Circuit Court for Carroll County
Case No. 06-K-05-033033

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2342

September Term, 2015

EDINSON HERRERA RAMIREZ

v.

STATE OF MARYLAND

Reed,
Leahy,
Shaw Geter

JJ.

Opinion by Shaw Geter, J.

Filed: June 18, 2018

In 2005, a jury, in the Circuit Court for Carroll County, convicted Edinson Ramirez, appellant, of one count of first-degree burglary, two counts of armed robbery, one count of conspiracy to commit armed robbery, two counts of robbery, two counts of first-degree assault, one count of use of a handgun in the commission of a crime of violence, and one count of theft. Ramirez was sentenced to a total of 95 years' imprisonment. Ramirez noted a direct appeal of those convictions, and this Court ultimately affirmed in a reported opinion. *Ramirez v. State*, 178 Md. App. 257 (2008).

In 2014, Ramirez filed a petition for post-conviction relief, which was denied by the circuit court. Ramirez then filed an application for leave to appeal the denial of his post-conviction petition, which this Court granted. In this appeal, Ramirez presents several questions for our review, which we have rephrased and consolidated into a single question[1]:

> Did the post-conviction court err in denying Ramirez's petition for post-conviction relief based on the allegation that trial counsel rendered ineffective assistance by not challenging a prospective juror after the juror stated during *voir dire* that he believed his experience as the victim of a burglary would affect his ability to be impartial?

[1] Ramirez phrased the questions as:

1. Did the post-conviction court erred [sic] in not finding that trial counsel rendered ineffective assistance of counsel, when she did not seek to strike for cause or use a peremptory challenge on a juror on the basis that, in response to being questioned on voir dire, the juror said that the fact that he had been a victim of a violence crime would affect his ability to render a fair and impartial verdict in this case?

2. Did the seating of a biased juror amount to a structural error?

3. Did the appellant asserting ineffective assistance of counsel that results in a structural error must [sic], in addition to demonstrating deficient performance, show that he was prejudiced by counsel's ineffectiveness?

For reasons to follow, we answer Ramirez's question in the negative and affirm the judgment of the circuit court.

BACKGROUND

Ramirez was arrested and charged with various crimes after he and another man, "masked and wielding guns, entered the home of Rodney and Linda Hidey; forced them into the basement with their six-year-old daughter; shot Mr. Hidey; hit him repeatedly in the head with a gun; forced Ms. Hidey to open a safe in the basement; and fled with more than $80,000 kept in the safe." *Ramirez*, 178 Md. App. at 261-62.

During jury selection at Ramirez's trial, the trial court asked prospective jurors: "Have you or any member of your family or close friends ever been victims of a crime, accused of a crime or a witness in a criminal case and that experience affects your ability to render a fair and impartial verdict?" Approximately 11 prospective jurors, including Juror Number 27, answered that question in the affirmative. Each of those jurors was then called to the bench for further inquiry. During the court's inquiry of Juror No. 27, the following colloquy ensued:

THE COURT: What is your experience, please?

JUROR NO. 27: I had an apartment that was broken into about a year-and-a-half ago.

THE COURT: All right. Would that experience, in any way, affect your ability to render a fair and impartial verdict in this case?

JUROR NO. 27: I believe it would.

In addition to the above-referenced "crime victim" question, the trial court asked the jury venire several other questions, including whether they could "decide a case in which the defendant is charged with First Degree Burglary and related charges based solely on the evidence" and whether there was "any reason" why they "could not decide a case involving these particular offenses and discharge his or her duty as a juror fairly and impartially based solely on the evidence." Juror No. 27 did not respond to either of those questions.

Throughout the jury selection process, the parties submitted challenges, either for cause or by way of a peremptory strike, regarding individual jurors. Juror No. 27 was not challenged and was ultimately selected as part of the trial jury. Shortly after Juror No. 27 was selected and the jury was sworn in, the following colloquy ensued:

> [DEFENSE]: Your Honor, may we approach?
>
> THE COURT: Sure.
>
> (Counsel, the Defendant, and Johnnie L. Benningfield, II, the interpreter, approached the bench and the following ensued:)
>
> THE COURT: Okay.
>
> [DEFENSE]: As to Juror No. 27, who is the young man that is seated in the yellow shirt, I would ask that he be stricken for cause. Upon the Court excusing the jurors, he just vehemently started shaking his head and just looked right at me with not a very pleasant face. I don't think he's happy about the fact that he's sitting on this jury, and I think that that would be sufficient to ask he be stricken for cause.
>
> THE COURT: Well, it also should be noted that there was a lot of glee from those who made it out without being chosen.

Go ahead. Do you wish to respond?

[STATE]: I would – I didn't see that. It's a situation where I would defer.

[DEFENSE]: I'm sorry? What…

THE COURT: Well, I'm gonna reserve on that. We have two alternatives. We'll entertain that issue and see how he reacts during the course of the trial.

[DEFENSE]: Thank you, Your Honor.

* * *

THE COURT: The State is – I mean, the Defense is to bring it back up before the jury retires if there – if they still wanna go and raise the issue.

[DEFENSE]: Thank you, Your Honor.

Defense counsel did not raise any further objections regarding Juror No. 27, and the record is silent as to whether Juror No. 27 was the subject of any other issues. Approximately ten years after he was convicted, Ramirez filed a petition for post-conviction relief. In that petition, Ramirez alleged, among other things, that trial counsel rendered ineffective assistance in failing to strike Juror No. 27 based on his response to the trial court's "crime victim" question.

At the hearing on his petition, Ramirez did not present any additional evidence or argument beyond that which was contained in his petition. The State, on the other hand, called Ramirez's trial counsel, Laura Morton-Coleman, as a witness. As part of that testimony, the State asked Coleman about her process during *voir dire* and how that process was utilized during Ramirez's trial:

[STATE]: And in terms of you indicated that you had a number of jury trials prior to Mr. Ramirez's jury trial, and do you have a procedure that you follow in terms of how you select a jury and how your client is involved?

[WITNESS]: Yes. Even prior to coming to Court, I meet with my client…and explain to them what the jury selection process is, what it consists of, we – each side has a certain number of strikes. I explain to my client what those number of strikes are, how it is that they are effectuated. I give an explanation to my client as to the fact that there are certain things that I look for, there are certain reasons why I may or may not want somebody on the jury. But I also talk to my client about whether or not they would feel that somebody should or should not be on the jury. I let them know that whatever it is, if it is somebody that they know, somebody that they may have had contact with, a hunch that they just don't like this person. Or that they don't feel comfortable with that person sitting on the jury, then they are to let me know so that I can include that in my process for selecting the jury.

[STATE]: And did you in fact follow that procedure during your representation of Mr. Ramirez in his criminal trial?

[WITNESS]: Yes, I did. I actually went over with him pretty extensively because of the cultural difference. Mr. Ramirez I believe, if I recall correctly was from Cuba and so the difference in the way the Court systems work, it is always important to me especially with my Spanish speaking clients that come from a different culture, to make them understand and let them know what the process and the procedure is and what their role on that is, because they don't have – they haven't been exposed to it like we have with television and things of that nature.

[STATE]: And once the jury selection began, was Mr. Ramirez involved in the selection of jurors?

[WITNESS]: Yes.

[STATE]: And specifically in what way was Mr. Ramirez in [sic] selecting the jurors?

[WITNESS]: If I can kind of backtrack as to what I did in this particular case. The day of trial, what happens is, here in Carroll County the jury commissioner will have the list of the jurors. The list of the jurors has the very basic information. The name, the marital status, the age, their occupation. And I think that is pretty much it. So that is given to the attorneys the morning of trial.

And the way that they do it here in Carroll County or the way that they did it in Mr. Ramirez's case and the way they have done it in every case that I have been in is, that the jury commissioner places that face down on the trial table. So I would get here early and I did get here early on that day, flip it over and start looking to see so I can get a grasp and an idea as to who the different jurors are – potential jurors are in the case.

Then what I do is I make myself a very simple graph and all of this I do before the jury pool is brought in, different attorneys have different ways of doing it, for me the easiest thing for me to do is just list the jurors in order and I have a box that allows me to write notes with respect to each particular juror.

So I would have done that before I started trial. One of things that I do is I look at their age and I look at their occupation. If it is individuals that for example, have a law enforcement background or people who have attorneys, I will put a little notation of that even before we get started just to make sure that I know that and I understand that. Once I do that, this trial took place in the old courthouse. And so once that was done, if I recall correctly then I met with Mr. Ramirez in the old courthouse, the meeting room for attorneys with the clients, is at the back of the courthouse.

So once I got that done, then I went to the back of the courthouse into that back room to meet privately with Mr. Ramirez and kind of give him just my impression of the overall jury pool at that point in time.

[STATE]: And was Mr. Ramirez present during the entire jury selection?

[WITNESS]: Yes, he was.

The State then asked Coleman whether she encountered any issues when deciding which jurors to challenge and if Ramirez was involved in that process:

[WITNESS]: There was some – as we went through the jury selection process and people started exercising their strikes, there was some question as to whether or not we were going to have enough individuals, not to be able to seat a whole jury but to be able to seat a full jury with two alternates. So as we kind of went through everybody was keeping an eye on that because there was a possibility that we were going to have to come back the next day if we didn't have a full panel with the two alternates.

If I recall correctly we did with both the State and myself, just had that discussion with Judge Stansfield who was the trial judge and Judge Stansfield basically said, let's go through this process and then we will see where we are at the end of it, if we need to bring in another panel tomorrow, we will do that and if we get done and everything is okay, then we will do that.

[STATE]: And in terms of the way the strikes worked, was Mr. Ramirez involved in discussion related to…using strikes for cause or the peremptory strikes?

[WITNESS]: Yes.

Finally, the State asked Coleman to explain the circumstances surrounding Juror No. 27:

[WITNESS]: From what I remembered, Juror Number 27 had indicated during the voir dire that – I don't remember exactly what it is that Juror Number 27 said but there was something that was said that gave an indication that

perhaps he needed to be – that juror needed to be looked at more closely with respect to whether or not they could be fair or impartial. There had been an incident in their background that had caused them to not answer the question as to being fair and impartial as forcefully as I would have liked to see before seating that juror.

[STATE]: And did there come a time that you asked that Juror Number 27 be struck?

[WITNESS]: Yes, I asked that he be struck for cause.

[STATE]: And do you recall what if anything occurred once you asked that Juror 27 be struck for cause?

[WITNESS]: I believe at that point in time, there was not an immediate ruling by Judge Stansfield if I recall correctly. Instead what he did was he reserved on the issue and then we continued to look at other jurors and whether or not they would be stricken for cause.

In the end, the post-conviction court denied Ramirez's petition for post-conviction relief, finding that Ramirez had failed to show that trial counsel's performance was constitutionally deficient or that Ramirez was prejudiced as a result. This timely appeal followed.

STANDARD OF REVIEW

"The standard of review of the [post-conviction] 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) (citations omitted). On the one hand, we "will not disturb the factual findings of the post-conviction court unless they are clearly erroneous." *Wilson v. State*, 363 Md. 333, 348 (2001). On the other hand, "[w]hen a claim is based upon a violation of a constitutional right it is [the appellate court's] obligation to make an

independent constitutional appraisal from the entire record." *Harris v. State*, 303 Md. 685, 697 (1985). "In other words, the appellate court must exercise its own independent judgment as to the reasonableness of counsel's conduct and the prejudice, if any." *Jones*, 138 Md. App. at 209.

DISCUSSION

Ramirez argues that the post-conviction court erred in denying his petition for post-conviction relief. Ramirez maintains that trial counsel's failure to strike Juror No. 27 constituted ineffective assistance of counsel in that it "fell below an objective standard of reasonableness" and permitted a "biased juror to be seated as a fact finder" at trial. Ramirez also maintains that trial counsel's failure to strike Juror No. 27 amounted to a "structural error" and that, as a result, prejudice must be presumed. Ramirez further contends that, even if prejudice is not presumed, trial counsel's deficient performance nevertheless resulted in prejudice because it allowed "a confessed biased juror to remain seated on the jury" and "affected the integrity of the jury from the very beginning of the trial itself."

"Both the Sixth Amendment, made applicable to the states through the Due Process Clause of the Fourteenth Amendment, and Article 21 of the Maryland Declaration of Rights guarantee the right to effective assistance of trial counsel." *Barber v. State*, 231 Md. App. 490, 514 (2017), *cert. denied* 453 Md. 10. In *Strickland v. Washington*, 466 U.S. 668 (1984), the United States Supreme Court held that a defendant is deprived of his constitutional right to effective assistance of counsel when trial counsel's performance falls below an objective standard of reasonableness and creates a reasonable probability that, but for counsel's deficiency, the result would have been different. *Id.* at 687. Thus, a

defendant who claims that he received ineffective assistance of counsel must make two showings: that counsel's performance was constitutionally deficient and that the deficiency caused prejudice. *Taylor v. State*, 428 Md. 386, 399 (2012); *See also Barber*, 231 Md. App. at 515 ("To establish ineffective assistance of counsel, it is the [defendant's] burden to demonstrate (1) that, under the 'performance prong,' counsel's performance was deficient, i.e., counsel committed serious attorney error, and (2) that, under the 'prejudice prong,' counsel's deficient performance prejudiced the defense.").

"To meet the requirements under the 'performance prong' and demonstrate 'serious attorney error,' a [defendant] must show that the acts or omissions of counsel were the result of unreasonable professional judgment and that counsel's performance fell below an objective standard of reasonableness considering prevailing professional norms." *Barber*, 231 Md. App. at 515. In addition, the defendant must "overcome the presumption that the challenged action might, under the circumstances, be considered sound trial strategy." *Oken v. State*, 343 Md. 256, 283 (1996). That is, the decisions made by trial counsel are presumed to be sound; "[e]ven under *de novo* review, the standard for judging counsel's representation is a most deferential one." *Harrington v. Richter*, 562 U.S. 86, 105 (2011). Moreover, when reviewing a claim of ineffective assistance, courts should be mindful that the standard for representation under *Strickland* is that it be effective, not that it be mistake-free:

> *Strickland* does not guarantee perfect representation, only a reasonably competent attorney. Representation is constitutionally ineffective only if it so undermined the proper functioning of the adversarial process that the defendant was denied a fair trial. Just as there is no expectation that competent counsel will be a flawless strategist or tactician, an attorney may

> not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities.

Id. at 110 (internal citations and quotations omitted).

Once a defendant has established that counsel's representation was constitutionally ineffective, the defendant must then establish that he was prejudiced by that ineffective performance. Specifically, he "must show a 'substantial or significant possibility' that, but for the serious attorney error, the result would have been different." *Barber*, 231 Md. App. at 516. Although a defendant is not required to show that trial counsel's deficient performance more likely than not altered the outcome of the trial, the defendant must establish that the errors "actually had an adverse effect on the defense." *Strickland*, 466 U.S. at 693. In other words, "the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently." *Harrington*, 562 U.S. at 111. "The 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." *Strickland*, 466 U.S. at 686. And, as to the error's effect on the outcome of the proceeding, "[t]he likelihood of a different result must be substantial, not just conceivable." *Harrington*, 562 U.S. at 112.

Here, we hold that the post-conviction court did not err in denying Ramirez's petition. First, we are not persuaded that trial counsel's failure to strike Juror No. 27 was the result of unreasonable professional judgment, nor are we persuaded that counsel's performance fell below an objective standard of reasonableness. To be sure, trial counsel

admitted at the post-conviction hearing that Juror No. 27's answer to the trial court's "crime victim" question was troubling; however, she explained that it was not the answer that she found troubling as much as the fact that the juror did "not answer the question…as forcefully as [she] would have liked." Given the fact that Juror No. 27 gave no response to other pertinent questions, namely, whether he could decide a burglary case on the evidence and whether there was "any reason" he could not be fair or impartial, it is entirely possible that trial counsel ultimately discounted Juror No. 27's less-than-forceful response to the crime victim question. *See Harrington*, 562 U.S. at 105 (noting that the *Strickland* standard is deferential because, in part, "the attorney observed the relevant proceedings[.]"). Moreover, trial counsel did ultimately challenge Juror No. 27 after he expressed displeasure at having been selected as part of the jury. That trial counsel was willing to challenge Juror No. 27 for that reason, but not for his response to the crime victim question, suggests that his answer to the crime victim question was not overly consequential in light of the surrounding circumstances.

Furthermore, trial counsel testified that a great number of factors went into her decision to challenge potential jurors, including their age and occupation, whether they had a background in law enforcement or as an attorney, and whether Ramirez had any personal feelings about a particular juror. Trial counsel also testified that, as prospective jurors were removed for cause or pursuant to a peremptory strike, the number of total jurors dwindled to the point that there was a possibility that the parties would run out of prospective jurors and be forced to come back the next day with a fresh pool of jurors. Given that St. Mary's County is one of the smaller counties in Maryland, it is possible that a fresh jury pool would

have resulted in a selection of prospective jurors who were even less desirable than Juror No. 27. *See Tetso v. State*, 205 Md. App. 334, 379 (2012) (noting that the failure of trial counsel to object to a juror who stated that she believed the defendant should prove his innocence "may have been part of a strategy to obtain [that juror] in lieu of other members of the panel, whom he may have deemed less desirable."). Although that factor is not, by itself, the most compelling justification for failing to strike Juror No. 27, it is indicative of the fact that trial counsel's decision not to strike Juror No. 27 was affected by a myriad of factors and competing interests. In short, we cannot say that trial counsel's decision not to challenge Juror No. 27 was constitutionally ineffective based solely on that juror's response to the court's crime victim question. *See Yonga v. State*, 221 Md. App. 45, 75 (2015) ("A tactical mistake by defense counsel…does not mean that the attorney was incompetent or ineffective.").

Finally, the record makes plain that Ramirez was actively involved in the *voir dire* process, including the decision to challenge (or not challenge) prospective jurors. Although not dispositive, we nevertheless find it somewhat disingenuous that Ramirez now claims that trial counsel rendered ineffective assistance in pursuing an action that he condoned, if not actively pursued. *See Harrington*, 562 U.S. at 105 ("An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest 'intrusive post-trial inquiry' threaten the integrity of the very adversary process the right to counsel is meant to serve.") (citations omitted).

Assuming, *arguendo*, that trial counsel rendered ineffective assistance, we are not persuaded that Ramirez suffered prejudice as a result. Before discussing that standard, we first address Ramirez's claim that the seating of Juror No. 27 was a "structural error" in which prejudice is presumed. In *United States v. Cronic*, 466 U.S. 648 (1984), the Supreme Court stated that, in the context of a claim of ineffective assistance of counsel, prejudice may be presumed in very limited circumstances, such as when a defendant is denied the assistance of counsel, either actually or constructively, or where defense counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing[.]" *Id.* at 659; *See also Roe v. Flores-Ortega*, 528 U.S. 470, 483 (2000). In *Smith v. Robbins*, 528 U.S. 259 (2000), the Supreme Court added that prejudice may be presumed "'when counsel is burdened by an actual conflict of interest.'" *Id.* at 287 (quoting *Strickland*, 466 U.S. at 692). Outside of those very narrow circumstances, we could find no case in which the United States Supreme Court determined that a defendant was relieved of his burden of proving prejudice when asserting ineffective assistance of counsel.

Although Ramirez attempts to liken the presumption of prejudice standard under *Strickland* to other situations where courts have found there to be a "structural error" (and thus prejudice presumed) following a direct appeal, he cites no Maryland or United States Supreme Court case in which a court held that the two concepts were interchangeable. In fact, in *Weaver v. Massachusetts*, 137 S.Ct. 1899 (2017), the Supreme Court had the opportunity to make such a determination but chose not to. *Id.* at 1911. In that case, the defendant, Kentel Weaver, was convicted in a Massachusetts trial court of first-degree murder. *Id.* at 1902. Several years later, Weaver filed a motion for a new trial, claiming

that his trial attorney rendered ineffective assistance in failing to object to the closing of the courtroom during jury selection, which he claimed violated his right to a public trial. *Id.* After that motion was denied, Weaver noted an appeal to the Massachusetts Supreme Judicial Court, which ultimately affirmed in part because, although the violation of Weaver's right to a public trial was a "structural error," Weaver had failed to establish prejudice. *Id.* at 1907.

The Supreme Court eventually granted certiorari to address the issue of "whether a defendant must demonstrate prejudice in a case…in which a structural error is neither preserved nor raised on direct review but is raised later via a claim alleging ineffective assistance of counsel." *Id.* As noted, the Court declined to decide that issue; however, the Court did hold that the violation of a defendant's right to a public trial, while generally considered a "structural error," did not fall within the very narrow ambit of cases in which prejudice is presumed following a claim of ineffective assistance of counsel. *Id.* In so doing, the Court noted that "the term 'structural error' carries with it no talismanic significance as a doctrinal matter" and that "[i]t means only that the government is not entitled to deprive the defendant of a new trial by showing that the error was 'harmless beyond a reasonable doubt.'" *Id.* at 1910 (citations omitted). By contrast, the Court explained:

> [t]he prejudice showing is in most cases a necessary part of a *Strickland* claim. The reason is that a defendant has a right to effective representation, not a right to an attorney who performs his duties "mistake-free." As a rule, therefore, a "violation of the Sixth Amendment right to effective representation is not 'complete' until the defendant is prejudiced."

Id. at 1910-11 (internal citations omitted).

The Supreme Court further noted that "although the public-trial right is structural, it is subject to exceptions" and "not every public-trial violation will in fact lead to a fundamentally unfair trial." *Id.* at 1909, 1911. The Court reasoned, therefore, that the violation of a person's right to a public trial requires a showing of prejudice when raised as part of an ineffective-assistance claim:

> [W]hen a defendant objects to a courtroom closure, the trial court can either order the courtroom opened or explain the reasons for keeping it closed. When a defendant first raises the closure in an ineffective-assistance claim, however, the trial court is deprived of the chance to cure the violation either by opening the courtroom or by explaining the reasons for closure.
>
> Furthermore, when state or federal courts adjudicate errors objected to during trial and then raised on direct review, the systemic costs of remedying the error are diminished to some extent.
>
> * * *
>
> When an ineffective-assistance-of-counsel claim is raised in postconviction proceedings, the costs and uncertainties of a new trial are greater because more time will have elapsed in most cases. The finality interest is more at risk, and direct review often has given at least one opportunity for an appellate review of trial proceedings. These differences justify a different standard for evaluating a structural error depending on whether it is raised on direct review or raised instead in a claim alleging ineffective assistance of counsel.

Id. at 1912 (internal citations omitted).

We think the above reasoning is sound and wholly applicable under the facts of the instant case.[2] Indeed, a defendant's right to a fair and impartial jury is a fundamental right,

[2] Ramirez relies on several cases from other jurisdiction in support of his claim. Those cases, however, were either directly abrogated by *Weaver* or are unpersuasive given its holding. *See e.g. Owens v. United States*, 483 F.3d 48 (1st Cir. 2007) (abrogated by *Weaver*, 137 S.Ct. at 1899); *Johnson v. Sherry*, 586 F.3d 439 (6th Cir.) (same); *Littlejohn v. United States*, 73 A.3d 1034 (D.C. 2013) (same); *Montana v. Lamere*, 112 P.3d 1005

the violation of which may, under certain circumstances, constitute a structural error that is immune from harmless error analysis. *See Tetso, supra,* 205 Md. App. at 368 ("A criminal defendant has a right to trial by an impartial jury.") (citing U.S. Const. amend. VI, XIV); *See also Vasquez v. Hillery*, 474 U.S. 254, 264 (1986) (holding that the exclusion of potential jurors based on race constitutes a structural error). That said, not every situation involving the seating of a potentially biased or otherwise unqualified juror necessitates an automatic reversal. *See e.g. Hunt v. State*, 345 Md. 122, 146 (1997) ("If a criminal defendant undertakes to challenge a juror on grounds of bias, the attack must be affirmatively advanced at the time of trial. It may not be raised for the first time in a collateral attack upon the conviction and/or sentence."); *Tetso,* 205 Md. App. at 369 ("'Should an unqualified juror be impaneled, courts are satisfied generally with the verdict when the record establishes that the juror did not evade intentionally disqualification and that his or her service was performed without bias.'") (citations omitted); *Morris v. State,* 153 Md. App. 480, 496 (2003) ("If disqualification for cause is improperly denied, but the accused has not exercised all allowable peremptory challenges, there is no reversible error.") (citations omitted).

Although we have yet to be confronted with the exact issue presented here, we have decided a case involving the issue of whether the ineffective assistance of trial counsel during *voir dire* amounted to a "structural error." In *Whitney v. State*, 158 Md. App. 519

(Mont. 2005) (same); *Hughes v. U.S.*, 258 F.3d 453, 463 (6th Cir. 2001) (relying on "harmless error analysis" in determining that prejudice is presumed under *Strickland*); *Winston v. Boatwright*, 649 F.3d 618, 633 (7th Cir. 2011) (same); *McGurk v. Stenberg*, 163 F.3d 470, 475 (8th Cir. 1998) (same).

(2004), the defendant alleged that trial counsel rendered ineffective assistance by not knowing, and as a result not utilizing, the proper number of peremptory strikes afforded the defense. *Id.* at 530. In evaluating the merits of that claim, we discussed whether, under *Strickland*, prejudice was presumed. *Id.* at 536-39. While we agreed that the attorney's error was constitutionally defective, we ultimately held that such error did not result in a presumption of prejudice. *Id.* at 530, 539. In so holding, we recognized that, ordinarily, "'[t]he denial or impairment of the right [to exercise peremptory] strikes is reversible error without a showing of prejudice'" and that the impairment of the use of peremptory strikes has resulted in a presumption of prejudice in other courts. *Id.* at 532, 536. Nevertheless, after reviewing the pertinent case law, including both *Strickland* and *Chronic*, *supra*, we determined that "the impairment or dilution of a peremptory strike does not constitute such extraordinary error so as to relieve [the defendant] of his burden of satisfying the *Strickland* prejudice component." *Id.* at 532, 538 (citations omitted).

In sum, we are not persuaded that the seating of Juror No. 27 fell within the very narrow circumstances in which prejudice is presumed. Accordingly, Ramirez was required to show that he was prejudiced.

Turning now to the merits of that claim, we hold that Ramirez has failed to carry his burden of establishing prejudice. As discussed, the question of prejudice does not turn on whether "counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently." *Harrington*, 562 U.S. at 111. Rather, the question is whether counsel's deficient performance so

undermined the proper functioning of the adversarial process such that the likelihood of a different result was substantial.

Based on the facts presented here, we cannot say that the seating of Juror No. 27 met that standard. Other than Juror No. 27's response to the trial court's "crime victim" question, which, as previously discussed, may not have been overly consequential under the circumstances, Ramirez has provided no evidence or argument to suggest that he was prejudiced by Juror No. 27's presence on the jury. *See Whitney*, 158 Md. App. at 539 ("Even with a jury [presumably and after the fact] not entirely in line with [the defendant's] preferences, the trial was not unreliable or fundamentally unfair.") (citations and quotations omitted). In fact, Ramirez seems to suggest that Juror No. 27's response to the crime victim question constituted *per se* proof that the juror was irrevocably biased and, as a result, was automatically disqualified as a prospective juror. That proposition, however, is not consistent with the law regarding jury selection in Maryland, as bias is a question of fact to be decided by the trial judge, who, pursuant to his discretion, determines whether a cause for disqualification exists. *Williams v. State*, 394 Md. 98, 113 (2006); *See also McCree v. State*, 33 Md. App. 82, 98 (1976) ("A juror may be struck for cause only where he or she displays a predisposition against innocence or guilt because of some bias extrinsic to the evidence to be presented."). In short, Ramirez's general claim that the seating of a "biased" juror somehow tainted the jury, while conceivable, is insufficient to show that the inclusion of Juror No. 27 undermined the proper functioning of the adversarial process or created a substantial likelihood of a different result.

JUDGMENT OF THE CIRCUIT COURT FOR CARROLL COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.