Circuit Court for Baltimore City
Case No. 118303001

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2277

September Term, 2019

EUGENE A. JAMES

v.

STATE OF MARYLAND

Shaw Geter,
Gould,
Wilner, Alan M.
(Senior Judge, Specially Assigned),
JJ.

Opinion by Shaw Geter, J.

Filed: May 17, 2021

Eugene James, appellant, was convicted by a jury in the Circuit Court for Baltimore City of first-degree murder and use of a handgun in the commission of a crime of violence. The court sentenced appellant to life for the first-degree murder conviction and a ten-year consecutive sentence, with the first five years without the possibility of parole for the handgun offense. Appellant timely appealed and presents the following questions for our review:

1. Was Mr. James denied his right to Due Process by the state's failure to timely disclose *Brady* material and did the court err in not declaring a mistrial?[1]

2. Did the trial court err in denying a mistrial after the abusive and sustained outburst by Ms. Smith in the middle of the trial?

3. Did the trial court improperly limit Mr. James's cross-examination of Ms. Smith?

4. Was Mr. James denied the effective assistance of trial counsel who failed to object to the *voir dire* questions that improperly shifted the burden of determining bias directly to the juror?

For the reasons discussed below, we affirm.

BACKGROUND

At approximately 10:30 p.m. on September 15, 2018, as a result of complaints of a shooting, Officer Andrew Gillig responded to the 700 block of North Grantley Avenue. The officer found the victim, Kahlil Alston, lying on the ground, suffering from multiple gunshot wounds. Ms. Smith, the victim's girlfriend was also present. An ambulance

[1] *Brady v. Maryland*, 373 U.S. 83 (1983).

transported the victim to the hospital, but he unfortunately succumbed to his injuries. Ms. Smith was subsequently interviewed by police and identified appellant as the shooter.

Appellant was indicted and a jury trial was held on July 16–18, 2019, in the Circuit Court for Baltimore City. Prior to jury selection, the prosecutor informed the court of an issue with Ms. Smith, stating, "[t]he witness is under the custody of the Department of Juvenile Services ("DJS"), and it's been brought to my attention that the Public Defender representing her has requested a hearing before Magistrate Brown in Juvenile Court tomorrow at 9:15." The State indicated that he had made unsuccessful attempts to reach Ms. Davis, Ms. Smith's attorney. Following jury selection, Ms. Davis appeared before the court and while advising the court about Ms. Smith, she stated:

> I think the defense is entitled to information that I don't think I'm at liberty to share at this point. And I think that the Department of Juvenile Services gave information to the State's Attorney that they had no business disclosing under the statute. I think the State's Attorney needed to file to get that information, and it wasn't done. And I disclosed that to [DJS]. He agreed but what's done is now done, so there's no way to undo that.

According to her, the documents were "only to be shared in the State's Attorney's Office to prosecute her for something else not to—for the State's Attorney just to have it." She also notified the court that the magistrate ordered "Ms. Smith . . . not [to] be released from her placement without a hearing because of her mental and physical safety."

The judge conferred with the magistrate and decided to defer further action until the magistrate's hearing with Ms. Smith the next morning. Appellant's counsel requested the records be made available to him and the State made a Motion in Limine to prevent the defense from having access to the records.

The next day, prior to the commencement of trial, appellant's counsel moved for a mistrial, in order to investigate the issue regarding the information in the court and prosecutor's file, which the court denied, stating:

> All right, well, Mr. James this did come up yesterday and the amount of records are not that voluminous. They are certainly sensitive in nature and I anticipate that there will be an opportunity for [defense counsel] to be able to review those records prior to questioning the witness.
>
> So I think that there is a way to—First of all, there is no reason [defense counsel] should have known it, it was confidential information. Having found out that they were there he acted, I think, as promptly as possible to say, Judge, I need to see those records.
>
> I said, well, I need to see them first and see whether you an [sic] see them, and that's what is going to happen. I am going to look at the records, I am going to make a determination as to whether they are disclosable, they are confidential in nature.
>
> If I think that the parties can refer to them I will issue the proper ruling so that that can be done and I will certainly give [the defense attorney] an opportunity to review those as an officer of the court.
>
> So I think that would cure any issue that I think you are concerned about. It may not be the relief that you need, but I certainly am going to be patient and allow Mr. Brown to be able to adequately look at the records before he questions the witness, so I am going to deny that request.

The trial then proceeded with opening statements and during the lunch break, the court reviewed the documents in camera and made them available for review by counsel. When court was called into session, the court stated:

> I did review the documents, I did make a determination in terms of what I felt was relevant to this case and then I memorialized that in the form of an order, which is in the file, it's a protective order, with [sic] delineating each of the documents, records that I felt might have some significance, not that do, but they might have some significance, and that is contained in the, that's in the open court file. All right?

The court also ordered the attorneys to approach the bench prior to attempting to question Ms. Smith about any of the information contained in the file.

Ms. Smith was called as a witness for the prosecution and testified that on the night of the incident she and the victim were in an alley, "chilling [and] talking" along with several others, including appellant. She stated that appellant became "mad" and pushed Kahlil.

[STATE]:	What happened next?
MS. SMITH:	He pulled his gun out and shot [the victim] in his face.
[STATE]:	Do you recall how many times?
MS. SMITH:	No, I don't recall how many times, but I know he shot him in his face. The only thing I saw was like the spark, like I don't know. I seen the spark and then like [the victim] pushed me and then I fell like and I rolled under the car and then—Yes, when I looked up he was shooting [the victim]. He know he did. You know you did. You was wrong. You were wrong for that. He was only 18, you did not have to do that to him.
[STATE]:	Ms. Smith—
THE COURT:	Ms. Smith?
MS. SMITH:	You know that.
THE COURT:	Ms. Smith? Ms. Smith? Ms. Smith? Ms. Smith? Ms. Smith?
MS. SMITH:	You know that you was wrong for that for real. You ruined my f***ing life for real. I really hate you for real.

THE COURT: All Right.

(Simultaneous speaking.)

MS. SMITH: I hate you so much.

(Witness uncontrollably sobbing.)

THE COURT: Ladies and gentlemen, if you could just put your books on the chairs.

(Jury was excused from the courtroom – 3:33 p.m.)

MS. SMITH: He's so f***ing wrong. I hate him. For real. I really do. I can't believe (inaudible***3:33:25) wrong. No. No. No.

[MS. DAVIS]: Calm down.

MS. SMITH: No. No. No. Get off of me.

[MS. DAVIS]: Calm down.

MS. SMITH: Please. You all don't understand. You all don't understand. For real you all do not understand. He mean everything to me. He mean everything to me. He was all I had. He's gone now, he ain't never coming back.

THE COURT: Officer? Officer?

MS. SMITH: He ain't never coming back ever, ever again. I will never see him again ever. That shit is f***ed up for real.

(Off microphone comments.)

MS. SMITH: I don't even care. I don't care if I have to, I don't give a f*** no more. For real, I don't give a f***.

(Counsel approached the bench where the following ensued:)

THE COURT: No, I think she's okay there. I think—I want to take him out. Get him out of here.

MS. SMITH: He's never going to find me.

[MS. DAVIS]: Shh.

MS. SMITH: So it don't matter, he not going to—You all don't understand though, you all don't. He ruined—He did that s*** to my boyfriend for nothing. He was a little a** boy. [The victim] was a little a** boy.

For real, he did not deserve that s*** at all. You know he didn't. F***ing didn't do s*** to him. He's a f***ing a-hole for real. (Inaudible ***3:35:00) That's why they put me in jail for (inaudible ***3:35:03), b****, and if I had to b**** you gonna die.

[MS. DAVIS]: Stop. Stop. Stop. Stop.

THE COURT: Ladies and gentlemen, for just for a few minutes could you please just step out in the corridor, please.

[MS. DAVIS]: Stop. Stop.

MS. SMITH: I don't care. I don't care. He know he f***ing wrong. He know he f***ing wrong.

[DEFENSE COUNSEL]: Your Honor, can I step back?

THE COURT: Yes.

([DEFENSE COUNSEL] leaves the courtroom 3:35 p.m.)

MS. SMITH: I don't give a f***, he wrong.

THE COURT: I mean every—Well—

[MS. DAVIS]: She can't go anywhere because it's not safe for her to go anywhere.

FEMALE VOICE: Yes, okay. Okay.

FEMALE VOICE: Come on.

MS. SMITH: I'm mad.

[MS. DAVIS]: Look at me. I need you to get it all out so that we can finish so you can go, because—Look at me. Look at me. Look. [Your] plane and your drink are waiting for your [sic] right? We talked about this.

(Off microphone comment.)

MS. SMITH: No, you all don't understand, I swear.

[MS. DAVIS]: No, we do.

MS. SMITH: You all don't.

[MS. DAVIS]: We do.

MS. SMITH: That was really my best friend and he be gone forever. He never coming back. You all don't understand because if that was your boyfriend you wouldn't be standing here right here. See, I'm telling you that was really my best friend. He was all I had, all I had.

My father don't do s*** for me. Nobody do s*** for me, for real, what I'm talking about you all don't understand. You don't. You all don't. You all don't. You all probably think I'm crazy.

[MS. DAVIS]: No, I'm not. Who is looking at you like you're crazy. We're looking at you like we feel bad for you, not like you're crazy.

MS. SMITH: I'm sorry. I didn't mean to get mad because I just got made [sic] because the defendant was, yes, like he deserved it.

(Simultaneous speaking.)

MS. SMITH: Like he just sitting there like, you know, like nothing ain't happening.

[MS. DAVIS]: Listen to me, DJS couldn't pay for the amount of therapy it was going to take to get all that out of you right now. Now it's out. You needed to get it out, it's out. You needed that for you. No one thinks you're crazy, everybody understands.

MS. SMITH: He's just sitting there smiling like nothing happened.

[MS. DAVIS]: He's sitting there smiling because he doesn't want the jury to (inaudible***3:36:51), so you don't have to look at him anywhere.

During a discussion at the bench, appellant's counsel requested a mistrial because of the outbursts, which the court denied. When the jury returned to the courtroom, the judge instructed: "[l]adies and gentlemen, any statements that Ms. Smith made directly to the [appellant] you are to disregard. Those were not responsive to [the State's] question. So it's only the ones that were made directly to [appellant]."

Counsel proceeded to cross-examine Ms. Smith, and then requested to approach the bench, stating "[a]t this point I think her mental or psychological or mental diagnosis is relevant based on her actions and her statements on the stand. In addition, Your Honor, I think I should be able to go to her prior bad act . . . ." The defense also requested additional time to consult with a "medical expert and stuff" because he did not understand the record. The court ultimately ruled that the defense could only question Ms. Smith about her hallucinations.

Following the close of all evidence, instructions, argument, and deliberations, appellant was convicted of first-degree murder and use of a handgun in the commission of a crime of violence. He was sentenced to life in prison for the first charge and a consecutive ten years sentence for the handgun charge, the first five years to be served without the possibility of parole.

DISCUSSION

"Appellate review of a decision to deny a mistrial is conducted 'under the abuse of discretion standard.'" *Vaise v. State*, 246 Md. App. 188, 239, *cert. denied*, 471 Md. 86 (2020) (quoting *Nash v. State*, 439 Md. 53, 66–67 (2014)). The court "declaring a mistrial is an extreme remedy not to be ordered lightly." *Nash*, 439 Md. at 69. "The determining factor as to whether a mistrial is necessary is whether 'the prejudice to the defendant was so substantial that he was deprived of a fair trial.'" *Kosh v. State*, 382 Md. 218, 226 (2004) (quoting *Kosmas v. State*, 316 Md. 587, 594–95 (1989)). When determining if a defendant has been prejudiced, the court "first determines whether the prejudice can be cured by instruction. Such an instruction must be timely, accurate, and effective. Unless the curative effect of the instruction ameliorates the prejudice to the defendant, the trial judge must grant the motion for a mistrial." *Id.* (internal citation and quotation omitted).

I. The trial court did not err in denying the motion for a mistrial based on allegations that the state committed a *Brady* violation.

In *Brady*, the Supreme Court held "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the

prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). In order for a *Brady* violation to occur:

> The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.

Yearby v. State, 414 Md. 708, 717 (2010) (quoting *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999)). "The failure of the prosecutor to disclose favorable, material evidence violates due process without regard to the good faith or bad faith of the prosecutor." *Ware v. State*, 348 Md. 19, 38 (1997). For evidence to be material, there must be "'a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome.'" *Byrd v. State*, 471 Md. 359, 375 (2020) (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)). "[T]here is never a real '*Brady* violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." *Williams v. State*, 416 Md. 670, 692 (2010). "[T]he burdens of production and persuasion regarding a *Brady* violation fall on the defendant." *Yearby*, 414 Md. at 720.

We observe, initially, that the prosecutor received Ms. Smith's case file from another prosecutor on the morning of the first day of trial and there is no evidence that the information was being withheld.[2] The record makes clear that the circumstances were fluid

[2] On the first day of trial when discussing the volume of the file the State received from the Department of Juvenile Services the state said, "this is what they gave me from juvenile today."

and that the court took immediate action to resolve the situation. As a result, one of the elements necessary for a *Brady* violation is not established as there was no willful or inadvertent suppression by the State.

Appellant, nevertheless, argues when "there is no *per se* violation . . . the relevant question is whether the defendant was prejudiced by a late or untimely disclosure," and cites *United States v. Neal*, 27 F.3d 1035, 1050 (5th Cir.1994); *United States v. McKinney*,758 F.2d 1036, 1050 (5th Cir.1985); and *United States v. Smith Grading & Paving, Inc.*, 760 F.2d 527, 532 (4th Cir.1985). Appellant asserts he was prejudiced by the State's actions because his attorney did not fully understand the documents and needed additional time to have an expert review them. The State argues that any information about Ms. Smith's diagnosis was not relevant to her ability to testify credibly and thus, the documents were not material in a Brady context. We agree.

The judge, upon learning about the potential issue, promptly obtained both the court's and the prosecutor's records, analyzed them and made the records available to counsel. At the following court session, the judge stated,

> I did make a determination in terms of what I felt was relevant to this case and then I memorialized that in the form of an order, which is in the file . . . if there is any mention that either counsel wish to make which is rooted in those records you need to request to approach and then I will make a determination as to whether you can pursue that line of questioning . . .

Defense counsel did not relay to the court that he needed additional time to review the documents, nor did he request a continuance or other relief. Ms. Smith was then called as a State's witness.

During her cross-examination, defense counsel asked to approach the bench, and

requested permission to question Smith about a prior bipolar diagnosis. He also indicated that he had not read the entire file. "The report is showing, the report has some things I don't really understand, but in going through it as quickly as possible that sometimes her speech is excessive and loud and her thoughts are scattered and disconnected." The court chronicled the disclosure timeframe and stated, "I just needed to address the fact that you said you didn't have enough time and I can tell you we broke our necks to get that ready." Defense counsel stated, "enough time for me would be like three weeks so I could talk to a medical expert and stuff . . . I mean enough time would be like a month to look at it really." The court responded that the diagnosis was not relevant, stating,

> But I don't see what bipolar has to do with the credibility of a witness, I mean I don't . . . She certainly has issues . . . I mean . . . the jury can see she has issues . . . I mean if it has to do with her observation . . . then I think that's fair game, but you know, I can't just say, okay, you are depressive, aren't you. I mean it doesn't really get to the issue concerning the ability to observe facts and what occurred at that time.

Appellant's position is that he was prejudiced by the late disclosure. In our view, the information appellant claims he needed additional time to evaluate was not "material evidence" and he has not established that there was "a reasonable probability that, had the evidence been disclosed to the defense [earlier], the result[s] of the proceeding would have been different." *Bagley*, 473 U.S. at 682. After reviewing the documents, the judge noted that the record was not "voluminous" and that he had read its contents and summarized them in less than one hour. The judge further, did not preclude all questions about information found in the records, but rather limited the inquiry. He did allow questions about a reported history of hallucinations because he found that it could be relevant to her

credibility. In our examination of the record, we found no information about the date of the bipolar diagnosis or attendant treatment, rather there was a statement that Smith had a prior diagnosis and another section that indicated the diagnosis was self-reported. Appellant has pointed to no areas in the report from which he might have found material evidence. As such, we hold appellant's assertion of prejudice is speculative and appellant has not established that there was a *Brady* violation.

We also observe that appellant requested a mistrial prior to any review of the documents, and he did not renew his motion for a mistrial after examining them. Rather, he sought leave to "question Ms. Smith about her bipolar diagnosis." As previously stated, the "extreme remedy" of a mistrial is "not to be ordered lightly." Here the court acted well within its discretion in denying the motion for a mistrial made prior to viewing and evaluating the documents to determine whether they were, in fact, *Brady* material and whether appellant had been prejudiced. *Nash*, 439 Md. at 69.

II. The trial court did not abuse its discretion in denying the motion for a mistrial based on Ms. Smith's outburst.

Appellant argues that Ms. Smith's outbursts lasted "for over 20 minutes, [were] abusive and in the jury's presence." Appellant contends that even though the court dismissed the jury, the jury heard Ms. Smith's comments and the curative instruction given by the court "was too limited." According to appellant, the court should have specifically told the jury to ignore all the statements yelled including the following statements: "he's never going to find me" and "that's why they put me in jail." He contends the statement made by Ms. Davis, "[s]he can't go anywhere because it's not safe for her to go anywhere"

was extraordinarily prejudicial.

"'Emotional responses in a courtroom are not unusual, especially in criminal trials, and manifestly the defendant is not entitled to a mistrial every time someone becomes upset in the course of the trial.'" *Malik v. State*, 152 Md. App. 305, 329 (2003) (quoting *Hunt v. State*, 312 Md. 494, 501 (1988)). "[T]he trial judge cannot, at times, control the emotions of witnesses, and every emotional outburst of a witness does not entitle an accused to a mistrial." *Morris v. State*, 192 Md. App. 1, 29–30 (2010) (quoting *Clarke v. State*, 238 Md. 11, 22 (1965)).

It is undisputed that Ms. Smith's testimony was emotional. She was a direct eyewitness to the murder of her boyfriend, and she recounted for the jury the details of the shooting. She began speaking directly to appellant and according to the transcript, Smith began "uncontrollably sobbing." At that point, the court excused the jury from the courtroom. Ms. Smith continued to address appellant and was eventually consoled by her attorney, Ms. Davis.

Appellant argues that the outbursts deprived him of a fair trial. He claims the sudden statements were in the jury's presence and also occurred approximately two minutes after the jury was excused. We agree that Ms. Smith did, in fact, make several emotional statements in the jury's presence, including: "You know you did it . . .," "You ruined my . . . life for real. I really hate you I hate you for real." However, nothing in the record reflects that the jury heard or was in a position to hear statements made by Ms. Smith after they were excused. On review, our responsibility is to rely solely on the record, and we cannot speculate as to what may have transpired. *Hunt*, 312 Md. at 501–02; *see also Bart v. Bart*,

182 Md. 477, 481 (1943). A "trial judge [has a] unique role and distinct advantage in evaluating questions of prejudice to a criminal defendant." *Nash*, 439 Md. at 87. "'The [trial] judge is physically on the scene, able to observe matters not usually reflected in a cold record. The judge is able to ascertain the demeanor of witnesses and to note the reaction of the jurors and counsel to inadmissible matters.'" *Id.* (quoting *State v. Hawkins*, 326 Md. 270, 278 (1992)). We hold the judge's instructions to disregard "any statements that Ms. Smith made directly to the [appellant]. . ." were a proper exercise of its discretion. The record is simply devoid of any indication that the jury was otherwise impacted by the outbursts and a "jury is presumed to follow curative instructions." *Cantine v. State*, 160 Md. App. 391, 409 (2004).

III. The trial court did not improperly limit cross-examination of Ms. Smith.

Appellant argues the court improperly limited his attorney's ability to cross-examine Ms. Smith when he was denied the opportunity to question her about her mental disorder diagnosis. He asserts that her diagnosis "results in scattered and disconnected thinking." The State counters the court did not abuse its discretion. The State argues appellant did not establish how Ms. Smith's diagnosis interfered with her ability to recall the murder she witnessed. We agree with the State.

"Trial judges are typically afforded broad discretion in the conduct of trials in such areas as the reception of evidence" and, as a result, "we normally extend the trial court great deference in determining the admissibility of evidence and will reverse only if the court abused its discretion." *Vielot v. State*, 225 Md. App. 492, 500 (2015) (internal citation and quotations omitted). "A witness generally may be cross-examined on any matter

relevant to the issues, and the witness's credibility is always relevant." *Reese v. State*, 54 Md. App. 281, 286 (1983).

Appellant argues that he should have been able to cross-examine Ms. Smith about her mental diagnosis and relies on *Reese v. State* and *Eiler v. State*, 63 Md. App. 439 (1985). In *Reese*, we found error in the trial court's limitation of questions about a witness's mental state. 54 Md. App. at 288–89. The witness in *Reese*, suffered from a mental illness that was proven to affect his "contact with reality as well as his ability 'to recollect issues in any kind of detail.'" *Id.* at 288. In *Eiler*, we held the trial court erred when it did not allow the witness's doctor, Dr. Spodak, to testify as to the "psychological diagnosis and the dosage and type of medication prescribed for [the witness]." *Eiler*, 63 Md. App. at 444, 50. We reasoned the following:

> As in *Reese*, the court had before it evidence, by way of testimony and proffer, that a key State's witness had a psychiatric history and a current mental condition which required her to take two medications prescribed by psychiatrists, whom she saw once a week. In addition, it had before it the proffer that the witness, while detained in the County Detention Center shortly after the murder, had been found by psychiatrists to be suffering from psychosis, schizophrenia, paranoia, and to be suicidal. Further, the court was advised that Dr. Spodak would define, in detail, what psychosis means and would describe the conditions for the treatment of which Mellaril is prescribed. In addition to all of the foregoing, [the witness'] testimony was replete with instances of non-recall. On this record, we think it patent that inquiry was likely to disclose defects in relevant factors of credibility.

Id. at 450. In *Testerman v. State*, we found "there was no abuse of discretion" when the court refused to allow cross-examination regarding the victim's medical history. 61 Md. App. 257, 268 (1985). We reasoned that although the record revealed that the victim suffered from schizophrenia, "no further medical explanation was ever solicited. There

was no evidence to show that this type of mental disorder, schizophrenia, was one that would affect the victim's credibility." *Id.*

Unlike the witnesses in *Reese* and *Elier*, but like *Testerman*, there is nothing in the record here to suggest that Ms. Smith's prior diagnosis affected her ability to recall the events she witnessed. Appellant argues that because Ms. Smith's record mentioned her thinking can be "scattered and disconnected," he should have been able to cross-examine her about her prior diagnosis. The court file, however, contained no information that the diagnosis was connected to Ms. Smith's inability to recall incidents, nothing regarding treatment, nor was there a detailed description of the diagnosis. The court did allow counsel to question her about hallucinations she may have experienced in the past, even though the judge noted, "[o]ne of the reports says that there is no evidence of hallucinations but then one report says that she self-reported that she had hallucinations . . ." Counsel also questioned her about her drug use. As there was no information to support a claim that a prior disorder "affected her credibility," in particular, her ability to recall the murder she witnessed, the court properly limited appellant's ability to cross-examine Ms. Smith on her about the prior diagnosis.

IV. Appellant's claim of ineffective counsel is a post-conviction matter.

Appellant argues that he was denied effective assistance of counsel during trial because his counsel did not object to the following two *voir dire* questions:

> Does any member of the panel hold any beliefs related to race, sex, color, religion, national origin or other personal attributes which would or might affect your ability to render a fair and impartial verdict based on the evidence and the law?

> If there's something that I didn't ask you about that didn't even come up and you think you need to bring it to our attention because you think that we might think that it would affect your ability to sit as a fair and impartial juror and it's not anything I asked about, then please stand at this time.

Appellant maintains these questions violated Maryland law. The State counters that this issue is not appropriate for direct appeal. We agree.

It is well established that "[p]ost-conviction proceedings are preferred with respect to ineffective assistance of counsel claims." *Mosley v. State*, 378 Md. 548, 560 (2003). The reason is "because the trial record rarely reveals why counsel acted or omitted to act, and such proceedings allow for fact-finding and the introduction of testimony and evidence directly related to allegations of the counsel's ineffectiveness." *Id.* "[T]he adversarial process found in a post-conviction proceeding generally is the preferable method in order to evaluate counsel's performance, as it reveals facts, evidence, and testimony that may be unavailable to an appellate court using only the original trial record." *Id.* at 562. However, "where the trial record reveals counsel's ineffectiveness to be 'so blatant and egregious' then review on appeal is appropriate." *Id.* "[W]here the critical facts are not in dispute and the record is sufficiently developed to permit a fair evaluation of the claim, there is no need for a collateral fact-finding proceeding, and review on direct appeal may be appropriate and desirable." *In re Parris W.*, 363 Md. 717, 726 (2001).

The Strickland analysis regarding ineffective assistance of counsel requires that appellant show "(1) that his or her counsel's performance was deficient, and (2) that he or she suffered prejudice because of the deficient performance." *Bailey v. State*, 464 Md. 685, 703 (2019); *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "To prove deficient

performance, the defendant must identify acts or omissions of counsel that were not the result of reasonable professional judgment." *In re Parris W.*, 363 Md. at 725. Judicial review of a counsel's trial performance is scrutinized under a "highly deferential, and there is a strong (but rebuttable) presumption that counsel rendered reasonable assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* "In order to rise to the level of ineffective assistance, counsel's actions must not be the result of trial strategy." *Bailey*, 464 Md. at 703.

Here, we cannot glean from the record whether the lack of objection was an intentional or strategic decision as opposed to deficient performance or a violation of "reasonable professional judgment." *In re Parris W.*, 363 Md. at 725; *Bailey*, 464 Md. at 703. As a result, this issue is not appropriate for review on direct appeal.

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