Circuit Court for Anne Arundel County
Case Nos. C-02-CR-17-000406 &
C-02-CR-17-000407

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

Nos. 1346 & 1347

September Term, 2021

STATE OF MARYLAND

v.

STACEY ERIC WILBURN

Beachley,
Tang,
Woodward, Patrick L.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Beachley, J.

Filed: September 23, 2022

In two separate trials before the Circuit Court for Anne Arundel County, juries convicted appellee Stacey Eric Wilburn of armed robbery, use of a firearm in the commission of a crime of violence, and other related offenses arising out of two robberies he committed on the same day.[1] Appellee filed petitions for post-conviction relief in both cases, alleging ineffective assistance of counsel. The circuit court granted appellee's petitions, and the State filed this timely appeal, challenging the post-conviction court's finding of ineffective assistance of counsel in both cases.

We shall reverse and hold that appellee did not adequately establish ineffective assistance of counsel.

FACTUAL AND PROCEDURAL BACKGROUND

On January 27, 2017, appellee went to Maryland Live! Casino shortly before 6:00 a.m. to play blackjack and lost $1,100. He left the casino sometime before 9:00 a.m. in a white Nissan Pathfinder. At the same time, Teresita Schell was leaving a nearby grocery store. Appellee followed Ms. Schell's vehicle to her home. When she exited her vehicle, appellee pointed a gun at her and demanded cash. Ms. Schell gave him her cell phone and her purse. Appellee returned the cell phone, but took cash out of the purse and left in his vehicle.

At approximately 6:45 p.m. the same day, appellee committed another armed robbery in Howard County, which is not part of this appeal. He returned to the casino

[1] Appellee was also convicted in Howard County for a third armed robbery he committed that same day. That conviction is not at issue in the present appeal.

shortly after 7:00 p.m. and stayed there until approximately 8:00 p.m., at which point he followed Kum Hernandez, a casino employee, to her home. When Ms. Hernandez exited her vehicle, appellee ran up to her and pointed a gun at her, demanding her purse. Ms. Hernandez attempted to run away, but appellee pushed her and grabbed her purse. He then ran back to his vehicle and drove away. As he drove to the casino for a third time that day, he threw Ms. Hernandez's phone and purse out of his vehicle, where they were later found along the side of the road.

Appellee was arrested the next day when he was pulled over after making an illegal left turn. A handgun and ammunition were found inside his vehicle. During a police interview after his arrest, appellee confessed to robbing both women.

I. TRIAL FOR ROBBERY OF MS. SCHELL

The trial for the robbery of Ms. Schell began on October 19, 2017. Before the trial began, defense counsel provided the court with a list of requested voir dire and jury instructions. During voir dire, the circuit court asked the venire two questions that are at issue in this appeal. First, the court asked:

> Does any member of this panel have strong feelings regarding possession of firearms -- and I'm going to add, to the point where it would affect your ability to render a fair and impartial verdict based only on the evidence that you hear?

Defense counsel had requested a substantially similar question.[2] The question elicited no

[2] Defense counsel requested: "Does any member of the jury panel have such strong feelings about the charges in this case, and more specifically the alleged use of a handgun, that it would affect your ability to render a fair and impartial verdict?"

affirmative response from the venire. The court later asked another question that was substantially similar to one defense counsel had requested:

> Does any member of this panel or your immediate family work in the federal government in any agency that would affect your ability to render a fair and impartial verdict? Any people who has an immediate family member works for the federal government that would affect your ability to be fair and impartial.[3]

Two prospective jurors responded to this question. Juror 31 stated: "Although I don't think that I would not be able to give an impartial verdict, I am an analyst in the National Security Agency." Juror 20 similarly indicated that he worked for the National Security Agency, and that his employment would not impact his ability to be fair and impartial.

Ms. Schell testified on the first day of trial and identified appellee as the individual who robbed her. She testified that, at the time of the robbery, the weather was sunny, and she had an unimpeded view of the assailant. Additionally, Ms. Schell testified that the police had shown her a photo array on January 30, 2017, and she selected appellee's photo, indicating at that time that she was "certain it's him." Detective Jeff Golas, who presented the photo array to Ms. Schell, testified that Ms. Schell "was certain when she saw the photograph."

The State presented video from a neighbor's home security system, which showed Ms. Schell's vehicle driving toward her house, and then "seconds later," a white Nissan Pathfinder traveling in the same direction. A short time later, the same white Nissan

[3] Defense counsel requested: "Do you or anyone in your immediate family work in the Federal Government in an Agency that would affect your ability to render a fair and impartial verdict?"

Pathfinder drove back in the opposite direction. Neither the driver nor the license plate of the Pathfinder is visible in the video, but when detectives showed appellee a still image from the video, appellee admitted that it was his vehicle.

The State also presented portions of a video of a police interview with appellee. During the interview, appellee admitted "that he pointed a gun at the victim and told her to give him . . . her purse." At that point, the police had not told appellee that the victim stated the assailant pointed a gun at her, and had not mentioned anything about a purse.

Appellee's fiancée, Sharee Vance, testified that their household had not been having any financial difficulties in January 2017, and that they did not have any "problems" related to appellee's gambling. However, on cross examination, Ms. Vance admitted that she and appellee had had difficulty obtaining $1,000 for appellee's bail. Despite appellee's admission that the Nissan Pathfinder was his vehicle, Ms. Vance questioned whether the Nissan Pathfinder seen in the neighbor's home security video was actually appellee's vehicle. Additionally, Ms. Vance testified on cross examination that she contacted someone from appellee's employer after he was arrested and falsely told that person that appellee would not be coming in to work because he was in the hospital. Appellee declined to testify.

Defense counsel's requested jury instructions included Maryland Pattern Jury Instruction-Criminal ("MPJI-Cr") 3:17 Election of Defendant Not To Testify. However, the court did not read that instruction to the jury, and defense counsel did not raise any objection to its omission.

After nearly four hours of deliberation, the jury returned verdicts of guilty on all counts. Appellee was later sentenced to 12 years' imprisonment for armed robbery, with all but 7 years suspended, and a concurrent 12 years' imprisonment for use of a firearm in a crime of violence, with all but 5 years suspended. Appellee did not appeal these convictions.

II. TRIAL FOR ROBBERY OF MS. HERNANDEZ

The trial for the robbery of Ms. Hernandez began on January 9, 2018. During voir dire, the circuit court asked two questions also at issue in this appeal. First, the court asked:

> Does any member of the prospective jury panel have any political, religious, or philosophical beliefs about our system of criminal justice which would make you hesitate to sit as a juror in this case? Any such beliefs that would impact your ability to be fair and impartial?

Defense counsel did not raise any objection to this question. The court later asked a question substantively similar to one defense counsel had requested:

> Are there any members of the jury panel who have such strong feelings about the nature of the charges in this case, and more specifically, the alleged use of a handgun, that it would impact your ability to render a fair and impartial verdict?[4]

No jurors responded to either question.

Ms. Hernandez testified on the first day of trial and identified appellee as the individual who robbed her. She testified that her driveway had a motion-detecting light that was on at the time of the robbery, and she saw appellee's face "very clearly."

[4] Defense counsel requested: "Does any member of the jury panel have such strong feelings about the charges in this case, and more specifically the alleged use of a handgun, that it would affect your ability to render a fair and impartial verdict?"

The State presented surveillance video from the casino showing Ms. Hernandez's vehicle leaving the parking deck, followed shortly thereafter by appellee driving a white Nissan Pathfinder. By the time Ms. Hernandez's and appellee's vehicles reached the exit of the parking deck, there were four vehicles between them. At the exit, while the line of vehicles was stopped, appellee maneuvered his vehicle into a lane intended for incoming traffic, then reversed back into the proper lane when another vehicle began coming toward him. Ms. Hernandez made a right turn onto the roadway, as did one of the vehicles behind her. Shortly thereafter, appellee also turned right onto the roadway and crossed a double yellow line to pass the vehicle between his Pathfinder and Ms. Hernandez's vehicle.

The State also presented over an hour and a half of the approximately two-hour police interview of appellee. Portions of the video that referenced Ms. Schell's case were redacted. During the interview, appellee confessed to robbing Ms. Hernandez, and correctly described her as "an Asian woman," even though police had not given appellee a description of the victim. He also correctly described Ms. Hernandez's vehicle as "dark" in color.

Detective Renko testified that Ms. Hernandez was shown a photo array the day after the incident, but she was unable to identify any of the individuals in the array as her assailant. However, Detective Renko testified that Ms. Hernandez "paused on [appellee's photo] for a long time," and did not pause on any other photos.

Appellee testified that, at the time of the robberies, he was earning $77,000 per year and Ms. Vance was earning $55,000 per year. According to his testimony, in December

of 2016, he had "saved up" approximately $15,000 from gambling winnings, which he kept in cash. Contrary to his statement to police, appellee testified at trial that, when he left the casino that evening, he did not drive to the area near Ms. Hernandez's house and did not rob Ms. Hernandez. He testified that he told police the victim was an Asian woman because: "when they told me that it was a dealer, the only dealers that I know there, race wise, I always classify as African-American or Asian. And, when they, after we had set there and talked for a while, I just gave them something that they wanted to hear, because I felt pressured to." On cross-examination, appellee testified that he had been convicted of a false report to police in 2011.

After approximately two hours of deliberation, the jury returned verdicts of guilty on all counts. Appellee was later sentenced to 20 years' imprisonment for armed robbery, with all but 7 years suspended, and a consecutive 10 years' imprisonment for use of a firearm in a crime of violence, with all but 5 years suspended.

Appellee noted a timely appeal to this Court, which resulted in an unreported opinion affirming his convictions. *Wilburn v. State*, No. 2136, Sept. Term 2018 (filed Dec. 30, 2019) (per curiam).[5]

[5] There was, in addition, a consolidated appeal of both Anne Arundel County robbery cases concerning the circuit court's denial of appellee's petition for writ of actual innocence. That appeal also resulted in an unreported opinion affirming the circuit court. *Wilburn v. State*, No. 490, Sept. Term 2019 (filed July 10, 2020) (per curiam).

III. APPELLEE'S PETITIONS FOR POST-CONVICTION RELIEF

On September 12, 2019, appellee filed a petition for post-conviction relief in the case involving Ms. Schell, alleging ineffective assistance of counsel. This initial filing was followed by multiple amended and supplemental post-conviction petitions, resulting in nine total allegations of error. The post-conviction court granted relief on three of the ineffective assistance allegations: requesting improper voir dire questions, failing to ensure the trial court gave a "no adverse inference" instruction, and failing to file a notice of appeal.[6]

On February 11, 2020, appellee filed a petition for post-conviction relief in the case involving Ms. Hernandez, also alleging ineffective assistance of counsel. Two supplements were also filed, resulting in seven total allegations of error. The post-conviction court granted appellee a new trial based on trial counsel's request for an improper voir dire question and failure to object to another improper voir dire question.

The court held a post-conviction hearing on January 22, 2021, for the case involving the robbery of Ms. Schell. Appellee testified at the hearing that part of the reason he decided not to testify at trial was his trial counsel's assurance that the jury would be instructed that it would not be able to consider his decision not to testify. Appellee indicated his belief that the failure to give the instruction prejudiced him because "the jury was . . . left to their own devices" to determine whether to consider his lack of testimony,

[6] The State does not challenge the post-conviction court's ruling which granted appellee a belated right to appeal due to counsel's failure to file a notice of appeal.

and "we don't know what the jury considered." Appellee did not testify concerning the voir dire questions.

Appellee's trial counsel also testified. We set forth the entire colloquy at the post-conviction hearing concerning the voir dire questions:

> [POST-CONVICTION COUNSEL]: . . . During the voir dire procedure, one of your goals is to learn as much as possible about the jurors' potential bias against your client. Is that right?
>
> [TRIAL COUNSEL]: Absolutely.
>
> Q: Are you familiar with the term 'self-assessing' voir dire questions?
>
> A: I -- self assess, no, I'm not.
>
> Q: Are you familiar with the line of cases related to State vs. Dingle?
>
> A: No, I am not.

Appellee's trial counsel testified in greater detail concerning the "no adverse inference" jury instruction. He testified that he and appellee spoke at length on numerous occasions about appellee's decision whether to testify at the trial. However, he did not remember any discussions about what motivated appellee's decision, or a "specific conversation" about the fact that the jury could be instructed not to consider appellee's decision not to testify. Appellee's trial counsel nonetheless did agree that "part of [his] conversation with . . . any client would be the fact that the jury would be instructed as to . . . the defense praying not to testify." Additionally, appellee's trial counsel testified: "I think we even did the advisement in the motions hearing, . . . if memory serves." He did

not provide any testimony concerning whether his failure to ensure the giving of a "no adverse inference" instruction caused his client any prejudice.

On April 30, 2021, the court held a post-conviction hearing for the case involving the robbery of Ms. Hernandez. Appellee testified at the hearing, but did not comment on the voir dire questions or any bias the jurors may have had. Appellee's trial counsel also testified, though his discussion of the voir dire questions was again minimal:

> [POST-CONVICTION COUNSEL]: [Trial counsel], during voir dire, in general, in your practice, is it one of your goals to use voir dire to learn as much as possible about the potential juror's bias against your client?
>
> [TRIAL COUNSEL]: Yes.
>
> Q: And are you familiar with the term self-assessing voir dire question?
>
> A: No.
>
> Q: Are you familiar with the line of cases, that includes *Dingle v. State*, which is 361 Md. 1, it's a 2000 case.
>
> A: No.

On July 30, 2021, the post-conviction court granted both petitions. The post-conviction court first found that defense counsel rendered ineffective assistance of counsel by requesting and failing to object to improper voir dire questions. The court applied the two-prong test from *Strickland v. Washington*, 466 U.S. 668, 687 (1984), which provides that defense counsel renders ineffective assistance when (1) "counsel's performance was deficient" and (2) "the deficient performance prejudiced the defense." According to the court, defense counsel's performance was deficient as defined in *Strickland* by requesting

compound, self-assessing questions contrary to *Dingle v. State*, 361 Md. 1 (2000), and *Pearson v. State*, 437 Md. 350 (2014). As to *Strickland*'s second prong, the court found prejudice as a result of counsel's deficient performance, concluding: "[I]t is impossible to determine how many, if any, of the potential jurors conducted their own assessments. Thus, trial counsel's error undermined the outcome of the trial, making the proceeding fundamentally unfair and unreliable."[7]

The court further found that defense counsel's failure to object to the omission of a "no adverse inference" jury instruction constituted ineffective assistance of counsel in the case involving Ms. Schell. Regarding the performance prong of the *Strickland* test, the post-conviction court found:

> Trial counsel's failure to object when the court neglected to give the requested instruction, combined with his post-conviction testimony that he had discussed the possibility of the instruction with [appellee], the on the record references to the instruction and [appellee's] testimony that trial counsel had advised him that the instruction would be given if [appellee] elected not to testify cause this court to conclude that trial counsel's failure to object when the requested jury instruction was not given constituted deficient performance. Under the circumstances of this trial, there is no plausible trial strategy for not doing so.

The post-conviction court found prejudice resulting from this deficiency:

> It is impossible to know whether any of the jurors improperly considered [appellee's] invocation of his Fifth Amendment right in their deliberations.

[7] The court provided substantively the same reasoning regarding all four challenged voir dire questions: "Jurors had to determine their own bias, which is fundamentally unfair and unreliable"; "[T]he outcome of the trial could have been different as no juror responded to the question and a prospective juror could have had strong feelings but had determined themselves to be fair and impartial"; "If the prospective jurors had not had to self-assess their potential bias, other prospective jurors may have responded to the question."

> However, this right is so fundamental that its denial calls into question the fundamental fairness and reliability of the outcome of the proceeding.

Based on its findings of ineffective assistance of counsel in both trials, the post-conviction court granted appellee's requests for new trials.

This Court granted the State leave to appeal the circuit court's judgments.

DISCUSSION

The State argues that the post-conviction courts erred in finding that appellee's trial counsel was ineffective. Specifically, it argues that trial counsel's requests for compound, self-assessing jury questions did not amount to deficient performance, and that appellee failed to prove that he suffered any prejudice because of the alleged errors. Additionally, the State argues that appellee failed to prove that he suffered prejudice as a result of defense counsel's failure to ensure that the court gave a "no adverse inference" instruction in the case in which appellee did not testify.

Appellate review of a post-conviction court's ruling on an ineffective assistance of counsel claim is "a mixed question of law and fact." *Wallace v. State*, 475 Md. 639, 653 (2021) (quoting *State v. Syed*, 463 Md. 60, 73 (2019)). We defer to any factual findings of the post-conviction court unless they are clearly erroneous, and review the court's legal conclusions without deference. *Newton v. State*, 455 Md. 341, 351–52 (2017) (citing *Harris v. State*, 303 Md. 685, 697–98 (1985)).

In *Strickland*, 466 U.S. at 687, the Supreme Court established a two-part test for proving ineffective assistance of counsel.

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Review of counsel's performance must be "highly deferential" and determine "whether counsel's assistance was reasonable considering all the circumstances." *Id.* at 688–89. As to the second prong, prejudice is presumed in three circumstances: "(1) the petitioner was actually denied the assistance of counsel; (2) the petitioner was constructively denied the assistance of counsel; or (3) the petitioner's counsel had an actual conflict of interest." *Ramirez v. State*, 464 Md. 532, 541 (2019). Absent a presumption of prejudice, the petitioner must prove "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." *Syed*, 463 Md. at 86 (quoting *Newton*, 455 Md. at 355). Finally, because a petitioner must prove both prongs of the *Strickland* test, "we need not approach the inquiry in any particular order, nor are we required in every instance to address both components of the *Strickland* test." *Oken v. State*, 343 Md. 256, 284 (1996). "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." *Strickland*, 466 U.S. at 697.

We shall first consider the ineffective assistance claim with regard to the various voir dire questions at both trials, and then separately consider the failure to object to the

omission of the "no adverse inference" jury instruction in the trial for the robbery of Ms. Schell. As to all claims, we conclude that the post-conviction court erred in finding that appellee established prejudice under *Strickland*. Because we hold that appellee did not prove prejudice, it is unnecessary to determine whether his counsel's performance was deficient.[8] *Oken*, 343 Md. at 284.

I. APPELLEE FAILED TO PROVE THE VOIR DIRE QUESTIONS CAUSED PREJUDICE

The State argues that the post-conviction court "employed a flawed analysis in determining prejudice" with regard to the challenged voir dire questions by presuming prejudice rather than requiring appellee to prove prejudice. The State relies on *Ramirez*, 464 Md. 532, to support its contention that "a defendant cannot demonstrate *Strickland* prejudice simply by alluding to a bare possibility that, if properly phrased voir dire questions had been asked, additional prospective jurors might have revealed potential cause for disqualification." The State asserts that appellee failed in his burden to show either (1) actual prejudice, *i.e.*, that there was a reasonable probability that the result of the proceeding would have been different absent counsel's errors, or (2) that the result was fundamentally unfair or unreliable.

Appellee acknowledges in his brief that prejudice can be established either by proving "actual prejudice" or by "proving that the result of the proceeding was 'fundamentally unfair or unreliable.'" (Quoting *Newton*, 455 Md. at 355). According to

[8] Two of the voir dire questions—those asking about working in the federal government and "political, religious, or philosophical beliefs"—may not have been improper. For our analysis, we shall assume that they were improper.

appellee, "fundamental unfairness occurs in all cases" where a court asks a compound, self-assessing voir dire question, "because when an error like this one occurs, it can never be known if or how many jurors are conducting their own assessments." Appellee disclaims any reliance on presumptive prejudice, asserting instead that he proved prejudice by an "alternate means," specifically the "'fundamentally unfair or unreliable' option to prove prejudice, as opposed to demonstrating actual prejudice."[9] (Quoting *Newton*, 455 Md. at 355).

We agree with the State that *Ramirez* is instructive. There, the Court of Appeals held that a petitioner failed to prove that his trial counsel's deficient performance during jury selection resulted in a fundamentally unfair trial. 464 Md. at 541. During voir dire, the court asked the venire: "Have you[,] or any member of your family or close friends[,] ever been victims of a crime, accused of a crime[,] or a witness in a criminal case[,] and that experience affects your ability to render a fair and impartial verdict?" *Id.* at 542 (alterations in original). Juror 27 responded to the question, and indicated that his experience as the victim of a burglary would affect his ability to render a fair and impartial verdict. *Id.* "Trial counsel did not ask Juror 27 any follow-up questions, or request that the circuit court do so." *Id.* When the court inquired about striking jurors for cause, Ramirez's counsel confused Juror 27 with Juror 25 and asked that Juror 25 be struck for

[9] We note, however, that in both hearings before the post-conviction court, appellee argued that the court should presume prejudice as a result of the self-assessing voir dire questions. At oral argument in this Court, appellee's counsel disavowed any reliance on the concept of presumed prejudice.

cause because "Their home was broken into. Their response as to whether it would affect them was, I believe it would." *Id.* However, Juror 25 had not responded to any of the voir dire questions. *Id.* at 543. Juror 27 was ultimately seated on the jury. *Id.* The jury found Ramirez guilty of all charges, and Ramirez filed a petition for post-conviction relief, alleging ineffective assistance of counsel. *Id.* at 554. The post-conviction court concluded that Ramirez's trial counsel's performance was not deficient, and that Ramirez "had not identified any evidence that Juror 27 'showed bias[,]' and had 'instead [] offered mere conjecture.'" *Id.* at 555 (alterations in original).

Although the Court of Appeals disagreed with the post-conviction court's conclusion that Ramirez had not proven deficient performance, it nevertheless affirmed. *Id.* at 566–67. The Court first rejected Ramirez's argument that a presumed prejudice standard should apply because his counsel's actions caused "structural error." The Court held that "a court should presume that trial counsel's performance prejudiced the petitioner only if: (1) the petitioner was actually denied the assistance of counsel; (2) the petitioner was constructively denied the assistance of counsel; or (3) the petitioner's counsel had an actual conflict of interest." *Id.* at 573. The Court noted that, although a structural error requires reversal on direct appeal, an ineffective assistance of counsel claim still requires the petitioner to prove prejudice. *Id.* at 566, 573. "[T]he distinction between structural errors [and other types of error] matters only on direct appeal—not in a postconviction proceeding." *Id.* at 576 (citing *Weaver*, 137 S. Ct. at 1910).

The Court then turned its attention to whether Ramirez had satisfied his burden to

prove prejudice in light of the "strong direct evidence and circumstantial evidence of Ramirez's guilt." *Id.* at 578.

> As the Supreme Court explained in *Strickland*, [466 U.S. at 696], "a verdict [that is] only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." In other words, generally, a petitioner fails to prove that his or her trial counsel's performance prejudiced him or her where, at trial, the State offered strong evidence of the petitioner's guilt.

Id. at 577 (second alteration in original). The Court concluded that "The strength of the State's case against Ramirez leads to the conclusion that there is no substantial or significant possibility that the outcome of the trial would have been different had Juror 27 not served on the jury." *Id.* at 580. Specifically, the Court noted that "the jury did not submit any questions during deliberations, deliberated for less than three hours, and found Ramirez guilty of all eleven charges." *Id.* The Court continued,

> Significantly, Ramirez fails to marshal even a colorable argument that he was prejudiced. Indeed, both on brief and at oral argument, Ramirez's postconviction counsel seemed to take the position that Juror 27's response to the "crime victim" question, without more, conclusively establishes that Juror 27's presence on the jury was prejudicial. In his brief, Ramirez's postconviction counsel argues that Ramirez "was 'guilty from the start' when [Juror 27] was seated." Similarly, at oral argument, after being asked what circumstances showed that, but for Juror 27's presence on the jury, the trial's outcome would have differed, Ramirez's postconviction counsel stated that "the 'but for' is really just the seating of the juror." In making this assertion, Ramirez's postconviction counsel essentially conflates the performance prong and the prejudice prong—*i.e.*, he essentially presumes that, because Ramirez's trial counsel erred, that error must have been prejudicial.

Id. at 580–81.

Applying *Ramirez* to the instant case, we likewise conclude that because the evidence of appellee's guilt in both trials was "overwhelming," appellee failed to prove

prejudice under *Strickland*. Notably, both robbery trials included in-court identifications of appellee as the assailant, and both victims testified that they had a clear view of appellee's face during the crime. Ms. Schell also selected appellee's photo out of a police photo array conducted three days after the robbery, and indicated a high level of certainty in her identification. Though Ms. Hernandez did not identify appellee in a photo array, Detective Renko testified that she paused "for a long time" on appellee's photo and did not pause on any other photos. Both trials also included video of appellee confessing to the crimes, and video of appellee's vehicle following the victims' vehicles immediately before they were robbed. Additionally, video of appellee at the casino the day of the crimes showed him wearing clothing similar to the victims' description of their assailant's attire, and a handgun was found in appellee's vehicle when he was arrested.

Though Ms. Vance testified for the defense in the trial involving Ms. Schell, her testimony was contradictory to statements appellee made in the police interview. Furthermore, she admitted on cross-examination that, to protect appellee from the negative consequences of his arrest, she lied to someone at appellee's employer about why he was not at work the Monday after he was arrested. Appellee's testimony in the trial involving Ms. Hernandez was similarly contradictory to his statements to police, and cross examination revealed that he had been previously convicted of a false report to police.

In the trial for the robbery of Ms. Schell, the jury submitted three notes during deliberations. The first asked to see the DVD of the police interview with appellee, the second asked for a copy of the elements of each charge, and the third stated: "11 jurors

vote guilty on all counts, one juror says no to all counts." In response to the third note, the court read MPJI-Cr. 2:01[10] to the jury again. Less than an hour later, the jury returned a verdict of guilty on all charges. Overall, the jury deliberated for less than four hours.

In the trial for the robbery of Ms. Hernandez, the jury did not submit any notes during deliberations. The jury deliberated for slightly more than two hours before reaching a verdict of guilty on all charges.

At his post-conviction hearings, appellee failed to provide any proof that jury members in either trial held an unfair bias against him. Instead, he argued that the improper voir dire questions were "presumptively prejudicial." Because appellee relied on the concept of presumptive prejudice, he made little or no effort to show actual prejudice or fundamental unfairness. Implicitly recognizing that *Ramirez* precludes him from relying on presumptive prejudice, appellee argues on appeal that the voir dire questions, in and of themselves, created a situation where the trials lacked fundamental fairness. *Ramirez* rejects appellee's suggestion of *per se* prejudice in these circumstances. Indeed, *Ramirez*

[10] Specifically, the court instructed the jury:

> The verdict must be the considered judgment of each of you. In order to reach a verdict, all of you must agree. In other words, your verdict must be unanimous. You must consult with one another and deliberate with a view to reaching an agreement if you can do so without violating your individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. During deliberations, do not hesitate to re-examine your own views. You should change your opinion if convinced you are wrong, but do not surrender your honest belief as to the weight or effect of the evidence only because of the opinion of your fellow jurors or for the mere purpose of reaching a verdict.

found no *Strickland* prejudice even where a seated juror affirmatively stated that he *could not* render a fair and impartial verdict. The circumstances here are less egregious because it is unknown whether any juror maintained such beliefs. In *Ramirez*, a seated juror harbored bias, but in this case the post-conviction court found that "it is impossible to determine" whether any of the jurors had incorrectly determined that they could be fair and impartial. "It is not enough for the [petitioner] to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 581 (alteration in original) (quoting *Strickland*, 466 U.S. at 693). A petitioner must show that "'there was a substantial or significant possibility that the verdict[s were] affected' by his trial counsel's conduct." *Id.* at 577 (alteration in original) (quoting *Syed*, 463 Md. at 86–87).[11]

As in *Ramirez*, we conclude that appellee failed to meet his burden of proving that he was prejudiced by his counsel's request for improper voir dire questions and failure to object to another improper question.

[11] At oral argument, appellee attempted to differentiate *Ramirez* by arguing that the error in that case was a mere "trial error," whereas the error in the present case is a "structural error" and is therefore necessarily fundamentally unfair. However, as the Supreme Court made clear in *Weaver*, 137 S. Ct. at 1908, there are three types of structural errors: (1) those in which "the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest"; (2) those in which "the effects of the error are too hard to measure"; and (3) those which "always result[] in fundamental unfairness." Though any structural error will result in reversal on direct appeal, to prevail in a post-conviction hearing, the first and second types of error require a further showing of prejudice. *Id.* at 1910. As the post-conviction court suggests by finding that "In this case, it is impossible to determine how many, if any, potential jurors conducted their own assessments," the errors in this case were of the second type—"the effects of the error[s] are too hard to measure." *Id.* at 1908. Appellee therefore needed to prove prejudice beyond simply arguing that the error was a structural one.

II. APPELLEE FAILED TO PROVE PREJUDICE REGARDING THE JURY INSTRUCTION

The State next argues that the post-conviction court erred in finding that defense counsel's failure to renew his request for a "no adverse inference" instruction caused prejudice to appellee. The State alleges that the court's analysis "effectively presumed prejudice."

The State urges us to follow the analysis of the United States Court of Appeals for the Eleventh Circuit in *Bester v. Warden*, 836 F.3d 1331 (11th Cir. 2016). In that case, Bester was convicted of various crimes related to drug trafficking. *Id.* at 1333. Bester filed a petition for post-conviction relief, alleging that "his trial counsel rendered ineffective assistance by failing to request that the jury be given a no-adverse-inference jury instruction, which would have told the jurors that they could not infer from his failure to testify that he was guilty." *Id.* Rather than presenting any evidence indicating that jurors were improperly influenced by his failure to testify, he argued that the evidence against him was "not overwhelming" and that the jury's questions about the evidence show that it had doubts about whether he possessed certain drugs and paraphernalia. *Id.* at 1337. In making this argument, Bester relied upon a case concerning a direct appeal where the trial court failed to give a "no adverse inference" instruction despite the defendant's specific request. *Id.* at 1338. The Eleventh Circuit noted the difference in the burden of persuasion regarding prejudice between direct appeals and petitions for post-conviction relief: in a direct appeal, "[t]he government, not the defendant, bears the burden of establishing that a constitutional error is harmless"; in a petition for post-conviction relief, the petitioner "has

the burden of establishing prejudice under the *Strickland* standard." *Id.* The Eleventh Circuit concluded that "Bester ha[d] not carried his burden of showing prejudice. The evidence against him was overwhelming and the jurors' mid-trial questions did not show that they had doubts about this guilt." *Id.*

The Eleventh Circuit's analysis is persuasive, and follows the reasoning of the Court of Appeals in *Ramirez*. As discussed above, the State presented "overwhelming evidence" at trial of appellee's guilt. And, as with the voir dire questions, appellee failed to provide any proof that the trial was fundamentally unfair or unreliable. Instead, he merely argued that the failure to give a "no adverse inference" instruction created a situation whereby jurors "might have drawn an adverse inference" based on appellee's decision not to testify.[12]

Because the post-conviction court erred in finding that appellee's trial counsel's deficient performances prejudiced him, we reverse.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY REVERSED EXCEPT AS TO APPELLEE'S RIGHT TO FILE A BELATED APPEAL IN NO. 1347. COSTS TO BE PAID BY APPELLEE.

[12] The court instructed the jury that appellee "is presumed innocent of the charges," that the State "has the burden of proving guilt of the defendant beyond a reasonable doubt," and that appellee "is not required to prove his innocence." Assuming that any juror harbored bias against appellee because of his election not to testify, "there is no way to know" whether that bias continued into deliberations in light of these instructions. *See Bester*, 836 F.3d at 1339.