UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0753

September Term, 2013

TIMOTHY WARD SMITH, JR.

v.

STATE OF MARYLAND

Krauser, C.J.,
Arthur,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Kenney, J.

Filed: December 16, 2016

Appellant, Timothy Ward Smith, Jr., was convicted after a five-day jury trial in the Circuit Court for Calvert County of attempted murder in the first degree, assault in the first degree, reckless endangerment,[1] use of a handgun in the commission of a crime of violence, and wearing, carrying, or transporting a handgun.[2] On appeal, he presents one question:

> Did the post conviction court err by denying relief based on Appellant's claim of ineffective assistance of trial counsel, who failed to object to the prosecutor's impeachment of him using inadmissible prior convictions?

For the reasons that follow, we answer affirmatively and reverse the decision of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

The events giving rise to this case were previously recounted by this Court in its unreported opinion in *Smith v. State*, No. 2300, Sept. Term 2007, slip op. at 1-9 (Md. Ct. Spec. App. Aug. 4, 2009), which, because of the question now before us, we have included in some detail below:

> Late in the afternoon of August 26, 2006, Smith, a drug dealer, repeatedly shot Jeffrey Wells, another drug dealer, while they were both riding in a pick-up truck in Solomons. Smith testified at trial that he had decided earlier that day to replenish his inventory of cocaine because it was a Saturday, "a lot of money was calling," and neither Smith nor his cousin, Thomas Goldring, "had anything." Smith contacted Wells, from whom Smith had bought cocaine in the past. Throughout the day, Smith and Wells discussed where to meet and eventually decided on the Solomons Island

[1] At the sentencing hearing on November 9, 2007, the circuit court merged the assault in the first degree count and the reckless endangerment count.

[2] Appellant filed a direct appeal in this court that resulted in the merger of his convictions of wearing, carrying, or transporting a handgun and use of a hand gun in the commission of a crime of violence; the sentence imposed for the wearing, carrying, or transporting a handgun was vacated. *See Smith v. State*, No. 2300, Sept. Term 2007, slip op. at 18-19 (Md. Ct. Spec. App. Aug. 4, 2009).

boardwalk. Wells wished to sell to Smith, not Goldring, because Wells had never dealt with Goldring. Wells testified that he chose the boardwalk because it was a "public place" with "a heavy police presence." Wells testified that he came to the meeting without a gun. Smith testified that he and Goldring had a gun.

Smith testified that he and Wells had negotiated over the telephone that he would pay Wells $6,400 for 9 ounces, or a quarter-brick, of "product," at what Smith termed a "high" rate of $3,200 per eighth-kilo. According to Smith, he came to the meeting with $6,000 in his pocket. According to Wells, Smith had agreed to buy four and a half ounces for $3,800.

Wells arrived from Prince George's County in a Toyota Camry driven by someone he knew only as Corey. While Corey drove around and looked for "police presence," Wells waited on the boardwalk. Smith and Goldring arrived in a red extended-cab pickup truck provided that day by Goldring's uncle, whose employer owned it. Smith got out of the truck and talked to Wells. Corey came back, and Wells thought it was "time to take care of business." Smith seemed "a little tense," "a little edgy" to Wells, and Wells told Smith to "chill out, relax." Wells asked Smith for the money. Smith returned to the truck and drove off with Goldring at the wheel. Wells was "wondering what was going on because, you know, we're trying to take care of business and get back to what we have to do." Wells got back into the Toyota with Corey, and they followed the truck to a different area. Corey then parked the Toyota next to the truck, driver's side to driver's side. A discussion ensued about how to conduct the drug transaction. Wells told Corey to meet him at the Roy Rogers, got out of the Toyota, and approached Smith's side of the truck. According to Smith, he opened the passenger-side door of the truck, opened the interior half-door to the back seat of the truck, and moved his seat up so that Wells could get in. According to Wells, Smith had gotten out and seemed to want Wells to sit in the front seat. Wells got into the back seat.

Smith and Wells each testified about the ensuing events in the truck, and bystanders testified about what the bystanders could see from outside of the truck. Goldring did not testify.

Wells testified that when Goldring, whom Wells knew as "Junk," started to drive the truck towards Roy Rogers, Wells took the cocaine out of his pocket. The cocaine was in a clear zip lock bag. Wells did not hand it to Smith, whom Wells knew as "Boo" or "Timothy," because Smith had not yet paid. Then, Wells testified,

> I said y'all got the money. He said give him money. He – he referred – I asked Boo where's the money, he referred the question to Junk, and Junk said give him the money. At that

> time when he said give him the money, I . . . saw Boo turn around and start shooting. I seen the gun, but I didn't know I was shot until my ears start ringing, and I looked down, I had a hole in my right arm, a hole in my left arm, I saw I was hit once in my stomach, and I know my leg was aching. At that time I realized I was shot, I believe I got up, swerved the steering wheel once, I believe I got lightheaded and sat back down and swerved it again, which put me in the 7-11 parking lot.

Smith then tried to keep Wells from grabbing the steering wheel. Wells testified regarding his effort to get out of the truck:

> Once I got to the 7-11 I swerved the truck over, I believe the driver, which is—Junk, put it in park, and he hopped out and took off, but then I tried to get out. Once I – once I got out I – my leg was broke. I didn't know it at the time, but my leg was broke. So it got caught in between the door jamb and the driver's seat, the driver's side seat. Then I remember Junk coming back and hitting me. He hit me repeatedly, said why don't you die. And then I remember him taking – taking – taking the product off me out – taking the product off me, hopping into the back of the truck. At that time Timothy slid over, I'm talking about the shooter, slid over to the driver's seat, you know, and started to pull off. At the same time my leg was still caught in the door, so he dragged me a little bit.
>
> * * *
>
> I believe the driver took my leg and threw it – threw – talking about . . . Junk, I believe Junk took my left leg and threw it on the ground before he hopped in the back of the truck.

While Goldring was hitting Wells, Smith "said get the dope, get the dope." After Goldring disentangled Wells's leg and jumped into the back of the truck, Smith drove the truck away.

Wells explained that Smith had shot him through the gap between the driver's and front passenger's seats. Wells testified that Smith "turned around and was aiming toward me and shot at me." Wells was shot in the stomach, leg, and hand, had undergone two surgeries, and still had two bullets in him.

Smith gave a different account of the events in the truck. Smith testified that when Goldring began driving, Wells reached through the gap between the front seats and handed Smith a paper bag that "wasn't the right amount of weight." According to Smith, Smith looked at the cocaine; decided that it was "nowhere near nine ounces" and was "garbage;" handed the bag back to Wells; and told Wells, "there is no way in the world I am

paying six for it." Smith then "realized [Wells] had a gun," because Goldring "was screaming" in a "loud and boisterous voice," "man, he has got a gun." Smith stated, "I eventually ended up looking towards my right towards the passenger door . . . and . . . could see the reflection of the gun and the gun right here close to my head." According to Smith, Wells then said, "give me the f-ing money or where is the f-ing money . . . ." Smith testified to the next events as follows:

> Q. . . . [W]hat happened after that?
> A. Junk told me just give him the money, it's in the chicken box.
> Q. . . . [You] testified that you were prepared to pay $6,000-
> A. Right.
> Q. –for this cocaine. Where was the money?
> A. In my pocket.
> Q. All $6,000?
> A. Yes, ma'am.
> Q. So when Junk told you just give him the money, it's in the chicken box, what did you think that meant?
> A. During riding with Junk, I mean we usually keep a gun and I assumed that's where the gun was at.
> Q. [W]here was the chicken box . . . ?
> A. It was down in the floor between . . . me and Junk and the console . . .
> Q. . . . [H]ow long did this all take?
> A. It was a matter of minutes.
>
> * * *
>
> Q. . . . Is the truck continuing to drive . . . ?
> A. Well, we are moving along kind of speed limit, 10, 15 miles an hour I guess.
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> * * *
>
> Q. And after–after you reached down and you picked up the chicken box, what happened after that?
> A. I picked it up, I put it like in between like almost my legs like, but down like in the floor, and when I opened it up I seen the gun.
> Q. Okay. And what did you do after you saw the gun?
> A. I turned around and I shot twice.
>
> * * *
>
> Q. . . . And when you turned around and you said you shot fast, did you aim the gun?
> A. No.
> Q. Did you point specifically at any part of Mr. Wells?

A. No.
Q. What did you expect was going to happen once you turned with the gun?
A. Honestly, I was looking for shots to be fired back.
Q. You thought he was going to shoot you?
A. Yes, ma'am.
Q. And how did you react once you turned around?
A. I shot twice, I seen the gun coming back to – his gun coming to point in my face, and I grabbed the sleeve of his shirt, and I couldn't get a good grip because his shirt was like a T-shirt, and as you know they pull, they – they got a lot of elastic or whatever. So I don't have a good grip, and he has got a lot of leeway. So I shot again because he is still trying to point the gun at me. At this time when I shot again he like not fainted, but I could tell he was hit. So I got – I got a chance to let go and re-grab his hand, and he is still trying to point the gun at me.

* * *

Q. [I]n your mind is he still trying to shoot you?
A. Oh, you better believe it. That's I mean exactly what he is trying to do.

* * *

A. . . . I re-gripped to get a better grip of his hand, and I don't know if it was from the blood or what, but his hands was slippery, and, you know, I could never get a good grip . . . and it was hard. . . . I just kept seeing the opening of the barrel. I'm just looking for the bullet. So I shot again.

* * *

A. . . . I am trying to save my life, and not only my life, you know, I am trying not to get shot.

During cross-examination, Smith was asked about his earlier testimony concerning the chicken box. The following ensued:

A. . . . I said [Goldring] told me that the gun – that the money was in the chicken box.
Q. Yeah.
A. And I knew that the money was in my pocket. I reached down, and when I grabbed the chicken box, the gun was in there I didn't say I knew the gun was in there. That's not—
Q. Well, then why would you reach for the chicken box if the money was in your pocket?
A. Because I knew we – during previous times when me and Junk ride around he usually keeps a gun.

> Q. . . . You knew that that red truck had a box in it, and in that box was a gun, and it was a .38 automatic, wasn't it?
> A. No, ma'am.
> Q. What was it?
> A. The gun that was – eventually that was in the chicken box?
> Q. The gun that was in the box that you took and put in your hand and shot Jeffrey Wells, what was it?
> A. The gun was a .380.
>
> According to Smith, Wells then began to fight Goldring and grab for the steering wheel. The truck swerved into the 7-11, Goldring jumped out while the truck was rolling, and Smith threw the truck into park.
>
> Ms. Knight, a bystander in the 7 -11 parking lot, testified. Ms. Knight saw the red truck moving "with that guy's leg in the truck," and saw "the other kid" bend over the one on the ground, do "something," and jump into the bed of the truck. Ms. Knight testified that "the truck started to take off while this guy was – his leg was hung up in the truck." The "guy on the ground" did not fall; he was thrown. Ms. Knight went to help the man on the ground; she did not see any gun. No guns were recovered.

Not discussed above, but of particular relevance to this appeal, are Appellant's prior convictions. At trial, the court explained the implications of Appellant testifying in his own defense, stating "[i]f you should testify, I will assume you are waiving your Fifth Amendment right, that when you testify, you need to understand some past criminal convictions may be allowable. I don't know whether there are – there are any – [Madam State], does he have convictions?" The State responded that "I don't believe he has any that I can use. He has a handgun and some assaults, unless he brings up self defense, then I can use the assaults." Defense counsel did not object to or challenge the prosecution's assertion regarding use of the prior convictions.

On direct, Appellant testified that, when Mr. Wells said "give me the f-ing money or where is the f-ing money . . . ," Mr. Wells had a gun "right here, close to my head."

Appellant became "scared, scared, shocked" because, based on their "previous" business transactions, he did not expect Mr. Wells to threaten him. Later, he reiterated "words can't really explain how scared I was, how – I mean I was scared. He – you know, he – [when we were in the truck] he ha[d] the upper hand." Throughout the course of his struggle with Mr. Wells, Appellant said he was "scared. I'm scared to death my life has – I don't even – I mean, words don't really explain how I felt. I am trying to save my life, . . . I am not trying to get shot."

During cross examination, the State introduced "two certified copies of two second degree assaults that the [Appellant] ha[d]." The State argued that because Appellant "raised self defense, second degree assault can now be used." During a bench conference regarding the admission of the prior convictions, defense counsel failed to object and the State proceeded to ask:

> Q. Now, Mr. Smith, are you the same Timothy Smith who was convicted of a second degree assault on December 31st of 2003?
> A. Timothy Ward Smith, Junior?
> Q. Timothy Smith at . . . Mariner Circle, Lusby, Maryland?
> A. Yes, ma'am
> THE COURT: What was that date again? I'm sorry.
> [State]: That was December 31st of 2003.
>
> * * *
>
> Q. And on that one you received 18 months suspended sentence and were placed on probation, right?
> A. Yes, ma'am.
> Q. And you are the same Timothy Ward Smith, Jr. convicted of a second degree assault on August 5th 2004 in which you got a five year sentence, suspend all but four years and nine months, and then placed on probation until November 25th of 2007.
> A. Yes, ma'am.

Again, defense counsel failed to object.

On November 3, 2011, Appellant, filed a Petition for Postconviction Relief. The State answered on November 21, 2011, requesting that the petition be denied.[3] After the Public Defender's office entered its appearance, a Supplemental Petition for Post Conviction Relief was filed withdrawing issues raised in the original petition and alleging new errors, including "ineffective assistance of counsel for failure to object to the State's erroneous and prejudicial use of [his] prior convictions for impeachment purposes." The circuit court held a hearing on the petition on April 22, 2013.

On April 30, 2013, the court entered its Statement of Reasons and Order of Court regarding Appellant's supplemental petition that stated, in relevant part:

> **ALLEGATION ONE**
>
> The [Appellant] was denied effective assistance of counsel because counsel failed to object to the State's introduction of [his] prior convictions during cross-examination.
>
> **FACTS**
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> The parties agree that the main issue at trial was whether the [Appellant] shot the victim . . . . The [Appellant] testified at trial and denied shooting Wells. On cross-examination the State asked [Appellant] about two convictions that he received for second degree assault. His counsel did not object. The State sought to use these convictions to demonstrate, contrary to what the [Appellant] asserted at trial, that he did not have a reputation for peacefulness. The [Appellant] alleges that his counsel was ineffective for failing to object to this method of cross-examination.
>
> **ANSWER**
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> Maryland Rule 5-405(a) states:
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> "In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-

[3] Appellant was self-represented when he filed the Petition for Postconviction Relief; on April 20, 2012, the Office of the Public Defender entered its appearance on his behalf in the post-conviction matter.

> examination, inquiry is allowable into relevant specific instances of conduct."
>
> The Court finds that when the [Appellant] testified and denied shooting the victim, he essentially stated that he was a non-violent person who would have not have committed such a violent act. The State was permitted to cast doubt on this assertion by showing that the [Appellant] has been, in fact, convicted for two acts of assault in the past. Contrary to what [Appellant] argued at the post-conviction hearing, the Court does not find that the evidence was offered to cast doubt on the [Appellant's] veracity under Maryland Rule 5-609. Had the State attempted to do so, [it] should have been barred as convictions for second degree assault are neither infamous crimes nor convictions that shed light on the [Appellant's] truthfulness. *Cure v. State*, 421 Md. 300 (2011). Instead, the State properly used the convictions to show, that contrary to what the [Appellant] asserted, he was not a peaceful person. The jury could then consider evidence, along with all of the other evidence adduced at trial to determine if the [Appellant] was guilty of the offenses alleged in this case. As the prior convictions were properly used, the Court finds that [Appellant's] counsel was not ineffective in failing to object to the introduction of these convictions.

On May 16, 2013, Appellant filed an Application for Leave to Appeal the Denial of Post-Conviction Relief alleging that the circuit court made "a mistake of fact in its Order and Opinion" when it asserted that Appellant "testified and denied shooting" Mr. Wells and in concluding that Appellant "offered testimony and evidence at trial of his character for non-violence and peacefulness." He argued that the circuit court "conflate[d] a defense of self-defense with an assertion of a character trait of peacefulness," and that Maryland Rule 5-405(a) is inapposite because it "assumes that evidence of character or a trait of character was [already] offered."

On February, 16, 2014, this Court directed the State to file a response. The State responded on May 16, 2014, and requested that the Court "deny the application" because Appellant "plainly failed to establish that his trial counsel was ineffective as alleged." In

the State's view, the presumption that defense counsel had strategic reasons for not objecting remained unrebutted when Appellant failed to call "his trial defense counsel or any other attorney" to testify regarding why the failure to object was unreasonable. Therefore, the circuit court's ruling "denying post conviction relief was correct."

On September 23, 2015, this Court granted Appellant leave to appeal.

STANDARD OF REVIEW

Whether Appellant received ineffective assistance of trial counsel is a mixed question of fact and law. *State v. Purvey*, 129 Md. App. 1, 10–11 (1999). We do "not disturb the factual findings of the post-conviction court unless they are clearly erroneous." *Wilson v. State*, 363 Md. 333, 348 (2001). But, we independently analyze the mixed question of whether there was a violation of Appellant's constitutional right to counsel. *Harris v. State*, 303 Md. 685, 698 (1985).

Ineffective assistance of counsel claims are reviewed under the standard set in *Strickland v. Washington*, 466 U.S. 668 (1984). *See State v. Latham*, 182 Md. App. 597, 612 (2008). Under *Strickland*, a petitioner must show "that counsel's performance fell below an objective standard of reasonableness." *In re Parris W.*, 363 Md. 717, 725 (2001). The post-conviction court, in evaluating a petitioner's claim, "must indulge a strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance." *Latham*, 182 Md. App. at 612–13 (quoting *Strickland*, 466 U.S. at 689). In our review of an ineffective assistance of counsel claim, we "evaluate anew the findings of the lower court as to the reasonableness of counsel's conduct . . . ,"

Purvey, 129 Md. App. at 10, in light of the presumption that counsel's actions "might be considered sound trial strategy." *Latham*, 182 Md. App. at 612–13 (quoting *Strickland*, 466 U.S. at 689). In other words, we must be persuaded that counsel's conduct was not "sound trial strategy." *Evans v. State*, 151 Md. App. 365, 373 (2003) (quoting *Strickland*, 466 U.S. at 689).

But, even when counsel's actions or inactions are "professionally unreasonable, [it] does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.'" *State v. Gross*, 134 Md. App. 528, 554 (2000) (quoting *Strickland*, 466 U.S. at 691), *aff'd*, 371 Md. 334 (2002). A petitioner must also show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Jones*, 138 Md. App. 178, 206 (2001), *aff'd*, 379 Md. 704 (2004) (quoting *Strickland*, 466 U.S. at 694). A "reasonable probability is a probability sufficient to undermine confidence in the outcome." *Evans*, 151 Md. App. at 373 (2003) (quoting *Strickland*, 466 U.S. at 694).

DISCUSSION

Contentions

Appellant contends that the court erred in its ruling that the State could use his prior convictions in cross, and incorrectly applied Maryland Rule 5-405(a).[4] He asserts

[4] Maryland Rule 5-405(a) provides:
(a) Reputation or Opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-

clear error in the court's factual findings, including its findings that "the main issue at trial was whether [he] shot the victim" and that he had asserted a "reputation for peacefulness." Regarding the latter, he argues that "he produced no character witnesses to state either that he has a reputation for peaceableness or that, in the witness's opinion, he was a non-violent person." Therefore, trial counsel's failure to object to the inadmissible prior conviction evidence denied him effective assistance of counsel. According to Appellant, the post-conviction court "did not evaluate [his] ineffective assistance of counsel claim using the proper standard set forth in *Strickland v. Washington*, 466 U.S. 668, 690 (1984)."

The State contends that Appellant produced "no evidence whatsoever that rebuts the presumption that trial counsel made reasonable strategic decisions under the circumstances." According to the State, the trial record demonstrates that Appellant "attempted to portray himself on the stand as a peaceful drug dealer," by claiming "that he was not the initial aggressor in the conflict," and by claiming that "he was scared and placed in 'shock' when the situation became violent." Such testimony, the State argues, justified the admission of Appellant's prior second degree assaults under Maryland Rule 5-405, so that "the jury could fairly evaluate the self-defense claim on which [it] received instructions." The State further argues that, even if Appellant "met his initial burden of

examination, inquiry is allowable into relevant specific instances of conduct.

establishing a constitutionally deficient act committed by trial counsel," he failed to "establish any indicia of prejudice."

Analysis

In its Statement of Reasons and Order of Court, the post conviction court, citing Maryland Rule 5-405(a), concluded that the State was permitted to use Appellant's prior convictions for assault "to cast doubt" on Appellant's implicit assertion that "he was a non-violent person who would [ ] not have committed such a violent act."

When proof of character is offered "as circumstantial evidence that [a] person did the 'right' or 'wrong' thing in the incident at issue at trial, it is generally inadmissible under 'the propensity rule.'" 5 Lynn McLain, Maryland Evidence State and Federal 728-30 (3d ed. 2013). Codified in Maryland Rule 5-404, the propensity rule provides that ordinarily, "evidence of a person's character or character trait is not admissible to prove that the person acted in accordance with the character trait on a particular occasion," and that evidence of "other crimes, wrongs, or acts . . . is not admissible to prove the character of a person in order to show action in conformity therewith." The reason such evidence is not generally admissible is that it "will prejudice the jury against the accused because of the jury's tendency to infer that the accused is a 'bad man' who should be punished regardless of his guilt of the charged crime, or to infer that he committed the charged crime due to a criminal disposition." *Tichnell v. State*, 287 Md. 695, 711 (1980).

Maryland Rule 5-404(a)(2)(A) permits a criminal defendant to offer evidence of good character to show that he or she did not commit the offense charged: "An accused

may offer evidence of the accused's pertinent trait of character. If the evidence is admitted, the prosecution may offer evidence to rebut it." A defendant may not, however, seek to prove that character trait by specific acts consistent with that particular trait. *See* Md. Rule 5-404(d). In addition, a defendant is permitted to offer reputation or opinion evidence of the victim's violent character as proof that the victim was the initial aggressor. *See* Md. Rule 5-404(a)(2)(B) ("[A]n accused may offer evidence of an alleged crime victim's pertinent trait of character."); *Thomas v. State*, 301 Md. 294, 307 (1984) (stating that a defendant may use evidence of a victim's violent character to prove that he or she had a reasonable belief of danger and to corroborate evidence that the victim was the initial aggressor).

Importantly here, however, a criminal defendant does "not put his 'character' . . . in issue by merely taking the stand as a witness." *Braxton v. State*, 11 Md. App. 435, 439 (1971). Appellant did not "state[] that he ha[d] good character or a good record, or offer[] direct evidence of good character." *Id.* Had he done so, the prosecution would be entitled to rebut it under Maryland Rule 5-405.[5] *See id.* ("The State cannot show the bad character

[5] Maryland Rule 5-405 provides:

(a) Reputation or Opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) Specific Instances of Conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of relevant specific instances of that person's conduct.

of the accused until the accused has raised the issue by offering evidence of good character.").

The post-conviction court found that the "main issue" was whether appellant "shot the victim" and that Appellant "denied shooting the victim." As that court saw it, Appellant's testimony advanced the issue of his peacefulness, which the State was permitted to "cast doubt on." These findings are not supported by the record.

On direct, Appellant advanced a straightforward self-defense argument. He stated that he shot Mr. Wells, who also had a gun, because he was "trying to save [his own] life" and because he was "trying not to get shot." He also testified that he was "scared" and "shocked" when he saw Mr. Wells's gun "coming to point in [his] face." Such statements do not equate to "a claim of peaceable character, a reputation for peacefulness, or a character of non-violence." To the contrary, Appellant admitted that while "riding with Junk, I mean we usually keep a gun." Under these circumstances, the State should not have been permitted to introduce evidence of Appellant's prior assault convictions.

We now consider whether counsel's failure to object to the improper introduction of Appellant's prior convictions fell below an objective standard of reasonableness.[6] *See Strickland*, 466 U.S. at 687–88. Notwithstanding the presumption that counsel's failure to object to the admission of that evidence was "the product of reasonable professional judgment," *Cirincione v. State*, 119 Md. App. 471, 486 (1998), the question before us is

[6] The post-conviction court determined that counsel "was not ineffective in failing to object" to the convictions because the convictions were "properly used." It did not reach this stage in the *Strickland* analysis.

whether, under the circumstances of this case, counsel's conduct could "be considered sound trial strategy." *Perry v. State*, 357 Md. 37, 78 (1999) (quoting *Wiggins v. State*, 352 Md. 580, 602 (1999)).

To be sure, no attorney testified as to either the appropriateness or inappropriateness of counsel's failure to object to the admission of the Appellant's assault convictions.[7] But, in short, we can think of no sound strategy to support counsel's failure to object to the admission of Appellant's prior assault convictions. The convictions were for crimes similar to the crimes of which Appellant was charged. *See State v. Westpoint*, 404 Md. 455, 488 (2008) ("We have opined that evidence of other crimes, wrongs or acts is, generally, not admissible as substantive proof, because a jury could decide to convict on the basis of an alleged criminal disposition and might infer that because the defendant has acted badly in the past that he is more likely to have committed the crime charged.") (internal citations omitted); *Fulp v. State*, 130 Md. App. 157, 168 (2000) ("Because of the similarity in crimes, there was a great likelihood that the jury would use the prior conviction for an improper purpose, i.e., to prove the likelihood that affiant committed the crime for which he stood accused.").

It appears that counsel's failure to object was simply the result of ignorance of the law. As the Court of Appeals has stated, "[w]e do not see how trial counsel's failure to

[7] Trial counsel was not called to testify by the Appellant or the State in the post-conviction case; she was disbarred on April 1, 2010. *See* Attorney Grievance Commission and Office of Bar Counsel, Maryland Attorneys FY10 Sanctions and Actions Affecting Licensure, http://www.courts.state.md.us/attygrievance/sanctions10.html (last viewed Dec. 1, 2016).

object because of his ignorance of the law could possibly be seen as sound trial strategy or a strategic choice." *Coleman v. State*, 434 Md. 320, 338 (2013); *see also Jones*, 138 Md. App. at 222 (finding that counsel's failure to object to the multiple hearsay within a co-defendant's statement rendered his performance deficient), *aff'd*, 379 Md. 704 (2004). Not only did the convictions come into evidence, the failure to object resulted in the issue not being preserved for direct appeal.

Of course, deficient performance, by itself, "does not give rise to a presumption of prejudice." *Jones*, 138 Md. App. at 222. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. But, "reasonable probability" in the *Strickland* context does not require a defendant to "show that counsel's deficient conduct more likely than not altered the outcome in the case." *Jones*, 138 Md. App. at 208 (quoting *Strickland*, 466 U.S. at 693). Rather, the question is "whether the result of the proceeding was fundamentally unfair or unreliable." *Oken v. State*, 343 Md. 256, 284 (1996) (quoting *Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993)). In other words, it is enough if the introduction of the assault convictions "undermine[d] confidence in the outcome." *Strickland*, 466 U.S. at 694.

Here, Appellant points out, and we agree, that the "outcome of the trial undoubtedly turned on the jury's assessment of the relative credibility of Appellant and of [Mr. Wells] because their accounts could not be reconciled." They were admitted drug dealers engaged in a transaction gone bad and the only witnesses who testified regarding

what transpired inside the cab of the pickup truck, and who was the initial aggressor, at the time of the shooting. There was no physical evidence that would shed any meaningful light on either's version of the shooting itself. Because Appellant's defense rested on the jury believing that he acted in self-defense, the admission of Appellant's prior assault convictions may have proved decisive to the jury. Their admission under these circumstances was, in our view, sufficient to "undermine" confidence in the verdict.

JUDGMENT REVERSED. REMANDED TO THE CIRCUIT COURT FOR CALVERT COUNTY FOR PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY THE CALVERT COUNTY.