Circuit Court for Montgomery County
Criminal No. 26363C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2901

September Term, 2018

NAPOLEON GARRETT

v.

STATE OF MARYLAND

Berger,
Nazarian,
Wells,

JJ.

Opinion by Nazarian, J.

Filed: August 26, 2019

Napoleon Garrett was convicted in 1983 of first-degree felony murder and related offenses in the Circuit Court for Montgomery County. This Court affirmed Mr. Garrett's convictions in 1984. In 2015, Mr. Garrett filed a petition for postconviction relief raising a number of arguments related to two alleged problems during his trial—*first*, the admission of an out-of-court identification of Mr. Garrett by a non-testifying witness, and *second*, an allegedly defective jury instruction. The circuit court held a hearing on January 11, 2018 and denied Mr. Garrett's petition on March 7, 2018. Mr. Garrett filed an application for leave to appeal to this Court on January 8, 2019, which was granted. He urges us to find that the circuit court erred by denying his petition for postconviction relief. We find that the circuit court did not abuse its discretion and affirm.

I. BACKGROUND

Mr. Garrett was convicted of the first-degree felony murder of Karen Hackney in 1983. He was also convicted of two counts of armed robbery and two counts of using a handgun in the commission of a crime of violence. We need not revisit the details of Mr. Garrett's crimes;[1] it will suffice for present purposes to recount that Mr. Garrett and two other men forcibly entered Ms. Hackney's home to rob it and that she was shot and killed during the robbery. Ms. Hackney's fiancé, Samuel Hughes, was home at the time of the crimes and witnessed the murder. Mr. Hughes identified two of the intruders as Emmit Brown, whom he knew before the robbery, and Mr. Garrett.

[1] We recounted the events in full in our opinion on direct appeal. *Garrett v. State*, 59 Md. App. 97 (1984).

Mr. Hughes testified at trial, and again identified Mr. Brown and Mr. Garrett as two of the three intruders. Douglas Dawkins, a friend of Mr. Garrett's, testified that Mr. Garrett confessed that he was involved in a robbery with two other individuals, both named Brown. Mr. Dawkins testified that Mr. Garrett told him that as they were leaving the scene of the robbery, "somebody panicked, the female panicked . . . and he had them cover up with pillow cases and he shot her."

Detective Charles Shawen of the Montgomery County Police Department also testified at trial. Detective Shawen was involved in Ms. Hackney's homicide investigation from the beginning. He interviewed Mr. Hughes, who was initially considered a suspect, hours after the murder. During their interview, Mr. Hughes identified Emmit Brown as one of the intruders. Detective Shawen arrested Mr. Brown that evening and recovered a gun from his vehicle. Mr. Brown did not testify at Mr. Garrett's trial.

During Detective Shawen's cross-examination, Mr. Garrett's counsel inquired whether he had "show[n] [Mr.] Garrett's photo array to anybody[.]" Detective Shawen responded that he had shown it to Mr. Brown. On redirect, the State inquired further:

> THE STATE: When the photo array was shown to Emmit Brown, the photo array with Napoleon Garrett's picture in it, what happened?
>
> DETECTIVE SHAWEN: He positively identified him.
>
> THE STATE: Who?
>
> DETECTIVE SHAWEN: Mr. Emmit Brown positively identified Mr. Garrett's photograph as his accomplice.
>
> THE STATE: Nothing further.

Mr. Garrett's trial counsel did not object to the Detective's testimony. After the

court dismissed Detective Shawen, Mr. Garrett's counsel asked to approach the bench before the next witness took the stand. The court responded, "I don't think I need a bench conference about him. We'll deal with him as we go along." The following day, after the close of evidence and after the court instructed the jury, Mr. Garrett's counsel finally challenged Detective Shawen's testimony by objecting to a jury instruction that referenced Mr. Brown's identification of Mr. Garrett:

> MR. GARRETT'S COUNSEL: Also, Your Honor, we object to the instruction of Emmit Brown. Emmit Brown never testified.
>
> THE COURT: Well he didn't testify . . . . One of the reasons that Mr. Brown didn't testify in this case . . . is because [Detective] Shawen was permitted to state the identification and that is in the evidence.
>
> MR. GARRETT'S COUNSEL: At this time we move to strike that evidence[.]

The circuit court denied Mr. Garrett's motion to strike.

The jury convicted Mr. Garrett of first-degree felony murder, two counts of armed robbery, and two counts of using a handgun in the commission of a crime of violence. The circuit court sentenced Mr. Garrett to life imprisonment for the felony murder and to two consecutive fifteen-year sentences for the handgun charges.[2] He appealed his convictions, "complaining that (1) the court erred in refusing to permit defense counsel to inspect the grand jury testimony of Detective Barry Collier after Collier's in-court testimony on direct examination, and (2) the court erred in admitting evidence and instructing the jury upon

[2] Mr. Garrett received no additional prison time for the robbery counts.

appellant's use of a false name and address in New Jersey." *Garrett*, 59 Md. App. at 100. We held that the flight instruction was appropriate but "agree[d], and indeed the State concede[d], that the court erred in rejecting counsel's request to inspect Collier's grand jury testimony." *Id.* at 101. Even so, we affirmed Mr. Garrett's convictions, finding the error harmless.

Mr. Garrett sought postconviction relief in the circuit court in 2015. He made six arguments, all centered around two alleged errors at trial—*first*, Mr. Brown's identification of Mr. Garrett as his accomplice through Detective Shawen's testimony, and *second*, an allegedly defective jury instruction that, Mr. Garrett claims, improperly informed the jury that the jury instructions' contents were "advisory only." The court held a hearing on January 11, 2018 and denied Mr. Garrett's request on March 7, 2018. Mr. Garrett appeals the circuit court's findings *in toto*.[3] We supply additional facts below as needed.

[3] Mr. Garrett frames his Questions Presented as follows:

1. Did the post-conviction court err in finding that Mr. Garrett was not denied the effective assistance of trial counsel who failed to timely object to testimony that an absent witness identified Mr. Garrett as his accomplice?
2. Did the post-conviction court err in finding that Mr. Garrett waived his claim that he was denied his constitutional right to confront the witnesses against him and his right to due process?
3. Did the post-conviction court err in finding no error by the trial court and no ineffective assistance of trial and appellate counsel for refusing to strike the testimony of Detective Shawen?
4. Did the post-conviction court err in holding that Mr. Garrett was not denied his right to due process when the trial judge instructed the jury, several times, that its instructions on the law were advisory only?

II. DISCUSSION

A. Detective Shawen's testimony

A prior statement of identification is admissible only when the statement was made by a witness who testifies at trial and who undergoes cross-examination about it. Md. Rule 5-802.1(c). The Sixth Amendment to the U.S. Constitution guarantees criminal defendants the right to face their accusers. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ."). Inherent in that guarantee is the defendant's right to cross-examine witnesses against them. *State v. Breeden*, 333 Md. 212, 219 (1993). Mr. Brown identified Mr. Garrett as his accomplice prior to trial during a photo array conducted by Detective Shawen. Mr. Brown's identification was admitted without objection, but he did not testify and was not subject to cross-examination regarding his identification.

Mr. Garrett makes three arguments related to Mr. Brown's prior identification. He argues *first* that his trial counsel was ineffective for failing to object to Detective Shawen's testimony. He argues *second* that his appellate counsel was ineffective for failing to challenge the trial court's decision to deny Mr. Garrett's motion to strike. And he argues

5. Did the post-conviction court err in holding that Mr. Garrett was not denied the effective assistance of trial and appellate counsel for failing to object to the improper instructions?
6. Did the post-conviction court err in holding that the cumulative effect of the errors raised by Mr. Garrett did not deprive him of a fair trial or of the effective assistance of counsel?

The State frames its Question Presented as follows:

1. Did the circuit court properly deny Garrett's post-conviction petition?

third that the admission via Detective Shawen's testimony of Mr. Brown's out-of-court identification of Mr. Garrett as his accomplice violated Mr. Garrett's Sixth Amendment right to confront witnesses against him. We conclude that the postconviction court did not abuse its discretion in denying Mr. Garrett relief.

1. Mr. Garrett's trial counsel was not ineffective for failing to object to Detective Shawen's testimony.

The convicted defendant bears a stringent burden of proof in an ineffective assistance proceeding. *Strickland v. Washington*, 466 U.S. 668, 696 (1984). He must demonstrate *first* that his counsel was deficient, and *second* that there is a reasonable probability that, but for the alleged deficiency, the outcome of the case would have been different. *Id.* at 694. "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," and that "counsel's errors were so serious as to deprive the defendant of a fair trial[.]" *Id.* at 687. In reviewing an ineffective assistance claim, we "must exercise [our] own independent judgment as to the reasonableness of counsel's conduct and the prejudice, if any." *Fullwood v. State*, 234 Md. App. 57, 68 (2017) (cleaned up).

To prevail on this ineffective assistance claim, Mr. Garrett must demonstrate first that "counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. This inquiry is highly deferential. "[T]here is a strong (but rebuttable) presumption that counsel rendered reasonable assistance and made all significant decisions in the exercise of reasonable professional judgment." *In re Parris W.*, 363 Md. 717, 725 (2001). And if the challenged decision may have been considered the

product of sound trial strategy, counsel's performance was not deficient. *Fullwood*, 234 Md. App. at 68–69.

The postconviction court found that counsel's decision not to object to Detective Shawen's testimony was a tactical one. The court reasoned that counsel's request for a bench conference immediately following the Detective's testimony suggested the decision was strategic:

> While it is not clear from the transcript that [trial counsel] intended to raise [the Detective's testimony] at this bench conference, what is clear is [trial counsel] was left with the choice of making a speaking objection about the out-of-court identification in front of the jury and thereby highlighting the potentially damaging nature of the testimony or simply ignoring it. This was a tactical decision in the Court's view. Particularly considering the defense theory of the case was that Hughes and Brown conspired to murder Ms. Hackney, Mr. Brown's out-of-court identification of [Mr.] Garrett could easily explain away in closing argument as consistent with that theory.

We don't agree with the postconviction court's finding that "the [t]rial [c]ourt quite probably would have admitted [the testimony] over objection." The State does not argue, and we don't see how, Mr. Brown's statement was admissible. But on the record before us, there is nothing to rebut the presumption that Mr. Garrett's trial counsel was exercising reasonable professional judgment, as the postconviction court opined. Mr. Garrett did not call either of his two trial attorneys to testify at his postconviction hearing, arguing instead that there is no possible trial strategy that would explain his counsel's failure to object. There was such a strategy, though, and the circuit court was not clearly erroneous in finding that there was.

Even if we found counsel's failure to object unreasonable, Mr. Garrett has not demonstrated "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. The challenged portion of Detective Shawen's testimony served primarily to corroborate the testimony of two other witnesses—Mr. Hughes, who witnessed the crime firsthand, and Mr. Dawkins, to whom Mr. Garrett allegedly confessed. The testimony did not present the jury with any new information, and its omission from evidence would not create a reasonable probability of a different outcome. We find that Mr. Garrett's trial counsel was not constitutionally ineffective for failing to object to Detective Shawen's testimony.

2. Mr. Garrett's appellate counsel was not ineffective for electing not to appeal the circuit court's denial of Mr. Garrett's motion to strike Detective Shawen's testimony.

Mr. Garrett argues *next* that his appellate counsel was constitutionally ineffective for failing to challenge the denial of Mr. Garrett's motion to strike Detective Shawen's testimony. We disagree.

We assess appellate counsel's performance under the same *Strickland* standards that apply to trial counsel. *Newton*, 455 Md. 341, 362 (2017). Failing to bring a claim on direct appeal is ineffective assistance only when bringing the claim would have a "substantial possibility of resulting in a reversal of petitioner's conviction." *Gross v. State*, 371 Md. 334, 350 (2002). Mr. Garrett must demonstrate that his appellate counsel's failure to challenge the court's decision on his motion to strike was deficient and that there is a reasonable probability that his conviction would have been reversed but for that deficiency.

Id. at 349.

The Sixth Amendment does not demand that appellate counsel raise every possible issue on appeal. *Newton*, 455 Md. at 363. "[A]ppellate counsel need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal." *Id.* (cleaned up).[4] Had trial counsel timely objected to the Detective's testimony, Mr. Garrett would have had the benefit of *de novo* review of the circuit court's decision in this Court. *Brooks v. State*, 439 Md. 698, 709 (2014) ("[A] determination of whether a statement is hearsay is a legal question subject to *de novo* review."); *Davies v. State*, 198 Md. App. 400, 411 (2011) (*quoting Snowden v. State*, 156 Md. App. 139, 143 n.4 (2004), *aff'd*, 385 Md. 64 (2005)) ("We . . . apply the *de novo* standard of review to the issue of whether the Confrontation Clause was violated."). But trial counsel did not object, and instead made a last-minute motion to strike testimony given without objection the previous day, and did so after the jury had already been instructed. Appellate counsel made a reasonable tactical decision to forego this long-shot argument and to focus instead on the two issues they did raise, one of which this Court agreed was an error, albeit harmless.

Even if we agreed that Mr. Garrett's appellate counsel was constitutionally

[4] Mr. Garrett's counsel raised two issues on appeal, arguing *first*, that the trial court erred by failing to order the state to produce a requested grand jury transcript, and *second*, that the trial court should not have a given a "consciousness of guilt instruction based on [Mr.] Garrett's use of a false name and address when he was apprehended in New Jersey six weeks" after the murder. This Court agreed with his first argument but found the error harmless, and disagreed with his second argument. *Garrett*, 59 Md. App. at 111.

deficient, Mr. Garrett has not demonstrated that the outcome of his appeal would have been different had counsel challenged the court's denial of his motion to strike. In addition to Detective Shawen's passing reference to Mr. Brown's identification of Mr. Garrett as his accomplice, the jury had before it Mr. Hughes's identification, Mr. Dawkins's detailed account of Mr. Garrett's confession, Mr. Garrett's abrupt departure from the State after Ms. Hackney's murder, and Mr. Garrett providing a false name to law enforcement when he was ultimately apprehended in New Jersey months later for an unrelated offense. We agree with the State that "there is no substantial possibility of a different outcome" had Mr. Garrett's counsel raised this issue on appeal and find that Mr. Garrett's appellate counsel was not constitutionally ineffective for failing to raise the issue.

3. Mr. Garrett waived his Sixth Amendment claim by failing to raise it on direct appeal.

Mr. Garrett argues next that he was deprived of his Sixth Amendment right to confront witnesses when the trial court allowed Detective Shawen to testify that Mr. Brown identified Mr. Garrett as his accomplice in a pre-trial photo array. The postconviction court found that Mr. Garrett had waived his Sixth Amendment claim by failing to raise it on direct appeal. Mr. Garrett claims that finding was erroneous because his Sixth Amendment claim "could not have been raised on appeal because it was not timely objected to by trial counsel."[5] We agree with the postconviction court that Mr. Garrett waived his Sixth

[5] Mr. Garrett takes this position notwithstanding his argument that his appellate counsel was constitutionally ineffective for failing to raise this issue on appeal by challenging the trial court's denial of his motion to strike Detective Shawen's testimony. *See Section 2, above.*

Amendment claim.

Maryland Code § 7-106(b)(1)(i) of the Criminal Procedure Article ("CP") provides that "an allegation of error is waived when a petitioner could have made but intelligently and knowingly failed to make the allegation" either before trial, at trial, or on direct appeal. "When a petitioner could have made an allegation of error . . . but did not make an allegation of error, there is a rebuttable presumption that the petitioner intelligently and knowingly failed to make the allegation." CP § 7-106(b)(2).

Mr. Garrett's trial counsel could have objected to Detective Shawen's testimony as it was given, but didn't. Mr. Garrett's appellate counsel could have raised the court's decision to deny the motion to strike on direct appeal, but elected not to. Postconviction is "not a substitute for an appeal or a means of obtaining a belated appeal," and Mr. Garrett is not entitled to a belated substantive review of his Sixth Amendment claims. *Kelly v. Warden*, 243 Md. 717, 718 (1966). Mr. Garrett had the opportunity to raise his Sixth Amendment claim at trial in 1983 and on appeal in 1984. And although we consider separately the efficacy of his trial and appellate counsel for failing to raise those issues, *see above*, the postconviction court properly found the substantive claims of error waived.

B. Jury Instruction

Mr. Garrett's remaining arguments relate to a portion of the jury instructions given at trial. The trial court stated:

> We here in the state of Maryland operate under a rather unique constitution in that we're the only state in the union that permits you as jurors in a criminal case to not only decide what the facts are but you also are the judges of what the law is

which involves these various charges. This means that with regard to the law of this case and three separate and specific charges that you deal with the definition of those crimes and the legal effect of the evidence before you as it relates to those crimes, you as jurors are the final judges of what that law is. Therefore, the instructions which I will be giving to you later on in these instructions relating to the definition of the crime, you are at liberty to disregard if you choose to do so. This does not mean that you are at liberty to find the law what you would like it to be or what you would think it should be. This would be a violation of your sworn duty as a juror to base your verdict upon any theory of law other than that law that you now find is existing here in the state of Maryland. As to the law of the case, you may of course consider what I tell to you in these advisory instructions or that portion of the instructions. . . . I do not think there is going to be a very substantial dispute as to what the law is as to the three specific crimes that are charged in this matter. **With regards to all other aspects of the law other than the law of the crimes charged and the legal effect of the evidence as it relates to these crimes, my instructions are binding upon you. That is in such areas as burden of proof, reasonable doubt, presumption of innocence, requirements of unanimous verdict, the law as to identification, those matters what I say to you is binding on you and you must follow it in reaching the verdict.**

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I mentioned to you, ladies and gentlemen, when we began the trial Monday morning that you deal with two legal concepts in this case. The concept that the defendant, Mr. Garrett, is presumed to be innocent and the concept that the [S]tate must prove him guilty beyond a reasonable doubt. This presumption of innocence that he is clothed with stays with him throughout this trial until it has been overcome by proof establishing his guilt beyond a reasonable doubt and a moral certainty**. This burden of reasonable doubt is upon the [S]tate but this does not mean that the [S]tate must establish every material fact to the guilt of Mr. Garrett beyond a reasonable doubt, they must prove him guilty beyond a reasonable doubt and to a moral certainty but that does not mean that the [S]tate must prove him guilty to an absolute or mathematical certainty.** This reasonable doubt concept that you deal with,

> ladies and gentlemen, and the criteria that I suggest that you may utilize in discussing this reasonable doubt is whether you, as an individual juror would act upon or rely upon the body of evidence in this matter produced by the [S]tate in making an important decision effecting your life and/or property. If you take the cumulative effect of all of the State's evidence as you, as an individual juror would act upon or rely upon that evidence in making an important decision affecting your life and/or your property, this is the type of evidence that is sufficient to convict in a criminal case.

(Emphasis added).

Mr. Garrett argues that these jury instructions deprived him of due process for two reasons: *first*, because "the court failed to note the binding nature of its instruction that Mr. Garrett had a Fifth Amendment right to not testify and that exercising this right could not be held against him," and *second* because "the court gave an improper instruction regarding proof beyond a reasonable doubt." He also argues that both trial and appellate counsel were constitutionally ineffective for failing to raise these issues. The postconviction court disagreed, finding that "while inartful, the [jury] instructions relating to their advisory nature and the burden of proof were not fatally flawed." We agree with the postconviction court's assessment.

1. Mr. Garrett waived his due process arguments

"Advisory only instructions have a tortured history in this State." *State v. Adams-Bey*, 449 Md. 690, 694 (2016). Article 23 of the Maryland Declaration of Rights provides that "[i]n the trial of all criminal cases, the Jury shall be the Judges of Law, as well as of fact, except that the Court may pass upon the sufficiency of the evidence to sustain a conviction." This unusual constitutional mandate once required judges to "instruct the jury

that they are the judges of the law and that the court's instructions are advisory only." *Adams-Bey*, 449 Md. at 494 (internal quotation and citation omitted). And "[f]rom 1851 until 1980–81 . . . no opinion by [the Court of Appeals] held suggested or intimated that the constitutional provision" was limited in any way from what its plain language suggests—that juries are free to disregard the court's instructions in rendering their verdicts. *Unger v. State*, 427 Md. 383, 411 (2012).

In 1980, the Court of Appeals addressed whether Article 23 "facially deprives a defendant of the federally secured right to due process of law" under the Fourteenth Amendment to the U.S. Constitution. *Stevenson v. State*, 289 Md. 167, 169 (1980). The Court found that Article 23 and the jury instructions mandated to uphold it do not facially violate a defendant's due process rights, but that "it is incumbent upon a trial judge to carefully delineate for the jury" which instructions are binding upon them and which are merely advisory. *Id.* at 180. The jury is "the final arbiter of disputes as to the substantive 'law of the crime,' as well as the 'legal effect of the evidence,' and [] any comments by the judge concerning these matters are advisory only." *Id.* But the court also must inform the jury that with respect to all other aspects of the law, including the burden of proof and the presumption of innocence, the court's instructions bind them. *Id.*

The Court of Appeals reaffirmed this principle the following year in *Montgomery v. State*, 292 Md. 84, 91 (1981). In that case, the Court held that "[i]t was error for the trial judge to tell the jury they could pay no attention to instructions on the law which did not pertain to the elements of the crime[.]" *Id.* The Court explained that such an instruction

disregarded "guidelines of due process to which every jury is required to adhere. . . . . to preserve the integrity of the judicial system and to assure the defendant a fair and impartial trial." *Id.*

In 2008, the Court of Appeals in *State v. Adams* reaffirmed those principles once again and held that *Stevenson* and *Montgomery* "by their express terms, did not announce new law." 406 Md. 240, 256 (2008). And because, according to *Adams*, *Stevenson* and *Montgomery* did not break any new legal ground, "the criminal defendant who had failed to object to the advisory only instruction at trial waived the right to assert it as a ground for postconviction relief." *Adams-Bey*, 449 Md. at 695.

Finally, in 2012, the Court of Appeals changed course. In *Unger v. State*, the Court overruled *Stevenson*, *Montgomery*, and *Adams*, and held that *Stevenson* did establish a new constitutional standard in holding that advisory only instructions were applicable only to the substantive "law of the crime" and not to other general legal principles. *Unger*, 427 Md. at 417. And because *Stevenson* announced new constitutional law, the Court in *Unger* held that the failure to object to an advisory only instruction prior to *Stevenson* did not constitute a waiver. *Id.* at 416. "It is a well-established principle of Maryland law that a new interpretation of a constitutional provision or a statute is fully retroactive if that interpretation affects the integrity of the fact-finding process." *Id.* "A lawyer trying a criminal case . . . prior to *Stevenson* and *Montgomery* would not know that the non-binding nature of the jury instructions would be deemed erroneous under a new interpretation of Article 23 to be rendered in the future." *Id.* at 409. And because those attorneys were not

on notice to object, criminal defendants convicted before *Stevenson* was decided could pursue their unpreserved challenges to advisory only jury instructions on postconviction. *Id*.

In his brief, Mr. Garrett traces the history of advisory only jury instructions and concludes by emphasizing that "[i]n *Unger*, the court stated that 'the *Stevenson* and *Montgomery* opinions substantially changed the State's constitutional standard embodied in Article 23. Accordingly, failure to object to advisory only jury instructions in criminal trials prior to *Stevenson* will ***not*** constitute a waiver.'" (*quoting Unger*, 427 Md. at 391 (emphasis added by Mr. Garrett)). We agree with Mr. Garrett that that language from *Unger* is dispositive. But Mr. Garrett's trial was in 1983, and *Stevenson* was decided in 1980, so the emphasis in the *Unger* quote belongs elsewhere: the "failure to object to advisory only instructions in criminal trials ***prior to Stevenson*** will not constitute a waiver." 427 Md. at 391 (emphasis added).

Unger does not address explicitly a defendant's failure to object to advisory only instructions after *Stevenson*. *See Adams-Bey*, 449 Md. at 711 n. 1 (Watts, J., joining in judgment). But later decisions of this Court and the Court of Appeals hold that general waiver principles apply to a trial court's improper advisory only instructions in trials that took place *after* that decision. *See, e.g.*, *Calhoun-El v. State*, 231 Md. App. 285, 301 (2016) ("Here, appellant's trial took place after *Stevenson*. Accordingly, general waiver principles apply."); *State v. Bowman*, 450 Md. 40, 41 (2016) (ordering the Court of Special Appeals to vacate and remand to the circuit court "to determine whether Respondent waived any

claim under *Unger v. State*, 247 Md. 383 (2012), given that Respondent's trial occurred after [the Court of Appeals] issued its opinion in *Stevenson v. State*, 289 Md. 167 (1980)."). And that makes sense given that *Unger* focuses on the fact that, before *Stevenson*, attorneys were not on notice that most advisory only instructions were constitutionally defective. 427 Md. at 410. After *Stevenson* was decided in 1980, though, attorneys knew (or should have known) to object. At Mr. Garrett's 1983 trial, counsel was on notice but didn't object, either to the advisory only instruction or the reasonable doubt instruction. Under the general waiver principles outlined in Section A.3., *above*, Mr. Garrett waived his due process arguments.

2. Mr. Garrett's counsel was not constitutionally ineffective for failing to challenge the advisory only jury instruction.

Mr. Garrett argues that both his trial and his appellate counsel were constitutionally ineffective for failing to challenge the advisory only instruction. Again, we evaluate his arguments against *Strickland* and find that Mr. Garrett was not deprived of his right to effective assistance of counsel, either at trial or on appeal.

The advisory only instruction given in this case was imperfect, but it did say, in so many words, that the jury's role as "judges of the law" was limited to the law of the case. The court explained that Maryland's unusual constitutional provision "means that with regard to the law of this case and the three separate and specific charges . . . the definition of those crimes and the legal effect of the evidence before you as it relates to those crimes, you as jurors are the final judges of what that law is." The court went on to say that it did "not think there [would] be a very substantial dispute as to what the law is as to the three

specific crimes that are charged in this matter," and that "[w]ith regards to all other aspects of the law other than the law of the crimes charged . . . [the] instructions are binding upon you. That is in such areas as burden of proof, reasonable doubt, presumption of innocence, requirements of unanimous verdict, the law as to identification . . . you must follow [the instructions] in reaching your verdict."

Mr. Garrett complains that the court neglected to include Mr. Garrett's Fifth Amendment right not to testify in its list of instructions that were binding upon the jury. And it's true that the court did not list Mr. Garrett's Fifth Amendment right not to testify when it stated that the advisory portion of the instructions was limited exclusively to the law of the case. But the court provided later on in its instructions that "Mr. Garrett did not testify in this matter," and that the jury was "instructed that he has an absolute constitutional right to remain silent and not to testify." The court explained further that the jury "may not attach any significance or draw any inference of guilt from the fact that he has elected not to testify" and "cannot and must not draw any inference of guilt because he has an absolute constitutional right to remain silent and not to testify." Coupled with the court's directive that its instructions on all areas of law other than the law of the case were binding, the court told this jury that the instructions regarding Mr. Garrett's Fifth Amendment protections were binding.

In short, the instructions provided at Mr. Garrett's trial were not the kind anticipated in *Unger*. *Unger* and its progeny forbid instructions that "give the jury permission to disregard any or all of the court's instructions, including those bedrock due process

instructions on the presumption of innocence and the State's burden of proving the defendant's guilty beyond a reasonable doubt." *State v. Waine*, 444 Md. 692, 704 (2015). But the court in Mr. Garrett's case explained that its instructions were advisory only as to the law of the case, and binding in all other areas, including Mr. Garrett's constitutional protections. The instructions were imperfect, but not to the extent that trial counsel was ineffective for failing to object to them. And because we agree with the post-conviction court that the challenged instructions were "inartful" but not "fatally flawed," Mr. Garrett's appellate counsel was not ineffective for failing seek plain error review on direct appeal.

3. Mr. Garrett's counsel was not constitutionally ineffective for failing to challenge the reasonable doubt instruction.

Mr. Garrett argues that his trial and appellate counsel were both constitutionally ineffective for failing to challenge the circuit court's reasonable doubt instruction. He takes issue with following portion of the court's instructions:

> [the] burden of reasonable doubt is upon the [S]tate but this does not mean that the [S]tate must establish every material fact to the guilt of Mr. Garrett beyond a reasonable doubt, they must prove him guilty beyond a reasonable doubt and to a moral certainty but that does not mean that the [S]tate must prove him guilty to an absolute or mathematical certainty.

The postconviction court found that these instructions, like the advisory only instructions, were imperfect but not fatally flawed when considered in the context of the instructions as a whole. We agree.

When we assess the propriety of jury instructions, we review them in their entirety. *Fleming v. State*, 373 Md. 426, 433 (2003). And although we agree with Mr. Garrett that the court's statement that the beyond a reasonable doubt burden "does not mean that the

[S]tate must establish every material fact of Mr. Garrett beyond a reasonable doubt" is, in isolation, misleading, taken in the context of the instructions as a whole there is no "reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the [beyond a reasonable doubt] standard." *Carroll v. State*, 428 Md. 679, 690 (2012) (emphasis omitted) (*quoting Victor v. Nebraska*, 511 U.S. 1, 6 (1994)).

The circuit court explained that the State "must prove [Mr. Garrett] guilty beyond a reasonable doubt and to a moral certainty." The court also explained that Mr. Garrett was clothed with a presumption of innocence that stayed with him throughout the trial until it was overcome by proof establishing his guilt beyond a reasonable doubt and to a moral certainty. And the court reiterated, with the recitation of the elements of each charge, that the State must demonstrate those elements beyond a reasonable doubt. Taken as a whole, the jury instructions in Mr. Garrett's trial explained the State's burden to the jury adequately, and his counsel was not constitutionally ineffective for failing to challenge them, either at trial or on direct appeal.

C. Mr. Garrett's Sixth Amendment rights were not violated.

Mr. Garrett argues *finally* that the cumulative effect of the errors alleged "denied [him] his constitutional right to the effective assistance of counsel as well as the right to a fair trial." His brief dedicates two sentences to this argument. He is correct that the cumulative effect of counsel's errors may cross the threshold of ineffective assistance even when each in isolation does not, but the errors he alleges here do not meet that standard.

Bowers v. State, 320 Md. 416, 436 (1990). Mr. Garrett has not demonstrated that his counsel's performance fell below an objective standard of reasonableness, nor has he shown that the outcome of his trial would have been different but for counsel's omissions as required under *Strickland*. We affirm the circuit court's denial of post-conviction relief.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. APPELLANT TO PAY COSTS.