Circuit Court for Prince George's County
Case No. CT02-0128X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2337

September Term, 2018

WAYNE LEO SAVOY

v.

STATE OF MARYLAND

Berger,
Nazarian,
Wells,

JJ.

Opinion by Wells, J.

Filed: January 16, 2020

In 2002, a jury sitting in the Circuit Court for Prince George's County convicted Wayne Leo Savoy, appellant, of first-degree rape, second-degree rape, second-degree assault, first-degree burglary with the intent to commit a crime of violence, first-degree burglary with the intent to commit a theft, third-degree burglary, fourth-degree burglary, theft under $500, malicious destruction of property, and carrying a dangerous weapon openly with intent to injure. The jury acquitted Savoy of first-degree assault. The court sentenced Savoy to life imprisonment for first-degree rape, a concurrent twenty years for first-degree burglary, a concurrent sixty days for malicious destruction of property, and a concurrent three years for the weapons offense. The remaining offenses merged for sentencing purposes.

Savoy took a direct appeal of his convictions to this Court and we affirmed the judgments of the circuit court in *Savoy v. State*, No. 2022, Sept. Term 2002 (filed unreported October 15, 2003). Thereafter, Savoy filed a petition for post-conviction relief, which the circuit court denied in a written opinion and order dated October 23, 2017. Savoy then sought leave to appeal from that denial in this Court. We granted Savoy's application and transferred the case to our regular appellate docket. Savoy now presents us with the following questions, which we have re-ordered:

1. Did the post-conviction court err by denying relief based on appellant's claim of ineffective assistance of trial counsel, who failed to object to the issuance of an improper and coercive jury instruction in response to a jury note?

2. Did the post-conviction court err by denying relief based on appellant's claim of ineffective assistance of trial counsel, who failed to object to the prosecutor eliciting testimony from a witness that appellant had invoked his right to counsel?

3. Did the post-conviction court err by denying relief based on appellant's claim of ineffective assistance of trial and appellate counsel, for not objecting to the prosecutor's improper remarks at closing argument and for not raising them on appeal?

4. Should appellant's sentence for first degree burglary merge into his sentence for first degree rape?

For reasons discussed below, we shall vacate Savoy's sentence for first-degree burglary, and otherwise affirm.

BACKGROUND

In our opinion on Savoy's direct appeal of his convictions, we set forth the following background:

> [E.G.][1], the State's principal witness, testified that on December 5, 2001, she returned to her apartment from her evening job at approximately 11:00 p.m. When she went to her bedroom to change her clothes, she heard the patio door close. A masked man with a knife in his hands ran into the room.
>
> According to her testimony, he told her to take off her clothes and asked if she had a condom. She obtained one from a closet and complied when she was told to lie down on the bed on her stomach. He proceeded to have vaginal intercourse with her in that position. When he finished with the sexual intercourse, he threatened to harm her if she contacted the police, and he left through the patio door.
>
> On further examination, [E.G.] stated that the patio door had been secured by five locks; that she did not know anyone named Wayne Savoy; that she had not engaged in consensual sex with the masked intruder; and that she had not invited anyone to her home that night.
>
> Detective Michael Cleveland testified that he arrived at the apartment at 1:00 a.m. on December 6th and he described [E.G.] as being upset and agitated. He examined the patio doors in the dining room area. Entry had been gained by breaking the glass and peeling back the steel mesh. By interviewing neighbors, he obtained information from another resident of the

[1] We shall refer to the victim by her initials E.G., or as "the victim."

apartment complex who provided him with information regarding the incident.

Kathy Murphy, a sexual assault nurse, examined [E.G.] at the County Assault Center on December 6, 2001. She described [E.G.] as "quite hysterical," making a thorough pelvic examination incomplete because of her complaint of pain.

The State's final witness was Timothy Davis, who lived in the same complex as [E.G.]. His testimony was as follows: On December 5, 2001, at approximately 10:00 p.m., he saw appellant walking from the parking lot toward the complex. Davis knew appellant, who had previously worked as a security guard at the complex and asked him why he was in the area. Appellant responded that he knew a girl there. As they were talking, Davis observed [E.G.] enter a nearby building and then run back outside. At that point, Davis went into his own apartment. He also stated that when appellant was employed at the complex he saw appellant and [E.G.] conversing on several occasions.

Appellant did not testify in his own defense. He did, however, respond to questions from Detective Cleveland. According to the officer's testimony, the interview took place on January 4, 2002, at the Seventh District Police Station in Washington, D.C., where appellant was confined after his arrest pursuant to a warrant.

According to Detective Cleveland, he told appellant that he wanted to talk to appellant about a sexual assault that occurred on Brooks Drive in Prince George's County. Appellant expressed his consent to talk about the incident. After obtaining some personal information about appellant, the officer gave him his Miranda rights. The discussion lasted 35 to 40 minutes. Initially, appellant denied any knowledge of the breaking and entering, 'and then after a few minutes . . . he changed his story and indicated that he knew [E.G.]."

Appellant allegedly told Cleveland that he knew [E.G.] from the time he was employed at the complex as a security guard. On the evening of the assault, he said, he was at an apartment nearby when she arrived home that night. She came outside later and motioned him to come over to her apartment, and she told him someone had broken in. She asked him to help her clean up the mess, and he cut his hand on glass fragments in the door. [E.G.] initiated the sexual encounter by kissing him and then they had consensual sexual intercourse.

Savoy, Slip. Op. at 2-4.

Additional facts will be discussed as they relate to the questions raised.

DISCUSSION

I. Savoy's Ineffective Assistance of Counsel Claims.

A. Standard of Review.

"The Sixth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, and Article 21 of the Maryland Declaration of Rights, 'guarantee criminal defendants the right to the assistance of counsel at critical stages of the proceedings.'" *Smith v. State*, 394 Md. 184, 205 (2006) (quoting *Mosley v. State*, 378 Md. 548, 556 (2003)). To ensure that the right to counsel provides meaningful protection, the right has been construed to require the "effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)).

The Supreme Court stated in *Strickland* that "[t]he benchmark for judging any claim of ineffectiveness must be 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." 466 U.S. at 686. The analysis of a claim of ineffective assistance of counsel has two components, which may be considered in any order. *Newton v. State*, 455 Md. 341, 356 (2017), *cert. denied*, 138 S. Ct. 665 (2018). Moreover, courts need not address both components in every case. *Id*. In *Coleman v. State*, 434 Md. 320, 331 (2013), the Court of Appeals explained the two components as follows:

> First, the "defendant must show that counsel's performance was deficient," which is proven by showing that "counsel's representation fell below an objective standard of reasonableness," and that such action was not

> pursued as a form of trial strategy. *Strickland*, 466 U.S. at 687–89; *see also Oken v. State*, 343 Md. 256, 283–84. Second, "the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. This Court has noted that the standard to be used is whether there is a "substantial or significant possibility that the verdict of the trier of fact would have been affected." *Bowers v. State*, 320 Md. 416, 426 (1990) (quoting *Yorke v. State*, 315 Md. 578, 588 (1989)); *see also Williams v. State*, 326 Md. 367, 375 (1992).

"In assessing the performance prong of an ineffective assistance of counsel claim under the Sixth Amendment, a court will indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *State v. Peterson*, 158 Md. App. 558, 583 (2004) (internal quotation omitted). Moreover, "[t]he court must be highly deferential in reviewing counsel's performance, in order to avoid second-guessing counsel's assistance." *Id*. (internal quotation omitted) (alterations from original).

"As noted in *Strickland*, 'both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact.'" *Coleman*, 434 Md. at 331 (quoting *Strickland*, 466 U.S. at 698). When we independently examine a case, we "re-weigh the facts as accepted in order to determine the ultimate mixed question of law and fact, namely, was there a violation of a constitutional right as claimed." *Harris v. State*, 303 Md. 685, 698 (1985). On appeal, we conduct our own *de novo* independent appraisal of whether a petitioner has established the performance and/or the prejudice components of the *Strickland* inquiry. *State v. Peterson*, 158 Md. App. 558, 585 (2004). When reviewing the correctness of the lower court's ruling we apply the well-settled rule of

appellate procedure that, on direct appeal, an appellate court will ordinarily affirm on any ground adequately shown by the record. *Parker v. State*, 402 Md. 372, 398 (2007).

B. Trial counsel's non-objection to the trial court's response to a jury note.

During the second day of jury deliberations, the jury sent a note to the trial court which read: "Do we have to be unanimous on all counts? If we are not unanimous on all counts does Savoy walk?" During an ensuing bench conference, the following occurred:

DEFENSE:	Well, do you want my opinion?
THE STATE:	Of course the answer is they have to be unanimous, period.
DEFENSE:	And don't answer the next one?
THE COURT:	I don't think we should address it. If there is no disagreement I am going to spell it out that your decision has to be unanimous.
DEFENSE:	Okay.
THE COURT:	And you want me to put on all counts?
DEFENSE:	Uh-huh.
THE STATE:	Yes.
THE COURT:	Okay. I would ask both of you to sign this, at least acknowledging having seen it, and I'll send it back in there and I will ask for the note to be returned so we can file in the jacket.

The court returned the note to the jury with the written admonition that "[y]our decision has to be unanimous on all counts."

Savoy contends that he was denied his right to effective assistance of counsel when his trial counsel failed to object to the trial court's response to the questions posed by the jury. His claim has two parts. In part one, he claims that his trial counsel should have

objected to the court's response to the first half of the jury's question which asked "Do we have to be unanimous on all counts?" on the basis that the court's response coerced the jury into finding Savoy guilty. In part two, he claims that his trial counsel should have objected to the trial court's decision to not address the second half of the jury's question, which asked "If we are not unanimous on all counts does Savoy walk?" on the basis that the lack of response permitted the jury to impermissibly consider Savoy's penalty, or lack thereof.

As noted earlier, "courts need not consider the performance prong and the prejudice prong in order, nor do they need to address both prongs in every case." *Newton v. State*, 455 Md. at 356. We will first consider the prejudice prong of Savoy's claim. Because, as will be seen, we conclude that Savoy has failed to demonstrate prejudice within the meaning of *Strickland*, and its progeny, we need not decide whether trial counsel made a serious attorney error.

We have referred to the prejudice prong as an "imposing obstacle." *Evans v. State*, 151 Md. App. 365, 382 (2003). "The defendant … bears the burden of proving the prejudice prong and '[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding.'" *Id*. at 373 (quoting *Strickland*, 466 U.S. at 693). "Virtually every act or omission of counsel would meet that test and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding." *Id*. (citations omitted). In order to establish prejudice, Savoy "must show that there is a substantial possibility that, but for counsel's unprofessional

error, the result of the proceeding would have been different." *State v. Gross*, 134 Md. App. 528, 556 (2000), *aff'd*, 371 Md. 334 (2002).

Savoy offers no proof that he was prejudiced by any alleged error of his trial counsel with respect to the question from the jury and the trial court's response to it. In his brief before this Court, Savoy does little other than baldly assert that the trial court's response to the jury's note coerced them into finding him guilty. Savoy falls short of establishing prejudice, although in his brief he states:

> This note, sent at the end of the second day of deliberations, after the jurors had already received the standard unanimity instruction, revealed that the jurors were having trouble reaching a unanimous verdict and that at least some were concerned that Appellant would not be punished if they could not agree. An appropriate instruction addressing both the concerns with unanimity and the juror's consideration of punishment was imperative at this point. Instead, the court issued an instruction that failed to inform jurors that they should render a verdict without violence to their individual judgment and to not surrender their honest belief as to the weight or effect of the evidence only because of the opinion of their fellow jurors or for the mere purpose of reaching a verdict. The court then completely ignored the punishment inquiry.
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> ****
>
> The standard to assess whether prejudice resulted from trial counsel's ineffective assistance is whether, while applying a standard that is less than a preponderance of the evidence, the post-conviction court could conclude that there is a substantial possibility that the result would have been different. The trial court's instruction was incorrect, it was coercive, and it deprived Appellant of a fair and impartial verdict.

Moreover, the jury had otherwise been properly instructed, a fact which neither party disputes. In addition, it seems clear to us that the jury had no difficulty understanding its duties regarding unanimity, given that it acquitted Savoy of one count and convicted him of the remaining counts. Savoy offers us no insight into how the jury's verdict may

have favored him had the court responded to the note differently. In short, Savoy has not proved that there is a significant or substantial possibility of a different result at trial had his attorney not agreed to the trial court's response to the jury note.

The defense theory was that the victim was lying about being attacked as evidenced by the victim's actions after the encounter when she did not immediately call the police, but instead called her boyfriend. According to the defense, she also was reluctant to explain the details of the attack to the police and was hesitant to undergo a medical examination. Regarding the question of why the victim would lie about being attacked, the defense theorized that the victim had an "agenda." That agenda, according to the defense, could have involved the possibility of a lawsuit against the apartment building, and/or her being upset with her boyfriend when he did not immediately respond to her request for assistance after she found out that her apartment had been broken into and ransacked.

To bolster the victim's credibility, the State focused on the consistencies in the victim's statements to the police and the medical personnel, and the fact that she said her attacker wore a mask, and a mask matching her description was found in Savoy's home along with a hacksaw, a bent screwdriver, and a machete. In an attempt to damage Savoy's credibility, the State focused on Savoy's multiple statements to the police which ranged from a categorical denial that he knew the victim or had ever been in her apartment, to an acknowledgment that he had a sexual encounter with her in her apartment on the night in question. The State also focused on Savoy's bizarre action of tearing up his written statement and then creating a fictitious copy of a blank police form. The State pointed out that Savoy, who was no longer employed as a security guard at the apartment complex at

the time of the attack and therefore had no reason to be there, was very familiar with the complex and the comings and goings of its residents. The State asserted that Savoy was at the complex for only one reason – to break into the victim's apartment.

In our view, the State had considerable evidence of Savoy's guilt. Moreover, the defense was more suggested than proved by the evidence and, in any event, those theories bordered on the preposterous. Given that the weight of the evidence was against him, Savoy would have had to make a considerable showing of prejudice in order to prove a "significant or substantial possibility of a different result" at trial but for any error of counsel. *See State v. Gross*, 134 Md. App. at 556.

C. Trial counsel's non-objection to evidence that Savoy requested counsel during a post-Miranda custodial interrogation.

After Savoy was arrested, he agreed to waive his Miranda rights and speak with the police. Initially, he told Detective Michael Cleveland that he had no knowledge of either the break-in of the victim's apartment, or the sexual assault on her. According to Detective Cleveland, Savoy "pretty much denied everything initially." During the interview, however, Savoy changed his story. He claimed that on the night of the offense, he was in the vicinity of the victim's apartment when he saw the victim and she "beckoned for him to come towards her." Savoy told the detective that the victim told Savoy that someone had broken into her apartment and asked him to help her clean up the broken glass. In so doing, Savoy said he cut himself. Thereafter, according to Savoy, the two engaged in a consensual sexual encounter. Savoy claimed to have had a previous "affair" with the victim.

Detective Cleveland asked Savoy if he would be willing to memorialize his statement in writing, and Savoy initially agreed. Detective Cleveland testified that he then gave Savoy a standard form used for victims, witnesses, and suspects, to give a written statement to the police. Detective Cleveland had filled out the top portion of the form before giving it to Savoy. Before he left the room, Detective Cleveland said he saw Savoy begin to write on the form. A short time later, Detective Cleveland went to check on Savoy to see if he was finished writing. Detective Cleveland testified that:

> I went back to the interview room. And Mr. Savoy, like I said, he was sitting there and he had some blank pages in front of him – let me correct that. He had another – this is what we call the first page of the statement form. It has the top section where the personal information goes. He was sitting with another form just like this in front of him that had the top section filled out, but there was no writing where the statement goes.
>
> I walked back in. I was somewhat surprised when I had seen that, when I looked through the window when I seen that, because I thought that Mr. Savoy was writing when I left the room. So when I went back in and saw this blank form I asked him what the problem was. Mr. Savoy indicated to me that he did not want to write at that time, *he didn't want to provide a statement with – a written statement without a lawyer*.
>
> (emphasis added).

Confused about the blank paper that he had collected from Savoy after he had seen him start writing on the form, Detective Cleveland examined the form more carefully and realized that the top section of the form was not written in his handwriting. Rather, it was in Savoy's handwriting. Detective Cleveland then asked Savoy where the original sheet of paper was. Savoy directed Detective Cleveland to the desk blotter on the desk where Savoy had been sitting to write his statement. Inside the desk blotter was the form which had been torn into 30 to 35 pieces. At trial, the hand-written statement found torn up in the

blotter (and later taped back together) was read to the jury by Detective Cleveland, who testified:

> It reads as follows: When she arrived I was on the front about two apartments down talking to Timmie. We sit there and talked about ten minutes before he went into the house and I left.
>
> As I went around the bend she came out of the door, and — I can't read exactly what that word is — and asked if she could talk to me.
>
> And that's where the statement ends.

Savoy now claims that his lawyer erred in not objecting when Detective Cleveland testified that Savoy "didn't want to provide a … a written statement without a lawyer." We need not decide that issue however, because Savoy has not established prejudice, *i.e.* a significant or substantial possibility that the result would have been different had trial counsel objected to the remark.

From Savoy's words and actions in the interview room one may infer consciousness of guilt from the following summary of the facts: Savoy changed his initial story that he did not know the victim and knew nothing about the attack to one where he admitted he had consensual sex with the victim in her apartment; Savoy tore up his written statement and hid it; Savoy then lied about doing that and claimed to have not written a statement at all; and Savoy created a fictitious blank form presumably in an effort to cover his tracks. We agree with the State that Savoy's request for counsel was possibly the least incriminating thing that he did or said while in the interview room. That Savoy has not proved that there is a significant or substantial possibility of a different result but for any

error of his counsel is especially evident given the strength of the State's case as outlined above.

D. Trial counsel's non-objections to portions of the State's closing argument.

Savoy claims that his trial counsel made a prejudicial error in not objecting to certain portions of the State's closing argument, and that his appellate counsel, who raised an unpreserved argument about the State's closing argument on direct appeal, made a prejudicial serious attorney error in failing to raise additional unpreserved arguments in conjunction with it.

1.

Savoy maintains that his attorney should have objected to the State's comments made during closing argument that suggested that Savoy failed to present certain evidence. Savoy argues that those comments impermissibly shifted the State's burden of proof to the defense. "Maryland prosecutors, in closing argument, may not routinely draw the jury's attention to the failure of the defendant to call witnesses, because the argument shifts the burden of proof." *Wise v. State*, 132 Md. App. 127, 148 (2000).

Timothy Davis, a State's witness, testified that he was with Savoy in the apartment complex on the evening in question when Davis saw the victim come out of her apartment screaming. During an earlier interview with the police, Davis did not mention that he had seen the victim that night. At trial, Davis said that when the victim came out of her apartment, he [Savoy] "jumped up and went in his apartment and shut the door, and that's all I seen." Davis also testified that his mother had seen Savoy with him on the night in question. But it was revealed that Davis failed to mention that fact to the police when he

gave his statement. Savoy claims that his attorney should have objected when the State said in closing argument: "[Davis] did not tell [the police] that his mother had seen him [Savoy]. Was his mother here to testify to that? He is living with his mother. Didn't mention anything like that at all."

Savoy claims that the State's argument amounted to the State improperly shifting the burden to the defense by questioning why Savoy had not called Davis's mother to testify on his behalf. Savoy now argues his attorney should have objected.

Savoy was not prejudiced by the State's comment, because we conclude that even if Savoy's trial counsel objected, there is not a significant possibility of a different result. Additionally, there was no dispute that Savoy was at the apartment complex on the evening in question. According to Davis's testimony, that was the only thing to which Davis' mother could have testified. More importantly, as recounted earlier, the evidence against Savoy was substantial and compelling. Under these circumstances, proving *Strickland* prejudice presents an "imposing obstacle" which Savoy cannot overcome. *Evans*, 151 Md. App. at 382.

2.

Savoy also claims that the following comments from the State's rebuttal closing were objectionable:

> I still didn't hear anything about why when [Savoy] had the opportunity to talk with Detective Cleveland and write down his statement, he had to change his story three times about whether or not he knew her, whether or not he had ever been in her apartment before … and why he had the need to tear [the statement] up and stick it up under the blotter and then try to reproduce another statement page with his information on it but without any writing whatsoever.

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> There was ample opportunity for anyone, anyone, including Mr. Savoy, to come forward and say this is who you need to talk to, this is where they live, this is their telephone number, I didn't do this. He could have simply said I did not do this and brought that information forward.

Specifically, Savoy contends that that the portion of the State's rebuttal closing argument that begins: "I still didn't hear anything about why when [Savoy] had the opportunity to talk with Detective Cleveland and write down his statement, he had to change his story three times about whether or not he knew her…" was a comment on Savoy's failure to have presented evidence to which his attorney should have objected.

In our view, Savoy takes the comment out of context. Taken in context, and aware that it was made during the State's rebuttal closing argument, the comment merely noticed that the defense, in their closing argument, did not explain Savoy's odd behavior when he was questioned by the police. This included, among other things, Savoy dramatically changing his statement from a total denial of any impropriety, to admitting that he had sexual intercourse with the victim. Under the circumstances, the State's argument was fair and Savoy's trial counsel did not seriously err in not objecting to it.

Savoy also contends that his trial counsel should have objected to the State's comment that "[t]here was ample opportunity for anyone, anyone, including Mr. Savoy, to come forward and say this is who you need to talk to, this is where they live, this is their telephone number, I didn't do this." On direct appeal, Savoy raised a claim dealing with this exact passage from the State's argument notwithstanding that it was not objected to and therefore not preserved for review. We noted, that, ordinarily, the failure to object to

a closing argument "precludes consideration of the matter on appeal." *Savoy*, Slip Op. at 14. We then acknowledged that the State's comments were improper, stating:

> We disagree with the State's suggestion that the argument it made in closing qualifies as "oratorical flourish" and, therefore, was proper comment. By his plea, appellant has asserted his denial of the charges. Thereafter, he has no obligation to come forward and explain anything. When the State suggests in closing that 'anyone, anyone, including Mr. Savoy [could have] come forward," it is not engaging in oratorical flourish - - it is entering a mine field which detonation may result in the form of a reversal for clear error which prejudiced appellant's right to a fair trial.

Id.

We declined to reverse Savoy's convictions based on the unpreserved error, however, noting that: "There was substantial evidence to prove the charges without obliquely referring to appellant's failure to testify. Based on the record as a whole, we conclude that the closing argument, while inappropriate, does not warrant a reversal." *Id.* at 15.

While our finding that an un-objected to trial court error did not rise to the level of plain error on direct appeal does not by itself mean that Savoy cannot establish *Strickland* prejudice, but, in this case, we are hard-pressed to accept Savoy's suggestion of prejudice given our pervious decision not to find plain error on direct appeal. This position is even more compelling given our analysis *supra* of the strength of the State's case.

3.

Next, Savoy contends that his counsel should have objected when the State made a prohibited "golden rule" argument during closing when the State said: "He did what

everyone fears who own a home, who lives in an apartment, to have someone break into your house, take your things, and then violate your body."

A "golden rule" argument arises when counsel asks the jury members to place themselves in the shoes of the victim. *Lawson v. State*, 389 Md. 570, 594 (2005). Such arguments are not permitted because they improperly appeal to the jury members' "prejudices and asks [the jury members] to abandon their neutral fact-finding role." *Id.*

We agree with Savoy that the State's argument in this case wanders dangerously close to the prohibited "golden rule" line. Nevertheless, we are not persuaded that by not objecting, Savoy has proven that his "counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687–89. In addition, Savoy has not established prejudice. As noted previously, the State's case offered compelling evidence of Savoy's guilt. And, that evidence was only strengthened when placed along-side the far-fetched theories Savoy advanced about the victim's motivation to lie about what happened to her in her apartment. On balance, we conclude that while the State should have avoided making what is arguably a "golden rule" argument, that alone is insufficient to warrant reversal.

4.

Savoy's next claim is that this Court should review "the issue" for plain error pursuant to Rule 8-131(a). **"**The issue" appears to be Savoy's contention that he was prejudiced from the cumulative effect of the trial court's failure to take corrective action to the State's multiple improper comments. We note that this assignment of error was waived when it was not raised on direct appeal. *See* Md. Code, Crim. Proc. § 7-106(b); *Curtis v.*

State, 284 Md 132 (1978). As a result, "[w]e are called upon to employ our extraordinary power of plain error review in order to rescue appellant from his waiver. Precedent dictates, however, that plain error review is a creature of direct appellate review only and is not available in post-conviction proceedings." *Cirincione v. State*, 119 Md. App. 471, 512 (1998).

Not surprisingly, Savoy raises a claim of ineffective assistance of trial and appellate counsel for, respectively, not objecting at trial and not subsequently raising the cumulative effect argument on direct appeal. With respect to trial counsel, we have already addressed trial counsel's conduct with respect to each of the State's allegedly improper comments, and found either that trial counsel made no error, or that Savoy suffered no prejudice, or both. Moreover, we have already determined that "[t]here was substantial evidence to prove the charges without obliquely referring to appellant's failure to testify [and, b]ased on the record as a whole, we conclude that the closing argument, while inappropriate, does not warrant a reversal." *Savoy*, Slip Op. at 15.

As for his appellate counsel's alleged infectiveness, Savoy cites to *Lawson v. State*, 389 Md. 570 (2005) for support. In *Lawson*, on direct appeal, the Court of Appeals reversed Lawson's convictions based on multiple unpreserved errors related to the State's closing argument. It is, however, noteworthy that the Court of Appeals did not decide *Lawson* until several years after Savoy's 2002 trial. Moreover, as we have already held, some of the State's comments were not objectionable in the first place, therefore, it would have been pointless to raise them on direct appeal, especially as part of a plain error argument. Finally, Savoy does not rebut the presumption that appellate counsel made a

strategic decision to not raise any non-preserved error, as was his burden to do. "[A]ppellate counsel "need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal." *Newton v. State*, 455 Md. 341, 363 (2017), *cert. denied*, 138 S. Ct. 665 (2018). As a result, Savoy has not proved he was denied his right to effective assistance of counsel in conjunction with either his trial or appellate counsel with respect to the State's closing argument.

II. Merger of sentence for first-degree burglary into first-degree rape.

Savoy contends that the sentencing court erred in imposing separate sentences for his first-degree burglary and first-degree rape convictions. Savoy contends that his sentence for his first-degree burglary conviction should merge, under the required evidence test, *see Blockburger v. United States*, 284 U.S. 299 (1932), into his sentence for his first-degree rape conviction. The State agrees, and so do we.

The doctrine of merger of offenses derives in part from federal double jeopardy principles and Maryland's common-law principles of double jeopardy. *Pair v. State*, 202 Md. App. 617, 636 (2011). The doctrine "provides the criminally accused with protection from, *inter alia*, multiple punishment stemming from the same offense." *Purnell v. State*, 375 Md. 678, 691 (2003).

In *Blockburger, supra*, the United States Supreme Court utilized the required evidence test for determining when two offenses constitute the same offense for double jeopardy purposes. Under that test, "[t]he applicable rule is that when the same action constitutes a violation of two distinct statutory provisions, the test to be applied to

determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not[.]" *Id*. The Court of Appeals has "often pointed out that under settled Maryland common law, the usual rule for deciding whether one criminal offense merges into another or whether one is a lesser included offense of the other, when both offenses are based on the same act or acts, is the so-called required evidence test." *State v. Lancaster*, 332 Md. 385, 391 (1993) (internal quotation omitted). In *Lancaster*, the Court described the required evidence test as follows:

> [R]equired evidence is that which is minimally necessary to secure a conviction for each . . . offense. … [W]here only one offense requires proof of an additional fact, so that all elements of one offense are present in the other, and where both offenses are based on the same act or acts, . . . merger follows[.]

Id. at 391-92 (internal citations and quotation marks omitted). The required evidence test essentially asks whether, in the abstract, it is possible to commit each offense without also committing the other. "When there is a merger under the required evidence test, separate sentences are normally precluded. Instead, a sentence may be imposed only for the offense having the additional element or elements." *Id.* at 392. Moreover, if a jury could have based multiple convictions upon the same conduct, but it is not clear whether it actually did so, "… we must resolve the ambiguity in favor of appellant and assume that the jury based all of the convictions on the same conduct." *Snowden v. State*, 321 Md. 612, 618-19 (1991).

Section 3-303(a) of the Criminal Law Code defines a first-degree rape as engaging in "vaginal intercourse with another by force, or the threat of force, without the consent of the other" and committing that crime, among other things, "in connection with a burglary in the first, second, or third degree." As noted earlier, Savoy was convicted of, and

separately sentenced for, both first-degree rape, and first-degree burglary. The jury in Savoy's case was instructed that, to prove a first-degree rape, the State had to first prove a second-degree rape, and then prove one of several aggravators including that the rape was committed in connection with a "a burglary it the first, second or third degree." The jury's verdict did not reveal which of the aggravators it found.

In *Utter v. State*, 139 Md. App. 43 (2001), this Court held, under circumstances not dissimilar from this case, that "under the required evidence test, first degree burglary merged into attempted first-degree rape."[2] *Id*. at 54. As a result, the 20-year concurrent sentence for first-degree burglary must be merged into the life sentence for first-degree rape.

SENTENCE FOR FIRST DEGREE BURGLARY VACATED. JUDGMENTS OTHERWISE AFFIRMED. COSTS TO BE PAID THREE-FOURTH'S BY THE APPELLANT AND ONE-FOURTH BY PRINCE GEORGE'S COUNTY.

[2] Any distinction between attempted first-degree rape (as in Utter's case) and completed first-degree rape (as in Savoy's case) is analytically immaterial to the merger question before us.

The correction notice for this opinion can be found here:

https://mdcourts.gov/sites/default/files/import/appellate/correctionnotices/cosa/unreported/2337s18cn.pdf