Circuit Court for Baltimore City
Case Nos. 106220022-23

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2342

September Term, 2019

STATE OF MARYLAND

v.

THOMAS TAYLOR

Berger,
Arthur,
Gould,

JJ.

Opinion by Berger, J.

Filed: November 23, 2020

In 2008, Thomas Taylor, appellee, was convicted by a jury sitting in the Circuit Court for Baltimore City of crimes related to a shooting outside a convenience store.[1] Nine years later, in 2019, the circuit court granted appellee's motion for post-conviction relief and awarded him a new trial. The State filed an application for leave to appeal, which we granted and transferred the case to our appellate docket. The State raises one question on appeal, which we have slightly rephrased:

> Whether the post-conviction court erred in ruling that appellee's trial counsel was ineffective for failing to object to the State prosecutor's remark in rebuttal closing argument because it lowered the burden of proof and prejudiced appellee.

For the reasons below, we agree that the post-conviction court erred and shall vacate the post-conviction court's order.

I. TRIAL FACTS

Around 2:30 p.m. on March 1, 2006, three men were shot near a convenience store located on a street corner in Northwest Baltimore. Joseph Miller, Jr. was killed and Donyel Morris and Antoine Randall[2] were injured. As to a motive for the shooting, the State introduced evidence that in the weeks before the shooting, someone had "tagged" the wall

[1] Appellee was convicted of first-degree murder; attempted second-degree murder; first-degree assault; and two counts each of use of a handgun in the commission of a felony or a crime of violence and wearing, carrying, or transporting a handgun. Appellee was sentenced to life imprisonment for murder; a concurrent 30 years for attempted murder; a consecutive 20 years and a concurrent 20 years for his use of a handgun convictions. His remaining convictions were merged for sentencing purposes. We affirmed appellee's convictions on direct appeal. *See Taylor v. State*, No. 466, Sept. Term, 2008 (Md. App. September 22, 2009), *cert. denied*, 412 Md. 496 (2010).

[2] For clarity, we shall refer to Antoine Randall and his sister, Shauntae Randall, by their first names.

of the store in red spray paint with the words, "Blood," "Krip," "kill," "Shaggy," and "Gizzy." Appellee was known as Shaggy, and his friend Brandon Robertson was known as Gizzy. Various witnesses testified that the tagging marked the corner as territory of the Bloods gang; that appellee frequently wore red to signal his affiliation with that gang; and that appellee and Robertson sold drugs on the corner, which was known as an open-air drug market. The State also introduced evidence that Miller was unhappy with the tagging and the gang's increased activity on the block, and that a few hours before Miller was killed, Miller told his father that he and appellee were having a "problem."

Three main witnesses testified for the State. Grace Green was an eyewitness to the shooting. She testified that when she and Miller emerged from the convenience store just before the shooting, she saw Robertson on the corner arguing with Morris and Antoine, with the latter saying that the gang-related graffiti had to stop. Miller went over to calm the men down, and Robertson left. Appellee then emerged from behind some hedges wearing dark clothing and a red bandana, and he began shooting at the men. Green made a statement at the police station the day of the shooting and three months later, each time identifying appellee as the shooter. Green testified that she had known the victims, appellee, and Robertson for years because they "hung out in the neighborhood together."

Shauntae Randall testified that about a half an hour after the shooting, her sister called her and told her that their brother Antoine, as well as Morris and Miller had been shot. She testified that she is the mother of appellee's three children, and that she, appellee, and the victims had grown up together. She had ended her relationship with appellee in

2003 after their twins were born, but she and appellee remained friends, speaking several times a week.

Shortly after the phone call with her sister, Shauntae saw Antoine, their brother, at their mother's house where he yelled, "[Y]our man shot my boy." Two days later she met with appellee, and he told her about the shooting. Appellee explained that a few hours before the shooting, he and Miller had argued about the graffiti on the wall of the convenience store, and during the argument, he felt disrespected by Miller. Appellee told her that after the argument, he had gone home, changed into dark clothing, and returned to the corner where he shot Miller, after which he accidentally dropped the gun, picked it up, and ran off. Appellee told her that he intended to shoot Miller but not Antoine or Morris. She gave a statement to the police a few days after the shooting consistent with her trial testimony.

Barry Johnson, a retired Baltimore City Police Officer, testified that while in his front yard, he saw a young black man wearing dark clothing shoot at a group of men standing on the corner. The shooter at one point dropped his gun and then ran by him. Johnson was unable to identify the shooter, but he testified that the shooter's skin complexion and hair style matched appellee's at trial.

About six weeks after the shooting, the police interviewed Morris, one of the victims. He told the police that after the shooting, appellee sent him an apology, telling him that he was not meant to be shot.

Appellee was the only witness to testify for the defense. Appellee testified that he was not the shooter but had been running errands with a friend at the time of the shooting.

He denied having a "problem" with Miller or talking with Shauntae about the shooting. He admitted that he was friends with Shauntae and Green and he could think of no reason why they would say he was the shooter. He had prior convictions for possession with intent to distribute drugs, unauthorized use of an automobile, and malicious destruction of property. Appellee was subsequently convicted and sentenced as stated above.

Ten years after his conviction, appellee filed a motion for post-conviction relief, raising 11 alleged instances of ineffective assistance of counsel, including that his trial counsel failed to object to a statement by the prosecutor during rebuttal closing argument that, according to appellee, trivialized the concept of reasonable doubt and prejudiced him. During rebuttal closing argument, the State prosecutor had told the jury, without objection:

> [B]eyond a reasonable doubt is proof that would convince you of the facts to the extent that you would be willing to act on that belief without hesitation. It's not any magical standard. It's the kind of proof that you need in your decision making in which car to buy, what neighborhood to live in, where to send your children to school, whether to buy the flat screen TV with the tax refund check or save it for a rainy day.

A hearing on appellee's post-conviction motion was held, at which only he and his former trial counsel testified. His trial counsel testified she had been practicing law since 1986, and up to 80% of her practice over the years has been in criminal law. She also testified that her case file on appellee had been destroyed as a result of a fire in the basement of her office building. Trial counsel was never questioned about her failure to object during the State's rebuttal closing argument, but instead, the parties focused on trial counsel's failure to cross-examine Johnson about his 911 call. In that context, the following was elicited:

> [TRIAL COUNSEL]: I have to tell you that during the trial, [appellee] was what I call a yammerer.
>
> [POST-CONVICTION COUNSEL]: A yammerer?
>
> [TRIAL COUNSEL]: He continually talked in my ear. In fact, I came back from lunch one day and the court clerk was laughing, and she said; we've been laughing all over lunch, because did you hear the south [sic] come out of [trial counsel's] mouth when she said will you just hush, to the Defendant. So it could be because he over talked, was over talking the testimony, that I did not hear Mr. Johnson[']s trial testimony] that he saw a young man with a gun in his hand. He did -- I do remember that he saw a young man running with a gun in his hand.

When appellee took the stand, he likewise was never questioned about the State's rebuttal closing remark. During the parties' arguments to the post-conviction court, appellee focused on the 911 call and made no argument about the State prosecutor's rebuttal closing remark.

The post-conviction court issued a written opinion addressing all of appellee's 11 ineffective assistance of claims, concluding that only his argument about his trial counsel's failure to object during rebuttal closing argument merited a new trial. The court found the State's remark "an improper explanation of the standard of proof beyond a reasonable doubt" under *Joyner-Pitts v. State*, 101 Md. App. 429 (1994), and that the error was "severe" and "likely" to have confused the jury. The court believed the error prejudiced appellee, because, even though there was "compelling eyewitness testimony" against appellee, there was no physical evidence against him. Given the erroneous reasonable doubt remark by the State prosecutor, the centrality of the reasonable doubt standard in criminal cases, and the lack of physical evidence against appellee, the post-conviction court

concluded that the trial counsel's actions in not objecting to the reasonable doubt remark by the State fell below an objective standard of reasonable performance and prejudiced appellee.

II. DISCUSSION

The State argues the post-conviction court erred in three ways when it concluded that trial counsel was constitutionally ineffective. First, the post-conviction court's implicit finding that trial counsel had heard the State's remark on reasonable doubt was clearly erroneous, given that the State elicited evidence that appellee's trial counsel was distracted by his talking during trial. Second, the post-conviction court erred in finding trial counsel's performance deficient when she failed to object to the State prosecutor's remark because the remark did not lower the reasonable doubt standard. Third, the post-conviction court erred in finding that trial counsel's failure to object to the State's remark prejudiced appellee. Appellee addresses each of the State's arguments, arguing that the post-conviction court did not err in finding that his trial counsel was constitutionally ineffective.[3]

[3] Appellee also baldly suggests in his appellate brief that the State's use of the traditional phrase "without hesitation" instead of the now standard "without reservation" in its rebuttal closing argument on reasonable doubt was improper. Although appellee did not raise this argument in his post-conviction petition nor make this argument at the post-conviction hearing, the post-conviction court noted in its written order the State's use of the "without hesitation" language, observing that the "without hesitation" phrase is generally disfavored but not prejudicial per se. *See Wills v. State*, 329 Md. 370, 383-84 (1993) (explaining that in 1991 the Committee replaced the phrase "without hesitation" in Maryland Pattern Jury Instruction - Cr. 2:02 on reasonable doubt with the phrase "without reservation" because the hesitation phrase has an immediacy quality that might confuse the jury as to their responsibilities). Because appellant's without hesitation argument was not

A. Standard of review

"The review of a post[-]conviction court's findings regarding ineffective assistance of counsel is a mixed question of law and fact." *Newton v. State*, 455 Md. 341, 351 (2017), *cert. denied*, ____ U.S. ____, 138 S.Ct. 665 (2018) (citation omitted). An appellate court will not disturb the factual findings of a post-conviction court, unless those findings are clearly erroneous. *Arrington v. State*, 411 Md. 524, 551 (2009) (citation omitted). We review a post-conviction court's conclusions of law, including its conclusion as to whether the petitioner's counsel was ineffective, without deference, making an independent determination of the relevant law and its application to the facts. *Ramirez v. State*, 464 Md. 532, 560 (2019) (citation omitted), *cert. denied*, ____ U.S. ____, 140 S.Ct. 1134 (2020).

B. Ineffective assistance of counsel law

The Sixth Amendment to the U.S. Constitution, made applicable to the States through the Fourteenth Amendment, grants criminal defendants the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685 (1984). In *Strickland*, the Supreme Court set out a two-prong test for reviewing ineffective assistance of counsel claims. *Id*. at 687. The first prong is known as "the performance prong[,]" and the second prong is known as "the prejudice prong[.]" *Newton*, 455 Md. at 356 (citation omitted). A post-conviction petitioner bears the burden of proving both prongs. *Id*.

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brought before the post-conviction court, and the court made only a passing reference to the phrase in its order; because the phrase was not the basis on which the court granted appellee a new trial for ineffective assistance of counsel; and because appellee makes no argument on appeal linking the phrase to his trial counsel's performance or whether he was prejudiced, we shall not address this argument.

As to the first prong, the petitioner must show that counsel's performance was so deficient that counsel was not functioning as the "'counsel' guaranteed [ ] by the Sixth Amendment." *Strickland*, 466 U.S. at 687. Specifically, the petitioner "must show that counsel's representation fell below an objective standard of reasonableness . . . under prevailing professional norms." *Id*. at 688. The Supreme Court has explained:

> 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.

Id. at 689 (quotation marks and citations omitted). The Court added: "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id*. at 690. If counsel's acts "constituted reasonable 'trial strategy' or 'trial tactic,' counsel's performance cannot be deemed 'ineffective.'" *Barber v. State*, 231 Md. App. 490, 515 (2017) (quoting *Oken v. State*, 343 Md. 256, 283 (1996)).

As to the second prong, to make a successful ineffective assistance of counsel claim, the petitioner must also show that counsel's deficient performance prejudiced his defense. *Id*. at 687. This requires a showing "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." *Bailey v. State*, 464 Md. 685, 703 (2019) (quotation marks and citations omitted). The Court of Appeals has explained: "We have interpreted *reasonable probability* to mean there was a substantial or significant possibility that the verdict . . . would have been affected." *State v. Syed*, 463 Md. 60, 86-87 (quotation marks and citation omitted), *cert. denied*, ____ U.S. ____, 140 S.Ct. 562 (2019). In *Strickland*, the Supreme Court explained how to assess prejudice:

> [A] court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the [petitioner] has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.

Strickland, 466 U.S. at 695-96. The "reasonable probability" standard is less demanding than proof by a preponderance of the evidence but requires more than merely showing "that the errors had some conceivable effect on the outcome of the proceeding." *Id*. at 693-94. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Coleman v. State*, 434 Md. 320, 331 (2013) (quotation marks and citation omitted).

C. Closing argument and reasonable doubt law

"[A]ttorneys are afforded great leeway in presenting closing arguments to the jury." *Degren v. State*, 352 Md. 400, 429 (1999). "Generally, counsel has the right to make any comment or argument that is warranted by the evidence proved or inference therefrom" and, in doing so, to "indulge in oratorical conceit or flourish[.]" *Wilhelm v. State*, 272 Md. 404, 412-13 (1974) (citations omitted). Nevertheless, the scope of permissible argument "is not boundless[.]" *Clarke v. State*, 97 Md. App. 425, 431 (1993).

Reasonable doubt is an evidentiary standard that is the cornerstone of a fair criminal trial.[4] *Ruffin v. State*, 394 Md. 355, 363 (2006) (observing that the "reasonable doubt standard of proof is an essential component in every criminal proceeding"). Generally, "arguments of counsel are required to be confined to the issues in the cases on trial, the evidence and fair and reasonable deductions therefrom, and to arguments of opposing counsel[.]" *Lawson v. State*, 389 Md. 570, 591 (2005) (quotation marks and citations omitted). "In commenting on the State's burden of proof, counsel's closing argument must not undermine the judicially approved pattern definition of reasonable doubt." *Anderson v. State*, 227 Md. App. 584, 590 (2016). "'[W]here there is no dispute as to the law, counsel will not be permitted to argue law even where the argument is 'consistent' with the court's instructions." *Tetso v. State*, 205 Md. App. 334, 410 (quoting *White v. State*, 66 Md. App. 100, 118 (1986)), *cert. denied*, 428 Md. 545 (2012). The rationale for this rule is that

[4] The Due Process Clause of the Fourteenth Amendment to the United States Constitution guarantees that a criminal defendant's conviction can be had only upon proof beyond a reasonable doubt. *Wills v. State*, 329 Md. 370, 374 (1993) (citing *In re Winship*, 397 U.S. 358, 361-64 (1970)).

counsel are provided an opportunity to shape the content of the jury instructions, so to "allow counsel to embellish the trial court's instructions is fraught with the danger that the trial judge's binding instructions will be manipulated by counsel, resulting in the jury applying law different than that given by the trial court." *White*, 66 Md. App. at 118.

Joyner-Pitts, *supra*, was a direct appeal case in which the *trial court*'s jury instruction on reasonable doubt was a "rambling" affair that "aspire[d] to explain too much or insert[ ] too many illustrations[.]" 101 Md. App. at 444. The trial court compared the reasonable doubt standard, among other things, to the decision to purchase consumer goods and the decision to marry. In addition to the considerable length of the trial court's reasonable doubt instruction, 21 paragraphs in total of which at least nine paragraphs analogized the reasonable doubt standard to life within a marriage, the instruction's tone was flippant. *Id*. at 437-40. The trial court had instructed the jury: "Let's be honest about it. If nobody got married until they were convinced beyond all doubt we would all be single. Why? Because we are human beings. We always have that nagging reticence in making important decisions." *Id.* at 444-45 (emphasis removed). We reversed, faulting the trial court's efforts for not giving the "without reservation" language or even the disfavored "without hesitation" description, the rambling, "home-spun" nature of reasonable doubt instruction, and the court's failure to distinguish "nagging reticence" from "an actual substantial doubt[.]" *Id*. at 437, 444-45.

In *Carrero-Vasquez v. State*, 210 Md. App. 504, 510 (2013), another direct appeal case, the State prosecutor in rebuttal closing told the jurors they should convict if their "gut says I think he's guilty[.]" We held that the remark was improper because it "plainly

reduces proof 'beyond a reasonable doubt' to a 'gut' feeling." *Id*. at 511. After applying a harmless error analysis, we reversed. *Id*. at 512-15. In *Rheubottom v. State*, 99 Md. App. 335, 339, *cert. denied*, 335 Md. 454 (1994), the State prosecutor argued to the jury, over objection by the defense, that in order to have reasonable doubt "you will need to articulate and be able to write down on a piece of paper why and what your doubt is, if you've got one, and if you can't do that, specifically, then there's not a reasonable doubt." The defense requested a curative instruction, which the court denied. *Id.* After applying a harmless error analysis, we also reversed.

D. Deficient performance

We turn to the State's first argument, that the post-conviction court erred in concluding that trial counsel's actions were deficient because it was based upon an erroneous implicit finding that trial counsel had heard the State's rebuttal closing argument. The State concedes that "ordinarily, there is no reason for a court to determine whether counsel heard the evidence that he or she failed to object to that forms the basis for a defendant's ineffective assistance of counsel claim[,]" but the State nonetheless argues that the post-conviction court made a clearly erroneous finding of fact when it implicitly found that trial counsel heard the State's remarks in rebuttal closing argument, even though the court heard testimony that appellee was a "yammerer."

We agree with appellee's deductive reasoning, drawn from the events at trial and trial counsel's testimony at the post-conviction hearing, that trial counsel advised appellee to stop talking during the testimony of Johnson, the retired police officer, which occurred before the lunch break on the second day of trial. At the post-conviction hearing, trial

counsel testified that she immediately remedied the problem by telling appellee to stop talking. There was no evidence that the admonishment was ineffective, or that she continued to be distracted by appellee's talking during the State's rebuttal closing argument on the third day of trial. Accordingly, we agree with appellee that any suggestion by the State that the post-conviction court erred in implicitly finding that she heard the State's rebuttal closing argument is without merit, and the post-conviction court's implicit finding was not clearly erroneous.

We turn next to the State's second argument, that the post-conviction court erred in finding that trial counsel's failure to object to the State's rebuttal closing argument on reasonable doubt amounted to deficient performance. In addressing this argument, we emphasize that we are not asked to decide whether the *trial court* erred in its reasonable doubt instruction. It did not. We here are asked the narrower question of whether trial counsel's failure to object to the *State's* remark about reasonable doubt rendered trial counsel's performance deficient.

As we stated above, reasonable doubt is an evidentiary standard that is the cornerstone of a fair criminal trial. *Ruffin*, 394 Md. at 363. This is not a situation like *Joyner-Pitts*, however, which concerned improper jury instructions on reasonable doubt by the *trial court*. Appellee's argument and the post-conviction court's ruling presupposes an equivalence between jury instructions by the trial court and closing arguments by trial counsel with which we disagree. We concur with the following statement from the United States Court of Appeals for the First Circuit:

> We flatly reject [petitioner's] argument that a misstatement of the law by a prosecutor should be treated the same way as a misstatement of law by the judge. No juror would mistake a prosecutor for a judge. Our law assumes that the jurors follow jury instructions and thus that they followed the judge's, not counsel's, definition of reasonable doubt.

United States v. Gonzalez-Gonzalez, 136 F.3d 6, 9 (1st Cir.), *cert. denied*, 524 U.S. 910 (1998).

Additionally, this is not a situation like *Carrero-Vasquez* or *Rheubottom*. We do not think the examples given by the State prosecutor in the instant case, *i.e.*, buying a car, deciding what neighborhood to live in, where to send your children to school, or whether to buy a flat screen television with a tax refund check, are nearly as minimizing as the "trust your gut" remark in *Carrero-Vasquez* or the requirement that a reasonable doubt must be expressed on paper as stated in *Rheubottom*. We are mindful that unlike *Carrero-Vasquez* and *Rheubottom*, the question before us is not just whether the remark was improper but whether trial counsel's performance was deficient for failing to object to the remark. In the present situation, we can imagine that trial counsel might not have objected to the State's remark as a matter of trial strategy, to avoid alienating the jury where the remark was made during closing argument and appears not so far off the center mark. Nonetheless, given the importance of the reasonable doubt standard in a criminal trial and the possibility that the remark lowered the standard of reasonable doubt, we shall assume without deciding that trial counsel's failure to object amounted to deficient performance.

E. Prejudice

If this had been a direct appeal case, we would next determine whether the statement constituted harmless error and use long-standing, prescribed factors to make that determination.[5] However, because this is an appeal from an ineffective assistance of counsel claim, our review is different. We review prejudice in an ineffective assistance of counsel claim by deciding whether there was a reasonable probability that the result would have been different had the error not occurred, not whether the error was harmless.[6] We

[5] In *Dorsey v. State*, 276 Md. 638, 659 (1976), the Court of Appeals defined harmless error, stating:

> when an appellant, in a criminal case, establishes error, unless a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict, such error cannot be deemed 'harmless' and a reversal is mandated. Such reviewing court must thus be satisfied that there is no reasonable possibility that the evidence complained of—whether erroneously admitted or excluded—may have contributed to the rendition of the guilty verdict.

The Court of Appeals has long looked to three factors, among others, in considering a harmless error determination: first, the "severity of the remarks"; second, the measures taken by the trial court to cure any potential prejudice; and third, the weight of the evidence against the accused. *Lee v. State*, 405 Md. 148, 165 (2008) (citations omitted).

[6] In *State v. Thaniel*, 238 Md. App. 343, 370 (2018), *cert. denied*, -- U.S. --, 139 S.Ct. 2027 (2019), we acknowledged the "stark contrast" between the "harmless error standard" of *Dorsey* in direct appeal cases and the "more difficult standard" of "reasonable probability" in *Strickland*. (citing *Patterson v. State*, 229 Md. App. 630, 638-39 (2016), *cert. denied*, 451 Md. 596 (2017)). Specifically, that "[i]f an appellant establishes error in a direct appeal from a criminal conviction, the burden shifts to the State to show that the error in no way influenced the verdict." *Patterson*, 229 Md. App. at 638-39 (quotation marks and citations omitted). By contrast, when reviewing a claim for ineffective

agree with the State that, under the totality of circumstances of this case, appellee has failed to meet this prejudicial prong.

The State's reasonable doubt remark comprised one sentence and was made over the course of 25 pages of closing argument by the parties. The jury gave no indication that they were confused by the State's reasonable doubt remark. The trial court properly instructed the jury on reasonable doubt and appellee does not argue to the contrary. The trial court also properly instructed the jury on the presumption of innocence; the State's burden to establish each element of the offenses beyond a reasonable doubt; opening statement and closing argument are not evidence; and that the jury was to follow the law as given by the court.

Turning to the strength of the State's case, we recognize that in Maryland, "generally, proof of guilt based in whole or in part on circumstantial evidence is no different from proof of guilt based on direct [evidence, such as] eyewitness accounts." *State v. Smith*, 374 Md. 527, 534 (2003) (citation omitted). *See also Martin v. State*, 218 Md. App. 1, 34 (2014) ("Maryland has long held that there is no difference between direct and circumstantial evidence . . . . It is . . . an axiom of law that no greater degree of certainty is required when the evidence is circumstantial than when it is direct[.]") (quotation marks, citation, and some brackets omitted). Eyewitness identification, if believed, is sufficient to find a defendant guilty beyond a reasonable doubt. *Taylor v. State*,

assistance of counsel, the petitioner must show that there is a substantial possibility that a different result would have occurred at trial. *Strickland*, 466 U.S. at 693-96.

236 Md. App. 397, 441-42 (2018) (citing *Branch v. State*, 305 Md. 177, 183 (1986)), *cert. granted*, 467 Md. 692 (2020). Only the testimony of an accomplice, not an eyewitness, needs corroboration. *Branch*, 305 Md. at 183.

The unimpeached eyewitness identification testimony of Green was sufficient to sustain appellee's convictions. She observed the shooting, which occurred in the middle of the day, and knew both the victims and the shooter for years. She never wavered in her identification of appellee as the shooter -- identifying appellee to the police the day of the shooting, several months after the shooting, and at trial.

While there was no physical evidence corroborating her testimony (and none was necessary), other circumstantial evidence corroborated her identification in significant ways. Shauntae testified her brother told her immediately after the shooting, "your man shot my boy," and two days after the shooting, appellee told her he had been the shooter. Moreover, Shauntae's and Johnson's testimony overlapped on an important detail, that the shooter had dropped his gun during the shooting, lending credibility to their testimony. Additionally, Johnson's description of the shooter matched the description of appellee.

As to motive, there was testimony that appellee and Miller were having an argument over the expansion of gang territory on the corner as recently as the morning of the shooting. The State elicited evidence that appellee told both Shauntae and Morris that Miller was the target of the shooting, not Antoine or Morris, who were only injured and not killed. Although appellee tried to cast doubt on the State's witnesses' credibility, even appellee agreed at trial that he was friends with Shauntae and Green and could point to no reason why they would identify him as the shooter. Therefore, contrary to the post-

conviction court's assessment that the State's case was lessened by the absence of physical evidence corroborating the testimony of the witnesses, the State's case was strong without corroborating physical evidence.

Having failed to establish that there is a *reasonable probability* that the verdict would reasonably likely have been different absent the error, appellee has failed to meet his burden of proof that he was prejudiced. Accordingly, we shall reverse the post-conviction court's ruling that appellee's trial counsel rendered constitutionally ineffective assistance of counsel.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY REVERSED. COSTS TO BE PAID BY APPELLEE.