UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0422

September Term, 2014

TAVON ERVIN

v.

STATE OF MARYLAND

Nazarian,
Leahy,
Wilner, Alan, S.
(Retired, Specially Assigned),

JJ.

Opinion by Leahy, J.

Filed: July 14, 2016

More than a decade ago, a jury in the Circuit Court for Baltimore City convicted Tavon Ervin ("Appellant") of first-degree murder and related handgun offenses in the shooting death of Jerome Tate. On February 28, 2013, Appellant filed a petition for postconviction relief in the Circuit Court for Baltimore City. He asserted 15 grounds of ineffective assistance of counsel, including that his trial counsel failed to object to the trial court's reasonable doubt instruction to the jury.

At the hearing, Appellant's prior trial counsel ("Trial Counsel") testified that she had been deficient in her performance. In an opinion and order entered on March 31, 2014, the court ordered that Appellant be granted permission to file a belated motion for modification of sentence and a belated application for review of sentence, but denied all other relief, including Appellant's request for a new trial. This Court granted Appellant's application for leave to appeal in an order dated June 29, 2015, directing the parties to address the following question:

> Whether trial counsel rendered ineffective assistance of counsel by failing to object when the trial judge instructed the jury that reasonable doubt was the type of doubt they would use to decide their "daily activities and business affairs," instead of instructing them that reasonable doubt was the type of doubt they would use to decide their "important daily activities and business affairs?"

We conclude that Trial Counsel's performance was not deficient because her representation did not fall "below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). The disputed reasonable doubt instruction was within the range of reasonable doubt instructions found to be acceptable by Maryland

appellate courts before *Ruffin v. State*, 394 Md. 355 (2006), and, thus, a failure to object to the instruction did not render Trial Counsel's representation deficient. We affirm.

BACKGROUND

A. Appellant's Murder Trial

For the reason that this appeal is from a denial of postconviction relief and concerns a single question of law, we present an abbreviated account of the facts elicited at Appellant's trial.

Jerome Tate was shot and murdered on Vine Street in Baltimore City on August 18, 2001. Appellant stood trial for Tate's murder over four days—January 29, 30, 31 and February 5, 2003—charged with first-degree murder, use of a handgun in the commission of a crime of violence, and wearing, carrying, or transporting a handgun.

Tate's girlfriend, Cherie Finney, testified that late in the evening on August 18, 2001 she picked Tate up on Calverton Road in West Baltimore and proceeded driving toward her house. Tate asked her to drive to Vine Street first because he was looking for a friend. Upon arriving at Vine Street, one of a group of individuals standing on the block "yelled out something[,]" and Tate asked Finney to stop and back up the car. Tate exited the car and walked up to the group of five or six men. An argument ensued. Tate returned to the car to get back into the passenger side, but before he got in, he turned to walk back across the street. At this point in time, a man with gold teeth "popped the hood" of his car, pulled out a gun that had been wrapped in a t-shirt, and pointed it at Tate. Finney recounted that the man with the gold teeth then fired his gun "[l]ike 5 or 6 times" at Tate. The shooter

and two men got in a car and drove away. Finney testified that she had seen the same man with gold teeth in the neighborhood before, and that she identified Appellant as the shooter in a photo array on August 24, 2001. When presented with the photo array at trial, Finney confirmed that the person she earlier identified was "[t]he Defendant."

Kelly Henderson testified that on the evening of August 18, 2001, she was sitting with her two-year old son on the porch of a house located on the block of Vine Street where the shooting occurred. Two other women, Crystal Green and Toni, were also on the porch. She saw Finney and Tate drive up in a white car that stopped and backed up—consistent with Finney's testimony—to within five to seven houses from the porch on which she and others were sitting. She saw Tate get out of the car and begin arguing with Appellant, whom she knew as "Bump," and "a few other people . . . ." She then saw Tate walk back to the white car and saw Appellant get a gun out of his trunk. When Henderson saw Appellant with the gun, she picked up her son and ran away. She heard gunshots from around the corner, after she had run away. When she returned to the porch to pick up the possessions that she had left, she saw Appellant pulling away in a car.[1] Henderson identified Appellant from a photo array.

Crystal Green contradicted Henderson's testimony, so she was called as a defense witness. She testified that she was sitting on the porch before the shooting, but that

[1] Henderson's testimony is not entirely consistent. She also says that the reason why she felt safe to return to the crime scene to pick up her belongings was because "the police was up there"—which is difficult to square with her testimony that she saw Appellant pulling away after she returned to the scene.

Henderson was not on the porch with her. She knew Appellant because he lived in the same neighborhood and she had been on a date with him in the past.

On the evening in question, a group of about ten people were playing dice, and "just about all of them" had gold teeth according to Green. She saw Appellant walk up to the dice game about five to ten minutes before the shooting. Then, Appellant walked down Vine Street toward Smallwood, and was away "in between ten and fifteen minutes" before Tate's arrival at the dice game. Tate, she said, was arguing with a man she knew as "Jeter." Green admitted that she did not see the shooting or the person who fired the gun and claimed that after the shooting she looked around and did not see Appellant among the group.

Before the jury deliberated, the circuit court propounded the following reasonable doubt instruction to the jury:

> In this criminal case as in all criminal cases, the Defendant is presumed to be innocent of the charges and this presumption remains with the Defendant throughout every stage of the trial and is not overcome unless you are convinced beyond a reasonable doubt that the Defendant is guilty. The State has the burden of proving the Defendant's guilt beyond a reasonable doubt, and this burden remains on the State throughout the entire course of the trial.
>
> The Defendant on the other hand is not required to prove his innocence. However, the State is not required to negate every conceivable circumstance of innocence. Nor is the State required to prove guilt beyond all possible doubt. A reasonable doubt is a doubt which is founded upon reason. It is not a fanciful doubt, a whimsical doubt or a capricious doubt.
>
> **Proof beyond a reasonable doubt requires such proof as would convince you of the truth of a fact to the extent that you would be willing to act upon such fact in your own daily activities or business affairs without hesitation.** If you are not satisfied of a Defendant's guilt to that

> extent, then reasonable doubt exists and the Defendant must be found not guilty.

(Emphasis supplied). Trial Counsel raised no objection.

The jury convicted Appellant of first-degree murder; use of a handgun in the commission of a crime of violence; and, wearing, carrying, or transporting a handgun. On March 26, 2003, the court sentenced Appellant to life in prison for first-degree murder and 20 years' imprisonment for the handgun conviction, with the sentences to run consecutively.

Appellant challenged the verdict on direct appeal on March 28, 2003, and this Court affirmed the judgment in an unreported opinion that was filed on August 27, 2004, *Ervin v. State*, No. 183, Sept. Term, 2003. Appellant filed a petition of certiorari, but his request was denied.

B. Appellant's Postconviction Proceedings

Appellant filed a petition for postconviction relief in the Circuit Court for Baltimore City on February 28, 2013, asserting 15 grounds for ineffective assistance of counsel.[2] The court heard argument on the petition on December 3, 2013.

[2] The grounds stated for ineffective assistance of counsel were (1) "failing to seek suppression of identifications made based on impermissibly suggestive photo arrays," (2) "misleading Petitioner into believing that the highest charge for which he could be convicted was second-degree murder," (3) "failing to object to an 'other crimes' reference in the prosecution's opening statement," (4) "allowing the prosecution to elicit prejudicial hearsay testimony," (5) "failing to object to the prosecution's leading redirect examination of its witnesses," (6) "eliciting prejudicial, incriminatory hearsay testimony from a witness," (7) "failing to pursue a defense of mistaken identity," (8) "advising petitioner not to testify in his own behalf," (9) "failing to take exception to the trial court's propounding of a flight instruction," (10) "failing to seek a missing witness instruction (continued…)

Trial Counsel testified at the hearing that she believed she committed many errors in her representation of Appellant. Notably, she testified that she made a mistake by failing to object to the circuit court's reasonable doubt instruction. She explained that she missed the circuit court's alleged erroneous instruction because of her respect for the judge presiding at the trial:

> [Trial Counsel:] . . . I'm sure that I did not sit there with the reasonable doubt instruction in front of me, and went over it word for word as he was giving it.
>
> * * *
>
> . . . so, I can't say why, other than I missed it. I mean, it just -- if I'm listening word for word, if I'm in front of a judge I'm not familiar with, I will read along with the instruction, as the judge is giving the instructions.
>
> Most judges now give written instructions: now everybody has a copy of those instructions that are given. So, I was actually surprised when I read -- that's the one issue when I read the Petition that I was really surprised at. I didn't realize that there [were] so many ways that he deviated from the Standard Maryland Pattern Jury Instruction.
>
> [Appellant's postconviction counsel:] And in retrospect, would you have objected to the instruction --
>
> [Trial Counsel:] Yes --
>
> [Appellant's postconviction counsel:] had it been --

---

and failing to argue that inference to the jury," (11) "**failing to object to the court's defective reasonable doubt instruction**," (12) "failing to object to the prosecution arguing facts not in evidence and inferences drawn therefrom," (13) "failing to file a Motion for Modification of Sentence and Application for Review of Sentence," (14) "failing to provide Sixth Amendment effective assistance of counsel through the cumulative error of the preceding [thirteen] allegations," and (15) "failing to raise as plain error the defective reasonable doubt instruction given by the trial court." (Emphasis supplied). Of the fifteen alleged errors, only the eleventh (in bold) is before us on appeal.

> [Trial Counsel:] Yes. If it's not the -- any lawyer, it's been hammered into us, **particular[ly] over the last seven or eight years**, to object if the instruction deviates in any way from the Maryland Pattern Jury Instructions.

(Emphasis added).

Appellant argued that Trial Counsel's failure to object to the erroneous reasonable doubt instruction—in particular the omission of the word "important" before "daily activities and business affairs"—amounted to ineffective assistance of counsel. According to Appellant, the instruction as given, without the word "important", suggested to the jury that the degree of certainty it had to possess in order to convict him was only equivalent to that needed to make mundane or routine decisions. Appellant contended the defects in the instruction were of such magnitude that the instruction was constitutionally defective, warranting reversal of his conviction and a new trial.[3]

The State pointed out that *Ruffin*, *supra*, 394 Md. at 373 and n.5—which mandated the use of the pattern jury instructions on the presumption of innocence and proof beyond a reasonable doubt in every case—is not controlling law in Appellant's case because it was a prospective decision published several years after Appellant's conviction. Thus, the State argued the minor deviations from the pattern jury instructions did not warrant

[3] Appellant claimed that the instruction given by the court deviated from the Maryland pattern jury instruction in several ways, including (1) the court substituted the phrase "daily activities or business affairs" where the pattern jury instruction used the phrase "important daily activities or business affairs[;]" (2) the instruction lacked the phrase "or to a mathematical certainty" contained in the pattern instruction; (3) the court's instruction improperly included the sentence, "It is not a fanciful doubt, or a whimsical doubt, or a capricious doubt[;]" (4) and, the court used the phrase "act upon such fact . . .without hesitation" where the pattern jury instruction employed the phrase "act upon such belief without reservation in an important matter[.]"

postconviction relief in these circumstances and the reason that Trial Counsel did not object to the instruction was that, although it was "not [] perfect," the instruction "was [] enough for the jury to render a fair and impartial verdict and not shift the burden -- or not have the burden be confused."

The circuit court entered a 47-page written opinion and order granting postconviction relief in part and denying postconviction relief in part on March 31, 2014. The court ordered that Appellant be granted permission to file a belated motion for modification of sentence and a belated application for review of sentence, but denied all other relief.[4]

The court found that the deviations in the reasonable doubt instruction given in Appellant's case did not warrant reversal and Trial Counsel's failure to object was not ineffective assistance. The court concluded that the exclusion of the word "important" "did not confuse the concept of reasonable doubt with a lower burden of proof, such as preponderance of the evidence." The court reasoned that, even after *Ruffin*, "some deviations are permissible so long as the instruction is substantially adhered to in its delivery." The court further explained that

[4] The postconviction court observed that after Appellant's trial and conviction, he asked Trial Counsel to file a motion for modification of sentence, and Trial Counsel stated her intention to file the motion but failed to do so. The court decided this was ineffective assistance prejudicial to Appellant, pursuant to *Matthews v. State*, 161 Md. App. 248, 252 (2002). The court also found Trial Counsel was deficient under *Strickland* for failing to file an application for review of sentence. Notwithstanding this, the postconviction court stated that "[t]he record amply demonstrates [T]rial [C]ounsel's zealous and effective advocacy for her client *at trial*." (Emphasis added).

> [b]ecause the burden of proof was not changed and the court substantially adhered to the pattern jury instruction for reasonable doubt, *trial counsel's conduct did not fall below an objective level of reasonableness when she failed to object to the deviations.* [Appellant]'s right to a fair trial would have been prejudiced had the trial court's instruction unfairly shifted the burden of proof to a lower standard for conviction. In that event, counsel would have been deficient had she not objected. But such was not the case here.
>
> Taken as a whole, this Court does not find that [Appellant]'s reasonable doubt instruction deviated from a correct statement of law such that counsel was ineffective for failing to object to it for all the reasons explained above. Therefore, relief under this allegation of error is **DENIED.**

(Italics emphasis added; bold emphasis in original). Thus, the circuit court found that Appellant did not satisfy either the performance or the prejudice prongs of the ineffective assistance of counsel test as articulated in *Strickland, supra*, 466 U.S.at 687.

As to Appellant's claim that the erroneous jury instruction constituted structural error, the circuit court found, pursuant to *State v. Rose*, 345 Md. 238 (1997), that the argument was waived and not preserved when Trial Counsel failed to object at trial and appellate counsel failed to include the claim on appeal of the verdict.

Appellant filed an application for leave to appeal on April 23, 2014, which a separate panel of this Court granted by order on June 29, 2015. Once again, the single question the parties were directed to address is:

> Whether trial counsel rendered ineffective assistance of counsel by failing to object when the trial judge instructed the jury that reasonable doubt was the type of doubt they would use to decide their "daily activities and business affairs," instead of instructing them that reasonable doubt was the type of doubt they would use to decide their "important daily activities and business affairs?"

DISCUSSION

The standard of review of a lower court's determinations regarding issues of effective assistance of counsel "'is a mixed question of law and fact . . . .'" *State v. Jones*, 138 Md. App. 178, 209 (2001) (quoting *Strickland v. Washington*, 466 U.S. 668, 698 (1984)). Factual findings of the postconviction court are reviewed for clear error. *Id.* (quoting *Wilson v. State*, 363 Md. 333, 348 (2001)). "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.'" *Id.* (quoting *Harris v. State*, 303 Md. 685, 699 (1985)). We "must exercise [our] own independent judgment as to the reasonableness of counsel's conduct and the prejudice, if any." *Id.* (citing *Oken v. State*, 343 Md. 256, 285 (1996)). "'Within the *Strickland* framework, we will evaluate anew the findings of the lower 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.'" *Id.* (alteration in original) (quoting *Cirincione v. State*, 119 Md. App. 471, 485 (1998)).

A. The Parties' Contentions

Appellant argues that the circuit court's deviation from the Maryland Pattern Jury Instruction and omission of the word "important" reduced the State's burden from beyond a reasonable doubt to preponderance of the evidence. He argues that Trial Counsel's failure to object to the reasonable doubt instruction amounted to ineffective assistance of counsel.

He further contends that reviewing the instruction in its entirety makes the instruction worse, not better. He contends that he was prejudiced by the fact that he was convicted "under a standard of proof less than beyond a reasonable doubt," and that, if Trial Counsel had objected, the circuit court probably would have corrected its instruction. If Trial Counsel had objected and the circuit court did not correct its error, then, Appellant avers, he would have had a winning issue on direct appeal. Appellant also argues that this defective reasonable doubt instruction constitutes structural error and, thus, prejudice is presumed and he need not demonstrate the prejudice prong of *Strickland*.

In riposte, the State underscores the point that "[w]hen examined in the proper constitutional framework, as a whole and in the context of the entire record, the instruction was not ambiguous and did not create a reasonable likelihood that the jury was misled or confused by a suggestion of an improperly low degree of proof for conviction." The State argues that the instruction was not constitutionally defective in the first place because the instruction, as viewed in its entirety, adequately conveyed the reasonable doubt standard of proof and that there is a reasonable likelihood that the jury understood the instruction to convey the proper reasonable doubt standard. The State posits that when analyzing the jury instructions as a whole, the circuit court's use of the term "without hesitation" helped to reinforce the gravity of the situation and increased the burden of proof. As an alternative argument, the State also contends, relying on *Waddington v. Sarausad*, 555 U.S. 179 (2009), that the reasonable doubt instruction was not constitutionally infirm when one views the record as a whole and considers Trial Counsel's closing argument. But even

assuming that Trial Counsel committed error, the State contends prejudice is not presumed in this circumstance and that Appellant must still demonstrate prejudice, which he did not do.

B. *Strickland* Framework and Attorney Error

A criminal defendant's right to effective assistance of counsel is guaranteed by the Sixth Amendment to the United States Constitution, which has been made applicable to the States by the Fourteenth Amendment, and Article 21 of the Maryland Declaration of Rights. *Mosley v. State*, 378 Md. 548, 556 (2003) (citations omitted). The Postconviction Procedure Act allows a criminal defendant to bring a claim of ineffective assistance of counsel, contending, thereby, that his representation by trial counsel was ineffective to the point of depriving him of his Sixth Amendment right to counsel. Maryland Code (2001, 2008 Repl. Vol.), Criminal Procedure Article ("CP"), §§ 7-101 *et seq.*

In analyzing an ineffective assistance of counsel claim, courts apply the two-prong test that the Supreme Court established in *Strickland*. *Mosley*, 378 Md. at 557. The court must be satisfied that the defendant has demonstrated "that [(1)] counsel's competence failed to meet an objective standard of reasonableness and [,(2)] that counsel's performance prejudiced the defense in order to be successful in an ineffectiveness of counsel claim." *Id.* (citing *In re Parris W.*, 363 Md. 717, 725 (2001)). The purpose of this inquiry is to protect the integrity of the adversarial process. *Id.* (citing *Strickland*, 466 U.S. at 687, 692-93). A court may evaluate the two components of an ineffective assistance of counsel claim in either order. As the Supreme Court said in *Strickland*,

> there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. . . . The object of an ineffectiveness claim is not to grade counsel's performance. . . . Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.

466 U.S. at 697 (emphasis added); *see also Cirincione v. State*, 119 Md. App. 471, 485-86 (1998) ("our review of the two *Strickland* elements of ineffective assistance need not be taken up in any particular order. In other words, we need not find deficiency of counsel in order to dispose of a claim on the grounds of a lack of prejudice." (citations omitted)).

The proper standard for attorney error within the *Strickland* framework is that of "reasonably effective assistance." *Strickland*, 466 U.S. at 687 (citing *Trapnell v. United States*, 725 F.2d 149, 151-52 (2d Cir. 1983)). A defendant bringing this claim must demonstrate "that counsel's representation fell below an objective standard of reasonableness." *Id.* at 687-88. A reviewing court must determine whether the attorney's "assistance was reasonable considering all the circumstances," *id.* at 688, and that review "must be highly deferential." *Id.* at 689. In *Strickland*, the Supreme Court explained:

> It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort 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. **Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered**

> **sound trial strategy."** There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.
>
> * * *
>
> **Thus, a court deciding an actual ineffectiveness claim 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.** A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. **At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.**

Id. at 689-90 (emphasis added); *see also Mosley*, 378 Md. at 558 ("Reviewing courts must thus assume, until proven otherwise, that counsel's conduct fell within a broad range of reasonable professional judgment, and that counsel's conduct derived not from error, but from trial strategy."). A defendant alleging ineffective assistance of counsel has a "heavy burden" because the attorney error prong itself carries three components; the defendant must:

> (1) identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment;
> (2) show that his counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment—that, considering all the circumstances, the representation fell below an objective standard of reasonableness; [and]
> (3) overcome the presumption that, under the circumstances the challenged action might be considered sound trial strategy.

Harris v. State, 303 Md. 685, 697 (1985) (footnote omitted). Finally, the reasonableness of the counsel's challenged conduct *must be viewed as of the time of the conduct*, not retrospectively. *Maryland v. Kulbicki*, 136 S. Ct. 2, 4 (2015) (quoting *Strickland*, 466 U.S. at 690) (emphasis supplied).

With these standards in mind, we turn to the law concerning reasonable doubt instructions as it existed at the time of Appellant's trial in 2003.

C. A History of Pre-*Ruffin* Reasonable Doubt Instructions

At the time of Appellant's trial in 2003, the model reasonable doubt instruction, MPJI-CR 2:02, read:

> The defendant is presumed to be innocent of the charges. This presumption remains with the defendant throughout every stage of the trial and is not overcome unless you are convinced beyond a reasonable doubt that the defendant is guilty.
>
> The State has the burden of proving the guilt of the defendant beyond a reasonable doubt. This burden remains on the State throughout the trial. The defendant is not required to prove [his][her] innocence. However, the State is not required to prove guilt beyond all possible doubt or to a mathematical certainty. Nor is the State required to negate every conceivable circumstance of innocence.
>
> A reasonable doubt is a doubt founded upon reason. **Proof beyond a reasonable doubt requires such proof as would convince you of the truth of a fact to the extent that you would be willing to act upon such belief without reservation in an important matter in your own business or personal affairs.** However, if you are not satisfied of the defendant's guilt to that extent, then reasonable doubt exists and the defendant must be found not guilty.

(Emphasis added).

In *Ruffin v. State*, the Court of Appeals held "that in every criminal jury trial, the trial court is required to instruct the jury on the presumption of innocence and the

reasonable doubt standard of proof which closely adheres to MPJI-CR 2:02. Deviations in substance will not be tolerated." 394 Md. 355, 373 (2006) (footnote omitted). The Court, however, explicitly gave this holding prospective effect only, stating that it was a change in Maryland common law, not an overruling of previous decisions in this arena. *Id.* at 373 n.7 ("Our holding in this case represents a change in a Maryland common law principle and not an overruling of prior cases on the ground that they were erroneously decided. Consequently, the defendant Ruffin is entitled to the benefit of our holding, but, otherwise, the holding shall be applied only prospectively."). Therefore, *Ruffin* is not controlling in Appellant's case. *See Savoy v. State*, 420 Md. 232, 245-46 (2011) (observing that, in the context of a 1994 trial, "[b]ecause we made clear in *Ruffin* that our holding has only prospective application, it has no bearing on Petitioner's case.").

Before *Ruffin*, the Supreme Court of the United States held that no particular words or phrases were required in a reasonable doubt instruction. *Victor v. Nebraska*, 511 U.S. 1, 5 (1994) (citations omitted). The same held true in Maryland. *Merzbacher v. State*, 346 Md. 391, 399-400 (1997) (explaining that, although "MJPI-CR 2:02 provides an adequate, if not preferable, explanation of the reasonable doubt standard," "the law does not enshrine any particular form of the reasonable doubt instruction"). Instead, "'taken as a whole, the instructions [must] correctly conve[y] the concept of reasonable doubt to the jury.'" *Victor*, 511 U.S. at 5 (alteration in original) (quoting *Holland v. United States*, 348 U.S. 121, 140 (1954)). As to whether a reasonable doubt instruction violates the Due Process Clause, "the proper inquiry is not whether the instruction 'could have' been applied in an

unconstitutional manner, but whether there is a reasonable likelihood that the jury *did* so apply it." *Id.* at 6 (bold emphasis supplied; italics emphasis in original) (citing *Estelle v. McGuire*, 502 U.S. 62, 72 and n.4 (1991)).

Under the pre-*Ruffin* framework, an appellate court must "consider[] an explanation of reasonable doubt as a whole; it does not determine the propriety of an explanation from an isolated statement." *Wills v. State*, 329 Md. 370, 384 (1993). The effect of the suspect statement must be analyzed in the context of the entire instruction. *Id.* On direct appeal, "if the instruction . . . is in some way erroneous, the appellate court must determine whether the error is so prejudicial as to call for reversal or may be excused as harmless." *Id.* at 384-85.

In the seminal case, *Victor v. Nebraska*, the Supreme Court analyzed two reasonable doubt instructions. The first was as follows:

> "A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the State the burden of proving him guilty beyond a reasonable doubt.
>
> "Reasonable doubt is defined as follows: It is *not a mere possible doubt;* because everything relating to human affairs, and *depending on moral evidence,* is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, *to a moral certainty,* of the truth of the charge."

511 U.S. at 7 (emphasis in original) (citation omitted). The word "important" was not used, and the Supreme Court did not hold the instruction to be constitutionally deficient. The Court analyzed the instruction in its entirety and stated that it "[did] not think it reasonably

likely that the jury understood the words 'moral certainty' either as suggesting a standard of proof lower than due process requires or as allowing conviction on factors other than the government's proof." *Id.* at 16.

The second jury instruction that was at issue in *Victor* was the following:

> "[t]he burden is always on the State to prove beyond a reasonable doubt all of the material elements of the crime charged, and this burden never shifts."
>
> * * *
>
> "'Reasonable doubt' is such a doubt as would cause a reasonable and prudent person, in one of the graver and more **important** transactions of life, to pause and hesitate before taking the represented facts as true and relying and acting thereon. It is such a doubt as will not permit you, after full, fair, and impartial consideration of all the evidence, to have an abiding conviction, *to a moral certainty,* of the guilt of the accused. At the same time, absolute or mathematical certainty is not required. You may be convinced of the truth of a fact beyond a reasonable doubt and yet be fully aware that possibly you may be mistaken. You may find an accused guilty upon the *strong probabilities of the case,* provided such probabilities are strong enough to exclude any doubt of his guilt that is reasonable. A reasonable doubt is an *actual and substantial doubt* reasonably arising from the evidence, from the facts or circumstances shown by the evidence, or from the lack of evidence on the part of the State, as distinguished from a doubt arising from mere possibility, from bare imagination, or from fanciful conjecture."

Id. at 18 (italics emphasis in original; bold citation supplied) (citations omitted). Although Victor argued that the instruction at issue lowered the standard to below that of a reasonable doubt, the Court concluded that "the instruction provided an alternative definition of reasonable doubt: **a doubt that would cause a reasonable person to hesitate to act**." *Id.* at 20 (emphasis added). The Court believed that it was not "reasonably likely" that the jury would have interpreted the instruction as anything lower than beyond a reasonable

doubt. *Id.* at 21. The word "important" was used in the second instruction in *Victor*, but not the first, and neither instruction was held to be deficient.

In *Montgomery v. State*, the following reasonable doubt instruction was at issue:

> The standard for the criterion by which you are to judge Mr. Montgomery's guilt or innocence is that you must be convinced beyond a reasonable doubt that he is guilty. And the three of you that have sat on prior criminal cases, and those of you that will sit on future criminal cases, will undoubtedly appear before other judges who in their judgment will give you an example of what he or she thinks constitutes a reasonable doubt. I don't give any examples, because I don't know what would constitute a reasonable doubt in your respective minds. You 12 people represent a broad cross section of our county, and you come from different backgrounds and all with different experiences. And in making that determination as to whether or not you have a reasonable doubt as to whether or not Mr. Montgomery is guilty, you will draw on your own backgrounds and your own experiences to make that determination.
>
> When we use the term reasonable doubt, we do not mean beyond all possible doubt. A reasonable doubt is nothing more than what it says it is, it is the doubt which is founded upon reason. And we think that you ladies and gentlemen are reasonable ladies and gentlemen, and you will make that determination as to whether or not such a doubt exists in your mind.

292 Md. 84, 92 (1981), *overruled on other grounds by Unger v. State*, 427 Md. 383 (2012). The Court of Appeals determined that defining reasonable doubt "as the doubt which is founded upon reason" was confusing and circular, and held that the instruction was inadequate as an explanation of reasonable doubt. *Id.* at 92-95.

In *Bowers v. State*, the following reasonable doubt instruction was at issue:

> "Now, a reasonable doubt is a doubt that is founded upon reason. It is such a doubt as would cause a reasonable person to hesitate to act in the graver or more important transactions in his life.
>
> "Thus, if the evidence is of a character as to persuade you of the truth of the charges against the Defendant, with the same force that would be sufficient to persuade you to act in the **more important** transactions in your

> life then you would conclude the State has proven aggravating circumstances beyond a reasonable doubt.
>
> "If, on the other hand, you could not act based on that evidence in the **more important** transactions in your life, then you would conclude that the State had not met the burden of proof and therefore had not proven the aggravating circumstances."

298 Md. 115, 157 (1983) (emphasis supplied). The Court of Appeals "perceive[d] no error in the instruction [] viewed as a whole," *id.* at 159, and the phrase "more important" was used.

In an early case before our Court, *Street v. State*, the defendant took issue with the following reasonable doubt instruction:

> 'That means that if the evidence is sufficiently convincing to you that you would act upon that evidence in an important matter of your own, then it is enough evidence for you to convict in a criminal case. **This is an important matter. It is not the most important matter in your life, and it doesn't necessarily mean buying a house or major matters of that kind. What an important matter is to you will vary among all twelve of you jurors. What may be important to one juror may be very unimportant to another juror. So, it is a matter of your individual judgment as to what is important to you. It isn't minor, but on the other hand, it isn't the most important decision that you will have to make in your lives. It could mean anything in your daily lives which in your daily lives is an important matter to you.**
>
> Thus evidence is sufficient to remove a reasonable doubt when it convinces you as an ordinarily prudent person with such force that you would act upon that conviction **in your own important day-to-day affairs**, because from such evidence you may conclude that the State has met its burden . . . of proving the guilt of the defendant beyond a reasonable doubt.'

26 Md. App. 336, 341-42 (1975) (emphasis supplied). This Court concluded that "[a]lthough certain parts of the instruction, taken out of context, may appear to give an inaccurate interpretation of the law, a careful reading shows that the instruction, when considered as a whole, can be reconciled and harmonized with the charges approved in

[previous cases] . . . ." *Id.* at 343. The Court then affirmed the judgment because "the jury was not misled or confused by the instruction." *Id.* at 344.

In *Wills*, *supra*, the trial court propounded the following reasonable doubt instruction:

> The State has to prove that he is guilty beyond a reasonable doubt. Okay.
>
> Beyond a reasonable doubt means just that, beyond a reasonable doubt. I always say, okay, let's close our eyes and let's visualize those words, beyond a reasonable doubt. Those are the words used. Okay. It is important to know that the people who made the laws, the framers of the Constitution, didn't say beyond all doubt. They could have said that, but they didn't say that, beyond a shadow of a doubt, to a mathematical certainty. They used the words, beyond a reasonable doubt, so the State's burden in a criminal case, and in this criminal case, in particular, is to prove that Mr. Wills committed one or both of these crimes beyond a reasonable doubt. A reasonable doubt is the type of doubt that would cause you to hesitate and not act in an **important** decision in your own life.
>
> Okay. The law is going to be clear, once I explain the law to you, it is going to be pretty clear. Okay. There is not going to be any dispute, I don't think, in your minds this is the law. You have got to determine in your deliberations what the facts are and then plug that into the law. When you do that you have to be persuaded beyond a reasonable doubt those facts would be of the same nature and quality that you would rely on in making an **important** decision in your own life. *Now, picture making one of those decisions. Picture when you got married or bought a new home or changed jobs or decided to have an operation, decided to get divorced, it might be anything, a decision that has a major impact on your life. I doubt that any of you have made one of those decisions without having some question as to whether or not this is the right thing to do. When you make a major decision, you generally have a nagging doubt, but if you weigh all of the factors, if you weigh the things that say, I should do it, and the things that say, I shouldn't do it, and you decide to go forward, then you don't have a reasonable doubt.* The State's burden in this case is to persuade you to that same extent that you would rely on in making an **important** decision in your own life, that the defendant is guilty of one or both of these charges pending against him. [5]

[5] The Court of Appeals, in *Merzbacher*, 346 Md. at 401, declared this instruction to be "rambling and incomprehensible."

329 Md. at 385-86 (emphasis supplied). The Court of Appeals stated that this instruction, particularly the language in italics above, was "confusing and misleading" because it sounded more like the preponderance of the evidence standard, not the reasonable doubt standard. *Id.* at 387. Although the instruction contained the word "important," the Court of Appeals did not believe that the "nagging doubt" phrase was as good as the phrases "without reservation" or "without hesitation." *Id.* at 387-88. The word "important" did not save the instruction, and the case, which was on direct appeal from the original verdict, *id.* at 385, was remanded for a new trial. *Id.* at 388.

The discursive jury instruction in *Joyner-Pitts v. State*, 101 Md. App. 429, 437-41 (1994), further illustrates that inclusion of the word "important"—twice—could not save a deficient instruction when evaluated as a whole:

> Let us return back to the State's burden, called the State's burden of proof. This burden of proof requires that the State of Maryland convince 12 of you, as I said, that a crime has been committed, and [the defendant] is the actor. When I say convince twelve of you they must convince you beyond a reasonable doubt.
>
> Of all the elements that together make up the crime of his involvement, this beyond a reasonable doubt is sort of a mouthful of lawyer talk. That phrase is the name that we in the law centuries ago attached to the state of mental conviction at which you must arrive before you can put your hand and say I will vote for guilty on that. Anything short of that you must vote-not voting for guilty, you are squarely in the corner of innocence.
>
> That state of mind has been variously described as that you be as convinced of what need be proven to prove this man's guilt as you would have to be convinced of something very weighty in your own lives, such as adopting a child, buying a home, getting married. I have actually heard it described when I practiced back in the 60s, judges just used to sit up here and say ladies and gentlemen of the jury you will be said to be convinced beyond a reasonable doubt when you are convinced to a moral certainty. They usually shook their finger.

The problem with that I always found was that sort of replaced one totally incomprehensible legal concept with another totally incomprehensible legal concept. Amazingly the jury would sit there like they knew what the judge was talking about.

I sort of tend to deal in examples. You appreciate I trust that in your life and in my life every day, every day we make hundreds of decisions literally. It is how we get through the day. Some of them are almost mindless in the[ir] **importance**.

I use this as an example of that when you got up this morning you put your shoes on. Think back to when you got back up this morning and put your shoes on. How much thought did you spend this morning on the following question: I wonder what shoe I will put on first today?

I will answer for you just like you would have if called upon. I put the shoes on just like I did every day of my life. I didn't think about it much. That is not true, you did think about it. It is a whole series of conscious decisions. Your eyes have to make observations to relay the information to the brain. The brain transmits information and instructions to the arms, the hands, the feet, the legs. Otherwise you would put your shoes up on your ears.

It is a whole series of conscious decisions. You can't put your shoes on in your sleep, not and stay happily married. It is a low level of decision making. Why? The consequences to your well being and your daily life are almost nil. If you get your shoe on the wrong foot you will change it because it hurts.

On the other hand suppose when you got up this morning you had to decide whether or not to get married. Who amongst you would not give a bit more thought to that question than the question of what shoe you will put on? Once again I answer for you. Bet you. Marriage is a biggie. Marriage is one of those decisions in life that will smash you right up against the wall. It will get you physically, financially, emotionally, turn you every which way but loose. Before a sane man or woman enters into that allegedly holy state they want to know the who, the what, the when, and the God forbid the why.

To the extent that you, especially I would have to be convinced to get married, need you be convinced of the elements of the crime and this man's participation. You must be convinced of those elements and his participation as you would have to be convinced of a weighty matter in your own lives.

For indeed taking an oath to pass upon the guilt or innocence of a fellow human being is a weighty matter in your own life. That is the level at which you personally must arrive before you may raise your hand and say I will vote for guilty.

What is that level? I have no idea. There is no way I can tell you. Why? You are different human beings. As you are different human beings

things will impress you differently. You have a different sense of values, a different sense of weight.

My wife and I have been married 36 years. Over that period I bet you we have made tens of thousands of familial decisions, joint decisions having to do with the family. But if you want to go out and buy furniture it takes heck of a lot more to convince my wife than it takes to convince me. She knows if she can get me into a store I will buy everything between me and the door to get out. I'm not an informed consumer. I'm a paranoid consumer. I'm a psychotic consumer.

On the other hand, my wife buys nothing before she steps on it, bounces on it, tastes it, holds it up to the light, asks four people she never met before in there what they think of it. That is a roll of Bounty. You should see her when she is buying sofas and everything, it is an experience.

We will make a joint decision. It takes a heck of a lot more to convince her than it takes to convince me. We bring our individual experiences to bear on it. So you don't think that I pick on her. You go out to buy a car. My wife only asks one question. Will it show dirt? I live on a country road. Not does it have a mirror, does it come with a warranty, does it have all four tires? Does it show dirt? I live on a country road.

On the other hand I crawl around, look under the hood, look underneath, kick it, bang it, pretend I know what I'm doing, which I don't of course. It takes more to convince me to buy an automobile than it would to convince her.

The decision is a joint decision. I do not know at what level you individually will be said to be convinced beyond a reasonable doubt, the standard I just explained to you. Whatever that level is for you that is the level at which you must arrive before you can decide, Mrs. Lindsay, mark me down in the guilty column. Anything short of that level is not guilty.

Please note I am not telling you you must be convinced beyond all doubt, that is not the standard of law. It is not the duty of the State to convince you to a mathematical certainty of any of these elements. Let's be honest about it. If nobody got married until they were convinced beyond all doubt we would all be single. Why? Because we are human beings. We always have that nagging reticence in making **important** decisions. If something can go wrong it will happen to me. We give it a name, we call it Murphy's Law.

We are not talking about that nagging reticence. We are talking about a doubt to which you can ascribe a reason. I am not convinced of this because I do not believe this.

The reason itself has to be reasonable. You can't say don't believe that because it is raining outside. You can say that, but that is not reasonable.

> Indeed it is a reason, but it is not a reasonable reason. We are talking but [sic] being convinced beyond a doubt based upon reason, a reasonable doubt.
>
> Also please note it must be the unanimous decision of 12. 12 of you must be convinced of all the elements beyond a reasonable doubt and convinced of his participation beyond a reasonable doubt before a verdict of guilt can be found.

(Some alteration in original) (emphasis supplied). The circuit court's failure, despite its use of the word "important," was that it compared reasonable doubt to decisions such as getting married or purchasing consumer goods. This Court found fault with the jury's omission of the phrases "without reservation" or "without hesitation" and described the instruction as "rambling." *Id.* at 444. The Court further explained that the circuit court's use of domestic exemplars may have confused the jury. *Id.* This Court reversed the verdict. *Id.* at 447-48.

In *Himple v. State*, 101 Md. App. 579, 582-83, 585 (1994), this Court reversed for plain error the following instruction:

> The burden of proving the defendant guilty is upon the prosecution from the beginning to the end of the trail [sic]. The defendant has no burden to sustain, does not have to prove his innocence.
>
> * * *
>
> The charges against the defendant are not evidence of guilt, they are merely a complaint to let the Jury and the defense know what the charges are. The test of reasonable doubt is the evidence that the State has produced must be so convincing that it would enable you to act on an **important** piece of business in your everyday life. The words, to a moral certainty, do not mean absolute or mathematical certainty, *but a certainty based upon a convincing ground of probability.*

Id. at 581 (alteration in original) (italics emphasis in original; bold emphasis supplied). The Court explained that the instruction at issue in that case lowered the standard to

something below a reasonable doubt. *Id.* The Court disapproved of the omission of the phrase "without reservation," and declared that it was a better phrase than "without hesitation." *Id.* at 583. The Court urged trial courts to adhere closely to the model instructions. *Id.* at 583-85.

We conclude our survey of pre-*Ruffin* reasonable doubt instructions with *Merzbacher*, *supra*, 346 Md. at 397, in which the Court of Appeals analyzed the following:

> "as you . . . know [ladies and gentlemen of the jury] under our law the Defendant is presumed to be innocent of all of the charges against him. This presumption remains with the Defendant throughout every stage of the trial and is not overcome unless you are convinced beyond a reasonable doubt that the Defendant is guilty. The state, as you know, has the burden of proving the guilt of the Defendant beyond a reasonable doubt. This burden remains on the State throughout the trial. The Defendant is not required to prove his innocence, however, the State is not [ ] required to prove guilt beyond all possible doubt or to a mathematical certainty nor is the State required to negate every conceivable circumstance of innocence. Proof beyond a reasonable doubt, ladies and gentlemen, is proof that leaves you firmly convinced of the Defendant's guilt. There are very few things in this world that we know with absolute certainty and in criminal cases the law does not require proof that overcomes every possible doubt.
>
> If based on your consideration of the evidence you are firmly convinced that the Defendant is guilty of the crimes charged you must find him guilty. If on the other hand you think there is a real possibility that he is not guilty you must give him the benefit of the doubt and find him not guilty."

The Court of Appeals specifically noted that, in distinction to MPJI-CR 2:02, that these instructions did not employ the phrases "without reservation" or "in an important matter in [their] own business or personal affairs." *Id.* at 399. The Court concluded that, "[w]hile the instruction provided by the trial court below was perhaps slightly anemic, we cannot conclude that, in its entirety, it understated the State's burden of proof, or otherwise

prejudiced Merzbacher in any way." *Id.* at 403. Once again, the word "important" was not used in this instruction, and the instruction was held to not be deficient.

In *Merzbacher*, the Court of Appeals also analyzed the Maryland defective reasonable doubt instruction line of cases and explained that

> [t]he common thread running through these cases is the notion that the trial court properly informed the jury of the evidentiary standard that the State must meet—beyond a reasonable doubt—and then proceeded to explain that standard in terms which suggested that they could convict upon a quantum of proof lower than that legally required. For these trial courts, what started as a laudable attempt to further explain a legal abstraction ended in reversible error.

Id. at 403.

D. The Instruction Taken as a Whole, and Trial Counsel's Conduct at the Time

In the instant case, Trial Counsel testified at the postconviction hearing that "[she] didn't realize that there [were] so many ways that [the circuit court] deviated from the Maryland Pattern Jury Instruction," and that she would have objected to the reasonable doubt instruction if she had noticed. Thus, she testified that her failure to object was a mistake and, necessarily, not a strategic decision.

The postconviction court found that Trial Counsel did not provide deficient assistance because her "conduct did not fall below an objective level of reasonableness when she failed to object to the deviations." The court found that Trial Counsel's lack of objection was not unreasonable because the reasonable doubt instruction did not unconstitutionally lower the burden of proof and that, as a result, she did not act unreasonably by not objecting.

We agree with the postconviction court and conclude that Trial Counsel committed no error. Our survey of the relevant decisional law reveals that the word "important" was not required to be included in a reasonable doubt instruction in order for that instruction to meet constitutional muster. Indeed, before Appellant's conviction, *no* Supreme Court or Maryland appellate case had held that it is necessary to include the word "important" in a reasonable doubt instruction. Here, the trial court's reasonable doubt instruction substantially adhered to MPJI CR 2:02, and any deviations from MPJI CR 2:02 did not unconstitutionally lower the burden of proof. Certainly, the instruction was not as far afield as the instruction in *Merzbacher*, which did not employ the word "important" in its instruction, and was nevertheless found to be constitutional.

Moreover, the instruction in the present case did not employ circular reasoning to define reasonable doubt, as did the instruction in *Montgomery*, *supra*, 292 Md. at 92-95. It was also not "rambling and incomprehensible," like the instruction in *Wills*, *supra*, *see Merzbacher*, 346 Md. at 401 (describing the *Wills* reasonable doubt instruction), nor was it simply "rambling," like the trial judge's attempt to explain reasonable doubt with a foray into consumer goods shopping in *Joyner-Pitts*, *supra*, 101 Md. App. at 444. We cannot say "that there [wa]s a reasonable likelihood that the jury applied the instruction in such a way as to require either a higher degree of doubt than is required for acquittal or a lower degree of proof for a finding of guilt than is required under the reasonable doubt standard." *Id.* at 447.

As illustrated by the pre-*Ruffin* cases discussed *supra,* the reasonable doubt instruction in the present case was within the range of instructions deemed to be acceptable before *Ruffin*, and therefore, we cannot say that Trial Counsel's "representation fell below **an objective standard of reasonableness**." *Strickland*, *supra*, 466 U.S. at 688 (emphasis added). Rather, Trial Counsel's conduct fell "within the wide range of reasonable professional assistance," *id.* at 689, under the then-existing case law. *See Kulbicki*, *supra*, 136 S. Ct. at 4 (stating that counsel's alleged deficient performance must be assessed from the perspective of the time it was rendered). As Trial Counsel herself stated, "it's been hammered into us, **particular[ly] over the last seven or eight years**, to object if the instruction deviates in any way from the Maryland Pattern Jury Instructions." (Emphasis added). Notably, Appellant stood trial in 2003; he was not convicted over the last seven or eight years, and prior to *Ruffin*, the given instruction was an acceptable instruction.

We conclude, through a deferential lens and noting that it is "all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable[,]" *Strickland*, 466 U.S. at 689, that Trial Counsel committed no error that would rise to the level of ineffective assistance of counsel. In reaching this conclusion, we are mindful that Trial Counsel testified in Appellant's postconviction hearing that she erred by not objecting to the trial court's reasonable doubt instruction, but the pertinent question is not whether *she believes* she committed an error; it is whether her performance fell "below an objective standard of reasonableness." *Id.* at 688. In fact, we note that the postconviction court observed that "[t]he record amply

demonstrates [T]rial [C]ounsel's zealous and effective advocacy for her client at trial." Viewed from the vantage point of 2003, Trial Counsel's conduct was objectively reasonable.

Because we conclude that Trial Counsel's performance was not deficient, it is not necessary for us to address the prejudice prong of the *Strickland* test—or Appellant's argument that prejudice should be presumed because the instruction constituted structural error.

JUDGMENTS AFFIRMED.

COSTS TO BE PAID BY APPELLANT.