Circuit Court for Wicomico County
Case No. 22-K-15-000454

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 584

September Term, 2021

HARRY SOLOMON JONES

v.

STATE OF MARYLAND

Berger,
Friedman,
Beachley,

JJ.

Opinion by Friedman, J.

Filed: December 28, 2021

In 2016, a jury in the Circuit Court for Wicomico County convicted Harry Jones of sex offenses, assault, false imprisonment, and other related charges. Jones noted an appeal to this Court, and we affirmed in an unreported opinion. *Jones v. State*, No. 325, Sept. Term 2016, Slip Op. at 12 (unreported opinion) (filed Aug. 3, 2017). Jones thereafter filed a petition for post-conviction relief on the basis of ineffective assistance of counsel. Following a hearing, the post-conviction court denied Jones's petition. Jones then filed, in this Court, an application for leave to appeal the circuit court's denial of his post-conviction petition. We granted Jones's application, and he proceeded with the instant appeal, in which he presents a single question for our review:[1]

> Did the post-conviction court err in denying the petition for post-conviction relief?

For the reasons that follow, we hold that the post-conviction court did not err in denying Jones's petition. We, therefore, affirm the judgment of the circuit court.

BACKGROUND

At trial, the victim, M.S., testified that she went to Jones's home in Salisbury on June 13, 2015. M.S.'s daughter, D.S., had been in a relationship with Jones that had recently ended, and M.S. testified that she went to Jones's house "to see how he was doing." M.S. testified that, when she entered the home, Jones struck her in the head with a crowbar, causing her to lose consciousness. When she awoke, M.S. discovered that her arms and ankles were secured with zip ties. Jones then forced his penis into M.S.'s mouth.

[1] The decision by the panel to grant leave to appeal and transfer a case to our regular appellate docket is not a decision on the merits and does not bind the merits panel.

Eventually, Jones took M.S. to the bathroom, placed her in the bathtub, and put a sock in her mouth secured with duct tape. Jones also used wire hangers to further secure M.S.'s restraints. Over the next several days, Jones held M.S. bound and captive in his home and forced her to engage in various sexual acts. M.S. testified that Jones also repeatedly asked for information about her daughter, such as where her daughter lived and what kind of car her daughter's current boyfriend owned.

M.S. testified that, at some point on June 16, Jones placed her in the bathtub and then left the home. Shortly thereafter, M.S. managed to get out of the bathtub, locate some wire cutters, and remove her restraints. M.S. then fled the home and tried to find help by flagging down passing vehicles.

Two witnesses testified that, at some time between 4:00 p.m. and 5:00 p.m. on June 16, they observed M.S. on the side of the road with rope and zip ties around her neck and wrists. The two witnesses offered assistance, and one of the witnesses eventually called 9-1-1. At approximately 5:30 p.m., a paramedic arrived on the scene, and M.S. was taken to the hospital for treatment.

The following morning, the police executed a search warrant at Jones's residence and discovered multiple zip ties, various kinds and lengths of rope, wire hangers fashioned into ties, duct tape, and a sock attached to a piece of duct tape. The police later took a saliva sample from the sock and matched it to M.S.'s DNA profile. The police also took DNA samples from M.S.'s neck and clothes and found sperm and DNA that matched Jones's DNA profile.

Jones testified in his own defense, telling an entirely different story. According to Jones, M.S. texted him on June 13 and asked if he would "bring her some pills." The two met and went back to Jones's house, where, according to Jones, M.S. used drugs and then initiated sexual activities, which continued throughout the evening. Jones testified that, during the sexual activities, M.S. tied them both up with zip ties, which Jones later cut off using wire cutters. The following morning, Jones and M.S. left the home and got into Jones's truck so that Jones could take M.S. to a shelter. Jones testified that, during the trip, he and M.S. got into an argument about some pills that Jones claimed were missing from his home. At one point during the argument, M.S. threatened to accuse Jones of "the same thing she [was] accusing [him] of [at trial]." Jones testified that he dropped M.S. off at the shelter and that he did not see her again after that. Jones denied tying M.S. with straps, forcing her to do anything, or hitting her with a crowbar.

I. PERTINENT TESTIMONY AND ARGUMENT

During trial, M.S.'s daughter, D.S., testified that she and Jones had been in a sexual relationship that ended approximately two months prior to the incident. D.S. intimated that Jones had attacked her mother because D.S. had ended the relationship. D.S. testified that she did not see or hear from her mother between June 13 and June 16, 2015. When she visited her mother at the hospital on June 16, her mother told her about the attack.

As is particularly relevant to this appeal, D.S. testified that she was the first person her mother called after "all [of] this happened." D.S. testified that, during the call, M.S. indicated that she was in front of Jones's house waiting on an ambulance. D.S. testified

that right after she ended her conversation with her mother, she sent a text message to Jones, accusing him of taking her mother hostage. When asked if she texted Jones "early in the afternoon," D.S. agreed that she had and that it might have been around one o'clock, but that she did not remember the exact time.

Later, during closing argument, the State discussed the timing of the phone call between D.S. and her mother:

> The defense attorney questioned [D.S.] [She] was answering but she thought everything occurred a lot earlier than it did. She said Mom called me earlier, I went to the hospital earlier, … the important fact is, [D.S.] didn't recognize the phone number that came in, she didn't recognize it because it was one of the phones of the two nice ladies that were helping [M.S.] on the side of the road.

Then, during the defense's closing argument, defense counsel discussed the timing of the text message that D.S. sent to Jones following her phone conversation with her mother:

> Text messages, what do we know about the text message? … [Y]ou heard [D.S.] testify that early Tuesday afternoon, she wasn't sure the exact time, maybe 1:00, but she wasn't sure, but it was early Tuesday afternoon, that she had sent a text message to him. You had my mom hostage all this time, you dumb bastard, and some other things. But that was before, and she's claiming that she's locked up in [Jones's] bathtub and he said she wasn't even there, that was before [M.S.] said she had an opportunity to even call her. Sounds to me like somebody made a call to the daughter, sounds to me like [M.S.] called the daughter or texted the daughter, we don't have any texts, but it sounds like she called her earlier.

During rebuttal argument, the State responded on this point:

> [D.S.'s] testimony when she was on the stand was that everything happened earlier. … [One witness's] testimony was that this happened around four or five o'clock.
>
> Another witness testified, … and your recollection controls, but … she said 4:30. The professional witnesses that came in talked about when they arrived, when the dispatch call came out, 5:35, 5:24, that just goes to show you, as human beings we all recollect things differently depending on what's going on in our lives. And the standard is not a reasonable standard to hold [D.S.] to. It's not a reasonable standard to make [M.S.], who has been hit with a crowbar, who's been strapped in a tub and through all of this and running down the road, I mean, this was not an Oscar-winning performance that fooled Masie and all these other people. She was really there. Those are real injuries that you saw on the screen. To expect that she would recall everything, months after the event happened, as traumatic as it was, is completely unreasonable. Of course there's going to be inconsistencies.

II. POST-CONVICTION PROCEEDINGS

As noted, Jones was ultimately convicted. Jones thereafter filed a petition for post-conviction relief, in which he argued, among other things, that trial counsel was ineffective in failing to retain an expert witness to testify about the timing of the text message that D.S. sent to Jones following the phone conversation that D.S. had with her mother, M.S., on June 16. According to Jones, in the days following M.S.'s purported escape from Jones's home, the police compiled a "cell phone extraction report" that showed the timing and content of every text message sent to and from Jones's cell phone during the relevant period. The cell phone extraction report showed that, on June 16, D.S. sent a text message to Jones that read: "You had my mom hostage all this time you dumb bastard." Jones claimed that the report also showed that the text message was sent at 1:43

p.m., several hours *before* M.S. purportedly escaped from her confinement in Jones's home. Jones argued that, had an expert been called to testify about the report, such testimony would have shown that M.S. was "not telling the truth on a pretty significant aspect of her story" and was "perhaps lying about the entire thing."

At his post-conviction hearing, Jones called an expert in cell phone technology and forensics. Jones's expert testified that, ordinarily, text messages are stored in cell phones based on a "global time" known as Coordinated Universal Time ("UTC time"). According to the expert, when a cell phone extraction report is compiled, the relevant data can be kept in UTC time or converted to the pertinent time zone. If the extraction report is compiled using UTC time, then that time would need to be converted to the relevant time zone to determine when a particular text message was sent or received.

Jones's expert testified that, in Jones's case, the original cell phone extraction report had been converted to the relevant time zone, Eastern Time. According to that report, the text message from D.S. was received by Jones's phone at 1:43 p.m. on June 16. The expert also testified that he completed his own extraction of Jones's phone, which verified that the text message was sent at 1:43 p.m. Eastern Time.

At the post-conviction hearing, the State also called an expert witness. The State's expert testified that he analyzed the data extracted from Jones's cell phone and compiled a report from the extraction. According to his report, the State's expert testified that the text was sent at 5:43 p.m. The State later conceded, however, that its expert was incorrect and that the text was sent at 1:43 p.m.

Trial counsel also testified at the post-conviction hearing. During that testimony, Jones showed trial counsel a page taken from the cell phone extraction report, obtained from counsel's own files. The document showed that D.S.'s text had been received by Jones's phone at 1:43 p.m. on June 16. On that same page, there was a handwritten note that read: "[M.S.'s] daughter txt'd [Defendant] @ 1:43 pm on 6/16 (Tues) & appears to know she was kidnapped several hours b4 police." Trial counsel did not know who had written the note and could not remember whether she knew about the timing of the text message prior to trial. Trial counsel admitted that she did not consider consulting with an expert to verify the timing of the text message. When asked whether it would have helped Jones's case to be able to show definitively that the text was sent at 1:43 p.m., trial counsel agreed that it supported the defense's theory that M.S. had concocted the story about the assault. She also recalled, however, that D.S. testified to that fact during cross-examination and that the defense's theory was less about the text message and more about M.S.'s motive to lie.

In the end, the post-conviction court denied Jones's post-conviction petition and found as follows:

> The question is what deficient act did trial counsel commit in not having an expert in cell phone technology testify at trial regarding the timestamp of the text message received by [Jones]? [Jones] argues that had the expert testified, the jury would have been convinced that [D.S.] knew of her mother's captivity prior to her escape, which would have indicated that the story was fabricated.
>
> At trial, trial counsel was able to elicit testimony from [D.S.] that her recollection of the time she sent the text message

> to [Jones] was unclear, showing the discrepancy [Jones] wished to elicit from the expert. Furthermore, in closing arguments trial counsel shed light on the discrepancy between when [D.S.] stated she had sent the text message and when M.S. was found.
>
> Simply put, the information [Jones] seeks from the expert testimony regarding the timestamp of the text message was before the trier of fact and as such an expert would not have been necessary. Further, trial counsel was able to elicit the discrepancy during [D.S.'s] cross examination and highlight the discrepancy during closing argument. Not having an expert witness in cell phone technology was not the type of deficient act as described in *Strickland*, because looking at a timestamp on a text message is not outside of the purview of a layperson's understanding and as such this allegation of error must fail.

Jones thereafter filed an application for leave to appeal the denial of his post-conviction petition, which this Court granted. This timely appeal followed.

DISCUSSION

Jones contends that the post-conviction court erred in finding that trial counsel's failure to call an expert witness to testify about the timing of D.S.'s text message did not constitute ineffective assistance of counsel. Jones argues that trial counsel's performance was deficient because, had she consulted with an expert such as the one who testified at the post-conviction hearing, she "would have been able to prove that the message was sent [and, thus, that M.S. called D.S.] four hours before [M.S.'s] alleged escape from captivity." Jones argues further that trial counsel's deficient performance caused prejudice because, even though D.S. testified at trial that she sent the text around 1:00 p.m., she also stated that she was unsure of the actual time, which likely caused doubt in the minds of the jurors

as to when the text was actually sent. Jones maintains that the State ultimately was "able to eliminate any doubt in the jury's mind" by arguing during closing argument that D.S. was mistaken in her assertion that the text was sent around 1:00 p.m. Jones contends that had trial counsel established, concretely, that the text was sent at 1:43 p.m., then that fact would have directly contradicted M.S.'s testimony as to the timing of her escape and, thus, would have undermined her credibility.

The State argues that the post-conviction court correctly denied Jones's petition because the cell phone extraction report was never submitted to the jury and, thus, there was no need for expert witness testimony. The State contends further that, even if the report had been submitted to the jury, expert witness testimony was not necessary because understanding the timestamp on the report was within the common-sense understanding of the jury. The State also argues that it was reasonable trial strategy for trial counsel not to call an expert given that the information Jones sought to illicit—that D.S. sent the text message several hours before M.S. claimed to have escaped from captivity—was already before the jury in the form of D.S.'s testimony. For that same reason, the State argues, trial counsel's failure to call an expert witness did not prejudice Jones.

I. STANDARD OF REVIEW

"The standard of review of the lower court's determinations regarding issues of effective assistance of counsel is a mixed question of law and fact." *Barber v. State*, 231 Md. App. 490, 517 (2017) (citation and quotation omitted). "The factual findings of the post-conviction court are reviewed for clear error." *Wallace v. State*, 475 Md. 639, 653

(2021) (citation and quotation omitted). "But, a reviewing court must make an independent analysis to determine the ultimate mixed question of law and fact, namely, was there a violation of a constitutional right as claimed." *Barber*, 231 Md. App. at 517 (citation and quotation omitted). That is, "we exercise our own independent analysis as to the reasonableness, and prejudice therein, of counsel's conduct." *Wallace*, 475 Md. at 653 (cleaned up).

II. ANALYSIS

"Both the Sixth Amendment, made applicable to the states through the Due Process Clause of the Fourteenth Amendment, and Article 21 of the Maryland Declaration of Rights guarantee the right to effective assistance of trial counsel." *Barber*, 231 Md. App. at 514. In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court set forth a two-prong test that a defendant must satisfy to establish ineffective assistance of counsel. *Barber*, 231 Md. App. at 514-15. *First*, the defendant must show that "counsel's performance was deficient, *i.e.*, counsel committed serious attorney error[.]" *Id.* at 515. *Second*, the defendant must show that "counsel's deficient performance prejudiced the defense." *Id.*

"As to the first prong, the defendant must show that his counsel's representation fell below an objective standard of reasonableness, and that such action was not pursued as a form of trial strategy." *Newton v. State*, 455 Md. 341, 355 (2017) (citations and quotations omitted). "'Prevailing professional norms' define what constitutes reasonably effective assistance, and all of the circumstances surrounding counsel's performance must be

considered." *Mosley v. State*, 378 Md. 548, 557 (2003) (quoting *Strickland*, 466 U.S. at 688). "Judicial scrutiny of counsel's performance is highly deferential, and there is a strong (but rebuttable) presumption that counsel rendered reasonable assistance and made all significant decisions in the exercise of reasonable professional judgment." *Wallace*, 475 Md. at 655 (citation and quotation omitted).

"To establish the second prong—prejudice—the defendant must show either: (1) a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different; or (2) that the result of the proceeding was fundamentally unfair or unreliable." *Newton*, 455 Md. at 355 (2017) (citations and quotations omitted). The Supreme Court has interpreted "reasonable probability" as "a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The Court of Appeals has "further interpreted the reasonable probability standard to mean that there existed a substantial or significant possibility that the verdict of the trier of fact would have been affected[.]" *Wallace*, 475 Md. at 656 (citations and quotations omitted). In determining whether the result of the proceeding would have been different or was fundamentally unfair or unreliable, "we 'must consider the totality of the evidence before the judge or jury.'" *Id.* (quoting *Strickland*, 466 U.S. at 669).

Against this backdrop, we hold that Jones did not meet his burden of establishing that trial counsel rendered ineffective assistance by failing to call an expert witness to testify about the timing of D.S.'s text message to Jones. First, Jones failed to show that counsel's performance was deficient. Jones's sole reason for wanting an expert witness to

testify was to establish that D.S. sent the text message at 1:43 p.m., which, according to Jones, would have established that D.S. knew about her mother's captivity several hours before her mother had purportedly escaped and been found by the two bystanders around 4:30 p.m. But, as the post-conviction court pointed out, trial counsel was able to elicit that discrepancy during cross-examination of D.S. D.S. testified that she sent the text message "early in the afternoon" on June 16, maybe at about "one o'clock." D.S. also testified that she sent the text right after talking with her mother and that, during that conversation, her mother indicated that she had been held captive by Jones and was waiting on an ambulance. Later, during closing argument, trial counsel emphasized D.S.'s testimony by noting that D.S. had sent the text to Jones, and thus knew about her mother's captivity, "early Tuesday afternoon" at "maybe 1:00." Trial counsel then noted that the text was sent "before [M.S.] said she had an opportunity to even call [D.S.]." Trial counsel argued to the jury that D.S.'s testimony suggested that M.S. called D.S. at a time when M.S. was claiming she was restrained in Jones's bathtub.

From that, it is clear that trial counsel was able to elicit and argue the primary fact at issue, namely, that D.S. sent the text to Jones several hours before her mother's rescue. Although having an expert testify as to the timing of the text might have been beneficial, we cannot say that trial counsel's failure to consult with or call an expert witness "fell below an objective standard of reasonableness." *Newton*, 455 Md. at 355; *see also Cirincione v. State*, 119 Md. App. 471, 486 (1998) ("[C]ounsel's assistance is not

ineffective if he either makes reasonable investigations or makes 'a reasonable decision that makes particular investigations unnecessary'") (quoting *Strickland*, 466 U.S. at 691)).

Moreover, trial counsel testified that the defense's strategy was focused on M.S.'s motive to lie about the assault. That strategy was vigorously pursued by trial counsel. In so doing, trial counsel questioned D.S. about the timing of the text message, and D.S. admitted that she might have sent the text around 1:00 p.m. Trial counsel later testified at the post-conviction hearing that she believed that D.S.'s testimony had sufficiently established the timing of the text message and had been consistent with the defense's theory of the case. Given those circumstances, trial counsel's decision not to consult with an expert to confirm the timing of the text message was not only reasonable but may also have been "pursued as a form of trial strategy." *Newton*, 455 Md. at 355; *see also Fullwood v. State*, 234 Md. App. 57, 70 (2017) ("While pursuing multiple lines of defense may be an available strategic choice, the decision to pursue one strategy over the other may also be a reasonable strategic choice"). Thus, we hold that trial counsel's performance was not deficient.

But even if we were to assume that trial counsel's performance was deficient, Jones has also failed to show that he was prejudiced as a result. As noted, the sole fact that Jones wanted to establish by way of expert testimony—that D.S. sent the text to Jones at 1:43 p.m.—was already before the jury in the form of D.S.'s testimony. Expert testimony on that issue would have therefore been cumulative. *See Cirincione*, 119 Md. App. at 489 ("[T]he failure to present cumulative evidence generally fails to satisfy either the deficiency prong or the prejudice prong of the *Strickland* test"). Thus, Jones has not

demonstrated a "reasonable probability that, but for counsel's [failure to call an expert witness], the result of the proceeding would have been different." *Newton*, 455 Md. at 355.

To be sure, the State did argue at trial that D.S. was wrong about the timing of the text message, and expert testimony on that issue would likely have hindered the State's attempts to rehabilitate D.S.'s testimony. Nevertheless, D.S. testified that she sent the text in the early afternoon, and that testimony was uncontradicted by other evidence. Had trial counsel called an expert to testify, then the State would likely have called its own expert to testify, and that expert may have testified that the text came at a later time, as the State's expert initially did at the post-conviction hearing. Such testimony may have confused the jurors and created even more doubt as to the credibility of D.S.'s testimony. Instead, because no expert witness testified, trial counsel was able to argue, without any evidence to the contrary, that the text message was sent several hours before M.S.'s escape. Under this "totality of the evidence," we cannot say that there is a "substantial or significant possibility that the verdict … would have been affected" by the introduction of expert witness testimony. *Wallace*, 475 Md. at 669, 656.

In sum, trial counsel's failure to seek an expert witness was neither deficient nor prejudicial. Thus, the post-conviction court did not err in denying Jones's petition for post-conviction relief.

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