UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2706

September Term, 2016

STATE OF MARYLAND

v.

TEYON KING

Woodward, C.J.,
Meredith,
Thieme, Raymond G., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: July 12, 2017

In 2011, Teyon King was convicted by a jury in the Circuit Court for Baltimore City of attempted first degree murder, attempted kidnapping, witness intimidation, and conspiracy to commit first degree assault. The court subsequently sentenced King to twenty-five years' incarceration for the attempted murder, a consecutive twenty-five years' incarceration for the attempted kidnapping, and a consecutive fifteen years' incarceration for the witness intimidation, for a total term of sixty-five years' incarceration. The court did not impose a sentence for conspiracy to commit first degree assault. In 2016, King filed a petition for post-conviction relief, in which he requested, on numerous grounds, a new trial and a belated motion for modification of sentence. The post-conviction court found three of King's contentions meritorious, vacated the convictions, and awarded him both forms of relief. The court denied relief on the remaining contentions. The State filed an application for leave to appeal, claiming that the post-conviction court abused its discretion in vacating the convictions, or in the alternative, failing to vacate only the conviction of attempted kidnapping. King then filed a conditional cross-application, in which he asks this Court, in the event that we grant the State's application, to review whether the post-conviction court abused its discretion in finding five contentions to be without merit. For the reasons that follow, we grant the State's application and reverse the court's vacation of the convictions of attempted first degree murder, witness intimidation, and conspiracy to commit first degree assault. We also deny King's conditional cross-application.

At trial,

the State elicited evidence that the following events took place, on the night of December 27, 2008, in the 1500 block of North Bradford Street in the Eastern District of Baltimore City.

At 8:13 p.m. that night, police received a call for an "assault in progress" at 1509 North Bradford Street. The injured complainant Maurice Price was transported by ambulance to the hospital. Near the front of the home, police found some fresh blood, a cooking pan with dents in it and a bent handle, a belt, a glove and a piece of plastic with some kind of carpet over it. The female homeowner told police that two males had knocked on the door of the home, and after Price went outside to speak with them, they attacked and beat him.

Price later testified that he lived at that address, with his girlfriend Venus Watford, their children, her mother April Jordan, and Ms. Jordan's friend Howard Grant. From the neighborhood, Price had known for years appellant Teyon "Funk" King, Bernard Thompson, Dionte "Tippy" Williams, and Lendal "BooBoo" Sanchez. Price, King and Williams were all "certified" gang members of the Black [Guerrilla] Family. Price was selling crack cocaine for King, to whom he was supposed to be "giving a percentage back." However, Price admitted that he had a "grudge," and that he "took" some "drugs" from King, Williams and Thompson, because he "felt like they owed me something," because he "did something" for them, and gang "protocol demanded" that they give him his "reward."

That night at about 8 p.m., Price and his family were at the table getting ready for dinner, when there was a knock on the door of their house. When Price answered the door, it was King and Williams, at the bottom of the steps. They "yelled" at him that he wasn't a true "[Guerrilla]." Williams "swung at" him, and Price "swung back," then "pushed" King out of the way and ran into the alleyway. They pursued him, and all three of them were "fighting" and "wrestling," when King hit Price in the head with a "heavy object." They dragged him back in front of his house, still hitting him with that object and kicking him.

Williams "made a phone call for a car to pull up." Thompson got out of his silver colored car, and he, too, punched and kicked Price. King, Williams and Thompson then tried to "force" Price into the trunk of Thompson's car, while threatening to kill him. April Jordan was on the phone "yelling" that she was going to call the police, and she did so. Then, they stopped beating Price, and drove away in Thompson's car.

Price suffered a fractured skull and was kept in the hospital, overnight. Initially, at the hospital, Price told police that he "didn't" know his attackers. Later, however, he identified King, Williams and Thompson, from photographic arrays. Price also made an in-court identification of King.

April Jordan testified that she saw the beating take place, and that King hit Price with a "frying pan" and a "crowbar." She called the police, and the attack ended, when they heard "the sirens." Jordan made both photographic and in-court identifications of King. Venus Watford testified to seeing King and "Tippy" Williams come to the front door. She saw them chasing Price into the alley. Watford went outside, and then ran in the direction she thought they were going, in order to "cut them off," but she did not see them again, until the car was pulling away. Watford made photographic identifications of King and Williams, and she also made an in-court identification of King.

King was arrested on December 28, 2008, pursuant to a warrant. As a police officer was transporting him to Central Booking, King made the comment, "that it wouldn't have happened if he would of had that money right."

Sanchez testified for the State that he and King were best friends and that he knew both of the codefendants, Williams and Thompson. Sanchez and King were selling crack cocaine on the day of the assault. On January 14, 2009, Sanchez gave police a statement implicating King in this case, because Detective Dawnyell Taylor "confirmed that . . . if I made a statement she would let me go for the previous charge I was facing." Sanchez testified that he told Detective Taylor that King gave him and Price drugs to sell, that day, but later, King complained that they "owe" him some "money," and he then walked to Price's house. Sanchez also told police that, after the assault: "Tippy asked me to give Price $1,500.00 so that he can say that him and Funk didn't do it." However, Sanchez recanted and told the jury that he had "lied" to Detective Taylor, both: (1) about seeing King and Williams knock on Price's door; and (2) about Williams telling him to offer Price $1,500 to retract his allegation that King and Williams had assaulted him. Baltimore City Detective Dawnyell S. Taylor testified for the State that originally Venus Watford had identified a "Daniel Horton" as one of the assailants, but she changed her mind. She also said that King and Williams came to the door that night. King gave police a statement that he was standing on a nearby corner, when he saw Price in a fight with Williams and an Antonio Addison, but King denied any involvement. Detective Taylor noticed bruises on King's hands. Detective Taylor confirmed that, before she took a statement from Sanchez, he had been arrested and that he faced serious

> charges, in that other matter. Detective Taylor also noted that in many of the recorded telephone calls from the jail, there was mention of King's former defense counsel offering to take to the State's Attorney's office any witness who wanted to "identify other people" as the perpetrators of the assault.
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> When the police recovered Bernard Thompson's silver car they found that a piece of the trunk material matched the carpeting covering the plastic item which was found in the street at the scene. Detective Taylor showed in a photograph where that item would fit into the trunk. Police found no blood "anywhere on or in" Thompson's car. The detective knew that DNA swabs were taken from King, but did not know if DNA was ever removed from the pan found at the scene.
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> The State recorded telephone calls made from jail, after the arrest of King and his codefendants, and several calls were played for the jury, from a CD that was marked for identification only. The CD itself was never admitted into evidence or sent back to the jury during deliberations. The State provided jurors with a transcript it had prepared of the calls. After the CD was played, in open court, the trial judge ordered the Clerk to collect each transcript.
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> According to the defense, the transcriber found the content of most of the calls to be "indiscernible." On the tape, King made various inculpatory statements. King also can be heard discussing a bribe of $500 to a female witness and $1500 to Price for Price to recant his accusations against King and his co-defendant Williams.

King v. State, No. 1196, September Term, 2011, slip op. at 2-6 (January 9, 2013) (footnote omitted).

Following the close of the evidence, the court indicated that it would give the Maryland Criminal Pattern Jury Instructions on, among others, kidnapping and attempt. The prosecutor asked the court to strike the instruction on kidnapping "because . . . it[']s attempted kidnaping [sic]." Defense counsel did not lodge any objection, and the court struck the instruction. The court subsequently gave the pattern instruction on attempt, but did not include the elements of the offense of kidnapping.

In his post-conviction petition, King contended that defense counsel provided ineffective assistance in failing to object to the lack of an instruction on the elements of the offense of kidnapping. The post-conviction court agreed. The court concluded that "[w]ithout the full kidnapping instruction, the jury . . . had no way of determining whether the State met its burden to prove that [King] specifically intended to commit the elements of the crime of kidnapping." The court further concluded that "the attempted kidnapping charge was a cornerstone of the State's entire case," and that "[h]ad the jury been properly instructed and found [King] not guilty of attempted kidnapping, the jury may have reached a different verdict on the other crimes." Accordingly, the court vacated all of the convictions and awarded King a new trial.

In its application, the State concedes that defense counsel "erred in not objecting to the lack of a kidnapping instruction." Nevertheless, the State contends, "there exists no reasonable probability that the jury would have acquitted" King of attempted kidnapping, because the evidence in support of the offense "is overwhelming." The State further contends that, even if "a reasonable probability exists that the jury would have acquitted" King of the offense "if the instruction for kidnapping had been given, the remedy of a new trial [on all] counts amount[s] to a windfall and an injustice."

We agree with the post-conviction court that defense counsel provided ineffective assistance in failing to object to the trial court's failure to instruct the jury as to the elements of the offense of kidnapping. The Court of Appeals has stated that attempt is "an adjunct crime that cannot exist by itself, but only in connection with another crime." *State v. North*, 356 Md. 308, 312 (1999) (internal citation and quotations omitted). Accordingly, the

Maryland Criminal Pattern Jury Instructions instruct a trial judge to "[g]ive the instruction for the crime allegedly attempted immediately following th[e] instruction" for attempt. MPJI-Cr 4:02, Notes on Use. The post-conviction court did not abuse its discretion in vacating the conviction of attempted kidnapping and awarding King a new trial on that offense.

Nevertheless, we agree with the State that the post-conviction court abused its discretion in vacating the convictions of attempted first degree murder, witness intimidation, and conspiracy to commit first degree assault. "To establish ineffective assistance of counsel, it is the petitioner's burden to demonstrate (1) that, under the 'performance prong,' counsel's performance was deficient, i.e., counsel committed serious attorney error, and (2) that, under the 'prejudice prong,' counsel's deficient performance prejudiced the defense." *Barber v. State*, 231 Md. App. 490, 515 (2017) (citations omitted), *cert. denied*, No. 41, September Term, 2017 (Md. May 22, 2017). "Under the 'prejudice prong,' a petitioner must show a substantial or significant possibility that, but for the serious attorney error, the result would have been different." *Id.* at 516 (internal citation and quotations omitted).

Here, Price testified, in detail, that after he "took" King's drugs, King and Williams, both of whom Price had known for years, assaulted Price and repeatedly struck him in his head with a heavy object, fracturing his skull. Price later identified King in a photo array and in court. Jordan testified that she saw King assault Price with a frying pan and crowbar. She too identified King in a photo array and in court. Watford testified that she saw King and Williams approach Price's front door and subsequently chase him into an alley.

Following his arrest, King made an inculpatory statement to a police officer. Sanchez testified that he told a police officer that he heard King complain that Price owed King money, and saw King and Williams knock on Price's door. Finally, on the tape of King's telephone calls made from jail, King "made . . . inculpatory statements," and "can be heard discussing . . . bribe[s] . . . to a female witness and . . . to Price . . . to recant his accusations against King and . . . Williams." In light of this evidence, we conclude that there is no substantial or significant possibility that, but for the trial court's failure to instruct the jury as to the elements of the offense of kidnapping, the verdicts as to the remaining offenses would have differed.

Accordingly, we grant the State's application for leave to appeal, and reverse the court's vacation of the convictions of attempted first degree murder, witness intimidation, and conspiracy to commit first degree assault. With respect to King's conditional cross-application, the application, having been read and considered, is denied.

STATE'S APPLICATION FOR LEAVE TO APPEAL GRANTED. JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY REVERSED AS TO THAT COURT'S VACATION OF THE CONVICTIONS OF ATTEMPTED FIRST DEGREE MURDER, WITNESS INTIMIDATION, AND CONSPIRACY TO COMMIT FIRST DEGREE ASSAULT. CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. RESPONDENT'S CONDITIONAL CROSS-APPLICATION FOR LEAVE TO APPEAL DENIED. COSTS TO BE PAID BY RESPONDENT.