Circuit Court for Baltimore City
Case No. 117060003

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1439

September Term, 2021

STATE OF MARYLAND

v.

DARRION MALLETTE

Graeff,
Arthur,
Wright, Alexander, Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wright, J.

Filed: August 23, 2022

*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.

In 2017, a jury sitting in the Circuit Court for Baltimore City found Darrion Mallette, appellee, guilty of possession of a regulated firearm and possession of ammunition by a person previously convicted of a disqualifying offense. The court sentenced him to 10 years' imprisonment, the first five without the possibility of parole, for unlawful possession of the firearm, and a concurrent term of one year for unlawful possession of ammunition. We affirmed those judgments on direct appeal. *Mallette v. State*, No. 1624, Sept. Term, 2017 (filed Sept. 20, 2018) ("*Mallette I*").

Appellee thereafter filed a postconviction petition, alleging ineffective assistance of counsel, in violation of the Sixth Amendment. The basis of appellee's claim was an alleged failure of trial counsel to consult him before deciding to decline the trial court's offer to declare a mistrial upon discovering that an item not in evidence mistakenly had been sent to the jury room during deliberations. Although appellee's claim was a case of "he said, she said,"[1] he did not call trial counsel to testify at the postconviction hearing, and thus the record is devoid of trial counsel's version of events. The postconviction court nonetheless granted appellee's petition, vacated his convictions, and ordered a new trial.

The State filed application for leave to appeal, which we granted, and the case was transferred to the regular appellate docket. In this appeal, the State raises a single issue: whether the postconviction court erred in granting appellee's petition. For the reasons that follow, we shall affirm.

[1] Not quite literally, as both appellee and trial counsel are male.

BACKGROUND

The Crimes

On a Tuesday afternoon in February 2017, Baltimore City Police officers responding to a 911 call in west Baltimore encountered a group of "individuals," sitting on the porch of a rowhouse. When police approached them, they all "took off running." Appellee stood out from the others, according to Officer Andre Smith, one of the responding officers, because he was "clutching his left side of his jacket" while running away, which suggested to Officer Smith that he might be "armed with a gun."[2] While police officers were giving chase, appellee eventually tripped, "fell to the ground[,]" and was apprehended. A black jacket he had been wearing was recovered from a nearby alley where he had discarded it while fleeing from police. In the left-hand pocket of that jacket was a loaded handgun. The magazine and receiver of the handgun were mismatched, according to Officer Smith, and only with some difficulty was he able to pry the weapon out of the jacket pocket.[3] Appellee previously had been convicted of a disqualifying crime and did not legally possess either the handgun or ammunition.

[2] Over defense objection, Officer Smith was accepted by the trial court as an expert in the characteristics of an armed person.

[3] The receiver of the weapon was a Glock model 27, but the magazine was from a Glock model 22. The magazine is longer than the one designed for the Glock model 27, and it protruded beyond the lower part of the grip, causing it to lodge itself tightly in appellee's jacket pocket. This seemingly innocuous fact would become significant later because a hairbrush, which had never been admitted into evidence, was discovered in the same pocket during jury deliberations.

The following month, in March 2017, appellee was charged by indictment with possession of a regulated firearm by a person previously convicted of a disqualifying crime, possession of ammunition by a person previously convicted of a disqualifying crime, and wearing, carrying, or transporting a handgun on his person.[4] In August 2017, a two-day jury trial was held on those charges in the Circuit Court for Baltimore City.

Trial

Trial counsel's defense strategy was based upon lack of criminal agency. During opening statement, trial counsel asserted to the jury:

> You will hear evidence of the gun was submitted for fingerprints. There's not one fingerprint of Mr. Mallett[e]'s on this gun. There is not going to be any DNA of Mr. Mallett[e]'s on this gun. And there is also a jacket that they're going to say was recovered. And you're going to hear there was not one bit of DNA, not hair, not sweat, nothing, nothing at all to tie him with the gun or the jacket to Mr. Mallett[e].
>
> So at the end of the case, you're going to have to look at the charges and show that the State has met the burden. Have they proved this case to you beyond a reasonable doubt? I submit to you that the testimony of one officer, none of the other officers from there, and no forensic evidence is not enough to convict this young man of those crimes.

During the State's case-in-chief, Officer Smith described his encounter with appellee as summarized above. Because Officer Smith's ordinary duties involved serving with an aviation unit rather than as a patrol officer, he did not carry a body-worn video camera, and, consequently, the only such video that was available (recorded by another

[4] It appears from the trial transcript and postconviction petition that originally there were additional charges, but only those stated above were sent to the jury. The indictment is not included in the appellate record transmitted to us, and we therefore cannot verify precisely what charges were contained in the indictment.

officer near the scene) and admitted into evidence depicted only the aftermath of Officer Smith's encounter with appellee.[5]

The only other witness the State called was a firearms examiner, who testified about the firearm and ammunition that had been recovered from appellee's jacket pocket. The firearm was a .40 caliber Glock model 27, which, when tested, was fully operable, despite the mismatched magazine, which came from a different model, the Glock 22. Sixteen rounds of ammunition, recovered from appellee's jacket pocket, also were examined, thirteen of which were hollow-point and three of which were full-metal jacket.

No identifiable fingerprints were recovered from the handgun. No DNA testing or other forensic examination was performed on any of the physical evidence. Appellee elected not to testify, nor did he call any other witnesses.

During closing argument, trial counsel once again emphasized what he considered to be the thin evidence of his client's criminal agency. He exhorted the jury:

> You each now, or when you go back into the deliberating room, are going to make a determination if this State has proven beyond a reasonable doubt that this young man is guilty of rather serious crimes. Okay? And so you need to, kind of, take a step back and look at (indiscernible - 4:02:59) this is. There's really not that much to look at.
>
> The State only called two witnesses in this case, Officer Smith and the firearms tech. You can forget about the firearms tech. The gun worked. I agree with her. It worked. Feel free to discuss that, if you want. But that's not what's at issue here, right?

[5] The other officers apparently chased some of the other fleeing persons. Officer Smith zeroed in on appellee, the one he believed was armed, because, according to Officer Smith, he was "closer" and "probably" the fastest runner among the responding police officers.

> What's at issue here is Officer Smith. And can the State prove this case or have they proven this case beyond a reasonable doubt just based on Officer Smith? If you think they did, then you're going to find him guilty. If you think they didn't, then you'll find him not guilty. I suggest that you should find that they did (indiscernible - 4:03:41).

Trial counsel compared the State's investigation to a hypothetical, more diligent investigation of a juror who had handled the seized handgun when it was published to the jury. Assuming that a video of that exchange existed, explained trial counsel,

> we would bring the video. We would play the video. We would call other witnesses that were there and say, "Oh yeah, I saw her touch the gun, and I saw her touch the gun, and I saw her touch the gun," right? We wouldn't just have one person come in to say it. We would use all of the other tools. If there were fingerprints, we could use them. We would use the other tools. And that's how we prove a case, right?

Trial counsel launched into an attack against the lack of corroboration of Officer Smith's testimony:

> So the problem here with the State's case is that they have not done anything in order to prove the case other than give you Officer Smith. So maybe Officer Smith is telling the truth, maybe he's not telling the truth. Maybe he's mistaken. Maybe he's dishonest. We don't know because we have been given nothing from the State to corroborate anything that he said.
>
> So let's say -- so what could they have given us, so I'm not just making this up. What would be proof beyond a reasonable doubt, right? So you call Officer Smith. What about the other officers? So there's two other officers there. Why aren't they on the witness stand talking about "We also saw Mr. Mallett[e] run" or "We also saw Mr. Mallett[e], you know, holding his hand in such a way." Why aren't they here to corroborate any of this?

Trial counsel emphasized the absence of forensic evidence:

> Why -- and, you know, I keep harping on this, but why is there no forensics with regard to this? You know, this is the state of Maryland. There's, you know -- this is important enough that resources should be used to put together a proper case that the goal is to convict this young man. So the science exists. It's not like I'm talking about CIA satellites and taking

> (indiscernible - 4:07:53) out of the satellites and things of that sort. I'm talking about fingerprints. I'm talking about DNA. This -- I'm sorry. I don't mean to -- this jacket -- they could test a jacket for DNA. There would be hair. There would be sweat. There would be things they could test to say, in addition to Officer Smith, if it was true, that, "Oh yeah, well, we know this jacket was worn by Mr. Mallett[e] because we just called a DNA expert and this matches that." Or fingerprints on any one of these bullets. You got 16 bullets here. Fingerprint them. Any one of these bullets would corroborate. Or this magazine or the gun. That would corroborate his story. That would be proof beyond a reasonable doubt.

In rebuttal, the prosecutor sought to take the sting out of trial counsel's comments about the lack of forensic evidence:

> The law doesn't say you have to have fingerprints. The law doesn't say you have to have video. The law doesn't say you have to have DNA. The law says that testimony can be enough.
>
> * * *
>
> And if you look at the picture of the Defendant, he had another hoodie on. So if I put this jacket on top of my jacket, it's not touching my skin. It's not touching my DNA. But you don't need DNA to know that my jacket is on me, that Officer Smith's uniform is on him. You don't need DNA to know that the Defendant had the jacket on.
>
> You don't need fingerprints to know that I touched the gun because Officer Smith gave evidence, gave testimony that the Defendant touched the gun -- that the Defendant had the gun in his pocket. So he may not have even left fingerprints because it was in his pocket, not his hand.

The jury left the courtroom to begin deliberations at 4:27 p.m. Thirty-seven minutes later, at 5:04 p.m., the jury sent two notes to the court. One of the notes asked: "Was fingerprint, DNA, forensics tests completed? Was anything found?" The other note stated: "There is a brush in the pocket of the left jacket."

The trial court convened a bench conference to determine how to respond to the notes. The following colloquy occurred:

THE COURT: . . . Why is there a brush in there?

[PROSECUTOR]: It was just part of evidence. It was in there.

THE COURT: What do you mean it was just part of evidence? That's --

[PROSECUTOR]: But it was --

THE COURT: That's a mistake. That's going to cost you this case. "We see hair on the jacket. Was there DNA tested on the jacket?" You should never send anything to the jury that's not in evidence.

All right. Well, here's how I propose to answer the question, both questions. Well, here. You can look at the notes. So I propose to say "You must rely on the evidence that was presented in the courtroom."

[TRIAL COUNSEL]: Yeah.

[PROSECUTOR]: Yes, Your Honor.

[TRIAL COUNSEL]: Yes.

THE COURT: But the sad thing is that the brush is not in evidence and yet it was sent to the jury, which is clearly error. **If the Defense asked me for a mistrial, I'd probably grant it.**

[TRIAL COUNSEL]: **I'm not going to do that.**

THE COURT: Okay.

[TRIAL COUNSEL]: **Well, I guess I have to discuss it with my client.**

THE COURT: Yeah.

[TRIAL COUNSEL]: **I suppose it's really his decision, but --**

THE COURT: Now, do you want to wait for your client before you answer this -- before you agree to this answer to the question? Well, there he is.

[TRIAL COUNSEL]: I mean, I'm okay with it. Okay.

> THE COURT: That's a (indiscernible - 5:07:03). You want to take him the questions?
>
> [TRIAL COUNSEL]: Yeah, if I could.
>
> [PROSECUTOR]: Okay.
>
> [TRIAL COUNSEL]: Can I take the answer also? That way I can remember it.
>
> THE COURT: Oh, yeah. Sure.
>
> (Counsel returned to the trial tables, and the following occurred in open court:)
>
> (Court confers with Clerk.)
>
> (**Defense Counsel confers with Defendant.**)
>
> (Court confers with Clerk.)
>
> THE COURT: All right. Mr. [trial counsel], you set?
>
> [TRIAL COUNSEL]: This answer's fine (indicating).
>
> THE COURT: That[] answer's fine. All right. Let me have it.

(Emphasis added.)

The court then sent the agreed-upon written response (advising the jury that it must rely only upon "the evidence that was presented in the courtroom") to the jury. Shortly afterward, the court sought confirmation that trial counsel was not requesting a mistrial. The following colloquy occurred:

> THE COURT: I'm assuming because you didn't make a motion for mistrial, you're not making a motion for mistrial.
>
> [TRIAL COUNSEL]: I'm not, Your Honor.
>
> THE COURT: Okay. All right.

The subject of the conversation then turned to the continuing difficulties the court and the parties were experiencing in ascertaining that the physical evidence was properly accounted for and sent into the jury room. The following colloquy occurred:

> THE COURT: Did you check, Ms. [clerk]?
>
> THE CLERK: Yes, I did.
>
> THE COURT: Then I don't understand this question. **Did you all go through the exhibits? Did you all make sure that they were all there?**
>
> [TRIAL COUNSEL]: **I think so.**
>
> THE COURT: Obviously not, because the computer didn't go up and now we have a note from -- "Can we see the picture of the Defendant? No. 1, picture provided by Defense."
>
> [PROSECUTOR]: **We did ask for that.**
>
> [TRIAL COUNSEL]: **We sent that up.**
>
> [PROSECUTOR]: **We double checked** that that was in there --
>
> * * *
>
> [TRIAL COUNSEL]: I don't -- **I'm not sure about anything, but I do know we spoke of it, and we saw it, and it went in that pile.** It's --
>
> [PROSECUTOR]: Yeah.
>
> THE COURT: Okay.

(Emphasis added.)

At 5:36 p.m., the jury sent another note to the court, revealing that it was "split, 7 to 5[,]" that "the discourse has ended[,]" and that it was "feeling firm" in its "current decision." After conferring with the parties, the court excused the jury until the following morning.

The jury resumed its deliberations the next morning. After approximately an hour and a half, the jury reached a verdict, finding appellee guilty of possession of a regulated firearm by a person previously convicted of a disqualifying offense, and possession of ammunition by a person previously convicted of a disqualifying offense. The jury acquitted appellee of wearing, carrying, or transporting a handgun on his person.[6] The court thereafter sentenced appellee to ten years' imprisonment for illegal possession of a regulated firearm and a concurrent term of one year for illegal possession of ammunition, and he subsequently noted an appeal. *Mallette I* at 1.

Appeal

In his direct appeal, appellee raised three issues: (1) whether the trial court erred or abused its discretion in accepting Officer Smith as an expert in the characteristics of an armed person; (2) whether the trial court erred in dismissing the jury over defense objection and thereby accepting inconsistent verdicts; and (3) whether the evidence was sufficient to sustain the convictions. *Id.* We held that the trial court did not err or abuse its discretion in accepting Officer Smith as an expert in the characteristics of an armed person, *id.* at 6-10; that the verdicts, although "curious," were not legally inconsistent, *id.* at 15; and that the issue of evidentiary sufficiency was unpreserved because trial counsel "did not offer any reasons" in support of his motion for judgment of acquittal, *id.* at 16, but that, in any event, the evidence was sufficient. *Id.* at 16-19.

[6] Trial counsel objected to what he claimed were inconsistent verdicts and apparently sought to have the jury held while he could argue that claim to the trial court, but the court dismissed the jury before he could do so.

Postconviction Proceedings

In February 2020, appellee filed a postconviction petition, contending that he was deprived of his right to the effective assistance of counsel because trial counsel failed to consult him or move for a mistrial after it was discovered that an item not in evidence was allowed to be sent to the jury during its deliberations.[7] The State responded that trial counsel's decision not to request a mistrial was sound trial strategy. The State emphasized that appellee's postconviction claim "is based entirely on knowledge, now known to [him], that Trial Counsel could not have had at the time of the decision – specifically, that the seated jury would find [appellee] guilty."

During the (virtual) postconviction hearing,[8] appellee testified, but trial counsel was not called as a witness, although he had been provided an electronic invitation to the hearing. According to appellee,

> I got to the courtroom. [Trial counsel], he came to me and he said -- **I don't remember word-for-word what he said, but I remember him -- it was four years ago, but he said that the jury had a note that they found a hairbrush in a pocket, but he told me don't worry about it because it's -- that's what we need. We need confusion in the case, that it was going to work in our favor, for real. He said don't worry about it. They found the hairbrush in a pocket. That's all he said.**
>
> [POSTCONVICTION COUNSEL:] Okay. Now, where did this conversation occur, sir?

[7] He also raised a claim, based on *State v. Flansburg*, 345 Md. 694 (1997), that trial counsel was ineffective in failing to file a motion for modification of sentence. Appellee subsequently withdrew that claim because trial counsel did file that motion, and the trial court denied it.

[8] The postconviction hearing was held in December 2020, when Maryland courts were operating under special protocols because of the COVID pandemic. At that time, hearings were conducted by videoconference.

[APPELLEE:] In the courtroom, soon as you -- like soon as I walked through the door, he met me pretty much at the door.

[POSTCONVICTION COUNSEL:] Okay. Approximately how long did this conversation occur?

[APPELLEE:] It was no longer than two minutes.

[POSTCONVICTION COUNSEL:] Okay. After you had this two-minute-or-so-long conversation, what did [trial counsel] do next, sir?

[APPELLEE:] He said okay. That's all he said.

[POSTCONVICTION COUNSEL:] Okay. Did he then talk to the judge?

[APPELLEE:] Yeah, he went back to the judge.

[POSTCONVICTION COUNSEL:] Okay.

[APPELLEE:] He went back to the judge.

[POSTCONVICTION COUNSEL:] During this -- I'm sorry. I'm sorry to cut you off. Did I let you finish, sir?

[APPELLEE:] No, I'm finished.

[POSTCONVICTION COUNSEL:] Okay. **During this conversation, sir, did [trial counsel] tell you that Her Honor, [the trial judge], had talked about a mistrial?**

[APPELLEE:] **No.**

[POSTCONVICTION COUNSEL:] Okay. During this conversation, sir, did he explain to you what a mistrial was?

[APPELLEE:] No.

[POSTCONVICTION COUNSEL:] Okay. Was there ever a time during this conversation, sir, that [trial counsel] asked the Court to -- if he were permitted to go back down to the lockup with you and talk about this issue?

[APPELLEE:] No.

[POSTCONVICTION COUNSEL:] Okay.

[APPELLEE:] I understand now what a mistrial is.

[POSTCONVICTION COUNSEL:] Okay.

[APPELLEE:] I never knew about mistrial until I was already convicted and I was in Jessup reading through my transcripts, for real, and once I read through the transcripts and seen that conversation that they had about a mistrial and when the Judge was saying that it was error, then that's when it clicked in my mind about what -- that's when I started digging to find out what a mistrial was. But as of that day of the trial, I never knew nothing about mistrial.

* * *

[POSTCONVICTION COUNSEL:] Okay. And that was after you'd been incarcerated -- after you'd been convicted; is that correct?

[APPELLEE:] I was already convicted by the time I got knowledge of this. I was already sentenced. I was sentenced and doing my time.

[POSTCONVICTION COUNSEL:] Okay. Sir, if the description of a mistrial would have been relayed to you, what would your suggest -- would you have requested a mistrial or not requested a mistrial?

[APPELLEE:] **I'd requested a mistrial because that's evidence that -- that's important evidence that the State was basically saying that they didn't -- it was no way to figure out that the jacket did not belong to me. I was basically saying that it didn't belong to me, so to me, they basically left out a key factor in the case.** So I would have declared a mistrial because once they don't declare the mistrial, now they forever instruct the jury to act as if the brush not even there when the brush -- I have -- **like the brush could have declared my innocence**, for real, because that was big because it was five people there at the time, for real. So to me, you saying that you can't have -- there's no way for you to have gotten DNA because she said that I had another jacket on, for real, underneath of the jacket that I had on, but clearly now, you find -- **<u>now, I find out that there's a hairbrush in the pocket and that's clearly DNA</u>. <u>I got braids</u>. <u>I had braids that day</u>. I didn't just start growing my hair. I had braids my**

whole life. <u>I don't own a hair</u> -- <u>I don't need a hairbrush</u>. I don't do my own hair. So that would have been something that could have helped me out so I would have declared a mistrial.

[POSTCONVICTION COUNSEL:] Now, when you say would have helped you out, what do you mean by that?

[APPELLEE:] **It could have proved my innocence.**

[POSTCONVICTION COUNSEL:] How, though? What is your theory in regards to how it could prove your innocence?

[APPELLEE:] Because first of all, they saying that they got this gun out of the jacket's lefthand pocket and now, come to find out, a hairbrush pops up in the left -- jacket's lefthand pocket; that's first and foremost, for real.

The officer never even took -- nobody really knows where this gun came from because he went in the alley by himself, for real, and he had other officers there with body cameras and he -- nobody never seen him go back there hisself and get this handgun or whatever he's saying that he had, for real. So the fact that you're saying that you saw me running clinching my left side and my defense, even when I was in trial I told [trial counsel] I'm righthanded. Like, why would I have a gun in my left pocket -- anything in my left pocket and I'm righthanded, for real. That's like if you ask any officer which side do they hold they holster on it's going to be whatever hand that they are, for real. But he was saying that it's no way to declare that which hand you is; that's what he told me in trial, for real, but all I needed to do is just write. If I write with my right hand you'll see that I'm righthanded. I can't write with my lefthand. So the fact that a hand -- that they was saying that a gun was in the left pocket and a hairbrush pop up in that pocket, for real, that's going against what they was saying, for real.[9] So if you leave that out as if it -- that's something to me that's big in trial that if you leave out, it could make it go a whole another way.

* * *

[9] Given that the hairbrush was found in the same left-hand pocket in which the handgun had been found, and the jury was aware of the latter, it is unclear why the discovery of the brush would have made a difference in this respect. It would seem that appellee's problem was his failure to introduce into evidence that he was right-handed.

> [POSTCONVICTION COUNSEL]: And you would have -- if the mistrial would have been granted, more likely than not, a retrial would have occurred and you're saying before that retrial you would have requested that brush be tested for DNA; is that correct?
>
> [APPELLEE]: Yes, sir. Yes, I would have.
>
> * * *
>
> You can't just forget that the brush was inside a pocket. You can't forget nothing when it come to evidence, for real. That's something that could have proved my innocence, for real. That's how I look at it.

(Emphasis added.)

During cross-examination, appellee further clarified his version of the conversation that took place between him and trial counsel during the critical moments before trial counsel declined the court's offer to declare a mistrial:

> [STATE'S ATTORNEY:] Mr. Mallette, I just have a few questions. So I just want to clarify. So you testified that you weren't in the room when the note was given to the Judge; is that correct?
>
> [APPELLEE:] No, I wasn't in the room.
>
> [STATE'S ATTORNEY:] But did they bring you upstairs so you could talk to your attorney?
>
> [APPELLEE:] Yes.
>
> [STATE'S ATTORNEY:] Okay. And you did have an opportunity to talk to your attorney?
>
> [APPELLEE:] Yes, when I came in, the attorney talked to me.
>
> [STATE'S ATTORNEY:] Okay. And there was a period of time -- you said you read the transcripts, right?
>
> [APPELLEE:] After.

> [STATE'S ATTORNEY:] Yeah, yeah, of course. After, in preparation for this hearing today, you've read the transcripts of the trial?
>
> [APPELLEE:] Yes, I read the transcripts of the trial.
>
> [STATE'S ATTORNEY:] And you remember in the transcript there actually says there's a period of time that you and your attorney were able to speak but we don't get to know -- the transcript doesn't tell us what the conversation was.
>
> [APPELLEE:] Right.
>
> [STATE'S ATTORNEY:] Okay. And you told us today that the conversation was that [trial counsel] told you there was a coat in the pocket but that we need confusion --
>
> [APPELLEE:] It was a brush in the pocket.
>
> [STATE'S ATTORNEY:] I'm sorry, a brush, yes. That we need confusion and it will work in our favor.
>
> [APPELLEE:] Yeah, that's what he said.

The postconviction court then heard argument from the parties. The Assistant State's Attorney began by stating that she did not believe it "necessary to call [trial counsel] as a witness." When it was postconviction counsel's turn for rebuttal, he asked for and received permission to recall appellee, who further testified about the significance of the belatedly discovered brush in light of the prosecution's argument, during trial, about the difficulty in extracting the handgun from the jacket pocket purportedly leading appellee to discard his jacket:

> [POSTCONVICTION COUNSEL:] Okay. When was the first time you learned of the brush?
>
> [APPELLEE:] I learned of the brush when my lawyer -- when I got called up there, my lawyer said there was a brush in a pocket.

[POSTCONVICTION COUNSEL:] Okay. And --

[APPELLEE:] That the jury had sent a note saying that it was a brush inside the pocket.

[POSTCONVICTION COUNSEL:] Okay. You never learned of it before; is that correct?

[APPELLEE:] No, I never learned of it before.

[POSTCONVICTION COUNSEL:] Okay. Now, was there an argument in the case about the size of the gun?

[APPELLEE:] Yes. The State was arguing that as I was running -- that they was saying that the clip to the gun was not the same clip that supposed to have went to the gun, that the clip was big and that the -- I was -- the clip -- I was struggling to get the gun out of the pocket. That's why they -- as I was running and that's what -- and I couldn't get it out because the gun was so big, basically the gun was too big for the pocket they was saying and that was my reason for why I took the whole -- instead of me just taking the gun and throwing it, they was using -- saying that that was the reason why I took my whole coat off and threw the whole coat, for real, because I couldn't get the gun out of the pocket as I was running, for real, because the gun was too big. And the clip -- they was saying the clip to the gun was too big.

[POSTCONVICTION COUNSEL:] And it was too -- it was large for the pocket; is that correct?

[APPELLEE:] Right. They was basically saying it was too big so I -- that's what was making me struggle to get the gun out of the pocket as I was running; that's what they're arguing.

[POSTCONVICTION COUNSEL:] So after the note was sent, and after you talk about the brush, and after you talk to [trial counsel], did you ever see the brush?

[APPELLEE:] No.

[POSTCONVICTION COUNSEL:] Okay.

[APPELLEE:] To this day I don't -- I have no knowledge of what the brush -- I never seen the brush. I don't know about the brush.

In light of appellee's additional testimony, postconviction counsel amended his previous argument, asserting that trial counsel may have known about the hairbrush prior to when the jury's note was presented to the court and that, if he did, he should have adjusted his trial strategy accordingly:

> Your Honor, Judge, when this -- this whole case changed when the brush was found, okay? When the brush was found, the whole case changed. It's a piece of evidence. And as you know -- as we know as we're trying a case, the evidence is the gravamen to the case. So the entire case changed when this brush was found.
>
> **So when was it found? We know [the prosecutor] found it prior to it going into the jury room. Did [trial counsel], was he that "we" we're talking about or was it detectives when she was -- she prepares arduously, as we know.** Was it when she was preparing with the detectives that it came up? I don't know, but it was found sometime before. **If [trial counsel] knew about it before, then he should have done something about it one way or the other.** Not doing something -- if he found it with [the prosecutor] after the closing arguments were made, you know, Your Honor. The closing arguments are made and the jury goes to the room. The judge says, you all go over the evidence with the clerk. So if it was made then, then, hey, something should have been done. He should have done something, either asked for a mistrial, asked to reopen the case, something should have been done.
>
> If it was found when the jury brought it down and they alert him, he should have done something. He should have -- as I said, [trial judge], this is important. I need a break to talk to Mr. -- my client to explain what's happening here because the character -- just like the O. J. Simpson, I agree with that, you know, the glove and all that. It's an important part of the case, but nothing was done. At best, we're not going to do the mistrial; we're just going to move forward. So the jury's got the brush. What do they think? Who knows what they think. That's -- probably add to the confusion, too. But nothing was done when this was found, either -- by [trial counsel], either her -- [the prosecutor] at the collection of the evidence or later. Nothing was done in regards to his man's right . . . . He should have said, hey, we got this.
>
> This is an option you have. You have a mistrial; what that means. Nothing was done. So that furthers his ineffectiveness, Your Honor, and [the prosecutor] says it's hindsight. As I said, I don't think it's hindsight because

> the Judge said, if you ask for it, I'm probably going to grant it. So I don't think it was hindsight. And now Mr. Mallette tells us about the -- there was an issue about the size of the gun and the clip and whether it fit in the coat. So it changes the -- for all the -- it already changed the case when it came out, Your Honor. So for those reasons, Your Honor, I'm asking that the Court find there was ineffective assistance of counsel provided by trial counsel, and I'm asking for the relief of a new trial, Your Honor.

(Emphasis added.)

The Assistant State's Attorney pointed out that appellee had shifted his argument during the hearing and that she needed an opportunity to respond to the new argument:

> Just briefly, Your Honor. So just to -- I just want to make the record clear. The allegations that were filed in the petition were regarding whether or not [trial counsel] should have asked for a mistrial upon receiving the note from the jury and the State's arguments have been tailored as to whether or not [trial counsel] should have asked for a mistrial when receiving that note. **If Your Honor needs to hear anything regarding sort of the slight change in allegations which is he should have done something when he found out about the brush, I'd ask -- I'd sort of release [trial counsel] and I know he has a hearing in another court at 1:00 so he's not available now, but if Your Honor needs to hear something about what his strategy was for not asking for something else when he discovered the brush, be it should he have discovered it beforehand, when he discovered it when we looked at the evidence before sending it to the jury. If that's an argument the Defense is sort of making now -- excuse me, Petitioner is making now, we'd ask for an opportunity to have [trial counsel] because that's not (indiscernible - 5:19:32) looking at when it spoke to [trial counsel] in preparation for this hearing.**

(Emphasis added.)

The postconviction court ordered appellee to file a supplemental petition and the State to file a response. In that supplemental petition, appellee asserted that the "discovery of the brush changed the entire trial"; that trial counsel "should have re-evaluated the entire presentation"; but that "he did not[,]" nor did he ask for a mistrial or even explain to appellee what a mistrial is or what it likely would have meant in appellee's case. In

addition, appellee contended that it is "unclear" whether trial counsel "was aware of the brush's existence before the jury sent their note."[10] Finally, appellee maintained that, had trial counsel been aware of the brush prior to trial, the brush could have been tested for DNA;[11] and, moreover, he could have cross-examined Officer Smith as to whether he observed the brush while manipulating the black jacket to remove the handgun but that, under the circumstances, appellee was denied that opportunity to impeach Officer Smith, the only witness who testified as to appellee's criminal agency.

The State responded that trial counsel's actions reflected sound trial strategy; that trial counsel was or should have been aware of body-worn video camera footage depicting a police officer finding a brush in the left-hand jacket pocket and leaving it inside a zippered pocket;[12] that trial counsel's "failure to focus his defense on an item of no apparent evidentiary value, neither being contraband nor obviously indicative of ownership (e.g., an ID)[,]" was not objectively unreasonable; that appellee's "own testimony proves that" trial counsel "believed the jury was favorable to" appellee, and he "specifically said 'confusion' was good for the case"; and it proffered that trial counsel "would testify that he did discuss

[10] Appellee did not develop this point further, but it appears to have been in response to a suggestion made by the Assistant State's Attorney, during the postconviction hearing, that trial counsel may have been aware of the brush prior to when the evidence was sent to the jury room and that appellee, therefore, would not have been entitled to a mistrial.

[11] Appellee seems to suggest that such a test would have been favorable to him but does not expressly say so.

[12] The video was provided to trial counsel in discovery and subsequently introduced into evidence at appellee's trial, but it is unclear whether the part of the video depicting the discovery of the brush was played before the jury.

the possibility of a mistrial with" appellee, that "he advised [appellee] that the jury's discovery of the brush was helpful to their case[,]" and that a mistrial "would give the State the opportunity to remedy" any deficiencies in its case, to the detriment of appellee.

After the supplemental petition and the State's response were filed, the postconviction court issued a memorandum opinion and order granting appellee's petition and declaring:

> Trial Counsel's decision not to consult and ask for mistrial is clear error, not merely strategic decision making or sound trial strategy. The brush related to the debated ownership of the jacket as well as the size and contents of certain left-side pockets. The jury's discovery of the brush—not admitted into evidence—was a gamechanger for Trial Counsel's arguments upon targeting the State's failure to test for DNA. This Court agrees [with appellee] that, in view of the jury's first two notes, "the discovery of the brush changed the entire trial. Defense counsel should have re-evaluated the entire presentation."
>
> * * *
>
> In the circumstances of the fundamental evidentiary error immediately identified by [the trial judge] upon receiving the two jury notes, the Judge's specific discussion of the error—and specific invitation of mistrial—compels the conclusion of "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." [quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)] Had the mistrial been contemporaneously requested, it would have been granted. [The trial judge] reacted pointedly: "If the Defense asks for a mistrial, I'd probably grant it." The sequence with [the trial judge] reflected "a probability [of evidentiary error] sufficient to undermine confidence in the outcome," *Strickland*, 466 U.S. at 694.
>
> * * *
>
> Trial Counsel's error by inaction was compounded by [appellee]'s testimony that he was not consulted about whether to ask for a mistrial. Before discussing the jury notes with [appellee], Trial Counsel told the Judge his determination that he would not ask for a mistrial. When Trial Counsel briefly spoke with [appellee] off-the-record directly following the colloquy

> with the Judge and State regarding a mistrial, Trial Counsel told him that "the jury had a note that they found a hair brush in a pocket," but "don't worry about it, because that's what we need. We need confusion in the case . . ." Their discussion lasted "no longer than two minutes" and Trial Counsel did not mention, let alone explain, the possibility of a mistrial. That Counsel gave no report or context of [the trial judge]'s admonishment to [appellee] was not mere error of strategic decision-making.
>
> * * *
>
> It is quintessentially the duty of counsel to provide a client with available advice about an issue like the possibility of mistrial, and the failure to do so confirms that the first prong of the *Strickland* analysis is satisfied.
>
> Trial Counsel had ignored the import of the two jury notes and their timing that clearly indicated the inter-relationship of the brush with the issue of DNA testing as well as the size and location of the pockets. Trial Counsel barely reacted to the presence of new and unauthenticated evidence being presented to the jury. Trial Counsel did not ask for a mistrial despite the strong probability that it would be granted. Trial Counsel did not consult with [appellee] regarding the probability of a mistrial.

Opinion and Order, at 7-10 (filed March 4, 2021) (footnotes omitted). For those reasons, the postconviction court concluded that trial counsel "violated [appellee]'s Sixth Amendment right to effective assistance of counsel by failure to request a mistrial after the jury's questioning discovery of the brush"; that trial counsel "violated [appellee]'s Sixth Amendment right to effective assistance of counsel by failure to discuss the import and probability of a mistrial with [appellee]"; and that the "proper remedy is a new trial." *Id.* at 10.

DISCUSSION

Standard of Review

A postconviction court's ultimate conclusion on a claim of ineffective assistance of counsel presents a mixed question of law and fact. *State v. Syed*, 463 Md. 60, 73 (plurality

opinion of Greene, J.), *cert. denied*, 589 U.S. __, 140 S. Ct. 562 (2019); *Newton v. State*, 455 Md. 341, 351 (2017), *cert. denied*, 583 U.S. __, 138 S. Ct. 665 (2018). We review a postconviction court's factual findings for clear error. *Newton*, 455 Md. at 351. A court's factual finding is clearly erroneous if there is no evidence in the record that supports its finding; conversely, if there is any competent evidence in the record that supports a court's finding, then that finding cannot be clearly erroneous. *See*, *e.g.*, *Johnson v. State*, 440 Md. 559, 568 (2014).

We review a postconviction court's legal conclusions without deference. *Newton*, 455 Md. at 351-52. We apply the same non-deferential review to a postconviction court's ultimate conclusion as to whether a constitutional right was violated. *Syed*, 463 Md. at 73 (plurality opinion of Greene, J.); *Newton*, 455 Md. at 352.

Legal Principles Applicable to Ineffective Assistance Claims

The right to counsel, guaranteed by the Sixth Amendment to the United States Constitution (and applicable to the states through the Fourteenth Amendment), has been interpreted by the Supreme Court to mean "the right to the **effective** assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) (emphasis added). An ineffective assistance claim comprises two elements: deficient performance and prejudice. *Newton*, 455 Md. at 355 (citing *Strickland*, 466 U.S. at 687). Trial counsel's performance is deficient if it "was objectively unreasonable under prevailing professional norms." *State v. Wallace*, 247 Md. App. 349, 359 (2020), *aff'd*, 475 Md. 639 (2021) (quotation marks and citations omitted). Prejudice ensues if there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

Id. (quotation marks and citations omitted). A postconviction petitioner bears the burden of proof as to both elements of an ineffective assistance claim.[13] *Syed*, 463 Md. at 75 (plurality opinion of Greene, J.) (citing *Strickland*, 466 U.S. at 687).

"Judicial scrutiny of counsel's performance must be highly deferential." *Strickland*, 466 U.S. at 689. "[A]ccordingly, a reviewing court begins with a 'strong presumption' that counsel 'rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" *State v. Thaniel*, 238 Md. App. 343, 360 (quoting *Strickland*, 466 U.S. at 689-90), *cert. denied*, 462 Md. 93 (2018), *cert. denied*, 587 U.S. __, 139 S. Ct. 2027 (2019). "We judge the reasonableness of counsel's challenged conduct

[13] There appears to be a split of authority as to whether, if a postconviction petitioner presents a prima facie case of ineffective assistance, the burden should shift to the prosecution to rebut that prima facie case. *Compare Gov't of Virgin Islands v. Weatherwax*, 77 F.3d 1425, 1427 (3d Cir. 1996) (asserting that, because "Weatherwax made out a prima facie case of ineffective assistance of counsel under *Strickland*," the "burden shifted to the government to show that Weatherwax's counsel had proceeded on the basis of 'sound trial strategy'") *with Stallworth v. State*, 171 So. 3d 53, 92 (Ala. Crim. App. 2014) (declaring that '"[n]ever does the government acquire the burden to show competence, even when some evidence to the contrary might be offered by the petitioner"' (quoting *Chandler v. United States*, 218 F.3d 1305, 1314 n.15 (11th Cir. 2000) (en banc))), *cert. denied*, (Ala. 2015). We are unaware of any Maryland or Supreme Court authority directly addressing that issue, but we need not resolve it in this appeal.

We doubt that the Third Circuit is correct. If it were, then every time a postconviction petitioner testified at his hearing but elected not to call trial counsel, the burden would shift to the State to show that (absent) trial counsel had acted reasonably. This hardly seems consistent with *Strickland*, nor can it be reconciled with *Dunn v. Reeves*, 594 U.S. __, 141 S. Ct. 2405, 2407 (2021) (per curiam), which held that, where trial counsel was not called to testify at a postconviction hearing, the postconviction court could rely upon the presumption that trial counsel had acted reasonably in finding that a prisoner failed to prove his *Strickland* claims (and that the postconviction court did not, as the prisoner alleged, apply a *per se* rule that a *Strickland* claim must be denied in the absence of trial counsel's testimony).

on the facts of the particular case, viewed as of the time of counsel's conduct." *Wallace*, 247 Md. App. at 359 (quotation marks and citation omitted). Because it is "all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable[,]" we must make "every effort" to "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689.

"An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.* at 691. Rather, the judgment of a criminal proceeding generally may be set aside only if a postconviction petitioner "affirmatively" establishes "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[14] *Id.* at 693-94. "A 'reasonable probability' is 'a probability sufficient to undermine confidence in the outcome.'" *Wallace*, 247 Md. App. at 359 (quoting *Strickland*, 466 U.S. at 693). "That standard is less demanding than proof by a

[14] Under narrow circumstances, not applicable here, a postconviction petitioner may be relieved of his burden to prove prejudice. For example, "[a]ctual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice." *Strickland*, 466 U.S. at 692; *see also United States v. Cronic*, 466 U.S. 648, 659 & n.25 (1984). Moreover, "a similar, though more limited, presumption of prejudice" applies where "counsel is burdened by an actual conflict of interest[,]" which requires that the defendant demonstrate "that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'" *Strickland*, 466 U.S. at 692 (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 350, 348 (1980)).

preponderance of the evidence but requires more than merely showing 'that the errors had some conceivable effect on the outcome of the proceeding.'" *Id.* (quoting *Strickland*, 466 U.S. at 693-94).

Parties' Contentions

The State asserts two reasons the postconviction court erred in granting appellee's petition and awarding a new trial: first, because the court "incorrectly concluded that trial counsel had an obligation to 'discuss the import and probability of a mistrial with [appellee]'"; and second, because "it wrongly concluded that trial counsel was constitutionally deficient for deciding to forgo the mistrial." Although the State concedes that it was error for the jury to have been given an item that had not been admitted into evidence, it nonetheless maintains that the proper response to that error was a matter of trial tactics, within the wide range of presumptively reasonable representation by trial counsel.

Appellee counters that trial counsel "misle[d] the court into believing that he had consulted with his client about the possibility of a mistrial prior to declining the offer[,]" and that, instead, trial counsel merely informed appellee that a hairbrush had been found in the left pocket of the jacket. Thus, according to appellee, trial counsel failed to inform him fully of the circumstances surrounding the discovery that the brush had been improperly sent to the jury, and that, had trial counsel fully informed him, he would have requested a mistrial, which the trial judge already had declared that she would grant upon the defense's request.

Analysis

Prejudice

Although neither party has addressed prejudice,[15] we shall conduct our "'own independent analysis' as to the" prejudice that may have ensued from counsel's challenged conduct." *Syed*, 463 Md. at 73 (plurality opinion of Greene, J.) (quoting *Oken v. State*, 343 Md. 256, 285 (1996)).

The State appears to have conceded prejudice.[16] We are not required to accept the State's concession on a legal issue. *See Coley v. State*, 215 Md. App. 570, 572 n.2 (2013) ("An appellate court is not bound by a party's erroneous concession of error on a legal issue."). We note that some authorities have concluded that, to prove prejudice in a case, such as this, where the underlying allegation of attorney error was a failure to seek a mistrial, a petitioner must establish a reasonable probability, not merely that a mistrial

[15] Appellee, of course, had no reason to do so, as he recognized in his brief, which we quote:

> The State does not object to the post-conviction court['s] finding that the trial counsel's conduct caused Mallette a prejudice that gravely [a]ffected the outcome of his case. The State only contends that the post-conviction court did not properly analyze the performance of the trial counsel.

[16] Before the postconviction court, the State contended that trial counsel may have acquiesced in allowing the hairbrush to be sent to the jury and that, had trial counsel taken the trial court's invitation and moved for a mistrial, the State may have been able to persuade the trial court that, under the circumstances, such a remedy was "inappropriate[.]" That was one of the reasons the State asked to recall trial counsel and reconvene the postconviction hearing to take his testimony, but the postconviction court effectively denied that request by issuing its memorandum opinion and order without reconvening for additional testimony. The State does not challenge that aspect of the postconviction court's ruling in this appeal.

would have been granted, but that a retrial would have resulted in a more favorable outcome. *See*, *e.g.*, *Hammond v. Hall*, 586 F.3d 1289, 1329-30, 1335-42 (11th Cir. 2009) (holding that establishing prejudice requires showing a reasonable probability that, had trial counsel sought and been granted a mistrial after prosecutor's inappropriate comment about parole eligibility, the result of a new capital sentencing hearing would have been more favorable), *cert. denied sub nom. Hammond v. Upton*, 562 U.S. 1145 (2011); *Escobedo v. Lund*, 760 F.3d 863, 871-72 (8th Cir. 2014) (applying the AEDPA[17] deference) (concluding that state postconviction court's holding that, where ineffective assistance claim was based on failure to request mistrial, defendant must demonstrate "a reasonable probability the ultimate verdict would have been different" in a retrial, not merely "a reasonable probability the mistrial would have been granted," was not an unreasonable application of *Strickland*).

These authorities are distinguishable from the present case and may well reflect a minority view.[18] We shall assume without deciding that, as appellee and the postconviction

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[17] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132.

[18] *Hammond* may well have been limited to its facts. In that case, a Georgia statute, applicable to capital sentencing proceedings, required a trial court to grant a mistrial upon defense request if the prosecutor informed the jury that a life sentence (instead of the death penalty) rendered the defendant eligible for parole. The Eleventh Circuit noted that the "asserted error involved a state statutory right that not only does not protect or advance constitutional values or interests but also is in tension with them[,]" *Hammond*, 586 F.3d at 1335, and it concluded that trial counsel's "failure to enforce the remedies the state statute provides" did not "render[] the sentence proceeding unfair or unreliable." *Id.* at 1342.

(continued…)

court assumed, prejudice was established because it was reasonably probable that, had trial counsel requested it, a mistrial would have been granted.[19]

Deficient Performance

Postconviction counsel engaged in a high-stakes gamble in this case: he elected not to call trial counsel as a witness, even though there was no showing that trial counsel was unavailable.[20] Because the burden of persuasion in proving a *Strickland* claim is on the postconviction petitioner, failure to call trial counsel can frequently be '"fatal"' to such a claim. *Dunn v. Reeves*, 594 U.S. at __, 141 S. Ct. at 2410 (quoting *Reeves v. State*, 226 So. 3d 711, 749 (Ala. Crim. App. 2016), *cert. denied*, (Ala. 2017), *cert. denied*, 583 U.S. __, 138 S. Ct. 22 (2017)).[21] In this case, however (and unlike in *Reeves*), the postconviction

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Escobedo did not itself hold that, where failure to seek a mistrial is the underlying basis of an ineffective assistance claim, prejudice is assessed by determining whether it was reasonably probable that the outcome of a retrial would have been more favorable than the actual verdict. It merely held that the same holding by an Iowa postconviction court, in an unpublished decision, was not an unreasonable application of *Strickland*. *Escobedo*, 760 F.3d at 871-72.

[19] In his supplemental petition, postconviction counsel alluded to another reason we should find prejudice—that "[i]f a mistrial were declared, it is possible that the case would not be tried again[,]" which obviously "would have resulted in a different outcome[.]" That is a possibility we cannot discount.

[20] It appears from the transcript of the postconviction hearing that trial counsel may even have been (virtually) present but was not asked to testify, but in any event, the transcript makes it clear that trial counsel was, indeed, available.

[21] Although failure to call trial counsel at a postconviction hearing may make it more difficult for a petitioner to prove that trial counsel performed deficiently, it is not a *per se* bar to such a claim. For example, in *Syed*, despite trial counsel's unavailability due to death, six judges of the Court of Appeals concluded, without her testimony, that she had performed deficiently. 463 Md. at 84-86 (plurality opinion of Greene, J.); *id.* at 136 (Hotten, J., dissenting).

court credited appellee's testimony, and the State, caught flat-footed, did not itself call trial counsel to testify.[22] Thus, in the evidentiary void that resulted, we have only appellee's version of events, an account which the postconviction court credited, leading it to conclude that appellee rebutted the presumption that trial counsel had acted reasonably.

We begin our analysis of the performance prong by parsing the postconviction court's statement of reasons to ascertain its findings of fact, because those findings are subject to an exceedingly deferential standard of review and place limits on the scope of our analysis. The postconviction court found:

1. By inference, trial counsel must not have been aware of the brush prior to the jury note, *Opinion and Order*, at 7-8[23];

[22] During the application stage of this case, the State complained that the postconviction court abused its discretion in refusing to hold an additional hearing to afford the State an opportunity to call trial counsel to obtain his version of events. The State does not raise that issue in its brief before us, and it is therefore abandoned. Md. Rule 8-504(a)(6) (stating that a brief "shall" include "[a]rgument in support of the party's position on each issue"); *Klauenberg v. State*, 355 Md. 528, 552 (1999) (observing that "arguments not presented in a brief or not presented with particularity will not be considered on appeal") (citation omitted).

[23] We conclude that the postconviction court must have drawn this inference because it treated the jury's discovery of the brush as a "gamechanger[.]" Had trial counsel been aware of the brush beforehand, his actions would have been regarded as strategic (as the State had argued in its response to the supplemental petition) rather than, as the postconviction court characterized them, "inaction"). Moreover, the postconviction court expressly rejected the State's contention that trial counsel must have been aware of the hairbrush prior to when the jury began deliberations, characterizing the State's theory as a "fragile and unconvincing inference[.]" *Opinion and Order*, at 8. In any event, review under the clearly erroneous standard extends to all reasonable inferences the lower court could have drawn from the evidence before it. *See*, *e.g.*, *State v. McGagh*, 472 Md. 168, 193 (2021) (noting that in conducting review under the clearly erroneous standard, "it is simply not the province of the appellate court to determine whether it could have drawn other inferences from the evidence") (quotation marks and citation omitted) (cleaned up).

> 2. trial counsel erred "by inaction" because he failed to "re-evaluate[] the entire presentation" in light of the surprise discovery of the hairbrush in the jacket pocket from which the handgun had been recovered, *id.* at 7, 9;
>
> 3. although trial counsel briefly discussed the matter with appellee, at the critical moment when faced with deciding how to proceed in light of the surprise discovery of the hairbrush, he "did not mention, let alone explain, the possibility of a mistrial[,]" *id.* at 9; and
>
> 4. had trial counsel fully consulted with appellee and informed him of his options, appellee would have requested that trial counsel accept the trial court's offer to declare a mistrial, and had trial counsel complied with appellee's request, the trial court "would have declared a mistrial." *Id.* at 9.

Because those findings are derived from the trial transcript and appellee's testimony during the postconviction hearing, albeit without the possibility of contradiction by (absent) trial counsel, they are supported by competent evidence in the record and thus cannot be clearly erroneous. *Johnson*, *supra*, 440 Md. at 568. We therefore are constrained, for purposes of this appeal, to assume that, as appellee insisted, trial counsel advised him only that the discovery of the brush created "confusion" among the jurors and was a favorable development, but that trial counsel said nothing whatsoever about the trial court's offer to declare a mistrial or what that would entail going forward. Moreover, we are constrained to assume that trial counsel was unaware that the hairbrush was in the jacket pocket until the jury note was presented to the court. And finally, we are constrained to assume that, had trial counsel fully consulted with appellee and informed him of his options, appellee would have insisted on accepting the trial court's offer to declare a mistrial.

"A strategic trial decision is one that 'is founded upon adequate investigation and preparation.'" *Syed*, 463 Md. at 75 (plurality opinion of Greene, J.) (quoting *Coleman v.*

State, 434 Md. 320, 338 (2013)); *id.* at 135 (Hotten, J., dissenting) (noting trial counsel's duty to investigate). "Whether the attorney's performance was reasonable is measured by the 'prevailing professional norms.'" *Id.* at 75 (plurality opinion of Greene, J.) (quoting *Strickland*, 466 U.S. at 688). The version of the American Bar Association's Standards for Criminal Justice in effect at the time of appellee's trial guide our assessment of trial counsel's performance. *Id.* at 76 (plurality opinion of Greene, J.). Those standards provide, in pertinent part:

> Duty to Investigate and Engage Investigators
>
> (a) Defense counsel has a duty to investigate in all cases, and to determine whether there is a sufficient factual basis for criminal charges.
>
> (b) The duty to investigate is not terminated by factors such as the apparent force of the prosecution's evidence, a client's alleged admissions to others of facts suggesting guilt, a client's expressed desire to plead guilty or that there should be no investigation, or statements to defense counsel supporting guilt.
>
> (c) Defense counsel's investigative efforts should commence promptly and should explore appropriate avenues that reasonably might lead to information relevant to the merits of the matter, consequences of the criminal proceedings, and potential dispositions and penalties. Although investigation will vary depending on the circumstances, it should always be shaped by what is in the client's best interests, after consultation with the client. Defense counsel's investigation of the merits of the criminal charges should include efforts to secure relevant information in the possession of the prosecution, law enforcement authorities, and others, as well as independent investigation. Counsel's investigation should also include evaluation of the prosecution's evidence (including possible re-testing or re-evaluation of physical, forensic, and expert evidence) and consideration of inconsistencies, potential avenues of impeachment of prosecution witnesses, and other possible suspects and alternative theories that the evidence may raise.

American Bar Ass'n, *ABA Standards for Criminal Justice*, Standard 4-4.1 (4th ed. 2015).

Initially, we note that trial counsel did not mention the brush while cross-examining Officer Smith, which suggests, as the postconviction court appeared to conclude, that trial counsel negligently did not notice its presence while reviewing the discovery materials. Had trial counsel discovered the existence of the brush prior to trial, he could have and should have consulted with appellee to make an informed decision as to whether to pursue additional testing directed to whether the brush did not, as appellee later insisted, belong to him.

We further note that, based upon the incomplete trial record transmitted to us, we cannot determine whether appellee wore his hair in a style inconsistent with use of the hairbrush, as he testified during the postconviction hearing, but that the postconviction court had both the opportunity to observe appellee and to examine the trial exhibits, at least one of which depicted appellee's hair style at the time of the offenses. In other words, the postconviction court was in a far better position than we to weigh appellee's credibility on this point, and apparently, the postconviction court found appellee credible.

Furthermore, although it would have been reasonable strategy, in the abstract, to reject the trial court's offer to declare a mistrial, given trial counsel's apparent satisfaction with the jury and the progress of the trial up to that point, we do not look at his decision in a vacuum. *Strickland*, 466 U.S. at 695 (declaring that "a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury"). The alternative course of action, which plainly presented itself, but which trial counsel rejected out of hand, could only have become apparent had trial counsel fully advised appellee and fully consulted with him prior to declining the offer of a mistrial. Although trial counsel may

have had reason to believe that the jury would render a favorable verdict, he could have, after consultation with appellee, discovered that the hairbrush, in appellee's words, "could have proved [his] innocence."

"As a rough rule of thumb, when the decision to assert or to waive a right depends upon a time-sensitive assessment of a defendant's litigation position, a calculation that must ordinarily be made rapidly and in the heat of trial without any meaningful opportunity for consultation between counsel and a defendant, that decision is a matter of trial strategy." *Watkins v. Kassulke*, 90 F.3d 138, 143 (6th Cir. 1996). "That is *ordinarily* the case with the decision to request or to consent to a mistrial." *Id.* (emphasis added).

In *United States v. Chapman*, 593 F.3d 365 (4th Cir. 2010), the principal authority on which the State relies to support its conclusion that, ultimately, it was trial counsel's decision whether to accept the trial court's offer of a mistrial, the Fourth Circuit held broadly that "decisions involving mistrials—whether to ask for a mistrial and whether to accept an offer of a mistrial—are tactical decisions that must be made by the attorney, not the defendant." *Id.* at 367. Although that holding undoubtedly is true as a general proposition,[24] the context in which the *Chapman* Court made that declaration is

[24] For example, one of the authorities *Chapman* cites, *United States v. Washington*, 198 F.3d 721 (8th Cir. 1999), observed that "the decision to move for a mistrial often must be made in a split-second and it involves numerous alternative strategies such as remaining silent, interposing an objection, requesting a curative instruction, or requesting an end to the proceeding." *Id.* at 724. *Accord Watkins*, 90 F.3d at 143 (observing that "[w]hen faced with a trial occurrence that may be prejudicial to the defense, counsel must make some tough choices[,]" such as "[r]emaining silent, objecting, requesting a curative instruction, [or] moving for a mistrial[,]" and that, depending on the circumstances, "each may be a valid course of action").

considerably different than that faced by trial counsel in this case. In *Chapman*, the trial court "was demanding an answer from [defense counsel] then and there[,]" *id.* at 372 (Michael, J., concurring in the judgment), whereas here, the trial court halted the proceedings so that trial counsel could consult with appellee.

Judge Michael, in his opinion concurring in the judgment in *Chapman*, admonished the panel majority for its unnecessarily overbroad holding, deeming it "ill-advised" and declaring that he would not "foreclose the possibility that, in other situations, counsel's failure to consult with his client or follow his express, informed wishes would constitute constitutionally ineffective assistance." *Id.* at 371-72. We agree and conclude that this case presents such a situation. *See Watkins*, 90 F.3d at 143 (recognizing the possibility that there may be exceptions to the general rule that trial counsel may decide, without consulting his or her client, whether to seek or forego a mistrial). When the hairbrush unexpectedly was discovered, in the pocket of a key piece of evidence, appellee's personal grooming habits suddenly became crucially relevant to the case,[25] and his input was paramount to trial counsel's ability to make a strategic decision, '"founded upon adequate investigation and preparation."' *Syed*, 463 Md. at 75 (plurality opinion of Greene, J.) (quoting *Coleman*, 434 Md. at 338). Under the circumstances of this case, trial counsel

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[25] Legislatures and courts have struggled to recognize the uniqueness of African-American hairstyles. *See*, *e.g.*, *Uqdah v. Dist. of Columbia*, 785 F. Supp. 1015 (D.D.C. 1992) (constitutional challenge to cosmetology regulations by owners and operators of an "African hair styling salon and school"), *vacated as moot*, 995 F.2d 306 (D.C. Cir. 1993); Monica C. Bell, Comment, *The Braiding Cases, Cultural Difference, and the Inadequate Protection of Black Women Consumers*, 19 Yale J.L. & Feminism 125 (2007).

had a duty "to consult with" appellee on an "important decision[]" and to keep him "informed of [an] important development[] in the course of the prosecution." *Strickland*, 466 U.S. at 688.

Handicapped by his own preconception prior to investigation, trial counsel had already made up his mind to decline the trial judge's offer, and he failed to consult with his client. Had he done so, he would have been led to accept that offer. We conclude that, under the totality of the circumstances in this case, trial counsel performed below the prevailing professional norms, as set forth in *ABA Standards for Criminal Justice*, Standard 4-4.1, and given our ruling as to prejudice, we affirm the postconviction court's ruling, finding ineffective assistance of counsel.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY MAYOR AND CITY COUNCIL OF BALTIMORE.