Circuit Court for Prince George's County
Case No. CT901841A

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 426

September Term, 2018

STATE OF MARYLAND

v.

KEVIN STEWART

Fader, C.J.,
Meredith,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Raker, J.

Filed: July 26, 2019

In this case, the State of Maryland appeals the Circuit Court for Prince George's County's grant of a new trial in a post-conviction proceeding. Appellee Kevin Stewart was convicted on September 26, 1991 by a jury in the Circuit Court for Prince George's County of rape, kidnapping, and use of a handgun in the commission of a felony. On March 16, 2016, the circuit court granted him a new trial in post-conviction proceedings on the ground that defense counsel was ineffective in failing to object to the prosecutor's closing argument. The State appealed the grant of the petition, and we remanded the case to the circuit court for it to consider each ground raised by appellant. *State v. Stewart*, No. 359, Sept. Term 2016 (filed May 18, 2017). The State appeals the remand court's grant of a new trial (pursuant to Maryland Code, Criminal Procedure Article, § 7-109(a)) and presents the following question for our review:

> "Did the postconviction court err in finding that Stewart received ineffective assistance of counsel, and in ordering a new trial?"

We shall answer that question in the affirmative and shall reverse.

I.

We set forth the following facts elicited at trial. On the night of August 31, 1990, T.H.[1] was in the company of appellee and two other men. She had known appellee for approximately two years. After visiting a restaurant, appellee, the other men, and T.H. drove to a house in Washington, D.C. The three men asked T.H. to come inside with them

[1] As is our custom in sexual assault cases, we shall refer to the victim, T.H., by her initials.

rather than waiting outside in the car. She did so only at their urging. When she entered the house, two of the men brandished guns, and one told her to remove her clothes. When she refused, one of the men removed her clothes. The three men took turns raping her on a bed while pointing the gun at her. Appellee and one other man wore condoms. One of the men then went through her pocketbook and recorded her personal information, threatening T.H. and her mother's lives if she told anyone about the rapes.

After raping her, the men drove her to her home in Takoma Park, Maryland. They forced her to take a shower, again at gunpoint. Appellee suggested that they shoot T.H., then appellee and another man each raped her again while holding a handgun to her head. Appellee wore a condom. Before leaving to drive T.H. to work, they again threatened her if she told anyone about the rapes. While driving her to work, one man provided her with their pager numbers and suggested that she work for them as a prostitute or drug smuggler.

After work, T.H. reported the rape. The police tested appellee's used condom and T.H.'s clothing and bed linens for semen. The test results for the semen were inconclusive as to appellee but matched one of the other men. T.H. testified that appellee had an "obvious scar" on his chest, and appellee displayed the scar for the jury. As the parties acknowledged in their opening statements and closing arguments at trial, the case turned on the credibility of the victim because her testimony contradicted appellee's defense that he was present in the home but did not see or participate in the rape.

In closing argument, the prosecutor made statements which appellee alleges fall roughly into three categories of impermissible argument: vouching for a witness, burden-

shifting, and use of "Golden Rule" argument. As to witness vouching, the prosecutor argued as follows:

> "[T.H.] got up there and told you everything, told it absolutely like it is. Actually, from my standpoint, she was a dream witness. I did not have to lead her. I asked the general who, what, where, why when questions. I did not have to suggest an answer in my questions. I asked her a couple of questions and she took the ball on her own and told you detail by detail what happened . . . Ladies and gentlemen of the jury, she is traumatized. She is still traumatized over a year after this incident happened. There is no one who can make up a story like that. She is telling the God's honest truth.
>
> Her testimony isn't all you have in this case. Her testimony is the truth, but it is not the only evidence . . . Ladies and gentlemen, the bottom line is that [T.H.] was telling the truth. What will happen, well, [T.H.] was telling the truth and this is a search for the truth."

He then made the following statements regarding the evidence appellee presented, allegedly shifting the burden of proof to appellee:

> "[Defense counsel] couldn't tell you—he even admitted his client couldn't tell you why [T.H.] is saying this. They absolutely offered you no reason why [T.H.] would come in here, no motive . . . If there were a financial motive offered, some big dispute they had years ago, yes, that can be a legitimate argument, but there's absolutely nothing . . . What does [defense counsel] offer you? Was [defense counsel] offering you something? Was he telling you something that was a search for the truth? Was he helping you and aiding you in your search for the truth? He just says we don't have to do anything. We have no burden. We have no obligation. We don't have to show a motive. That's it."

As to the alleged Golden Rule violation, he argued as follows:

> "Imagine this happening to you and coming in and going through the whole gamut of the criminal justice system and the police system, to interviews with police officers on the scene,

> the interviews at the hospital, interviews with the detectives, back and forth, calls, interviews with friends, family, what happened, interviews with the prosecutor, interviews with officers again, coming into court, bearing all of this, the worst possible experience that can happen to you. Imagine you turning to complete strangers except for your time here on jury duty and revealing the worst possible sexual experience, the very intimate things you ever had? Magnify that by having to reveal it over, and over, and over, and over again and then come into court under penalty of perjury in a formality, most formal of proceedings in front of a judge, on the record under oath and telling you face up, looking you right in the eye, 'This really happened to me.' Imagine all of that, and then you come and you put your stamp, denied."

He concluded his argument by claiming that the police would not have dedicated resources to investigating T.H.'s claims if they did not believe her. Appellee's trial counsel objected to that statement, and the trial court overruled the objection.

The jury convicted appellee of two counts of first degree rape, two counts of second degree rape, and use of a handgun in the commission of a felony. The court merged his sentences for first and second degree rape and sentenced him to a term of incarceration of sixty years. This Court affirmed his conviction on direct appeal in 1992. *Stewart v. State*, No. 1894, Sept. Term 1991 (filed September 29, 1992).

In 2010, appellee filed a petition for post-conviction relief, and the post-conviction court held a hearing in May 2015. In March 2016,[2] the circuit court issued a memorandum opinion and order setting out appellee's eight allegations of error, but the court ruled only on the first issue—whether appellee's trial counsel was ineffective in failing to object to

[2] The record does not reflect the reason for the delay.

the witness vouching in the prosecutor's closing argument. The court granted appellee a new trial on that basis. The State appealed to this Court. Noting that the post-conviction court failed to address and rule on each ground raised by appellee, we declined to address the merits of the issue raised by the State in the appeal and instead remanded the case to the post-conviction court for that court to address and rule on each ground presented by appellee. *State v. Stewart*, No. 359, Sept. Term 2016 (filed May 18, 2017).

On remand, the post-conviction court addressed nine issues:

1. Whether Trial Counsel rendered ineffective assistance of counsel by failing to object to the prosecutor's alleged impermissible vouching;
2. Whether Trial Counsel rendered ineffective assistance of counsel by defining reasonable doubt in such a fashion as to allegedly usurp the court's function and lower the prosecutor's burden of proof;
3. Whether Trial Counsel rendered ineffective assistance of counsel by failing to object to the prosecutor's alleged inflammation of the jury's passion;
4. Whether Trial Counsel rendered ineffective assistance of counsel by failing to object when the prosecutor argued in his closing that Petitioner had not provided any evidence;
5. Whether Trial Counsel rendered ineffective assistance of counsel by failing to admit into evidence the prior statements of Petitioner and the victim;
6. Whether Trial Counsel rendered ineffective assistance of counsel by failing to secure Petitioner's right of confrontation of the DNA and FBI reporters;
7. Whether the cumulative effect of Trial Counsel's errors rendered his assistance ineffective rendered his assistance ineffective;
8. Whether the State manufactured and presented false evidence to the Court; and
9. Whether the State deprived the Petitioner of due process and a fair trial by either suborning, knowingly using, or failing to correct perjured testimony.

Defense counsel testified at the post-conviction hearing as a witness called by the State. Importantly, appellee's trial occurred in 1991; the post-conviction hearing was held on May 3, 2015. Counsel testified as to why he did not object at trial, stating as follows:

> "Well, I have reviewed the closing arguments in the last day or so in preparation for this hearing. I saw what [the prosecutor] argued. It did not appear to me when I reviewed it recently, and I am assuming I had the same mindset at the trial, that there was vouching. [The prosecutor's argument] appeared to me to be fair argument based upon inferences drawn from the evidence.
>
> [The State's Attorney] asked the jury to believe the State's version of what the complainant said. And the manner in which he did it, I did not—I do not believe, looking back on it, constituted improper vouching and, therefore, I assume I had the same mindset at the time. That's why I would not have objected."

The court found again that appellee's trial counsel was deficient for failing to object to the prosecutor's vouching and that counsel's deficient performance was ineffective assistance warranting a new trial. The court found also that the other eight grounds did not entitle appellee to post-conviction relief. The State filed this timely appeal.

II.

Before this Court, the State argues that appellee was not denied effective assistance of counsel because the prosecutor did not vouch for the witness in closing argument, and hence, counsel's failure to object to the prosecutor's argument was not deficient performance. The State contends that the prosecutor's arguments regarding T.H.'s truthfulness were based upon her demeanor and testimony at trial and that they were proper

rhetoric rather than improper vouching. Because the statements were not vouching and, in the alternative, were not substantial enough to mislead the jury, the State argues that appellee's trial counsel was not deficient in failing to object.

Appellee supports the post-conviction court's finding that he was denied effective assistance of counsel when counsel failed to object to the State's argument about the victim's veracity. He argues that the prosecutor's repeated statements that T.H.'s testimony was truthful constituted impermissible witness vouching. He emphasizes that the prosecutor repeated the argument, that T.H. was the State's key witness, and that the trial judge did not remediate the vouching error with any curative instruction. He argues that his trial counsel's failure to object to such improper and harmful closing argument was necessarily defective performance. He notes that there is no evidence that his trial counsel made a tactical or strategic decision—trial counsel testified in post-conviction proceedings that he did not think the arguments constituted vouching. Turning to the prejudice prong of ineffective assistance, he emphasizes that T.H.'s credibility was the core of the State's case and that the prosecutor's arguments on the issue were a "prominent" part of closing argument. He concludes that for those reasons, his trial counsel's failure to object to the arguments prejudiced him and entitles him to a new trial.

Appellee presents three alternative grounds as a basis for this Court to affirm the post-conviction court. He asserts that the prosecutor's argument that he failed to produce evidence of T.H's motive for lying shifted the burden of production from the State to him. Such arguments are improper, and appellee argues that his trial counsel's failure to object

was deficient representation. Because the burden of proof is critical to the fair trial of a criminal defendant, he concludes that the deficient performance prejudiced him.

Appellee argues in the alternative that we should affirm the post-conviction court, claiming that the prosecutor's closing argument was designed to inflame the passions of the jury. He argues that the prosecutor made a prohibited "Golden Rule" argument when he asked the jury to place itself in the shoes of the victim and that the "Golden Rule" argument was raised below, as it is a subset of arguments appealing to the passions of the jury. He asserts that by asking the jury to put itself in the victim's shoes, the prosecutor made an impermissible argument that sought a conviction based upon the jury's sympathy for T.H. rather than a reasoned consideration of the evidence. Because the argument was an extended and "extreme" version of a Golden Rule argument that he claims warranted reversal, appellee asserts that it was objectively unreasonable for his trial counsel to fail to object to it. For the same reasons, he concludes that he was prejudiced—there is a reasonable probability of a different outcome had counsel functioned effectively. Finally, appellee argues that the cumulative effect of his counsel's failures to object denied him effective assistance of counsel for the reasons set out above.

III.

Before we address appellee's individual claims of ineffective assistance of counsel based upon his attorney's failure to object to the prosecutor's closing argument, we discuss the prevailing jurisprudence on post-conviction relief for ineffective assistance of counsel.

In *State v. Smith*, 223 Md. App. 16 (2015), this Court set forth the standard of review from a grant of post-conviction relief based upon ineffective assistance of counsel claims:

> "The Sixth Amendment to the United States Constitution guarantees all criminal defendants the right to the assistance of counsel. Both the United States Supreme Court and the Court of Appeals have recognized that 'the right to counsel is the right to the effective assistance of counsel.' In order to prevail on a claim of ineffective assistance of counsel, a defendant must establish that trial counsel's performance was constitutionally deficient and that the deficient performance prejudiced the defense.
>
> 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.' Our review of counsel's performance is 'highly deferential.' We look to whether counsel's 'representation fell below an objective standard of reasonableness.' We assess reasonableness as of 'the time of counsel's conduct.'
>
> 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.' 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.'
>
> Determinations by the post-conviction court regarding ineffective assistance of counsel claims are mixed questions of law and fact. We will not disturb the factual findings of the post-conviction court unless they are clearly erroneous. We will make our own independent analysis, however, based on our own judgment and application of the law to the facts, of whether the State violated a Sixth Amendment right. 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. at 26–27 (internal citations omitted). Appellee must "overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Bell v. Cone*, 535 U.S. 685, 698 (2002) (internal citation and quotations omitted). Thus, a court must "affirmatively entertain the range of possible reasons [the defendant]'s counsel may have had for proceeding as they did[.]" *Cullen v. Pinholster*, 563 U.S. 170, 196 (2011).

In applying the high standard for deficient performance, courts must remember that the proper inquiry is "into the objective reasonableness of counsel's performance, *not counsel's subjective state of mind."* *Harrington v. Richter*, 562 U.S. 86, 110 (2011) (emphasis added); *State v. Syed*, 463 Md. 60, 119 (2019). As Judge Shirley Watts pointed out in her concurring opinion in *Syed*, 463 Md. at 119, "the question is not what [defense counsel]'s rationale *was*, but rather what the rationale of a *reasonable lawyer in [appellee's] trial counsel's position could* have been." (emphasis added).

IV.

Appellee's arguments to support his claims of ineffective assistance of counsel are based on his contention that his defense counsel's failure to object to the prosecutor's closing arguments denied him effective assistance of counsel. The prejudice he alleges is that had counsel objected, the issues would have been preserved for consideration on direct appeal, creating a substantial possibility that his conviction would have been reversed on those grounds. At his post-conviction hearing, appellee testified to and raised three grounds to support those contentions: (1) that the prosecutor vouched for the credibility of

the victim; (2) that the prosecutor argued improperly that the defense failed to present evidence; and (3) that the prosecutor's argument meant to inflame the passion of the jury.

Whether counsel decides to object to inadmissible evidence is a classic tactical decision, as counsel may wish to avoid highlighting for the jury prejudicial evidence or argument. Thus, failure to object rarely establishes constitutionally ineffective legal representation. *E.g., Oken v. State*, 343 Md. 256, 295 (1996); *State v. Purvey*, 129 Md. App. 1, 20–21 (1999); *see also Gordon v. United States*, 518 F.3d 1291, 1300 (11th Cir. 2008); *Benefield v. State*, 945 N.E.2d 791, 799 (Ind. 2011); *Sweet v. State*, 602 S.E.2d 603, 609 (Ga. 2004); *People v. Anzalone*, 45 Cal. Rptr. 3d 876, 886–87 (Cal. Ct. App. 2006) (stating that in litigation, there are no absolute rules as to tactical choices, particularly whether to object, and lawyers are not required to make every conceivable objection).

In the words of the Supreme Court of Georgia:

> "The next question is whether Braithwaite's trial counsel was deficient in not objecting to this improper argument. As trial counsel testified at the motion for new trial hearing, he recognized the impropriety of the State's argument, but decided that objecting and drawing attention to the argument would be worse for his client than ignoring it and hoping the jury would too. With the benefit of hindsight, one can always argue that trial counsel's failure to object was something that no reasonable trial lawyer would do. Our task, however, is to determine whether, in the throes of closing argument, no reasonable attorney, listening to the inflection of the speaker's voice and judging the jurors' reactions, would choose to remain silent instead of objecting and calling attention to the improper argument."

Braithwaite v. State, 572 S.E.2d 612, 615–16 (Ga. 2002). At minimum, a defendant arguing ineffective assistance of counsel from the failure to object must prove that the

objection would have been sustained. *Smith v. State*, 765 N.E.2d 578, 585 (Ind. 2002).

Attorneys are afforded great leeway in presenting closing arguments to the jury.[3] *Pickett v. State*, 222 Md. App. 322, 329 (2015). Counsel may legitimately discuss the evidence and reasonable inferences which may be fairly drawn from the facts in evidence, and such comments are afforded a wide range. *Id.* at 330. This range in not boundless, however. "Counsel should not be permitted by the court, over proper objection, to state and comment upon facts not in evidence or to state what he could have proven." *Id.* On direct appeal, reversal is required only where the prosecutor's arguments were likely to have misled or influenced the jury to the prejudice of the accused. *State v. Newton*, 230 Md. App. 241, 254 (2016). In *Spain v. State*, 386 Md. 145 (2005), the Court of Appeals set out factors on direct appeal for reviewing courts to consider, stating as follows:

> "When assessing whether reversible error occurs when improper statements are made during closing argument, a reviewing court may consider several factors, including the severity of the remarks, the measures taken to cure any potential prejudice, and the weight of the evidence against the accused."

Id. at 159 (internal citations omitted).

We begin our analysis with the prosecutor's alleged vouching arguments. We agree

[3] While counsel is afforded great leeway in closing arguments, an attorney may not express a personal opinion as to the credibility of a witness or ask the jury to place itself in the shoes of the victim. Md. Rule 19-303.4(e) (stating that an attorney shall not "in trial . . . assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused"). Our holding here should not be interpreted as endorsing the arguments made in this case.

with the State and hold that the prosecutor did not vouch for T.H. Therefore, appellee's trial counsel was not deficient in failing to object.

Vouching occurs when a prosecutor makes personal assurances of the witness's veracity or suggests that information from outside the trial supports the witness's testimony. *United States v. Young*, 470 U.S. 1, 17, 19 (1985); *Spain*, 386 Md. at 153. When a prosecutor "vouches" for the credibility of a witness, he or she infringes upon the defendant's right to a fair trial. *Spain*, 386 Md. at 153. Such prosecutorial commentary is impermissible because it can cause the jury to substitute the prosecutor's judgment for its own and "jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury." *Young*, 470 U.S. at 18–19. Nevertheless, "it is common and permissible generally for the prosecutor and defense counsel to comment on . . . the credibility of the witnesses presented." *Spain*, 386 Md. at 154.

In the instant case, the prosecutor assured the jury repeatedly that T.H. testified truthfully. Critically, though, he based his assurances on T.H.'s testimony at trial.[4] At the post-conviction hearing, defense counsel, one of the most experienced and well-respected defense attorneys in this State, testified that to him, the prosecutor's argument was "fair argument based upon inferences drawn from the evidence." He explained that, in his view, an objective statement by a prosecutor that a witness is telling the truth is "a statement

[4] As appellee acknowledges, appellee did not raise on direct appeal or in post-conviction the prosecutor's statements that the police believed the victim and acted on that basis. His counsel objected at trial, and the trial court overruled the objection. Because appellee's counsel objected to those statements, they do not affect our analysis.

made in the context of the overall argument like any lawyer makes when asserting a position." We agree and hold that the comments were not witness vouching.

Statements that T.H. "got up there and told you everything, told it absolutely like it is" and "[h]er testimony is the truth" did not include the prosecutor's explicit, personal endorsement of the testimony. They focused on T.H.'s testimony, not outside information. The comments explaining that T.H. was "a dream witness" arguably implied that in the prosecutor's experience outside the trial, T.H. was an unusually good witness. But the comments focused on the way T.H. testified, explaining that "she took the ball on her own and told you detail by detail what happened." Because the prosecutor's comments were not vouching, trial counsel performed reasonably when he did not object. We hold that the post-conviction court erred in granting a new trial based on defense counsel's failure to object to the prosecutor's alleged vouching in closing arguments.

Appellee argues in the alternative that we may affirm the post-conviction court's judgment based on defense counsel's failure to object to the prosecutor's "burden-shifting" argument. At trial, the prosecutor argued as follows:

> "[Defense could not tell you—he even admitted his client could not tell you why [the victim] is saying this. They offered you no reason why she would come in here, no motive.
>
> ***
>
> [Defendant] kept on saying something [is not] right. Something [is not] right. Defense has no burden or no obligation. What does [defense counsel] offer you? Was [defense counsel] offering you something? Was he telling you something that was a search for the truth? Was he helping you and aiding you in your search for the truth? He just [said] we

> do not have to do anything. We have no burden, we have no obligation. We do not have to show motive. That is it."

The post-conviction court interpreted appellee to be complaining that the prosecutor's argument commented upon appellee's right to remain silent. The court rejected the argument. It concluded that defense counsel's failure to object was not ineffective assistance of counsel because the prosecutor merely commented on the state of the evidence at the end of the trial.

We agree with the determination of the court below. The State argued to the jury that appellant did not introduce evidence of a motive for T.H. to fabricate her testimony. The prosecutor did not comment upon appellee's right to remain silent in making that argument.

As to appellee's new argument on appeal that by commenting on the lack of motive, the State shifted the burden of proof to the defendant, we disagree. This argument was not raised below; it is a completely new argument, and thus, not properly before us. *Syed*, 463 Md. at 102–03. In any case, even if it were properly before us, we would find no deficient performance by defense counsel and hence, no ineffective assistance of counsel. There was no argument that the State need not prove each element of the crime beyond a reasonable doubt. The prosecutor was merely addressing defense counsel's remarks and was entitled to argue to the jury that no motive to lie was shown. Appellee's defense counsel testified at the post-conviction hearing that he thought the argument was a fair comment on the evidence rather than a shifting of the burden of proof. We agree—counsel was not deficient in failing to object to this part of the State's closing argument.

We turn now to appellee's final argument—that the prosecutor made a prohibited "Golden Rule" argument by asking the jurors to place themselves in the victim's shoes. *See Lawson v. State*, 389 Md. 570, 594 (2005). Appellee argued below that the prosecutor inflamed unfairly the passion of the jury with his closing argument. Asking us to reach the Golden Rule issue on appeal, he argues here that the Golden Rule is simply a sub-set of the proscription against appeals to the passions of the jury and that the issue was therefore preserved. Golden Rule arguments may be a sub-set of appealing to the passion of the jury in some cases. But appellee made absolutely no argument before the post-conviction court that the prosecutor asked the jurors to put themselves in the shoes of the victim.

When appellee testified at the hearing below, he explained his objections as follows:

> "How he just stood up for her, you know, like I was lying and she was telling the truth, you know, because I guess they've been talking for a whole year and he's basically—he was basically telling the jury that, you know, that she remembered it like it was yesterday, and whatever my lawyer said at the time, he is basically telling a lie, you know. Don't listen to whatever he's saying because he ain't putting up no defense. He don't have nothing really to say about anything.
>
> I was basically concerned about that at the time. But I really, you know, being as though I'm new to the law, I really didn't really understand, you know, I just thought it was wrong. Just how he stood up for her without even—just taking her word. She could have just said anything, and would have just took her word for it."

He never mentioned the Golden Rule issue and did not present to the post-conviction court the complaint he raises here. The petitioner has the burden of proving ineffective assistance of counsel, *Bowers v. State*, 320 Md. 416, 424 (1990), and he could hardly do so without discussing the alleged deficiency. Failure to present evidence at a hearing in support of

factual claims in a post-conviction motion constitutes abandonment of that claim. *Syed*, 463 Md. at 102–03. Even if appellee had preserved the issue, we could not say that any reasonable lawyer would necessarily have objected to the Golden Rule argument. Like our sister jurisdictions, we are cognizant that attorneys have tactical reasons for not objecting and calling attention to opposing counsel's arguments.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY REVERSED. COSTS TO BE PAID BY APPELLEE.