Circuit Court for Prince George's County
Case No. CT86-979

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 575

September Term, 2015

STATE OF MARYLAND

v.

GARY STEPHENSON

Wright,
Arthur,
Leahy,

JJ.

Opinion by Leahy, J.

Filed: November 3, 2017

After a 24-hour interrogation, during which Gary Stephenson ("Appellee") voluntarily took and failed a polygraph exam, Stephenson confessed to sexually assaulting eight women. The State indicted him for four of those attacks. After being convicted and sentenced for first-degree sexual assault in the first three cases, Stephenson stood trial for first-degree rape in the fourth case—the subject of this post-conviction appeal. During that trial, his defense counsel elicited testimony revealing that Stephenson took a polygraph exam voluntarily before providing police with several written confessions. This opened the door to the State to introduce evidence that Stephenson failed that polygraph and confessed to a serial spree of sexual assaults. He was convicted and this Court upheld his conviction on appeal.

Decades later he petitioned the Circuit Court for Prince George's County for post-conviction relief alleging ineffective assistance of counsel. The post-conviction court found that Stephenson was prejudiced by his trial counsel's deficient performance and prosecutorial misconduct in presenting inadmissible evidence of polygraph testing. The State ("Appellant") appealed.

We affirm the post-conviction court's grant of a new trial for ineffective assistance of counsel under the precepts of *Strickland v. Washington*, 466 U.S. 668 (1984), and *Bowers v. State*, 320 Md. 416, 424-25 (1990). We also hold, as the parties agree on appeal, that it was not the prosecutor's misconduct that led to the admission of the polygraph evidence.

BACKGROUND

At 8:50 a.m. on June 10, 1986, Prince George's County Police Department began questioning Gary Stephenson ("Appellee") about his suspected role in a number of rapes that were connected in the same area of Hyattsville, Maryland. The interrogation continued for 24 hours until 8:50 the following morning when police brought Stephenson before a District Court Commissioner. By the end of their interrogation, detectives had secured confessions from Stephenson on his involvement in seven separate sexual assaults they were investigating plus an eighth. The State brought charges against Stephenson for four of those attacks, the last of which, the rape at gunpoint of B.M., forms the basis of this appeal.

A. Related Trials for Other Rapes

Prior to Stephenson's trial for the rape of B.M., juries had already found Stephenson guilty in three related cases. On October 28, 1986, a jury found Stephenson guilty of first-degree sexual assault in CT86-983, and the court sentenced him to 25 years. Then, on June 10, 1987, a jury found Stephenson guilty of first-degree sexual assault in CT86-982 and on one count of first-degree sexual assault and use of a handgun in the commission of a violent crime in CT86-1027. In CT86-982, the court sentenced Stephenson for a period of life with all but 40 years suspended to run consecutively to his first sentence (CT86-983). In CT86-1027, the court sentenced Stephenson for a period of life with all but 40 years suspended for the sexual assault and 20 years consecutive to that sentence for the handgun violation with this total sentence to run concurrent to that for CT86-982. In all, Stephenson's sentences from these three trials run for 85 years from June 10, 1986.

B. Stephenson's Trial for the Rape of B.M. (CT 86-979)

Following a grand jury indictment of Stephenson on charges including first-degree rape, first-degree sexual assault, and use of a handgun in the commission of a felony in CT86-979, the case proceeded to trial on July 29, 1987.

1. Pretrial Colloquies

Before Stephenson's trial for the rape of B.M., the State informed the court that Stephenson's defense counsel planned to include in his opening statement a defense centered on a theory that the police coerced the defendant's confessions, and that "he may well introduce to the jury other confessions [sic] were adduced by the police to other crimes other than the crime the defendant is charged with today." The prosecutor noted that in the State's case he "had planned to limit [his] questions to the state's witnesses specifically to the occurrence of this crime and this particular confession for obvious reasons[,]" but, given the defense's proffered trial strategy, the prosecutor asked the court for guidance on when he could "rebut or at least introduce evidence concerning those other confessions once defense counsel has commented on it in opening statement."

In response, the court explained its view that the length of the twenty-four hour confession was "part and parcel" to the fact that the police were investigating seven crimes, not one, and that it was "patently unfair" to the State to permit the defense to argue coercion based on the interrogation's duration without allowing the State to inform the jury that the police were questioning Stephenson about seven crimes. Defense counsel then announced that by the State's first witness, the jury would already "know exactly what took place through that entire" interrogation.

In response, the court attempted to explain to defense counsel that the State had

> absolutely no intention to allow anything to come into this trial except those things related to this case and this case alone, out of fairness to the defense. However, the defense has chosen to tailor its case to the interrogation period on a defense of coercion and I have no problems with that, but once you do that, the state must then address that issue and that issue is, why did you, Mr. Detective, speak to this man for twenty-four hours. Because, Mr. State, I was not talking to him about one incident, I was talking to him about a series of seven incidents. This is what the state is saying.

Then, the State sought guidance on the polygraph evidence:

> [THE STATE]: . . . One of our witnesses is going to be a polygraph examiner and he is going to testify, I suppose, that he gave the defendant a polygraph, at his request. I am going to instruct that witness not to mention the results of the polygraph at any time, but . . . there does come a time the witness, I would suspect, would testify that he discussed the results of the polygraph with the accused, and I know we are really skating on thin ice, at that point. I wonder if he could just use that phrase without giving the results of the polygraph.
>
> THE COURT: Obviously, if you give a test, there is some result, so the mere fact he uses the word, results, I don't think that would in any way prejudice the defendant.
>
> * * *
>
> Do you have any problems with that, [defense counsel?]
>
> [DEFENSE COUNSEL]: No.

2. Opening Statements

The State limited its opening statement to a description of the crime it alleged that Stephenson committed against B.M. and the fact that Stephenson confessed to the crime after the Prince George's County Police identified him as a suspect.

Defense counsel began his opening statement by telling the jury that B.M. failed to positively identify Stephenson on multiple occasions. After then informing the jury that

the police interrogated Stephenson for 24 consecutive hours and asking the jury to consider the circumstances of that interrogation, *including* "[w]hether or not a polygraph exam was conducted," he offered the following:

> Ladies and gentlemen, we intend to show that Mr. Stephenson, in fact, gave seven written statements to the Prince George's County Police after he was interrogated for hours, after he was psychologically torn down to the point where it didn't matter. We tell you those statements are not true. You will be given those statements to read. That will be your determination and that will be one of the questions that you will have to answer when you go into the jury room.

Following opening statements, the court asked counsel to approach the bench and the following ensued:

> THE COURT: . . . I am having some second thoughts about [the State] presenting anything in anticipation of rebutting, so try not to do that. You will be afforded plenty of opportunity, after cross examination for redirect, and I think that it is best that you do that rather than anticipate. [Defense counsel] should have the opportunity to change his strategy at any time, but if I allow you to anticipate, then he is restricted and rather than do that, lets not do it.
>
> [STATE'S ATTORNEY]: Okay. Just for the record, he did mention, in his remarks to the jury, there were seven statements --
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> THE COURT: I understand. Those seven could be this case.
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> [STATE'S ATTORNEY]: Can I ask the officer if those seven were in this case?
>
> THE COURT: No. Wait until the evidence is presented because what he says is not evidence. So once [defense counsel] brings out there are seven statements, then you can, on cross examination, explain the whole thing away.
>
> [STATE'S ATTORNEY]: The court understands this is risky business because the police are going to pick out one now from a number.
>
> THE COURT: I understand.

> [STATE'S ATTORNEY]: I have just told the police at the previous recess the door has been kicked open. I want a brief recess, after the complaining witness has testified to tell them the door is closed.
>
> THE COURT: No problem.
>
> [DEFENSE COUNSEL]: One thing, on the record, as to the events I am presenting today, I discussed this in detail with Mr. Stephenson and also discussed in detail with his mother, at his request, and it was decided that, as I told the court earlier, we are going into the voluntariness of the statement and he knows the ramifications of that and we have decided to do it anyhow, and that is something that he is in total agreement with.
>
> THE COURT: You know, and I understand you have put it on the record you have discussed it with his mother, but lets make it unmistakably clear, it is not his mother's decision.
>
> [DEFENSE COUNSEL]: He made the decision.

3. Presentation of Evidence

a. The State's Case

The State's first witness was B.M., who testified to the following details of her assault and rape. She was attacked on April 30, 1985, around 8:30 or 9:00 p.m., and it was dark out at the time her assailant approached. Her assailant grabbed her arm and spun her around as he was walking by her and placed a gun in her side and directed her around 80 feet from the unlit path where she'd been walking, at which point he raped her both orally and vaginally. After her assailant raped her, he left while she remained crying behind a tree for five to ten minutes.

When she first saw her attacker walking toward her she could tell he was a slightly short, medium built, white male in his early-to-mid-twenties, with long, straight, brown hair under a hat, but she eventually threw off her glasses when he kept telling her not to

look at him. Even without her glasses and despite the dark, B.M. testified that she was able to get a good look at her attacker. She testified that she was able to glance at his face as he unfastened his pants, but was only able to see his face for a total of a second or so before the attack, vaguely out of the corner of her eye as he led her off the path, and briefly through tear-filled eyes after the attack. Then, from the witness stand, B.M. identified Stephenson as her attacker, and then also made a positive voice identification when Stephenson spoke in court. Testimony also revealed, however, that B.M. failed to positively identify Stephenson's picture from a photo array and, at one point before police identified Stephenson as a suspect, B.M. identified for the police another person who looked like the assailant.

The State also called as a witness Corporal Edward Heilman, the detective to whom Stephenson confessed. On direct examination, the State elicited testimony from Cpl. Heilman that Stephenson provided him a written confession during his interrogation on June 10, 1986. On cross-examination, defense counsel asked Cpl. Heilman whether he was a certified polygraphist and inquired into Cpl. Heilman's qualifications to administer a polygraph exam. Cpl. Heilman testified that his polygraph exam procedures "verify truth." After establishing Cpl. Heilman's credentials and the pre-exam procedures, defense counsel asked if the exam began with Cpl. Heilman asking Stephenson about a sex offense against a person named Ms. D, and then proceeded to ask Cpl. Heilman about statements he took from Stephenson about cases not involving B.M. Then the following transpired:

[DEFENSE COUNSEL]: Could Ms. H be one of them?

[CPL. HEILMAN]: Yes, sir.

[DEFENSE COUNSEL]: Ms. B?

[CPL. HEILMAN]: Yes.

[STATE'S ATTORNEY]: Could I object. Rather than just giving names, I think the jury should know who these names are associated with.

[DEFENSE COUNSEL]: I am going to clear that up.

[STATE'S ATTORNEY]: So long as it is cleared up eventually.

[DEFENSE COUNSEL]: I am going to clear it up. I am going to introduce–

[STATE'S ATTORNEY]: I think they are statements.

THE COURT: I understand they are. Come up both of you.

(Counsel and the defendant approached the bench and the following ensued).

THE COURT: **I am awfully leery now about these things coming in. Are you sure you want these things in?**

[DEFENSE COUNSEL]: Your Honor, the statements are all basically a repeat of each other, showing very, very little information. All of them are broken up into two stages and they form a pattern.

THE COURT: They form a pattern in practice of whatever it is that someone is supposed to have done. In other words, **what it shows is a modus operandus, does it not?**

[DEFENSE COUNSEL]: I do not believe so.

THE COURT: All right.

[DEFENSE COUNSEL]: **I realize what the risks here are.**

THE COURT: **I am not talking about risk. You are letting these things in, you are moving them in, and you know full well there is absolutely no way the state could get these things in.**

[DEFENSE COUNSEL]: **I know that** but I don't think -- you can't challenge something and then hide in a closet at the same time.

THE COURT: All right. Okay.

(Emphasis added).

Defense counsel then entered Stephenson's other confessions into evidence and elicited testimony from Cpl. Heilman that he interviewed Stephenson "in reference to five or six of the cases[,]" and that "Stephenson admitted to me to four of the cases and made an indication in the fifth case of the picture of one of the victims in that case, in the fifth case." Next, defense counsel established that it took Cpl. Heilman twelve hours to obtain all of these confessions, and that Stephenson's written statements did not include the various denials he made throughout the interrogation.

On re-direct, the State elicited testimony from Cpl. Heilman that he presented Stephenson with six photographs because "[t]here had been a series of attacks in the area of a similar method of operation and similar description[,]" and that Stephenson positively identified the victims in all but one of the photographs. Cpl. Heilman then testified that after the polygraph exam he discussed the results with Stephenson and, at that point, Stephenson's manner changed. He explained:

> Initially, Mr. Stephenson had minimal eye contact, but would give me eye contact. He was cross legged, not totally closed, but somewhat closed. After the polygraph exam, as we discussed the results and his involvement with Ms. D.'s assault, he then began to open up, his body language opened up. This is a phenomena that happens in some instances when people, they end up admitting to their mistake, and Mr. Stephenson's case, there came a time, to describe the words, his eye contact dropped from he [sic]. He slightly went down a little bit, admitted to grabbing Ms. D., and he was back up again on an even keel giving me eye contact again.

The next day, the State called as a witness Detective Roberto Hylton, the lead

investigator on Stephenson's case. After establishing a foundation, the State asked Det. Hylton about his investigation of Stephenson as a suspect in the rape one of the other victims, and whether he noticed a pattern of sexual assaults in the Hyattsville area. Det. Hylton testified that the assaults had the following common features: "They were perpetrated by a white male, the majority of the victims were approached from behind, grabbed from behind. The white male demanded fellatio at first and then he progressed into vaginal intercourse." He then testified that the victims gave a similar description of their attacker and that he kept a chart categorizing "[t]he race, description of the victims and the modus operandi[.]" The State asked if the modus operandi was similar and, at this point, defense counsel objected. The Court asked counsel to approach and the following ensued:

> THE COURT: What is the basis of your objection?
>
> [DEFENSE COUNSEL]: Now, he is going into, we are talking about the statements of the other cases, and he is talking about the reason for picking [Stephenson] up, but as far as going into every other crime and identifications and everything else I don't believe that is part and parcel --
>
> THE COURT: [Counsel], I am confused. You told the jury yesterday, you accused the detective who was on the stand of the two detectives being in the room, one telling the other one how -- I am sorry. When the interviewing detective would ask a question, that the other one would tell your client what to write down as the answer.
>
> [DEFENSE COUNSEL]: That is correct.
>
> THE COURT: Therefore, implying that all of those confessions were false, coerced and fraudulently obtained by the police.
>
> [DEFENSE COUNSEL]: That is correct.
>
> THE COURT: What he is now showing is that they had all of this information

about all of these crimes beforehand and he is now leading them through how they did all of this. I don't understand. **On the one hand, you are trying to bring this in, and on the other hand you are then trying to handcuff the state.**

[DEFENSE COUNSEL]: I don't agree with that, Your Honor. The reason I don't agree with it is we are talking about number one, one case right now. I have --

THE COURT: No. Wait a minute. Just a moment, sir. **We are no longer talking about one case. You brought all of these other cases in and before you did, sir, I brought you up to this bench and put on the record, for the last time, because we had discussed it many times, are you sure you want to bring all of these things in.** You told me you had discussed it with your client. You told me you had discussed it with your client's mother, and at that point I told you if your client is found guilty, his mother isn't the one who will go to jail, it is he, and you said, it was his decision to bring these things in and that is all on the record.

[DEFENSE COUNSEL]: May I finish?

THE COURT: Sure.

[DEFENSE COUNSEL]: This isn't what I was going to say. What we were talking about is the time involved in the statements, meaning of taking the statements and the voluntariness of the statements.

THE COURT: **Part of the voluntariness of the statement is whether or not they are true. Can't you see that, sir?**

[DEFENSE COUNSEL]: Your Honor, if we are going to have all of this hearsay evidence in --

THE COURT: I am sorry, [counsel], **part and parcel of those statements is whether or not they reflect what actually happened, and if you think that you can accuse the state of coercing fraudulent statements and then not allow the state to show that they are true -- I don't understand what you thought would happen.**

[DEFENSE COUNSEL]: Let me put my objection on the record, then, if that is what the court's ruling is going to be. I do not believe that the state can have a police officer sit on this witness stand and testify what everybody else told him, victims told him, witnesses told him, other police officers told him,

> merely because of the fact that I am challenging those statements. That is hearsay evidence and it is inadmissible.
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> THE COURT: In the first place, that is not what the state is doing, and I don't have to explain what the state is doing because the Court of Appeals will well understand that. Is there anything else that you have to say?
>
> [DEFENSE COUNSEL]: No, Your Honor.

(Emphasis added).

The State then elicited testimony from Det. Hylton that while Cpl. Heilman was interviewing Stephenson, Hyattsville City Police contacted Prince George's County Police about another similar rape, to which Stephenson also admitted involvement when Det. Hylton confronted him. In all, the detectives interrogated Stephenson for twenty-four hours and, according to testimony, secured his confession to eight crimes. Both Cpl. Heilman and Det. Hylton testified to conditions of Stephenson's interrogation that tended to indicate Stephenson was not coerced: he volunteered to take the polygraph exam, he was permitted a break whenever Cpl. Heilman took one, he declined food and water, never asked for an attorney, and he would have been free to leave (at least up to a certain point in the interrogation), but he never indicated he wished to stop talking. Det. Hylton also testified on rebuttal that he did not suggest answers to Stephenson, that he did not suggest Stephenson could go home if he confessed, and that he advised Stephenson of his constitutional rights.

b. Defense's Case

Stephenson's defense put on a three-part defense. First, he called four character witnesses, two of whom the State confronted on cross-examination with other-crimes

evidence. Second, Stephenson's former work manager testified that his employee records indicated that Stephenson was working at the time of B.M.'s rape. And third, Stephenson took the stand in his own defense, testifying to the interrogation's length and psychological effect, that he was not advised of his rights for roughly the first twelve hours, and that he did not use the restroom or request food or drink the entire twenty-four hours because he was afraid. Ultimately, Stephenson testified that he did not rape B.M. and that he only confessed because he "was tired and scared" and he "just wanted them just to leave [him] alone."

c. Verdict, Sentence & Appeal

On July 31, 1987, the jury returned a verdict, finding Stephenson guilty of first-degree sexual assault, first-degree rape, and the use of a handgun in the commission of a violent crime. The court sentenced Stephenson to two concurrent life sentences for the rape and sexual assault, plus 20 years for the handgun conviction, with all sentences to run concurrently to his sentences from the three prior trials. Stephenson appealed his conviction and this Court affirmed the circuit court in an unreported opinion, *Stephenson v. State*, No. 880, Sept. Term, 1987 (filed March 15, 1988).

C. Post-Conviction Relief

In August of 1999, Stephenson filed his first petition for post-conviction relief, but withdrew it on October 29, 2003. He filed another on February 19, 2004, and the court granted a continuance in those proceedings. On August 19, 2008, he filed another petition, which he amended on June 14, 2010, alleging ineffective assistance of trial counsel, ineffective assistance of appellate counsel, and prosecutorial misconduct in regard to his

conviction for the rape of B.M., as well as similar claims for his convictions in CT86-982, CT86-983, and CT86-1027.

At the post-conviction hearing, Stephenson's trial counsel, Mr. Ansell, testified with respect to his trial strategy regarding the polygraph examination:

> Q Do you recall putting on the record that it was -- that it was your strategy to bring in the polygraph -- not the results -- but the fact that he took a test and that he had confessed to other rapes, as a way of attacking the voluntariness of the confession in this case?
>
> A I may have, Your Honor. And the reason I'm saying that is we had three prior cases, and I presented a different defense on each and every case. And all three defenses failed. And I know I did something in the last case -- and very well may have -- as another strategy. Everything else I knew -- tried -- and lost. **This was throwing the cake out and saying, let's see what we come back with this one.** And I may have done it for that reason, yes. Because nothing else was working.
>
> Q And this was a case **where in opening statements, you did mention the polygraph.** You did mention that he gave seven written statements to the police after he was interrogated for hours, after he was psychologically torn down to the point where it didn't matter. We tell you those statements aren't true. You will be given those statements to read. So --
>
> A I probably did that as a defense at --
>
> Q Okay. So the question is, since we have the transcript that lets us know what you did, I'm refreshing your recollection as to what you did starting with the opening statement making -- telling the jury that there was a polygraph and that he made seven written statements to the police.
>
> A If I said that in the transcript in an opening statement, that's exactly what the defense was that I was using and what you had said would be correct.
>
> Q And can you tell the Court -- one of the questions . . . on post-conviction is whether a trial strategy is reasonable. And that's something that [the post-conviction court] needs to determine. Can you explain -- is there anything else that you can say about why you took that strategy, any other strategies, you considered?

A Basically **I don't know whether you'd call it a legal strategy**, **but a street strategy**. It's if you've lost everything, it's gone, you got one left, and it's not going to be helpful to him if he gets convicted. And **I don't think it would hurt him too bad, because he's already getting hit with heavy sentencing, I saw nothing to lose to do it at that point and try to sell the jury** --

Q Okay.

A -- those other points. And had they have been believed or been successful, he would have walked. That would have cut 25 percent of his problems.

* * *

Q You didn't consider that another -- you said something about that he wouldn't be hurt too bad. You're saying you didn't consider another conviction to be hurting him too bad?

A No. What I'm saying, **he's already been convicted of three rapes. What makes the difference on a fourth?** If we win, it helps. If we lose, he's further down the tubes. I don't know how much further he could get down the tubes at that point, but that was my assessment of where I stood at the time.

And he was really not talking to me that much as far as deals go, so I had a trial, and I tried it the best way I thought I could looking at the other three that we'd lost.

(Emphasis added).

Stephenson's post-conviction counsel then argued that the trial judge was "extremely troubled" "regarding the polygraph -- the testimony and polygraph testing and the testimony regarding five or six sex offenses that were unrelated to this case . . . because this is not testimony or evidence that could have -- that the State could have gotten in on their own."

Post-conviction counsel argued further that the trial strategy was unreasonable

because "there's absolutely no reason why you would want the jury to know that he has took a polygraph, failed the test, and confessed to five or six other sex offenses, when he's on trial for a first degree sex offense, a first degree rape." He continued, contending that "it's highly troubling that evidence of the polygraph and five or six other sex offenses came into evidence. The jury got to hear all that. And the State even argued, look, the guy's done this before." According to post-conviction counsel, it "was an alibi case" in which Stephenson testified on his own behalf, making it unnecessary for trial counsel to bring in the other evidence. He contended that it did not advance this strategy "to have the jury given the impression that [Stephenson] was a serial rapist and had failed a polygraph test." Although it may have been deliberate, he concluded, "it doesn't make it right."

At the post-conviction hearing, the State framed the question as "whether any other lawyer might have chosen this strategy. When the others haven't worked, is it time to take a Hail Mary[.]" The State focused on the fact that this was a deliberate strategy, rather than a mistake by trial counsel, and argued that it was "within the realm of possibilities" that a defense counsel might choose Stephenson's trial counsel's strategy. The State also suggested that each of the three prior trials demonstrated how a jury would respond to the evidence, warranted a trial strategy that was "less direct . . . more risky."

Nearly two years later, on April 1, 2015, in an order and memorandum opinion dated March 11, 2015, the post-conviction court denied Stephenson relief in cases CT86-982, -983, and -1027, but granted him relief in the underlying case: CT86-979. In CT86-979, the court granted relief on two grounds: (1) that the "[p]rosecutor committed misconduct by presenting inadmissible evidence of polygraph testing and other unrelated crimes"; and

(2) "[t]rial counsel failed to object to testimony regarding polygraph testing."

The court incorporated its rationale for both holdings into a single explanation:

> It has been universally held that "evidence of the defendant's willingness or unwillingness to submit to a lie detector examination is inadmissible." Mention during a criminal trial of the results of a polygraph, the taking of the test will raise the specter of reversal. The polygraph test is a pariah. Not all mention of the verboten word "polygraph" warrants reversal. The determining factor for reversal is whether there was prejudice for the defendant. If the reference to a polygraph is inadvertent it does not necessarily insure prejudice. Furthermore, the decision to grant a mistrial rests at the discretion of the trial judge, and review is limited to whether there has been an abuse of discretion. Trial judges are granted wide discretion and the exercise of that discretion will not be abused unless it has been clearly abused.
>
> In the instant case, irrespective of error or misconduct by any party, inadmissible evidence related to polygraph testing of Petitioner was introduced to the jury during trial. **The testimony did not explicitly convey the results of the polygraph test, but the language used would strongly infer the results of Petitioner's polygraph exam.** Akin to *Kelley v. State*, the testimony introduced in Petitioner's trial created a substantial likelihood that the jury would infer Petitioner failed a polygraph exam. Here, the testimony by the detective who interrogated Petitioner stated at trial "[a]fter we informed him of the results of the test, he relaxed, he opened up, he started telling us everything." **This statement is fraught with implication forcing the jury to speculate as to the result of the polygraph examination. It is highly improbable that the jury would infer anything other than Petitioner failed the polygraph.** Therefore, **because the opinion expressed by the detective implicitly conveyed evidence of a nature which Maryland Courts have held never to be competent and which was inherently prejudicial, the trial court's admission of that testimony was an abuse of discretion.** Consequently, the Court grants relief on this allegation and a new trial is ordered for CT 86-979.

(Emphasis added; internal citations omitted).

On April 13, 2015, the State noted its timely appeal to this Court. It presents two questions for our review:

I. "Did the post conviction court err to the extent it granted Stephenson post conviction relief on the ground that the prosecutor committed misconduct

by presenting, and the trial court abused its discretion by admitting, inadmissible evidence of polygraph testing?"

II. "Did the post conviction court err when it granted Stephenson relief on the ground that the trial counsel was ineffective for affirmatively introducing inadmissible evidence of polygraph testimony?"

Discussion

I.

Prosecutorial Misconduct and/or Trial Court Error

The first issue that the State presents on appeal is whether or not the post-conviction court erred in finding prosecutorial misconduct and error on the part of the trial court for the admission of polygraph evidence. In response to this first issue, Stephenson concedes that the record does not support a finding of prosecutorial misconduct regarding the admission of polygraph evidence. Instead, Stephenson contends the admission of polygraph evidence was the result of the ineffectiveness of his defense counsel. Stephenson adds that defense counsel rendered ineffective assistance by eliciting, inviting and not objecting to "voluminous evidence that he had sexually assaulted numerous other women." We agree with the parties that it was not the prosecutor's misconduct that led to the admission of the polygraph evidence, and move on to address defense counsel's actions.

II.

Ineffective Assistance of Counsel

According to the State, the post-conviction court erred by finding that Stephenson's trial counsel was ineffective for affirmatively introducing evidence of the polygraph testing and other related crimes. The State contends that we should reverse because: (1) the post-

conviction court misunderstood the issue, leading the court to reframe it improperly; and (2) because Stephenson's claim does not pass the test articulated in *Strickland*, *supra*, 466 U.S. at 688.

A. The Post-Conviction Court's "Reframing"

Before the post-conviction court, Stephenson presented the issue as "Trial counsel rendered ineffective assistance by failing to object or in the alternative improperly opening the door regarding testimony of a polygraph test given to Petitioner during his statement to the police." In its memorandum opinion, the post-conviction court placed its holding on this issue under the subheading: "Petitioner's Allegation: Trial counsel failed to object to testimony regarding polygraph testing on Defendant." The State argues that the issue litigated below was whether defense counsel was ineffective for opening the door for the admission of the polygraph and that the post-conviction court's re-framing was unsupported and serves as grounds for reversal. Appellee addresses this argument in a cursory footnote, in which it states: "Appellee respectfully disagrees and suggests the State is parsing the issues too finely[.]"

We agree with Appellee. The State seems to premise its argument on the name of the subheading under which the post-conviction court granted relief to Stephenson. Even if we were to consider the subheading's omission of "or in the alternative [for] improperly opening the door regarding testimony of a polygraph test" as a reframing—which stretches credulity—that would not provide sufficient grounds to reverse the post-conviction court's decision. As the Court of Appeals has explained, "an appellee is 'ordinarily *entitled* to assert any ground shown by the record for upholding the trial court's decision even though

the ground was not relied on by the trial court[.]" *Unger v. State*, 427 Md. 383, 403 (2012) (emphasis in original; citation omitted). In other words, even if the post-conviction court did not consider Stephenson's alternative theory for relief, but still found in his favor, Stephenson may still assert and we may still consider those grounds on appeal.

B. *Strickland*

The State argues that even if we construe the court's ruling as properly addressing Stephenson's claim that his trial counsel was ineffective for opening the door to the admission of polygraph testimony, we must still reverse because Stephenson's claim does not pass either prong of the two-part test the Supreme Court set out in *Strickland*, *supra*, 466 U.S. 668. Under *Strickland*, the State contends, (1) Stephenson's defense counsel's trial strategy was reasonable given the circumstances and (2) Stephenson was not prejudiced by his trial counsel's strategy because the jury would have found him guilty based on his confession and the victim's in-court identification.

Stephenson responds that Maryland courts have established repeatedly that polygraph evidence is inherently and unequivocally prejudicial—especially where, as here, a defendant's defense rests on the jury's evaluation of his credibility. He contends that informing the jury that he failed a polygraph exam "did nothing to advance the purported goal of challenging the veracity of [his] confession to the sexual assault of B.M. Instead, it cast further doubt on [h]is credibility and bolstered evidence that he had committed a similar crime against []other wom[e]n." In addition to being unreasonable, Stephenson maintains that his trial counsel's strategy was also highly prejudicial. Stephenson suggests that there were many reasons to doubt the State's evidence, including B.M.'s prior failure

to identify Mr. Stephenson, the lack of forensic evidence, and his alibi. According to Stephenson, his trial counsel's admission of the polygraph labeled him a liar in the jury's eyes, thereby prejudicing him by undermining his testimony that police coerced his confession.

"The Sixth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment, and Article 21 of the Maryland Declaration of Rights guarantee criminal defendants the right to counsel." *Coleman v. State*, 434 Md. 320, 334 (2013) (citations omitted). "'The right to counsel is the right to effective assistance of counsel . . . [although counsel] can also deprive a defendant of the right to effective assistance, simply by failing to render *adequate* legal assistance.'" *Id.* (quoting *Harris v. State*, 303 Md. 685, 694 (1985) (emphasis and alteration in *Coleman*).

"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686. The Supreme Court in *Strickland* adopted a two-prong analysis to determine whether counsel's representation was constitutionally deficient. Under *Strickland*, a defendant alleging ineffective assistance of counsel must demonstrate: (1) "counsel's representation fell below an objective standard of reasonableness," and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 688, 694.

"The review of a postconviction court's findings regarding ineffective assistance of counsel is a mixed question of law and fact." *Newton v. State*, ___ Md. ___, ___, No. 86,

September Term 2016, slip op. at 6 (filed August 23, 2017) (citation omitted). We review its factual findings for clear error and its legal conclusions *de novo*. *Id.* In doing so, we "'re-weigh' the facts in light of the law to determine whether a constitutional violation has occurred." *Id.* In other words, while we "'defer to the post-conviction court's findings of historical fact, absent clear error, . . . we will make our own, independent analysis of the appellant's claims.'" *Barber v. State*, 231 Md. App. 490, 517 (2017) (citation omitted).

1. Constitutionally Deficient Counsel

As set forth above, the State contends that Stephenson's trial counsel was not deficient because he employed "a plausible and prudent strategy" designed to convince the jury that Stephenson's confession was false. Stephenson responds that presenting the jury with the fact that Stephenson took—and failed—a polygraph exam does "nothing to advance the purported goal of challenging the veracity of [his] confession to the sexual assault of B.M."

"The performance component of [*Strickland*'s] two-pronged test is met if 'counsel's representation fell below an objective standard of reasonableness.' 'The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" *Bowers v. State*, 320 Md. 416, 424-25 (1990) (quoting *Strickland*, 466 U.S. at 688) (internal citation omitted). We will not conclude that trial counsel's performance was deficient if it was the part of a *sound* trial strategy. *Coleman*, 434 Md. at 338. We "assume, until proven otherwise, that counsel's conduct fell within a broad range of reasonable professional judgment, and that counsel's conduct derived not from error but from trial strategy." *Mosley v. State*, 378 Md. 548, 557-58 (2003) (citation omitted). But we do not

consider the shortcomings in trial counsel's performance to be "sound trial strategy or a strategic choice" absent an explanation "indicat[ing] that he made a rational and informed decision on strategy and tactic after 'adequate investigation and preparation.'" *Coleman*, 434 Md. at 338 (citation omitted).

Here, trial counsel testified at the post-conviction hearing that his presentation of polygraph evidence was consistent with his strategy—not a legal strategy, "but a street strategy." Because he had already lost three similar trials, he testified, his strategy "was throwing the cake out and saying, let's see what we come back with [on] this one." We must determine whether Stephenson's "street strategy" was sound and consistent with the prevailing legal norms in 1986, the time of the trial.

By 1958, the Court of Appeals had already declared that "the result[s] of a lie detector test [are] almost universally excluded as evidence." *Lusby v. State*, 217 Md. 191, 194-95 (1958). This was due to "overwhelming weight of judicial authority on the ground that these tests have not yet attained sufficient scientific acceptance as an accurate and reliable means of ascertaining truth or deception." *Rawlings v. State*, 7 Md. App. 611, 614 (1969) (following "the general rule that evidence of polygraph tests is inadmissible" and "that the accused's willingness or refusal to take a polygraph test is likewise inadmissible." (citations omitted)). Given this lack of reliability, this Court in 1978 invalidated an agreement between a defendant and the State that stipulated to the admissibility of the results of the defendant's polygraph exam, reasoning that a stipulation does not "enhance[] in any significant way the inherent reliability of evidence produced by a so-called scientific process or art." *Akonom v. State*, 40 Md. App. 676, 680 (1978).

Then, in 1980, the Court held that a police officer's testimony "should not have been admitted because it created a substantial likelihood that the jury would draw an inference that [an alibi witness] had failed [a polygraph] test." *Kelley v. State*, 288 Md. 298, 302 (1980). In *Kelley*, the trial court permitted the State, over defense counsel's objection, to solicit from the polygraph examiner his opinion of the alibi witness' "character for truth and veracity." *Id.* at 300. The officer testified in response: "It was my opinion that [the witness] was lying about his statements that he made regarding this investigation." *Id.* The Court of Appeals held that this was error because "[t]he atmosphere surrounding [the officer's] testimony was fraught with this implication" that the witness failed the polygraph, "[t]he jury was forced to speculate as to what transpired[.]" *Id.* at 302-03. The Court concluded that it was "highly improbable that the jury would draw any inference other than that [the witness] had failed the polygraph exam." *Id.* at 303. Consequently, the Court held that the trial court abused its discretion by allowing testimony that "implicitly conveyed evidence of a nature which [the Court of Appeals] has never held to be competent and which was inherently prejudicial[.]" *Id.*

Four years later (still two years before Stephenson's trial at issue here), the Court held that a complaining witness' unsolicited and inadvertent reference to taking a lie detector was grounds for a mistrial. *Guesfeird v. State*, 300 Md. 653, 655 (1984). In *Guesfeird*, the complaining witness in a sexual assault case, who was the state's principal witness and the only witness to testify in support of the allegations, inadvertently referenced the fact that she had taken a polygraph exam. *Id.* at 656. The State asked her if she told school authorities about the defendant's sexual abuse, and she responded: "Um-

hum, and that is when I took the lie detector test and Bobby a . . .” – at which point the defense requested a bench conference and moved for a mistrial. *Id.* at 656-57. In reviewing the trial court’s denial of a mistrial, the Court of Appeals noted that there was no question that the statement was inadmissible and explained that the appeal turned on “the prejudicial character of the statement[,]” which would determine whether the error was reversible. *Id.* at 658-59. The Court set out factors that courts may consider “[i]n determining whether evidence of a lie detector test was so prejudicial that it denied the defendant a fair trial,” including but not limited to:

> whether the reference to a lie detector was repeated or whether it was a single, isolated statement; whether the reference was solicited by counsel, or was an inadvertent and unresponsive statement; whether the witness making the reference is the principal witness upon whom the entire prosecution depends; whether credibility is a crucial issue; whether a great deal of other evidence exists; and, whether an inference as to the result of the test can be drawn.

Id. at 659.

Based on these factors, the Court determined that the reference was prejudicial because the complaining witness was the prosecution’s sole witness in support of the charges, her testimony was uncorroborated and conflicted with that of the defendant and the other witnesses, and “credibility was the crucial issue for the jury.” *Id.* at 666. The Court explained that given that she was the State’s only fact witness, “[t]he unavoidable inference for the jury to make [wa]s that if she took the test, she passed and was telling the truth at trial; otherwise, the prosecution would not have gone forward with her as the only witness.” *Id.* This convinced the Court that “some, if not all, of the jurors might well have

turned to this inadmissible evidence as the deciding factor in determining whom to believe." *Id.* at 666-67.

It is clear from these decisions that by the time of Stephenson's trial in 1986, the prevailing norm was that polygraph evidence was inherently unreliable and that it was improper to offer testimony even tending to suggest that a criminal defendant failed an exam. The circumstances surrounding Stephenson's third trial only reinforce this point. It is undisputed that Stephenson wanted to testify on his own behalf. His desire to testify coupled with the fact that the State's case focused on his confession placed Stephenson's credibility in center focus. By offering into evidence otherwise inadmissible polygraph evidence, defense counsel opened the door to the State eliciting testimony from Cpl. Heilman that suggested Stephenson failed the exam. Doing so undermined his client's credibility severely and in manner that the State could not have accomplished.

The record reveals that trial counsel seems to have vastly underestimated the implications of his trial strategy to bring into evidence other cases to support the defense that Stephenson's confessions were false and coerced. This is most evident from his attempt to object to Det. Hylton's testimony about the other victims' statements. The trial court noted its confusion with the defense's objection, and explained to defense counsel that his strategy opened the door to Det. Hylton's testimony. Trial counsel attempted to parse the issues and argue that he only opened the door to the voluntariness of Stephenson's statements, to which the court responded: "part and parcel of those statements is whether or not they reflect what actually happened, and if you think that you can accuse the state of coercing fraudulent statements and then not allow the state to show that they are true -- *I*

*don't understand what you thought would happen***.**" (Emphasis added).

We have little doubt that trial counsel failed to appreciate the import of a trial strategy that was not sound to begin with. Thus, we hold that trial counsel's representation "was deficient because it fell below the range of competence demanded of attorneys in criminal cases and was not pursued in furtherance of sound trial strategy." *See Coleman*, 434 Md. at 340.

2. Prejudice to the Defense

The State argues that even if we conclude that Stephenson's trial counsel was deficient, Stephenson was not prejudiced by that deficiency because he "confessed to multiple rapes, and he was convicted of rape at three trials based on comparable evidence[.]" Additionally, the State points out that regardless of strategy, "the jury would have learned in this case that Stephenson confessed to raping B.M. and that B.M. could identify Stephenson unequivocally as her rapist."

Stephenson contends that but for his counsel's deficient representation, at least one juror could have had reasonable doubt based on the lack of reliability in B.M.'s identification, the lack of forensic evidence, and the alibi defense his work manager presented. If the jury were to believe Stephenson on these points, all that remained was the confession and his trial counsel's introduction of the polygraph evidence, which implied Stephenson failed the test, significantly undermining his defense. Stephenson also asks us to look beyond counsel's introduction of polygraph evidence to the resulting prejudice from his counsel's "eliciting, opening the door to, and failing to object to evidence that he had confessed to and committed numerous other sexual assaults"—a claim

which the post-conviction court did not address but one that he believes supports affirmance.[1] He contends that, particularly considering the type of crimes at issue, counsel having opened the door to this other-crimes evidence was prejudicial because it likely led the jury to convict him based on his criminal disposition.

The State replies that this other-crimes evidence was part and parcel of trial counsel's strategy attacking the voluntariness of Stephenson's confession. "It not only made sense for defense counsel to utilize the other crimes evidence proactively to attack the voluntariness of the confessions," the State argues, "the strategy depended on it." The State insists that there can be no prejudice under *Strickland* because the jury would have convicted him anyway based on his confession and B.M.'s identification.

1. *Strickland*'s Prejudice Prong

To establish prejudice under *Strickland*, "the defendant must show either: (1) 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different'; or (2) that 'the result of the proceeding was fundamentally unfair or unreliable.'" *Newton*, *supra*, ___ Md. at ___, slip op. at 10-11

[1] "[A]n appellee is 'ordinarily *entitled* to assert any ground shown by the record for upholding the trial court's decision even though the ground was not relied on by the trial court and *was perhaps not raised in the trial court by the parties*[.]'" *Unger v. State*, 427 Md. 383, 403 (2012) (quoting *Grant v. State*, 299 Md. 47, 53 n.3 (1984) (emphasis in *Unger*). "This principle is fully applicable in postconviction cases." *Id.* Because the post-conviction court granted Stephenson complete relief with respect to CT86-979, there were no grounds on which he could have filed a cross-appeal. *See id.* He is therefore not precluded from asserting alternative grounds for affirmance. *See id.* at 405. Accordingly, we must look at the entire record and analyze the cumulative effect of counsel's deficiencies. *See Bowers v. State*, 320 Md. 416, 436 (1990).

(quoting *Coleman*, 434 Md. at 340-41). "The *Strickland* Court explained, 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Id.* (quoting *Strickland*, 466 U.S. at 694). A defendant attempting to establish a "reasonable probability," need not prove his claim by a preponderance of the evidence, but must show something more than "'some conceivable effect on the outcome[.]'" *Bowers*, 320 Md. at 425 (quoting *Strickland*, 466 U.S. at 693, 697).

Explicating the "reasonable probability" standard, the Court of Appeals has adopted the "may well" standard that Maryland courts apply in the context of newly discovered evidence. *Id.* at 425-27 (citing *Yorke v. State*, 315 Md. 578, 588 (1989)). Under the "may well" standard, we will find prejudice if counsel's unprofessional performance "'may well have produced a different result, that is, there was a substantial or significant possibility that the verdict of the trier of fact would have been affected.'" *Id.* at 426 (quoting *Yorke*, 315 Md. at 588). To assess prejudice, we look at the trial as a whole, not one charge alone. *Id.* at 436-37 (citations omitted). "Even when individual errors may not be sufficient to cross the [prejudice] threshold, their cumulative effect may be." *Id.* at 436.

In *Bowers*, a seminal case applying *Strickland* in Maryland, the defendant in a capital case for rape and murder claimed that he was just an accomplice and did not actually carry out the acts himself. *Id.* at 419-20. The State presented evidence that a man with the same name as Bowers' alleged accomplice was imprisoned in another state at the time of the murder. *Id.* at 422. According to the Court of Appeals, this made it "of great importance to the defense to produce evidence that someone had been with Bowers, as he insisted." *Id.* Yet Bowers' defense counsel failed to call as a defense witness a forensic

chemist who could have testified to a State Police Report that hair samples taken from Bowers were different compared to those found on the victim. *Id.* at 422. Additionally, the manager of the Ramada Inn where Bowers stayed and was arrested testified that she "'found two gentlemen in the room,'" but defense counsel asked her no questions about the second man on cross-examination. *Id.* at 423.

The Court of Appeals agreed with the post-conviction court that Bowers' counsel's failure fell outside "'the wide range of reasonably competent legal assistance.'" *Id.* at 427. Moving on to discuss prejudice, the Court explained that the jury could have only convicted Bowers of first-degree murder if it found willful, deliberate, and premeditated intent. *Id.* at 430. Applying the "may well" standard, the Court reasoned:

> Had the Negroid hair evidence been presented to the jury, it might well have believed that Bowers had a companion on the fatal night. Had it believed that portion of Bowers's statement, it might well have found credible the other portions in which Bowers depicted [his accomplice] as the prime mover of the entire incident and the sole killer of [the victim]. Based on those beliefs, it follows naturally that the jury might well have concluded that Bowers had not possessed the requisite *mens rea* for premeditated murder. The jury, therefore, might well have found him to be an accessory to second degree murder, [] or perhaps guilty of second degree murder. At the very least, the jury might well have harbored reasonable doubt as to the premeditated murder charge.

Id.

In addition to finding these specific failures to be prejudicial, the Court went on to catalog counsel's various other errors, including that he revealed Bowers' possible defenses in a pre-trial motion, never met with Bowers outside of the courtroom during the trial, failed to investigate physical evidence, told Bowers incorrectly that there was no budget for expert witnesses, failed to cross-examine or impeach key State witnesses, and

made no opening statement and only a cursory closing. *Id.* at 432-33. The Court held that the culmination of these errors was also enough to establish defense counsel's representation was constitutionally deficient. *Id.* at 437.

More recently, in *Coleman*, the Court of Appeals considered the prejudicial effect of defense counsel's repeated failure to object to references to the defendant's post-*Miranda* silence. 434 Md. at 325. In about 30 instances at trial, the officer who interrogated Coleman testified without objection that Coleman remained silent in the face of questions during the interrogation. *Id.* at 327-28, 341-42. The Court concluded that several factors, "taken together, indicate that there [wa]s a 'substantial possibility' that the outcome . . . would have been different absent counsel's errors." *Id.* at 342. Those factors were the frequency of the mentions, that the cumulative effect of those mentions would likely lead the jury to believe that Coleman's silence was a sign of his guilt, and that several times the officer mentioned Coleman's post-*Miranda* silence "came after questions that went to the heart of his involvement in the murder." *Id.* at 342-43. Further, the Court explained that the prejudicial effect of the silence was intensified by the officer editorializing Coleman's silence, describing Coleman as "'very silent,'" that he "took a 'long pause,' and that 'Coleman put[] his head in his hands and stay[ed] in that position for a long time [in response to a question].'" *Id.* at 342 (alterations in *Coleman*).

Further analyzing whether these errors created a "'substantial or significant possibility'" of prejudice, the Court noted that Coleman's credibility was an essential factor to his defense, and that counsel's errors "negatively affected Coleman's credibility because it gave the jury the opportunity to question why he may have been silent in those instances."

Id. at 344-45 (citation omitted). Finally, the Court emphasized the character of the evidence at issue, observing that "the improper admission of evidence of post-*Miranda* silence 'is so egregious and so inherently prejudicial, reversal is the norm rather than the exception.'" *Id.* at 345 (citation omitted). Taking together all of these points, the Court held that counsel's errors "'so upset the adversarial balance'" and created a "'substantial possibility that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.* at 346 (citations omitted).

2. The Prejudicial Impact of Stephenson's Polygraph Exam

a. The *Guesfierd* Factors

Returning to the case before us, we must assess the prejudicial impact of Stephenson's counsel's errors. As we explained above, the Court of Appeals has set forth a non-exclusive list of factors to determine whether the admission of polygraph evidence prejudiced the defendant:

> whether the reference to a lie detector was repeated or whether it was a single, isolated statement; whether the reference was solicited by counsel, or was an inadvertent and unresponsive statement; whether the witness making the reference is the principal witness upon whom the entire prosecution depends; whether credibility is a crucial issue; whether a great deal of other evidence exists; and, whether an inference as to the result of the test can be drawn.

Guesfeird, 300 Md. at 659. [2]

[2] We are cognizant that the *Guesfeird* factors apply in a direct appeal rather than a petition for post-conviction relief, and the Court of Appeals cautioned recently that "errors that would result in automatic reversal on direct appeal may not warrant a new trial when raised as part of a postconviction ineffective-assistance-of-counsel claim." *Newton*, ___ Md. at ___, slip op. at 15 (citation omitted). We believe, however, that even in the post-conviction context, the *Guesfeird* factors remain useful as a measurement of prejudice and a predicate to the "may well" standard.

The first factor supports a finding of prejudice here. The reference to a lie detector in Stephenson's trial was not simply repeated, but an underlying part of his own counsel's trial strategy.

It follows that the statements solicited by counsel were not inadvertent. Worse yet, Stephenson's trial counsel affirmatively elicited testimony from the State's witness that the polygraph procedures "verify truth." Since at least the 1950s the Maryland courts have refused to admit polygraph evidence precisely because of their *inability* to verify truth reliably. Despite this, Stephenson's counsel informed the jury that his client took a lie detector test—knowing the results indicated Stephenson's guilt—and then bolstered that evidence by eliciting testimony that the test results were verifiably true. This, too, weighs in favor of finding prejudice. On top of defense counsel's own references to Stephenson's lie detector test, the State solicited testimony from Cpl. Heilman, the administering polygraphist, who responded by editorializing at length as to Stephenson's response to the test. He testified that after Stephenson's test, Stephenson's body language "began to open up," which he explained to be "a phenomena that happens in some instances when people . . . end up admitting to their mistake[.]" Cpl. Heilman went on to explain that Stephenson exhibited this exact phenomena after admitting to assaulting another victim.

According to the *Guesfeird* factors, Cpl. Heilman's testimony referencing the polygraph was prejudicial in two more ways. Although B.M. may have been the most vital witness to the State's case, it is fair to say that Cpl. Heilman's testimony was a central component to the State's case. And further, as the trial court found, the obvious inference for the jury to make from Cpl. Heilman's editorializing was that the results of Stephenson's

test indicated his guilt. Much like in *Coleman*, "[t]his added commentary intensifie[d] the prejudicial effect" of the error. 434 Md. at 342.

b. Other Evidence, Credibility, and the "May Well" Analysis

The two remaining *Guesfierd* factors—whether credibility was at issue and whether a great deal of evidence exists—lead us to our "may well" analysis. As for the existence of other evidence, the State's argument that Stephenson could not be acquitted because he was a serial rapist is a red herring. To properly assess the prejudice resulting from trial counsel's errors, we must separate the evidence admitted as a result of those errors from what evidence remains. A more narrow analysis would ignore *Strickland*'s instructions to consider whether the result of trial would have been different "'*but for* counsel's unprofessional errors'" and whether those errors caused the proceeding to be "'fundamentally unfair or unreliable.'" *Coleman*, 434 Md. 340-41 (emphasis added; citations omitted); *see also Kelley*, 288 Md. at 304 ("Since the character testimony was based, at least, in part on the polygraph test, we conclude that its basis was inadequate and it was an abuse of the trial court's discretion to admit it.").

In Stephenson's trial for B.M.'s rape, the other related rape crimes were before the jury solely because Stephenson's *own trial counsel* opened the door to the State's presentation of that evidence. In the trial court's view, the evidence that the police were investigating Stephenson for seven other sexual assaults and the victims' statements from those investigations were "part and parcel" to his trial counsel's supposed strategy of admitting in the polygraph exam in order to challenge the length of the interrogation. Perhaps most prejudicial was defense counsel's decision to inform the jury that Stephenson

submitted to a lie detector test because it opened the door for Cpl. Heilman to testify that Stephenson admitted to other sexual assaults.

The remaining evidence was B.M.'s identification of Stephenson, Stephenson's alibi, and Stephenson's confession. Despite the State's contention, B.M.'s identification was not "unequivocal." The defense presented evidence at trial that suggested B.M. made at least one prior false identification and failed to pick out Stephenson's photo from an array. Additionally, B.M. testified that it was dark outside she had thrown off her glasses before she was able to glance at her assailant's face, and even then it was only for a second and out of the corner of her eye. Given the conditions when B.M. saw her assailant and her failure to identify Stephenson initially, the jury might well have harbored doubts about B.M. identification. Furthermore, the State fails to acknowledge that the defense presented testimony by Stephenson's former work manager that suggested Stephenson was working at the time of B.M.'s rape. If the jury were to believe Stephenson's alibi witness, they might well have harbored doubts about his innocence. That leaves his confession.

The defense strategy was to put Stephenson on the stand and have him explain to the jury how his prior confession was a result of the pressures accompanying a long and difficult interrogation. Accordingly, much like in *Coleman*, 434 Md. at 344, *Bowers*, 320 Md. at 430, and *Guesfeird*, 300 Md. at 666, credibility was key to Stephenson's defense. At the post-conviction hearing, his trial counsel testified that he willingly risked the admission of other prejudicial evidence because if Stephenson's then-current version—his recantation—"ha[d] been believed or been successful, he would have walked." As should be clear by now, this supposed strategy was self-defeating. Defense counsel turned the

trial into a credibility contest and began it by undermining his client's credibility. He introduced polygraph evidence knowing full well that the results of that exam implied his client's guilt, elicited testimony from a state's witness that the polygraph exam "verified truth," and opened the door for the state to present evidence that Stephenson was a serial rapist, destroying his client's credibility in the eyes of the jury. Had Stephenson's trial counsel not impaired Stephenson's credibility, the jury might well have believed Stephenson's testimony in which he recanted his confession.

Thus, given the inherently prejudicial nature of polygraph evidence and its long-standing inadmissibility, *Kelley*, 288 Md. at 303-4, plus the prejudice specific to Stephenson's trial under the *Guesfeird* factors, 300 Md. at 659, we conclude that Stephenson's trial counsel's introduction of polygraph evidence and other-crimes evidence prejudiced Stephenson.

c. The Cumulative Prejudicial Effect

Finally, looking to the trial as a whole, the cumulative effect of Stephenson's trial counsel's unprofessional conduct further bolsters our conclusion that Stephenson was prejudiced. *See Bowers*, 320 Md. at 436. As Stephenson points out on appeal, the prejudice caused by his trial counsel's representation was not limited to the mere introduction of the polygraph evidence. In addition to introducing "evidence of a nature which th[e] Court [of Appeals] has never held to be competent and which was inherently prejudicial," *Kelley*, 288 Md. at 303, Stephenson's trial counsel did so knowing that it would lead to the State introducing evidence of other rapes. The Court of Appeals addressed the mention of other rape testimony in *Clark v. State*, 332 Md. 77 (1993). There, a trial judge had refused to

admit otherwise inadmissible evidence for curative purposes when a police officer blurted, while testifying, that the defendant was a suspect in another rape. *Id.* at 81-83. On appeal, the Court of Appeals explained a trial court's refusal to apply curative admissibility was rarely grounds for reversal, but the special circumstances of the case—mainly, that "[t]he officer's other rape testimony, left unrebutted"—warranted reversal. *Id.* at 93. The Court reasoned that "the damage to [the defendant's] case [could]*not be overstated*[,]" because the other rape testimony "could certainly have undermined the jury's ability to fairly decide th[e] case[,]" and "may have been sufficiently prejudicial to justify a mistrial." *Id.* at 92-93 (emphasis added). Similarly, it is difficult to overstate the damage the other rape evidence caused to Stephenson's case here.

Taken together, Stephenson's counsel introduced an inherently unreliable and prejudicial form of otherwise inadmissible evidence that led to the admission of otherwise inadmissible other-rape evidence that is prejudicial in and of itself. The effect of this was to prejudice Stephenson in the eyes of the jury and to bolster the State's case at trial. Looking at the trial as a whole, and more particularly at the extremely prejudicial nature of both polygraph evidence and the other related evidence at the focus of Stephenson's polygraph exam, we conclude that but for the unprofessional conduct of Stephenson's trial counsel, there is a substantial possibility that the jury might well have had reasonable doubt of his guilt. *See Bowers*, 320 Md. at 426.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY ORDERING NEW TRIAL AFFIRMED. COSTS TO BE PAID BY PRINCE GEORGE'S COUNTY.