UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 232

September Term, 2015

VERNON BIRDELL COIT

v.

STATE OF MARYLAND

Krauser, C.J.,
Wright,
Raker, Irma S.
(Senior Judge, specially assigned),

JJ.

Opinion by Raker, J.

Filed: February 21, 2017

Vernon Coit, appellant, was convicted in the Circuit Court for Baltimore County of robbery with a dangerous or deadly weapon. In this post-conviction appeal, appellant presents one question for our review:

> "Did the trial counsel render ineffective assistance in failing to object to comments made by the prosecutor during his rebuttal closing argument?"

We shall hold that defense counsel's failure to object to the prosecutor's closing rebuttal argument did not constitute ineffective assistance and shall affirm the judgment.

I.

Vernon Birdell Coit was convicted by a jury on January 30, 2007, in the Circuit Court for Baltimore County of robbery with a dangerous weapon. The circuit court sentenced appellant, as a subsequent offender, to a term of incarceration of 25 years without parole. Appellant noted a direct appeal, and in an unreported opinion, this court affirmed. *Coit v. State*, September Term 2007, No. 113 (filed July 24, 2009).

Because appellant is arguing in this appeal that his counsel provided ineffective assistance of counsel in not objecting to remarks made by the prosecutor during rebuttal closing argument, we set out the relevant evidence presented at trial: On the morning of May 20, 2006, Michelle Johnson was working as a teller at K-Bank when a man wearing sunglasses and holding a bag came to the door. Ms. Johnson testified that the man showed her a withdrawal slip, which read "Bomb in a bag. Give me the money." Ms. Johnson testified that the robber was a clean shaven "black male . . . in his forties" wearing "a khaki

hat . . . , a black button down shirt, khaki pants, black [leather] shoes" and "black sunshades." Ms. Johnson stated the robber put most of the money she gave him in "white market plastic bag," but left some of the money he touched on the counter. Ms. Johnson said that she had an opportunity to look at the robber during the robbery. Prior to trial, Ms. Johnson viewed a six-person line-up that included appellant. At her request, each of the six individuals in the line-up said, "[o]pen the second drawer." She testified at trial that she identified appellant in the line-up as the robber, based on his appearance and voice.[1] Ms. Johnson also identified appellant in the courtroom as the robber. The State offered into evidence four surveillance camera photographs depicting the robber, and Ms. Johnson once again identified the man in these photographs as appellant.

Garry Woodard, a limousine driver who was driving in the vicinity of the robbery, testified that he saw a man running away from K-Bank. He then saw a "poof of red smoke" that he recognized as an activated dye pack coming from a bag held by the man. Mr. Woodard testified that the man was wearing blue jeans, an olive or khaki sort of top, and a tan baseball-type cap. He testified that he told a policeman that a dye pack had gone off, and then he flagged down a police officer after work to describe what he had seen earlier in the morning.

[1] Specifically, when asked at the line-up if she could identify any of the six, Ms. Johnson said that appellant "looks familiar" to me.

A technician with the Baltimore Country Crime Lab testified that he found twelve latent fingerprints on the bank's entrance doors, four on the exit doors, and six on the loose money found near the dye pack. None of these prints belonged to appellant.

Police arrested appellant on May 30, 2008. At the time of appellant's arrest, he was wearing jeans and a black Adidas baseball hat. Police found a white baseball hat inside the front waist area of his pants, a pen in his left pants pocket, and a blank piece of paper that had been torn from a pad in his right pants pocket.

The defense did not call any witnesses. During initial closing argument, defense counsel argued that "this case is about identification." Defense counsel cited to discrepancies and weaknesses in the State's evidence to show that the prosecution had not proven that appellant was the robber beyond a reasonable doubt. Defense counsel emphasized that Ms. Johnson's recollection was incorrect, citing to discrepancies between her trial testimony and what she told the police on the day of the robbery.[2] Defense counsel highlighted the differences between Ms. Johnson's and Mr. Woodward's description of the robber.[3]

The prosecutor presented the following rebuttal argument:

[2] The discrepancies in Ms. Johnson's testimony argued by defense counsel in her closing were that she testified that she never told the police that the robber left the scene of the robbery in the red truck, but this detail was in the police report. Defense counsel also said in her closing argument that Ms. Johnson told police that she let the robber into the bank, but at trial testified that someone else let the robber into the bank.

[3] Ms. Johnson testified that the robber wore a khaki hat, black shirt, khaki pants, and black shoes. By contrast, Mr. Woodward testified that the robber wore an olive drab shirt and blue jeans.

". . . Here's a case for you. The mystery of the cup. Who put the cup on the ledge? Now, this might seem like an easy case because we have eye witnesses. I'm sure every one of you would say, I'm the one that put the cup on the ledge. But just to be safe you might want to investigate further and use all your investigative tools. You might call Technician Boyanich to come in and take fingerprints from that cup. He comes in. Takes fingerprints from the cup. He lifts the cup of all the fingerprints. None of them match me. Does that mean that I did not put the cup there? Of course not. You saw me put the cup there. It's an eyewitness case.

And so it is with this robbery. In this case we have an eyewitness. The fact that the fingerprints that were lifted whenever they were put there on the doors to a busy bank on the corner of Liberty Road and Old Court Road. The fact that they didn't match the Defendant doesn't mean the Defendant wasn't in that bank. Not at all. Ladies and gentlemen, this is an eyewitness case.

Now, Defense counsel, Ms. Peyton-Braden is an excellent attorney. And she is doing her duty in this case. Just like my duty is to bring in witnesses. Call them to the stand. And have them tell you what happened to them so that you can hear the facts of this case. Its Ms. Peyton-Braden's duty to raise doubt. She doesn't have to prove anything on behalf of Vernon Coit. She just needs to try to raise some doubt.

To do that she's using a couple techniques. One is to try to take your attention away from the facts. Take your attention. Don't look at the photos. Don't look at the hat. Don't think about where the Defendant lives or where he was running. Let's think about the fingerprints. There were no fingerprints in this case. Ladies and gentlemen, you don't need a fingerprint in this eyewitness case in order to find the Defendant guilty of robbery with a deadly weapon. Suppose in our mystery cup Technician Boyanich comes in and found that there was my fingerprint on there. Well, you know what? Ms. Peyton-Braden would do her duty again. And what would she say then? She would have you remember what Technician Boyanich said yesterday. Fingerprints when they're left on something could be left there indefinitely. If the Defendants fingerprints were on the door

the argument would be well, he wasn't there that day. They could have been left there a month ago or weeks ago. *There will also be some kind of argument to try to distract you from the truth*. Ladies and gentlemen, this case is not about a fingerprint.

There are a couple other distractions that the Defendant would like you to focus on to take your attention away from the truth in this case. One of them is to try to point out some inconsistencies in what witnesses said. Especially in the area of what the Defendant was wearing that day. Well, remember this. We have a photograph. You can go look at the photograph to see what he was wearing that day. What we're talking about here, these inconsistencies between two witnesses we're talking about people's memories of what somebody was wearing, their exact appearance from an event that happened eight months ago. I'll bet if I ask each one of you exactly what I was wearing yesterday some of you might get it right. Some of you might get it wrong. Not everybody is going to remember those kind of details the same way. There's a difference in being able to describe or to remember those details and being able to identify somebody. For example, you might not be able to say what I wore yesterday. But let's say I didn't shave this morning. I had a little bit of facial hair. You would probably still recognize me and be able to identify me and say, that's this Assistant State's Attorney on my trial. Ladies and gentlemen, that's what happened in this case. We might have some minor inconsistencies. That doesn't amount to much when given all the other evidence with the hat, the photographs. There is no doubt Vernon Coit robbed Michelle Johnson on May 20th, 2006.

Ladies and gentlemen, *don't be distracted from your duty. Your duty is to find the truth in this case*. And the truth is in front of you. The truth is in the photographs. The truth is in the hat. The truth is that the robber sits twenty feet from you today.

To Vernon Coit this was just a bank robbery. But you know better. You heard from Michelle Johnson. She didn't deserve to be threatened and robbed on a Saturday morning in May when she was just trying to do her job. She did not deserve that. Ladies and gentlemen, you're about to go and deliberate

> on this case. *When you return to this courtroom to render your verdict, when you render a verdict of guilt and find the Defendant guilty of robbery with a dangerous weapon you send a very powerful message to Vernon Coit. With your verdict of guilt you tell the Defendant that what you did to Michelle Johnson was wrong. It will not be tolerated in our community. We find you guilty of robbery with a dangerous weapon. Ladies and gentlemen, have the courage now to stand up for Michelle Johnson*."

Defense counsel did not object to any part of the prosecutor's rebuttal closing argument.

On November 11, 2011, appellant filed a pro-se post-conviction petition. Appellant later obtained counsel, who on March 20, 2012, filed a supplemental petition. One allegation of error was that trial counsel rendered ineffective assistance by failing to object to the State's closing rebuttal argument. On June 13, 2012, the circuit court held a hearing on the petition for post-conviction relief. At this hearing, appellant did not call trial defense counsel to testify about her reasons for not objecting to the prosecutor's rebuttal closing argument. On March 13, 2013, the circuit court granted appellant the right to file a belated motion for modification of sentence and a belated application for review of sentence, but otherwise denied post-conviction relief. This timely appeal followed.

II.

Appellant asserts that trial counsel rendered ineffective assistance in failing to object to comments made by the prosecutor during his rebuttal closing argument. Appellant explains that the analysis in these types of cases begins with the consideration of whether the prosecutor's comments were improper. Appellant argues that the prosecutor's rebuttal

closing argument was improper for two reasons. First, the prosecutor violated the "golden rule" by appealing directly to the jury's interests by asking them to send a message that robbery "will not be tolerated in [their] community." Second, the prosecutor improperly denigrated defense counsel's role as appellant's advocate by claiming that it was defense counsel's "duty to raise doubt." Next, appellant argues that these improper comments were highly prejudicial because of the increased severity of the remarks heard right before the jury began deliberation, the lack of measures taken to cure the prejudice, and the weak nature of the evidence against appellant. Finally, appellant argues that defense counsel rendered deficient performance by failing to object, and there is a substantial possibility that, but for trial counsel's failure to object, the result of the proceeding would have been different– either at trial or on direct appeal.

The State counters that the prosecutor's remarks fell within the wide latitude accorded to counsel in rebuttal closing argument. And even if the remarks were improper, the State argues that defense counsel was not ineffective in failing to object because there might have been strategic reasons for not objecting or asking for a curative instruction. Finally, the State maintains that even if counsel had objected, there is no reasonable probability that the result of the trial would have been different.

III.

The right to effective assistance of counsel in a criminal trial is guaranteed by the Sixth Amendment to the United States Constitution, made applicable to the states through

the Due Process Clause of the Fourteenth Amendment. *See Strickland v. Washington*, 466 U.S. 668, 684-85 (1984). It is black letter law in Maryland that a "post-conviction proceeding pursuant to the Maryland Post Conviction Procedure Act, Maryland Code § 7-102 of the Criminal Procedure Article, is the most appropriate way to raise the claim of ineffective assistance of counsel." *Mosely v. State*, 378 Md. 548, 558-59 (2003).

The threshold level for an ineffective assistance of counsel claim is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686. In other words, a defendant must demonstrate that his lawyer was "not functioning as the 'counsel' guaranteed [to] the defendant by the Sixth Amendment." *Id.* at 687. Ineffective assistance of counsel has a two-pronged test, that of a "performance component" and a "prejudice component." *State v. Jones*, 138 Md. App. 178, 205 (2001). A defendant must first show that "under the circumstances, counsel's acts resulted from unreasonable professional judgment, meaning that 'counsel's representation fell below an objective standard of reasonableness . . . .'" *Id.* at 206 (internal citation omitted). "To establish the requisite degree of prejudice in Maryland, the defendant must demonstrate a 'substantial possibility that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.* at 207 (internal citation omitted).

The standard of review for an effective assistance of counsel claim is a mixed question of law and fact. *Strickland*, 466 U.S. at 698. This court will not disturb the factual findings of the post-conviction court unless they are clearly erroneous. *Jones*, 138 Md.

App. at 209. Nonetheless, "a reviewing court must make an independent analysis to determine the 'ultimate mixed question of law and fact . . . [i]n other words, the appellate court must exercise its own independent judgment as to the reasonableness of counsel's conduct and the prejudice, if any." *Id.* (internal citation omitted).

First we examine whether the remarks by the prosecutor in his rebuttal closing argument are proper, and then, if improper, whether the remarks create a cause for ineffective assistance of counsel under the *Strickland* standard.

Appellant argues first that the State's comment to the jury that their verdict sends a message that robbery will not be tolerated in their community was improper. While counsel is given wide discretion during opening and closing arguments, counsel nonetheless "must remain within the bounds of the evidence presented at trial and refrain from appealing to the jury's passions or prejudices." *Lawson v. State*, 389 Md. 570, 608 (2005). Counsel should not argue for jurors to "consider their own interests in violation of the prohibition against the 'golden rule' argument." *Lee v. State*, 405 Md. 148, 171 (2008).

An appeal to a juror to place his or her self in the shoes of the victim violates the "golden rule" and is an improper argument. *See Lawson*, 389 Md. at 594-95 (finding that prosecutor's comment during closing argument "asking the jurors to place themselves in the shoes" of the alleged child sex abuse victim's mother was an improper golden rule argument). Golden rule arguments also include appeals to the jurors own interests, such as preserving the safety or quality of their communities. *Beads v. State*, 422 Md. 1, 11 (2011) (explaining that the prosecutor's argument that the jury "say Enough!" in *Hill v.*

State, 355 Md. 206, 225 (1999), implored the jurors to consider its own personal safety, and "therefore violated the prohibition against the 'golden rule' argument."). *See also Donaldson v. State*, 416 Md. 467, 473-74 (2010) (finding an argument by prosecutor that drug dealers are "the root of all evil" to be improper); *Lee*, 405 Md. at 172-73 (finding that jurors "should clean up the streets to protect the safety of their community" invoked a prohibited golden rule argument).

By arguing that a verdict of guilt would ensure that defendant's actions "will not be tolerated in our community," the prosecutor again made an improper golden rule argument. Even if, as the State argues, the prosecutor's comments were directed to teach appellant a lesson, these comments were nonetheless improper because they called for the jury to look at the evidence through the lens of its own personal interests and abandon the jury's neutral fact-finding role. *See Lee*, 405 Md. at 173.

Appellant argues next that the State's argument that it was defense counsel's duty to raise doubt during rebuttal closing argument denigrated the role of defense counsel, and thus was improper. A prosecutor may not "impugn the ethics or professionalism of defense counsel in closing argument." *See Smith v. State*, 225 Md. App. 516, 529 (2015), *cert denied*, 447 Md. 300 (2016). But a prosecutor's rebuttal argument is proper if it is "nothing more than a reasonable reply to the arguments made by the defense." *Id.* at 528-29 (finding that the State's comments that defendant's case consisted of "smoke and mirrors" were not improper because they "were clearly directed to defense counsel's argument and did not impute impropriety or unprofessional conduct to defense counsel."). *See also Degren*, 352

Md. at 431-32 (finding prosecutor's comment that criminal defendants have a motive to lie to be a proper response to defense counsel's comment during closing "that the jury should not believe the State's witnesses because they had various motives to lie.").

Contrary to appellant's assertions, the State's rebuttal in this regard was a permissible response to defense counsel's closing argument. The State's comment that it was "[trial counsel]'s duty to raise doubt . . . [s]he needs to raise some doubt" was directed at defense counsel's closing argument highlighting the inconsistencies in the evidence and was not an attack on the ethics or professionalism of defense counsel. Thus, this comment by the State, unlike the previously discussed comment associated with a violation of the golden rule, was not improper.

Given the violation of the golden rule by the State in its closing rebuttal argument, we examine next, under *Strickland*, whether counsel rendered ineffective assistance of counsel by failing to object. As stated above, whether counsel rendered ineffective assistance of counsel is a two-part test where a defendant must show (1) "counsel's acts resulted from unreasonable professional judgement," and (2) the "defendant was prejudiced" by counsel's acts. *Jones*, 138 Md. App. at 206.

Concerning the performance component of *Strickland*, a reviewing court "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." *Strickland*, 466 U.S. at 690. The purpose behind the first part of this test is not to "grade counsel's performance" as "[t]here are countless ways to provide effective assistance in any given case." *Id.* at 689, 697.

Strickland review of ineffective assistance of counsel claims are highly deferential and a defendant "must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id*. at 689 (internal citation omitted).

Concerning the prejudice component of *Strickland*, "prejudice is rarely presumed" and the "defendant must prove that *actual prejudice* resulted from counsel's deficient performance." *Jones*, 138 Md. App. at 207. While the defendant must show a "substantial possibility" that but for the prejudice, the result of proceeding would have been different, a defendant need not show that the prejudice "more likely than not altered the outcome in the case." *Id.* at 207-08.

Based on a review of the record, and given that appellant did not call defense counsel to testify at the post-conviction hearing, the record is devoid of any reason for defense counsel not objecting to the prosecutor's rebuttal closing argument. We will not speculate as to the reason nor will we conclude that the failure to object was anything other than trial strategy. Even if it could be said that counsel's performance was deficient, appellant fails to meet his burden under the second prong of the *Strickland* test, i.e., to show prejudice. The trial judge instructed the jury that closing arguments do not constitute evidence and the prosecutor's comment was one isolated statement. Based on these facts, combined with the evidence presented at trial, we cannot conclude that there was a reasonable possibility that, but for defense counsel's failure to object to some improper comments by the prosecutor, the result of the proceeding would have been different. We hold that defense

counsel's failure to object to the prosecutor's argument did not constitute ineffective assistance of counsel.

JUDGEMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.