UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0799

September Term, 2015

MICHAEL JOHNSON

v.

STATE OF MARYLAND

Berger,
Arthur,
Reed,

JJ.

Opinion by Arthur, J.

Filed: December 15, 2016

The State accused appellant Michael Douglas[1] of murdering Rockelle Harper, the mother of two of his children. Following a six-day trial in the Circuit Court for Baltimore City, a jury rejected the defense theory that Ms. Harper had shot herself while Douglas was trying to prevent her from committing suicide. Instead, finding that Douglas shot Ms. Harper in the heat of an argument, the jury convicted him of second-degree murder, using a handgun to commit a crime of violence, and possessing a handgun after a disqualifying conviction. The court sentenced Douglas to an executed term of 50 years' imprisonment.[2]

QUESTIONS PRESENTED

Challenging his convictions, Douglas presents the following questions for our review:

1. Did the court below err by permitting Detective Jonathan Jones to be exempted from sequestration during Appellant's trial?

2. Did the trial court err by ruling pre-trial that testimony about a cylinder gap test using a revolver was admissible?

3. Was it reversible error for the trial court to admit Appellant's statement during the testimony of Paramedic Alan Russell?

4. Did the trial court err by ruling that [M.E., a 12-year-old child] was competent to testify?

[1] Although the appellant was charged under the name Michael Johnson, the trial court granted a defense motion to refer to him by his correct name, Michael Douglas. Throughout trial, the court and the parties referred to him as Michael Douglas. The appellate briefs refer to him as Michael Douglas. Consequently, we shall refer to him as Douglas.

[2] The court sentenced Douglas to 30 years for murder, a consecutive 20 years on the handgun conviction (the first five without parole), and a concurrent 15 years for possessing a handgun after a disqualifying conviction (the first five without parole).

5. Is the evidence legally insufficient to sustain Appellant's convictions?

On the first four questions, we find no error. We decline to consider the final question, concerning the sufficiency of the evidence, because Douglas failed to preserve his challenge. On this direct appeal, we also decline to consider whether the failure to preserve that challenge amounted to the ineffective assistance of counsel.

FACTUAL AND LEGAL BACKGROUND

On Sunday, February 3, 2013, while the Baltimore Ravens were defeating the San Francisco 49ers in Super Bowl XLVII, Rockelle Harper was shot in her home in Baltimore City. The fatal bullet, which was fired at close range from a .44 caliber revolver, entered the left side of her upper neck and severed her carotid artery and jugular vein before exiting on the right side of her head just below the right earlobe. The State charged Douglas with first-degree murder, second-degree murder, use of a firearm in the commission of a felony or crime of violence, possession of a regulated firearm after being convicted of a disqualifying crime, first-degree assault, second-degree assault, reckless endangerment, and discharging a firearm in Baltimore City.

At trial, the primary issue was whether the death was a homicide or a suicide. The State presented evidence demonstrating that Ms. Harper had attempted to defend herself from Douglas, the father of two of her three children, as he loaded and fired the revolver. The defense countered that Ms. Harper, distraught after learning that Douglas was having a child with another woman, threatened suicide with the gun, which "went off" as Douglas tried to stop her. Because the jury convicted Douglas of intentional but

unpremeditated (second-degree) murder and related handgun offenses, our summary presents the evidence in the light most favorable to State on those charges. *See Jones v. State*, 425 Md. 1, 8 (2012).

Ms. Harper's 10-year-old son, M.E., heard the shooting, as well as the interactions between his mother and Douglas just before the shooting. On the night of the shooting, he gave a recorded statement to police investigators. At trial, M.E., by then 12 years old, refreshed his recollection from a transcript of that interview and confirmed his earlier account.

M.E. testified that he recognized the revolver that fired the fatal shot as one that had been given to Douglas. The gun had been in the kitchen just before his mother died.

On the evening of his mother's death, when Douglas and Ms. Harper started "fussing," Douglas made M.E. and his brothers leave the upstairs bedroom where they had been playing. As the couple argued in a closed room, M.E. heard his mother "saying stuff" that indicated that she "got mad." He heard "clicking" that he recognized as the sound of the gun being loaded.[3] He heard his mother "screaming" and saying, "[G]et that gun out of my face." Then he heard a gunshot. Douglas instructed M.E. "to go get help." The child went across the street to a neighbor, who called 911.

When the first responder, paramedic Alan Russell, came upstairs, Douglas was sitting on the floor with his back against the wall, "cradling" Ms. Harper as she lay

[3] M.E. explained that he knew how the gun was loaded because "[i]n school we talk about weapons" and how to use one "if somebody break[s] in[.]" He testified that "you put six bullets in and open it and click it back in. You push the top button, the top thing and then you shoot."

bleeding and unresponsive. A revolver was on the floor nearby, with "one cartridge casing located in position one and . . . four live cartridges remaining in the cylinder." As the paramedic rendered aid to Ms. Harper, Douglas stated twice that he "came home and found her this way."

The police arrived while the paramedic was still at the house. Sitting outside the house, a "distraught" Douglas told Detective Sergeant Scott Mileto of the Baltimore Police Department that "she had the gun" and that when he "tried to stop her" by taking it away from her, "[i]t went off." At that time, Douglas's hands were "bagged" for later gunshot-primer residue ("GSR") testing.[4] As a detective transported Douglas to the police station, he "was rocking back and forth" saying that he never should have told his girlfriend that he was having a baby with another woman and that he "tried to stop her."

At the police station later that evening, Douglas gave a voluntary statement to Detective Jonathan Jones, the primary investigator. The State played a recording of that statement at trial and provided a transcript to the jury.

In the statement Douglas said that he and Ms. Harper had been together for more than eight years and had two sons. Although he was not M.E.'s father, he considered M.E. to be "his biological son" rather than a stepson. Douglas admitted that he and Ms. Harper "had been going through problems a lot lately," that they had "got in a couple fights before," that he had been previously arrested for domestic violence when he "tried

[4] A detective explained that "GSR bags" are placed over hands to "preserve[] any gunshot residue that's already on the hands or any contamination from getting on the hands after an incident has already occurred."

to take [his] son," and that he had "a new girlfriend" who was expecting his child. Nevertheless, he referred to Ms. Harper as his fiancée, claiming that he "love[d] her with all [his] heart" and "just wanted to go back home." According to Douglas, Ms. Harper kept a gun in the house "for protection" because of crime and because "dogs weren't enough." He claimed that she used to "take . . . four or five" Motrin or "Hydrocodines" [sic] when her body was hurting and had tried to commit suicide "[w]ith some pills once."

Douglas denied shooting Ms. Harper. He told the police that earlier that evening, after Ms. Harper learned about the "new girlfriend's" pregnancy, she said, "it's no point in me being here," and "I can't deal with this no more," and told Douglas that he "was gonna have to take care of the kids." He claimed that she grabbed her revolver, which, he said, was lying on the bed. In Douglas's account, as he was trying to stop her from shooting herself, he "grabbed her hand," and the gun "went off." When asked if "she pull[ed] the trigger," or whether he "accidentally, pull[ed] the trigger?" Douglas responded: "I grabbed her hand. Both our hands was right there, and I tried to hurry up and . . . pull it away. It happened so . . . quick."

Instead of calling 911 himself, Douglas sent M.E. for help, tried to "hold the wound," and called his mother. He told his mother that Ms. Harper "shot herself," but that he was "afraid that the police" would "blame" him "because that's normally what happens."

Takia Wilkes, Ms. Harper's younger sister, recounted two occasions on which she had observed arguments between her sister and Douglas. During one argument, Douglas

retrieved a gun from an upstairs bedroom before walking away. In another incident, she and her sister locked Douglas out of the apartment, but Douglas broke in through a balcony door and "took his son."

Ms. Wilkes testified that Ms. Harper was right-handed. The entrance wound, however, was on the upper-left side of her neck. If Ms. Harper had used her dominant right hand to fire the revolver, she would have had to reach across her body and twist her right wrist back toward the left side of her neck to make the weapon fire in the direction of the wound path.

The State presented forensic evidence to support its contention that, as Ms. Harper was facing Douglas, he shot her, using his dominant right hand to fire into the left side of her neck, while she held both hands defensively over the cylinder of the revolver. This evidence included tests of gunshot-primer residue conducted on swabs taken from both Douglas and Ms. Harper, the test-firing of the revolver, and the autopsy performed on Ms. Harper.

GSR was found on the right hands of both Douglas and Ms. Harper, and "particles often associated with but not specific to GSR" were found on both of their left hands. The autopsy report described the location, size, and pattern of the soot deposit.

In brief, surrounding the entrance wound on the left side of Ms. Harper's neck, just below the jaw, there was a "dense eccentric soot deposition that extended up to 3/4" from the wound edge posterolaterally (9 o'clock)." A "[l]ess dense" deposit of "soot extended inferiorly (6 o'clock) over the neck up to 2-3/4' from the wound edge." The

descriptions indicate that the soot was deposited in the shape of an upside-down L, whose vertical and horizontal lines intersected at the site of the entrance wound.[5]

On Ms. Harper's right palm, from the base of the fourth (or ring) finger to the "thenar eminence,"[6] there was a "1-3/4' x 1/2' area of black powdery substance (probable soot)." A "[b]lack powdery substance (probable soot) was [also] on the palmar aspect of the right fourth finger (3/4' and right third finger (1/2' x 1/2')."[7] A photograph shows an L-shaped soot deposit that begins along the right ring finger and turns at a right angle on the base of the palm.

Finally, "[f]ocal areas" of a "faint[,] black powdery substance" were on the "dorsal left second through fifth fingers (1/8' to 1/ 4' x 1/8')" – i.e., on the knuckles of the second through fifth fingers on the left hand – and on the ulnar aspect of the left forearm (1 x 1/4')."[8]

Victor Meinhardt, a Firearms Examiner with the Baltimore City Police Department, examined the weapon that was found near Ms. Harper, a .44 Special revolver manufactured by Taurus. Mr. Meinhardt testified that the act of loading

[5] The State introduced enlarged photographs of the entrance wound, but the record on appeal does not appear to contain them.

[6] The "thenar eminence" is the group of muscles at the base of the thumb. *See* MOSBY'S MEDICAL DICTIONARY 1754 (10th ed. 2016).

[7] The "palmar aspect" of a finger would appear to be the portion of a finger that is on the side of the palm (as opposed to the back of the hand).

[8] The "ulnar aspect" of the forearm would appear to be the outside portion of the forearm – that part that follows the contours of the ulna, the larger of the two bones in the forearm (the other being the radius).

cartridges into the revolver created a "small tink" from "metal on metal" and that closing the cylinder "makes . . . a very fairly distinctive click." He demonstrated the noises for the jury.

At the medical examiner's request, Mr. Meinhardt had conducted two types of tests to obtain evidence of the soot-dispersal patterns from the revolver. One test gauged the soot-dispersal patterns from the muzzle; the second test gauged the soot-dispersal pattern from the cylinder gap – the small space between the barrel of the revolver and the revolving cylinder that holds that bullets.

In the first test, Mr. Meinhardt fired the weapon at swatches of white fabric that were placed at specified distances from the muzzle – on the muzzle itself, an inch from the muzzle, and three inches from the muzzle. In the second test, Mr. Meinhardt draped a piece of white fabric over the top of the revolver to capture the soot-dispersal pattern from the cylinder gap. Over a defense objection, the court admitted those swatches into evidence.[9]

Dr. Melissa Brassell, a forensic pathologist and assistant medical examiner, performed the autopsy on Ms. Harper and observed the test-firing of the revolver. She explained that "[s]oot is a black powdery substance," composed of "combusted gunpowder particles and gases," which "can be deposited on the skin surface when a weapon is fired within a close range to the skin surface." Over Douglas's objection, she

[9] Despite the importance of at least some of the swatches to the issues on appeal (*see infra* section II), the record does not appear to contain any of them.

compared the "soot deposition patterns" produced by test-firing the revolver with the patterns found on Ms. Harper's body.

On the basis of that comparison, Dr. Brassell observed that when the gun was fired at a distance of one inch from the white fabric, the soot-deposition pattern was "very similar" to the pattern on Ms. Harper's neck. She opined that the gun was fired at a distance of an inch or less from Ms. Harper's neck.

Turning to the soot-deposition patterns on the hands, Dr. Brassell opined that Ms. Harper had not been handling the grip or trigger of the revolver, but had been holding both hands in a defensive position adjacent to the gun's cylinder and barrel when it was fired. Comparing the soot-dispersal pattern on the swatch of white fabric that had been draped over the muzzle of the revolver when it was test-fired to the soot-dispersal pattern shown in the photograph of Ms. Harper's right palm, Dr. Brassell opined that the pattern on the swatch was "consistent with a linear pattern of soot deposition seen . . . on Ms. Harper's hand." According to Dr. Brassell, the "linear" soot-dispersal pattern on Ms. Harper's right palm and ring finger was "most consistent" with her hand having been over the cylinder when the gun was fired. The "linear" pattern on Ms. Harper's left knuckles meant that the back of her left hand had probably been adjacent to the cylinder gap as well.

After demonstrating these likely hand positions for the jury, Dr. Brassell testified that, in her expert opinion, Ms. Harper's injuries were not consistent with suicide. She later observed that in "most suicides" "the gun is directly up against the skin surface

when the gun is fired." In this case, by contrast, Dr. Brassell had opined that the gun was up to an inch away from Ms. Harper's neck when it was fired.

DISCUSSION

I. Exemption from Sequestration

Douglas contends that the trial court erred or abused its discretion in granting the State's request to exempt Detective Jonathan Jones, the primary investigator into Ms. Harper's death, from its sequestration order. The State counters that Douglas "is doubly wrong" because "the trial court did not have the discretion to deny the State's request, and even if it did, the court did not abuse that discretion."

Sequestration of witnesses is governed by Md. Rule 5-615, which provides in pertinent part:

> **(a) In General.** Except as provided in sections (b) and (c) of this Rule, upon the request of a party made before testimony begins, the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses. . . . The court may order the exclusion of a witness on its own initiative or upon the request of a party at any time. The court may continue the exclusion of a witness following the testimony of that witness if a party represents that the witness is likely to be recalled to give further testimony.
>
> **(b) Witnesses Not to Be Excluded.** *A court shall not exclude pursuant to this Rule . . . .*
>
> *(2) an officer or employee of a party that is not a natural person designated as its representative by its attorney*[.]

(Italics added.)

"[T]he State of Maryland qualifies as 'a party that is not a natural person.'" *Poole v. State*, 207 Md. App. 614, 624 (2012) (quoting Md. Rule 5-615(b)(2)). From the plain

language of the rule itself, therefore, it would appear that a trial court may not exclude an officer or employee whom the State, as a party, has, through its attorney, designated as its representative.

"In adopting Rule 5-615, . . . the Court of Appeals used language very similar to that used in Federal Rule [of Evidence] 615." *Poole*, 207 Md. App. at 625. "The legislative history of the federal rule makes clear the intent that an investigating officer is not subject to mandatory sequestration." *Id.* at 626. Hence, "[b]ased on the legislative history of Federal Rule [of Evidence] 615, federal courts have held that the 'officer or employee' exception includes a law enforcement officer, and therefore, the trial court 'has a right to make an exception from a general rule of sequestration in favor of the chief investigating agent of the government involved in a trial.'" *Id.* at 627 (quoting *United States v. Parodi*, 703 F.2d 768, 773 (4th Cir. 1983)).

Moreover, "the procedural history leading to the adoption of Rule 5-615 confirms the intent that" the exemption from mandatory sequestration extends to "a law enforcement officer designated as the State's representative." *Poole*, 207 Md. App. at 628. In particular, in adopting the rule the Court of Appeals rejected an exception stating that "in a criminal case the State may not be" represented by an officer or employee. *Id.* at 628-29. Accordingly, this Court held "that a law enforcement officer involved in a criminal prosecution falls within the 'officer or employee' exception to the mandatory sequestration requirement of Rule 5-615(a), and pursuant to Rule 5-615(b), the officer may remain in the courtroom if designated as the State's representative." *Id.* at 629; *accord* Joseph F. Murphy, Jr., *Maryland Evidence Handbook* 99 (4th ed. 2010) ("Rule 5-

615(b)(2) creates a 'case agent' exception for criminal cases[,]" under which "[p]rosecutors are now entitled to have an 'advisory witness' at the trial table").

In this case, the State designated Detective Jones as its representative. The trial court, expressly relying on *Poole*, granted the State's request to exempt him from its sequestration order. In explaining its decision, the court recognized that the detective was the chief investigator. In addition, the court referred to what defense counsel called the "challenging" nature of the case, as well as its length.

Although the rule states that "a court shall not exclude" the designated representative of a party that is not a natural person, Douglas argues that the court had discretion to exclude the detective. He contends that the court abused its discretion because, he says, the court "seemed not to give much weight" to his contention that the case, however "challenging," was not "complex," or to his concern that it would bolster the detective's testimony if he were allowed to sit at the trial table with the prosecutor.

Assuming for the sake of argument that the rule afforded the trial court some discretion to sequester Detective Jones, the court did not abuse that discretion in declining to do so. This case was significantly more complex than *Poole*, where this Court affirmed a decision to exempt a police officer from sequestration during a one-day trial with only two State witnesses. In contrast, this case was tried over six days, during which the State presented 11 forensic and fact witnesses, including the victim's 12-year-old child whose competency to testify was challenged. Moreover, there was little danger that Detective Jones could be "taught or prompted by" the trial testimony of other witnesses (*see Tharp v. State*, 362 Md. 77, 95 (2000)), given that, as lead investigator, he

had prior knowledge of their statements and forensic conclusions. Nor was his testimony unfairly bolstered by his presence next to the prosecutor, given that the detective's testimony primarily reviewed the course of the investigation to establish a factual foundation for the admission of photographs taken at the crime scene, Douglas's recorded interview, and the test results. In these circumstances, the trial court did not err or abuse its discretion in declining to sequester Detective Jones.

II. Admission of Cylinder-Gap Test Evidence

Douglas contends that the trial court erred in a pre-trial ruling "that testimony about a cylinder gap test using a revolver was admissible." In his view, the State failed to satisfy the *Frye-Reed* threshold governing whether a scientific conclusion is sufficiently accepted in the scientific community to be admitted in a criminal trial. Under that standard, set forth in *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923), and adopted in *Reed v. State*, 283 Md. 374, 381 (1978):

> [B]efore a scientific opinion will be received as evidence at trial, the basis of that opinion must be shown to be generally accepted as reliable within the expert's particular scientific field. Thus, according to the Frye standard, if a new scientific technique's validity is in controversy in the relevant scientific community, or if it is generally regarded as an experimental technique, then expert testimony based upon its validity cannot be admitted into evidence.

After reviewing the record and authorities discussed below, we conclude that the trial court did not err or abuse its discretion in admitting cylinder gap evidence based on the test-firing of the revolver.[10]

The *Frye-Reed* Hearing

On the morning of the first day of trial, Douglas moved to exclude "any testimony regarding cylinder gap analysis and any opinions derived from said analysis." In support of the motion, Douglas argued that "how this particular cylinder [g]ap test was conducted does not fall within the accepted standards for testing scientific evidence." The prosecutor objected to the timing of the motion, asserted that he was unprepared to argue the issue for the first time on the day of trial, and argued that the *Frye-Reed* standard did not even apply to the type of evidence in question. When the trial court asked whether defense counsel contended that "this involves a novel scientific method," she answered, "that is part of our argument." Counsel added that "the methodology in terms of the cylinder gap test is not readily acceptable in the field and particularly how it was done in this manner."

After a recess, the trial court observed that the *Frye-Reed* challenge appeared to be something of an afterthought, but it nonetheless decided to conduct a hearing outside the presence of the jury.

[10] Douglas appears to challenge only the evidence relating to soot-dispersal patterns from the cylinder gap; he does not challenge the similar evidence showing soot-dispersal patterns at various distances from the muzzle.

The only witness at the hearing was Dr. Brassell, the board-certified forensic pathologist who conducted Ms. Harper's autopsy. She testified on direct examination that in April 2014 she observed a firearms examiner test-fire the revolver "to determine range of fire [and] to observe soot, deposition powder and cylinder gap." She described the method used in conducting the tests. Based on those tests, she was able to conclude that "there was a linear pattern of soot deposition on the palm of the right hand [of Ms. Harper] which was similar in appearance to the cylinder gap soot dispersion that was . . . visible during the testing."

Under cross-examination, Dr. Brassell conceded that she did not administer the cylinder-gap discharge test. Defense counsel then asked what training she had in cylinder-gap analysis, and the following colloquy ensued:

> **[Dr. Brassell]:** The cylinder gap analysis and soot deposition in general are a part of my general training as a forensic pathologist.
>
> **[Defense Counsel]:** How many times have you had that particular training?
>
> **[Dr. Brassell**]: I couldn't say.
>
> **[Defense Counsel]:** And . . . so you're saying that the soot analysis also incorporates some study of cylinder gap analysis?
>
> **[Dr. Brassell]:** It's the study of soot dispersion and how that relates to autopsy, specifically to gunshot wounds on the skin surface.
>
> **[Defense Counsel]:** And if you can alert the Court to any literature that you are aware of that you studied in reference to cylinder gap testing?
>
> **[Dr. Brassell]:** General forensic pathology textbook, specifically D[i]Maio's gunshot wound textbook.

> **[Defense Counsel]**: Okay. And it specifically talks about cylinder gap testing?
>
> **[Dr. Brassell]:** It does.
>
> **[Defense Counsel]**: Now, do you remember . . . meeting with myself and [others] one day last week?
>
> **[Dr. Brassell]:** Yes.
>
> **[Defense Counsel]**: And do you recall when we asked you if you were aware of any literature, do you recall what your answer was?
>
> **[Dr. Brassell]**: Well, there is a difference between literature and textbooks. When I'm asked about a specific literature as a medical professional, a scientist, I think of journal articles and specific experimentation and in that regard no, I am not aware of any but, of course, there are general forensic pathology textbooks that talk about soot deposition and specifically soot deposition from cylinder gap with respect to revolvers, that's how I know about it and received training about it during my fellowship training.

Later, defense counsel returned to the topic of Dr. Brassell's training:

> **[Defense Counsel]:** And you said that you were trained in soot analysis and cylinder gap analysis, correct?
>
> **[Dr. Brassell]:** I am a forensic pathologist. I'm trained in injury and patterns of injury as they pertain to autopsy findings and that includes soot deposition on the body with respect to gunshot injuries.

Citing the lack of "literature" and precedent in case law, defense counsel argued that cylinder-gap discharge analysis is "novel." Counsel distinguished cylinder-gap discharge analysis from generally accepted scientific tests such as fingerprinting and DNA analysis, for which "[t]here is voluminous literature."[11]

[11] In addition, counsel argued that the National Fire Protection Association and the "National Academy of Forensic Scientists" had not discussed the analysis of cylinder-gap discharges. It is unclear why the National Fire Protection Association, (continued…)

The trial court rejected defense counsel's argument.

The *Frye-Reed* Challenge

We conduct a *de novo* review of the denial of a motion *in limine* to exclude scientific evidence under the *Frye-Reed* standard. *See Wilson v. State*, 370 Md. 191, 201 n.5 (2002).

According to Dr. Brassell, cylinder-gap discharge testing and analysis is taught in the field of forensic pathology generally, and within the field of gunshot and gunpowder-primer residue analysis specifically. The doctor testified that "D[i]Maio's gunshot wound textbook" addresses the scientific analysis of "soot" discharged through the gap between the cylinder of a revolver and its barrel.[12] In addition, Dr. Brassell received training in cylinder-gap testing and analysis during her pathology fellowship. Although she could not cite any scholarly articles on the subject, the inclusion of this subject in her pathology curriculum and clinical training demonstrates that cylinder-gap testing and analysis and its underlying scientific theory are neither novel, experimental, nor in

an organization that focuses on fire and electrical hazards, would be an authority on soot-dispersal patterns from guns. There appears to be no organization called the "National Academy of Forensic Scientists," although there is an American Academy of Forensic Scientists.

[12] Because Dr. Brassell testified that she had been with the Office of the Chief Medical Examiner "[s]ince 2005," her education and training must have occurred before that date. As Douglas acknowledges, however, the textbook in question remains in circulation. *See* Vincent J.M. DiMaio, M.D., *Gunshot Wounds: Practical Aspects of Firearms, Ballistics, and Forensic Techniques* (CRC Press, 3d ed. 2016). The textbook's author, Dr. DiMaio, testified as a defense expert in Maryland in a criminal case that involved dueling forensic opinions about whether a victim's fatal gunshot wound was self-inflicted. *See Smith v. State*, 423 Md. 573 (2011), *rev'g* 196 Md. App. 494 (2010).

controversy. As the State unsuccessfully argued in opposing the *Frye-Reed* hearing, it is doubtful that the principles of *Frye-Reed* apply to an analytical procedure like this one, which pathologists and medical examiners routinely study as part of their professional training. *Cf. Rochkind v. Stevenson*, 229 Md. App. 422, 452-53, 464 (2016) (holding that court did not abuse discretion in not holding *Frye-Reed* hearing before admitting physician's testimony that lead-poisoning in childhood may cause ADHD); *Stevenson v. State*, 222 Md. App. 118, 130-33 (holding that circuit court did not abuse its discretion in not holding *Frye-Reed* hearing before admitting detective's expert testimony about call-detail data to ascertain the location of a cell phone), *cert. denied*, 443 Md. 737 (2015).

But even if cylinder-gap discharge testing and analysis were novel (such that a *Frye-Reed* hearing was required), the State adequately demonstrated that the procedure is generally accepted in the scientific community. In her testimony, Dr. Brassell identified Dr. Vincent DiMaio's textbook as the "most cited" and "most often referenced" textbook that describes "soot dispersion from a cylinder gap." According to that text, "[w]hen a revolver is fired, gas, soot, and powder emerge not only from the muzzle but also from the gap between the cylinder and the barrel." Vincent J.M. DiMaio, M.D., *Gunshot Wounds: Practical Aspects of Firearms, Ballistics, and Forensic Techniques* 75 (2d ed. 1999). The material that "emerges at an approximate right angle to the long axis of the weapon" can produce an observable pattern. *Id.* at 75-76. For instance, "[i]f the weapon is held parallel to the body at the time of discharge, the jet of soot-laden gas escaping from the cylinder-barrel gap may produce a linear, a L-shaped or a V-shaped gray sooty deposit on the skin or clothing." *Id.* at 76. The text mentions that suicide victims often

have soot lines on the palm of their hands when they use their other hand to steady the weapon as they fire. *Id.* at 358.

Although Dr. Brassell did not mention any other texts (and the State has cited none), other sources confirm that the discharge from a cylinder gap may be useful in determining the position of a gun when it was fired. *E.g.*, Michael G. Haag & Lucien G. Haag, *Shooting Incident Reconstruction* 47-48 (2d ed. 2011) (explaining that the discharge from the cylinder gap of a revolver "can blast or burn a characteristic pattern into almost any surface immediately adjacent to the cylinder gap" and that "[c]ylinder-gap deposits are of special value in possible suicide cases [or] in alleged struggles over a revolver"); Jason Payne-James et al., *Forensic Medicine: Clinical and Pathological Aspects* 157 (2003) (explaining that "[m]aterial exiting from the cylinder gap is usually deposited in a linear, L-shaped, or V-shaped pattern on clothing or skin in close proximity to the gap" and that "[r]ecognition of this phenomenon is extremely helpful in reconstructing the sequence of events in a shooting, as it allows the pathologist to determine with great certainty the precise position of the revolver at the time of discharge").

In addition, in a number of cases courts have admitted cylinder-gap discharge evidence. The trial court mentioned two. The first shares factual similarities with this case.

In *State v. Shaw*, 839 S.W.2d 30, 34-35 (Mo. Ct. App. 1992), the accused maintained that he accidentally shot his estranged girlfriend and did not intentionally shoot her. The Missouri court held that the trial court did not err in allowing the State to

question the medical examiner and a defense expert using three photographs copied from a textbook, showing a revolver being fired. *Id*. at 34. The court explained:

> The photographs were used to show the manner in which gases are ejected from a revolver when it is fired. The gas escapes from the muzzle and from the gap between the cylinder and barrel of a revolver.

Id.

The court continued:

> **[**T]here was a lead deposit found on the left shoulder of [the victim's] sweatshirt and a powder burn on her neck. This was consistent, witnesses testified, with the muzzle of the revolver being six inches or less from Ms. Johnson's neck and the cylinder gap being only a couple of inches from her shoulder when the revolver was fired. This showed the improbability of the shooting being accidental. The exhibits in question helped to understand all this testimony by illustrating how gas escaped from a revolver.

Id. at 35.

In addition to contending that he did not intentionally shoot his estranged girlfriend, the Missouri defendant attempted to show that the murder weapon might have been a rifle fired by someone else. "Evidence of the 'cylinder gap' discharge," the Missouri court said, "was therefore admissible to disprove this alternative inference offered by the defendant." *Id.* at 35.

The second case to which the trial court referred appears to be the unreported decision in *State v. DiBartolo*, 2000 WL 968474 (Wash Ct. App. July 13, 2000). In that case, a medical examiner opined that the defendant had not been shot in a struggle with robbers, as he claimed, but that he had shot himself and inflicted a superficial wound in an attempt to cover up the murder of his wife. *See id.* at *3. The prosecution presented

evidence, apparently without objection, about a comparison of the soot pattern on the defendant's clothing with the pattern produced by test-firing the defendant's revolver after a paper towel had been placed over the cylinder gap. "The gap flash left an L-shaped mark if the gun was upside down when it fired and an inverted L if it was right side up." *Id.* at *3. But although the defendant claimed that the gun was upside down when it was fired (*id.* at *2), the "sooting pattern on [his] shirt and skin was typical of cylinder gap flash from a two-inch barrel firearm that was right side up and pointed slightly downward when fired at near-contact range." *Id.* at *3. In addition, although the defendant claimed to have had his hand over the gun when it was fired (*id.* at *2), "[t]here was no evidence of an intervening object, such as a hand, between the cylinder gap and the shirt." *Id.* at *3. The court affirmed the convictions. *Id.* at *21.

Douglas's brief cites another Washington case in which a court admitted cylinder-gap evidence on the issue of whether the defendant or her husband had fired the fatal shot from a revolver. In *State v. Green*, 328 P.3d 988, 992 (Wash. Ct. App.), *rev. denied*, 337 P.3d 325 (2014), a forensic pathologist testified "that based on the blood spatter and gunpowder residue, [the victim's] right hand must have been in very close proximity to the cylindrical gap of the gun." The medical examiner and a firearms expert both "agreed that [his] right hand probably was on the cylinder[.]" *Id.*

Although we found no case directly addressing whether cylinder-gap evidence is sufficiently reliable to be admitted over a *Frye-Reed* objection, each of the following cases considered cylinder-gap evidence to be relevant to the determination of whether a fatal gunshot wound was self-inflicted or accidental: *Sims v. Livesay*, 970 F.2d 1575,

1578, 1580-81 (6th Cir. 1992) (trial representation was prejudicially deficient because counsel failed to investigate patterns of powder residue on quilt that lay on bed where decedent died; residue suggested that gun was wrapped in quilt when fired, which could explain why "there was no lead fouling, no lead stipling [sic], no smoke fouling, and no tattooing around the wound," and which could support defendant's claim that victim shot herself and refute State's theory that defendant "must have shot" victim "from a distance"); *State v. Ayers*, 200 S.W.3d 618, 622-23 (Tenn. Ct. Crim. App. 2005) (trial court erred in excluding testimony of forensic pathologist that cause of death was homicide, not suicide, based on proffered evidence that victim's "hands, wrists and forearm area, showed an absence of any gun powder residue or any stip[p]ling caused by the cylinder gap in a revolver," whereas "soot would have been visible . . had he shot himself"); *Benjamin v. State*, 264 P.3d 1, 11 (Wyo. 2011) (State's expert pathologist contradicted defendant's claim that revolver fired as she and victim were struggling over it; because there was no powder on victim's hands from either the muzzle or the cylinder gap, " the shots had been fired from a distance of three or four feet or more"); *see also Sanborn v. State*, 812 P.2d 1279, 1283-84 (Nev. 1991) (trial counsel's representation was prejudicially deficient because counsel failed to investigate and to challenge prosecution expert's opinion that defendant's gunshot wound was self-inflicted; opinion was premised solely on results of cylinder-gap test that left no residue, but more relevant muzzle test conducted after trial showed that a self-inflicted shot would have left "massive residue"); *Ard v. Catoe*, 642 S.E.2d 590, 594-95, 599 (S.C. 2007) (trial representation was prejudicially defective because counsel failed to investigate and

challenge prosecution evidence that victim did not have GSR on her hands; presence of particles on right hand would support defense theory that she shot herself).[13]

In the Tennessee case, *Ayers*, 200 S.W.3d at 623, that expert said that the studies upon which he relied are published in textbooks used by every pathologist in the United States.

Based on this record and case law, we are persuaded that, assuming that *Frye-Reed* even applies to cylinder-gap discharge testing and analysis, it satisfies the *Frye-Reed* standard for scientific evidence. The trial court did not err or abuse its discretion in overruling Dr. Brassell's testimony comparing the soot deposition on Ms. Harper's hands and forearm with the soot deposition generated by the test-firing of the revolver.[14]

III. Admission of Douglas's Statement to Paramedic

To challenge Douglas's theory that Ms. Harper had committed suicide, the State presented evidence that he initially told Paramedic Allen Russell that he "came home and found [Ms. Harper] this way," but changed his story and told the police officers that he

[13] In the most heavily publicized example of this type of evidence, investigators relied in part on cylinder-gap testing to confirm that Deputy White House Counsel Vincent Foster committed suicide in 1993 by shooting himself with a revolver. *See* Report on the Death of Vincent W. Foster, Jr., by the Office of Independent Counsel In re: Madison Guaranty Savings and Loan Association, at 42-43 (Oct. 10, 1997).

[14] After analyzing the *Frye-Reed* issue, the trial court went on to exercise its discretion under Md. Rule 5-702 to conclude that Dr. Brassell had sufficient qualifications and a sufficient factual basis to deliver her expert opinions. The "threshold question" of the reliability of a scientific technique "does not vary according to the circumstances of each case" and thus it is not "a matter within each trial judge's individual discretion." *Reed*, 283 Md. at 381. We do not address the discretionary portions of that ruling, because Douglas challenges only the *Frye-Reed* determination.

"tried to get the gun" out of her hand before "it went off." Douglas contends that it was reversible error for the trial court to admit his statement to the paramedic because, he says, it "was inadmissible hearsay." In support of that contention, Douglas points to the following questions and answers.

> **[Prosecutor]:** Paramedic Russell, upon entering into the room what, if any, interactions did you have with any of the individuals there?
>
> **[Paramedic Russell]:** Part of my training as a paramedic would be actually to observe the individual and the situation is possible. Observing the male who was back against the wall, I reiterate that and with the female with her eyes closed at the moment. I tried to determine whether there was something I could do. In CPR it's called A, B, C's. . .
>
> Airway, breathing, circulation.
>
> **[Prosecutor]:** Okay. And did you get any response from any of the individuals there?
>
> **[Paramedic Russell]:** The question was to the gentleman of a form of what's going on while I was assessing that. . . .
>
> **[Prosecutor]:** What, if any, further response did you get from the male?
>
> **[Defense Counsel]:** Objection.
>
> **THE COURT:** Overruled.
>
> **[Paramedic Russell**]: Nothing – *the response from the gentleman was I came home and found her this way.*

(Emphasis added.)

Later during Russell's direct testimony, he testified, without objection, that Douglas stated a second time that "he came home and found her . . . that way[.]" When

Russell was recalled to testify in the defense case, the prosecutor again elicited, over defense objection, testimony that Douglas said he "came home and found her this way."[15]

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Md. Rule 5-801(c). Douglas's statement, however, was not offered for the truth of the matter asserted, *i.e.*, it was not offered to prove that Douglas really had arrived home to find that Ms. Harper was already mortally wounded. To the contrary, it was offered to show that Douglas's story had changed over time – that he had initially denied being present when Ms. Harper had been shot and later admitted to being present, but claimed to have tried to prevent her from shooting herself. If anything, the statement was offered for its falsity, not for its truth. It was not hearsay.

In any event, even if Douglas's statement had been hearsay, the court could properly have admitted it under the hearsay exception for statements by a party-opponent. Md. Rule 5-803(a)(1). Douglas's argument to the contrary notwithstanding, it makes no difference that "the prosecutor did not proffer [that the statement] fell within any recognized exception to the rule against hearsay": unless asked by the trial court, the State is not required to proffer the hearsay exception under which it is seeking admission

[15] Because the defense did not object on one of the occasions when Russell reiterated Douglas's alleged statement, Douglas arguably waived his objection. *DeLeon v. State*, 407 Md. 16, 31 (2008) (after an initial objection to evidence is overruled, that objection will be "waived if, at another point during the trial, evidence on the same point is admitted without objection"); *see also Paige v. State*, 226 Md. App. 93, 124 (2015); *Webster v. State*, 221 Md. App. 100, 114 (2015). Nonetheless, the State does not argue waiver.

of an out-of-court statement. *See McCray v. State*, 122 Md. App. 598, 610 (1998) (citing *Holmes v. State*, 350 Md. 412 (1998)).

IV. Competency of Minor Witness

At the time of trial, M.E. was a 12-year-old middle schooler. Defense counsel, after reviewing M.E.'s school records showing that he had an Individualized Education Program and had received mental health treatment, challenged M.E.'s competency. To determine M.E.'s competency, the trial court conducted a voir dire proceeding outside the presence of the jury. Douglas contends that the court erred in ruling that M.E. was competent. We disagree.

The Voir Dire Record

The prosecutor elicited the following testimony:

> **[Prosecutor]:** Now [M.], do you like sports?
>
> **[M.E.]:** Yes.
>
> **[Prosecutor]:** And what kind of sports do you like?
>
> **[M.E.]:** Basketball. . . .
>
> **[Prosecutor]:** Does basketball have rules?
>
> **[M.E.]:** Yes.
>
> **[Prosecutor]:** And what happens if you don't follow the rules in basketball?
>
> **[M.E.]:** You get kicked out.
>
> **[Prosecutor]:** You get kicked out, okay. [M.], do you understand the difference between the telling the truth or –
>
> **[M.E.]:** Yes.

[Prosecutor]: -- or telling a fib?

[M.E.]: Yes.

[Prosecutor]: What is the difference, [M.]?

[M.E.]: The truth is like you're not lying or nothing. A lie is when you say something that -- like you didn't -- like you didn't see it, like you didn't know.

[Prosecutor]: Okay.

THE COURT: I can't hear you. Tell me again.

[M.E.]: The truth is like something – like when you tell the right truth and a lie is like you didn't. I don't know. I'm not pretty sure.

[Prosecutor]: If I told you the sky was green, would that be telling you the truth or a lie?

[M.E.]: A lie.

[Prosecutor]: And why is that?

[M.E.]: Because the sky is blue.

[Prosecutor]: Okay. [M.], if I told you that I had a K-9 at home, what would be your answer?

[Defense Counsel]: Objection.

[M.E.]: I don't know.

THE COURT: Overruled.

[Prosecutor]: What would be your answer?

[M.E.]: I don't know.

[Prosecutor]: You know what a K-9 is?

[M.E.]: Yes.

[Prosecutor]: What's a K-9?

[M.E.]: A dog.

On cross-examination, defense counsel asked M.E. whether he had "a favorite sibling?" The following exchange ensued:

[M.E.]: Yeah.

[Defense Counsel]: Who is that?

[M.E.]: My two brothers on my mother's side. . . . JR and [J.]. . . .

[Defense Counsel]: If [J.] got in trouble, if [J.] and you were walking to the store and [J.] stole a popsicle, some candy, and you knew that he was going to get in trouble, would you tell?

[M.E.]: Yes.

[Defense Counsel]: Why?

[M.E.]: Because I don't want him to get in trouble.

[Defense Counsel]: I'm sorry.

[M.E.]: I don't want to go to – get in trouble or something or go to jail or something. . . .

I don't want to go to – get in trouble or something or go to jail or something.

[Defense Counsel]: I'm sorry.

THE COURT: Can't hear you [M.].

[M.E.]: I don't want him to get in trouble. . . .

[Defense Counsel]: So what would you do for him not to get in trouble?

[M.E.]: Take it back.

THE COURT: Take the popsicle back?

[M.E.]: Yes.

[Defense Counsel]: Would you tell your mom and dad?

[M.E.]: No, because I did the right thing. I didn't do it myself. Like yes so they can know what's going on.

[Defense Counsel]: So what is the answer yes or no?

[M.E.]: Yes. . . .

[Defense Counsel]: If you didn't hear something would you say that you heard it?

[M.E.]: No.

Based on this examination, the trial court was "satisfied" that M.E. was competent and allowed him to testify.

Appellant's Competency Challenge

Douglas contends the trial court abused its discretion in allowing M.E. to testify because, he says, M.E. "exhibited difficulty explaining the difference between truth and a lie as well as difficulty describing the consequences of not telling the truth." Citing responses that he says either "did not make sense" or were contradictory, Douglas characterizes M.E.'s understanding of those core competency concepts as "demonstrably weak."

"The determination of a child's competence is within the sound discretion of the trial judge," *Perry v. State*, 381 Md. 138, 148 (2004), as the trial judge sees the witness,

observes his or her manner and level of intelligence, and has the opportunity to question the child. *See id.*

"The age of a child is not the test used to determine if a child is competent to testify." *Id.*; *accord* Md. Code (1974, 2013 Repl. Vol.), § 9-103 of the Courts and Judicial Proceedings Article ("[i]n a criminal trial, the age of a child may not be the reason for precluding a child from testifying"). "Rather, the test is 'whether the witness has intelligence enough to make it worthwhile to hear him [or her] at all and whether he [or she] feels a duty to tell the truth.'" *Perry v. State*, 381 Md. at 148 (quoting *Brandau v. Webste*r, 39 Md. App. 99, 104 (1978)). "[T]he essential requirements" are "(1) capacity for observation; (2) capacity for recollection; (3) capacity for communication, including [the] ability 'to understand questions put and to frame and express intelligent answers;' and, (4) a sense of moral responsibility to tell the truth." *Id.* at 149 (quoting 2 Wigmore, *Evidence* § 506 (Chadbourn rev. 1979)).

"The types of questions usually asked to determine if a child is competent to testify are not related to the trial itself and include questions like 'Where do you go to school?,' 'How old are you?,' . . . [and] 'Do you know what happens to anyone telling a lie?'" *Id.* (ellipsis in original). "The questions asked should not be 'complicated or tricky' and should include questions that ferret out if a child understands the concept of truth and falsehood. For example, 'Q. . . . If I were to say that I'm wearing a red jacket, would that be a lie or would that be the truth?, A. A lie [, and] Q. And why would it be a lie?, A. Because you're wearing a brown jacket.'" *Id.* at 150 (citation omitted).

M.E.'s voir dire followed these guidelines. Moreover, the trial court, unlike this Court, was able to observe M.E. and to evaluate the extent to which his responses reflected other factors such as nervousness about testifying and distress about revisiting his mother's death. When viewed in context, his answers adequately showed his understanding that truth and falsehood are opposite concepts (*i.e.*, "The truth is like you're not lying or nothing"), correctly identified a statement as false (*i.e.*, the prosecutor's assertion that the sky is green was "a lie" because "the sky is blue"), and recognized that he lacked knowledge to determine whether another statement was true (*i.e.*, he did not know whether the prosecutor had a K-9 at home). These answers sufficed to establish M.E.'s "ability 'to understand questions put and to frame and express intelligent answers[.]'" *Id.* at 149.

Contrary to Douglas's assertion, the child did not demonstrate an incomprehension of the consequences of lying simply because he had some difficulty articulating answers to the popsicle dilemma. That hypothetical inquiry focused on whether M.E. would report theft by a sibling, not on whether he understood the consequences of making a false statement. In any event, his responses revealed an understanding that dishonesty was wrong and that it could result in "trouble." Most significantly, when defense counsel asked whether he would say that he heard something when he had not, M.E. answered that he would not. These responses sufficed to establish M.E.'s "sense of moral responsibility to tell the truth." *See id.*

Based on this record, the trial court did not err in finding that M.E. understood his duty to testify truthfully and did not abuse its discretion in determining that he was competent to testify.

V. Sufficiency of the Evidence

In his final challenge, Douglas argues that the evidence is legally insufficient to sustain his convictions. He points to the following "deficiencies in the prosecution's case":

> There were no eyewitnesses to the shooting other than Appellant. [M.E.] heard an argument before the shooting, but he did not see what happened. In fact, he testified that he did not know what took place in the room where his mother and Appellant were. Appellant explained to the investigating detectives that Rockelle Harper was distraught. Appellant tried to stop her from shooting herself, but he was unable to do so. He denied shooting her. He was extremely upset by the events of February 3, 2013.

(Transcript citations omitted.)

When a criminal defendant moves for a judgment of acquittal, whether at the close of the State's case or the close of all the evidence, he or she must "state with particularity all reasons why the motion should be granted." Md. Rule 4-324(a). Failure to do so precludes the defendant from challenging the sufficiency of evidence on appeal. *See, e.g.*, *Byrd v. State*, 140 Md. App. 488, 494 (2001) (holding that sufficiency challenge was not preserved where defense counsel failed to state with particularity why motions for judgment of acquittal at close of State's evidence and at close of all evidence should be granted). The purpose of limiting appellate review to challenges that were actually argued to the trial court is to "prevent[] unfairness and requir[e] that all issues be raised in

and decided by the trial court[.]" *State v. Rich*, 415 Md. 567, 574 (2010) (citation and quotation marks omitted).

Here, when Douglas's counsel moved for a judgment of acquittal at the close of the State's case, she argued only that "that the evidence was insufficient to send the charges of murder in the first degree and two handgun charges to the jury." Later, when counsel moved for judgment at the close of the defense case, she stated only, "I'll submit." In these circumstances, Douglas plainly failed to preserve his challenge to the sufficiency of the evidence. *See, e.g.*, *Byrd*, 140 Md. App. at 494.

Conceding that his counsel "did not present a specific argument as to why the evidence was legally insufficient," Douglas asks us to exercise our discretion under Md. Rule 8-131(a) to review the unpreserved claim. Alternatively, Douglas asks us to conclude that because of the failure to present a specific argument in support of the motion for judgment, he did not receive the effective assistance of counsel. *See generally Strickland v. Washington*, 466 U.S. 668 (1984).

Rule 8-131(a) gives us the discretion to decide an unpreserved issue if it is "necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal." But neither of those considerations apply in this case. Because we have rejected every claim of error that Douglas properly preserved, we have no reason to offer guidance to the trial court on remand, nor any expectation of another direct appeal.

Turning to the argument regarding ineffective assistance of counsel, a criminal defendant typically should raise that claim in a post-conviction proceeding, and not on direct appeal. *See, e.g.*, *Mosley v. State*, 378 Md. 548, 562 (2003). Appellate courts

prefer not to evaluate ineffective assistance of counsel claims in direct appeals, "because the trial record rarely reveals why counsel acted or omitted to act[.]" *Id.* at 560. The trial record typically lacks that important information "because the character of counsel's representation is not the focus of the proceedings and there is no discussion of counsel's strategy supporting the conduct in issue." *Smith v. State*, 394 Md. 184, 200 (2006). By contrast, in a post-conviction proceeding, the court can take evidence and have "counsel testify and describe his or her reasons for acting or failing to act[.]" *Johnson v. State*, 292 Md. 405, 435 (1982), *abrogated in part on other grounds*, *Hoey v. State*, 311 Md. 473, 494-95 (1988).

In this case, the record contains nothing to show why Douglas's counsel did not specify the bases for the motions for judgment of acquittal. In view of the evidence that the State amassed in its case against Douglas,[16] however, it is entirely conceivable that counsel's conduct resulted from a rational, strategic decision (for example, to preserve

[16] Without passing judgment on the sufficiency of the evidence under the applicable legal standards (*see Jackson v. Virginia*, 443 U.S. 307, 319 (1979)), it is noteworthy that a right-handed person would be very unlikely to commit suicide by shooting herself on the left side of her neck, as Douglas claims Ms. Harper did. It is also noteworthy that the soot deposits on Ms. Harper's neck were inconsistent with those from a typical suicide, because they indicated that the gun had not been pressed against her skin at the time when it was fired, but was as much as an inch from her skin; that the soot deposits on Ms. Harper's hands indicated that she had been holding her hands in a defensive position in front of her neck; that Douglas changed his story about how the incident had occurred, first implying that he had not been present when the shooting occurred, but later acknowledging that he had been present; that Douglas had previously threatened Ms. Harper with a gun that he had retrieved from upstairs in the house in which she was shot; that shortly before the shooting, M.E. saw a gun in the kitchen, which he identified as Douglas's; and that M.E. heard Douglas and Ms. Harper arguing with one another, heard the click of the revolver being loaded, heard his mother screaming "get that gun out of my face," and heard the fatal gunshot.

credibility with the court) rather than from a careless omission. The post-conviction court will be in a far better position than we are to determine intelligently whether counsel's actions met the applicable standard of competence under *Strickland v. Washington* and the many cases that follow and apply it.

In urging a contrary conclusion, Douglas cites *Testerman v. State*, 170 Md. App. 324, 340 (2006), in which this Court upheld a claim of ineffective assistance of counsel on direct appeal because defense counsel had failed to move for judgment on a sufficiency ground that, as a matter of law, would have resulted in acquittal. *Testerman* differs markedly from this case.

Testerman concerned the discrete legal issue of whether the defendant had "attempted to elude" a police officer under Maryland Code (1977, 2002 Repl. Vol.) § 21-904 of the Transportation Article by switching seats with his passenger after complying with the officer's order to pull his vehicle to the side of the road. *See Testerman*, 170 Md. App. at 335. None of the facts were in dispute, and the legal issue "was fully aired at trial." *Id.* at 336. In those rarified circumstances, this Court saw no need for a collateral fact-finding proceeding. *Id.*

Unlike *Testerman*, this case does not involve the application of a discrete principle of law (such as what it means to "elude" an officer) to a limited set of undisputed facts. Rather, it involves the correct evaluation of a complex array of disputed facts and factual

inferences that were developed over the course of a multi-day trial. For that reason, we decline to review the claim of ineffective assistance on this direct appeal.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.