Circuit Court for Baltimore City
Case No. 108343005, 09, 108364001, 03, 05, 07, 09, 011, 013, 015

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND**

No. 2045

September Term, 2021

CHARLES YASIN MCGANEY

v.

STATE OF MARYLAND

Nazarian,
Shaw,
Albright,

JJ.

Opinion by Shaw, J.

Filed: March 13, 2023

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

**At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

This appeal stems from the denial of post-conviction relief by the Circuit Court for Baltimore City. In October 2010, Appellant, Charles Yasin McGaney, was found guilty of felony murder, robbery with a dangerous weapon, conspiracy, and other related offenses and sentenced to life plus thirty years' incarceration. Appellant appealed and this court vacated one conspiracy conviction, but otherwise affirmed. On September 14, 2020, Appellant filed a petition for post-conviction relief which was denied by the circuit court, following a hearing. He timely appealed and presents the following questions for our review.

1. Did the postconviction court err when it excluded expert testimony concerning complex low template DNA mixtures at [Appellant's] postconviction hearing?

2. Did the postconviction court err in ruling that trial counsel did not render ineffective assistance of counsel when he failed to object to facts not in evidence?

For the reasons discussed below, we affirm.

BACKGROUND

On September 20, 2008, Appellant and two others robbed the owner and staff of New Haven Lounge in Baltimore City, and during the commission of the robbery, former Baltimore City Councilman Kenneth Harris was killed. Appellant and his co-defendants were charged and tried jointly.

At trial, the State called Kelly Miller, a Baltimore Police Department Crime Laboratory Analyst, as an expert in the field of forensic DNA analysis. During her testimony, Miller explained the structure of DNA, the process for analyzing DNA, the

calculation of statistical data and how a DNA profile and report is generated. She explained, "there's approximately three billion base pairs within your DNA. And we're not looking at all of the DNA . . . we're looking at 13 locations." (Cleaned up). "These are the same 13 locations on the DNA that all the forensic testing laboratories in the United States use." Miller stated:

> When we further add the DNA testing for forensics and we're actually looking at specific locations on that DNA strand, we can then identify to who that sample is coming from . . . . [T]here's a whole process. When we receive a sample, we extract that sample. So basically, it's purifying the DNA in that sample. We then quantify it, determine how DNA's present, amplify it by xerox copying the DNA at those 13 locations . . . . So it's basically molecular xerox copying, looking at those 13 locations on the DNA. And we then generate a DNA profile.

As part of her responsibility in the laboratory, Miller examined several crime scene items including latex gloves, a green bandana, two wallets, and a jacket. She then generated a DNA profile for McGaney and his co-defendants and identified multiple DNA profiles that were consistent with each item. On sample four, Miller testified that McGaney and two other unknown male DNA profiles were found and were consistent with the latex gloves. She stated that one unknown male's DNA was present at 13 of 13 loci and "Charles McGaney at 11 of 13 loci." On sample seven, a swab of another latex glove from a backyard, that DNA profile yielded results consistent with McGaney at 11 of 13 loci. She opined that "[t]he chance of selecting an unrelated person from the African American community as a possible contributor is 1 in 5.38 trillion." Miller testified that the number of loci identified from the sample is used to classify the DNA profile. The DNA profile is classified as either "included", "excluded", or "cannot be excluded." Miller explained the

Baltimore City protocols for when a DNA profile can be "excluded" or "cannot be excluded." A DNA profile is classified as "cannot be excluded" from the evidence sample

> when doing the comparison there was not enough to exclude, but there is not enough to include. So, it's that gray area of I don't know, so it cannot be excluded. . . . If they're not present at five or more loci, then we can exclude that individual. But . . . it's based on analyst discretion . . . . Analyst discretion means that if you're examining the known standard and comparing it to the evidence sample, if you don't feel comfortable that they could possibly be or be not excluded, then you can say cannot be excluded. . . . [T]hat statement and those calls are gonna be reviewed by the technical reviewer.

(Cleaned up).

During her testimony, Miller used the word "matched" in comparing the DNA profile of certain evidence to the known DNA profile of Appellant. When asked by counsel "as to sample number seven, who if anyone, has a profile that would match sample seven other than Mr. McGaney?" She answered "None. We've matched this DNA profile to the known standard from Charles McGaney." In reference to the same sample, Miller was asked "Is that Mr. McGaney's profile matched to that sample, ma'am?" She replied "Yes. His DNA profile matched to that evidence sample."

In its rebuttal closing argument, the State addressed Miller's testimony, by stating:

> Now, we presented Kelly Miller. We qualified her. You may, you know, she's—her credentials are impressive. Bachelor of science in microbiology, master's of forensic science, she's an analyst with perfect proficiency testing. She's an auditor. She checks other people's work. . . . She explained the science to you. And they can get up here and they can pull smoke and mirrors all they want, but what she told you was, forget the figures and we'll talk about (inaudible), you know, the statistics, but she said a match is a match. A match is a match. And you'll have her[] report and she will tell you that there was a match, . . . McGaney on the inside [of] the purse, on gloves and bandanas. . . .

* * *

> Do you remember what she talked about how many loci they look at? Thirteen. And that's what they look at to see if that person's DNA is there. And on one of the pieces, 13 out of 13 matched, 13 out of 13.
>
> *   *   *
>
> . . . what they never wanted you to remember is, what she said was contamination doesn't have any impact on a match. It doesn't mean the match is no good. It just means some of those unknowns, there may be some unknowns on there that we can't explain. The match is still the match.

Following deliberations, the jury convicted McGaney of felony murder, use of a handgun in the commission of a crime of violence, and wearing/carrying a handgun as to Kenneth Harris. McGaney was also convicted of conspiracy to commit robbery with a dangerous weapon, robbery with a dangerous weapon, first-degree assault, use of a handgun in the commission of a crime of violence, and wear/carry a handgun as to seven other victims. He was sentenced to life plus thirty years' incarceration. McGaney appealed and this court vacated one conspiracy conviction and otherwise affirmed the judgments.

On September 14, 2020, McGaney filed a petition for post-conviction relief arguing that his trial counsel rendered ineffective assistance for failing to object to the State's improper arguments and failing to file a motion for modification of sentence. His post-conviction hearing was scheduled for July 2021.

On March 26, 2021, McGaney filed a Disclosure of Expert notice, stating his intention to call Dr. Charlotte J. Word, PhD, as an expert in DNA identification and testing. He attached Dr. Word's report which was based on her review of some of the DNA Analysis Reports and Miller's trial testimony. Dr. Word stated, in part:

> When the DNA profile obtained by the laboratory from an item of evidence indicated the presence of a mixture of DNA from two or more contributors, and especially when the profile resulted from the amplification of very small amounts of DNA and/or had three or more contributors, the analysts used inappropriate and extremely misleading language when reporting their conclusions regarding the comparison of the mixed DNA profile results to the DNA profiled of known individuals. Typically when small amounts of DNA (termed "low template DNA") are amplified using the polymerase chain reaction (PCR) during DNA testing, there is insufficient DNA available to generate a complete DNA profile from the individual; this results in a DNA profile with data missing in an unknown and unpredictable manner.
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> * * *
>
> When the DNA profile from a known individual is compared to the DNA data obtained from an item of evidence and it is determined that some of the alleles from the known individual are not present in the evidentiary profile obtained, there are two possible contradictory explanations for this observation: 1) the alleles are not present because the person is *not* a contributor to the DNA and is therefore excluded as a possible source; or 2) the person is a contributor to the DNA, but some alleles are missing due to allele dropout from the amplification of a small amount of DNA. It is generally impossible for the analyst interpreting and comparing the data to know which of these conclusions is correct. It is routine for laboratories to report an inconclusive statement for the comparison of the DNA profile in this situation with some qualifying statement (e.g. the subject cannot be included or excluded as a source of the DNA obtained from item 1 due to insufficient data). However, the language used in DNA Analysis Reports by the analysts in the Baltimore Police Department for mixed DNA profiles where dropout is likely a possibility and must be considered is that the subject "cannot be excluded as a possible contributor to this evidence sample." Only one half of the correct statement is made and the second half stating that the subject also cannot be included as a possible contributor is never provided.

(Emphasis in original).

The State filed a motion *in limine* to preclude her testimony, arguing that her testimony was not relevant to any of Petitioner's claims. The State argued that Dr. Word "will testify that the DNA test results in this case were unreliable. But [McGaney], in his Petition for Post-Conviction Relief, does not claim that he is entitled to post-conviction

relief because the DNA tests were unreliable . . . ." At the time of the motion, McGaney had only alleged that his trial counsel was ineffective for failing to object to the State's improper argument and failing to file a motion to modify his sentence.

McGaney then filed a supplemental petition for post-conviction relief raising two additional claims. He claimed that inaccurate and misleading scientific evidence was admitted during trial in violation of the Due Process Clause of the Constitution and that his trial counsel rendered ineffective assistance by failing to consult with an expert and provide expert testimony. He countered the State's motion by arguing Dr. Word's proffered testimony will discredit Miller as an expert because she provided inaccurate and misleading DNA evidence.

McGaney then filed a Motion to Reconsider, which was denied. His post-conviction hearing was held on August 18, 2021, and on November 18, 2021, the court issued a written opinion and order denying relief. The court found that: 1) "Trial counsel had no meritorious objection to make that could have been successfully litigated on appeal"; 2) "Petitioner has not presented sufficient evidence to establish Petitioner requested his trial counsel to file any post sentence motion for modification of sentence on his behalf"; 3) "Dr. Word did not give any specific example of the State's Expert's testimony that was incorrect or misleading"; and 4) "Trial counsel made the strategically tactical decision not to call the expert as a witness on behalf of Petitioner." McGaney timely appealed.

STANDARD OF REVIEW

"Our review of a post-conviction court's findings regarding ineffective assistance of counsel is a mixed question of law and fact." *State v. Syed*, 463 Md. 60, 73 (2019).

"The factual findings of the post-conviction court are reviewed for clear error." *Id.* "The legal conclusions, however, are reviewed *de novo*." *Id.* "The appellate court exercises 'its own independent analysis' as to the reasonableness, and prejudice therein, of counsel's conduct." *Id.* (citing *Oken v. State*, 343 Md. 256, 285 (1996)). "[T]he general standard of review for admission of expert testimony is discretionary. . . ." *Alford v. State*, 236 Md. App. 57, 69 (2018). "In the absence of an error of law or fact, we review the admission of expert testimony for abuse of discretion." *Id.* at 71 (citing *Bomas v. State*, 412 Md. 392 (2010)).

DISCUSSION

Expert Testimony

McGaney argues the admission of inaccurate and misleading scientific evidence at trial violated his rights to a fair trial under the Due Process Clause of the United States Constitution. He contends that the post-conviction court erred and/or abused its discretion by granting the State's motion *in limine* to exclude the testimony of his DNA Expert, Dr. Charlotte Word, who would have discredited the State's DNA expert. He asserts Dr. Word provided a sufficient factual basis to support her testimony and her letter "set out precisely 'what was incorrect or wrong with the findings from the previous expert.'"

He states that "Dr. Word first highlighted the problem with [Miller's] conclusion, . . . for mixed DNA profiles where allele dropout is a likely possibility" when she stated, "the subject 'cannot be excluded as a possible contributor to this evidence sample.'" This statement was "incomplete and therefore 'extremely misleading'" because she "omit[ted] the fact that the subject also *cannot be included* as a possible contributor. . . ." (Emphasis

in original). He asserts that Dr. Word "discussed the problem with Miller's use of Combined Probability of Inclusion (CPI) statistics in her inclusion statements for the mixed DNA profiles in this case. . . ." She explained that CPI statistics are reserved for "DNA profiles where there is high confidence that the complete DNA profile for ALL contributors is observed and available for interpretation and comparison." She stated the CPI statistic is not suitable for "DNA profiles suspected of missing any alleles from any contributor" and that "most of the profiles in this case would not meet the criteria for use of the CPI statistic." She further reasoned that "many laboratories across the United States were using the CPI calculation incorrectly at the time of the DNA analysis in Appellant's case, and stated that the Scientific Working Group for DNA Analysis Methods recognized this when issuing its January 2010 interpretation guidelines."

He argues that "[a]lthough Dr. Word did not cite to a particular document in this section of the letter" showing laboratory standard operating procedures, she asserted that "[w]ith the noted exception of the Prince George's County Police Department laboratory, . . . I am not aware of any other laboratory anywhere that used or currently uses the misleading 'cannot be excluded' language in place of an inconclusive statement. . . ."

Appellant asserts that Dr. Word's letter was an attachment to his Disclosure of Expert and pursuant to Maryland Rule 4-263, Dr. Word was not required to include citations to any of her sources. He contends that Dr. Word's letter complied with Maryland Rule 4-263, which requires the defense to provide the State with "the expert's name and address, the subject matter on which the expert is expected to testify, the substance of the findings and the opinions to which the expert is expected to testify, and a summary of the

grounds for each opinion. . . ." Md. Rule 4-263(e)(2)(A).

He also maintains that Dr. Word addressed "the fact that the Baltimore Police Department laboratory did not have a standard in place at the time of the DNA analysis in this case for the determination of whether any given mixed DNA profile contained all alleles from all contributors—and, therefore, whether the mixture was suitable for interpretation and comparison." The lack of standards "led to the inappropriate use of the CPI statistic." He notes that Dr. Word called for a re-evaluation of the DNA evidence in this case performed with proper interpretation and comparison methods; and that such re-evaluation would result in important corrections to Miller's original conclusions. In sum, he maintains that Dr. Word (or another expert) should have been permitted to testify to discredit Miller's inaccurate and misleading DNA evidence.

The State argues the court properly exercised its discretion by excluding Dr.Word's testimony. The State contends that "Miller emphasized that 'cannot be excluded' was 'not an inclusion'" and she explained that it was a "gray area". In response to Appellant's Md. Rule 4-263 argument, the State asserts that "the post-conviction court did not [] exclude his witness for failure to comply with a discovery rule[,] [r]ather, the postconviction court did not find the substance of what was proffered by McGaney to be sufficient to support Dr. Word testifying."

Maryland Rule 5-702 provides:

> Expert testimony may be admitted in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making that determination, the court shall determine

> (1) whether the witness is qualified as an expert by knowledge, skill experience, training or education,
> (2) the appropriateness of the expert testimony on the particular subject, and
> (3) whether a sufficient factual basis exists to support the expert testimony.

"Under this rule, trial courts have 'wide latitude in deciding whether to qualify a witness as an expert or to admit or exclude particular expert testimony.'" *Alford*, 236 Md. App. at 71 (quoting *Massie v. State*, 349 Md. 834, 850-51 (1998)). In *Santiago v. State*, the Supreme Court of Maryland[1] stated that "'the admissibility of expert testimony is a matter largely within the discretion of the trial court, and its action in admitting or excluding such testimony will *seldom* constitute a ground for reversal.'" 458 Md. 140, 154 (2018) (emphasis in original) (internal citation omitted).

In the present case, following argument, the post-conviction court concluded:

> [It] could not find what standards were used by the doctor, what protocols were used by the doctor or what studies were used by the doctor . . . .[T]he doctor did not indicate what inappropriate protocols or studies were used by the expert in the trial . . . . As far as the standards, whatever they may be, it's not clear whether or not these were standards from 2008, 2010, 2020, or 2021. Neither does Dr. Word tell us exactly what was incorrect or wrong with the findings from the previous expert or from the findings, how [her] findings differ from that of the previous expert. What statistics were used? What part of the prior expert's findings were wrong, why were they wrong— I just could not find any of that. Nor was there anything to indicate that there had been a reevaluation of any part of the findings. It was basically an assumption that because certain words were used, certain implications and certain findings were automatic. There were no specific examples of the work of Dr. Miller given by Dr. Word to indicate that there was any deficiency or any appropriateness in her findings as well. . . .

Based on this record, we hold the court did not err in its factual findings, nor did the

[1] At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Appeals of Maryland to the Supreme Court of Maryland. The name change took effect on December 14, 2022.

court abuse its discretion in granting the motion in limine. In her letter, Dr. Word referred to information that is "well known" and "routine" practices but she did not provide the court with a factual basis to support her statements. She did not provide any guidelines, standards, or accepted practices as a basis for her expert opinion. Dr. Word also concluded:

> I was not provided with the DNA Analysis Report dated April 6, 2010 (as referenced in the trial court transcript) or any others that may have been issued after January 15, 2009; any of the laboratory case files or electropherogram data upon which the reported results and conclusions were based; any information regarding the collection, preservation and handling of the evidence items tested; any quality assurance checks, information regarding any controls performed by the laboratory to assess if contamination possibly occurred in this case or any other deviations from testing that occurred in this case; any information regarding quality issues that occurred in the laboratory during the time of testing in the case; or any information regarding what corrective actions the laboratory has put in place to retroactively review cases such as this where incorrect procedures and practices were in place in the laboratory for interpreting, comparing, and reporting DNA test and statistical results. I am, therefore, unable to make any additional statements or draw any conclusions regarding the accuracy of any of the exclusions or inclusions reported by the Baltimore Police Department at this time. All statements provided above are based on limited materials I had available for review in this case and prior knowledge regarding the Baltimore police Department laboratory from previous review of other cases.

As we see it, her conclusions were general in nature and lacked specificity, and the court simply did not find her opinion reliable.

McGaney also argues that the State's reliance on Miller's "inaccurate" and "misleading" statements violated his right to Due Process because the jury based their verdict on misinformation. The State counters that the DNA testing and testimony by Miller complied with then-existing standards, and Dr. Word's letter did not specify what standards and processes Miller used that were inaccurate.

The post-conviction court found that McGaney's rights were not violated because

Miller's testimony was not false or inaccurate. The court concluded that Appellant's expert, "Dr. Word focuses on assumptions, opinions, but not fact. . . . Dr. Word does not provide authorized specific examples of inaccurate statements, cited analysis or an evaluation, of the DNA evidence." The post-conviction court concluded that Dr. Word's letter did not substantiate Appellant's claims that Miller's testimony was inaccurate. The court stated, "Dr. Word did not give any specific example of the State's Expert's testimony that was incorrect or misleading."

As we see it, the scientific evidence provided by Miller was sufficiently reliable, Appellant had an opportunity to challenge that evidence and the jury was ultimately able to weigh it. As the Court stated in *Armstead v. State*, the testimony must be "so extremely unfair that its admission violates 'fundamental conceptions of justice.'" 342 Md. 38, 84 (1996) (internal citations omitted). Based on our holding that the court did not err, we also determine there was no due process violation.

Ineffective Assistance of Counsel

To prevail on an ineffective assistance of counsel claim, a petitioner must satisfy the two-prong test laid out in *Strickland v. Washington*, 466 U.S. 668 (1984). "Under *Strickland*, to establish ineffective assistance of counsel, a defendant must show that: (1) his attorney's performance was deficient; and (2) he was prejudiced as a result." *Newton v. State*, 455 Md. 341, 355 (2017) (citing *Strickland v. Washington*, 466 U.S. at 687).

"As to the first prong, the defendant must show that his 'counsel's representation fell below an objective standard of reasonableness, and that such action was not pursued

as a form of trial strategy.'" *Id.* (citing *Coleman v. State*, 434 Md. 320, 331 (2013)). In *Ramirez v. State*, the Supreme Court of Maryland held that:

> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. . . . [C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

464 Md. 532, 561 (2019) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)).

"To establish the second prong—prejudice—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.'" *Id.* "Generally, where a petitioner alleges ineffective assistance of counsel, 'the burden rests on' him or her to satisfy both the performance prong and the prejudice prong." *Ramirez*, 464 Md. at 562 (citing *United States v. Cronic*, 466 U.S. 648, 658 (1984)). However, "[i]n certain Sixth Amendment contexts, prejudice is presumed." *Strickland*, 466 U.S. at 692.

> [A] court should presume that trial counsel's performance prejudiced the petitioner only if: (1) the petitioner was actually denied the assistance of counsel; (2) the petitioner was constructively denied the assistance of counsel; or (3) the petitioner's counsel had an actual conflict of interest. Absent these three circumstances, the presumption of prejudice does not apply, and the petitioner must prove prejudice.

Ramirez, 464 Md. at 573.

In *Ramirez*, the petitioner claimed that "his trial counsel rendered ineffective assistance of counsel by failing to either move to strike Juror 27 for cause, . . . or use a peremptory challenge as to Juror 27." 464 Md. at 559. "During *voir dire*, the circuit court asked the prospective jurors whether they, their relatives, or their close friends had ever had experiences as victims of crime, defendants, or witnesses in criminal cases that would 'affect [their] ability to render a fair and impartial verdict[.]'" *Id.* at 567. Juror 27 stated that his apartment had been 'broken into' and that he believed it would affect his ability to render a fair and impartial verdict. *Id.*

"Ramirez's trial counsel did not move to strike Juror 27 for cause based on his response to the 'crime victim' question, but moved to strike Juror 25 for cause on the ground that his 'home was broken into' and his 'response as to whether it would affect them was, I believe it would.'" *Id.* "When trial counsel was given the opportunity to exercise a peremptory challenge as to Juror 27, she stated that Juror 27 was '[a]cceptable.'"

During his post-conviction hearing Ramirez claimed that:

> his trial counsel's performance was deficient because allowing the seating of a biased juror cannot be sound trial strategy. Ramirez asserts that the presumption of prejudice applies because his trial counsel caused structural error . . . . Ramirez argues that there was a significant possibility that the trial's outcome would have differed if Ramirez's trial counsel had peremptorily challenged Juror 27.

Maryland's Supreme Court held that Ramirez had proven deficient performance, but not prejudice. *Id.* at 566-67. The Court considered the "overwhelming evidence" introduced against Ramirez and held that Ramirez did not prove that but for his trial

counsel's deficiency the result of the proceeding would have been different. *Id.* at 578-80. The Court could not conclude that trial counsel's failure to move to strike or peremptorily challenge Juror 27 caused structural error that rendered Ramirez's trial fundamentally unfair. *Id.* at 573. Therefore, Ramirez did not prove prejudice and failed on his claim of ineffective assistance of counsel.

McGaney argues that his trial counsel provided ineffective assistance by failing to object to facts not in evidence. According to him, during closing argument, prosecutors overstated Miller's testimony and mischaracterized her conclusions by stating that "there was 'a match'" and "a match is a match". McGaney contends that his trial attorney should have objected to these inaccurate statements. He states:

> all of the DNA profiles in this case were complex mixtures with multiple contributors, and that Kelly Miller never stated, even for the profiles that she concluded 'included' Appellant, that any of the profiles she developed actually matched all 13 of his alleles—she found only 11 or 12 of 13 alleles. Thus, . . . for the prosecutor to say to the jury that Miller looked at all 13 of 13 alleles and found a perfect match was misleading.

The State counters that although McGaney's DNA "profile did not match at all 13 locations on some of the evidence," such as sample seven, he did match at all 13 loci on other evidence such as sample twenty, a green bandana. For sample seven, McGaney was "the only contributor to that sample. The chance of finding an unrelated individual in the population that would match at the remaining loci would be 1 in 5.38 trillion in the African American population." The State argues "[g]iven the statistics, Miller stated that she 'matched' the DNA profile to the known standard for McGaney. This alone supported the prosecutor's arguments concerning a 'match.'"

The post-conviction court held that even though McGaney's DNA profile did not match at all 13 loci for every piece of evidence, "the lack of 13 of 13 loci does not affect the identification as of the contributor Petitioner claims it does." When Miller was asked by counsel, "Now, because it's not 13 of 13, how does that affect the identification?" She answered, "It doesn't. It's still consistent, his DNA profile is still consistent and included in that mixture on that evidence sample." The court found that Miller further explained "why the DNA is a match" and analyst discretion, stating, "according to our protocol we'll consider an individual to be included in a mixture with at least nine loci naturally, but it is analyst discretion." The court held that "the State's remarks made during closing argument were consistent with the testimony provided by the expert witness during trial" and that McGaney's "[t]rial counsel had no meritorious objection to make that could have been successfully litigated on appeal."

We agree. The State relied on language used by its expert witness' testimony in its closing remarks and the State did not argue facts not in evidence. Given the lack of any available meritorious objection, Appellant's claim of ineffective assistance of counsel fails. We note further that the trial judge instructed the jury that "opening statements and closing arguments of the lawyers are not evidence."

Based on the foregoing reasons, we hold the court did not err or abuse its discretion.

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