Circuit Court for Wicomico County
Case No. C-22-CR-22-000033

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1906

September Term, 2022

MARKELL DAESHAWN PURNELL

v.

STATE OF MARYLAND

Ripken,
Tang,
Meredith, Timothy M.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Ripken, J.

Filed: November 13, 2023

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

In September of 2022, a jury sitting in the Circuit Court for Wicomico County found Markell Daeshawn Purnell ("Appellant") guilty of multiple charges, including attempted first-degree murder. The court sentenced Appellant to 40 years of active incarceration. At trial, Appellant's counsel ("defense counsel") did not put on a defense or call witnesses. Appellant noted a timely appeal of his convictions. He presents the following issue for review: whether trial counsel's failure to call an alleged co-defendant to testify constituted ineffective assistance of counsel.[1] For the reasons to follow, we shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant was tried for several offenses arising from a violent confrontation which culminated in the October 2021 shooting of Mikea Adams ("Adams"). Security camera video evidence from the scene shows three men, including an individual identified by the State as Appellant, engage in an altercation with another group, which included Adams. The video of the confrontation shows one of the men handing a firearm to another person who then discharged the weapon several times in the direction of Adams, striking him once in the leg. The State alleged that Appellant was the individual who fired the weapon, and that he had conspired with his two associates to murder Adams. The two co-defendants were Jyhova Ballard ("Ballard") and Anton Fooks ("Fooks"). At trial, the State's evidence identified Fooks as the person who handed the gun to Appellant. Prior to Appellant's trial, Fooks and Ballard both pled guilty to charges stemming from the October 2021 shooting.

[1] Rephrased from: "Was trial counsel's failure to call Anton Fooks to testify ineffective assistance?"

During a pretrial conference, defense counsel requested a postponement of the trial date to allow Fooks, who was incarcerated at Eastern Correctional Institute, to attend the trial as a defense witness. Defense counsel contended that Fooks, who had accepted full responsibility for the attempted murder charge, had stated that Appellant was not involved in shooting Adams. The court granted defense counsel's motion to postpone.

At a second pretrial conference, defense counsel informed the court that Fooks "possibly" could be called as a defense witness.[2] The State noted that it was also requesting that Fooks attend the trial as a potential State's witness. At the outset of trial, defense counsel was informed that Fooks had been successfully transported to the circuit court. At trial, the State called four witnesses to testify, but did not elect to call Fooks. None of the State's witnesses testified that they personally observed Appellant at the scene of the shooting.

One of the State's witnesses was Detective James Hicks ("Det. Hicks") who was with the Salisbury Police Department at the time of the shooting. Det. Hicks assisted with the investigation into the incident, which led to the arrests of Appellant, Ballard, and Fooks. Det. Hicks testified that police arrested Fooks in October of 2021. After his arrest, Fooks waived his Miranda rights and agreed to be interviewed. Det. Hicks testified that after showing Fooks still images from surveillance video of the shooting, Fooks

[2] At his second pretrial conference, Appellant was represented by an attorney standing in for and operating at the direction of his trial counsel. Appellant does not allege ineffective assistance of counsel arising from his representation at the second pretrial conference.

"acknowledge[d] everything, and he essentially had a look of defeat."[3] At trial, Det. Hicks did not allege that Fooks implicated Appellant, stating that Fooks declined to identify the shooter. The State did not call Fooks as a witness during its case.

At the close of the State's case, defense counsel requested that before being heard on a motion for judgement of acquittal, the court grant him a "recess [to] confer with [his] client and discuss trial strategy." The court agreed. After the recess, the court reconvened outside the presence of the jury, and defense counsel made a motion for judgment of acquittal, which was denied.

Defense counsel then, on the record, advised Appellant of his right to put on a defense, of the State's burden of proof, as well as of his right not to testify in his own defense. Having been advised, Appellant stated on the record that he elected to exercise his right not to testify. Next, defense counsel informed Appellant of his right to put on a defense and call witnesses, explicitly including Fooks:

> [W]e have the right to call witnesses in our defense. In fact, we have secured witnesses in our defense. We secured Mr. Fooks and we have Mr. Ballard, both of which were co-defendants in this matter. And if you would like, we can ask for either one of them or both of them to come up here and testify in your defense. You don't have to.
>
> Remember, it's the State's burden and the State's burden alone to prove your guilt beyond a reasonable doubt. You do not have to prove your innocence. So you're allowed to call zero witnesses. You're allowed to offer zero evidence. Because, at the end of the day, it's the State's burden of proving your guilt.

[3] Defense counsel objected to this testimony on the basis that it was not relevant; the court sustained the objection. We recite this excluded portion of Det. Hick's testimony only for its potential relevance to Appellant's ineffective assistance of counsel claim.

> But, also, I need you to understand that the jury, the fact finders are going to consider the evidence that's brought before them. So if it's your desire to present any evidence in your defense, this is your opportunity to do so. If you don't wish to, you not presenting any evidence can't be used against you, but . . . we're not presenting any evidence that can help your either. So that is your constitutional right. If I understand correctly, you do not wish to present a defense, you wish to rest and submit[.]

Appellant confirmed that he did not want to call witnesses or otherwise present a defense case. Defense counsel submitted the case. However, as the jury was re-entering the jury box so that the defense could rest their case in the presence of the jury, the following exchange occurred:

> [DEFENSE COUNSEL]: Whoa, whoa, what now?
>
> [APPELLANT]: I said I might, yeah, I'm, I'm, I'm presenting a defense.
>
> [DEFENSE COUNSEL]: What kind of defense?
>
> [APPELLANT]: The two co-defendants, alleged co-defendants.
>
> [DEFENSE COUNSEL]: Your Honor, if I may have a moment to speak with my client?
>
> * * *
>
> (Off-the-record conversation between [defense counsel] and Mr. Purnell)

After their off-the-record discussion, a bench conference was held that included Appellant. Defense counsel requested that, notwithstanding his prior indication that he would be submitting the case, he be allowed to present evidence and call witnesses, to include Fooks and Ballard. The court agreed to the request.

However, when it became apparent that Fooks and Ballard had already been removed from the courthouse, Appellant again changed his mind about putting on a case:

[DEFENSE COUNSEL]: . . . I do want to make sure that my client's right to have, to put on his defense is properly protected, Your Honor.

[THE COURT]: Sure, sure. [Fooks and Ballard are] still in the building, right?

[DEFENSE COUNSEL]: I don't believe they are. My understanding is that they've been sent—

[APPELLANT]: Oh, they left already?

[DEFENSE COUNSEL]: —they've been sent out.

[APPELLANT]: If they left already, just forget it.

[DEFENSE COUNSEL]: Are you sure?

[APPELLANT]: Yeah, I'm positive. Positive. Stop asking me am I sure, am I not sure—

[DEFENSE COUNSEL]: I'm just, I want to make sure, man.

[APPELLANT]: I'm positive, yeah, if they already gone, they gone. I'm positive, that's fine.

[DEFENSE COUNSEL]: So you want to proceed, rest and submit—

[APPELLANT]: Let's proceed. Let's proceed.

[DEFENSE COUNSEL]: Your Honor, may I qualify my client briefly at the bench?

[THE COURT]: Alright.

[DEFENSE COUNSEL]: Mr. Purnell, you have the right—

[APPELLANT]: I know I got the right.

[DEFENSE COUNSEL]: —to call these witnesses.

[APPELLANT]: I know.

[DEFENSE COUNSEL]: Okay? You can choose not to put on something.

> [APPELLANT]: They already told 'em that I had nothing to do with it, so what else is gonna be [different]. . . . I don't know them. They don't know me. I didn't have nothing to do with it.
>
> [DEFENSE COUNSEL]: Okay. If you're sure that this is how you wish to proceed, this is how we'll proceed. But if you tell me you want them called back, I'm going to, I'm going to—
>
> [APPELLANT]: It's fine.
>
> [DEFENSE COUNSEL]: —zealously advocate that they be brought back.
>
> [APPELLANT]: It's fine, I'm ready to just get to this verdict and get it over with.

After the conversation with his client, defense counsel again submitted the case to the circuit court:

> [DEFENSE COUNSEL]: The decision is that we will rest and submit right here, right now, without the presentation of any evidence, Your Honor.
>
> [THE COURT]: Mr. Purnell; is that correct?
>
> [APPELLANT]: Yes.
>
> [THE COURT]: Okay. You told me five minutes ago, three minutes ago—
>
> [APPELLANT]: I was thinking that they were, they already said they didn't know me and that I was never there. They already proved that. The detective proved it. My lawyer proved it. So what else is them coming up here and saying it again over and over and over again?
>
> [THE COURT]: Okay. So you're satisfied . . . for your attorney to rest at this point . . . and not call any witnesses?
>
> [APPELLANT]: Yes.

Following this exchange, Appellant and both attorneys returned to the trial tables. Defense counsel and Appellant had another conversation that was off the record, and the defense rested without submitting evidence or calling witnesses. After closing arguments, the jury

returned a verdict of guilty on all but one of the counts.[4] Additional facts will be incorporated as they become relevant to the issues.

DISCUSSION

I. IT IS NOT APPROPRIATE ON DIRECT APPEAL TO REVIEW APPELLANT'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM.

On this direct appeal, Appellant asserts that defense counsel's decision not to call Fooks to testify constituted ineffective assistance of counsel, which violated his constitutional rights and necessitates a reversal of his conviction.

A. Ineffective Assistance of Counsel

As established by the United States Supreme Court in *Strickland v. Washington*, a defendant's Sixth Amendment right to counsel is violated through ineffective assistance of counsel when counsel's performance is (1) deficient and (2) prejudicial to the defense. 466 U.S. 668, 687 (1984); *Newton v. State*, 455 Md. 341, 355 (2017). Counsel's performance is deficient when it fails to "meet an objective standard of reasonableness," based on "prevailing professional norms." *Mosley v. State*, 378 Md. 548, 557 (2003). Decisions by counsel that are the result of a considered trial strategy do not constitute deficient representation. *See Coleman v. State*, 434 Md. 320, 338 (2013). A strategic trial decision is one that is founded "upon adequate investigation and preparation." *State v. Borchardt*,

[4] The jury found Appellant guilty of attempted first- and second-degree murder, conspiracy to commit murder with Fooks, first- and second-degree assault, reckless endangerment, use of a firearm in the commission of a violent crime, illegal possession of a regulated firearm by a prohibited person, possession of a firearm by a prohibited person, wearing or transporting a handgun in a vehicle, and wearing, carrying, or transporting a handgun. The jury found Appellant l not guilty of conspiracy to commit murder with Ballard.

396 Md. 586, 604 (2007). In order to prove prejudice arising from an attorney's error, a defendant must show "'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Newton*, 455 Md. at 355. (quoting *Coleman*, 434 Md. at 340–41 (citation omitted)). In the absence of an actual conflict of interest, there is no presumption that deficient performance inherently results in prejudice. *See Harris v. State*, 303 Md. 685, 699 (1985).

The most appropriate method to resolve an ineffective assistance of counsel claim is a postconviction proceeding pursuant to the Maryland Uniform Postconviction Act. *Mosley*, 378 Md. at 558–59; *see generally* Md. Code, Criminal Procedure Article §§ 7-101 to 109. A postconviction proceeding is strongly preferred over a direct appeal, as "the trial record rarely reveals why counsel acted or omitted to act," whereas a postconviction proceeding allows for "fact finding and the introduction of testimony and evidence directly related to [the] allegations of counsel's ineffectiveness." *Id.* at 560. The expanded scope of evidence afforded by a postconviction hearing is generally necessary for the fair evaluation of an ineffective assistance of counsel claim, as the contents of a trial record alone are normally inadequate to defeat the strong presumption "that counsel rendered reasonable assistance and made all significant decisions in the exercise of reasonable professional judgement." *In re Parris W.*, 363 Md. 717, 725–26 (2001).

Therefore, we review a claim for ineffective assistance of counsel on direct appeal only in those "extremely rare situations," *Crippen v. State*, 207 Md. App. 236, 251 (2012), where the record itself reveals that counsel's ineffectiveness was "blatant and egregious." *Mosley*, 378 Md. at 562 (internal quotation marks omitted). Review on direct appeal is only

appropriate when the "the critical facts are not in dispute" and the trial record is "sufficiently developed to permit a fair evaluation of the claim." *In re Parris W.*, 363 Md. at 726.

B. Parties' Contentions

On direct appeal, Appellant argues that defense counsel's decision not to call Fooks was both deficient and prejudicial to his defense. As to deficient performance, Appellant asserts that his counsel violated prevailing professional norms, specifically the duties of competence and diligence. Md. Rules 19-301.1, 301.3. Appellant contends that no competent attorney would have failed to call Fooks, who he describes as an "exculpatory witness." In so arguing, Appellant analogizes his case to *In re Parris W.*, where the Supreme Court of Maryland, reviewing a direct appeal, determined that an attorney's performance was deficient when the attorney failed to subpoena five witnesses, all of whom the defense intended to call, for the correct trial date. 363 Md. at 720. Appellant also posits that defense counsel violated the duty of diligence by declining to call Fooks on the basis that his client "mistakenly believed it was too late for that witness to be called," as well as by declining to warn him that Fooks could still be called to testify or inform him about the potential consequences of failing to do so. Similarly, Appellant argues that a reasonable attorney in defense counsel's position would have called Fooks notwithstanding his client's explicit disapproval. He also asserts that no reasonable trial strategy could justify failing to call Fooks, arguing that Fooks, as an "exculpatory witness" could be potentially helpful to the defense, and there "was no reasonable likelihood" that Fooks' testimony would harm Appellant's defense. Additionally, Appellant claims prejudicial

effect resulted from his counsel's representation, asserting that there was a reasonable probability that he would have been found not guilty if Fooks had testified; he supports this claim by characterizing the evidence against him as weak, and emphasizing that no witnesses, including the two alleged co-conspirators, claimed that they saw the shooting or placed him at the scene.

The State disagrees with Appellant's analysis, and notes that a postconviction proceeding, not a direct appeal, is generally the preferred method of bringing an ineffective assistance of counsel claim. The State asserts that the trial record contains insufficient information to conclude that defense counsel's performance was deficient, in part because the record notes multiple off-the-record conversations between Appellant and his defense counsel which might shed light on defense counsel's trial strategy. The State also posits that Appellant's abrupt change in tactics, first seeking to put on a case, and then declining to do so, was itself plausibly the result of his counsel's effective explanations of a considered trial strategy. The State further argues that the record does not establish prejudice resulting from defense counsel's actions, as it does not sufficiently demonstrate what Fooks' testimony would have added to the record on Appellant's behalf. The State also notes that Fooks' testimony had the capacity to prejudice the jury *against* Appellant, as Fooks had previously expressed he was afraid of violent retaliation if he testified, implicitly from Appellant or his associates.

C. Review of Ineffective Assistance of Counsel on Direct Appeal is Extremely Rare.

Appellant argues that his trial counsel's performance was ineffective because no

reasonably competent counsel would have failed to ensure that Fooks was available at the start of the defense case, and no rational trial strategy could involve not calling Fooks as a witness. He further asserts that defense counsel failed to provide diligent representation by not calling Fooks merely because his client believed it was no longer possible, and also by failing to instruct Appellant to the contrary. We decline to address the merits of these assertions.

The trial record is not sufficiently developed to allow us to effectively evaluate Appellant's claims. In contrast to *In re Parris W.*, where the undisputed facts in the record clearly demonstrated that counsel's performance was unmistakably deficient, in this case, the record provides little insight into defense counsel's decision-making process, and allows for multiple plausible interpretations of his actions. 363 Md. at 727–28. In general, "the question of whether to call a witness is a question of trial strategy ordinarily entrusted to counsel," and counsel's considered decision is entitled to "great deference." *Borchardt*, 396 Md. at 614. There are interminable reasons why a capable defense attorney might refrain from calling a witness, even a witness potentially capable of providing testimony beneficial to a client. *See Ramirez v. State*, 464 Md. 532, 561 (2019) ("There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. . . . [C]ounsel is strongly presumed to have rendered adequate assistance[.]" (citing *Strickland*, 466 U.S. at 689-90)). While some of these reasons might fall outside the scope of considered trial strategy or constitute deficient performance, others are entirely reasonable applications of professional judgement. *See Borchardt*, 396 Md. at 612–13 (holding that, even in a capital case,

counsel's failure to call a defense mitigation specialist due to the risk of opening unfavorable lines of questioning on cross-examination did not constitute ineffective assistance).

Because the record does not allow us to determine the reasoning for defense counsel's choice not to call Fooks as a witness, we decline to address Appellant's claim that electing not to do so was ineffective assistance. Nor can we address Appellant's contention that defense counsel's failure to ensure Fooks was present at the start of the defense case was deficient performance, as the record is unclear on this point as well. Similarly, as the record is silent as to defense counsel's rationale for not calling Fooks as a witness, we cannot determine to what degree Appellant's own comments and feelings about trial strategy impacted his attorney's decision. Similarly, because multiple conversations between Appellant and his trial counsel were off the record, we cannot say that defense counsel erred by failing to provide effective explanations or advice to Appellant. Nor, without a better understanding of what Fooks' testimony would have been, or what other avenues of inquiry his testimony might have opened for the State to pursue, can we determine if his absence was prejudicial to Appellant's case.

Here, the record is not developed to a degree which would allow us to determine defense counsel's reasons for declining to call Fooks; thus, Appellant's claim is best heard within a postconviction proceeding. At a hearing in the circuit court, testimony might explain the reasoning for defense counsel's actions, the court can consider the propriety thereof, and, if necessary, determine if prejudice resulted to Appellant's case. On direct appeal, the record available to this Court is insufficient to answer those same questions,

and consequently we decline to address Appellant's claim of ineffective assistance of counsel.

JUDGMENTS OF THE CIRCUIT COURT FOR WICOMICO COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.