Circuit Court for Anne Arundel County
Case No. 02-K-09-000831

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 3207 & 3209

September Term, 2018

STATE OF MARYLAND

v.

CHARLES BRANDON MARTIN

Fader, C.J.,
Graeff,
Eyler, James R.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: September 20, 2019

In 2010, appellee, Charles Brandon Martin, was convicted of attempted first-degree murder and sentenced to life in prison. On October 5, 2018, the Circuit Court for Anne Arundel County granted appellee's petition for postconviction relief and ordered that he be granted a new trial.

On appeal, the State presents the following questions for this Court's review, which we have rephrased slightly, as follows:

1. Did the postconviction court err in ruling that the State committed a *Brady*[1] violation in failing to give the defense a forensic computer analysis report performed on appellee's computer?

2. Did the postconviction court err in ruling that appellee's trial counsel was ineffective in not objecting to compound questions posed during voir dire?

3. Did the postconviction court err in ruling that appellee's trial counsel was ineffective in failing to object to the State's closing argument?

Appellee filed a cross-appeal, in which he presents an additional question for our review, which we have rephrased slightly, as follows:

> Did the postconviction court err in concluding that appellee was not prejudiced by his trial counsel's failure to timely object to a Confrontation Clause violation?

For the reasons set forth below, we agree with the State's contentions of error, and therefore, we shall reverse the judgment of the circuit court.

[1] *Brady v. Maryland*, 373 U.S. 83 (1963).

FACTUAL AND PROCEDURAL BACKGROUND

The factual background of the underlying offense was summarized by this Court in its opinion on direct appeal of appellee's conviction. *Martin v. State*, 218 Md. App. 1, 8–14 (2014). We adopt this summary as follows:

> On October 27, 2008, Jodi Lynne Torok, the victim, was found at her home in Crofton, Maryland, with a gunshot wound to her head. Having survived that wound, the victim testified, at the trial below, that she had been in a romantic relationship with Martin, who was married to someone else, and that about eight or nine weeks before the shooting, she had become pregnant with his child. After the victim informed Martin of her condition, he angrily demanded that she obtain an abortion. Although she had, at first, agreed to do so, she later changed her mind and decided to have the baby. Upon informing Martin of her change of mind, the victim advised him of her intention "to go to court and take him for child support." Predictably, that advisement led to cooling of their relationship.
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> Subsequently, on the day of the shooting, at about 3:00 p.m., the victim was talking on the phone, at her home, with a close friend, Blair Wolfe, when a man, purporting to be a salesman, knocked on her front door. She then ended the call to respond to the "salesman," but thereafter never called Ms. Wolfe back or answered any of Wolfe's subsequent telephone calls. Growing increasingly concerned but unable to take any action on her own,[5] Ms. Wolfe telephoned Jessica Higgs, the victim's roommate, and requested that she leave work and return home to make sure that the victim was safe. Upon arriving at the residence that she shared with the victim, Ms. Higgs found the front door unlocked and the victim lying on the foyer, unconscious and bleeding from a gunshot wound to her head. Higgs immediately called "911."
>
> When the first police officer arrived at the victim's residence, he secured the scene. Then, upon entering the residence, he found the victim, Ms. Torok, "laying in the doorway," "fully clothed," still breathing, but unresponsive. There were no signs of forcible entry or that the victim's personal property had been disturbed.

[5] At the time of this telephone call, Ms. Wolfe was living in Pittsburgh.

When paramedics arrived at the scene, they transported the victim to the Shock Trauma Center at the University of Maryland Hospital in Baltimore City, where she remained for nearly a month. As a result of the gunshot wound, the victim's pregnancy was terminated, and she suffered severe and disabling injuries. Neither during that time nor thereafter could she recall the events that took place, from the end of her telephone conversation with Ms. Wolfe on October 27th until Thanksgiving, one month later.

The evidence recovered by the police at the scene of the shooting included a Gatorade bottle, which appeared to be fashioned into a home-made silencer;[6] a spent projectile as well as a spent shell casing; and the victim's Blackberry cell phone.

Gatorade bottle/silencer

From the Gatorade bottle, police evidence technicians extracted "a human hair" of "Negroid origin"[7] and saliva from the mouth of the bottle. DNA testing of both linked the bottle to Martin.[8]

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[6] The mouth of the Gatorade bottle was wrapped with two layers of tape, and at the bottom of the bottle was a hole. The tape exhibited a distinct, rectangular shape, a shape suggesting that the mouth of the bottle had been pressed against the barrel of a semi-automatic handgun. Furthermore, sooty residue lined the bottle's inside surface at the location of the hole, indicating that that opening at the bottom of the bottle had been made by an exiting bullet. It appeared, to police, to be a home-made silencer.

[7] Martin is an African–American male.

[8] Martin's mitochondrial DNA profile was the same as that derived from the hair strand. One of the State's expert witnesses testified at trial that only about 0.06 per cent of the population of North America shares the same mitochondrial DNA profile as that derived from the hair fragment found on the Gatorade bottle.

DNA testing of a swab of saliva taken from the mouth of the bottle revealed that it contained "a mixture of DNA from at least three individuals," at least one of whom was female and another a male. The test results excluded "approximately 94 percent of the Caucasian population," as well as "approximately 96 percent of the African–American population," but among

The victim testified that neither she nor [the victim's roommate] drank Gatorade, but that Martin did and often.[9] Martin's fondness for Gatorade was later confirmed by the officer who drove him to the Anne Arundel police station, who testified that, on the way to the station, he and [appellee] stopped at a convenience store, where Martin purchased a bottle of Gatorade to drink.

Granted immunity from prosecution for the shooting and possibly for other unrelated charges, Michael Bradley testified that, on the day of the shooting, he; his brother, Frank Bradley; Martin; and Jerry Burks, an acquaintance of Martin, were together at Maggie McFadden's house "about noon" and that he observed Frank Bradley carrying "some white ... medical tape" and a Gatorade bottle upstairs to McFadden's bedroom, where he was joined by Martin. Then, according to Michael Bradley, Martin and Burks left together, "approximately 1:30, 2:00" p.m., and returned after 3:00 p.m. but before 6:30 p.m. the same day.[10]

* * *

Ballistic evidence

The bullet recovered by police, a .380 caliber bullet, and the shell casing that was found, could have been fired, according to a State's expert witness, from a semi-automatic firearm. Such a firearm could have been manufactured by any one of sixteen different manufacturers, which was consistent with Martin's purchase, in 2003, of two .380 caliber semi-automatic handguns made by Bryco Arms, one of those sixteen manufacturers.[11] Moreover, Sheri Carter testified that, in September and October of 2008, the time period just

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[8] (continued)
the males, who could not be excluded, was Martin. And, among the females, who could not be excluded, was the victim, Jodi Torok.

[9] The victim stated that Martin drank Gatorade "a lot."

[10] The State's theory was that Burks was the shooter and that he had been solicited by Martin. Burks was tried separately, six months before Martin's trial, on charges that included attempted first- and second-degree murder and conspiracy to commit murder. He was acquitted by a jury on all counts. Five days before Martin's trial, the State moved in limine to "exclude from trial any evidence that Jerold Burks was acquitted of the charges" in that case,

before the shooting, she had observed Martin carrying a "small, silver, [black-handled], semi-automatic" handgun.

The firearm itself was never found. The testimony of Michael Bradley suggested why that was so. According to Michael Bradley, when Martin returned to McFadden's home the evening of the shooting, he saw Martin give a brown paper bag to Frank Bradley and tell Bradley to "get rid of this."

Victim's cell phone

Finally, the last of the four items found at the victim's residence was her Blackberry cell phone. Text messages extracted from that phone by police confirmed that Martin had exchanged several text messages with the victim on the day of the shooting.[12]

Martin's statement

The day after the shooting, Martin gave a statement to police. During the interrogation, Martin downplayed his relationship with Ms. Torok, the victim, telling detectives that he did not know her last name and that he was unsure where she lived, but he conceded that he had previously been to her house. And, although he was "highly doubt[ful]" that he was the father of the victim's baby, since they "hadn't had any contact," he admitted to police that he had agreed to provide money to her to "help her out." Finally, Martin claimed that, on the day of the shooting, he was at home with his wife and children until mid-day and that later he had visited "Frankie" and "Mike" Bradley, who were friends of his, arriving at "around" 1:00 p.m., staying with them until about 4:30 p.m., and then returning home.

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[10] (continued)
and, on the day trial commenced, the court granted that motion. Thereafter, the State nol prossed the conspiracy charge against Martin.

[11] The parties stipulated that, in 2004, one of those handguns "was transferred to another party."

[12] Police technicians used a device known as a universal memory exchanger ("UME"), that extracts the data stored on a cell phone, including text messages.

Martin, 218 Md. App. at 8–14 (footnote omitted).

Significant to one of the issues on appeal is the testimony of Sheri Carter, one of appellee's former girlfriends. Ms. Carter testified that appellee had kept a computer at her residence, and he got the computer "from a place that he used to work and [they] didn't have administrative rights so you couldn't make any changes to the computer because [they] didn't have the password log in."[2] In late September or early October 2008, she saw appellee "looking up gun silencers" on the computer. Appellee subsequently took the computer from her apartment, stating that they "had looked up so many crazy things on the internet," and he did not want it found if her apartment "got searched." Ms. Carter testified that appellee "said he got rid of it."[3]

On May 5, 2010, a jury in the Circuit Court for Anne Arundel County found appellee guilty of attempted first-degree murder.[4] On December 21, 2010, the circuit court

[2] This computer was referred to by the parties at the postconviction proceeding as the "CSM Computer[.]" CSM is an acronym for College of Southern Maryland, where Martin had previously worked as a basketball coach.

[3] At the conclusion of all the evidence at trial, the court gave the jury the following instruction:

> You have heard evidence that Defendant removed a computer from the house of Sheri Carter.
>
> Concealment of evidence is not enough by itself to establish guilt, but may be considered as evidence of guilt. Concealment of evidence may be motivated by a variety of factors, some of which are fully consistent with innocence.
>
> You must first decide whether the Defendant concealed any evidence in this case. If you find that the Defendant concealed evidence in this case then you must decide whether that conduct shows a consciousness of guilt.

[4] The jury acquitted appellee of solicitation to murder.

sentenced appellee to life in prison. This Court affirmed appellee's conviction on direct appeal, *Martin*, 218 Md. App. at 46, and the Court of Appeals and the United States Supreme Court denied appellee's petitions for writ of certiorari. *Martin v. State*, 440 Md. 463 (2014); *Martin v. Maryland*, 135 S. Ct. 2068 (2015).

On September 15, 2015, appellee, a self-represented litigant, filed a petition for postconviction relief. Appellee's mother subsequently filed a Maryland Public Information Act request, which resulted in the disclosure of several documents, including a document dated April 22, 2009, entitled "Anne Arundel County Police Department Criminal Investigation Division Computer Analysis and Technical Support Squad Lab Notes" ("Computer Analysis").

The Computer Analysis listed three desktops and two laptops that had been removed from appellee's home pursuant to an October 2008 search warrant. One of the computers was a "CSM laptop," which appellee testified at the postconviction hearing he received while working at the College of Southern Maryland. The Computer Analysis indicated that the computer had last been shut down in 2005.[5] It explained that a detective had run

[5] The Analysis provided, in pertinent part:

> The accounts used for this computer were "Administrator," "Laptop," and "Todd Downs." The Administrator account last logon indicated no data and a last password change of 4/26/05 at 05:43 hours. The Laptop account indicated a last login of 5/19/05 at 10:14 hours and no other account data. The account Todd Downs indicated a last login of 5/17/05 at 1100 hours, a password change of 4/26/05 at 1135 hours, and an incorrect password login of 4/26/05 at 1145 hours.

keyword searches on the laptop for the words "Handgun," "Gatorade," "silencer," "Contract murder," "Murder for hire," "Hardware," "Syria," "Homemade silencer," "hitman," and that these keyword searches produced "no data of investigative value."

This document was never provided to appellee prior to his trial. Following the discovery of this Computer Analysis, appellee supplemented his postconviction petition with assistance by counsel. He argued that the State violated *Brady* and committed prosecutorial misconduct by failing to turn over the Computer Analysis.

On June 23, 2017, the circuit court held a hearing on the postconviction petition. Regarding the alleged *Brady* violation, the parties stipulated that the State never received the Computer Analysis from the Anne Arundel County Police Department. The State argued that, because appellee knew the computer existed, the Computer Analysis did not constitute "*Brady* material," and therefore, there was no *Brady* violation.[6]

Appellee's postconviction counsel argued that the Computer Analysis "would have been important to the case, and if trial counsel had been made aware of it[,] it would have been used at trial" to establish "that Ms. Carter's testimony was inaccurate and unreliable." Appellee's trial counsel testified that the Computer Analysis would have helped him undermine Ms. Carter's testimony.

At his postconviction hearing, appellee presented for identification an affidavit from Todd Downs, which stated that Downs was employed by the College of Southern Maryland from 2001 to 2006 as technical support staff.

[6] The State also argued, a position it has abandoned on appeal, that the laptop mentioned in the Computer Analysis was not the same laptop discussed in Ms. Carter's testimony at trial, and therefore, there was "no evidentiary value to it."

On October 5, 2018, the postconviction court issued its memorandum opinion finding that the State had committed a *Brady* violation. The court stated that the Computer Analysis at issue was favorable to appellee because it could have been used to impeach Ms. Carter's testimony that she saw appellee use the CSM laptop to research gun silencers, and it "show[ed] that Petitioner did not conceal or destroy evidence, an issue for which a jury instruction was given." The court concluded that prejudice ensued as a result of the State's suppression of this favorable evidence because there was a "reasonable probability" that disclosure of the suppressed evidence "would have led to a different result in this case." In that regard, the court stated that "the essential link between [appellee] and the victim was the silencer[,]" and the "two strongest links connecting [appellee] to the silencer were the DNA evidence and Carter's testimony." The court found that the Computer Analysis "would have cast some reasonable doubt on the State's argument and Carter's testimony."

The court then addressed appellee's 13 separate claims of ineffective assistance of counsel. We will discuss those rulings, as relevant to this appeal, in the discussion that follows.

The circuit court ultimately granted the petition for postconviction relief and ordered that appellee be granted a new trial. This appeal followed.[7]

[7] On November 5, 2018, the State filed a timely application for leave to appeal the grant of postconviction relief. On November 15, 2018, appellee filed an application for leave to file a cross-appeal. This Court subsequently granted both the State's and appellee's applications, as well as the parties' joint motion to consolidate the appeals.

DISCUSSION

STANDARD OF REVIEW

The Court of Appeals has explained the relevant standard of review with respect to postconviction proceedings:

> We "will not disturb the factual findings of the post-conviction court unless they are clearly erroneous." *Wilson v. State*, 363 Md. 333, 348, 768, A.2d 675, 683 (2001). "Although reviewing factual determinations of the post-conviction court under a clearly erroneous standard, we make an independent determination of relevant law and its application to the facts." *State v. Adams*, 406 Md. 240, 255, 958 A.2d 295, 305 (2008), *cert. denied*, [556] U.S. [1133], 129 S. Ct. 1624, 173 L.Ed.2d 1005 (2009).

Arrington v. State, 411 Md. 524, 551–52 (2009). *Accord Ramirez v. State*, 464 Md. 532, 560 (2019).

I.

The State contends that the postconviction court erred in finding that it committed a *Brady* violation in failing to provide the defense with the Computer Analysis of the computers seized from appellee's home. It asserts that, given the overwhelming evidence that appellee orchestrated the shooting of the victim, there is not "a reasonable probability of a different outcome" if the evidence had been provided.

Appellee contends that the postconviction court correctly concluded that the State committed a *Brady* violation. He asserts that the Computer Analysis, which the State concedes was suppressed and favorable to his defense, was material because "trial counsel would have used it not only to impeach Carter, but also to cast doubt on the police investigation and to undermine the State's credibility (and thus, its entire case)."

In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." The Court of Appeals has explained:

> To establish a *Brady* violation, the defendant must establish (1) that the prosecutor suppressed or withheld evidence that is (2) favorable to the defense—either because it is exculpatory, provides a basis for mitigation of sentence, or because it provides grounds for impeaching a witness—and (3) that the suppressed evidence is material.

Ware v. State, 348 Md. 19, 38 (1997). *Accord Yearby v. State*, 414 Md. 708, 717 (2010). Appellee bears the burdens of production and persuasion regarding the alleged *Brady* violation. *Yearby*, 414 Md. at 720.

As indicated, the first element of a *Brady* claim is that the State suppressed evidence. *Ware*, 348 Md. at 38. "Evidence will be deemed to be suppressed within the meaning of *Brady* if it is 'information which had been known to the prosecution but unknown to the defense.'" *Conyers v. State*, 367 Md. 571, 601 (quoting *Spicer v. Roxbury Corr. Inst.*, 194 F.3d 547, 557 (4th Cir. 1999)), *cert. denied*, 537 U.S. 942 (2002). Although the prosecutor apparently did not receive a copy of the Computer Analysis prior to trial, the disclosure obligation under *Brady* "exists even as to evidence 'known only to police investigators and not to the prosecution.'" *Smith v. State*, 233 Md. App. 372, 422 (2017) (quoting *Conyers*,

367 Md. at 602). The State concedes that the Computer Analysis "was suppressed within the meaning of *Brady*."[8,9]

The second element of a *Brady* claim is that the suppressed evidence is favorable to the defense. "Favorable evidence includes not only evidence that is directly exculpatory, but also evidence that can be used to impeach witnesses against the accused." *Ware*, 348 Md. at 41. The State concedes that the information in the suppressed Computer Analysis was favorable to appellee because it could have been used to impeach Ms. Carter's testimony that appellee used the computer to search for information regarding gun silencers.

We agree with the State's concessions that the Computer Analysis was suppressed and favorable to appellee. The Computer Analysis was not provided to appellee, and it could not have been found by appellee "through reasonable and diligent investigation." *Ware*, 348 Md. at 39. This is not an instance in which appellee "knew or should have known facts that would have allowed him to access the undisclosed evidence." *Id.* There was no indication prior to trial that the State had requested that the computers seized from appellee's home be analyzed for search terms. Indeed, that the Computer Analysis was never handed over to the State further supports appellee's position that he did not know,

[8] The State argues, however, that appellee cannot claim prejudice because he "knew or should have known that the computer was in police custody," and therefore, he could have pointed this out at trial to avoid a destruction of evidence jury instruction.

[9] In that regard, we note that, at the postconviction hearing, appellee testified that, when Ms. Carter testified about the laptop in question, he told his trial counsel that he "didn't destroy it."

nor should he have known, of the existence of the Computer Analysis. Thus, the evidence was suppressed. And it clearly was favorable because it could have been used to impeach Ms. Carter.

Thus, the only question that remains involves the third element, i.e., whether the Computer Analysis was material under *Brady*. We review the issue of materiality *de novo* and "independently evaluate the totality of the circumstances as evidenced by the entire record." *Id.* at 48.

Evidence is considered material if "'there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Conyers*, 367 Md. at 610–11 (quoting *Wilson v. State*, 363 Md. 333 (2001)) *cert. denied*, 537 U.S. 942 (2002). A "reasonable probability" is a "probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682 (1985) (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)).

The reasonable probability standard has been interpreted to mean a substantial possibility that the result of the trial would have been different. *Conyers*, 367 Md. at 611.[10] "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in

[10] The materiality standard for a *Brady* violation "is essentially the same test as set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), in determining whether a defendant has been prejudiced by a constitutional violation affecting his right to a fair trial." *Yearby v. State*, 414 Md. 708, 718 (2010). This same test is used in assessing the impact of newly discovered evidence in the context of a motion for new trial. *Adams v. State*, 165 Md. App. 352, 434–35 (2005), *cert. denied*, 391 Md. 577 (2006).

the constitutional sense." *United States v. Agurs*, 427 U.S. 97, 109–10 (1976). *Accord Strickler v. Greene*, 527 U.S. 263, 289 (1999) (Although impeaching information, if known, might have changed the outcome of the trial, petitioner's burden was to show a reasonable probability that the result of the trial may have been different.); *State v. Syed*, 463 Md. 60, 87–88 (2019) (To show a reasonable probability of a different result, "'the likelihood of a different result must be substantial, not just conceivable.'") (quoting *Harrington v. Richter*, 562 U.S. 86, 112 (2011)), *petition for cert. filed*, No. 19-227 (Aug. 19, 2019)).

The State argues that the evidence was not material because the evidence against appellee was "so overwhelming that there is no reasonable probability of a different outcome even if Carter's testimony about internet searches is completely discounted." In contrast, appellee argues that Ms. Carter's testimony was critical, and if he had been able to show that the computer that the State argued he destroyed was in fact in police custody, as the Computer Analysis revealed, it could have "dealt a serious blow to the State's credibility, thereby creating doubt as to its entire case."

The parties assert that, in the situation where evidence that could have been used to impeach a witness is suppressed, the proper analysis is to assume that the jury would have discredited the witness' testimony and consider the other evidence to determine whether there is a reasonable probability of a different outcome. We agree. *See McGhie v. State*, 449 Md. 494, 511–13 (2016) (In the context of newly discovered evidence that would have impeached a State witness, the Court considered whether, if the witness' testimony was

excluded, there was a substantial possibility that the outcome of the trial would have been different.).[11]

Based upon our review of the record, we agree with the State that the Computer Analysis was not material. Even if defense counsel had been able to use the Computer Analysis to totally discredit Ms. Carter's testimony linking appellee to the silencer/Gatorade bottle, there was strong evidence of appellee's guilt.

As the circuit court noted, the evidence connecting appellee to the silencer/Gatorade bottle was a key component of the State's case. There was substantial evidence making that connection, however, even without Ms. Carter's testimony.

Initially, there was DNA evidence linking appellee to the Gatorade bottle. The Gatorade bottle, which the evidence indicated was used as a silencer for the gun used to shoot the victim, was wrapped in duct tape, with white medical tape underneath. A human hair fragment of "Negroid origin" was found on the white medical tape. A DNA expert testified that the mitochondrial DNA profile from the hair matched appellee's mitochondrial profile. The expert explained that, due to the unique nature of mitochondrial

[11] As the appellee notes, there is a stricter standard for materiality in those cases where "the prosecution's case includes perjured testimony and . . . the prosecution knew, or should have known, of the perjury." *Conyers v. State*, 367 Md. 571, 610 (2002) (quoting *Wilson v. State*, 363 Md. 333, 346–47 (2002)). In that situation, the conviction "must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment." *Wilson v. State*, 363 Md. 333, 347 (2001) (quoting *United States v. Agurs*, 427 U.S. 97, 103 (1979)). There was no evidence in this case, however, that perjured, as opposed to possibly mistaken, testimony was given, or that the prosecution knew that perjured testimony was given. *See Conyers*, 367 Md. at 605 n.32 (Inadvertently false or mistaken testimony does not qualify as perjury.). Accordingly, this stricter standard is not applicable here.

DNA, individuals related through appellee's maternal line, such as siblings or distant relatives, could not be conclusively excluded, but appellee was in the 0.06 percent of North Americans who could have left that hair.

Moreover, DNA testing of saliva found on the mouth of the bottle indicated "a mixture of DNA from at least three individuals," at least one of whom was female and another a male. The test results excluded "approximately 94 percent of the Caucasian population," as well as "approximately 96 percent of the African–American population." Appellee could not be excluded as a contributor to the mixture.[12]

Michael Bradley's testimony also connected appellee to the Gatorade bottle. He testified that, on the day the victim was shot, he was at the home of his sister, Maggie McFadden, another of appellee's girlfriends. He saw appellee and his brother, Frank Bradley, going back and forth between Ms. McFadden's room and the kitchen with white medical tape and a Gatorade bottle. And the white medical tape found on the Gatorade bottle at the scene had the same characteristics, i.e., the same width, weave count, acetate fibers, and acrylic-based adhesive, as one of the rolls of tape seized from Ms. McFadden's home.

There also was evidence, albeit more attenuated, that connected appellee to the gun used to shoot the victim. The bullet found near the victim was from a .380 caliber semi-automatic handgun, and records from the United States Bureau of Alcohol, Tobacco, Firearms, and Explosives showed that appellee previously had purchased two .380 caliber

[12] The victim also could not be excluded as a contributor to the saliva on the bottle.

semi-automatic handguns. One of these handguns was transferred to someone else in 2004, but appellee's other handgun was not found in any of the searches of the locations where appellee stayed. Supporting the State's theory that appellee's missing handgun was the one used to shoot the victim was Michael Bradley's testimony that, on the day of the crime, when appellee returned to Ms. McFadden's house between 3:00 and 6:30, appellee handed Frank Bradley a brown paper bag, telling Frank Bradley to "get rid of" it.[13]

Additionally, the State presented evidence that appellee had a motive to kill the victim. As noted by this Court on direct appeal, "[t]he victim had told Martin that she was pregnant with his child and had refused his request that she undergo an abortion. Were she to have his child, Martin would have had to contribute, much to his chagrin, to the support of that child, a point the victim impressed upon an enraged Martin." *Martin*, 218 Md. at 36.

Text messages recovered from the victim's phone also connected appellee to the crime. The morning of the shooting, appellee texted the victim to see what time she was working. The victim responded that she was "off," but appellee did not follow up on that text. At 5:11 p.m., after the shooting, appellee texted the victim: "I got some stuff with the

[13] Michael Bradley testified that, on October 27, 2008, the day of the shooting, appellee and Jerry Burks left Ms. McFadden's house at approximately 1:30–2:00 p.m. Michael Bradley went to go pick up his niece at 2:30 p.m. at a location "about 25 minutes to a half an hour" away. Frank Bradley was the only person in the house when Michael Bradley returned home from picking up his niece. Appellee and Mr. Burks returned to the house sometime after Michael Bradley did, but before Ms. McFadden got home around 6:30–6:45 p.m. The shooting was estimated to have occurred at approximately 3:00 p.m., based on the victim's phone conversation with Blair Wolfe. *Martin v. State*, 218 Md. App. 1, 9 (2014).

kids to about 7:00, so any time after. How much did you need?" A jury could infer that appellee was trying to make sure that the victim would be home when the shooter arrived and then texted again as an attempted cover.

Given all the evidence connecting appellee to the attempted murder, appellee has not met his burden of showing that, had the Computer Analysis been provided to appellee, there is a reasonable probability that the result of his trial would have been different.[14] Accordingly, the circuit court erred in finding that there was a *Brady* violation that required a new trial.

II.

The State's next contention involves the postconviction court's finding that trial counsel was ineffective in not objecting to compound questions posed during voir dire." The voir dire questions at issue are as follows:

> There will be testimony in this case regarding interracial dating. Is there any prospective juror who has such strong feelings against interracial dating that, that juror would not be able to render a fair and impartial verdict in this case?
>
> * * *
>
> Have you or any member of your family or close friend ever been associated with, or in any way, involved with a group or organization whose

[14] We agree with appellee that if Ms. Carter's testimony had been discounted, the instruction regarding concealment of evidence may not have been given. That does not, however, change our analysis here, i.e., whether, given all the evidence, excluding Ms. Carter's testimony, there is a reasonable probability that the outcome of the trial would have been different. As indicated, the State presented strong evidence of appellee's guilt, even excluding Ms. Carter's testimony.

> mission it is to abolish legalized abortion? Does any member of the jury hold such strong views about abortion that if there is evidence in this case about abortion, you could not be fair and impartial?[15]

The postconviction court found that these voir dire questions were objectionable pursuant to *Dingle v. State*, 361 Md. 1 (2000), that there was no strategic reason for counsel not to have objected to them, and that counsel's failure to object was prejudicial to appellee.

The State contends that this ruling was improper for two reasons. First, it argues that the interpretation of *Dingle* has changed, and the court improperly assessed "counsel's performance based on law as it existed at the time of Martin's 2018 postconviction proceedings, rather than as it existed at the time of his 2010 trial." Second, the State asserts that the circuit court "erroneously applied a presumption of prejudice."

Appellee contends that the "post-conviction court correctly found that trial counsel was constitutionally ineffective for failing to object to two improper *voir dire* questions," which "improperly shifted the burden of determining prospective jurors' ability to be fair and impartial from the trial court to the individual venire person." Appellee argues that these questions were "prohibited under *Dingle* – both today and at the time of [his] trial[.]"

A.

Ineffective Assistance of Counsel Claims

The Court of Appeals has explained:

> The Sixth Amendment to the U.S. Constitution grants criminal defendants a right to effective assistance of counsel. *Strickland*, 466 U.S. at 685, 104 S.Ct. 2052. Under *Strickland*, to establish ineffective assistance of

[15] No prospective juror responded to these questions, and appellee did not challenge the propriety of these questions on appeal.

> counsel, a defendant must show that: (1) his attorney's performance was deficient; and (2) he was prejudiced as a result. *Id.* at 687, 104 S.Ct. 2052.
>
> As to the first prong, the defendant must show that his "counsel's representation fell below an objective standard of reasonableness, and that such action was not pursued as a form of trial strategy." *Coleman v. State*, 434 Md. 320, 331, 75 A.3d 916 (2013) (quoting *Strickland*, 466 U.S. at 687–89, 104 S.Ct. 2052) (internal quotation marks omitted). We have explained that "[p]revailing professional norms define what constitutes reasonably effective assistance, and all of the circumstances surrounding counsel's performance must be considered." *Mosley v. State*, 378 Md. 548, 557, 836 A.2d 678 (2003) (citation and internal quotation marks omitted). Accordingly, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052.

State v. Newton, 455 Md. 341, 355 (2017). "Our review of counsel's performance is 'highly deferential.'" *State v. Newton*, 230 Md. App. 241, 250 (2016) (quoting *Kulbicki v. State*, 440 Md. 33, 46 (2014)). Moreover, when a defendant alleges that counsel's performance was deficient, he or she "'must also show that counsel's actions were not the result of trial strategy.'" *Syed*, 463 Md. at 75 (quoting *Coleman v. State*, 434 Md. 320, 338 (2013)).

The second prong of an ineffective assistance of counsel claim "requires the defendant to show prejudice." *Syed*, 463 Md. at 86. "[T]he court does not presume the defendant suffered prejudice as a result of the deficient performance." *Id.* at 86–87.[16] "A

[16] The Court of Appeals recently noted that there are limited circumstances in which a presumption of prejudices applies:

showing of prejudice is present where 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.* (quoting *Strickland*, 466 U.S. at 694). "A reasonable probability is a probability sufficient to undermine confidence in the outcome," *Strickland*, 466 U.S. at 694, a "'substantial or significant possibility that the verdict of the trier of fact would have been affected,'" *Syed*, 463 Md. at 86–87 (quoting *Bowers v. State*, 320 Md. 416, 426 (1990)). The "'likelihood of a different result must be substantial, not just conceivable.'" *Syed*, 463 Md. at 87–88 (quoting *Harrington v. Richter*, 562 U.S. 86, 112 (2011)).

B.

Voir Dire

"*Voir dire* (*i.e.*, the questioning of prospective jurors) 'is critical to' implementing the right to an impartial jury." *Pearson v. State*, 437 Md. 350, 356 (2014) (quoting *Washington v. State*, 425 Md. 306, 312 (2012)). The circuit "court has broad discretion in the conduct of voir dire, most especially with regard to the scope and the form of the questions propounded," and "it need not make any particular inquiry of the prospective

> (1) the petitioner was actually denied the assistance of counsel; (2) the petitioner was constructively denied the assistance of counsel; or (3) the petitioner's counsel had an actual conflict of interest. Absent these three circumstances, the presumption of prejudice does not apply, and the petitioner must prove prejudice.

Ramirez v. State, 464 Md. 532, 573 (2019).

jurors unless that inquiry is directed toward revealing cause for disqualification." *Dingle*, 361 Md. at 13–14.

Here, the circuit court relied on *Dingle* in finding that counsel rendered ineffective assistance of counsel in failing to object to the voir dire questions at issue. In *Dingle*, the Court of Appeals held that it was improper to ask the venire compound questions regarding whether they had certain experiences or associations,[17] and if so, whether the experience or association "would affect [their] ability to be fair and impartial." *Id.* at 3–4. The trial court instructed the potential jurors that they did not need to respond to the question unless they answered both parts in the affirmative, i.e., that they had the experience or association and it would affect their ability to be fair and impartial. *Id.* at 4.

The Court of Appeals held that this voir dire procedure "usurped the court's responsibility" because "the trial judge is charged with the impaneling of the jury and must determine, in the final analysis, the fitness of the individual venire persons." *Id.* at 8–9. It explained:

> By upholding a voir dire inquiry in which a venire person is required to respond only if his or her answer is in the affirmative to both parts of a question directed at discovering the venire persons' experiences and associations and their effect on that venire person's qualification to serve as a juror, and producing information only about those who respond . . . [this]

[17] The voir dire questions at issue in *Dingle* asked

> whether the prospective jurors (1) had been the victim of a crime, (2) had been accused of a crime, (3) had been a witness in a criminal case, (4) had served as a juror in criminal case, (5) had belonged to a victim's rights group, (6) had attended law school, or (7) were associated with members of law enforcement.

Dingle, 361 Md. at 4 n.4.

> endorses a voir dire process that allows, if not requires, the individual venire person to decide his or her ability to be fair and impartial. Moreover, in those cases where the venire person has had the questioned experience or association, but believes he or she can be fair, the procedure followed in this case shifts from the trial judge to the venire responsibility to decide juror bias. Without information bearing on the relevant experiences or associations of the affected individual venire persons who were not required to respond, the court simply does not have the ability, and, therefore, is unable to evaluate whether such persons are capable of conducting themselves impartially. Moreover, the petitioner is deprived of the ability to challenge any of those persons for cause. Rather than advancing the purpose of voir dire, the form of the challenged inquiries in this case distorts and frustrates it.

Id. at 21.

Two years later, in *State v. Thomas*, 369 Md. 202, 204 (2002), the Court of Appeals held that the circuit court abused its discretion in refusing to ask the venire panel if any of them had "such strong feelings regarding violations of the narcotics laws that it would be difficult for [them] to fairly and impartially weigh the facts at a trial where narcotics violations have been alleged[.]" The Court indicated that, when the question includes the state of mind of a potential juror, a "two-part" question was not prohibited by *Dingle*. *Id.* at 204 n.1 ("When the inquiry is into the state of mind or attitude of the venire with regard to a particular crime or category of crimes, it is appropriate to phrase the question as was done in this case.").

In *State v. Shim*, 418 Md. 37, 54 (2011), the Court subsequently reasserted the position that a two-part question was proper in a question regarding strong feelings. The Court stated:

> Therefore, to the extent that this Court has not already done so, we recognize today that the potential for bias exists in most crimes, and thus we will

> require *voir dire* questions which are targeted at uncovering these biases. When requested by a defendant, and regardless of the crime, the court should ask the general question, **"Does any member of the jury panel have such strong feelings about [the charges in this case] that it would be difficult for you to fairly and impartially weigh the facts."**

(Emphasis added; alteration in original.)

In 2014, however, the Court of Appeals explicitly abrogated *Thomas*, *Shim*, and other cases that permitted two-part "strong feelings" voir dire questions. *Pearson*, 437 Md. at 363–64. The Court explained:

> Despite this Court's holding in *Shim*, 418 Md. at 54, 12 A.3d at 681, however, we conclude that, here, the "strong feelings" *voir dire* question (*i.e.*, "Does any member of the panel hold such strong feelings regarding violations of the narcotics laws that it would be difficult for you to fairly and impartially weigh the facts of this trial where narcotics violations have been alleged?") was phrased improperly. We realize that the "strong feelings" *voir dire* question was phrased exactly as this Court mandated in *Shim*,418 Md. at 54, 12 A.3d at 681—"When requested by a defendant, and regardless of the crime, the [trial] court should ask the general question, 'Does any member of the jury panel have such strong feelings about [the charges in this case] that it would be difficult for you to fairly and impartially weigh the facts.'" (Brackets in original.)
>
> In retrospect, however, it is apparent that the phrasing of the "strong feelings" *voir dire* question in *Shim* clashed with existing precedent. *See State v. Green*, 367 Md. 61, 79, 785 A.2d 1275, 1285 (2001) ("[I]t is sometimes advisable to correct a decision . . . if it is found that the decision is clearly wrong and contrary to other established principles." (Citations and internal quotation marks omitted)). Specifically, the phrasing of the "strong feelings" *voir dire* question in *Shim* was at odds with *Dingle v. State*, 361 Md. 1, 21, 5, 759 A.2d 819, 830, 821 (2000), in which we held that the trial court abused its discretion in asking during *voir dire* such compound questions as:
>
> > Have you or any family member or close personal friend ever been a victim of a crime, and if your answer to that part of the question is yes, would that fact interfere with your ability to be fair and impartial in this

case in which the state alleges that the defendants have committed a crime?

* * *

Just like the phrasing of the *voir dire* questions in *Dingle, id.* at 5, 759 A.2d at 821, the phrasing of the "strong feelings" *voir dire* question in *Shim* "shifts from the trial [court] to the [prospective jurors] responsibility to decide [prospective] juror bias." *Dingle*, 361 Md. at 21, 759 A.2d at 830. In other words, as with the *voir dire* questions' phrasings in *Dingle, id.* at 5, 759 A.2d at 821, the phrasing of the "strong feelings" *voir dire* question in *Shim* required each prospective juror to evaluate his or her own potential bias. Specifically, under *Shim*, 418 Md. at 54, 12 A.3d at 681, each prospective juror decides whether his or her "strong feelings" (if any) about the crime with which the defendant is charged "would [make it] difficult for [the prospective juror] to fairly and impartially weigh the facts." That decision belongs to the trial court, not the prospective juror.

Thus, we hold that, on request, a trial court must ask during *voir dire:* "Do any of you have strong feelings about [the crime with which the defendant is charged]?" We abrogate language in *Shim*,418 Md. at 54, 12 A.3d at 681, to the extent that this Court required a trial court to phrase the "strong feelings" *voir dire* question in a way that shifted responsibility to decide a prospective juror's bias from the trial court to the prospective juror, *i.e.*, "'Does any member of the jury panel have **such** strong feelings about [the charges in this case] **that it would be difficult for you to fairly and impartially weigh the facts.** " *Shim*, 418 Md. at 54, 12 A.3d at 681 (emphasis added) (brackets in original).

To be clear, we amend this Court's holding in *Shim, id.* at 54, 12 A.3d at 681, only in the context of the phrasing of the "strong feelings" *voir dire* question in *Shim.* We reaffirm this Court's essential holding in *Shim* that, on request, a trial court must ask during *voir dire* whether any prospective juror has "strong feelings" about the crime with which the defendant is charged. *Id.* at 54, 12 A.3d at 681. We simply recognize that, in *Shim* and its parent cases, the "strong feelings" *voir dire* questions' phrasings were at odds with *Dingle*, 361 Md. at 21, 759 A.2d at 830. *See Thomas*, 369 Md. at 214, 204, 798 A.2d at 573, 567 (This Court held that the trial court abused its discretion in declining to ask a *voir dire* question that the defendant phrased as follows: "Does any member of the jury panel have such strong feelings regarding violations of the narcotics laws that it would be difficult for you to fairly and impartially weigh the facts

> at a trial where narcotics violations have been alleged?" (Footnote omitted)); *Sweet v. State*, 371 Md. 1, 9–10, 806 A.2d 265, 270–71 (2002) (This Court held that the trial court abused its discretion in declining to ask a *voir dire* question that the defendant phrased as follows: "Do the charges [*i.e.*, child molestation] stir up strong emotional feelings in you that would affect your ability to be fair and impartial in this case?"). We note that, although *Thomas*, *Sweet*, and *Shim* postdate *Dingle*, in none of the three cases did this Court supersede *Dingle;* in *Thomas*, *Sweet*, and *Shim*, this Court did not address any issue regarding the "strong feelings" *voir dire* questions' phrasings.

Id. at 361–64.

Based on this case law, and the shift in 2014, we agree with the State that, at the time of appellee's trial in 2010, the case law permitted two-part "strong feelings" voir dire questions.[18] And it is clear that "'counsel must be judged upon *the situation as it existed at the time of trial*.'" *State v. Gross*, 134 Md. App. 528, 553 (2000) (quoting *State v. Calhoun*, 306 Md. 692, 735 (1986))), *aff'd*, 371 Md. 334 (2004). *Accord State v. Hunter*, 103 Md. App. 620, 623 ("At the time this case was tried, the instruction that the trial judge gave was consistent with what was thought at the time to be the proper thing to say. The law does not require lawyers to anticipate changes in the law. . . . Since at the time it was given the instruction was generally considered to be correct, counsel's failure to object to

[18] *Wimbush v. State*, 201 Md. App. 239 (2011), *cert. denied*, 424 Md. 293 (2012), also reflects the view that "strong feelings" compound questions were permissible. In *Wimbush*, this Court noted the distinction between "associations" and "state of mind" voir dire questions, citing *Thomas* for the conclusion that "state of mind" questions could be phrased as compound questions. *Id.* at 266–68 ("[T]wo years after *Dingle*, the Court of Appeals opined that not all compound questions are impermissible.").

the omission of [the phrase at issue] was not a deficient act."), *cert. denied*, 338 Md. 557 (1995).

Accordingly, the postconviction court erred in holding that trial counsel's performance was deficient based on the failure to object to the two-part strong feelings questions. Because appellee failed to satisfy the first prong of the ineffective assistance claim, we need not reach the prejudice prong. *Newton*, 455 Md at 356 ("*Strickland* also instructs that courts need not consider the performance prong and the prejudice prong in order, nor do they need to address both prongs in every case.").

III.

The State next contends that the "post conviction court erred in ruling that trial counsel was ineffective in failing to object to the State's closing argument." Appellee disagrees, asserting that "the post-conviction court correctly found that trial counsel was constitutionally ineffective for failing to object to the State's improper burden-shifting comments during closing argument."

A.

Background

1.

Trial

During its rebuttal closing argument, the State made several statements, two of which are at issue on appeal. One comment pertained to the defense theory that it was Ms. McFadden, not appellee, who planned the shooting of the victim. In support of that theory,

defense counsel during his closing argument attributed several statements to Ms. McFadden: "I had someone shot in the head"; "If people get in my way I know how to take care of them"; and "Heaven has no rage like love to hatred turned nor hell a fury like a woman scorned."

Counsel referred to Ms. McFadden as "a raving lunatic," "emotionally unstable, and intensely jealous." Counsel continued:

> Now in addition you don't just have the — I mean we know she told Sheri Carter that she had someone shot in the head. So when the State stands up and tells you there's no evidence that anybody else did it,[19] well, that's evidence, that's a statement by somebody that they did the crime, someone else—told someone else they did the crime that he's accused of.
>
> She said she brought a gun with her to the meeting with Sheri. She said she likes to beat people up.
>
> * * *
>
> Now just remember something here, we don't have to prove to you that Maggie engineered this shooting, that's not our burden of proof. Because, you know, under our system of justice as I mentioned, that doesn't go to us, that's on them. Okay? So we don't have to prove that Maggie did it, but they do have to prove that she didn't, and they certainly have not proved that in this case.
>
> * * *
>
> And I guess the point I'm trying to make is, I think that's what happened here with the State's investigation in this case. They were so focused on Brandon Martin and on developing evidence to charge him with this crime that when evidence came up suggesting that it was Maggie McFadden who had the motive and the reason and the absolute lunatic—the lunacy, the insanity to actually do something like this they ignored it, they

[19] In the prosecutor's initial closing argument, the prosecutor addressed the possibility that the victim was shot, not by appellee, but by a jealous girlfriend, stating: "There is no evidence of that."

did not pursue her. And I think that's what—that's what happened in this case.

* * *

Maybe—we haven't heard from Maggie McFadden. She played police and the prosecutors in this case like a violin. Conveniently going to Iraq for a year before they were able to serve her with a subpoena.

* * *

The—this is my last chance to address you because the State, again, they have the burden of proof . . . . There's some evidence, but is it beyond a reasonable doubt when they haven't even told you what he did or what he said? I don't think so.

In rebuttal, the State made two comments with which appellee takes issue. First, the State said:

> It was not really addressed, but the Defendant – by the Defense, I guess they didn't want you to really think about it, but they didn't address the fact that this Defendant did purchase the two .380 caliber handguns. One of them by stipulation was transferred; however, that still leaves one handgun unaccounted for, and that handgun is linked to the Defendant, and you can see the link between that missing handgun and this case, because it's a .380 caliber handgun, and by the way, the ballistics at the crime scene indicate that the projectile right near [the victim's] head that was located as well as a casing that popped off when the shot was fired are both .380 caliber. Again, a link to the Defendant. I guess they didn't want you to think about that when you went back to the jury room.

Additionally, the State said:

> They want to pretty much pin this case on Maggie. . . . [I]sn't that easy, doesn't it make it simple for the Defense to be, it's not my client, it's the girl who's not here?
>
> And really what evidence do we have that Maggie did it? We have that she—perhaps they proved that she's a rude person. Perhaps they proved that she has a big mouth and that she has bad manners. What else do they

prove to tie her to this crime? Nothing. We know that she was at work that day, so certainly she was not the shooter.[20]

2.

Postconviction Hearing

At the postconviction hearing, appellee's trial counsel was questioned as follows:

[The State]: But you're aware the State is not allowed to shift the burden on the defense. Is that a fair statement?

[Counsel]: Yes.

[The State]: Okay. And is it—would it be a correct statement that if you had heard any statements by the State shifting the burden you would have objected to those in closing; is that fair?

[Counsel]: If I perceived it.

In its memorandum opinion, the postconviction court concluded that the prosecutor's comments in rebuttal closing argument were impermissible burden shifting arguments. The court characterized the comments as (1) suggesting that the jury should accept evidence indirectly linking appellee to the gun because "[the Defense] didn't address the fact that [appellee] did purchase the two .380 caliber handguns"; and (2) appellee's "defense should be rejected because he did not 'prove [anything] to tie [McFadden] to this crime.'" The court found that trial counsel's failure to object to these "impermissible burden-shifting during closing arguments" constituted deficient conduct. It further concluded that trial counsel's lack of objection kept the circuit court from giving

[20] Michael Bradley testified that, when he woke up at 6:00 a.m. on the day of the shooting, Ms. McFadden had already gone to work.

a curative instruction contemporaneously with the improper statements the State made during closing argument, and therefore, trial counsel's failure to object was prejudicial to appellee and constituted ineffective assistance of counsel.

B.

Analysis

The State argues that the comments in closing "were proper comments on the evidence and [appellee's] closing argument and, in context, did not shift the burden of proof." Because the arguments were proper, trial counsel's failure to object did not constitute deficient performance. In any event, even if the arguments were improper, the State contends that the postconviction court erred in concluding that appellee was prejudiced by the failure of counsel to object to the closing argument.

Appellee contends that the State's burden shifting arguments were improper, and the circuit court properly found that counsel's failure to object resulted in ineffective assistance of counsel. He asserts that "defense counsel's proper comments on the evidence (or lack thereof) do not permit the State to improperly comment on the defendant's failure to refute the State's evidence—a burden which he does not have." Appellee argues that the postconviction court "properly concluded that [he] was prejudiced by trial counsel's failure" to object because, had counsel objected, "the trial court would have had the opportunity to cure the errors. Because he did not, there is a reasonable probability that at least one juror accepted the State's invitation to adopt its theory of the case only because [appellee] failed to refute it."

As the Court of Appeals has explained, the scope of closing argument is broad, and "it is, as a general rule, within the range of legitimate argument for counsel to state and discuss the evidence." *Mitchell v. State*, 408 Md. 368, 380 (2009). *Accord Degren v. State*, 352 Md. 400, 429 (1999) (Attorneys generally "are afforded great leeway in presenting closing arguments."). Closing argument not only permits the prosecutor to speak harshly on the accused's actions, *see Mitchell*, 408 Md. at 380, but it gives counsel the opportunity to "expose the deficiencies in his or her opponent's argument." *Henry v. State*, 324 Md. 204, 230 (1992), *cert. denied*, 503 U.S. 972 (1992).

"Despite the leeway afforded to counsel in closing argument," however, "'a defendant's right to a fair trial must be protected.'" *Sivells v. State*, 196 Md. App. 254, 270 (2010) (quoting *Lee v. State*, 405 Md. 148, 164 (2008)). One type of argument that prosecutors may not make is one that "tend[s] to shift the State's burden to prove all the elements of a crime beyond a reasonable doubt," *Lawson v. State*, 389 Md. 570, 546 (2011), and therefore, the State generally may not "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, *cert. denied*, 360 Md. 276 (2000). "'[W]hat exceeds the limits of permissible comment or argument by counsel depends on the facts of each case.'" *Mitchell*, 408 Md. at 380 (quoting *Smith and Mack v. State*, 388 Md. 468, 488 (2005)).

We address first the State's comment regarding the handguns, i.e., that the defense "didn't address the fact that [appellee] did purchase the two .380 caliber handguns." The State contends that the comments "were a permissible comment on the evidence and a fair

response to defense counsel's extensive attack on the quality of the police investigation and the State's evidence," and in "context, it is clear that the prosecutor was referring to defense counsel's failure to address the evidence in closing argument, not the defense's failure to produce evidence at trial." We agree.

Throughout closing argument, appellee's counsel discussed that there was "no evidence as to anything that [appellee] said" and there was "no evidence as to anything that he did." Appellee's counsel criticized the police investigation in several ways.[21] In light of this closing argument, it was not improper for the prosecutor to note counsel's failure to address in closing argument the evidence that "this Defendant did purchase the two .380 caliber handguns," that one handgun was still "unaccounted for," and one could "see the link between that missing handgun and this case, because it's a .380 caliber handgun," and conclude by saying: "I guess they didn't want you to think about that when you went back to the jury room." Because the State's comments were not improper, counsel did not render deficient performance in failing to object to those comments.

The prosecutor's rebuttal argument regarding Ms. McFadden is a closer call. To be sure, defense counsel argued extensively that it was Ms. McFadden who shot the victim. In response, the State argued in its rebuttal closing argument:

> And really what evidence do we have that Maggie did it? We have that she—perhaps they proved that she's a rude person. Perhaps they proved

[21] Appellee's counsel stated in closing, among other things, that the State lost an audio interview with a witness, the Gatorade bottle was not tested for gunshot residue, and as indicated, that the State was "so focused" on appellee that they did not pursue Ms. McFadden, whom defense counsel referred to as an "absolute lunatic."

> that she has a big mouth and that she has bad manners. What else do they prove to tie her to this crime? Nothing. We know that she was at work that day, so certainly she was not the shooter.

The State argues that this comment, in context, did not impermissibly shift the burden of proof from the State to appellee, but rather, the State was merely "arguing that the evidence that [appellee] did produce did not support his theory that McFadden was involved in Torok's shooting." If the prosecution had merely stated, as it did in its initial closing argument, that there was "no evidence" that Ms. McFadden was involved in the shooting, that would have been proper. The prosecutor however, framed the comments as what did "they [the defense] prove to tie her to this crime? Nothing." This comment implicitly suggested that appellee was required to prove that Ms. McFadden did it. As such, it was improper, and we agree with the circuit court that trial counsel's failure to object was deficient conduct.

We disagree, however that these comments, and counsel's failure to object entitled appellee to a new trial. When an improper comment in closing argument is challenged on direct appeal, the Maryland appellate courts have made clear that "reversal is not automatically mandated." *Sivells*, 196 Md. App. at 288. *Accord Degren*, 352 Md. at 430. Rather, "reversal is only required where it appears that the remarks of the prosecutor actually misled the jury or were likely to have misled or influenced the jury to the prejudice of the accused." *Id.* (cleaned up). *Accord Spain v. State*, 386 Md. 145, 158 (2005). In assessing prejudice in this regard, we consider various factors: "including the severity of the remarks, the measures taken to cure any potential prejudice, and the weight of the

evidence against the accused." *Warren v. State*, 205 Md. App. 93, 133 (quoting *Spain*, 386 Md. at 159), *cert. denied*, 427 Md. 611 (2012).

This case is not before us on direct appeal, but rather, it stems from a claim of ineffective assistance of counsel in a post-conviction proceeding. The issue remains, however, whether there was prejudice to appellee as a result of the improper remark. The one difference in this procedural posture is that appellee has the burden to show prejudice. *See Strickland*, 466 U.S. at 687.

Here, we are not persuaded that appellee has met his burden. As the State notes, the remarks at issue were a small part of the prosecutor's argument, amounting to several "short sentences in the beginning of a 21-page rebuttal closing argument." And the slight suggestion that the jury should consider appellee's failure to produce evidence was outweighed by the court's instructions and the closing arguments as a whole, which made clear that the burden of proof was on the State to prove appellee's guilt, and appellee had no burden to produce evidence.

Moreover, "[i]f the State has a strong case, the likelihood that an improper comment will influence the jury's verdict is reduced." *Sivells*, 196 Md. App. at 289. Here, as indicated, there was strong evidence of appellee's guilt.

Under these circumstances, appellee has failed to meet his burden to show prejudice as a result of the comments, i.e., that if counsel had objected to the comments and the court had given a curative instruction, there is a reasonable probability that the result of the trial

would have been different. Accordingly, the postconviction court erred in finding that appellee received ineffective assistance of counsel.

IV.

Appellee's cross-appeal involves trial counsel's failure to review the DNA discovery provided by the State, which made clear that the State's expert witness at trial, Dr. Terry Melton, had not conducted the DNA testing. As a result of the failure to review the discovery, counsel did not timely object on confrontation grounds to the expert testimony. The circuit court, in rejecting the claim of ineffective assistance of counsel in this regard, found that appellee failed to show prejudice "because had defense counsel made the objection, the two other technicians that conducted the DNA testing were available to testify at trial."

Appellee contends that the postconviction court's finding "was based on improper speculation not supported by the record." He asserts that the court improperly assumed that, if defense counsel had objected, the technicians who had conducted the DNA testing were available to testify and would have been permitted to do so, but "there was no proof that the witnesses were, in fact, available."

The State contends that appellee's argument "belies a misperception regarding the burden of proof in an ineffective assistance of counsel claim." It asserts that it was the appellee's burden to provide evidence that, "had counsel entered a timely objection, the technicians *would not* have been available to testify, that the trial court *would not* have permitted their testimony, or that, if permitted to testify, their testimony would have been

so unfavorable that the outcome of the trial would have been different." Because appellee failed to meet his burden of proof, the State maintains that the postconviction court "properly denied relief on this claim."

A.

Background

1.

Trial

During trial, Dr. Terry Melton, President and CEO of MITO Typing Technologies, an expert in mitochondrial DNA analysis and statistical interpretation, testified that her lab performed mitochondrial DNA testing on a hair extracted from tape that was found on the Gatorade bottle found at the scene of the crime. A comparison of the hair from the Gatorade bottle to a sample taken from appellee indicated that appellee and his maternal relatives could not be excluded as a contributor of the hair, and 99.94 percent of North Americans would not be expected to leave the hair that was found on the Gatorade bottle.[22] Appellee was in the 0.06 percent of people in North America who could have left the hair.[23]

During cross-examination, Dr. Melton testified that she did not physically test the samples in this case, and Bonnie Higgins and Michele Yon were the two technicians who worked with the samples. At that point, counsel for appellee objected to Dr. Melton's

[22] Mitochondrial DNA is passed through the maternal line.

[23] Dr. Melton noted that her lab ran tests comparing the hair found on the Gatorade bottle to two separate samples from appellee on two separate occasions. Both tests yielded the same result.

testimony and moved to strike it, arguing that appellee had the right to confront the technicians who actually did the testing on the hair sample.

The court excused the jury and proceeded to hear argument from the parties. The State argued that Dr. Melton's testimony was permissible under the Maryland Rules and Maryland statutory law,[24] stating that "an expert witness may express an opinion that's based in part on hearsay if the hearsay is the kind that's customarily relied on by experts in that particular calling." The State argued that Dr. Melton did all of the analysis and rendered conclusions as to the comparison of the hair samples, whereas the technicians who physically did the testing did not draw conclusions or truly analyze the samples. As such, the State argued that it had not violated appellee's right of confrontation.

The court responded:

> It sounds like they complied with the statute and the rule, but then it's all trumped by this case, *Melendez-Diaz* [v. Massachusetts, 557 U.S. 305 (2009)], which is similar – a similar situation to what you're describing in Massachusetts, I believe this was Massachusetts, where they had a statute and they were permitted to put in the certificates and Justice Scalia goes on and on about how the defendant has the right to have those people who did

[24] Specifically, the State cited Maryland Rule 5-703(a), which at the time appellee was charged and at the time of trial read as follows:

> **In general.** The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject the facts or data need not be admissible in evidence.

Additionally, the State cited Md. Code (2012 Repl. Vol.) § 10-915 of the Courts and Judicial Proceedings Article ("CJ"), which concerns the admissibility of DNA profile evidence. The State asserted that "a statute passed by the General Assembly bears a presumption of constitutionality."

> any of the work involved in determining – in coming up to the conclusion that was let into evidence in the case, he that [sic] has right to confront those people, and Scalia goes on to say "that there is no obligation on the part of the defendant to bring in those people." In other words, it's the State's obligation and the defendant need not do anything to bring those people in.
>
> Do you not feel that all of the compliance that you of course have expressed, and I agree that you've complied with the rule and the statute, is not trumped completely by this case?

The State argued that it had complied with all requirements for expert witness testimony under Maryland law, and therefore, there was no confrontation issue. In any event, the State asked the court if it could be permitted to bring in the technicians who had actually performed the DNA testing so that appellee could cross-examine them. Counsel for appellee objected, stating that appellee would be prejudiced by the technicians' appearance because they were not listed on the witness list and counsel had not had the opportunity to prepare for their testimony.

After a lunch break, the State returned and argued that *Melendez-Diaz* was distinguishable. The State contended that

> if we can find that the technicians' work was generally reliable and there [are] indications of that because of the checklists followed, the protocols that were followed and the contamination controls that were observed, that it is not a necessity that the State produce that person in order to render the conclusions of the ultimate expert, admissible.

Accordingly, the State asked that the court deny defense counsel's motion to strike Dr. Melton's testimony.

Counsel for appellee stated that reliability was not part of a confrontation analysis and argued that Dr. Melton's testimony fell squarely within the purview of *Melendez-Diaz*.

He proposed that the court order the State to bring the relevant witnesses in after counsel had a few days to prepare to cross-examine them.

After another break, the State argued that counsel for appellee had waived the issue by failing to timely object. The State asserted that "the Defense was not surprised by the fact that different technicians had their hand in, so to speak, doing some of the initial scientific data collection" because this fact was evident from the special discovery packet prepared for and turned over to appellee's counsel.

Counsel for appellee conceded that he had received a CD during discovery regarding the DNA testing on the Gatorade bottle hair. He stated that he did not attempt to look at the CD the State had given him because he was informed by his expert that he did not have the proper software to view it.

After establishing that the discovery CD provided to appellee's counsel contained documents that had been signed by technicians other than Dr. Melton, the court concluded that counsel for appellee had received notice that Dr. Melton did not perform the DNA testing. Accordingly, it found that counsel had waived the confrontation issue.

2.

Postconviction

At the June 23, 2017, postconviction hearing, appellee's counsel argued that trial counsel erred in not reviewing the discovery, and "but for the trial counsel's waiver of the confrontation clause issue[,] there was a strong probability that DNA evidence would have been excluded." He asserted that the surprise at trial that Dr. Melton was not the person

who did the testing, which led to the subsequent waiver of the confrontation clause issue, entitled appellee to a new trial based on ineffective assistance of counsel. Trial counsel testified that he had no strategic reason not to object timely to the DNA evidence, and he "didn't know the [confrontation] issue existed until the first couple of questions of cross-examination."

The State argued that the trial court never made a substantive determination regarding the confrontation clause issue, but rather, it simply concluded that the issue was waived. The State asserted that, at the time of trial, the *Melendez-Diaz* argument may not have prevailed. In any event, the State asserted that "the technicians were available and would have testified if the objection had been sustained," and therefore, there was no prejudice.

As indicated, the postconviction court agreed with the State that appellee did not receive ineffective assistance of counsel because trial counsel's failure to make a timely objection did not result in prejudice. The court concluded that there was no prejudice "because had defense counsel made the objection, the two other technicians that conducted the DNA testing were available to testify at trial."

B.

Analysis

We agree with the circuit court that appellee failed to prove prejudice. *See Strickland*, 466 U.S. at 697 ("If it is easier to dispose of an ineffectiveness claim on the

ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed."). *Syed*, 463 Md. at 75 (The burden of proving prejudice is on the appellee.).

The record here indicates that the technicians were available to testify if the trial court determined that there was a violation of appellee's right to confrontation in their absence. The State asserted at trial, and reiterated during the postconviction hearing, that it was willing to bring in the technicians who had done the actual testing to testify at the trial.[25] Moreover, appellee's counsel suggested that a possible remedy would be to allow the technicians to testify, after granting him a continuance to prepare. If these witnesses had been permitted to testify, there would have been no confrontation issue regarding the admissibility of the testing, and therefore, no reasonable probability of a different result.

Appellee technically is correct that there was no evidence presented regarding whether these witnesses were available to testify. The record certainly suggests, however, that they were available. And it was appellee's burden to show that they were not available and the DNA evidence would have been excluded if defense counsel had timely objected. He failed to do so, and, therefore, the postconviction court properly concluded that appellee had not met his burden to show prejudice and was not denied effective assistance of counsel in this regard.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY REVERSED. COSTS TO BE PAID BY APPELLEE.

[25] Thus, this case does not, as suggested by appellee, involve a scenario where he was "required to guess at (and rebut) all the potential evidence that the State could have but did not present."