Circuit Court for Baltimore City
Case Nos. 198044053, 198044054, 198083006

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1416

September Term, 2019

MARK HOLLINGSWORTH

v.

STATE OF MARYLAND

Berger,
Nazarian,
Beachley,

JJ.

Opinion by Nazarian, J.

Filed: April 30, 2021

Mark Hollingsworth shot and killed two people and seriously injured a third on January 18, 1998. He was convicted by a jury in the Circuit Court for Baltimore City of first-degree murder, second-degree murder, and first- and second-degree assault, as well as use of a handgun in commission of a felony or crime of violence, and wearing, carrying, or transporting a handgun. We affirmed the convictions on direct appeal.

Mr. Hollingsworth sought post-conviction relief, and after a series of hearings, the post-conviction courts denied it. On appeal, he argues that the State committed a *Brady*[1] violation, that his counsel was constitutionally ineffective, and that prosecutorial misconduct tainted his trial and convictions. We agree with the post-conviction court's decision to deny relief and affirm.

I. BACKGROUND

A. The Incident And Investigation

On the night of January 17–18, 1998, Mr. Hollingsworth was working as a disc jockey at a night club in Baltimore. The club became crowded and at 3:00 a.m., a fight broke out. Police arrived on the scene, and Mr. Hollingsworth was brought in for questioning, along with several others who were at the club that night.

Mr. Hollingsworth gave three statements to the police on January 18. His first statement was taken at 5:45 a.m.; as we explain later, this statement was suppressed prior to trial. Mr. Hollingsworth was kept at the police station all day and officers interviewed him a second time at 11:15 p.m. This statement was not recorded, but notes were taken by

[1] *Brady v. Maryland*, 373 U.S. 83 (1963).

the lead detectives.[2] Mr. Hollingsworth's third statement began at 11:57 p.m., and this time was recorded. The recording of the third interview was shown to the jury, and the transcript admitted into evidence.

The first statement was taken by an officer early in the morning, during the initial investigation of the incident. The officer interviewed several people, including Mr. Hollingsworth, who had been at the club when the shooting occurred. The officer took brief notes during this interview. In the course of this first statement, Mr. Hollingsworth told the officer that he was a disc jockey that night, and he saw that a fight broke out but didn't see the shooter or who was involved in the fight.

Mr. Hollingsworth gave his second statement to the lead detectives, James Shields and Mark Wiedefeld, who memorialized it only through their notes:

> Detective Shields's notes:
>
> Then a bunch of guys came into the club, talking about guns, one guy came straight at me with a black semi auto handgun. I get the gun away from him and started to shoot him—once in the stomach—I'm not sure.
>
> Detective Wiedefeld's notes:
>
> Bunch of boys came running. I shot boy I took gun from in stomach (1) time. Took shirt off, dropped gun I shot that I took from guy who came at me. Boys started coming in talking about guns. I was trying not to get killed. Me and Steve tried to stop it.

The third statement by Mr. Hollingsworth followed shortly after and was recorded. During this statement, Mr. Hollinsworth's story changed yet again. This time, he admitted

[2] These notes are referred to by Mr. Hollingsworth and the State as Exhibits 6 and 7. We will refer to the investigators' notes from the second interview as the "interview notes."

shooting one victim, shooting a second victim who was standing right behind the first, and running out of the building while continuing to shoot.

Before trial, the prosecutor held a meeting with defense counsel and made the record of the case available for defense counsel to investigate and review. Mr. Hollingsworth also moved to suppress his first and third statements to the officers, and the court held a hearing on the motion before trial. At the hearing, Detective Wiedefeld testified that he "spoke to [Mr. Hollingsworth], made some brief notes" before asking Mr. Hollingsworth if he would make another statement that Detective Wiedefeld could record. The circuit court suppressed the first statement, but declined to suppress the third statement, the one recorded at 11:57 p.m. The second statement and Detective Wiedefeld's notes were not at issue during the motions hearing.

B. Trial And Appeal

At trial, the defense argued self-defense and provocation. The defense's witnesses claimed to not have seen the shooter and denied seeing Mr. Hollingsworth with a gun. Mr. Hollingsworth did not testify.

The State offered several witnesses who testified about the scene at the club. The witnesses said that they saw Mr. Hollingsworth run through the club shooting and watched him shoot one of the victims in the back. Detective Wiedefeld testified for the State and detailed his investigation and Mr. Hollingsworth's statements. When the prosecutor asked Detective Wiedefeld to describe Mr. Hollingsworth's demeanor, he said that Mr. Hollingsworth was afraid, remorseful, and upset.

The jury found Mr. Hollingsworth guilty of first-degree murder, second-degree murder, first- and second-degree assault using a handgun, and wearing, carrying, or transporting a handgun. He was sentenced to life plus fifty years.

Mr. Hollingsworth appealed to this Court, and we affirmed his convictions.

C. Post-Conviction Relief And Application For Leave To Appeal

On May 21, 2009, Mr. Hollingsworth filed a petition for post-conviction relief. Five hearings were held to review his case, and in the end, relief was denied in a July 19, 2016 Statement of Reasons and Order.

Mr. Hollingsworth then filed a timely application for leave to appeal. We directed the case back to the post-conviction court to review one issue. A follow-up hearing was held on June 14, 2019, and relief on the issue was also denied. On October 9, 2019, this Court granted Mr. Hollingsworth's application for leave to appeal. We supply additional facts as needed below.

II. DISCUSSION

On appeal, Mr. Hollingsworth raises three arguments. He contends that (1) the State withheld *Brady* material from him, (2) his defense counsel rendered ineffective assistance, and (3) the prosecutor engaged in prosecutorial misconduct.[3]

[3] Mr. Hollingsworth framed his Questions Presented as follows:

> 1. Did the State violate *Brady v. Maryland*, 373 U.S. 83 (1963)?
>
> 2. Did defense counsel render ineffective assistance under *Strickland v. Washington*, 466 U.S. 668 (1984)?
>
> 3. Did the State engage in prosecutorial misconduct?

A post-conviction court's decision encompasses both findings of fact and conclusions of law. *Newton v. State*, 455 Md. 341, 351 (2017). We defer to the court's factual findings unless they were clearly erroneous. *Id.* "We then re-weigh the facts as accepted in order to determine the ultimate mixed question of law and fact . . . ." *Harris v. State*, 303 Md. 685, 698 (1985) (*citing Walker v. State*, 12 Md. App. 684, 691–95 (1971)). "A conclusion that a verdict generally or a finding of fact specifically is clearly erroneous is not a wild card that appellate courts may freely play." *State v. Brooks*, 148 Md. App. 374, 398 (2002).

> A finding of fact should never be held to have been clearly erroneous simply because its evidentiary predicate was weak, shaky, improbable or a "50-to-1 long shot." A holding of "clearly erroneous" is a determination, as a matter of law, that, even granting maximum credibility and maximum weight, there was no evidentiary basis whatsoever for the finding of fact. The concern is no with the frailty or improbably of the evidentiary base, but with the bedrock non-existence of an evidentiary base.

Brooks, 148 Md. App. at 399. "Under the 'clearly erroneous' standard, 'if there is any competent evidence to support the factual findings below, those findings cannot be held to be clearly erroneous.'" *Johnson v. State*, 440 Md. 559, 568 (2014) (*quoting Washington v. State*, 424 Md. 632, 651 (2012)). A finding is clearly erroneous only when, considering the evidence in its entirety, we are left with a definite and firm conviction that a mistake has been committed. *See Kusi v. State*, 438 Md. 362, 383 (2014) (*quoting Goodwin v. Lumbermens Mut. Cas. Co.*, 199 Md. 121, 130 (1952)).

A. There Was No *Brady* Violation

Mr. Hollingsworth contends that the State violated its obligation, as articulated in *Brady v. Maryland*, to disclose exculpatory evidence when it withheld the investigators' interview notes that memorialized Mr. Hollingsworth's short interview with detectives before he gave the longer recorded statement. This withholding was material, he says, because it changed the defense's trial strategy and prevented defense counsel from making a vital objection during the State's closing argument. The State counters that no evidence exists to support that the State intentionally withheld the notes. We find no clear error in the post-conviction court's finding that the notes were available to defense counsel, and that finding resolves the *Brady* argument against Mr. Hollingsworth.

A *Brady* violation is a constitutional claim, based on the Due Process Clauses of the Fifth and Fourteenth Amendments. *See, e.g.*, *United States v. Agurs*, 427 U.S. 97, 107 (1976). A *Brady* violation calls into question whether the State met its obligation and duty to disclose "evidence favorable to an accused upon request . . . where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. 83, 87 (1963). This obligation applies whether or not the defense has requested the evidence. *Agurs*, 427 U.S. at 107.

"There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999). *First*,

"[f]avorable evidence includes not only evidence that is directly exculpatory, but also evidence that can be used to impeach witnesses against the accused." *Ware v. State*, 348 Md. 19, 41 (1997) (*quoting Giglio v. United States*, 405 U.S. 150, 154 (1972)). *Second*, "suppression is inextricably intertwined with the timing of disclosure and the defendant's independent duty to investigate, especially in a situation where the defense 'was aware of the potentially exculpatory nature of the evidence as well as its existence.'" *Yearby v. State*, 414 Md. 708, 722–23 (2010) (*quoting* 6 Wayne R. LaFave et al., *Criminal Procedure* § 24.3(b), at 362 (3d. ed. 2007)). And *third*, prejudice can be likened to materiality and is analyzed by asking if there was a reasonable probability that the evidence would have produced a different result. *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). "[T]he burdens of production and persuasion regarding a *Brady* violation fall on the defendant." *Yearby*, 414 Md. at 720 (*citing Diallo v. State*, 413 Md. 678, 704 (2010)). And the defendant's duty to investigate inheres when he knows or should have known that the exculpatory evidence exists. *See id.* at 723.

After hearing testimony from trial counsel on both sides, the post-conviction court found that the investigator's notes had in fact been available to defense counsel and the prosecutor:

> In this case, the incomplete notes that detectives took were known to [defense counsel], and she testified that she was aware of what Mr. Hollingsworth said before the tape started. Additionally, Detective Wiedefeld handed over the notes to [the State], and [defense counsel] subsequently reviewed the file containing the notes in [the State's] office while being afforded the opportunity to review all files and documents concerning the case. As [the prosecutor] testified, there would

> be no reason why she would not include the notes in the file for [defense counsel]'s review.
>
> Because [Mr. Hollingsworth] failed to establish that the statement was unknown to [defense counsel], there was no non-disclosure and, therefore, no Brady violation.

Moreover, defense counsel testified "that she was aware of what Mr. Hollingsworth said before the tape started."

Additionally, the prosecutor testified at the post-conviction hearing that she has a habit of being "very generous with discovery" and that she would not have "hid[den]" the interview notes:

> [POST-CONVICTION COUNSEL]: Exhibits No. 6[4] and No. 7,[5] do you know whether you disclosed those to defense counsel?
>
> [THE STATE]: If I had them I feel confident that I did.
>
> . . .
>
> [THE STATE]: It is my practice to be very generous with discovery. I wasn't trying to hide anything. There's nothing in the notes that – I mean I would have given them any way, but there's nothing in these notes that would hurt the State. I would give it because it's part of the statement. Notes taken by the

[4] Exhibit 6 is Detective Shields's notes:

> Then a bunch of guys came into the club, talking about guns, one guy came straight at me with a black semi auto handgun. I get the gun away from him and started to shoot him—once in the stomach—I'm not sure.

[5] Exhibit 7 is Detective Wiedefeld's notes:

> Bunch of boys came running. I shot boy I took gun from in stomach (1) time. Took shirt off, dropped gun I shot that I took from guy who came at me. Boys started coming in talking about guns. I was trying not to get killed. Me and Steve tried to stop it.

> detective as part of the statement. I wouldn't call it a statement per se like you refer to it, but –
>
> . . .
>
> [THE STATE]: Also, [defense counsel] did come to my office and we discussed the case, and normally when that would happen we would go through the entire file.

And at the post-conviction hearing, Detective Wiedefeld testified that his interview notes from the second statement were turned over to the State with all other evidence and documentation.

Defense counsel testified at the post-conviction hearing that she went through the file in the State's office and didn't find anything of particular value:

> [POST-CONVICTION COUNSEL]: Exhibit 6 and 7. Do you recall seeing Exhibits 6 and 7 or either 6 and 7, when you went through and reviewed the file at the meeting with [the State]?
>
> [DEFENSE COUNSEL]: I don't remember if I saw these. I can say that nothing significant came out of that open file, going through that file, there's nothing of significance. And I consider these two documents of significance. So I think if I had seen these two I definitely would have had her copy them and brought them up. Because it verified what he was telling me.

Because "[p]rosecutorial suppression of evidence is a predicate to a *Brady* claim," *Yearby*, 414 Md. at 722, Mr. Hollingsworth's claim here requires us to find clear error in the court's resolution of the conflicting testimony. And we can't: although the lawyers' memories differed, we cannot say that the trial court erred, let alone clearly, in finding that the evidence was not suppressed by the State, let alone willfully. Further, "no *Brady* violation exists when exculpatory evidence is available to the defendant from a source where a reasonable defendant would have looked." *Ware v. State*, 348 Md. 19, 39 (1997)

(*citing Barnes v. Thompson*, 58 F.3d 971, 975 (4th Cir. 1995)). The evidence from the post-conviction hearing supports a finding that the notes were contained in the State's file and that the prosecutor's practice of admitting defense counsel to her office to look through the case file afforded the defense an opportunity to find the notes. Assuming for the moment that the interview notes would have benefited Mr. Hollingsworth under the first prong of *Brady* analysis, we discern no clear error in the court's finding that they weren't withheld, and that conclusion precludes a finding that a *Brady* violation occurred.

B. Mr. Hollingsworth's Trial Counsel Was Not Ineffective

Second, Mr. Hollingsworth argues that even if the interview notes were available, defense counsel's failure to discover them and use them effectively at trial violated his Sixth Amendment right to effective assistance of counsel. The State counters, and the post-conviction court agreed, that defense counsel's choice not to use the notes could have been intentionally strategic. Under *Strickland*, a finding that defense counsel's performance was deficient isn't enough—we also would need to find a reasonable probability that the result of the proceeding would have been different and that wasn't the case here.

We review the post-conviction court's assessment of counsel's performance deferentially, and against an objective standard of reasonableness grounded in "prevailing professional norms." *Strickland v. Washington*, 466 U.S. 668, 689 (1984). The standard of review for *Strickland* claims is a mixed question of law and fact. As with the *Brady* violation, we defer to the post-conviction court's findings of fact unless they're clearly erroneous. *See, e.g.*, *State v. Jones*, 138 Md. App. 178, 209 (2001). But we "must exercise

[] our own independent judgment as to the reasonableness of counsel's conduct and the prejudice, if any." *Id.* (*quoting Oken v. State*, 343 Md. 256, 285 (1996)). "The 'benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper function of the adversarial process that the trial cannot be relied on as having produced a just result.'" *Id.* at 206 (*quoting Strickland*, 466 U.S. at 686).

Strickland articulated a two-prong test: *first*, counsel's performance must have been deficient, and *second*, counsel's failure must have caused the defendant prejudice. *Strickland*, 466 U.S. at 687. To satisfy the first prong, counsel's performance must have resulted in "unreasonable professional judgment, meaning that 'counsel's representation fell below an objective standard of reasonableness.'" *Jones*, 138 Md. App. at 206 (*quoting Strickland*, 466 U.S. at 694)). To meet the second prong, counsel's performance must have been so deficient that there is a reasonable probability "the result of the proceeding would have been different." *Id.* (*quoting Strickland*, 466 U.S. at 694)).

And in this case, as to the first prong, our analysis of counsel's judgment begins with the post-conviction court's factual finding that the interview notes were available to the defense before and at the time of trial. Mr. Hollingsworth claims that the interview notes would have benefitted his trial presentation in three specific ways: counsel should have used them to cross-examine the detective, counsel should have advised Mr. Hollingsworth to testify at trial, and counsel should have objected during the prosecutor's closing argument. He asserts that "there could have been no sound trial strategy in failing to take reasonable additional steps to discover the content[s] of the [interview] notes." The

State responds that Mr. Hollingsworth's argument overlooks two realistic possibilities: "(1) that [defense counsel] did not see the notes in discovery, but that was not ineffective assistance of counsel; or (2) that [defense counsel] knew about the notes and opted not to use them, which also was not ineffective assistance."

It is far from obvious that Mr. Hollingsworth's case would have gotten any stronger had counsel used the interview notes in the ways he argues on appeal. The most significant evidentiary addition from those notes was a new (and third) story about what happened, and it is difficult to understand how additional inconsistency could have helped his case. The post-conviction court found as much—assuming defense counsel knew of or had the interview notes, "to introduce an inconsistent statement as evidence would allow for the jury to infer that Mr. Hollingsworth was not truthful and that his self-defense claim was untrue." And "[b]ecause attempting to boost the credibility of a client is sound trial strategy, [defense counsel] was not ineffective for failing to introduce an additional inconsistent statement . . . ." The contrast is all the greater after defense counsel succeeded in getting the first recorded statement suppressed—with that statement out, defense counsel could, and did, portray Mr. Hollingsworth as a defendant with a consistent story who was willing to cooperate. Introducing the interview notes would have undermined that strategy, and the theoretical alternative—that defense counsel could have introduced Mr. Hollingsworth's first statement, which was suppressed, the interview notes, and the recorded statement—would only have compounded the inconsistency.

Mr. Hollingsworth also contends that his statements to the detectives would have

bolstered his self-defense theory. "Counsel testified that had she been aware of the existence of [the interview notes], she would have cross-examined Wiedefeld with them, she would have advised [Mr. Hollingsworth] to testify, and she would have objected to the prosecutor's closing argument." But again, even if we assume that counsel was ineffective, it is difficult to see how the notes would have helped Mr. Hollingsworth, and even more, how the decision not to use the interview notes prejudiced him. For the notes to have the effect Mr. Hollingsworth claims for them here, the jury would have had to believe his otherwise uncorroborated description of threats from others (threats that weren't connected to his ultimate victims) notwithstanding his failure even to mention these threats in his recorded statement immediately after. Put another way, a prejudice finding depends on a jury being more likely to believe him *as a result of* his inconsistent statements to police, not in spite of them. We see no error in the post-conviction court's decision not to see it that way.

Regardless of whether Mr. Hollingsworth could succeed on the performance prong of the *Strickland* test, which, as we discuss above, he does not, we share the post-conviction court's skepticism that the outcome of the trial would have been different and that Mr. Hollingsworth was prejudiced by the absence of the interview notes in his trial presentation. *See Cirincione v. State*, 119 Md. App. 471, 486 (1998) ("In other words, we need not find deficiency of counsel in order to dispose of a claim on the grounds of a lack of prejudice." (*citing Strickland*, 466 U.S. at 697)). To establish prejudice, the defendant must show either: "(1) 'a reasonable probability that, but for counsel's unprofessional

errors, the result of the proceeding would have been different'; or (2) that 'the result of the proceeding was fundamentally unfair or unreliable.'" *Newton v. State*, 455 Md. at 355 (*quoting Coleman v. State*, 434 Md. 320, 331 (2013)). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. And because "[t]he likelihood of a different result must be substantial, not just conceivable," *Harrington v. Richter*, 562 U.S. 86, 112 (2011) (*citing Strickland*, 466 U.S. at 693), we affirm the post-conviction court's denial of Mr. Hollingsworth's ineffective assistance claim.

C. There Was No Prosecutorial Misconduct Because There Wasn't a *Brady* Violation.

Third, Mr. Hollingsworth argues that the State engaged in prosecutorial misconduct at two specific points during his trial: *first*, when "the prosecutor allowed Wiedefeld's false testimony about the pre-tape statement to go uncorrected," and *second*, during the State's closing argument when the prosecutor "capitaliz[ed] on [Wiedefeld's false] testimony." Both arguments flow from the premise that the State committed a *Brady* violation, a premise we rejected above, and these prosecutorial misconduct theories fail as a result.

1. Detective Wiedefeld's testimony

The false testimony to which Mr. Hollingsworth alludes includes a statement by Detective Wiedefeld describing Mr. Hollingworth's remorsefulness:

> [PROSECUTOR]: Could you describe the defendant's demeanor during the interview, during the conversation you had prior to the taped interview?
>
> [DET. WIEDEFELD]: He was pretty upset. He was afraid. He was pretty remorseful. [He was] saying things like it was so

stupid, things to that effect.

Mr. Hollingsworth argues that this statement insinuates that his pre-taped statement, the one memorialized only in the interview notes, was inconsistent with the statement and tone in the taped interview. This is because, he says, the interview notes contain statements about threats from others and Mr. Hollingsworth's claim that he took the gun from someone else. By introducing only the recorded interview, Mr. Hollingsworth argues, the prosecutor let false testimony go uncorrected at trial.

The State responds, and the post-conviction court found, that the State had no affirmative obligation "to point out the absence of a reference in the taped statement to [Mr.] Hollingsworth's asserting before being taped that he got the gun from an assailant." Further, the post-conviction court found that in light of the evidence, even if the interview notes had been withheld, the outcome of the trial would not have been different.

2. Closing argument

In closing argument, the prosecutor characterized the recorded statement that had been admitted into evidence and played for the jury at trial as Mr. Hollingsworth's "entire statement on tape." Mr. Hollingsworth says the prosecutor's intent was to point out "important things" from this statement stated in Mr. Hollingsworth's "own words." Mr. Hollingsworth contends that the State's closing argument misled the jury because the prosecutor "never expressly drew a distinction" between the interview notes, which were not in evidence, and the taped statement, which was.

The State counters that Mr. Hollingsworth has misinterpreted the prosecutor's

statements and that the post-conviction court concluded correctly that a prosecutor is not required to "avoid commenting on the evidence that is *actually* before the jury and pointing out to the jury what is and what is not present in the very evidence that they are charged with analyzing." (emphasis in original).

The question, then, is whether the post-conviction court clearly erred in concluding that the prosecutor hadn't misled the jury. "'Reversal is required, however, only 'where it appears that the remarks of the prosecutor actually misled the jury or were likely to have misled or influenced the jury to the prejudice of the accused.'" *State v. Newton*, 230 Md. App. 241, 254 (2016) (*quoting Pickett v. State*, 222 Md. App. 322, 330 (2015)).

Closing arguments are important, but they're delivered by human beings in real time, and if every minor transgression was cause for reversible error only few verdicts would ever stand. *Lawson v. State*, 389 Md. 570, 589 (2005). And although we review allegations of prosecutorial misconduct closely, we don't leap lightly to the conclusion that misstatements, if any, were intentional or designed to mislead:

> Such arguments, like all closing arguments of counsel, are seldom carefully constructed in toto before the event; improvisation frequently results in syntax left imperfect and meaning less than crystal clear. While these general observations in no way justify prosecutorial misconduct, they do suggest that a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations.

Donnelly v. DeChristoforo, 416 U.S. 637, 646–47 (1974). For an appellate court to determine if there was prejudice to the defendant, we look at "the severity of the remarks,

the measures taken to cure any potential prejudice, and the weight of the evidence against the accused." *Spain v. State*, 386 Md. 145, 159 (2005) (*citing United States v. Melendez*, 57 F.3d 238, 241 (2d Cir. 1995)).

The alleged misconduct here didn't prejudice Mr. Hollingsworth. Again, the argument is that the prosecutor painted a misleadingly incomplete picture of Mr. Hollingsworth's statements by referring in closing argument only to the statement that was admitted, and by failing to complete the picture with statements Mr. Hollingsworth made but weren't admitted (statements that, he claims, were withheld from his counsel altogether). Making arguments from evidence that wasn't in evidence would itself inject reversible error into the case. *See Jones v. State*, 217 Md. App. 676, 689–99 (2014). And Mr. Hollingsworth doesn't argue that the prosecutor mischaracterized the statement she referenced. In that regard, then, this stands in contrast to *Whack v. State*, where the prosecutor explicitly misrepresented expert testimony about DNA evidence that was vital to the defendant's conviction for second-degree murder. 433 Md. 728, 732–33 (2013). The prosecutor in that case went so far as to overemphasize the DNA evidence's statistical significance by asserting that "one in 172 is equal to one in 212 trillion in terms of probability." *Id.* at 745–46.

We agree with the post-conviction court that the prosecutor argued the evidence that was before the jury and that doing so here, where only one statement was in evidence, was not an act of misconduct. Nor was the prosecutor hiding the ball—the interview notes were available to the defense and hadn't been admitted at trial. Had there been a *Brady* violation,

the answer might well have been different—a prosecutor who withheld exculpatory evidence would mislead a jury by arguing that the only available statement inculpates the defendant. That's not what happened here: the post-conviction court found, and we have affirmed, that the interview notes weren't withheld and were available to the defense. The absence of a *Brady* violation means the decision not to use the notes was a tactical one, and the prosecutor's argument characterized the only admitted statement fairly. The post-conviction court did not err in denying relief on this basis.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. APPELLANT TO PAY COSTS.