Circuit Court for Montgomery County
Case No. 118329-C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2523

September Term, 2016

PHILIP O. YOUNG

v.

STATE OF MARYLAND

Nazarian,
Fader,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Raker, J.

Filed: October 22, 2018

Appellant Philip O. Young was convicted in the Circuit Court for Montgomery County of armed robbery, first degree burglary, and twelve related counts, all arising from a home invasion and robbery of the individuals present. Appellant presents the following question for our review, which we have rephrased:

> In failing to object to testimony regarding a co-defendant that implicated appellant and a police detective's opinion that another individual was not involved in the robbery at issue, did the conduct of trial counsel for appellant fall below an objective standard of reasonableness such that there is a substantial possibility that the outcome would otherwise have been different?

Finding that trial counsel provided ineffective assistance of counsel in accordance with *Strickland v. Washington*, 466 U.S. 668 (1984), we shall reverse.

I.

On April 27, 2012, following a joint trial, appellant and his co-defendant Elliott Baumgardner were each convicted of first degree burglary, conspiracy to commit robbery, four counts each of armed robbery, use of a handgun in a crime of violence, and false imprisonment related to a home invasion. A third participant in the crime, Maurice Jones, pled guilty shortly before trial and asserted his Fifth Amendment right not to testify when he was called as a witness at appellant's trial by Baumgardner. This Court affirmed appellant's convictions on direct appeal in July 2014. Appellant filed a petition for post-conviction relief in the Circuit Court for Montgomery County in October 2014. The post-conviction court denied the motion, finding that although appellant satisfied the deficiency prong of his ineffective assistance of counsel claim, there was not a substantial possibility

that it affected the outcome of the trial given the other evidence against appellant. Appellant filed an Application for Leave to Appeal to this Court, which we denied in October 2017. *Philip Young v. State of Maryland*, No. 2523, Sept. Term 2016 (filed October 3, 2017). He filed a Motion for Reconsideration in this Court, and we granted his motion in December 2017, recalling our October 2017 opinion and permitting appellant to appeal to this Court. This appeal followed.

We state the following facts as set forth at trial. On the evening of January 29, 2011, Juan Gomez and four family members were inside the Gomez home in Silver Spring. The testimony of the family members was inconsistent, but they testified that three to six men entered the home. The robbers identified themselves as police and wore vests labeled either "WMATA" or "Police." All but one wore balaclava masks during the robbery, and at least one carried a handgun. Most were 20–25 years old, but one of the robbers was described as 40–50 years old, tall, thin, and carrying a backpack. Two or more spoke with "Caribbean" accents, and one of the robbers called one of his compatriots a name that sounded like "Uggy." One witness later identified the unmasked man as Brian Graham, and multiple witnesses identified Baumgardner as one of the robbers. The robbers zip-tied the hands of three of the four adults present and took various valuables from the home, including a medallion worn by Mr. Gomez and a PlayStation 3 video game console. On the night of the robbery, Baumgardner used his phone in the area of Jones's mother's house, then in the area of the robbery, and finally in the area of a Hyattsville house owned by appellant's mother and managed by appellant. Baumgardner called Mr. Graham that evening.

The day after the robbery, Mr. Gomez found a string bag in his home that contained Pepco receipts, a telephone receipt, Citibank receipts, and lottery tickets. The items in the bag and the serial number from the PlayStation 3 led police to the homes of Jones and Elhaji Timbo. They found a black balaclava and a traffic vest labeled "WMATA" at the home of Jones's mother; she testified that she had three such vests at the time of the robbery. Police also arrested Baumgardner, who had a black balaclava mask in his possession. Baumgardner attempted to call Mr. Graham from jail.

Police later executed a search warrant at the four-bedroom house in Hyattsville owned by appellant's mother. Appellant did not live there, but used one of the bedrooms regularly. Police found a Pepco bill addressed to appellant and bearing the same account number as the one in the string bag. They also found an AK-47 behind the refrigerator, zip-ties similar to those used in the robbery in the basement, and a handgun matching the description of the one used in the robbery in the ceiling of a basement bedroom. Additionally, police found a package of cigarettes on a desk used by appellant. The cigarette package contained bullets usable by the handgun in the ceiling of a basement bedroom. The same desk contained jewelry stolen in the robbery.

At the time of the robbery, Angel Fontanez, who had recently pawned the medallion stolen from the Gomez home, rented the room in the basement that held the handgun. Mr. Graham also rented a room in the Hyattsville home at that time. When appellant was arrested at the Hyattsville home, his wallet contained a Citibank card matching the receipts and lottery tickets similar to those found in the Gomez home. Although appellant testified that he was unemployed and delinquent on his Pepco account at that time, he had $600

cash on his person. At the time of the robbery, appellant was 51 years old, 6' tall, weighed 170 pounds, and spoke with a Jamaican accent.

At trial, an associate of Baumgardner testified that before the robbery, she drove Baumgardner to the Gomez home for reconnaissance. Baumgardner testified at trial. During cross-examination, the prosecutor questioned Baumgardner about a letter he wrote to Jones, purportedly an attempt to convince Jones to tell the truth about the robbery. The following exchange occurred:

> "[THE STATE]: . . . so you were angry at [Jones] because you found out that he said that you did the robbery with him.
>
> [BAUMGARDNER]: No, first of all he said he bought the items from me.
>
> [THE STATE]: *That's what he said first and then he actually came to the State's Attorney's Office—*
>
> [BAUMGARDNER]: Right.
>
> [THE STATE]: *—and said that he went into the house with you and [appellant] and Darius and* [Mr. Graham].
>
> [BAUMGARDNER]: And then what else did he say?
>
> [THE STATE]: *And he said that you all did the robbery together.*
>
> [BAUMGARDNER]: No, at the end of the statement, what did he say?
>
> [THE STATE]: He asked Mr. Nee well, what am I going to get for this and when they started talking about that he backed out and said, "Oh, I think I'm going to back out of my statement." Isn't that true?
>
> [BAUMGARDNER]: Is that his words, is that what he said? Is that what he wrote? No.

[THE STATE]: That—

[BAUMGARDNER]: He said in the statement that I was given, this statement, it's false. The only reason I'm giving it is to get a reduced sentence and that in fact you all can prove that he was there beyond a reasonable doubt. That's why.

[THE STATE]: And isn't true then that he didn't get a reduced sentence ultimately, correct?

[BAUMGARDNER]: I don't know what he got?

[THE STATE]: You don't know what he got?

[BAUMGARDNER]: No.

[THE STATE]: *So you don't know what he got for pleading guilty?*

[BAUMGARDNER]: Nope.

[BAUMGARDNER'S COUNSEL]: Objection.

[APPELLANT'S COUNSEL]: Objection.

THE COURT: Sustained."

Detective Fumagalli, who investigated the Gomez robbery, testified as a State's witness and a defense witness. While she testified as a defense witness on direct examination, Baumgardner's counsel asked her about Mr. Fontanez's involvement with the robbery:

"[BAUMGARDNER'S COUNSEL]: As a result of all the information you gathered and your vast amount of experience as a detective, did your powers of observation lead you in the direction of Mr. Fontanez as a likely suspect?

. . .

[DET. FUMAGALLI]: Do I think he was involved in the robbery?

[BAUMGARDNER'S ATTORNEY]: Yes.

[DET. FUMAGALLI]: No.

[BAUMGARDNER'S ATTORNEY]: What reasons do you have why you believe that to be the case?

[DET. FUMAGALLI]: He didn't seem well-organized.

[BAUMGARDNER'S ATTORNEY]: By that you concluded that he was incapable of participating in the robbery?

[DET. FUMAGALLI]: No.

[BAUMGARDNER'S ATTORNEY]: So after the arrest of Mr. Fontanez, there was not a follow-up with Mr. Fontanez, was there?

[DET. FUMAGALLI]: There was a subsequent court date after my initial interview with him.

…

[BAUMGARDNER'S ATTORNEY]: So the case was dismissed by the State, correct?

[DET. FUMAGALLI]: Yes.

…

[BAUMGARDNER'S ATTORNEY]: Are you saying, just to clarify, you don't suspect Mr. Fontanez as being involved in the robbery?

[DET. FUMAGALLI]: That's correct."

Mr. Graham's sister also testified and said that appellant looked familiar to her, that she believed his name was "Jackie," and that she believed he had a nickname similar to

"Juggie" or "Juggo." Appellant testified that he previously rented a room to a man named Jackie, and appellant's mother testified that appellant did not have a nickname such as "Uggo" or "Uggie.". Appellant, his mother, and his girlfriend testified that appellant spent little time at the Hyattsville property, living instead at his home in the District of Columbia or with his girlfriend in Suitland, Maryland. Appellant claimed not to smoke, but the State introduced video evidence of him smoking the same brand of cigarettes as the package on appellant's desk in the Hyattsville home that contained bullets.

In a post-conviction hearing on October 21, 2016, trial counsel for appellant stated that he did not know why he committed the errors at issue here. He agreed that his trial strategy was to distance appellant from the other tenants in the Hyattsville home and from his co-defendants. He admitted on cross examination that his purpose could have been to avoid drawing the jury's attention to the evidence, but he did not recall any such purpose. Based partially on trial counsel's testimony, the post-conviction court denied the petition, finding that trial counsel's performance was deficient but that appellant suffered no prejudice. This timely appeal followed.

II.

Before this Court, appellant argues that his trial counsel provided ineffective assistance of counsel under the standard set out in *Strickland*, 466 U.S. at 669. Appellant argues that the first prong of *Strickland*, deficient performance, is satisfied because his trial counsel was objectively unreasonable in making three errors. First, counsel failed to object to Baumgardner's statement on cross examination that co-defendant Jones implicated

appellant in his statement to the State's Attorney. Appellant argues that this was inadmissible testimonial hearsay and an unreliable statement against interest outside the hearsay exception codified in Md. Rule 5-804(b)(3). Second, counsel objected to Baumgardner's subsequent statement that Jones pled guilty. Although the trial court sustained defense counsel's objection, counsel failed to ask the court for any curative action, such as striking the testimony, making a limiting instruction to the jury, or a declaring a mistrial. Third, Det. Fumagalli testified that she concluded that Mr. Fontanez did not participate in the robbery because he "didn't seem well-organized." Appellant argues that trial counsel was unreasonable in failing to object to such testimony because it was an impermissible opinion, both because Det. Fumagalli was not certified as an expert and because the opinion impermissibly determined a defendant's mental state. Further, appellant argues that it was unreasonable of trial counsel to fail to cross-examine Det. Fumagalli on the various statements she heard from Mr. Fontanez that suggested Mr. Fontanez's involvement in the robbery. Appellant argues that these actions were unreasonable not only because counsel failed to utilize well-established law but because his actions contravened his strategy of attempting to separate appellant from the tenants of the Hyattsville house and his co-defendants. As to the second prong of *Strickland*, prejudice, appellant argues that the first statement implicated appellant in the robbery, the second suggested that he and others were guilty of the crimes charged, and the third suggested that the most likely alternative suspect to appellant did not participate in the robbery. Because the State's case against appellant was circumstantial and weaker than its case against his co-defendants, appellant argues, there is a substantial possibility that the

statements at issue affected the verdict against appellant, thereby prejudicing him.

The State contests both prongs of *Strickland*. Regarding deficient performance, the State argues that appellant fails to overcome the *Strickland* presumption that trial counsel was effective. As to Baumgardner's testimony implicating appellant, the State stresses that trial counsel admitted in the post-conviction hearing that he did not remember the testimony and may have failed to object to avoid drawing the jury's attention to the evidence. As to Det. Fumagalli's testimony, the State argues that the testimony did not implicate appellant directly and that evidence impeaching Det. Fumagalli may have been ruled inadmissible—thus, it may have been reasonable not to object. Regarding prejudice, the State argues that the testimony was brief and that Det. Fumagalli's testimony did not implicate appellant directly. Compared to the wealth of circumstantial evidence against appellant, the State argues, the testimony at issue was not prejudicial under *Strickland*.

III.

Our review of the lower court's determinations for an ineffective assistance of counsel claim is a "mixed question of law and fact." *Strickland*, 466 U.S. at 698. We do not disturb the lower court's findings of fact unless they are clearly erroneous. *Fullwood v. State*, 234 Md. App. 57, 68 (2017). We conduct an independent analysis on the "ultimate mixed question of law and fact . . . in other words, the appellate court must exercise its own independent judgment" as to the reasonableness of counsel's conduct and any resulting prejudice. *Id.*

Under the Sixth Amendment to the United States Constitution and the Maryland

Declaration of Rights, a criminal defendant is entitled to the effective assistance of counsel. *Shortall v. State*, 237 Md. App. 60, 71 (2018). The question in 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 fair result." *Strickland*, 466 U.S. at 686. To prove ineffective assistance, appellant must prove both a "performance component" and a "prejudice component" to the purported deficiency. *Fullwood*, 234 Md. App. at 67–68. Under the first prong, deficient performance, appellant must demonstrate that, under the circumstances at trial, counsel's performance fell below an objective standard of reasonableness. *Id.* There is a strong presumption that counsel's conduct was reasonable. *Gilliam v. State*, 331 Md. 651, 665–66 (1993). In *State v. Jones*, the defendant was convicted of multiple crimes stemming from a home invasion, the relevant convictions being murder and robbery. *Id.*, 138 Md. App. at 186 (2001). In post-conviction proceedings, the defendant claimed ineffective assistance of counsel where trial counsel failed to object to testimony that a co-perpetrator was convicted of the crimes at issue. *Id.* at 209–10. This Court held that trial counsel's failure to object was not deficient performance because the testimony did not directly implicate the defendant and thus was consistent with trial counsel's stated strategy of conceding involvement in the robbery and denying participation in the murder. *Id.* at 211.

Here, in contrast to *Jones*, trial counsel's errors were both objectively unreasonable and contrary to counsel's stated trial strategy of distancing appellant from the other suspects in the robbery. The first statement at issue, Baumgardner's testimony that Jones told the State's Attorney he committed the robbery with appellant, was inadmissible under

both the 6th Amendment and Md. Rule 5-804 as testimonial hearsay. *State v. Snowden*, 385 Md. 64, 84 (2005); Md. Rule 5-804(b)(3). It was unreasonable for trial counsel to fail to object to such incriminating testimony because the trial court could have excluded the statement, given a limiting or curative instruction, or even granted a mistrial.[1] The second statement, made moments after the first, was that Jones pled guilty to the crimes at issue in appellant's trial. Trial counsel objected to this second statement, and the court sustained his objection, but counsel failed to move to strike the testimony or request any other remedy from the court. It was unreasonable for counsel to fail to ask the court to take some remedial action as to this inadmissible, prejudicial remark after the court sustained his objection. The third set of statements at issue comprised Det. Fumagalli's opinion and conclusion that Mr. Fontanez was not involved in the robbery because he was organized insufficiently. Those statements were inadmissible because Det. Fumagalli testified as a lay witness; her conclusion, if admissible at all, required expert testimony. *Ragland v. State*, 385 Md. 706, 725–26 (2005).

Trial counsel's decisions were contrary to his stated trial strategy. Counsel's strategy was to distance appellant from the other suspects, arguing that appellant was not sufficiently close to the tenants of the Hyattsville home to be involved in the robbery. The statements at issue, that one of the suspects implicated appellant and pled guilty for the crimes at issue and that a police detective did not believe the most likely alternative suspect

[1] We agree with the post-conviction court that, while the testimony elicited on cross examination may have been intended for impeachment of Baumgardner only, it was not limited to such use by the court because counsel failed to object, and thus, there was no limiting instruction as to that issue given by the court to the jury.

was involved, directly and powerfully contradicted such a strategy. Though the State elicited post-conviction testimony from trial counsel that his strategy *could* have been to avoid drawing the jury's attention to the testimony at issue, we agree with the post-conviction court that such theoretical testimony was inadequate to explain counsel's plainly unreasonable decisions. Moreover, a decision not to object to highly prejudicial evidence in an effort to avoid drawing attention to the evidence is not reasonable. Counsel ordinarily has the option of asking to approach the bench and to make the objection known out of the jury's presence.

We hold that trial counsel's errors prejudiced appellant. The second prong of a *Strickland* claim requires appellant to prove prejudice. To establish prejudice, appellant must show that there was a "substantial possibility that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Fullwood*, 234 Md. App. at 68. Multiple errors may be considered cumulatively. *Coleman v. State*, 434 Md. 320, 342 (2013). In *State v. Jones*, the defendant was convicted of robbery and murder following a home invasion. *Id.* at 186. He filed a post-conviction claim of ineffective assistance of counsel on the basis that counsel failed to object to an inadmissible "hearsay within hearsay" statement that "we" (the declarant and the defendant) committed the murder at issue. *Id*. at 212. On appeal, this Court held that the admission of the statement satisfied *Strickland*'s prejudice requirement. *Id.* at 225–26. The two key portions of the State's case were the defendant's statement, which he contested as coerced, and the inadmissible hearsay statement that the defendant participated in the murder. *Id.* We reasoned that in addition to the inadmissible statement constituting an important part of the

State's case, it "may well have been a decisive factor in persuading the jury to conclude that Jones's confession was both voluntary and accurate" and that there was thus a substantial possibility of a different outcome had trial counsel objected to the statement. *Id.* at 225.

Here, as in *Jones*, the State's case against appellant was hardly overwhelming. The testimony at issue is Baumgardner's testimony that Jones implicated appellant in the robbery and that Jones pled guilty and Det. Fumagalli's conclusion that Mr. Fontanez was not involved in the robbery. Aside from that testimony, the State's strongest evidence was the string bag that purportedly belonged to appellant, the inconsistencies in his testimony, and appellant's similarity to the physical description of one of the robbers—who one of the complaining witnesses identified as someone other than appellant. In the absence of the testimony, the jury may well have concluded that there was insufficient evidence to prove that appellant participated in the robbery. There is a substantial possibility that the jury would instead have believed trial counsel's well-argued theory that one of the other tenants in the house took the string bag and that Mr. Fontanez, not appellant, participated in the robbery and hid items used in the robbery in the Hyattsville house.

Because trial counsel's performance was objectively unreasonable and there is a substantial possibility that the result of the trial would have been different without counsel's errors, we hold that appellant was denied effective counsel mandated by the 6th Amendment to the United States Constitution.

JUDGMENTS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY REVERSED; CASE REMANDED TO THAT COURT FOR A NEW TRIAL. COSTS TO BE PAID BY MONTGOMERY COUNTY.