

REPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1647

September Term, 2005

STATE OF MARYLAND

v.

CARLOS JOSEPH MCCLELLAN, JR.

Eyler, James R.,
Woodward,
Moylan, Charles E. Jr.,
(Retired, Specially Assigned),

JJ.

Opinion by Woodward, J.

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The State of Maryland asks us to reverse an order of the Circuit Court for Baltimore City in a post conviction case filed by appellee, Carlos Joseph McClellan, Jr. By Memorandum Opinion dated August 19, 2005, and Order dated August 31, 2005, the post conviction court ruled that appellee was denied his Sixth Amendment right to effective assistance of counsel, because his trial counsel failed to object to the jury instruction on reasonable doubt. Accordingly, the post conviction court granted appellee a new trial.

On appeal, the State presents one question for our review: "Did the circuit court misapply *Strickland v. Washington*, 466 U.S. 668 (1984), and erroneously grant post conviction relief based on ineffective assistance of trial counsel for failing to object to a[] [jury] instruction that adequately explained the reasonable doubt standard?" Finding no error, we affirm the judgment of the post conviction court.

BACKGROUND

On January 31, 1992, a jury convicted appellee of first-degree murder, use of a handgun in the commission of a crime of violence, and conspiracy to commit first-degree murder. Appellee filed a motion for new trial on February 5, 1992, which motion was denied on March 11, 1992.¹ That same day, the court sentenced appellee to two concurrent terms of life in prison for the first-degree murder

¹ The Motion for New Trial is not part of the record submitted on appeal.

and conspiracy to commit first-degree murder convictions, and a concurrent ten-year term of imprisonment for the handgun conviction. Thereafter, appellee noted a timely appeal to this Court,² and on December 2, 1992, in an unreported opinion, we affirmed the judgments of the circuit court.³ Upon our decision, appellee petitioned *pro se* for writ of certiorari to the Court of Appeals, which denied his petition on May 11, 1993.

Almost four years later, on March 19, 1997, appellee filed a petition for post conviction relief in the circuit court.⁴ His petition was dismissed without prejudice on March 5, 1998. Several years later, on September 30, 2004, appellee filed a second petition for post conviction relief.⁵ In that petition, appellee

² In his direct appeal, appellee raised the following three issues for our review:

(A) The trial court erred in failing to grant appellant's motion to suppress his statements, allegedly made in voluntary response to inquiries by the homicide investigators.

(B) The trial court improperly admitted into evidence the assault rifle entirely unrelated to the charged offenses.

(C) The evidence was insufficient to sustain appellant's convictions.

³ See *McClellan v. State*, No. 375, Sept. Term, 1992 (Md. Ct. Spec. App. Dec. 2, 1992).

⁴ The Petition for Post Conviction Relief is not part of the record submitted on appeal.

⁵ Under section 7-103(b)(1) of the Uniform Postconviction Procedure Act, see Maryland Code (2001), sections 7-101 through 7-301 of the Criminal Procedure Article, a petition under the Act may not be filed more than 10 years after the sentence was imposed in a case where the death sentence was not imposed "[u]nless extraordinary cause is shown." This section, however, was enacted by the General Assembly in the 1995 session and took effect on October 1, 1995. See 1995 Md. Laws, chap. 258. Section 2 of Chapter 258 states:

argued that he "was denied effective assistance of trial counsel because his counsel failed to object to the judge's erroneous jury instruction on reasonable doubt." Specifically, he contended that, "[t]he judge's reasonable doubt instruction was erroneous in that it analogized the decision of [appellee's] guilt or innocence to everyday decisions in the jurors' lives[,] and that such "instruction was held to be an unacceptable explanation of the reasonable doubt standard."

The post conviction court held a hearing on appellee's petition on May 3, 2005. Thereafter, by Memorandum Opinion and Order, the post conviction court granted appellee's petition for post conviction relief. In its opinion, the court ruled that appellee had received ineffective assistance of counsel based on defense counsel's failure to object to the jury instruction on reasonable doubt, explaining "that the jury instruction given as to reasonable doubt to which no objection was made did not comply with the standard as set forth in *Himple [v. State]*, 101 Md. App. 579 (1994)]. Therefore, the allegation succeeds." Consequently, the post conviction court vacated appellee's convictions and ordered

[T]his Act shall be construed prospectively to apply only to postconviction proceedings for sentences imposed on or after the effective date of this Act and may not be applied or interpreted to have any effect on or application to postconviction petitions for sentences imposed before the effective date of this Act.

(Emphasis added).

Consequently, because appellee was sentenced on March 11, 1992, his petition for post conviction relief, filed over 12 years later, is not subject to the limitations of section 7-103(b) (1).

that he be granted a new trial.

On September 28, 2005, the State applied for leave to appeal the grant of post conviction relief pursuant to Maryland Code (2001), section 7-109 of the Criminal Procedure Article⁶ and Maryland Rule 8-204.⁷ By order dated December 21, 2005, this Court granted the State's application for leave to appeal.

DISCUSSION

At the close of all evidence in appellee's 1992 trial, the court instructed the jury on reasonable doubt as follows:

[T]he State has the burden of proving guilt beyond a reasonable doubt to your unanimous satisfaction. Defendants are always presumed innocent in all the courts of this country until that presumption is overcome, so to speak, by the State's proof beyond a reasonable doubt.

* * *

[W]e speak of this term 'reasonable doubt.' The State must convince you beyond a reasonable doubt. By that we do not mean absolutely [sic] certainty and we do not mean mathematical certainty and we do not mean moral certainty. **We simply mean, again drawing on your everyday experience, if you feel there is enough evidence in this case to permit you to go forward with a decision, then go ahead and make the decision. It is that simple really.**

By that we mean, further, that if you have a doubt, it should be a doubt to which you can ascribe a reason. There should be a reason for your doubt. Now when we speak of your everyday decision-making we mean it this way. **That everyone of you here has made a decision of**

⁶ Section 7-109 sets forth the provisions governing an appeal of a final order.

⁷ Maryland Rule 8-204 sets forth the provisions governing applications for leave to appeal to the Court of Special Appeals.

magnitude in your - - in your life - - not whether you will have coffee with sugar or without sugar or what your cereal will be, but whether you will marry or not marry, whether you will change jobs, whether you will have children and whether you will change the city - - your location - - go move to Indianapolis or something.

I mean, these are serious decisions - - or divorcing. These are serious decisions which I am sure all of you have made one or more of just by your existence on the earth and being over eighteen. And this, too, is a serious decision and that is what we mean by that concept of deciding something beyond a reasonable doubt.

(Emphasis added).

On appeal, the State argues that the post conviction court misapplied *Strickland* and erroneously granted post conviction relief based on ineffective assistance of counsel for failing to object to the above jury instruction, which the State claims, adequately explained the reasonable doubt standard. In support of this argument, the State makes two specific contentions, that: (1) the instruction "adequately explained the reasonable doubt standard and is distinguishable from that in *Himple* on several significant grounds;" and (2) the "court misapplied *Strickland* in treating appellee's claim as if it had been raised on direct appeal and in viewing the instruction given in 1992 from the perspective of 2005, rather than correctly applying the principles governing [the] review of collateral claims challenging the [in]effective assistance of counsel."

Appellee counters that the post conviction court correctly

applied *Strickland*, and committed no error in granting appellee's request for post conviction relief. Specifically, appellee responds that the above jury instruction was erroneous, because it clearly impressed upon the jury that appellee could be convicted by a preponderance of the evidence or some standard less than "beyond a reasonable doubt." He further asserts that although *Himple* was decided after the jury instruction was propounded in the instant case, the post conviction court properly considered *Himple* in analyzing whether appellee was denied effective assistance of counsel, because *Himple* "did not establish a new criteria for reasonable doubt[;] all it did was explain the current law." We agree with appellee.

As we have previously stated, "[t]he defendant bears the burden of proving that he was denied effective representation by trial counsel." *State v. Hunter*, 103 Md. App. 620, 622 (1995). In *Strickland*, 466 U.S. at 687, the United States Supreme Court explained that this burden has two components:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

"The Sixth Amendment does not require the best possible

defense or that every attorney render a perfect defense. In order to be deficient, counsel's acts or omissions must be 'outside the wide range of professionally competent assistance.'" *Gilliam v. State*, 331 Md. 651, 665 (1993) (quoting *Strickland*, 466 U.S. at 690). Moreover, "courts should not, aided by hindsight, second guess counsel's decisions." *Id.* at 666. Nevertheless, because it is constitutionally mandated that the prosecution prove guilt beyond a reasonable doubt, an erroneous jury instruction on reasonable doubt is never harmless. See *Williams v. State*, 322 Md. 35, 42 (1991). Thus, when defense counsel fails to object to an erroneous reasonable doubt instruction, the resulting error is both plain and prejudicial. See *Himple*, 101 Md. App. at 585.

(I)

The Himple Distinction

When the post conviction court granted appellee's petition for relief, it determined that the reasonable doubt instruction "did not comply with the standard set forth in *Himple*," and "[t]herefore [appellee's] allegation succeeds." In *Himple*, we were called on to decide whether the trial court committed "plain error" in instructing the jury regarding the reasonable doubt standard. See 101 Md. App. at 581. The instruction given was as follows:

The burden of proving the defendant guilty is upon the prosecution from the beginning to the end of the trail [sic]. The defendant has no burden to sustain, does not have to prove his innocence.

* * *

The charges against the defendant are not evidence of guilt, they are merely a complaint to let the Jury and

the defense know what the charges are. The test of reasonable doubt is the evidence that the State has produced must be so convincing that it would enable you to act on an important piece of business in your everyday life. The words, to a moral certainty, do not mean absolute or mathematical certainty, *but a certainty based upon a convincing ground of probability.*

Id.

We found "plain error" because "the instruction was erroneous in its equation of a convincing ground of probability to reasonable doubt." *Id.* at 582. We also observed that, even if the "probability" factor had not been included in the instruction, the balance of the instruction inaccurately "equate[d] the degree with which people make important decisions in their everyday lives with the reasonable doubt standard." *See id.* at 583. We explained that "[t]he legal reasonable doubt standard and the decision making process in respect to important personal matters in a layman's life are not the same." *Id.*

In the instant case, the State contends that "the core problem in the instruction at issue in *Himple*, [(i.e., the improper phrase 'convincing ground of probability')] is absent here." Although the State is technically correct in this assertion, the instruction was still deficient, because it suggested to the jury that appellee could be convicted by a preponderance of the evidence, or some standard less than beyond a reasonable doubt, by referring to "the decision making process in respect to important personal matters in a layman's life." *Id.*

This concept is consistent with the decision of the Court of

Appeals in *Wills v. State*, 329 Md. 370 (1993), where the Court focused on the judge's instruction to the jury, "that in making an important decision, 'if you weigh all of the factors, if you weigh the things that say, I should do it, and the things that say, I shouldn't do it, and you decide to go forward then you don't have a reasonable doubt.'" *Id.* at 387. The Court of Appeals stated:

This explanation is confusing and misleading because it leans towards the preponderance [of the evidence] standard rather than the reasonable doubt standard. . . . It plants the possibility in the minds of the jury that if the weighing process is evenly balanced they may convict. Moreover, it does not contest a notion, which the jury could well entertain from what was said, that when all the evidence is weighed, if the evidence adduced by the State has more convincing force and produces in the minds of the jury a belief that it is more likely true than not, the reasonable doubt standard has been met. That may meet the preponderance standard, but it clearly does not comport with the reasonable doubt standard even when considered in the light of the entire instruction.

Id. (citation omitted).

Similar to the instructions in *Himple* and *Wills*, the jury instruction in the instant case called upon jurors to "draw[] upon your everyday experience." The court then advised, "if you feel there is enough evidence in this case to permit you to go forward with a decision, then go ahead and make the decision." The court followed up by stating, "[i]t is that simple really." Although the court explained to jurors that, in terms of seriousness, the decision to convict was more akin to the decision to marry or divorce than the decision to have coffee with or without sugar, the trial court equated making a "serious decision" with the "concept

of deciding something beyond a reasonable doubt.” Such equation suggested to the jury that the test for reasonable doubt was a preponderance test.

The State also contends that the jury instruction here is not erroneous under the teachings of *Himple*, because the failure to include any “without reservation” language does not, by itself, constitute “plain error.” We agree with the State on this point. We note, however, that the failure to include the “without reservation” language is not and has never been an issue in this case. The issue in this case, and more globally in *Himple*, was whether the instruction erroneously equated the reasonable doubt standard with the preponderance of the evidence standard. We need not rely on the lack of the “without reservation” language to resolve that issue.

Finally, the State contends that our opinion in *Morris v. State*, 153 Md. App. 480 (2003), in which we declined to exercise “plain error” review upon a mistake in the reasonable doubt instruction, supports its position that post conviction relief was not justified upon the instruction in the instant case. If it were that simple, we would agree; however, it is not, and therefore, the State’s reliance on *Morris* is misplaced.

In *Morris*, the trial judge propounded the pattern jury instruction on reasonable doubt (MPJI-Cr. 2:02), but in so doing “misspoke himself on a single adjective” when he said that “the State is not required to prove guilt beyond all reasonable [instead

of "possible"] doubt." *Id.* at 506. Writing for this Court, Judge Moylan stated: "[A]ppellants, with hindsight, would now have us believe that the jurors, with the ears of a gazelle, pounced upon the slip that everyone else had missed and gave it possibly dispositive significance." *Id.* Accordingly, we declined to exercise plain error review upon our determination that the reasonable doubt instruction contained a mere "slip of the tongue," and was not otherwise flawed. *See id.*

In the instant case, the court's reasonable doubt instruction was not a verbatim recitation of the pattern jury instruction, nor did the trial court make a mere "slip of the tongue" or "misstatement on a single adjective" as in *Morris*. Rather, the trial court propounded an instruction, which, as we have explained, was flawed in that it suggested to the jury an incorrect burden of proof. Consequently, *Morris* is inapposite to our conclusion in the case *sub judice*.

(II)

Retroactive Application

The State also argues that the post conviction court erred in looking to *Himple*, because *Himple* was not decided until more than two and one-half years after appellee's trial, and that the reasonable doubt instruction propounded at appellee's trial was "couched in language that was accepted at the time it was given and adequately explained the concept of reasonable doubt." Appellee responds that the jury instruction given by the trial court "was

deficient then and [is] deficient now," and that *Himple* is applicable to the instant case because it did not announce new law, but rather explained existing law. We agree with appellee.

In support of its position that the trial court erred in essentially applying *Himple* retroactively to the instruction in the instant case, the State places great emphasis on this Court's decision in *Hunter*, 103 Md. App. 620. The State's reliance on *Hunter* is misplaced.

In *Hunter*, the post conviction court determined that because the trial court's reasonable doubt instruction did not contain either of the phrases, "without hesitation" or "without reservation," the instruction was defective. See *id.* at 623. The post conviction court reasoned that, "even though the Court of Appeals had not yet ruled that one of the 'without' phrases had to be used, he expected the court would so rule in the future," and thus "the 'reasonable doubt' instruction that was given was improper and counsel had been ineffective for failing to object to it." *Id.* at 622.

In our opinion, we explained that the problem with the post conviction court's reasoning was that it relied upon case law that was decided after the case was tried. See *id.* at 623. We explained that because the judge gave an instruction that was consistent with what was thought to be proper at the time the case was tried, the instruction was adequate. See *id.* We noted: "The law does not require lawyers to anticipate changes in the law."

Id.

By contrast, in the case *sub judice*, the trial court did not propound an instruction that was thought to be adequate at the time it was given. It has been a fundamental rule in Maryland for many years that "the jury in a criminal case, before finding a verdict of guilty, must be satisfied of the guilt of the accused beyond a reasonable doubt." *Lambert v. State*, 193 Md. 551, 558 (1949). Moreover, "a trial judge in a criminal case[] must give an instruction correctly explaining 'reasonable doubt' if requested by the accused." *Lansdowne v. State*, 287 Md. 232, 243 (1980); accord *Montgomery v. State*, 292 Md. 84, 95 (1981). By definition, proof by a preponderance of the evidence is a lower standard than proof beyond a reasonable doubt. See generally Joseph F. Murphy, Jr., *Maryland Evidence Handbook*, § 406 (3rd ed. 1999, 2004 Supp.). Consequently, when the Court of Appeals set forth a correct explanation of the reasonable doubt standard derived from its opinions from 1949 to 1991, the Court stated, *inter alia*, that, "[t]he State is not required to prove guilt beyond all possible doubt or to a mathematical certainty, but it is not enough if the evidence shows that the defendant is *probably* guilty." *Wills*, 329 Md. at 382-83.

In his concurring opinion in *Wills*, Judge McAuliffe expressly addressed a reasonable doubt instruction that equated proof beyond a reasonable doubt with making a decision in an important matter in one's life or business. He said:

[The] instruction often suggest[s] to the jurors that if they make a decision concerning important affairs in their life or business, the evidence upon which they act necessarily constitutes proof beyond a reasonable doubt. That is wrong. **Important decisions in one's life are often, and of necessity, made on a mere preponderance of evidence.**

Id. at 389 (emphasis added).

As previously stated, the instruction in the case *sub judice* equated making a "serious decision," such as marriage, divorce, or relocation, with "deciding something beyond a reasonable doubt." That is wrong today and was wrong at the time of the trial in this case in 1992.

Nevertheless, the State asserts in its brief that the language in question in the instruction "covered the core concepts explained in the pattern jury instruction." See MPJI-Cr. 2:02. Specifically, the State claims that the language emphasizing the serious decisions that jurors make in their personal or business lives is carried over into the pattern jury instruction.

This argument is without merit, for the simple reason that the language of the instruction in the instant case is conceptually very different from the pattern jury instruction. The pattern jury instruction states, in relevant part:

Proof beyond a reasonable doubt requires such proof as would convince you of the truth of a fact to the extent that you would be willing to act upon such belief without reservation in an important matter in your own business or personal affairs.

MPJI-Cr. 2:02. Nowhere in this sentence does it state that proof

beyond a reasonable doubt is the same as making "a decision of magnitude . . . in your life." In the pattern jury instruction, proof beyond a reasonable doubt is compared to believing the truth of a fact to a certain extent, not to the making of a decision, in an important matter in one's own personal or business affairs.

Finally, we conclude that appellee proved his claim of ineffective assistance of counsel under *Strickland*. Because proof of guilt beyond a reasonable doubt is constitutionally mandated in a criminal proceeding, defense counsel's failure to object to a jury instruction permitting the jury to convict appellee based upon a lower standard of preponderance of the evidence was a deficient act. See *Wills*, 329 Md. at 375-76; *Himple*, 101 Md. App. at 581, 585. It was also clearly prejudicial. See *Himple*, 101 Md. App. at 585 (holding that a reasonable doubt instruction allowing the jury to convict based upon a preponderance of the evidence was both "plain error" and "clearly prejudicial").

For these reasons, we conclude that the post conviction court did not err in granting appellee's petition for post conviction relief and according appellee a new trial.

**JUDGMENT AFFIRMED; CASE REMANDED TO
THE CIRCUIT COURT FOR BALTIMORE CITY
FOR A NEW TRIAL.**