Circuit Court for Caroline County
Case No. 05-K-08-007257

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1962

September Term, 2017

CHRISTOPHER MICHAEL MANSFIELD

v.

STATE OF MARYLAND

Nazarian,
Arthur,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Raker, J.

Filed: October 18, 2018

*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.

Appellant Christopher Michael Mansfield filed a petition for post-conviction relief in the Circuit Court for Caroline County, claiming ineffective assistance of counsel at his criminal trial for sexual abuse of a minor. He appeals the circuit court's denial of his petition, raising one question for our review:

> "Did [appellant]'s trial attorney render ineffective assistance of counsel when he made a frivolous argument in support of his motion to exclude evidence of recorded conversations between the complaining witness and [appellant] and failed to make a meritorious argument that was supported by the facts and the law?"

We find no error and shall affirm.

I.

After a bench trial in July 2008, the Circuit Court for Caroline County convicted appellant of seven counts of sexual abuse of his niece, a minor. The court imposed a term of incarceration of twenty years for one count of sexual abuse and imposed a term of incarceration on the other counts of twenty years, consecutive, but suspended, followed by five years' supervised probation. Appellant noted a direct appeal to this Court, which he subsequently dismissed. In July 2016, appellant filed a Petition for Post-Conviction Relief. In July 2017, the circuit court denied the petition.

At his trial, appellant waived trial by jury and proceeded to trial before the Hon. Calvin R. Sanders. The State alleged that he sexually abused A.K., his wife's niece, over many years. A.K. testified that appellant touched her breasts and vaginal area, penetrated

her vagina with his penis, and engaged in fellatio and cunnilingus. Appellant testified at trial and denied all the allegations.

In 2007, A.K. told her uncle that appellant molested her, and the next day, A.K. met with Maryland State Trooper Jean Davenport. Trooper Davenport had A.K. call appellant on a police-recorded line. In that phone call, A.K. told appellant that she went to the doctor, who found "STDs" and "scar tissue." She told appellant that her mother wanted her to go to the police and that she did not want to do that, and she asked him what she should do. Appellant responded that she should "do whatever you got to do . . . I can't talk to you." When A.K. again asked appellant whether she should tell the police "what we did," appellant responded that he could not talk to her but that he could "give [her] the number to [his] lawyer and [she] can talk to [the lawyer]." After A.K. asked him a third time, he said that he "can't talk to [her] about anything because . . . of what her Aunt's doing." After appellant hung up, A.K. called him back, and they had a similar conversation.

Defense counsel filed a motion *in limine* to exclude all of the statements appellant made during the phone calls with A.K. The basis of the motion was that A.K. "was a state agent attempting to obtain incriminating statements from the primary suspect who invoked his *Miranda* rights." At the hearing on the motion, the State argued that the statements were admissible as consciousness of guilt evidence for two reasons: (1) appellant's statement that A.K. should talk to his lawyer evidenced a guilty mind, and (2) when A.K. asked appellant her questions, he did not deny the accusations, and his responses were not plausible reactions. Defense counsel argued at the motions hearing as follows:

> "Your Honor, please, I see . . . I haven't seen another case like it. It's kind of a case of first impression. But I think the . . . the sense of the phrase in the case I cited, functional equivalent of interrogation is so apt as to make it, you know to bring all the *Miranda* rules into play under the circumstances when unbeknownst to the Defendant, the investigative forces are enlisting the complainant and trying to get an inculpatory statement. It is the functional equivalent of a . . . interrogation. And when unpredictably the person suspected invokes his right to counsel, that's an unusual sequence of events but it lends itself to Miranda analysis. And that's what I'm trying to persuade the court is valid and appropriate and fair in this case."

The hearing court denied the motion *in limine*, ruling that *Miranda* didn't apply because appellant was not in custody (a prerequisite for *Miranda*) and thus "factually and legally, there's no basis to suppress, uh, anything that's in that phone call . . ."

Appellant filed his petition for post-conviction relief, requesting that the court reverse his convictions and grant him a new trial or, in the alternative, grant him an opportunity to file a belated motion for modification of sentence based on *Flansburg v. State,* 345 Md. 694 (1997).[1] In appellant's post-conviction petition, he asserted that his trial counsel was ineffective because the *Miranda*-based argument was "a non-starter" because he was not in custody when he made the statements and because counsel should have argued that the calls and statements were inadmissible on the grounds of relevance and prejudice. At the post-conviction hearing, he called no witnesses, did not call his prior defense counsel to explain counsel's decisions, and raised only the above-summarized argument.

[1] The post-conviction court granted appellant relief on this issue and allowed him to file a belated motion for modification of sentence.

The post-conviction court filed a Statement of Reasons and denied post-conviction relief. The court determined that appellant was not entitled to relief because he did not assert that trial counsel's performance fell below an objective standard of reasonableness or that suggestions of alternative trial strategy do not render performance deficient. The court explained as follows:

> "In the instant matter, Petitioner alleges that his trial counsel was deficient by seeking to exclude evidence on one ground instead of another. Petitioner essentially seeks to use the benefit of hindsight to question the decision-making of his attorney. However, Petitioner does not assert that such conduct fell below the level of a reasonably competent attorney. This Court, as well as the Court of Appeals, has previously held that suggestions of alternative strategy do not render counsel's actual performance deficient merely because of an undeniable result. It also appears clear to this Court that counsel's conduct did not so undermine the trial process so as to have produced an unjust result. Accordingly, this Court finds that the conduct of Petitioner's trial counsel was not deficient, and did not fall below the standard of a reasonably capable attorney, therefore his claim for ineffective assistance of counsel must fail.
>
> Because Petitioner did not meet his burden of proof regarding the first prong of the Strickland test, there is no need to address the second prong [prejudice]. However, if the issue had been reached, that prong would not have been satisfied. Petitioner makes no assertion whatsoever that the outcome of the trial would have been difference had counsel pursued the exclusion of the evidence in question on different grounds. The proceeding at issue was a three-day bench trial, during which other evidentiary exhibits were admitted, as well as direct testimony from victim. At the conclusion of the presentation of the case, Judge Sanders weighed all of the evidence and determined the Petitioner was guilty beyond a reasonable doubt. There was no showing that, by substituting this particular strategy of arguing a motion for another, the outcome of the trial would have been different, and thus there is no showing of prejudice against Petitioner. Therefore,

> Petitioner would have failed with respect to the second prong of the *Strickland* test."

Appellant noted this timely appeal.

II.

Before this Court, appellant argues that defense counsel rendered ineffective assistance of counsel when he made a frivolous argument in support of his motion to exclude recorded conversations between appellant and the victim in this case and when he failed to argue that the evidence was irrelevant, a basis to exclude the evidence supported by the facts and the law. He maintains that defense counsel's argument that the phone call interview violated appellant's rights had zero chance of success because *Miranda* protections were inapplicable in that appellant was not in custody, a prerequisite for *Miranda* jurisprudence to apply. Appellant argues that instead of pursuing the *Miranda* argument, trial counsel could have successfully excluded the calls using Maryland case law that holds that a defendant's statement of his or her intention to contact a lawyer was irrelevant and thus inadmissible, citing *Hunter v. State*, 82 Md. App. 679 (1990); *Waddell v. State*, 85 Md. App. 54 (1990); *Casey v. State*, 124 Md. App. 331 (1999); *Martin v. State*, 364 Md. 692 (2001). In short, appellant argues, counsel's decision to make a doomed argument when a meritorious argument with a strong chance of success was available was not reasonable and is the definition of *Strickland's* deficient performance prong. As to prejudice, the second prong of *Strickland*, appellant makes two points: first, had the calls been excluded, given the "he said, she said" posture of the case, there is a substantial

possibility that the verdict would have been different. Second, had trial counsel objected and preserved the relevance argument, appellant could have raised that issue on direct appeal as a basis to reverse the judgments of conviction.

The State argues first that appellant's post-conviction claim is waived because defense trial counsel in fact presented a general objection at trial to the admission of the phone calls and did not limit that objection to the *Miranda*-based grounds presented in the motion *in limine*, and hence, he could have challenged the admitted evidence on direct appeal. Appellant voluntarily withdrew that appeal, and the State argues that he cannot complain here that defense counsel deprived him of viable grounds he could have presented on direct appeal. As to the merits, the State argues that at the post-conviction proceeding, appellant failed to present evidence explaining why counsel pursued the *Miranda*-based objection. Hence, in the absence of an explanation by trial counsel, he failed to carry his burden to show that no competent attorney would have pursued a *Miranda*-based motion in lieu of a motion based on the cases of *Hunter*, *Wadell*, *Casey*, and *Martin*, cases which, in the State's view, are inapposite.[2] According to the State, the cases cited by appellant are distinguishable because the statements in those cases were prospective statements that the defendants wanted to speak with a lawyer before proceeding, and those statements were admitted on the sole basis that a desire to contact a lawyer evidenced consciousness of guilt. Here, the State argues, appellant's statements referred to an attorney already engaged for a different matter, and the statements could also be admitted to show appellant's failure

[2] Clearly the exercise of the right to counsel is not admissible as consciousness of guilt. *Hunter*, 82 Md. App. at 691.

to respond to A.K.'s accusations. As to the prejudice prong of *Strickland*, the State argues that appellant has failed to show that, but for his counsel's failure to raise a challenge based upon *Hunter*, *Wadell*, *Casey*, and *Martin*, the outcome of his trial would have been different. The State maintains that there is no evidence that the trial judge considered the calls for any improper purpose and that the trial court did not draw a consciousness of guilt inference from the mere fact that appellant had consulted counsel.

III.

We address first the State's argument that this issue was waived by appellant when he failed to raise it on direct appeal. Ordinarily, post-conviction claims are best considered in post-conviction proceedings and are not waived when not raised on direct appeal, *Mosley v. State*, 378 Md. 548, 558–64 (2003), but the issue and the prejudice argued by appellant are different from a routine ineffective of counsel claim. Appellant argues here that he was precluded from raising the relevancy grounds for exclusion of evidence on direct appeal because trial counsel only raised *Miranda* grounds as a basis to exclude the phone calls at trial. Hence, appellant argues, he could not raise this issue on direct appeal because he would be met with a preservation or waiver argument. The State argues that appellant could have raised the relevancy objection below because trial counsel made a general objection when the prosecutor offered the phone call evidence that was the subject of the motion *in limine*.

We disagree with the State. Although a general objection at trial preserves *all* grounds for appellate review, *see* Md. Rule 4-323(c), here, however, appellant's objection

at trial was *not* a general objection but instead a reiteration of his motion *in limine* grounds. His trial objections to the phone calls were specific objections explicitly stated to "renew [counsel's] objection, the same I did earlier," objections "to the call on the basis of, uh, what was heard in the motion in limine." There is a reasonable probability that an appellate court on direct appeal would have held that the relevancy objection argued before this Court was not preserved for appellate review. Therefore, we hold that appellant did not waive the admissibility of evidence issue for our review.

IV.

Turning to the merits of appellant's claim, we hold that appellant was not denied effective assistance of counsel.

Whether counsel's performance was deficient or whether appellant was prejudiced as a result of counsel's performance are mixed questions of law and fact. *Strickland,* 466 U.S. at 698. As an ineffective assistance of counsel claim is based upon a violation of a constitutional right, we make an independent constitutional appraisal from the entire record. *Harris v. State*, 303 Md. 685, 697 (1985). There is a strong presumption that counsel's conduct was reasonable. *Gilliam v. State*, 331 Md. 651, 666 (1993). We explained the standard of review in *State v. Jones*, 138 Md. App. 178, 209 (2001), as follows:

> "The standard of review of the lower court's determinations regarding issues of effective assistance of counsel 'is a mixed question of law and fact. . . .' We 'will not disturb the factual findings of the post-conviction court unless they are clearly erroneous.' But, a reviewing court must make an independent

> analysis to determine the 'ultimate mixed question of law and fact, namely, was there a violation of a constitutional right as claimed.' In other words, the appellate court must exercise its own independent as to the reasonableness of counsel's conduct and the prejudice, if any."

(Citations omitted.)

Under the Sixth Amendment to the United States Constitution and under the Maryland Declaration of Rights, a criminal defendant is entitled to the effective assistance of counsel. *Shortall v. State*, 237 Md. App. 60, 71 (2018). In order to prevail on an ineffective assistance of counsel claim, a criminal defendant must show first that counsel's performance was deficient and second that the deficient performance prejudiced him or her. *Strickland,* 466 U.S. at 688; *Coleman v. State,* 434 Md. 320, 331 (2013). To establish deficient performance, a defendant must show that counsel's representation fell below an objective standard of reasonableness and that such action was not trial strategy. *Strickland*, 466 U.S. at 687–89. A defendant must then establish prejudice by showing that there is a "substantial or significant possibility" that the outcome of the proceeding would have been different but for the error. *Coleman*, 434 Md. at 331 (1990).

We address the performance prong first. Appellant argues that defense counsel's performance was deficient because he failed to argue the rationale of four Maryland cases, i.e., *Hunter v. State*, *Casey v. State*, *Waddell v. State*, and *Martin v. State*. The cases cited by appellant are distinguishable. In *Hunter*, *Casey*, and *Waddell*, evidence that the defendant *sought* counsel after being implicated in a crime was admitted for the sole evidentiary purpose of establishing consciousness of guilt. Similarly, in *Martin*, 364 Md. at 707–08, such a statement was held to be inadmissible for consciousness of guilt alone

and substantially more unfairly prejudicial than probative when used as a curative admission[3] for which other statements were sufficient.

Here, the statements were not that appellant sought counsel at that time but that appellant already had counsel, purportedly for another matter. The statements were admissible arguably as tacit admissions rather than solely for consciousness of guilt. Refusal to respond to an accusation that a party would naturally be expected to deny is probative and admissible circumstantial evidence of guilt if it qualifies as a tacit admission. *Grier v. State*, 351 Md. 241, 252 (1998). To qualify as a tacit admission, the admitting party must hear and understand the other person's statement and have an opportunity to respond. *Id.* at 253. Further, the content of the statement must be such that a reasonable person in the admitting party's position who disagreed with the statement would voice disagreement. *Id.* Refusal to respond is not a tacit admission if the admitting party knows he or she is in the presence of police officers. *Weitzel v. State*, 384 Md. 451, 461 (2004). Here, appellant plainly heard and understood the statements, as he stated that he could not talk about that issue, and he was specifically asked to respond. The statements implicated appellant in such extreme conduct that a reasonable, innocent party would have responded to them. Notably, there is no evidence that appellant was aware that a police officer was

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[3] Under the doctrine of curative admission, otherwise irrelevant, inadmissible evidence may be admitted as a "counterpunch" to offset the damage done by an opposing party's admission of irrelevant or incompetent evidence earlier in the trial. *Clark v. State*, 332 Md. 77, 88 (1993). In *Martin*, evidence of the defendant's consultation with an attorney was held to be substantially more unfairly prejudicial than it was probative on the issue of whether his former employer advised him of his rights on termination, which included consultation with an attorney. *Martin*, 364 Md. at 708–09.

monitoring the phone call. Therefore, appellant's refusal to respond was admissible arguably as a tacit admission to A.K.'s accusations—subject to a balancing as to prejudice versus probative value. Because all four cases cited by appellant were inapposite and the evidence was otherwise likely admissible, it was not objectively unreasonable for counsel to fail to rely on those cases.

We cannot say on the record before us that counsel was unaware that his argument was doomed to fail. Counsel never testified at the post-conviction hearing, and hence, we have only the record to discern his thinking and strategy. He first told the court that this was a case of first impression. He then argued not that the questions by A.K. were interrogation, but that they were the "functional equivalent" of interrogation. Finally, he did not argue to the suppression court that *Miranda* strictly applied, but that "when unpredictably the person suspected invokes his right to counsel, that's an unusual sequence of events but is lends itself to *Miranda* analysis." It is entirely possible that counsel recognized that the phone calls might be admitted as a tacit admission and that he was "pushing the envelope" and trying to persuade the motions judge to keep the evidence out on "novel" grounds. He told the judge that "this is a case of first impression," thereby making it clear that he did not believe that traditional *Miranda* was a basis for exclusion. As to the prejudice prong, we find, as did the post-conviction court, that appellant failed to establish prejudice and to show that but for counsel's performance, the outcome of the trial would have been different. Appellant waived his right to a jury and proceeded to trial before the court. The trial judge, Judge Calvin Sanders, was a most experienced jurist. There is no evidence or support in this record to establish that the trial judge considered

the evidence at all, no lest for an improper purpose. There is no basis to conclude that had trial counsel acted differently, the outcome of the trial would have been different.

JUDGMENTS OF THE CIRCUIT COURT FOR CAROLINE COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.