Circuit Court for Prince George's County
Case No.: CT071096X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 638

September Term, 2020

STATE OF MARYLAND

v.

ANTONIO MCGHEE

Friedman,
Wells,
Eyler, James R.
(Senior Judge, Specially Assigned),
JJ.

Opinion by Eyler, James R., J.

Filed: November 30, 2021

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Following a December 2007 trial in the Circuit Court for Prince George's County, a jury found Antonio McGhee, appellee, guilty of first-degree murder. On January 8, 2008, the court sentenced appellee to life imprisonment. Appellee appealed to this Court, which affirmed the judgments of the circuit court. *McGhee v. State*, No. 2827, Sept. Term 2007 (filed June 23, 2009).

Thereafter, appellee filed a petition for post-conviction relief under the Maryland Uniform Postconviction Procedure Act, seeking to vacate his convictions. In his petition, appellee alleged two instances in which he had been denied his right to effective assistance of trial counsel: *first*, in failing to object to what has become known as a "CSI effect" voir dire question asked during juror selection; and *second*, for failing to object to missing or incomplete jury instructions.

On June 11, 2020, the post-conviction court, after holding a hearing on the petition, filed a memorandum opinion and order finding both of appellee's claims meritorious and granting post-conviction relief in the form of a new trial. The State then sought leave to appeal from the post-conviction court's judgment in this Court, which we granted.[1] We then transferred the case to our regular appellate docket. *State v. McGhee*, CSA-ALA-0473-2020.

In this appeal, the State of Maryland, appellant, raises two issues, which we have

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[1] In his petition for post-conviction relief, appellee also raised a claim that he had been denied his right to effective assistance of appellate counsel for not raising a preserved issue on direct appeal of his conviction. Because the post-conviction court declined to grant appellee relief on that issue, the propriety of that ruling was not contained in the State's application for leave to appeal; therefore, it is not before us.

rephrased:

1. Did the post-conviction court err in concluding that appellee was denied his right to effective assistance of trial counsel when his trial counsel failed to object when the trial court asked a "CSI-effect" voir dire question during jury selection?

2. Did the post-conviction court err in concluding that appellee was denied his right to effective assistance of trial counsel when his trial counsel failed to object to missing or incomplete jury instructions?

For the reasons set forth below, we answer these questions in the affirmative, and therefore, we shall reverse the judgment of the circuit court.

FACTUAL BACKGROUND

On the evening of March 17, 2007, Keith Dreher, the victim, was shot and killed by a single sawed-off shotgun blast to the head while standing outside of a pizzeria smoking a cigarette.

Jerrone Joyner (Jerrone[2]), who, at the time of the shooting was the assistant manager of the pizzeria, testified at trial that he was outside smoking a cigarette with the victim when he heard a "chit chit," which sounded to him like a gun. He looked up, saw what appeared to him to be a "sawed off," and heard someone say "empty your pockets." Jerrone testified that he then slowly walked back inside. Although he acknowledged that he described the shooter to the police as between five feet seven to five feet nine inches tall, wearing a black coat and blue jeans, dark skinned, with perhaps a goatee, he testified that he did not, and could not, identify him. He also testified that he did not remember telling the police that he saw appellee and the victim inside the pizzeria on the night of the

[2] We refer to some of the witnesses by their first names for clarity.

shooting.

Detective Paul Dougherty testified at trial that he took a statement from Jerrone on the day of the shooting. In that statement, which Jerrone signed, Jerrone said that both the victim and appellee were in the restaurant for approximately 20 minutes prior to the shooting. In addition, the detective testified that Jerrone told him that, if the police could show him a photograph of the shooter, "he would guarantee" that he could identify him.

Demetrius Young (Young) testified that he went to the pizzeria on the night of the shooting to meet Shamell Joyner (Shamell) to go to a party. He said that he saw appellee, who he knew as "Dip," ask the victim for a cigarette, who said "he ain't had none." The victim then left the pizzeria and "Dip" followed him. About two minutes later, Young heard what he believed to be a gunshot.

Shamell was at work making pizzas at the time of the shooting. He testified that he saw appellee, who he also knew as "Dip," in the pizzeria that night. He heard an argument in the pizzeria and testified that a "gunshot went off[, w]e turned around, saw there was blood[, t]hat's all I know." Four days after the shooting, on March 21, 2007, Shamell accompanied Detective Michael Delaney to an elementary school and pointed out "Dip" to the detective.

Several other police officers responded to the elementary school at Detective Delaney's request for assistance in apprehending appellee. When two plain-clothes police officers with their badges around their necks identified themselves to appellee and his companion, and asked them to talk, appellee ran. The police officers radioed this information to Detective Delaney.

Detective Wayne Martin overheard on the radio that appellee had fled and testified that he gave chase when he saw appellee running. He also said that he saw a gun protruding from appellee's clothing. When appellee was eventually apprehended and searched, there was no gun. The police searched the area and found a sawed-off shotgun on the ground in a wooded area behind the elementary school where appellee had been seen running. Detective Martin testified that the shotgun "appeared to be the same gun" that he had seen protruding from appellee's clothing.

Susan Lee, a firearms examiner, testified that the firearm recovered by the police, a bolt-action 20-gauge shotgun, was operable. The shotgun had two unspent shells in its magazine. She explained that she took apart the unspent shells to examine the shot pellets and wadding. In her opinion, the wadding and shot pellets recovered from the victim's head during an autopsy were consistent in their design and construction with the wadding and shot pellets she found inside the shotgun shells that she disassembled. Moreover, the wadding recovered from the autopsy was consistent with 20-gauge wadding. Because no fired shells were found at the scene of the shooting, the firearms examiner could not positively state that the shotgun recovered by police after they chased appellee was the one used in the shooting.

After appellee was arrested, the police photographed him and created a photographic array. A month after the shooting, on April 17, 2007, police detectives showed the photographic array to Jerrone who selected appellee's photograph and, according to Detective Andre Brooks, said "I'm a hundred percent that's the one who shot the victim." Detective Delaney said that, before selecting appellee's photograph, Jerrone

asked "was that the guy," to which the Detective responded, "I couldn't tell you that. I wasn't there." Then Jerrone said "that's him[, t]hat's the guy that did it." At trial, Jerrone testified that he only selected appellee's photograph because appellee was the only person in the array that he did not recognize. He also testified that he never told the police that appellee was the shooter. In fact, Jerrone testified that he "never seen nobody shoot nobody."

Detective Delaney testified that, on April 5, 2007, he, along with another police detective, visited appellee in the detention center to execute a court ordered DNA search warrant on appellee. After Detective Delaney asked appellee whether he had an attorney, appellee responded that he believed that his family had retained an attorney, but he thought "they would be wasting their money because [the police] got the pump."[3] Detective Delaney testified that he believed that the "pump" was a reference to the sawed-off shotgun that the police recovered after the chase that resulted in appellee's arrest.

The State also presented evidence that the shotgun had been inspected for fingerprints and DNA. Mark Danus, a forensic analyst, testified at trial that there was not enough DNA on the shotgun to do a genetic profile, and Mertina Davis, a fingerprint specialist, testified at trial that the fingerprints recovered from the shotgun were not usable.

Dayontae Duncan (Duncan) testified for the defense that he knew appellee from the

[3] This statement of appellee was suppressed prior to trial because of a *Miranda* violation. However, after appellee testified inconsistently with the statement on direct examination, the State called the detective as a rebuttal witness to testify to appellee's prior statement to impeach appellee's credibility. A statement obtained by a *Miranda* violation may be used as impeachment evidence. *Harris v. New York*, 401 U.S. 222 (1971).

neighborhood and was with appellee on the night of the shooting. According to Duncan, he met appellee and several others at a party around 7:45 p.m. on March 17, 2007. The group remained at the party for approximately two and a half hours. Appellee then accompanied Duncan back to Duncan's house where the two went to bed. Duncan testified that appellee went to bed early because he had a toothache. On cross-examination, Duncan testified that his brother had called him the day after the shooting and reported that appellee had been "apprehended with a gun." He also testified that he was not asked to be an alibi witness until seven months after the shooting.

Appellee testified in his own defense that, on the evening of the shooting, he was playing basketball with friends when someone called one of his friends and told him about a party. The group then met Duncan at the party a little before 8 p.m. where they "chilled … for a little while, ate some food and then … left." Appellee testified that he went to Duncan's house after the party. Regarding his arrest a few days later, appellee testified that he did not have a gun on him when he ran from the police. In addition he said that he ran from the police "[b]ecause recently in the past times around the neighborhood, the police have been coming around our neighborhood harassing young dudes because of the colors we wear, and I had on blue that day[,] I guess they think we are in gangs." On cross-examination, however, he testified that he ran from the police because he did not know who they were at first, did not see their badges hanging around their necks, and did not hear them announce themselves as police officers. He denied making any statement to the effect that his family was wasting its money on a lawyer because the police had the "pump." Lastly, appellee denied going to the pizzeria where the shooting took place on March 17,

2007.

DISCUSSION

In *State v. Smith*, 223 Md. App. 16, 26–27 (2015), this Court set forth the applicable standard for reviewing claims of ineffective assistance of counsel on appeal from a grant of post-conviction relief:

> The Sixth Amendment to the United States Constitution guarantees all criminal defendants the right to the assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 684–85 (1984). 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." *McMann v. Richardson*, 397 U.S. 759, 771 n. 14 (1970); *Mosley v. State*, 378 Md. 548, 557 (2003). 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. *Strickland*, 466 U.S. at 687; *Mosley*, 378 Md. at 557.
>
> 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; *Bowers v. State*, 320 Md. 416, 421 (1990). Our review of counsel's performance is "highly deferential." *Kulbicki v. State*, 440 Md. 33, 46 (2014). We look to whether counsel's "representation fell below an objective standard of reasonableness." *Harris v. State*, 303 Md. 685, 697 (1985). We assess reasonableness as of "the time of counsel's conduct." *Strickland*, 466 U.S. at 690.
>
> 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. 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 (1996) (quoting *Strickland*, 466 U.S. at 687).
>
> Determinations by the post-conviction court regarding ineffective assistance of counsel claims are mixed questions of law and fact. *State v. Purvey*, 129 Md. App. 1, 10 (1999). We will not disturb the factual findings

> of the post-conviction court unless they are clearly erroneous. *Evans v. State*, 151 Md. App. 365, 374 (2003); *State v. Jones*, 138 Md. App. 178, 209 (2001). 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. *Jones*, 138 Md. App. at 209. 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. *Evans*, 151 Md. App. at 374 (citing *Cirincione v. State*, 119 Md. App. 471, 485 (1998)).

Thus, to prevail on a claim of ineffective assistance of counsel, a convicted defendant must show both that counsel's performance was deficient and that prejudice resulted.

I.

On the first day of appellee's December 2007 trial, during jury selection, the trial court asked, without objection, the following voir dire question:

> Does any member of this panel believe that the State has got to present fingerprint evidence, DNA, blood sample evidence, ballistic evidence, any scientific evidence in order to convince you of the defendant's guilt? In other words, do you think the State has a requirement to do that in all cases?

Such voir dire questions have been referred to as "CSI effect" questions and have been rejected by this Court and the Court of Appeals.

In *State v. Armstead*, 235 Md. App. 392 (2018), in a petition for post-conviction relief, the defendant claimed that he was denied his right to effective assistance of counsel when his trial counsel failed to object to a "CSI effect" voir dire question propounded during his trial. The post-conviction court granted Armstead relief. This Court reversed the post-conviction court's grant of relief because it determined that Armstead had not established that prevailing professional norms required his trial counsel to object to the voir

dire question at the time of his March 2009 trial. *Id*. at 424-25.

In *Armstead* we recounted the history of the appellate decisions discussing the "CSI effect," as follows:

> A CSI effect jury message received its initial reported appellate analysis in Maryland in *Evans v. State*, 174 Md. App. 549 (2007), which involved a *jury instruction*. It re-surfaced next in the context of a *voir dire question* in *Drake & Charles v. State*, 186 Md. App. 570 (2009), *rev'd sub nom*. *Charles & Drake v. State*, 414 Md. 726 (2010). Since then, the implications of CSI effect jury messages have tasked repeatedly both of our appellate courts to consider the potential for prejudice on the minds of jurors.
>
> As relevant to this appeal, *Stabb* [*v. State*, 423 Md. 454, 472 (2011)] and *Atkins* [*v. State*, 421 Md. 434 (2011)] (the present day standard-setters) make clear, based on the "inconclusive state of the scholarly legal and/or scientific research taken as a whole," that Maryland disapproves of preemptive anti-CSI messages to the venire or the empaneled jury. *Stabb*, 423 Md. at 473 (to the extent that such an instruction is requested, its use ought to be confined to situations where it responds to correct pre-existing overreaches by the defense, i.e., a curative instruction. The Court of Appeals may revisit the appropriateness of CSI messages when tailoring an "appropriate response through *voir dire* questions and/or jury instruction" when a demonstration of scholarly research has become more abundant); *State v. Stringfellow*, 425 Md. 461, 473–74 n. 4 (2012) ("*Stabb* and *Atkins* discuss when it may be permissible for courts to *pose a voir dire question* or a jury instruction to counter what has been referred to popularly as the 'anti-CSI effect.' Suffice it to say; these cases hold that it is erroneous to pose such a question or instruction as a pre-emptive measure." (emphasis added)). There must be, at minimum, some form of relevant misstatement(s) of law or conduct by counsel for the court to issue an appropriate and curative CSI effect jury instruction or similar anticipatory grounds to ask a *voir dire* question. *See Hall v. State*, 437 Md. 534, 540–41 (2014). Moreover, counsel's mere reference to, or argument regarding (or announced intent to argue), the absence or insufficiency of the State's scientific evidence to meet its burden of proof to convict a criminal defendant does not warrant automatically the court's issuance of a CSI message. *See Robinson v. State*, 436 Md. 560, 580 (2014).
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> *Stabb*, "with a [clairvoyant] nod to the future," noted that there might be situations where CSI effect messages may be appropriate. *Stabb*, 423 Md. at 473. When those situations arise, the message must be neutral, i.e., the

> message must not convey to the jury that their only option is to *convict*, even if no forensic evidence linking the defendant to the crime(s) is adduced by the State. The message should (at least) include language indicating that a not guilty verdict is an alternative. *See Charles & Drake*, 414 Md. at 738, (noting the language of the *voir dire* question was not neutral, "using the term 'convict,' solely, rather than including its alternative"); *Samba v. State*, 206 Md. App. 508, 534 (2012) ("the anti-CSI effect instruction was fatally flawed for not advising the jury to *consider the lack of forensic* evidence in evaluating reasonable doubt").

235 Md. App. at 412–15 (footnotes omitted).

As noted earlier, appellee claimed in his petition for post-conviction relief that he was denied his right to effective assistance of counsel because his trial counsel erred in failing to object to the "CSI effect" jury voir dire question. In making this argument, appellee relied on *Charles & Drake v. State*, 414 Md. 726 (2010) and *McFadden & Miles v. State*, 197 Md. App. 238 (2011) – in which the appellate Courts held that the trial courts should not have given a voir dire question similar to the one in this case – and *Atkins v. State*, 421 Md. 434 (2011) and *Stabb v. State*, 423 Md. 454 (2011), in which the Courts held that the trial courts should not give preemptive "CSI effect" jury instructions.

Addressing the two voir dire decisions, the post-conviction court in this matter reasoned as follows:

> Petitioner cites to decisions made in *Charles & Drake* and *McFadden* which concluded the venire is poisoned by CSI effect voir dire questions, depriving Defendants of fair and impartial juries. However, *State v. Armstead*, 235 Md. App. 392 (2018) held *Charles & Drake* and *McFadden* holdings do not apply retrospectively, and therefore would not apply to Petitioner's 2007 trial. Although at the time of Petitioner's trial, the CSI question was allowed, the Court believes the question must still be analyzed based on its prejudicial effect on the jury.
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> "When a trial court injects erroneously a CSI effect voir dire question, in order for a court to find harmless error, the court must be satisfied beyond

> a reasonable doubt that the abuse of discretion was harmless." *Armstead* at 425 (citing *Hall v. State*, 437 Md. at 540; *State v. Stringfellow*, 425 Md. at 474). To pass the *Strickland* prejudice prong, "the record must demonstrate that the reference to a lack of scientific evidence was not material to the contested issue." *Armstead*, at. 426. In the present case, the lack of scientific evidence was material to the question of Petitioner's guilt as the eye-witness who previously identified Petitioner as the one who shot the victim recanted on the stand. No forensic evidence tied Petitioner to the commission of this crime.
>
> In cases where the CSI question was given but was deemed harmless error, the prejudice injected by the question was subsequently ameliorated either by the trial judge or the attorneys. *Armstead*, at 427. *See Stringfellow* where the trial judge permitted Defendant's attorney during closing, over State's objection, to make the argument that the police officer's failure to request testing of the confiscated handgun for latent fingerprints created reasonable doubt. That is not the case in this trial. The jury instructions were woefully inadequate, and did not ameliorate any potential prejudice caused by the CSI instruction.

As earlier referenced, claims of ineffective assistance of counsel are governed by a two-part test, under which the petitioner bears the burden of demonstrating: (1) that counsel's performance was deficient; and (2) that, as a result, the petitioner was prejudiced. *Barber v. State*, 231 Md. App. 490, 515 (2017) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). We need not reach one part of the test if the other is dispositive; here, our analysis will focus on deficiency. *Armstead*, 235 Md. App. at 408 n.8 (2018) (citing *Strickland*, 466 U.S. at 697).

The post-conviction court effectively wrote the performance prong out of the *Strickland* standard. After recognizing that the "CSI effect" cases are not fully retroactive, and after recognizing that "at the time of Petitioner's trial, the CSI question was allowed," the court analyzed the prejudice prong of *Strickland*, stating that "the Court believes the question must still be analyzed based on its prejudicial effect on the jury."

As noted in *Armstead*, "[i]t has long been established that an attorney is not required ordinarily to be prescient as to changes in the law and act accordingly." *Armstead*, 235 Md. App. at 422 (citing *Maryland v. Kulbicki*, 577 U.S. 1 (2015) (*per curiam*); *Unger v. State*, 427 Md. 383, 409 (2012)). The party claiming ineffective assistance of counsel must therefore present "evidence establishing that the prevailing professional norm at the time of his trial was to object" and if no such evidence is presented we assume "that counsel's conduct fell within a broad range of reasonable professional judgment." *Armstead*, 235 Md. App. at 422-23 (cleaned up).

As can be discerned from the earlier recitation of the history of the "CSI effect" jury instruction and voir dire question cases, the only "CSI effect" case that had been decided at the time of appellee's December 2007 trial was *Evans v. State*, 174 Md. App. 549 (2007) in which this Court approved of a "CSI effect" jury instruction. As in *Armstead*, appellee presented no evidence establishing that the prevailing professional norm at the time of his trial was to object to "CSI effect" messages to the venire or jury. Consequently, we conclude that trial counsel's failure to object to the trial court's "CSI effect" voir dire question in this case was not deficient performance. *Armstead*, 235 Md. App. at 422-23.[4]

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[4] Appellee also relied on *Allen v. State*, 204 Md. App. 701 (2012), in which this Court stated that *Atkins* and *Stabb* did not announce a new constitutional or statutory rule but rather applied settled constitutional guarantees to a new and different actual pattern. Thus, the holdings applied to all convictions. *Id*. at 722. Appellee argued that *Allen* stands for the proposition that *Atkin*s and *Stabb* apply to this case. In *Armstead*, this Court rejected that exact argument and distinguished *Allen* from *Armstead*, pointing out that Allen was on direct appeal. In this case, the post-conviction court recognized this aspect of *Armstead* and, accordingly, ruled that the holdings of those cases were not to be given retrospective (continued…)

II.

As noted earlier, in his petition for post-conviction relief, appellee contended that he was denied his right to effective assistance of counsel when his trial counsel failed to object to missing or incomplete jury instructions. Those instructions were from Chapter 3 of the Maryland Criminal Pattern Jury Instructions titled "Evidentiary Instructions." Specifically, appellee contends the trial court did not give instructions MPJI-Cr 3:00 "What Constitutes Evidence," MPJI-Cr 3:18 "Statement of Defendant," and MPJI-Cr 3:30 "Identification of Defendant." In addition, according to appellee, the trial court left a sentence out of MPJI-Cr 3:19 "Prior Statements."

The post-conviction court agreed with appellee's argument and vacated his convictions for this reason in addition to the lack of objection to the "CSI effect" voir dire question. The post-conviction court failed to apply the *Strickland* test. Under that test, as noted earlier, the defendant has the burden to prove that (1) trial counsel made a serious attorney error, and (2) that the defendant suffered prejudice. *Strickland*, 466 U.S. at 687. We address below the post-conviction court's *Strickland* analysis of each of the jury instructions that appellee claims his trial counsel should have objected to, which, as previously mentioned, we review *de novo*. *Evans*, 151 Md. App. at 374.

A. MPJI-Cr 3:00 "What Constitutes Evidence"

The version of MPJI-Cr 3:00 "What Constitutes Evidence" in effect at the time of

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application. The appellee claims that *Armstead* was wrongly decided. Regardless of the result, we are bound by *Armstead*.

appellee's 2007 trial was as follows:

> In making your decision, you must consider the evidence in this case; that is
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> (1) testimony from the witness stand;
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> (2) physical evidence or exhibits admitted into evidence;
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> (3) [stipulations;]
>
> (4) [depositions;]
>
> (5) [facts that I have judicially noticed.]
>
> In evaluating the evidence, you should consider it in light of your own experiences. You may draw any reasonable inferences or conclusions from the evidence that you believe to be justified by common sense and your own experiences.
>
> The following things are not evidence and you should not give them any weight or consideration:
>
> (1) charging document;
>
> (2) inadmissible or stricken evidence;
>
> (3) questions and objections of counsel.
>
> The charging document in this case is the formal method of accusing the defendant of a crime. It is not evidence against the defendant and must not create any inference of guilt.
>
> Inadmissible or stricken evidence must not be considered or used by you. You must disregard questions that I did not permit the witness to answer and you must not speculate as to the possible answers. If after an answer was given, I ruled that the answer should be stricken, you must disregard both the question and the answer in your deliberations.
>
> During the trial, I may have commented on the evidence or asked a question of a witness. You should not draw any inferences or conclusions from my comments or questions, either as to the merits of the case or as to my views regarding the witness.
>
> Opening statements and closing arguments of lawyers are not evidence in this case. They are intended only to help you to understand the

> evidence and to apply the law. Therefore, if your memory of the evidence differs from anything the lawyers or I may say, you must rely on your own memory of the evidence.

The post-conviction court addressed appellee's contention that his trial counsel should have objected to the trial court's failure to give the foregoing instruction as follows:

> MPJI-Cr 3:00, what constitutes evidence, is an essential jury instruction to aid in the proper deliberation of evidence in a case. Jurors consist of twelve people off the street who invariably have no formal legal training. Jurors must be directed to adhere to the law, and must be instructed as to which law to apply during deliberations, or they won't know what to do or what to consider.

That terse analysis does not sufficiently address either prong of *Strickland*. In any event, under our own independent appraisal of the claim, we discern neither deficient performance nor prejudice resulting from the failure to object. Although the trial court did not give this precise pattern instruction, most, if not all, of its content was given to the jury either in preliminary instructions at the outset of trial, or during the jury instructions prior to closing arguments.

At the outset of trial, the trial court told the jury:

> Now, in a minute or two you're going to hear opening statements from these lawyers and that's important. Opening statements are, but it's not evidence. So what you hear in opening statements is not evidence in the case. The only evidence that you are to consider is what comes from that witness stand in the form of answers.
>
> Questions are not evidence. The answers are. Sometimes there's an objection. It's my job to rule on objections. If an objection is made and I sustain the objection, it shouldn't be answered. Sometimes it is. Sometimes witnesses blurt out an answer to which I have sustained an objection. I have to ask you to strike it from your minds because it's not evidence. Same way with physical evidence. Physical evidence are documents, usually, and photographs and what not that you may see in this trial. But until that physical evidence is admitted, it's not something that you can use and deliberate on.

> So it's got to be admitted into evidence before it becomes evidence. Those are pretty basic rules, but I want to explain that to you because that's what you base your decision on.
>
> Eventually when you get this case, you will take into that jury room with you the evidence that you have heard and seen, the physical evidence that ha[s] been admitted and, of course, your own common sense and life experiences. All of that belongs in the deliberative process.
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> ***
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> [A]t the end of the case you're going to hear what we call closing argument from counsel. They're going to talk to you about the case. And that's important, too, but it's not evidence. If your minds differ from something they say in closing arguments, you make the call collectively.

Moreover, the instructions that the trial court gave the jury just prior to closing arguments included the following:

> When you deliberate, you base your decision on the evidence that you've heard and seen, the evidence that's been admitted into evidence. A lot of these documents and physical evidence have been [referred] to but not admitted, so don't ask me for them if you don't get them.
>
> The case is over. And you take that with you and you take your own common sense and life experiences. You put that all together and that's how you arrive at a verdict.
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> ***
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> You have heard and seen witnesses. You have to judge their credibility.
>
> ***
>
> Also, there's a couple kinds of ways of looking at evidence. Direct evidence, you've all heard of. Eyewitness testimony. But there's another kind of evidence that's just as important and in the eyes of the law, carries just as much weight as direct evidence, and that's what we call indirect or sometimes called circumstantial evidence. A good example, you go to bed at night. The ground is dry. You get up in the morning. No snow. Circumstantial evidence.
>
> ***

> Now you've heard some talk about stipulations. That's evidence. I made that pretty clear at the time the stipulations were made.

Finally, after the State objected to a portion of appellee's closing argument, the trial court repeated its instruction to the jury that the closing argument was not evidence.

A comparison between what the trial court actually instructed the jury about what constituted evidence and the pattern instruction reveals that nearly every applicable aspect of the pattern instruction was included in what the trial court told the jury. Appellee points out the reference in the pattern instruction to the charging document, which was not covered by the actual instruction, but the charging document was not introduced into evidence. Trial counsel did not err in failing to object to the court's failure to have used the pattern instruction.

B. MPJI-Cr 3:18 "Statement of Defendant" & MPJI-Cr 3:19 "Prior Statements"

The following statements provide the context for these issues.

The State introduced into evidence Jerrone's pre-trial identification of appellee and a written statement by him to the police. The trial court advised the jury that they could consider the statements as substantive evidence.

In the defense's case, after appellee testified that he never mentioned a "pump" to police, the State introduced appellee's prior statement to police. Because appellee's prior statement to police had been suppressed because of a *Miranda* violation, the statement was admissible for impeachment.

Appellee argued to the post-conviction court that his attorney's performance was deficient in that the attorney did not object to the court's failure to advise the jury that

Jerrone's written statement was admitted only to assist the jury in determining whether to credit his trial testimony.

The trial court did not advise the jury that appellee's statement was admissible only on the issue of credibility. Defense counsel did not object, and the failure to object was not raised before the post-conviction court.

Because the post-conviction court blended the analysis of the court's failure to give both of these instructions, we will address them together. The version of MPJI-Cr 3:18 "Statement of Defendant" in effect at the time of appellee's 2007 trial provided as follows:

> Evidence has been introduced that the defendant made a statement to the police about the crime charged. The State must prove beyond a reasonable doubt that the statement was freely and voluntarily made. A voluntary statement is one that, under all circumstances was given freely. To be voluntary it must have not been compelled or obtained as a result of any force, promises, threats, inducements or offers of reward. In deciding whether the statement was voluntary, consider all of the circumstances surrounding the statement, including:
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> (1) the conversations, if any, between the police and the defendant;
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> (2) whether the defendant was warned of [his] [her] rights;
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> (3) the length of time that the defendant was questioned;
>
> (4) who was present;
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> (5) the mental and physical condition of the defendant;
>
> (6) whether the defendant was subjected to force or threat of force by the police;
>
> (7) the age, background, experience, education, character and intelligence of the defendant;
>
> [(8) whether the defendant was taken before a district court commissioner without unnecessary delay following arrest and, if not, whether that affected the voluntariness of the statement;]

> (9) any other circumstances surrounding the taking of the statement.
>
> [If you find that the statement was actually made, you may not consider it unless you find, beyond a reasonable doubt, that the statement was voluntary.]
>
> If you find beyond a reasonable doubt that the statement was voluntary, give it such weight as you believe it deserves. If you do not find beyond a reasonable doubt that the statement was voluntary, you must disregard it.

The version of MPJI-Cr 3:19 "Prior Statements" in effect at the time of appellee's 2007 trial stated as follows, with the portion that the trial court omitted in italics:

> PRIOR STATEMENTS
>
> You have heard testimony that ________ made a statement [before trial] [at another hearing] [out of your presence]. Testimony concerning that statement was permitted only to help you decide whether to believe the testimony that the witness gave during this trial.
>
> It is for you to decide whether to believe the trial testimony of __________in whole or in part, *but you may not use the earlier statement for any purpose other than to assist you in making that decision*.

The post-conviction court addressed appellee's contentions that his trial counsel should have objected to the trial court's failure to give MPJI-Cr 3:18 "Statement of Defendant" and failure to include the last sentence of MPJI-Cr 3:19 "Prior Statements" as follows:

> The record shows the trial Court allowed a prior statement of Defendant to be admitted into evidence when Detective Delaney testified that during a visit with Petitioner in the County Detention Center, he blurted out that [he] believed his family would be wasting their time hiring an attorney because the police already had the "pump," meaning the shotgun. Transcript Dec. 5, 2007 Vol. II, pg. 99-101. The given instruction on MPJI-Cr 3:19, Prior Statement of a Witness was meaningless without the last part instructing the jurors on "you may not use the earlier statement for any purpose other than to assist you in making that decision." The jury also should have been given the instruction on determination of the voluntariness

of the defendant's statement, which is explained in MPJI-Cr 3:18.

With respect to MPJI-Cr 3:18, appellee claims, and the post-conviction court found, that appellee was denied his right to effective assistance of counsel when trial counsel failed to object to the trial court's failure to give MPJI-Cr 3:18 which concerns the voluntariness of appellee's statement to the police that he believed his parents were wasting money hiring a lawyer because the police had recovered the "pump," meaning the shotgun.

In order to generate that instruction, the defense needed to put forth some evidence that the statement was made involuntarily. *See Hof v. State*, 337 Md. 581, 620 (1995) ("So long as there is some evidence which supports the defendant's claim that his confession was involuntary, the issue has been generated."). At appellee's trial, the defense never raised the issue that appellee's statement about the "pump" was involuntary. To the contrary, appellee testified that he never made the statement, not that he made it involuntarily. While it is true that appellee was in a room with two detectives who were there to execute a search warrant for appellee's DNA when he made the statement, the statement was, only barely, if at all, the product of the detective's question about whether appellee had an attorney. In short, if the instruction was generated, and if appellee's attorney had requested it and the trial court had given it, we are not persuaded that appellee was prejudiced. In sum, we conclude that appellee has not demonstrated error or prejudice within the contemplation of *Strickland* and its progeny.

Appellee also claims that his trial counsel erred in not objecting to the trial court's failure to give the last sentence of MPJI-Cr 3:19 which would have told the jury that they "may not use the earlier statement for any purpose other than to assist you in" determining

the credibility of the witness.[5]

With respect to Jerrone, a failure to instruct would have to rely on the fundamental premise that all of Jerrone's prior statements were admissible into evidence solely for impeachment purposes. To the contrary, his prior written statement and his oral identification of appellee as the shooter were admissible as substantive evidence. *See Nance v. State*, 331 Md. 549, 569 (1993); Md. Rule 5-802.1(b); and Md. Rule 5-802.1(c).

Consistent with those theories of admissibility, the trial court instructed the jury as follows:

> You also have heard testimony about Jerrone Joyner, that he made a written statement prior to trial and an oral statement of identification prior to trial. The written statement was introduced into evidence. The prior written statement as well as the oral statement of identification may be considered by you as what we call testimonial evidence, substantive evidence. It's for you to decide whether to believe the trial testimony of Jerrone Joyner in

[5] In his post-conviction petition, appellee complained that the trial court erroneously omitted the italicized portion of the instruction, and reasoned that appellee was prejudiced by this omission because, at trial, *Jerrone* was impeached with a prior inconsistent statement. At trial, Jerrone denied identifying appellee as the shooter, yet a police detective testified to a prior inconsistent statement whereby Jerrone positively identified appellee as the shooter. Under those circumstances, according to appellee, the jury, without the benefit of the final sentence of the jury instruction, allowed the jury to consider appellee's prior inconsistent statement as substantive evidence and not only as impeachment evidence.

The post-conviction court apparently believed that the subject of the instruction was *appellee*. The post-conviction court reasoned that appellee was prejudiced because the jury was left to believe that appellee's statement, that his family was making a mistake in hiring a lawyer because the police had the "pump," which he denied making at trial, was the statement at issue for this instruction. The finding that the subject of the prior statement jury instruction was appellee is clearly erroneous. Jerrone Joyner was the subject of that instruction.

On appeal, appellee now argues, consistent with the post-conviction court's ruling, that the subject of the prior statement instruction was him. Given that, during the post-conviction proceedings, appellee never raised this issue with respect to *his* prior statement, we decline to address it on appeal.

> whole or in part, and/or whether to believe the prior written statement in whole or in part, and/or whether to believe the oral statement of identification in whole or in part.

Hence, at least as far as Jerrone's prior statements are concerned, there was nothing objectionable about giving the instruction the trial court gave and not giving the one that appellee complains about. Trial counsel did not err with respect to this instruction.

C. MPJI-Cr 3:30 "Identification of Defendant"

The version of MPJI-Cr 3:30 "Identification of Defendant" in effect at the time of appellee's 2007 trial stated as follows:

> The burden is on the State to prove beyond a reasonable doubt that the offense was committed and that the defendant was the person who committed it. You have heard evidence regarding the identification of the defendant as the person who committed the crime. In this connection, you should consider the witness's opportunity to observe the criminal act and the person committing it, including the length of time the witness had to observe the person committing the crime, the witness's state of mind, and any other circumstance surrounding the event. You should also consider the witness's certainty or lack of certainty, the accuracy of any prior description, and the witness's credibility or lack of credibility, as well as any other factor surrounding the identification. [You have heard evidence that prior to this trial, a witness identified the defendant by ________________.]
>
> [The identification of the defendant by a single eyewitness, as the person who committed the crime, if believed beyond a reasonable doubt, can be enough evidence to convict the defendant. However, you should examine the identification of the defendant with great care.]
>
> It is for you to determine the reliability of any identification and give it the weight you believe it deserves.

The post-conviction court addressed appellee's contention that his trial counsel should have objected to the trial court's failure to give the foregoing instruction as follows:

> MPJI-Cr 3:30, identification of the defendant, was possibly one of the most important instructions in the present case, outside of MPJI-Cr 3:00. The evidence in the present case was largely circumstantial and the eyewitness

> identification of the defendant as the shooter in the murder of the victim was paramount to the State's case. Without a doubt, the key eyewitness, Mr. Jerrone Joyner, recanted on the stand his eye witness' testimony and directly contradicted his prior written and oral statements. Transcript Dec. 4, 2007 Vol. I, pg. 145 line 21-23. Jury instructions MPJI-Cr 3:19[6] on how the jury was to consider the eyewitnesses' testimony before and during the trial was imperative and should have been given to the jury.

The first sentence of the pattern instruction was fairly covered by the trial court's reasonable doubt jury instruction and its alibi jury instruction. In both of those instructions, the jury was reminded that the State had the burden to prove appellant's criminal agency.

Moreover, the remainder of the pattern instruction was fairly covered when the trial court instructed the jury on how to assess witness testimony even though the court's instructions were not specifically tied to the identification of appellee. The trial court instructed the jury as follows:

> You have heard and seen witnesses. You have to judge their credibility. That's your call. . . . How do you really assess the credibility of a witness? Well, we have some factors for you that might help. One is simply by looking at the witness and observing his or her demeanor and manner of testifying.
>
> Did the witness have a motive not to tell the truth, is a factor. Was the witness's testimony consistent[?] What was the accuracy of the witness's memory? Did the witness have some interest in the outcome of the case? Was the witness's testimony supported or contradicted by other evidence in the case? And did the witness have the ability to perceive the act about which the witness is testifying. And whether the witness in[-person] testimony before the court differed from something the witness said on some prior occasion.
>
> You don't have to believe the testimony of any witness, even though the witness's testimony is uncontradicted. So you can believe all, part or none of the testimony of any witness.

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[6] We can only assume this is intended to reference MPJI-Cr 3:30.

As can be seen, although the court's instructions did not specifically address the identification of appellee, the instructions told the jurors to consider a variety of factors when assessing testimony of witnesses, including their demeanor, motive to tell the truth, the consistency and accuracy of their testimony, whether their testimony is contradicted by other evidence, and their ability to perceive what they are testifying about.

While it is true that, under some circumstances, the failure to give the MPJI-Cr 3:30 jury instruction upon request could amount to an abuse of discretion, *Gunning v. State*, 347 Md. 332 (1997), it does not follow that the failure to object to the trial court's failure to give such an instruction automatically amounts to deficient performance. Under the circumstances of this case, we conclude that trial counsel's failure to object was not deficient performance.

D. Prejudice

Lastly, the post-conviction court offered the following remarks at the conclusion of its analysis:

> The absence of these instructions in a trial where defendant has adamantly denied being the shooter, and the one person who allegedly stated he was, gives conflicting and inconsistent testimony, was key to his conviction. The State is correct, it is always speculative as to what the outcome of a trial would have been absence [sic] errors. But to characterize the evidence against Petitioner in this case as compelling and quite strong regardless of these missing instructions, and the CSI voir dire question, are without merit. This Court cannot fathom how the absence of giving these <u>standard</u> four instructions correctly did not have a prejudicial impact on the outcome of this trial. Petitioner is entitled to a fair trial, and due to the ineffectiveness of his trial counsel, did not receive one.

The post-conviction court's analysis presumes that appellee was prejudiced. Such a presumption is reserved for rare circumstances that are not present here. In fact, not even

a structural error, which is presumptively prejudicial on direct appeal, is necessarily presumptively prejudicial on a claim of ineffective assistance of counsel. *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017). In *Weaver*, the Supreme Court had the opportunity to determine that all structural errors are presumptively prejudicial, but chose not to do so. *Id*. at 1911. In any event, none of the purported errors in this case constitute structural errors.

Although Jerrone recanted his identification to the police of appellee as the shooter at trial, the evidence of guilt was substantial. The State admitted into evidence Jerrone's prior written statement wherein he described appellee and said that he was in the pizzeria before the shooting, and that he saw the shooter with a sawed-off shotgun. The State's case also included evidence that Jerrone had identified appellee in a photographic array, which he explained with the comment that he only picked appellee's photograph because appellee was the only person in the array that he did not know. Two other witnesses, who were both familiar with appellee and knew him as "Dip," testified that appellee was in the pizzeria just prior to the shooting. One of them testified that "Dip" followed the victim outside. The other said that he heard an argument before the shooting.

Police officers testified that four days after the shooting, appellant ran when they approached him. One of them saw him with a firearm. After appellee was apprehended, the police found a sawed-off shotgun along appellee's path. That shotgun was of the same gauge, had the same size shot, and had the same wadding as the shotgun shell remnants removed from the victim's head during the autopsy.

The State presented evidence that appellee made a seriously incriminating

statement after being asked whether he had an attorney and appellee indicated he believed his family was wasting its money because the police had recovered the "pump." As the prosecutor noted during closing argument, in order to believe appellee's testimony that he never was in the pizzeria on the night of the shooting, multiple State's witnesses, including police officers, would have been testifying to the same lie.

To succeed on a claim of ineffective assistance of counsel, in addition to proving deficient performance of counsel, a defendant must demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Armstead*, 235 Md. App. at 425 (quoting *State v. Sanmartin Prado*, 448 Md. 664, 681-82 (2016)). Given the state of the evidence at appellee's trial, we are not persuaded that there is a reasonable probability that the result of his trial would have been different absent any of the alleged errors of counsel.

Consequently, we shall reverse.

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