within the limits of Baltimore City. He was charged with and found not guilty of first- and second-degree attempted murder and attempted voluntary manslaughter.

In July of 2021, Appellee filed the Petition alleging ineffective assistance of counsel. Appellee asserted that his counsel had been ineffective on three bases: his trial counsel did not object to two *voir dire* questions which Appellee alleges improperly shifted the responsibility of a bias determination from the judge to the venire panel (Issue I); his trial counsel failed to request a jury instruction for perfect and imperfect self-defense as to assault (Issue II); and his trial counsel did not file a motion for modification of sentence after telling Appellee he would do so (Issue III). The State filed a response to the Petition in December of 2021. Appellee supplemented the Petition ("the Supplemental Petition") in May of 2022 wherein Appellee asserted two additional allegations of ineffective assistance of counsel: that his trial counsel had failed to interview the victim and failed to call the victim and two others as witnesses (Issue IV)[3]; and that his trial counsel had failed to object to testimony from Sgt. Mercado regarding a prior investigation of Appellee (Issue V). The State responded to the Supplemental Petition in July of 2023.

The circuit court held a hearing in August of 2023. Appellee called his trial counsel, John Cox ("trial counsel"), as the sole witness. Trial counsel testified that he was barred in 1999 and had in excess of twenty years of experience in the field of criminal law. He testified that he was familiar with the law governing proper phrasing of *voir dire* questions; however, he had "missed" the questions Appellee alleges were objectionable. He testified that he had initially requested that self-defense instructions as applicable to the assault

[3] Appellee subsequently withdrew Issue III. The postconviction court denied the Petition as to Issue IV and no cross appeal was raised thereto. Hence, we will not further discuss those issues other than where related to the issues raised on appeal.

charges and was surprised when the prosecutor objected and argued that self-defense was not applicable; upon further consideration he chose not to renew his request. He further testified that he had previously tried many cases opposite the prosecutor in this case, and it was his habit to meet with her and come to an understanding regarding police officer testimony that identified his clients. He noted that he had no specific memory of doing so in the trial here, but believed he met with the prosecutor to discuss Sgt. Mercado's testimony prior to trial.

The postconviction court issued an order and a separate memorandum opinion granting the Petition as to Issues I, II, and V and denying it as to Issue IV. The court found that trial counsel was ineffective for failing to object to two *voir dire* questions, failing to request a self-defense instruction as to assault, and failing to object to Sgt. Mercado's testimony. The State filed a timely application for leave to appeal, which this Court granted.

Additional facts relating to each issue will be discussed as relevant.

DISCUSSION

The United States Supreme Court established in *Strickland v. Washington* that a criminal defendant's Sixth Amendment right to counsel is violated through ineffective assistance of counsel when trial counsel's performance is (1) deficient and (2) prejudicial to the defense. 466 U.S. 668, 687 (1984); *Newton v. State*, 455 Md. 341, 355 (2017). Deficient performance is performance which fails to "meet an objective standard of reasonableness" based on "[p]revailing professional norms." *Mosley v. State*, 378 Md. 548, 557 (2003). Decisions by counsel resulting from a considered trial strategy do not constitute deficient representation. *See Coleman v. State*, 434 Md. 320, 338 (2013). A

strategic trial decision is one that is founded "upon adequate investigation and preparation." *State v. Borchardt*, 396 Md. 586, 604 (2007). To demonstrate prejudice arising from counsel's error, a defendant has the burden to show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Newton*, 455 Md. at 355 (internal quotation marks omitted).

Review of a postconviction court's determination on a claim of ineffective assistance of counsel is a mixed question of law and fact; this Court extends deference to the postconviction court's findings of fact but reviews questions of law *de novo*. *State v. Gross*, 134 Md. App. 528, 558–59 (2000) *aff'd*, 371 Md. 334 (2002) (citing *Strickland*, 466 U.S. at 698).

I. THE POSTCONVICTION COURT ERRED IN FINDING THAT COUNSEL WAS INEFFECTIVE FOR NOT OBJECTING TO TWO *VOIR DIRE* QUESTIONS.

A. Additional Facts

Two *voir dire* questions posed by the trial court are at issue here. The trial court first asked the venire:

> So the first one, as I said, may sound strange, but if you have strong feelings – and I want to define that – if you have strong feelings concerning attempted murder, assault, reckless endangerment, guns and gun laws – now, I'm not asking you if you think they're – any of that is terrible or wrong or immoral or reprehensible. Again, I need to determine whether anyone has such strong feelings that they could not be fair and impartial. So if you have strong feelings concerning attempted murder, assault, reckless endangerment or guns or gun laws, please stand.[4]

[4] Hereinafter, "Question 1."

In excess of twenty members of the venire panel indicated a response to Question 1. After several additional questions concerning the prospective jurors' prior knowledge of the case, potential grounds for statutory disqualification, and connections to Appellee, the victim, the witnesses, or the attorneys in the case, the court asked:

> Again, this is a three part question. I'd ask that you'd wait for all three parts. If you have ever been charged with a crime similar to any of the crimes involved in this case, if you have ever been the victim of a crime similar to any of the crimes charged in this case or if you have had a negative experience with the criminal justice system that would affect your ability to serve as a fair and impartial juror, please stand.[5]

In excess of ten members of the venire panel indicated a response to Question 2. Neither trial counsel nor the prosecutor objected to these questions. After posing questions to the venire panel and excusing disqualified jurors, the court then individually questioned every juror who responded to a question. No member of the venire who had responded to Questions 1 or 2 was ultimately selected as a juror or alternate.

The postconviction court found that both questions were impermissible compound questions which improperly shifted the burden of determining bias from the judge to the prospective jurors. That court also found that the compound phrasing was reversible error, and that trial counsel failed to preserve the issue for initial appellate review.

B. Parties' Contentions

The State contends that trial counsel's failure to object to either question was not deficient performance because an objection was not warranted as to either question and

[5] Hereinafter, "Question 2."

therefore would have been meritless. The State also contends that Question 1 is not compound and is therefore permissible. As to Question 2, the State notes that while it is compound as to its third part, the compound nature is permissible because only "strong feelings" questions must not be compound. As to prejudice, the State contends that, had trial counsel objected, there would be no reasonable probability of a different result either at trial or on appeal because the questions were not objectionable.

Appellee contends that both questions were impermissibly compound and that the failure to object to either question was deficient performance.[6] Appellee also contends that the trial court's questions would have constituted reversible error if preserved for a direct appeal; that the *voir dire* procedure employed by the trial court resulted in fundamental unfairness; and that under the circumstances of this case prejudice can be presumed.

[6] Appellee further contends that the first part of Question 2, which asks whether any potential juror had been charged with a crime similar to the crimes involved in the case, goes to statutory disqualification pursuant to Maryland Code (2006, 2020 Repl. Vol.), section 8-103(b)(4–5) of the Courts & Judicial Proceedings Article. Appellee asserts that statutory disqualification questions should not be asked in a compound manner. However, the record reflects that the trial court did pose the required statutory disqualification questions, including whether any potential juror had pending charges or a past conviction carrying a sentence of six months or more, prior to posing Question 2. The record reflects that there was no juror response to those questions.

C. Analysis

1. Trial Counsel's Failure to Preserve the Voir Dire *Issue for Appeal was not Ineffective Assistance Because the Issue did not have a Strong Likelihood of Success on the Merits.*

A question of ineffective assistance of counsel for the failure to preserve a claim for appeal necessitates some overlap in the analysis of performance and prejudice. *Gross v. State*, 371 Md. 334, 349–50 (2002). Counsel's performance is not deficient for failing to preserve an issue that is without merit, but may be deficient for failing to preserve a claim "that would have had a substantial possibility of resulting in a reversal of petitioner's conviction," thus prejudicing the defense. *Id.* at 350. As the underlying merits of an unpreserved appellate claim are relevant to both the deficient performance and prejudice prongs of a *Strickland* analysis, we will analyze the prongs together. Hence, the issue is whether trial counsel's performance in not objecting to the questions prejudiced the defense by failing to preserve an appellate claim that had a substantial possibility of a reversal.

Courts in Maryland employ limited *voir dire* aimed at uncovering specific grounds for disqualification of a venire person. *Pearson v. State*, 437 Md. 350, 356 (2014). On request, a trial court may only ask a *voir dire* question if it is reasonably likely to reveal "biases directly related to the crime, the witnesses, or the defendant[.]" *Id.* at 357 (quoting *Washington v. State*, 425 Md. 306, 313 (2012)). A trial court is required, on request, to inquire whether any prospective juror has strong feelings about the crimes charged. *Id.* at 360. In *Pearson*, the Supreme Court of Maryland established that the required "strong feelings" question must not be asked in a compound manner that shifts the responsibility of determining juror bias from the judge to the prospective jurors. *Id.* at 362 (relying on

Dingle v. State, 361 Md. 1, 5, 21 (2000)). Thus, it is improper to ask: "Does any member of the jury panel have such strong feelings about [the charges in this case] that it would be difficult for you to fairly and impartially weigh the facts[?]" *Id.* at 363 (internal citation and quotation marks omitted).

It is not the case, however, that prospective jurors can never be asked to self-report on their ability to be fair and impartial. *See Dingle*, 361 Md. at 15 ("Confession by a venire person is one way of establishing bias[.]"). In *White v. State*, the Supreme Court of Maryland held that "disapproved *Dingle*-type questions, *standing alone*, would constitute reversible error," but that the use of compound questions is not an abuse of discretion where the manner of *voir dire* "create[s] a reasonable assurance that partiality and bias would have been uncovered." 374 Md. 232, 242 (2003) (emphasis in original). More recently, in *Collins v. State*, the Court reiterated the principle that the required "strong feelings" question must not be phrased in compound form. 463 Md. 372, 379 (2019). However, the Court also held that other questions, such as whether something in a prospective juror's past would affect their verdict, whether sympathy, pity, or anger would affect their verdict, and "catchall" questions, may be asked in compound form so long as these questions do not substitute for a properly phrased "strong feelings" question. *Id.* at 400.[7]

[7] As *Collins* was not decided at the time of Appellee's trial, we will not assume that trial counsel anticipated its holding. *See McGhee v. State*, 482 Md. 48, 72–73 (2022) (holding that subsequent developments in applicable case law should not be considered when assessing the performance prong of an ineffective assistance of counsel claim). However, it is appropriate to consider *Collins* when evaluating prejudice. *See McGhee*, 482 Md. at 70.

Here, the trial court did not phrase Question 1, the "strong feelings" question, in a compound manner. The court, anticipating that the question may sound "strange" to some prospective jurors, prefaced the question by explaining its purpose in asking: "Again, *I need to determine* whether anyone has such strong feelings that they could not be fair and impartial." (emphasis added). The court then asked, "[I]f you have strong feelings concerning attempted murder, assault, reckless endangerment or guns or gun laws, please stand." This phrasing accords with *Pearson*'s requirement that "a trial court must ask during *voir dire* whether any prospective juror has 'strong feelings' about the crime with which the defendant is charged." 437 Md. at 363 (internal citation omitted). Because Question 1 was not compound, trial counsel's performance was not deficient in not objecting to the question. *See Gross*, 371 Md. at 350.

The postconviction court found, and the State concedes, that Question 2 is compound. In the third part of the question, the trial court asked whether any of the jurors "have had a negative experience with the criminal justice system that would affect [the] ability to serve as a fair and impartial juror."[8] We agree with the postconviction court that

[8] Appellee contends that Question 2 was compound as to all three parts. He contends that

> a reasonable person . . . hearing the three-part question would conclude that he should only stand if he had been charged with a crime that would affect his ability to be fair and impartial; that he should only stand if he had been the victim of a crime similar to those charged that would affect his ability to be fair and impartial; and that he should only stand if he had a negative experience with the criminal justice system that would affect his ability to be fair and impartial.

The law governing compound questions is concerned not with possible interpretation, but with precise phrasing. *See, e.g., Pearson*, 437 Md. at 363 (proscribing a quoted compound question). We therefore address the trial court's precise wording of the *voir dire* questions at issue, not their potential interpretation by prospective jurors.

this is compound phrasing. As Maryland courts disfavor compound *voir dire* questions, *see White*, 374 Md. at 242 n.4, it would not have been unreasonable for trial counsel to object to the compound phrasing in that portion of Question 2. However, both before and after *Collins*, the applicable law did and does not prohibit compound phrasing in every instance. *See White*, 374 Md. at 242; *Dingle*, 361 Md. at 15. It is therefore, likewise, reasonable that trial counsel did not object. *See Mosley*, 378 Md. at 557 (holding that deficient performance is performance which fails to "meet an objective standard of reasonableness").

Nevertheless, because trial counsel did not object to the compound phrasing, the issue of whether Question 2's compound phrasing was impermissible was not preserved for Appellee's direct appeal. As this issue was raised in the context of a failure to preserve, we assess the likelihood of success of an appeal on the merits of the unpreserved claim in order to determine if the defense was prejudiced by the lack of preservation. *See Gross*, 371 Md. at 350. Appellee contends that his conviction would have been reversed if the issue was preserved. To be sure, "*Dingle*-type questions, *standing alone*, would constitute reversible error." *White*, 374 Md. at 242. However, the compound question asked here did not stand alone. The trial court asked a range of *voir dire* questions, including a properly phrased "strong feelings" question. The court subsequently conducted individual *voir dire* of the prospective jurors who had responded to the "strong feelings" question. The *voir dire* procedure thus "create[d] a reasonable assurance that partiality and bias would have been uncovered." *Id.* at 242.

In *Collins*, the Supreme Court of Maryland emphasized that the asking of some compound questions is not improper as long as the questions do not substitute for a properly

phrased "strong feelings" question. 463 Md. at 379, 400. As we have discussed, the trial court here did ask a properly phrased "strong feelings" question, and the compound portion of Question 2 was not a substitute for questions directed at fundamental biases. Had trial counsel objected, it is unlikely that an appeal based on such objection would have succeeded following the holding in *Collins*. 463 Md. at 400. Even had the issue been preserved by an objection to the compound question, Appellee would not have had a substantial possibility of success on the merits of an appeal. *Gross*, 371 Md. at 350. Thus, trial counsel's not objecting to the questions was not deficient performance and did not prejudice the defense.

2. The Presumption of Prejudice does not Apply.

Appellee contends that this is a case in which prejudice should be presumed based on actual or constructive denial of counsel or, in the alternative, structural error. The Supreme Court in *United States v. Cronic* recognized three circumstances in which prejudice can be presumed: the actual denial of the assistance of counsel; the constructive denial of the assistance of counsel; and cases in which no attorney could provide effective assistance, such as an actual conflict of interest. 466 U.S. 648, 659–60 (1984); *see also Ramirez v. State*, 464 Md. 532, 562–63 (2019). Maryland courts have not expanded beyond those three established circumstances. *Clark v. State*, 485 Md. 674, 702 (2023) ("This Court has not permitted an encroachment on the three circumstances under which prejudice is presumed post-conviction."). Here, Appellee alleges that trial counsel's failure to object

to the compound *voir dire* question amounts to both an actual and a constructive denial of counsel. It is neither.

An actual denial of the assistance of counsel occurs where counsel "was either totally absent, or prevented from assisting the [petitioner] during a critical stage of the proceeding." *Ramirez*, 464 Md. at 574 (internal citation omitted). For instance, the Supreme Court of Maryland found an actual denial of the assistance of counsel where counsel was prohibited from consulting with the defendant during an overnight recess. *Clark*, 485 Md. at 680. In this case, however, trial counsel was present for the entire duration of *voir dire*; the trial court did not exclude counsel from the courtroom, forbid counsel from raising objections, or take any other action that would prevent counsel from assisting Appellee during *voir dire*. In trial counsel's own estimation, his not objecting was merely something he "missed." Appellee's contention—that trial counsel's "oversight" amounted to a "prevent[ion] from properly assisting [Appellee] during a critical stage" of the trial—has no supporting authority. Because trial counsel was not prevented from assisting Appellee during *voir dire*, Appellee was not actually denied the assistance of counsel.

A constructive denial of the assistance of counsel occurs where counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing." *Walker v. State*, 391 Md. 233, 247 (2006) (internal quotation omitted). The Court in *Walker* emphasized the high standard for finding constructive denial—the failure to subject the case to adversarial testing must be "complete." *Id.* at 247–48 (citing *Florida v. Nixon*, 543 U.S. 175, 190 (2004)).

In *Walker*, the defendant alleged ineffective assistance of counsel on the basis that his counsel participated minimally at trial due to the defendant's own absence. 391 Md. at 244. The Court analyzed *Cronic* and its progeny and held that the constructive denial of the assistance of counsel does not apply where counsel "failed to challenge specific aspects of the State's case." *Id.* at 248. The Court thus rejected the defendant's argument "not that his counsel failed to oppose the prosecution throughout the sentencing proceeding as a whole, but that his counsel failed to do so at specific points." *Id.* at 248 (quoting *Bell v. Cone*, 535 U.S. 685, 696 (2002)). Here, Appellee is making a similar argument, alleging that his trial counsel failed to object to *voir dire* at specific points, namely, the two questions he contends are improperly compound. Appellee does not allege that trial counsel failed to participate in *voir dire* entirely, nor does the record reflect that such an allegation would hold true. Because trial counsel did not "entirely fail[] to subject the prosecution's case to meaningful adversarial testing," Appellee was not constructively denied the assistance of counsel. *Walker*, 391 Md. at 247.

Appellee next contends that prejudice should be presumed on the basis that the asking of compound questions is "error that always results in fundamental unfairness or error [the effect of which] is too hard to measure." Here, Appellee relies on *Weaver v. Massachusetts*, in which the Supreme Court defined three broad categories of structural error, subsequently adopted by Maryland courts: "the right at issue serves an interest other than protecting against erroneous conviction; 'the effects of the error are simply too hard to measure'; and 'the error always results in fundamental unfairness.'" *Clark*, 485 Md. at 707 (quoting *Weaver v. Massachusetts*, 582 U.S. 286, 295–96 (2017)).

Weaver does not establish that each category of structural error can create a foundation for a presumption of prejudice. The *Weaver* Court "assumed, without reaching the issue, that the prejudice prong could be satisfied if the attorney's errors were 'so serious as to render [the] trial fundamentally unfair'—the third category of structural error." *Newton*, 455 Md. at 356 (quoting *Weaver*, 582 U.S. at 301). In *Ramirez v. State*, after providing a thorough explanation of *Weaver* and its place alongside the presumptive prejudice doctrine, the Supreme Court of Maryland concluded that as a threshold matter, the failure to strike or challenge an allegedly biased juror did not clearly result in structural error. 464 Md. at 565–67, 573. The Court noted:

> [n]ot every claim with respect to the failure to strike or challenge an allegedly biased juror will result in a determination that a trial was fundamentally unfair. And, even if we were to determine structural error, that would not relieve [the defendant] of the obligation to prove prejudice when alleging the ineffective assistance of counsel.

Id. at 573 (citing *Weaver*, 582 U.S. at 301 and *Newton*, 455 Md. at 357). Thus, the Supreme Court of Maryland held that a petitioner must show either a reasonable probability of a different result (i.e., actual prejudice) or fundamental unfairness of the proceeding. *Id.* at 357. Structural errors that fall into the category of errors for which the effects are simply too hard to measure cannot serve as the basis for a presumption of prejudice.

Maryland courts have rarely found instances that amounted to structural error. Previous findings of structural error have included "an error in a reasonable doubt jury instruction" and "an unsworn jury." *Newton*, 455 Md. at 354–55 (citing *Savoy v. State*, 420 Md. 232, 254 (2011) and *Harris v. State*, 406 Md. 115, 130–32 (2008)). Even where courts

find structural error, it is uncommon to find that the error results in fundamental unfairness. The Court in *Newton* remarked: "The Supreme Court [of the United States] has found only a handful of circumstances that render a trial fundamentally unfair, including: the complete deprivation of counsel . . .; the failure to give a reasonable doubt jury instruction . . .; a biased trial judge . . .; and the race-based exclusion of grand jurors." *Id.* at 361 (internal citations omitted).

Appellee relies on *White* to argue that the asking of compound *voir dire* questions renders a trial fundamentally unfair. In *White*, the trial court asked an impermissibly compound question, but also individually questioned each venire person. 374 Md. at 242. The Court in *White* made clear that the *voir dire* procedure should be assessed in its entirety to determine whether the procedure "created a reasonable assurance that partiality and bias would have been uncovered." *Id.* This case-by-case evaluative standard does not suggest that when a compound question is posed, the high standard of fundamental unfairness is met; nor do the other Maryland cases regarding compound *voir dire* questions—*Dingle*, *Pearson*, and *Collins*—hold that impermissible compound questions result in a procedure that is fundamentally unfair. *Dingle*, 361 Md. at 21 (holding that a trial court may not employ a *voir dire* procedure in which every question requested by the defense was asked in a manner that improperly shifted the burden of determining bias to the venire persons); *Pearson*, 437 Md. at 363 (holding that, if asked, a trial court must ask the "strong feelings" question and may not phrase it in a compound manner); *Collins*, 463 Md. at 400 (reaffirming the holding in *Pearson* and holding that other questions asked did not substitute for a properly phrased "strong feelings" question).

Appellee additionally cites *Wright v. State* to argue that the asking of compound questions is structural error. In *Wright*, the Court addressed a method of *voir dire* in which the trial court asked seventeen questions one after the other, without obtaining responses following the questions but instead asked venire persons to remember and self-report their responses to each question at the conclusion of the questions. 411 Md. 503, 506 (2009). Because this procedure created "the very real possibility that the venire members failed to disclose relevant information[,]" the Court held that direct proof of prejudice was "a virtual impossibility[,]" and the defendant was not required to show such proof. *Id.* at 513. That holding does not create a presumption of prejudice here for several reasons.

First, Appellee is alleging a type of structural error based on *Wright*'s holding—that the effects of the contended error are too difficult to measure—which does not support a presumption of prejudice. Second, even if Appellee were alleging that this holding establishes fundamental unfairness, *Wright* is distinguishable from the present case. *Wright* came before the Court on direct appeal. *Id.* at 507. The standard applied to an ineffective assistance of counsel claim on direct appeal is less focused on finality than that at the postconviction stage.[9] Thus, "errors that would result in automatic reversal on direct appeal

[9] It is worth noting that requiring proof of prejudice in the case of unpreserved claims of structural error is important to uphold the contemporaneous objection rule. *See State v. Brand*, ___ Md. App. ___, ___, 2025 WL 957558, at *20 (filed Mar. 31, 2025). This Court recently examined and rejected an argument that prejudice should be presumed for a claim of ineffective assistance based on an underlying claim that a defendant's waiver of a jury trial was not knowing and voluntary. *Id.* at *23. Although this claim, if established on direct appeal, would have resulted in an automatic reversal, we held that at the postconviction stage Brand was required to show a reasonable probability of a different outcome—"the default rule for ineffective assistance claims." *Id.* at *23–24. To hold otherwise "would

may not warrant a new trial when raised as part of a postconviction ineffective-assistance-of-counsel claim." *Newton*, 455 Md. at 359. The error challenged in *Wright*, that of an "incomplete voir dire," is also not applicable to the error alleged here. As we have noted, the challenged compound question in this case was an isolated issue and did not cast doubt on the trial court's entire *voir dire* process. *See Wright*, 411 Md. at 513. Thus, prejudice of an entirely faulty *voir dire* process is not applicable here, where the *voir dire* process created a reasonable assurance of uncovering bias. *See White*, 374 Md. at 242.

As Appellee has not demonstrated actual prejudice—i.e., a substantial possibility of success on the merits of an appeal—and as this is not a case in which the presumption of prejudice applies, he has not met his burden to establish prejudice. *Gross*, 371 Md. at 350; *Newton*, 455 Md. at 357.

II. THE POSTCONVICTION COURT ERRED IN FINDING THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO REQUEST SELF-DEFENSE INSTRUCTIONS AS TO ASSAULT.

A. Additional Facts

The relevant factual basis regarding the potential issue of self-defense arose from the cross examination of Det. Haziminas, who led the investigation of the shooting. Trial counsel elicited Det. Haziminas' agreement that in the statement of probable cause, his interpretation of the video was that the victim pulled up his shirt and reached for what appeared to be a handgun prior to Appellee opening fire. The trial court agreed to give self-defense instructions as to the attempted murder charges on those grounds.

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treat an unpreserved structural error no differently than a preserved structural error." *Id.* at *20. Here, too, the "default rule" is the applicable standard.

While discussing proposed jury instructions, trial counsel initially requested perfect and imperfect self-defense instructions as to first- and second-degree attempted murder, and an imperfect self-defense instruction as to first-degree assault. The prosecutor opposed the inclusion of self-defense instructions, arguing that the factual basis to generate those instructions was not in evidence. After hearing from counsel, the court indicated an intent to give self-defense instructions as to the attempted murder charges, concluding that the minimum amount of evidence to generate the instructions was present.

Trial counsel then renewed his request for an imperfect self-defense instruction as to first-degree assault, and the prosecutor contended that self-defense would mitigate only the "serious bodily harm" modality of first-degree assault. Trial counsel disagreed with that assertion but agreed not to pursue the issue rather than to have the instruction for only one assault modality, stating, "I just think we're going to confuse the heck out of the jury at this point." The court gave self-defense instructions as to attempted first- and second-degree murder, and trial counsel did not object.

The postconviction court found that a self-defense instruction as to the assault charges was merited, and that failure to advocate for, or object to the exclusion of, a self-defense instruction as to assault was not a reasonable strategic decision. On the issue of prejudice, the postconviction court noted that Appellee was acquitted of attempted first- and second-degree murder charges, where self-defense instructions were given.

B. Parties' Contentions

The State contends that whether an imperfect self-defense instruction as to assault was applicable is an unsettled question of law, and trial counsel made a strategic choice to

pursue a misidentification theory of defense rather than press a self-defense theory. As to prejudice, the State contends that, even had a self-defense instruction as to assault been given, there is not a substantial probability that the jury would have found Appellee not guilty of assault and the various firearm offenses.

Appellee contends that self-defense, including imperfect self-defense, applies to assault, and trial counsel's performance was deficient in not pursuing self-defense instructions.[10] As to prejudice, Appellee contends that the jury's acquittal of him on attempted murder charges demonstrates a finding of self-defense, and therefore, had an instruction been given as to assault, there is a substantial possibility that he would have been found not guilty.

[10] Appellee also contends that self-defense applies to reckless endangerment and, had a self-defense instruction been given as to reckless endangerment, there was a substantial possibility that Appellee would have been found not guilty of all charges. The postconviction court held that only a self-defense instruction as to assault was merited. The issue of trial counsel's failure to advocate for the inclusion of a self-defense instruction as to reckless endangerment is therefore not before us.

C. Analysis

1. Counsel's Performance was not Deficient in Declining to Pursue Self-Defense Instructions as to Assault.

It is an unsettled question of law whether imperfect self-defense continues to mitigate first-degree assault.[11] Resolution of that question is not before us. Nonetheless, "[s]elf-defense applies to assaultive crimes generally." *Bynes v. State*, 237 Md. App. 439, 442 (2018) (internal citation and quotation marks omitted).

Counsel's performance is not deficient where decisions result from a considered trial strategy. *See Coleman v. State*, 434 Md. 320, 338 (2013). It can be a reasonable trial strategy not to request every jury instruction to which the defense may be entitled. *See State v. Mann*, 466 Md. 473, 503 (2019) ("[T]he entitlement to an instruction if you want one does not imply that you are derelict for not wanting one."). Choosing not to request an instruction may be reasonable where there is not a strong factual basis for an instruction, or where counsel has selected a different reasonable defense strategy. *Id.* at 500–01; *State v. Latham*, 182 Md. App. 597, 618 (2008).

Here, trial counsel initially pursued a self-defense instruction as to assault, then abandoned the request when faced with the State's contention that Appellee was not entitled to that defense as to the firearm modality of first-degree assault. The factual basis generating assault came from one witness's—Det. Haziminas'—interpretation of the

[11] Following the initial resolution of that question in *Christian v. State*, 405 Md. 306 (2008), the Supreme Court of Maryland abrogated the case used by *Christian* to reach its decision. *See State v. Jones*, 451 Md. 680 (2017) (overruling *Roary v. State*, 385 Md. 217 (2005)).

security video, which the jury could view and assess for themselves. Trial counsel attempted to elicit Sgt. Mercado's agreement with the self-defense interpretation of the video; however, counsel was unsuccessful.

Self-defense was not the primary focus of the defense theory pursued by trial counsel. The theory of the defense was misidentification. Counsel's opening statement focused on the issue of misidentification of Appellee on video, and he posed self-defense only as a fallback: "So watch the video. Tell me whether that's him beyond a reasonable doubt. That's the first step. Now I don't know if you even get past it. I'm pretty sure you won't get past it. Let's say that you do . . ." Trial counsel's closing argument similarly did not focus significantly on self-defense: "Now I didn't really want to get into it because I don't think it matters because you can't see the person to say beyond a reasonable doubt it's my client." Hence, the self-defense theory was in contradiction to the misidentification theory and was approached with strategic nuance by defense counsel. *See Latham*, 182 Md. App. at 618 (holding that counsel was not deficient for failing to request self-defense instructions where he argued that the defendant had been an innocent bystander, a theory of the case which contradicts self-defense).

Trial counsel had limited grounds on which to generate a self-defense instruction and a primary defense that was factually inconsistent with self-defense. Trial counsel's performance was not deficient in declining to pursue self-defense instructions as to assault because it was reasonable considering the defense strategy.

2. The Jury's Verdict does not Demonstrate that there was Prejudice to the Defense.

Even if the failure to request a jury instruction was deficient performance, Appellee has not sufficiently demonstrated that he was prejudiced by defense counsel's actions. To demonstrate prejudice, Appellee must show a reasonable probability that but for trial counsel's actions, the result at trial would have been different. *Newton v. State*, 455 Md. 341, 355 (2017). Appellee contends that the lack of a self-defense jury instruction as to assault resulted in his conviction on that charge. Appellee further asserts that his acquittal of attempted homicide charges evidences the jury's belief that he acted in self-defense.

In *Wallace v. State*, the Supreme Court of Maryland analyzed the prejudicial impact of a jury instruction that erroneously stated the requisite intent for attempted second-degree murder. 475 Md. 639, 658 (2021). There, the defendant was acquitted of first-degree attempted murder but convicted of second-degree attempted murder, assault, and use of a handgun in the commission of a crime of violence; these determinations reflected that the defendant "intended to cause offensive physical contact while using a firearm with the intent to cause serious physical injury." *Id.* at 662. Because this finding was not sufficient to support second-degree attempted murder, the erroneous instruction given to the jury was prejudicial. *Id. Wallace* is factually distinguishable from the case here, but its model of analysis in assessing the impact of a jury instruction on the final verdict through reasonable inferences is helpful. To determine if Appellee was prejudiced by the failure to request a self-defense instruction as to assault, the jury's finding of "guilty" as to first-degree assault

must be understood in context of the instructions, the evidence, and the entire verdict. *See id.*

The jury was provided with evidence of a security video of the shooting and an identification of Appellee on video. While the video depicts several bystanders present, none testified at trial. Nor did the victim testify. Appellee chose not to present any evidence in his case. Thus, the jury was not presented with any evidence of what, if anything, was said during the altercation nor with the perception of an eyewitness of Appellee's and the victim's behavior. The task of the jury as factfinder was to assess the credibility of the identification of Appellee and to make their own assessment of what occurred based on the evidence to include viewing the video.

The record reflects that the jury was instructed to find Appellee not guilty of all attempted murder charges if it found that he met the elements for complete self-defense, and to find him guilty of attempted voluntary manslaughter if the elements of the underlying crime where proven in conjunction with the elements for partial self-defense. The jury returned a verdict of "not guilty" as to all three attempted murder charges; however, the jury returned a verdict of "guilty" for first-degree assault, for which two modalities were given (intent to cause serious physical injury or use of a firearm to commit assault); and a verdict of "guilty" for all charged firearm offenses.

One possible interpretation of the jury's verdict is that based on a finding of perfect self-defense they found Appellee not guilty of the attempted murder charges. It is not possible, given the mitigation instructions, to conclude that the jury found that the elements of first- or second-degree attempted murder were met, yet that Appellee acted in imperfect

self-defense; were that the case, the jury would have found Appellee guilty of attempted voluntary manslaughter. Another possibility is that the jury found that Appellee intended to shoot the victim, meeting the elements of first-degree assault, but lacked sufficient insight into his state of mind to find that he did so with the intent to kill. Unlike the verdict returned in *Wallace*, there is no apparent inconsistency in the overall verdict raised by the assault conviction. *See* 475 Md. at 662 (where the jury's overall verdict was consistent with a finding of intent to cause serious bodily harm, and a conviction of second-degree murder was therefore inconsistent).

Given that Appellee's proposed understanding of the jury's verdict is not the only reasonable interpretation of the record, we cannot say that there was a "substantial or significant possibility" that Appellee's first-degree assault conviction was affected by the non-inclusion of a self-defense instruction as to assault. *Wallace*, 475 Md. at 660. The jury's verdict is not sufficient to demonstrate that the defense was prejudiced.

III. THE POSTCONVICTION COURT ERRED IN FINDING THAT COUNSEL WAS INEFFECTIVE FOR NOT OBJECTING TO SGT. MERCADO'S TESTIMONY.

A. Additional Facts

At trial, the State called Sgt. Mercado to testify. Sgt. Mercado testified that he is a supervisor for the Operations Unit for the Northern District of Baltimore City and that his unit primarily investigates crimes of violence and crimes involving controlled dangerous substances. He testified that in the spring of 2017, his unit had been investigating Appellee using multiple means of surveillance, for three weeks to a month. Sgt. Mercado himself had surveilled Appellee on at least ten occasions and had observed him operating two

vehicles, one of which he identified as the blue Acura involved in the shooting. Sgt. Mercado stated that the location of the investigation was one and a half to two blocks from the location of the shooting. Hence, when Det. Haziminas circulated a picture of the blue Acura, Sgt. Mercado was able to identify it as one of the two vehicles Appellee routinely drove. As a result, upon viewing the security video depicting the shooting, Sgt. Mercado was able to identify Appellee.

The postconviction court held that Sgt. Mercado's testimony constituted prior bad acts evidence not within an exception, and that trial counsel was ineffective for failing to object because the testimony was prejudicial to Appellee.

B. Parties' Contentions

The State contends that Sgt. Mercado's testimony laid a foundation for his identification of Appellee on the security video and was therefore admissible as an exception to Maryland Rule 5-404(b).[12] The State also contends that because trial counsel had previously reached an agreement with the prosecutor regarding Sgt. Mercado's testimony, there was no strategic reason for counsel to object. As to prejudice, the State

[12] Appellee asserts that the State's argument, that Sgt. Mercado's testimony was "narrowly tailored" to the issue of identification, is unpreserved for appeal. The State, in its response to the Supplemental Petition, argued that "Sgt[.] Mercado's testimony was [offered] for the purpose of laying a foundation for the identification" and that trial counsel and the prosecutor agreed to "tailor" Sgt. Mercado's testimony for that purpose. At the postconviction hearing, the State argued that, under *Moreland v. State*, 207 Md. App. 563 (2012), for Sgt. Mercado to identify Appellee on video, the State had to "lay a proper foundation that that person is in a better position to make that identification than the jurors." Since the State's argument was raised in the postconviction court, and addressed by that court's finding that the testimony did not fall within an exception to Maryland Rule 5-404(b), it is preserved for our review. Md. Rule 8-131(a).

contends that the postconviction court did not conduct a prejudice analysis on this issue. The State argues that Appellee cannot demonstrate that he was prejudiced by trial counsel's non-objection to Sgt. Mercado's testimony because the objection would have been meritless.

Appellee contends that, by discussing the nature of his work with the Operations Unit, the methods of surveillance used by that unit, and the length of time Appellee was under investigation, Sgt. Mercado's testimony implied a criminal propensity and was inadmissible under Maryland Rule 5-404(b). Appellee also disagrees that trial counsel employed reasonable trial strategy in failing to object.[13] As to prejudice, Appellee contends that trial counsel's non-objection failed to advance his interests at trial. Appellee further argues that "[b]ecause there was no probative value to the testimony in question, there is nothing to weigh against the undue prejudice of the evidence."

C. Analysis

1. Counsel's Choice not to Object to the Testimony was not Deficient Performance.

Failure to object to the admission of prior bad acts evidence is not deficient performance where the evidence is admissible through a relevance exception. *See Wallace v. State*, 475 Md. 639, 672 (2021) (finding that trial counsel was not deficient for failing to

[13] On the issue of trial strategy, Appellee also contends that one of the State's examples on this point—that trial counsel lodged repeated objections to "other aspects" of Sgt. Mercado's testimony—is unpreserved. The State discussed the issue of trial strategy in its response to the Supplemental Petition and at the hearing. The postconviction court addressed this issue in its order in finding that trial counsel did not employ a reasonable trial strategy. This, therefore, is preserved for our review. Md. Rule 8-131(a).

object to propensity evidence where the evidence was relevant to show motive and identity). Maryland Rule 5-404(b) excludes evidence of other crimes, wrongs, or acts; however, such evidence "may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, *identity*, absence of mistake or accident . . ." (emphasis added). In order to be admissible, prior bad acts evidence must be "substantially relevant to some contested issue in the case," clear and convincing in establishing the accused's involvement, and not substantially outweighed by "the danger of unfair prejudice." *Gutierrez v. State*, 423 Md. 476, 489–90 (2011) (citing *State v. Faulkner*, 314 Md. 630, 634–35 (1989)).

Here, the contested issue was the identity of the person on the security video and whether that was Appellee. Because the identification was being made from a video, Sgt. Mercado's testimony had to establish sufficient familiarity with Appellee such that he was in a better position to make the identification than the jury. *See Moreland*, 207 Md. App. at 573. Sgt. Mercado's testimony established the length of his investigation and amount of time he had spent surveilling Appellee, laying a necessary foundation for his identification on video.

Appellee contends that Sgt. Mercado improperly spoke at length about his investigation, referencing his identification of the blue Acura and the intersection where the shooting took place. The identity exception to the exclusion of prior bad acts evidence can take many forms, including "the defendant's presence at the scene or in the locality of the crime on trial; . . . that on another occasion the defendant . . . was using certain objects used by the perpetrator of the crime at the time it was committed; . . . [and] that the

witness'[s] view of the defendant at the other crime enabled him to identify the defendant as the person who committed the crime on trial." *Faulkner*, 314 Md. at 637–38 (quoting *Cross v. State*, 202 Md. 468, 477–78 (1978)). Sgt. Mercado's testimony established Appellee's presence in the locality of the shooting, Appellee's prior use of the blue Acura captured on video, and Sgt. Mercado's sufficient familiarity with Appellee to identify him.

While Appellee objects to Sgt. Mercado's statements about the nature of his unit's work and investigative practice, Sgt. Mercado never specified whether Appellee was under investigation as a criminal suspect or what, if any, involvement Appellee might have had in criminal activity. Regarding the investigation, he said, "[o]ne of the primary things we were doing at the time was surveillance in a certain location in reference to certain individuals, [Appellee] being one of them." While Sgt. Mercado's testimony could have created an inference of criminal suspicion, he did not directly implicate Appellee in a crime, and his testimony was highly probative to the issue of identity. The probative value of this testimony therefore substantially outweighed any danger of unfair prejudice. Because Sgt. Mercado's testimony fell within the identity exception to prior bad acts evidence, it is unlikely trial counsel's objection would have succeeded. *See Wallace*, 475 Md. at 672.

There is a presumption that "counsel's conduct fell within a broad range of reasonable professional judgment." *Coleman v. State*, 434 Md. 320, 335 (2013) (internal citation and quotation marks omitted). Appellee thus had the burden to prove that trial counsel's non-objection was not the result of a reasonable trial strategy. *See id.* at 338. As we have noted, trial counsel testified at the postconviction hearing that though he had no specific memory of his strategy at trial as to this issue, he believed that he acted in

accordance with his habit and worked out an agreement with the prosecutor regarding Sgt. Mercado's testimony. Trial counsel's opening statement at trial reflects that he anticipated Sgt. Mercado's testimony. He informed the jury that "[t]here is a video and there is a detective who is going to say I saw the video and I know who it is." He pointed out Appellee in the courtroom and stated, "you, ladies and gentlemen, will have just as much, if not more opportunity to see my client as this detective did *when they surveilled him*." (emphasis added) Trial counsel was aware that Sgt. Mercado was going to testify about his prior investigation of Appellee and laid groundwork to undermine Sgt. Mercado's identification.

The record reflects that trial counsel was aware of the purpose of Sgt. Mercado's testimony—to lay a foundation for his identification of Appellee on video—and that trial counsel was involved in the limiting of that testimony. When the prosecutor proposed showing the video during Sgt. Mercado's testimony, trial counsel initially objected, noting a concern that Sgt. Mercado might narrate the video. The prosecutor explained her objective:

> [Prosecutor]: [] What I'm doing is I'm having him watch it. So I'm playing what's already in evidence to the jury again and then I'm going to have him describe how he was able to make the identification based on what details from the video. That's all.
> [Trial counsel]: Okay.

Trial counsel's assent to identification of Appellee as a proper form of Sgt. Mercado's testimony demonstrates his correct understanding that this was admissible testimony.

On cross examination, trial counsel elicited further details of Sgt. Mercado's investigation of Appellee. He asked whether Sgt. Mercado had a case folder detailing the

investigation; what specific date the investigation began; whether any officers had taken video of Appellee; and what specific dates Sgt. Mercado had surveilled Appellee. Trial counsel then referred to Sgt. Mercado's testimony about the investigation in his closing argument. He criticized Sgt. Mercado's failure to answer his cross-examination questions and sought to undermine his identification of Appellee, as previewed in his opening statement.

Trial counsel's approach to Sgt. Mercado's testimony at trial supports his conclusion at the postconviction hearing that he worked with the prosecutor to limit the testimony to the issue of identification. Trial counsel crafted a trial strategy that anticipated testimony about surveillance of Appellee and sought to undermine Sgt. Mercado's identification of his client on video, a key piece of the State's evidence. Because the testimony was admissible and trial counsel's testimony at the hearing and actions at trial reflect a considered trial strategy surrounding Sgt. Mercado's testimony, trial counsel's performance was not deficient. *See Coleman*, 434 Md. at 338.

2. Appellee has not Demonstrated Prejudice.

The proponent of a claim of ineffective assistance of counsel has the burden to establish either "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" or that the result was "fundamentally unfair or unreliable." *Newton v. State*, 455 Md. 341, 355 (2017). Here, Appellee has the burden of establishing that, but for trial counsel's non-objection to Sgt. Mercado's testimony, the outcome at trial would have been different, or that the non-objection rendered the trial fundamentally unfair. *See id.* at 357.

Appellee has not demonstrated either. Instead, he argues that in not objecting trial counsel did not advance Appellee's interests—presumably in excluding harmful evidence—and that the testimony at issue was prejudicial in implying a criminal propensity. Appellee relies on *State v. Borchardt* to assert that a reasonable trial strategy must "advance the client's interests," and that since it was against Appellee's interest for Sgt. Mercado to testify about his investigation, trial counsel did not act reasonably. 396 Md. 586, 615 (2007). This is an argument that goes to performance, not prejudice.[14] As we have discussed above, trial counsel's actions did reflect a reasonable choice based in trial strategy.

In arguing that the testimony implied a criminal propensity, Appellee appears to conflate the danger of prejudice posed by prior bad acts evidence with the *Strickland* standard for prejudice. The question of whether the probative value of the testimony at issue was substantially outweighed by the danger of unfair prejudice goes to the issue of trial counsel's performance, as discussed above. Had trial counsel objected to Sgt. Mercado's testimony, it is likely his objection would have been overruled, as Sgt. Mercado's testimony was highly probative of the issue of identity. Lodging an objection would not have prevented admission of the testimony and thus would not have changed the outcome at trial. This is not an instance where prejudice can be presumed. *See Ramirez*,

[14] *Borchardt* concerns the reasonableness of a decision not to call a witness, which is not at issue here. 396 Md. at 615. A trial attorney has considerably more control over the testimony presented in calling the defense's own witnesses, compared to testimony elicited from the opposing party's witnesses. Thus, we cannot expect a defense attorney to ensure that testimony by a witness called by the State advances his client's interests.

464 Md. at 573; *Harris v. State*, 303 Md. 685, 699 (1985). Therefore, Appellee has not met his burden of demonstrating that counsel committed an error which prejudiced the defense.

For the forgoing reasons, we conclude that the circuit court erred in granting a new trial based on ineffective assistance of counsel because Appellee did not meet his evidentiary burden to demonstrate deficient performance and prejudice to the defense in any of the three instances before us. Accordingly, we reverse.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY REVERSED. COSTS TO BE PAID BY APPELLEE.