UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1252

September Term, 2014

SAHAR BEGUM ALI

v.

STATE OF MARYLAND

Krauser, C.J.,
Woodward,
Arthur,

JJ.

Opinion by Arthur, J.

Filed: January 13, 2017

After Sahar Begum Ali's psychologist terminated their therapeutic relationship, Ms. Ali repeatedly threatened and harassed her, sending her numerous text messages, hacking into her private email account, and copying a privileged communication between her and her attorney. The State charged Ms. Ali with 13 counts of illegal access to computers, one count of identity theft, one count of unauthorized possession of a computer code, and other offenses. A Baltimore County jury convicted Ms. Ali, and this Court affirmed the computer-related charges. *Ali v. State*, 199 Md. App. 204 (2011).

In a petition for post-conviction relief, Ms. Ali contended that she received ineffective assistance of counsel because her defense attorney did not object to what she characterized as expert testimony by a police detective. The circuit court denied her petition. We affirm.

FACTUAL AND PROCEDURAL HISTORY

A. Ms. Ali's Harassment of Dr. Jenkins

Ms. Ali became a patient of Tina M. Jenkins, Ph.D., a licensed clinical psychologist, in March of 2008. Dr. Jenkins terminated the relationship in September of that year, but allowed it to resume on December 30, 2008, provided that the interactions were limited to one in-person session per week and up to two 15-minute phone calls per week.

Ms. Ali exceeded these limitations, sending text messages to Dr. Jenkins in-between sessions, calling her constantly, and emailing her frequently. At one point, Ms. Ali suggested to Dr. Jenkins that she and her father had contemplated suing her for professional malpractice.

After exchanging privileged emails with her attorney and consulting her professional association, Dr. Jenkins decided to terminate the relationship once again. In a letter dated February 20, 2009, Dr. Jenkins informed Ms. Ali of the termination, citing "recent threats and innuendos of litigation from you and your father." Dr. Jenkins told Ms. Ali that she would remain available on an "emergency basis" for one month while Ms. Ali located a new therapist.

On February 23, 2009, Dr. Jenkins met with Ms. Ali one last time to discuss the details of the termination. At that meeting, Dr. Jenkins gave Ms. Ali a copy of the February 20 letter.

Ms. Ali did not respond well to the termination. She sent at least 15 text messages to Dr. Jenkins over the next four days. In some messages, she threatened legal action. In others, she implored Dr. Jenkins to respond to her. One of the messages attached a photograph showing a hypodermic needle in Ms. Ali's arm, with the caption: "Is this what you want me to do?"

On or about March 6, 2009, Ms. Ali sent an email, attaching a Microsoft Word document, to the Hotmail email account that Dr. Jenkins used to communicate with her patients. The document contained a copy of a private email from Dr. Jenkins to her attorney, accompanied by Ms. Ali's commentary in red type. Ms. Ali offered no explanation of how she obtained this email other than to write that it "fell into [her] lap." At around the same time, Dr. Jenkins began to have trouble logging into her Hotmail email account and began to receive messages that her user ID and password were

incorrect. The doctor experienced no such problems with another email account that she did not use to communicate with patients.

Over the next two days, Ms. Ali sent another 26 text messages to Dr. Jenkins. She implored Dr. Jenkins to respond to her. She said she was "[l]osing it." One of the messages contained a photograph of Ms. Ali holding a gun to her head.

Because of Ms. Ali's "threatening and harassing" behavior, Dr. Jenkins sent her a final termination letter on March 7, 2009. That letter said Dr. Jenkins would obtain a peace order against Ms. Ali if her behavior continued. On March 12, 2009, Dr. Jenkins obtained the peace order, to which Ms. Ali consented.

In April 2009, Detective Delbusso, the contact person for internet crimes at the Howard County Police Department, executed a search of Ms. Ali's Baltimore County residence. He uncovered a hard copy of Dr. Jenkins's private email to her attorney, along with a series of handwritten notes listing Dr. Jenkins's home telephone number, her husband's name, the last four digits of Dr. Jenkins's social security number, and the names of several other patients whom she was treating.[1]

The State charged Ms. Ali with 13 counts of illegal access to computers, one count of identity theft, one count of unauthorized possession of a computer access code, one count of false application to purchase a regulated firearm, three counts of failure to comply with a peace order, one count of stalking, and one count of harassment.

[1] In addition, during his investigation, Detective Delbusso subpoenaed records from America Online regarding an account that Ms. Ali set up under Dr. Jenkins's name in March of 2009. Dr. Jenkins did not have an email account with America Online.

B. The Trial

At trial, Ms. Ali's defense counsel did not deny that she had accessed Dr. Jenkins's email account. Instead, to gain credibility with the jury, counsel adopted a strategy of admitting the obvious while attempting to establish that Ms. Ali's conduct was not "willful" or criminally culpable, but was a troubled young woman's cry for help to a therapist who had abandoned her.[2] Although conduct is typically defined as "willful" if it merely is "deliberate and not the result of surprise, confusion or bona fide mistake" (*Furda v. State*, 194 Md. App. 1, 31 (2010) (citation and quotation marks omitted)), Ms. Ali's counsel persuaded the trial court to instruct the jury that willfulness involves a significantly higher level of culpability – knowingly engaging in conduct for which there is no reasonable excuse. Defense counsel anticipated that Ms. Ali would take the stand in her own defense, present herself as a sympathetic person who desperately needed therapy, and attempt to persuade the jury that she had not acted "willfully."

Detective Delbusso was one of the State's witnesses. He had subpoenaed certified records from internet service providers, which disclosed the Internet Protocol addresses ("IP address") associated with Ms. Ali's home, her place of employment, her father's home, Dr. Jenkins's home, and Dr. Jenkins's office. Citing his "training, knowledge and experience," the detective explained that an IP address is "a unique number that is

[2] At the post-conviction hearing, Ms. Ali's trial counsel testified that Ms. Ali endorsed this strategy. Ms. Ali testified that she knew of the strategy, but denied that it was hers.

assigned to your access for the Internet when you go on the Internet." He likened an IP address to "fingerprints."

The detective testified that every time Dr. Jenkins or someone else accessed Dr. Jenkins's email accounts, an "access history log" would disclose the IP address of the device or network that was used to access the account. The State introduced an exhibit that showed each of the IP addresses that, it said, were associated with Ms. Ali.

The detective compiled a spreadsheet that contained a summary of information from the "access history log" for Dr. Jenkins's email accounts. The spreadsheet showed when an IP address associated with Ms. Ali had accessed Dr. Jenkins's email accounts. The detective concluded that Ms. Ali had accessed Dr. Jenkins's accounts around 74 times between January 29, 2009, and March 14, 2009.

Although the State had not designated Detective Delbusso as an expert, trial counsel did not object to the detective's conclusion or to any of the bases for it, including his statement about the unique nature of each IP address.[3]

[3] In these post-conviction proceedings, Ms. Ali disputes the detective's testimony about the uniqueness of each IP address. She distinguishes a "static" IP address, which she says "is a number assigned to a computer by an ISP to be its permanent address," from a "dynamic" IP address, which she says "is a temporary number that is assigned for the duration of [an] Internet session or for some other specified amount of time." In fact, "a provider may assign a dynamic IP address to a customer for a long period of time, such that it is effectively equivalent to a static IP address." 81 Fed. Reg. 87,282 (Dec. 2, 2016); *see also* http://whatismayipaddress.com/dynamic-static (last viewed Jan. 10, 2017) ("even if you have a dynamic IP address it's possible that it won't change for months on end"). The infrequency of any changes would explain why the detective found that addresses associated with Ms. Ali had accessed Dr. Jenkins's account on dozens of occasions over a period of weeks. The only other explanation would be that the internet

After the detective testified, and only minutes before Ms. Ali was supposed to take the stand, she informed her counsel that she was no longer going to testify. The jury convicted Ms. Ali of all charges.

On appeal, this Court reversed some of the convictions,[4] but affirmed all of the convictions based on the computer-related charges. On those charges, we reasoned that the evidence "was straightforward and discrete[,] . . . requir[ing] nothing more than for the jury to compare the dates on which [Ms.] Ali accessed [Dr.] Jenkins's email account from her home IP address to the dates of the charged count." *Ali v. State*, 199 Md. App. at 256.

C. Post-Conviction Proceeding

Ms. Ali filed a petition for post-conviction relief on grounds of ineffective assistance of counsel. In support of her petition, Ms. Ali cited numerous instances of deficient conduct, including counsel's failure to object to expert testimony from Detective Delbusso. After considering testimony from Ms. Ali and her trial counsel, the Circuit Court for Baltimore County denied Ms. Ali's request.

Ms. Ali filed requested leave to appeal on several grounds. This Court granted her leave to appeal on the issue of counsel's failure to object to Detective Delbusso's

service provider somehow kept assigning the same dynamic IP addresses to different people who were all trying to hack into Dr. Jenkins's email account.

[4] We reversed a conviction for submitting a false application to purchase a firearm. *Ali v. State*, 199 Md. App. at 254. We also reversed and remanded for a new trial on the charge of harassment, because the court had erred in admitting communications that were protected by the psychotherapist-patient privilege. *Id.* at 259.

testimony.

QUESTION PRESENTED

Ms. Ali presents a single question for our review: "Whether the post-conviction court erred in concluding that defense counsel did not provide constitutionally ineffective assistance by failing to object to testimony by a lay witness regarding internet protocol addresses and records related to these addresses?"

Because the post-conviction court's ultimate conclusion was correct, we affirm.

DISCUSSION

Whether Ms. Ali received ineffective assistance of counsel is "a mixed question of fact and law." *State v. Purvey*, 129 Md. App. 1, 10 (1999). "[W]e will defer to the [post-conviction] court's findings of historical fact, absent clear error." *Cirincione v. State*, 119 Md. App. 471, 485 (1998) (citation omitted). But we exercise our "own independent judgment as to the reasonableness of counsel's conduct and the prejudice, if any." *State v. Jones*, 138 Md. App. 178, 209 (2001), *aff'd*, 379 Md. 704 (2004).

The Sixth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment and Article 21 of the Maryland Declaration of Rights, guarantee a defendant the right to counsel in a criminal proceeding. To ensure that the right to counsel provides meaningful protection, the right has been construed to require the "effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)).

For Ms. Ali to make out a claim of ineffective assistance of counsel in violation of her constitutional rights, she must satisfy the two-prong test articulated in *Strickland*.

The first prong requires Ms. Ali to show that her counsel's performance was deficient because he "made errors so serious that counsel was not functioning as the 'counsel' guaranteed [to Ms. Ali] by the Sixth Amendment." *Strickland,* 466 U.S. at 687. The second prong requires Ms. Ali show that counsel's performance was so deficient that she was prejudiced by it. *Id.*

To satisfy the first prong, Ms. Ali must: (1) identify the acts or omissions of trial counsel that were not the result of reasonable professional judgment; (2) show that trial counsel's representation fell below an objective standard of reasonableness considering all the circumstances known to counsel at the time, including prevailing professional norms; and (3) overcome the strong presumption that trial counsel's identified acts or omissions, under the circumstances, are considered sound strategy. *Id.* at 690. The Sixth Amendment does not guarantee Ms. Ali perfect representation; for representation to be constitutionally deficient, trial counsel's acts or omissions must be "outside the wide range of professionally competent assistance." *Id.* at 690.

To satisfy the second prong, Ms. Ali must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694; *Harris v. State*, 303 Md. 685, 700 (1985). In these circumstances, a "reasonable probability" means "a probability sufficient to undermine confidence in the outcome." *State v. Borchardt*, 396 Md. 586, 602 (2007).

The *Strickland* test for ineffective assistance of counsel is conjunctive and, therefore, requires Ms. Ali to establish both prongs of the test before she is entitled to

relief. *See Oken v. State*, 343 Md. 256, 284-85 (1996), *cert. denied*, 519 U.S. 1079 (1997); *State v. Calhoun*, 306 Md. 692, 729 (1986).

A. Did Detective Delbusso Give Expert Testimony?

Ms. Ali complains that her trial counsel failed to object when Detective Delbusso presented what she describes as expert testimony concerning the "unique" nature of an IP address and his conclusion that Ms. Ali, through IP addresses that the detective associated with her, accessed Dr. Jenkins's accounts more than 70 times. Although the post-conviction court asserted that "Detective Delbusso was simply explaining what an IP address [wa]s for purposes of clarification," we assume for the sake of argument that the detective testified as an expert.

We do so for three reasons. First, the nature of an IP address, and particularly the arcane question of whether each IP address is "unique" to a particular device or network, is a question of computer science that is beyond the ken of ordinary laypersons and, hence, "ordinarily should be the subject of expert testimony." *See, e.g., Wood v. Toyota Motor Corp*., 134 Md. App. 512, 518 (2000). Second, in testifying about the allegedly unique nature of each IP address and likening an IP address to a fingerprint, Detective Delbusso cited his "training, knowledge, and experience," which suggests that his testimony amounted to expert, rather than lay, opinion. *See Ragland v. State*, 385 Md. 706, 725 (2005) (holding that Rules 5-701 and 5-702 "prohibit the admission as 'lay opinion' of testimony based upon specialized knowledge, skill, experience, training, or education"). Third, the detective based his conclusions on subpoenaed documents that were not themselves self-explanatory, but required some degree of specialized training

and erudition to interpret. *See State v. Payne*, 440 Md. 680, 700 (2014). Most notably, the "access history log" for Dr. Jenkins's email account contains columns labeled "pass" and "fail." The meaning of those columns and their contents would be opaque at best to ordinary laypersons, but the detective, implicitly relying on his specialized training, purported to interpret them to indicate whether an attempt to access the account had succeeded.

B. Reasonable Professional Judgment

Assuming for the sake of argument that Detective Delbusso was allowed to give expert testimony despite the State's failure to disclose him as an expert, we turn to the question of whether counsel's failure to object was an error "so serious that counsel was not functioning as the 'counsel' guaranteed [to Ms. Ali] by the Sixth Amendment." *Strickland*, 466 U.S. at 687. We conclude that the error, if any, came nowhere near that level of seriousness, because counsel's approach to the witness appears to have been the product of a reasonable strategy based on the information available to him at the time. *See State v. Thomas*, 325 Md. 160, 171 (1992) (requiring trial counsel's alleged deficient acts to be judged based on the facts known by her or him at the time they occurred) (citation omitted).

As previously explained, counsel adopted a strategy of conceding that Ms. Ali had committed the *actus reus* of the computer-related offenses with which she was charged, but contesting whether she had possessed the requisite *mens rea* – i.e., contesting whether she had acted willfully. Counsel adopted that strategy because, even without Detective Delbusso's testimony, the State had a considerable amount of evidence that Ms. Ali had

hacked into Dr. Jenkins's email account. That evidence included Dr. Jenkins's email to her attorney, which Ms. Ali had obtained without permission, altered, and sent back to her therapist; the hard copy of the privileged email, which the detective found in Ms. Ali's residence when he executed a search warrant; a document containing the last four digits of Dr. Jenkins's social security number, which the detective also found when he executed the warrant; and the evidence that Dr. Jenkins was having trouble logging into the email account that was known to patients such as Ms. Ali, but was having no such problems with her other email account, which her patients did not know about. In view of the considerable evidence that Ms. Ali had hacked into Dr. Jenkins's account and had thereby obtained the doctor's confidential communication with her attorney, it was hardly an unreasonable strategy for counsel to attempt to preserve his credibility with the jury by conceding the obvious, but arguing that Ms. Ali was a disturbed young woman who did not act with criminal intent.

When Detective Delbusso testified, counsel was proceeding under the premise that Ms. Ali would take the stand, admit what she had done, and explain to the jury that she had a reasonable excuse and was not acting "willfully" – that she was begging for help and attention from a therapist who, she believed, had abandoned her in a time of need. In faulting counsel for not attempting to block the detective's testimony, Ms. Ali fails to note that, when the detective testified, her counsel anticipated that she would take the stand shortly thereafter and admit to having done exactly what the detective said she had done. Counsel's alleged "error" becomes apparent only in hindsight, after Ms. Ali pulled the rug out from under her attorney by deciding, at what he said was "the moment that

[he] was ready to call her to the stand," that she would not testify in her own defense. Ms. Ali did not receive ineffective assistance of counsel merely because her attorney failed to foresee that she would change her mind about testifying.

According to her post-conviction testimony, Ms. Ali appears not to have complained of trial counsel's strategy before or during trial. Based on the evidence and circumstances that were known to trial counsel at the time, we find no reason for her to complain about it either.[5]

C. Substantial Probability of a Different Result

To be entitled to relief under *Strickland*, Ms. Ali was required to show that, had trial counsel objected to Detective Delbusso's testimony, there is a substantial probability that his testimony would have been excluded at trial. *See Jones*, 138 Md. App. at 206. Ms. Ali did not sustain her burden. Even assuming that trial counsel should have objected to Detective Delbusso's testimony, Ms. Ali's claim for ineffective assistance of counsel would still fail, because she did not show a reasonable probability that the result would have been different but for counsel's alleged error.

[5] Ms. Ali also contends that focusing on her lack of "willfulness" was not a sound trial tactic. We disagree. In view of the indisputable evidence that she had impermissibly obtained a privileged email between Dr. Jenkins and her attorney, Ms. Ali had little by way of a plausible defense other than an argument that she did not act with criminal intent. Moreover, her attorney succeeded in persuading the trial court to give the jury an instruction on willfulness that was highly advantageous to the defense case. As the post-conviction court pointed out, the instruction on willfulness "create[d] a higher threshold to be met by the [S]tate." A tactic is not unsound simply because it does not succeed.

Ms. Ali contends that, had her counsel objected, the trial court would have excluded the detective's testimony as a discovery sanction. She also contends that the detective did not have adequate qualifications to testify as an expert. We disagree on both counts.

Under Md. Rule 4-263(n), the rule governing discovery in criminal cases, "[t]he failure of a party to comply with a discovery obligation . . . does not automatically disqualify a witness from testifying." Instead, the trial court has discretion to fashion remedies for discovery violations. *See Bellard v. State*, 229 Md. App. 312, 340 (2016) (citing *Thomas v. State*, 397 Md. 557, 570 (2007)). "[B]ecause the exclusion of prosecution evidence as a discovery sanction may result in a windfall to the defense, exclusion of evidence should be ordered only in extreme cases." *Thomas*, 397 Md. at 573 (citations omitted).

The purpose of Rule 4-263 is "to assist the defendant in preparing his or her defense, and to protect the defendant from surprise." *Ragland*, 385 Md. at 716-17 (citation omitted). Detective Delbusso's testimony, however, would not have come as any surprise. Although the State did not name the detective as an expert and disclose the substance of his testimony in narrative form, there is no dispute that it produced all of the documents on which he relied, most notably including the access-history log in which he summarized each occasion on which an IP address associated with Ms. Ali had accessed Dr. Jenkins's Hotmail account. Because trial counsel was on notice of these conclusions and had sufficient time to prepare for the testimony before trial, it is extremely unlikely that the trial judge would have exercised her discretion to prohibit the detective from

testifying had counsel objected. *See, e.g.*, *Bellard*, 229 Md. App. at 341-42 (concluding that trial court was "well within" its discretion to deny motion to exclude expert testimony as sanction for belated disclosure where court found that defendant "had 'sufficient time' and had 'been given notice of the existence of the subject matter about which [the expert might] be expressing an opinion'").

Moreover, had her counsel objected to the detective's qualifications, Ms. Ali has given little reason to doubt that the State could have shown him to have sufficient "knowledge, skill, experience, training, or education" to testify as an expert. Md. Rule 5-702. He is the contact person for internet-related crime at the police force in one of the largest counties in the State. He disclosed that he had received training in internet-crime investigations from the National White Collar Crime Complaint Center, in conjunction with the Federal Bureau of Investigation, and had attended two seminars conducted by the Maryland State Police. Because he mentioned those aspects of his training despite the lack of any focused effort to qualify him as an expert, there is little reason to doubt that he could have supplied additional details about the nature of his education and experience had counsel challenged his qualifications. Furthermore, although Ms. Ali had the "heavy burden" (*State v. Gross*, 134 Md. App. 528, 555 (2000)) of showing a reasonable probability that the court might have excluded the detective had counsel objected to his testimony, she did not call the detective at the post-conviction hearing to enable a court to conduct a full investigation into whether he "'exhibit[ed] such a degree of knowledge as to make it appear that his opinion [was] of some value,'" *Roy v. Dackman*, 445 Md. 23, 42 (2015) (quoting *City Homes v. Hazelwood*, 210 Md. App. 615,

677 (2013)), the standard for evaluating the adequacy of an expert's qualifications under Rule 5-702. In view of that failure of proof on an issue on which she bore the burden, Ms. Ali did not show a reasonable probability that the result at trial would have been different had her attorney objected to the detective's qualifications to testify as an expert.

Finally, although the detective's testimony may have assisted the State in quantifying the specific number of occasions on which Ms. Ali gained unauthorized access to Dr. Jenkins's email account, the other evidence in the case left little doubt that Ms. Ali had committed that offense. It was beyond dispute that Ms. Ali had purloined a privileged communication between Dr. Jenkins and her attorney, had edited that communication and sent it back to the therapist with no legitimate explanation about how she had obtained it, and had kept a hard copy of the privileged communication at her residence, where it and other pieces of inculpatory evidence (such as the last four digits of Dr. Jenkins's social security number) were found when the police executed a search warrant. Considering "the totality of the evidence before the . . . jury" (*Strickland v. Washington*, 466 U.S. at 695), the alleged error in not objecting to Detective Delbusso's testimony is not "sufficient to undermine confidence in the outcome." *Id.* at 694.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.