Circuit Court for Washington County
Case No.: 21-K-03-032388

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 539

September Term, 2015

KARIM WARD

v.

STATE OF MARYLAND

Leahy,
Shaw Geter,
*Krauser,

JJ.

Opinion by Shaw Geter, J.

Filed: August 8, 2017

* Krauser, Peter B., J., now retired, participated in the hearing of this case while an active member of this Court, and as its Chief Judge; after being recalled pursuant to the Constitution, Article IV, Section 3A, he also participated in the decision and the adoption of this opinion.

This is an appeal from the denial of a petition for post-conviction relief filed by appellant, Karim Ward. The case started as an altercation at a night club, which led to a fistfight, and ultimately a shooting. A jury in the Circuit Court for Washington County subsequently convicted appellant of second-degree murder; use of a handgun in the commission of a crime of violence; use of a handgun in the commission of a felony; wearing, carrying or transporting a handgun; unlawful possession of a regulated firearm; and unlawful possession of a firearm. Appellant filed an initial appeal on April 21, 2004, raising the sole issue of sufficiency of the evidence. We affirmed his convictions. Ten years later, on September 16, 2014, appellant filed a petition for post-conviction relief. The post-conviction court found that his attorney did not provide ineffective assistance of counsel, and it denied his request for relief. Thereafter, appellant noted this timely appeal, presenting five issues for our review:

1. "Did the post-conviction court abuse its discretion when it denied Ward's petition for post-conviction relief when it found that the defense was not prejudiced by the failure of defense counsel to object to comments by the prosecutor during closing argument and rebuttal 'that intimated that witnesses were hesitant to come forward, or that witnesses were risking their lives by testifying?'"

2. "Did the post-conviction court abuse its discretion when it denied Ward's petition for post-conviction relief when it found that the defense was not prejudiced by the failure of defense counsel to object to a 'golden rule' argument by the prosecutor during closing argument and rebuttal?"

3. "Did the post-conviction court abuse its discretion when it denied Ward's petition for post-conviction relief when it found that the defense was not prejudiced by the failure of defense counsel to object to the prosecutor's 'ill-conceived' attempt to vouch for witnesses during closing argument and rebuttal?"

4. "Did the post-conviction court abuse its discretion when it denied Ward's petition for post-conviction relief when it found that defense counsel was not constitutionally ineffective when he failed to object to the prosecutor's closing arguments about the intent of people who acquire illegal drugs which 'telegraphed' to the jury that Ward had been previously convicted of a drug-related offense?"

5. "Did the post-conviction court abuse its discretion when it denied Ward's petition for post-conviction relief when it found that the defense was not prejudiced by the failure of defense counsel to request a jury instruction limiting the jury's consideration of Ward's stipulation that he had a prior conviction disqualifying him from possessing a handgun as to only the charge of possession of a firearm by a disqualified person and to no other offenses?"

For the reasons discussed below, we shall affirm the judgment of the circuit court denying appellant's petition for post-conviction relief.

BACKGROUND

Carl Wallace spent the evening with Shree Harrell on December 13, 2002. They saw a movie, went to a local bar, then a nightclub, got something to eat, and returned home. In the early morning hours on December 14, Harrell received a phone call from her sister, Asia Burns, who was out with a friend, Felicia Archie. Burns indicated that she had been jumped by Tamika White—appellant's girlfriend—and Harrell later testified that "when you get jumped you go to the girl's house and they fight." So Wallace and Harrell met with Burns and Archie, and the four proceeded to White's house at 466 Jonathan Street in Hagerstown, Maryland.

Burns walked up to White's front door once they arrived and began beating on it with a wooden board. Appellant answered, and the two started yelling at each other. Eventually, White came outside, Burns dropped the board, and a fistfight ensued. The fight

spilled into the street, and Burns began banging White's head into the ground. Appellant tried to break up the fight, but Burns and Archie told him to let them continue. At this point, appellant grabbed a gun out of his pants and fired a series of warning shots. Harrell heard Wallace say "[l]et them fight," to which appellant responded "[w]ho the fuck are you," and then appellant shot him six times. Afterward, appellant fled the scene. Wallace died of gunshot wounds shortly thereafter.

At trial, Harrell testified that she was three to four feet from where the shooting took place, and she identified appellant as the shooter. Harrell's out-of-court identification of appellant, conducted the day of the shooting, was also introduced. Kenny Jenkins, a taxi driver responding to a call for service at the nearby Coca-Cola plant, testified that while he was waiting for his fare, he saw a large group of people at Jonathan Avenue. Jenkins heard what he initially thought was a car backfiring, then, ten to fifteen seconds later, heard five or six more shots. Jenkins saw one man coming forward and another man fall to the ground. Later that day, Jenkins identified appellant in a photo array as the shooter and again during the trial.

Raymond Williams was working the night shift at the Coca-Cola plant when he observed the fight between Burns and White. Williams said that a man in a group of six to eight people tried to intervene and, not long after, pointed a gun at another male in the group and shot him three times. Williams did not see the shooter's face, but he had the same build as appellant, whom Williams frequently saw outside of the residence on his way to work. Williams identified appellant as the shooter at trial. This testimony was further corroborated by Decatur Young, another Coca-Cola plant employee, who observed

the fight between Burns and White, and the shooting, where one of the two males present shot the only other male in the group. Afterward, Young saw the shooter go inside 466 Jonathan Street.

At the conclusion of the case, the jury found appellant guilty of second-degree murder; use of a handgun in the commission of a crime of violence; use of a handgun in the commission of a felony; wearing, carrying or transporting a handgun; unlawful possession of a regulated firearm; and unlawful possession of a firearm.[1] The court imposed a thirty-year sentence for the murder conviction; a ten-year consecutive sentence for the use of a handgun in the commission of a crime of violence conviction, the first five years to be served without the possibility of parole; and a three-year concurrent sentence for the unlawful possession of a regulated firearm conviction. The court merged the remaining convictions.

On April 21, 2004, appellant filed his first appeal, raising the sole issue of sufficiency of the evidence. We affirmed his convictions, noting that both Harrell and Jenkins identified appellant on the day of the shooting and again in court, and we held that their identifications were sufficient to prove appellant's criminal agency.

Ten years later, on September 16, 2014, appellant filed a petition for post-conviction relief. He raised the following grounds in support of his petition:

1. trial counsel rendered ineffective assistance by failing to object to the State's injecting the specter of witness intimidation into the trial at closing argument when no such evidence was admitted at trial;

[1] The record reflects that the jury reached a verdict after one hour and seventeen minutes.

2. trial counsel rendered ineffective assistance by failing to object to the State's "Golden Rule" argument at closing by telling the jury to not let down the witnesses who risked their lives to testify;

3. trial counsel rendered ineffective assistance by failing to object to the State's vouching for the credibility of its witnesses during closing argument;

4. trial counsel rendered ineffective assistance by failing to object to the State's testifying as an expert during closing argument;

5. trial counsel rendered ineffective assistance by failing to object to the State's telegraphing to the jury that petitioner had a prior, drug-related conviction;

6. trial counsel rendered ineffective assistance by omitting several critical inconsistencies in the State's case;

7. trial counsel rendered ineffective assistance by failing to request a limiting jury instruction that Petitioner's stipulated prior conviction was only to be used to determine whether he was guilty or not guilty of illegally possessing a firearm after conviction for a crime which prohibited such possession, and not as evidence of guilt with other charged crimes; and

8. the cumulative errors of trial counsel constituted ineffective assistance.

On March 11, 2015, the post-conviction court denied appellant's petition in a memorandum opinion and order. The court found that the prosecutor made improper remarks during closing argument, but it noted that the State had a strong case, citing the identifications made by Harrell and Jenkins, as well as the corroborating accounts of the shooting from other witnesses. Therefore, although the court found that defense counsel was deficient for failing to object to the prosecutor's remarks, it held that "counsel's deficiencies did not prejudice the defense such that, without the error, there is a substantial or significant possibility that the outcome would have been different." Appellant subsequently filed an application for leave to appeal the denial of his post-conviction relief, which was granted on November 3, 2016.

DISCUSSION

The Sixth Amendment of the United States Constitution and Article 21 of the Maryland Declaration of Rights guarantee all criminal defendants the right to effective assistance of counsel. *Mosley v. State*, 378 Md. 548, 556 (2003). In order to prove that counsel provided ineffective assistance, a defendant must establish both prongs of the test in *Strickland v. Washington*, that is: 1) she must show that counsel's performance was constitutionally deficient, and 2) that the deficient performance prejudiced the defense. 466 U.S. 668, 687 (1984); *see also Mosley*, 378 Md. at 557. When applying this standard, we have recently explained:

> In discerning whether counsel's performance was deficient, we start with the presumption that he or she "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690, 104 S.Ct. 2052; *Bowers v. State*, 320 Md. 416, 421, 578 A.2d 734 (1990). Our review of counsel's performance is "highly deferential." *Kulbicki v. State*, 440 Md. 33, 46, 99 A.3d 730 (2014). We look to whether counsel's "representation fell below an objective standard of reasonableness." *Harris v. State*, 303 Md. 685, 697, 496 A.2d 1074 (1985). We assess reasonableness as of "the time of counsel's conduct." *Strickland*, 466 U.S. at 690, 104 S.Ct. 2052.
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> To satisfy the prejudice prong of *Strickland*, a defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S.Ct. 2052. The ultimate inquiry is whether " 'counsel's errors were so serious as to deprive [the petitioner] of a fair trial, a trial whose result is reliable.' " *Oken v. State*, 343 Md. 256, 284, 681 A.2d 30 (1996) (quoting *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052).

State v. Smith, 223 Md. App. 16, 26–27 (2015). Unless a defendant establishes both prongs of the *Strickland* test, it cannot be said that the conviction "resulted from a breakdown in the adversary process that renders the result unreliable." 466 U.S. at 687.

"Beyond the directions of *Strickland*, we are still governed by the general rules of appellate review. Specifically, determinations by the circuit court regarding effective assistance of counsel claims are mixed questions of law and fact." *Evans v. State*, 151 Md. App. 365, 374 (2003). We "will not disturb the factual findings of the post-conviction court unless they are clearly erroneous." *Wilson v. State*, 363 Md. 333, 348 (2001). However, we will make our own independent analysis "based on our own judgment and application of the law to the facts, of whether the State violated a Sixth Amendment right." *Evans*, 151 Md. App. at 374. "Consequently, absent clear error, we defer to the post-conviction court's historical findings, but we conduct our own review of the application of the law to the defendant's claim of ineffective assistance of counsel." *Id.*

I. Closing Argument

It is well settled that attorneys have wide latitude in closing argument "to draw reasonable inferences from the evidence, and discuss the nature, extent, and character of the evidence." *Smith v. State*, 367 Md. 348, 354 (2001); *see also Degren v. State*, 352 Md. 400, 430 (1999) (citations omitted) ("There are no hard-and-fast limitations within which the argument of earnest counsel must be confined—no well-defined bounds beyond which the eloquence of an advocate shall not soar. He may discuss the facts proved or admitted in the pleadings, assess the conduct of the parties, and attack the credibility of witnesses. He may indulge in oratorical conceit or flourish and in illustrations and metaphorical allusions.").

Closing argument is not boundless, however, "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." *Sivells v. State*, 196 Md. App. 254, 288 (2010). In making this determination, we apply the two-part test from *Sivells*. First, we assess "the severity of the remarks, cumulatively, the weight of the evidence against the accused and the measures taken to cure any potential prejudice." *Id.* at 289 (quoting *Lee v. State*, 405 Md. 148, 174 (2008)). In evaluating the potential prejudice, an important factor is "the strength of the State's case against the defendant. If 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. Second, we consider "the nature of the prosecutor's remarks. In assessing this factor, we consider whether there was one isolated comment, as opposed to multiple improper comments, and whether the comments related to an issue that was central to a determination of the case or a peripheral issue." *Id.* at 290.

Appellant raises four arguments in connection with the prosecutor's closing argument. As we shall explain, none of the prosecutor's remarks likely misled or influenced the jury to the prejudice of appellant. Therefore, defense counsel's failure to object does not warrant reversal in this case.

A. Witness Intimidation

One of the limitations on the scope of proper closing argument is that counsel may not comment upon facts that are not in evidence. *State v. Newton*, 230 Md. App. 241, 254 (2016). However, under the opened door doctrine, which is based on principles of fairness, a party may "introduce evidence that otherwise might not be admissible in order to respond to certain evidence put forth by opposing counsel." *Mitchell v. State*, 408 Md. 368, 388

(2009); *see also Clark v. State*, 332 Md. 77, 85 (1993) ("'[O]pening the door' is simply a way of saying: 'My opponent has injected an issue into the case, and I ought to be able to introduce evidence on that issue.'").

We recently discussed a similar issue in *Newton*. There, the trial counsel noted that the police went to the crime scene and "talked to everybody [they] could." *Id.* at 252. Trial counsel argued the issue was that the State presented no witnesses to the shooting except the victim, and the prosecutor stated that other witnesses did not want to get involved because they feared retaliation. *Id.* at 251. We found that the prosecutor's comments were not tantamount to saying "the State failed to call eyewitnesses because [appellee] would retaliate against them," reasoning:

> The prosecutor said nothing to indicate that appellee was responsible for the witnesses' fear. To the contrary, the State's reference to newspapers and television made clear that she was referring to a general fear of retaliation, as opposed to appellee specifically, as the cause of the State's lack of witnesses willing to testify. The prosecutor was merely explaining that the jurors should not be surprised by the lack of witnesses in this case because it is common for witnesses to refuse to cooperate. We conclude that this was a fair response to defense counsel's criticism regarding the State's lack of witnesses, especially given Detective Nicholson's testimony that other witnesses did not want to come forward, a common scenario given witnesses' "fear for retaliation."

Id. at 256–57. As a result, we held that trial counsel was not deficient in failing to object to the prosecutor's argument. *Id.* at 257.

In this case, like in *Newton*, appellant notes that the jury heard no testimony or evidence of witness intimidation. Yet, appellant argues, the State repeatedly informed the jury that witnesses were afraid and put their lives on the line by testifying at trial.

Specifically, appellant claims that the prosecutor engaged in improper argument when he made the following statements:

> [#1] [I]n this world, and I can understand it, I hope I am never in this situation because I would like to say today that I'm enough of a man to come forward, but there is no guarantees until you are in that situation. And we don't . . . I don't have the right, having never been in this situation, to criticize others for not coming forth and putting their lives on the line to tell you what happened.
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> [#2] Ladies and Gentlemen, the real significance of [the victim's] shirt however is not those [bullet] holes. The real significance of this shirt is that in this world where this could happen and does happen over nothing it is very difficult for the hardworking men of the Hagerstown Police Department and women who were with [Detective] Hoover, to go out there, Detective Moulton, to beat the bushes to say-Do you want to come to court and tell these people who did this and testify against a person who is willing to shoot a man down in a girl fight?
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> [#3] These are the bullets and bullet fragments removed from Mr. Wallace. The same kind of bullets that prevent people from wanting to come forward.
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> * * *
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> [#4] [The recovered shell casings] are also a reminder as they lay on Jonathan Street, as they do in our State's exhibit number five, that the next one could be for you if you come forward. Reminds the people that walked away from that scene as he laid there, Mr. Wallace, is an even bigger reminder.
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> * * *
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> [#5] And in this world that you have gotten a glimpse of is very difficult to extract those people that are willing to overcome the fear that this kind of thing instills in people, that those shell casings and that body laying on Jonathan Street instill in people and get them to come here, and they did.
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> * * *

> [#6] Shree Harrell, testified to come in here, wouldn't come to court on Monday, showed up on Wednesday.
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> * * *
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> [#7] Shree Harrell is the person that, not withstanding her fear of this happening to her, came forward. Notwithstanding her fear. Kenny Jenkins, notwithstanding his fear. [Defense counsel] says, "Oh I have lived in Hagerstown all my life. It's not that bad." Well from what they saw that night, it is that bad. As I told you initially, this is the world, which not everybody lives in, that they live in and they are entitled, but they have to continue to live in that world from here on out with what they know and what they know could happen to them. And that is the measure of credibility.

Appellant argues that these comments were improper for three reasons: they were based on alleged facts not in evidence; they suggested consciousness of guilt; and they suggested that Ward had a propensity for violence. Appellant also distinguishes *Newton* by arguing that what was not and could not have been common knowledge was that witnesses were terrified of being shot to death as a direct result of testifying against him.

Appellee, by contrast, argues that the issue of absent or reluctant witnesses was properly before the court. Appellee notes one of the detectives testified that as many as sixteen people could have been present at the scene, and defense counsel requested missing witness jury instructions regarding Asia Burns and Felicia Archie. Appellee points out that when defense counsel asked Shree Harrell why she failed to appear the first day of trial, all counsel approached the bench (outside the hearing of the jury), and the prosecutor asserted that Harrell had been threatened.[2] Finally, appellee argues generally that appellant was not

[2] No further information is available about the alleged threat. Defense counsel did not follow up on this line of questioning, and the court sustained appellant's objection when the State later asked if Harrell had been "scared to talk."

prejudiced because the State had a strong case, and although it is not possible to know defense counsel's thought process, the failure to object could be considered a matter of trial strategy.[3]

In appellant's case-in-chief, defense counsel argued that the police department's investigation faltered because detectives failed to interview potential witnesses. Building on this theme, during closing argument, defense counsel criticized the State for failing to bring to the jury "all of the evidence," arguing, "we got two missing cabs with two missing cab drivers and a missing passenger, James." Further, like the detective in *Newton*, Detective Hoover characterized Felicia Archie (who did not testify), and Asia Burns (did not testify) as "reticent." Detective Hoover added that Kenny Jenkins was "frightened," and that Shree Harrell was both "reticent" and "appeared very afraid." Finally, before the case went to the jury, the trial judge gave missing witness jury instructions regarding Asia Burns and Felicia Archie.

We disagree with appellant's characterization that the prosecutor's closing argument intimated that witnesses were terrified of being shot to death *as a direct result* of testifying against Ward. In the prosecutors comments, he referred generally to "this world" where witnesses were afraid to testify in court, which "made clear that [he] was referring to a general fear of retaliation, as opposed to [Ward] specifically, as the cause of the State's lack of witnesses willing to testify." *Newton*, 230 Md. App. at 257. As a result, the prosecutor's statements were a fair response to defense counsel's criticism regarding the

[3] Defense counsel passed away in 2012.

State's lack of witnesses, especially given Detective Hoover's testimony that witnesses were reticent in coming forward.[4]

B. Golden Rule Argument

The Court of Appeals has defined a "golden rule" argument as "one in which a litigant asks the jury to place themselves in the shoes of the victim, or in which an attorney appeals to the jury's own interests." *Lee v. State*, 405 Md. 148, 171 (2008). Such argument is improper because it impermissibly "appeals to [the jurors'] prejudices and asks them to abandon their neutral fact finding role." *Lawson v. State*, 389 Md. 570, 594 (2005); *see also Hill v. State*, 355 Md. 206, 216, 220–21 (1999) (finding the prosecutor's comments, which referred "to the need for the jurors to convict petitioner in order to preserve the quality of their own communities," were "wholly improper and presumptively prejudicial").

Appellant argues that the prosecutor's statements one through five and seven, *supra*, constitute improper golden rule arguments. Additionally, appellant challenges the following remarks:

> [#8] This case gave you a picture into a world that some of you may not be familiar with. A world that while many people sleep is a world of fear, a world of retaliation, a world of escalation of violence. A world in which coming forward to testify in front of you and coming to court and coming to the detectives equals credibility, equals class, equals reliability.
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> [#9] So at this point there is no doubt of who did it, what he did, first degree murder, using a handgun to do that murder, and the last link was crossed

[4] Because we have found that the prosecutor's comments were not improper, *Jones v. State*, 217 Md. App. 676 (2014) is not controlling in this case.

> when Shree Harrell and Kenny Jenkins got it up in their guts to tell you. Don't let them down now.

Appellant cites *Hill*, and he argues that the prosecutor's comments were prejudicial because they had no relevance to Ward's guilt or innocence. Appellant contends that the post-conviction court misread the record regarding the strength of appellee's case: appellant notes that the State's witnesses did not provide a consistent description of the shooter and other important details varied, such as how the victim was shot, the number of witnesses present, and the manner in which the shooter fled the scene. Finally, appellant argues that the post-conviction court applied an incorrect standard when it stated "it cannot be said that . . . there is a significant probability that the outcome would have been different." Appellee, on the other hand, cites the number and nature of eyewitnesses, the absence of conflicting testimony, and the State's previously withstanding a sufficiency challenge on appeal as evidence that their case was strong. As a result, appellee argues that Ward cannot show the outcome would have been different had defense counsel objected during closing argument.

In reviewing the State's closing argument, there is one occasion where the prosecutor asked the jurors to abandon their neutral fact finding role—when he stated "[d]on't let them down now," in reference to Shree Harrell and Kenny Jenkins. The other remarks, as indicated above, were a permissible response to defense counsel's criticism regarding the lack of State's witnesses. This case is therefore distinguishable from *Hill*, since it cannot be said that the prosecutor "throughout the trial and over constant objection"

informed the jurors that they had a responsibility to "keep their community safe from people like [appellant]." 355 Md. at 211.

Finally, we agree with appellant that the post-conviction court applied an incorrect standard when it stated "it cannot be said that . . . there is a significant probability that the outcome would have been different." *See Bowers v. State*, 320 Md. 416, 426 (1990) (emphasis added) (quoting *Yorke v. State*, 315 Md. 578, 588 (1989) (applying the "substantial or significant *possibility*" test to *Strickland* claim)). This error was harmless, however. Appellee correctly notes that due to the number and nature of eyewitnesses, appellant has failed to establish the applicable standard—that is, appellant has failed to show there is a significant possibility that the verdict would have been different if defense counsel objected at trial. As such, the prosecutor's improper statement does not warrant reversal.

C. Vouching Claims

Another exception to the rule that lawyers have wide latitude in closing argument is the prohibition against vouching for a witness's credibility, as it infringes on a defendant's right to a fair trial. *Sivells v. State*, 196 Md. App. 254, 277 (2010). Vouching typically occurs "when a prosecutor place[s] the prestige of the government behind a witness through personal assurances of the witness's veracity . . . or suggest[s] that information not presented to the jury supports the witness's testimony." *Spain v. State*, 386 Md. 145, 153 (2005) (internal quotation marks omitted) (quoting *United States v. Daas*, 198 F.3d 1167, 1178 (9th Cir. 1999)). However, "where a prosecutor argues that a witness is being truthful based on the testimony given at trial, and does not assure the jury that the credibility of the

witness based on his own personal knowledge, the prosecutor is engaging in proper argument and is not vouching." *Id.* at 155 (citation omitted).

Appellant, citing comments seven and eight, *supra*, argues that the prosecutor improperly vouched for the State's witnesses. According to him, the prosecutor engaged in improper argument when he told the jury to find the State's witnesses credible for testifying at trial, despite their fear. Appellant also challenges the prosecutor's statement that "Shree Harrell, terrified to come in here, wouldn't come to court on Monday, showed up on Wednesday." Appellant argues this was improper because the jury was unaware of the State's intended order of witnesses, and they did not know whether one of the witnesses was missing on a particular day. Conversely, appellee notes the jurors were instructed that arguments of counsel are not evidence, and they argue that appellant has made no showing that the jury could not fulfill their role in discerning argument from evidence without undue prejudice to appellant. As a result, appellee argues that appellant cannot establish the result would have been different if defense counsel had objected.

In this case, none of the prosecutor's statements expressed any personal belief or assurance as to the witnesses' credibility. Moreover, as we have noted, the prosecutor's statements were a fair response to defense counsel's criticism regarding the State's lack of witnesses. Finally, as appellee correctly points out, the remarks were unlikely to be prejudicial because the State had a strong case, and the trial court instructed the jury as to their roles as judges of the witnesses' credibility. Accordingly, we find that the prosecutor did not impermissibly vouch for the State's witnesses during closing or rebuttal argument,

and that his remarks were not likely to mislead or influence the jury to the prejudice of appellant.

D. Appellant's Prior Conviction

Appellant argues that the prosecutor "telegraphed" to the jury the nature of his prior conviction during closing argument. Appellant challenges two of the prosecutor's statements. First, the prosecutor told jurors that the trial had given them a glimpse into "a world of fear," and added "[a] world where certain people are prohibited from having firearms and weapons to prevent just this sort of thing." Second, the prosecutor stated:

> Refer to the stipulation that [appellant] is prohibited by law due to his prior conviction of possessing a firearm, possessing a regulated firearm. You are asked to apply your commonsense experiences to a situation like this. We are all prohibited from owning certain things and the, one of those things is drugs. People can't own illegal drugs. So if you get the illegal drugs, what is your intention when you get the illegal drugs? Just to have them? No. To use them, which is illegal. To sell them, which is illegal.

These statements were improper, appellant argues, because they impermissibly suggested that Ward was a violent individual based on his prior conviction, and the State signaled to the jury that the conviction was for selling drugs. Appellant principally relies on *Old Chief v. United States*, where the Supreme Court found that unfair prejudice may exist if the prosecutor generalizes "a defendant's earlier bad act into bad character and taking that as raising the odds that he did the later bad act now charged (or, worse, as calling for preventive conviction even if he should happen to be innocent momentarily)." 519 U.S. 172, 180–81 (1997). Finally, appellant argues that the post-conviction court erred in finding the prosecutor's statements went to the concept of intent, which is an element of first-degree murder, because "[t]he disqualifying conviction would only become relevant

once the jury had determined through other admitted evidence that Ward actually possessed a gun."

Appellee, by contrast, argues that the prosecutor's primary purpose in raising the stipulation was not to highlight the existence of appellant's prior conviction, but rather to establish that Ward knew it was illegal to possess a firearm. In support of this position, appellee notes the prosecutor argued in closing that Ward formed the intent to do something illegal because he planned to use the gun to shoot the victim. Appellee also argues there is no legal basis to establish that counsel should have objected and, as a result, there is no basis to conclude that the prosecutor's remarks prejudiced appellant's case.

Appellant raised a similar argument before the post-conviction court. The court looked at the prosecutor's statements as a whole, and it found that he did not telegraph appellant's prior conviction, reasoning:

> The purpose of these two examples was to convey intent. In the first example, a person who intentionally possesses illegal drugs has formed the intent to do something illegal with them, whether it is selling or using them. In the second example, a person who intentionally possesses an illegal firearm (or a firearm, illegally) has formed the intent to do something with that firearm, namely, to illegally use it to shoot bullets. It is not fair to characterize [the prosecutor's] statement as an attempt to telegraph something to the jury when, taken in context, [the prosecutor's] statement argues that [appellant] had formed intent.

We agree with the post-conviction court. Given Shree Harrell and Kenny Jenkins' testimony that appellant shot the victim with a gun, which was corroborated by two other witnesses, the prosecutor's statements were relevant for the jury to consider whether appellant formulated the intent to commit first-degree murder. Further, *Old Chief v. United States* is distinguishable from this case. In *Old Chief*, the trial court denied the defendant's

requested stipulation, and the government, over renewed objection, "introduced the order of judgment and commitment for Old Chief's prior conviction." 519 U.S. at 177. The Supreme Court held that "a district court abuses its discretion if it spurns such an offer and admits the full record of a prior judgment, when the name or nature of the prior offense raises the risk of a verdict tainted by improper considerations, and when the purpose of the evidence is solely to prove the element of prior conviction." *Id.* at 174. Here, by contrast, the trial court accepted appellant's stipulation; the prosecutor referred generally to possessing illegal drugs; and the prosecutor's statements were offered to prove intent, rather than the element of appellant's prior conviction. The post-conviction court thus did not err in denying relief on this claim.

II. Failure to Request a Limiting Instruction

The final issue for review is whether defense counsel's failure to request an instruction that limited the jury's consideration of appellant's prior conviction constitutes reversible error. Appellant argues that defense counsel should have requested an instruction stating that Ward's prior conviction could only be considered in the context of the firearm charges, or advising that the conviction could not be used as evidence that Ward had a propensity to commit the crimes charged. Appellant cites *Old Chief* for the proposition that, given boundless discretion, there exists a significant risk that the jury could have taken his prior conviction as "raising the odds" that he committed the crimes for which he was convicted. Finally, appellant argues that the post-conviction court erred by failing to address his argument that the jury was improperly allowed to consider his prior conviction as propensity evidence.

Conversely, appellee notes that the existence of the prior conviction was already known to the jury, and given the strength of the State's case, a specific instruction that the jury not consider appellant's prior conviction for other purposes could not affect the outcome of the case. Appellee also argues that unlike *Old Chief*, the trial court allowed the parties to stipulate to appellant's prior conviction. As a result, appellant was not prejudiced by defense counsel's failure to request a limiting instruction.

We agree with appellee. As indicated above, this case is distinguishable from *Old Chief*, where the trial court denied the defendant's stipulation, and the government "introduced the order of judgment and commitment for Old Chief's prior conviction." 519 U.S. at 177. Here, the risk that the jury generalized appellant's prior conviction is significantly reduced because, unlike *Old Chief*, the trial court admitted appellant's stipulation into evidence. Moreover, it is noteworthy that Old Chief's prior conviction was assault causing serious bodily injury, and the charges he faced at trial included assault with a dangerous weapon and using a firearm in relation to a crime of violence. *Id.* at 174–75. Appellant's prior conviction, on the other hand, involved the sale of drugs, and the underlying conviction was second-degree murder. Finally, based on the strength of the State's case, we cannot say that appellant was prejudiced by his attorney's failure to request a limiting instruction.

In sum, appellant has failed to establish "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Accordingly, it cannot be said that appellant's convictions "resulted from a breakdown in the adversary process that renders the result

unreliable," *id.* at 687, and we see no abuse of discretion in the court's denial of his petition for post-conviction relief.

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