UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 755

September Term, 2016

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DOMINIC ANDERSON

v.

STATE OF MARYLAND

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Kehoe,
Leahy,
Alpert, Paul E.
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Alpert, J.

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Filed: May 8, 2017

Dominic Anderson, appellant, was convicted by a jury sitting in the Circuit Court for Baltimore City of first-degree murder, use of a firearm in the commission of a crime of violence; and possession of a regulated firearm after having been convicted of a disqualifying crime.[1] Appellant asks the following two questions on appeal, which we have slightly rephrased:

I. Did the trial court err in failing to treat appellant's expression of dissatisfaction with his attorney mid-trial as a request to discharge counsel?

II. Did the trial court err in finding that a State's witness was feigning memory loss?

For the reasons that follow, we shall affirm.

## FACTS

The State's theory of prosecution was that on the evening of May 3, 2015, appellant shot and killed Khai Hebron because he was jealous of Hebron, who was in a relationship with Raina Witherspoon, the mother of appellant's then three-year-old child. The State's evidence came from a video surveillance camera on a house near where the shooting occurred and testimony from, among others, Witherspoon. The theory of defense was lack of criminal agency. The defense presented no testimonial witnesses. Viewing the evidence in the light most favorable to the State, the prevailing party, the following was elicited at trial.

[1] Appellant was sentenced to life imprisonment for murder; a consecutive twenty years for use of a firearm, and a concurrent ten years for firearm possession; the first five years of each of his two firearm convictions are to be served without the possibility of parole.

On the evening of May 3, Witherspoon was at a friend's house in the 3000 block of Elizabeth Avenue in Baltimore. Also present, among others, was her boyfriend Hebron, appellant, and Ladell Taylor, who was friends with both appellant and Hebron. Witherspoon testified that at the time of the shooting she and appellant had a three-year-old son, but that she and Hebron had been in a relationship for about two years. Witherspoon testified that appellant was not happy she was in a relationship with the victim, and appellant had told her several months earlier that he "wanted his family back[.]"

Around 8:00 p.m., appellant told her to take their son into her friend's house. As she was getting their son's things together, appellant "kept coming back over to me like, now, now, take him now. Get off this block now." She took their son to a nearby 7-Eleven store but within a couple of minutes she returned when she saw an ambulance going to the area she had left. When she returned, she saw Hebron being placed into an ambulance. Hebron, who had been shot in the head and abdomen, was pronounced dead at the hospital. The police recovered from the crime scene: 1) two .40 caliber Smith & Wesson cartridge casings, which were determined to have been fired from a semi-automatic firearm, and 2) video footage from a surveillance camera from 3034 Elizabeth Avenue.

The next day, at the police station, Witherspoon reviewed video footage from the surveillance camera. She identified in each frame the persons in the video, including appellant, who she identified as the shooter. The video was played for the jury at trial, during which, she again identified those on the video, including appellant as the shooter.

Taylor, who admitted that he was serving a five year prison sentence for robbery, testified that he knew both Hebron and appellant. Taylor testified that he was "not

particularly happy" about testifying at appellant's trial. He testified, among other things, that he did not know who killed Hebron; that he had heard a gunshot but did not know how many he had heard; and that he did not remember talking to a detective about the murder. The court ruled that Taylor was feigning memory loss and allowed a video recording of his statement to the police to be played for the jury. In the recording, Taylor said that he saw appellant shoot Hebron twice; first in the head and then again while he stood over top of him. Taylor explained that appellant "wanted his baby mama back and had a problem with" Hebron.

The parties stipulated that appellant had been convicted of a crime for which he was prohibited from possessing a regulated firearm.

## DISCUSSION

### I.

Appellant argues that he is entitled to a new trial because the trial court failed to treat his mid-trial expression of dissatisfaction with his attorney, which he argues was corroborated by defense counsel's subsequent statements to the court, as a request to discharge counsel. The State responds that appellant's comments were not a request to discharge counsel, and even if they were, the trial court did not err because it provided appellant with "an opportunity to explain his disagreements with defense counsel over legal strategy." We agree with the State.

A defendant in a criminal prosecution has a constitutional right to have effective assistance of counsel and the corresponding right to reject that assistance and represent himself. *See Powell v. Alabama*, 287 U.S. 45, 71 (1932)(recognizing the constitutional

right to the effective assistance of counsel) and *Faretta v. California*, 422 U.S. 806, 807 (1975)(recognizing the constitutional right to defend oneself). *See also Snead v. State*, 286 Md. 122, 123 (1979)(recognizing that a defendant has both the constitutional right to the assistance of counsel and the right to defend *pro se*). Md. Rule 4-215(e) was adopted to protect these constitutional guarantees and sets forth the procedure a court must strictly follow when a defendant waives his right to counsel. *Parren v. State*, 309 Md. 260, 281-82 (1987) and *Johnson v. State*, 355 Md. 420, 464 (1999).

Once "meaningful trial proceedings" have commenced, however, Rule 4-215 is "curtailed to prevent undue interference with the administration of justice." *State v. Brown*, 342 Md. 404, 412 (1996)(citation omitted). When a defendant makes a mid-trial request to discharge counsel, the trial court "must conduct an inquiry to assess whether the defendant's reason for dismissal of counsel justifies any resulting disruption[.]" *State v. Hardy*, 415 Md. 612, 628 (2010)(quotation marks and citation omitted). The narrow question before us is whether appellant's statements mid-trial constituted a request to discharge counsel. This determination is not always clear, but the Court of Appeals has offered some guidance on what constitutes a cognizable discharge request:

> We explained that a defendant need not "utter a talismanic phrase," . . . or "state his position or express his desire to discharge his attorney in a specified manner" to trigger the rigors of the Rule. . . . Moreover, a request to discharge an attorney need not be explicit. *See State v. Hardy*, 415 Md. 612, 623 . . . (2010)("A defendant makes such a request when his or her statement constitutes more a declaration of dissatisfaction with counsel than an explicit request to discharge."). Rather, Rule 4–215(e) is triggered by any statement from which a court could conclude reasonably that the defendant may be inclined to discharge counsel. . . .

> Once Rule 4–215(e) is triggered, the trial court has an affirmative duty to address the defendant's request. As we explained in [*State v.*] *Taylor*, [431 Md. 615, 633 (2013),] when it is (or should be) clear objectively that a defendant is making a request to discharge counsel, "the defendant must be provided [ ] with a forum in which he or she (and/or counsel) may explain the underlying reasons for the purported request to discharge counsel."

*Williams v. State*, 435 Md. 474, 486-87 (2013)(some citations omitted). *Cf. Gambrill v. State*, 437 Md. 292, 293-94 (2014)(treating as a request to discharge counsel when defense counsel advised the trial court that the defendant "indicates that he would like to hire private counsel in this matter."); *Williams*, 435 Md. at 479 (treating as a request to discharge counsel when the defendant wrote a letter to the trial court that his counsel had "[n]o interest on my behalf in trying to help me on my case. I truly feel I'm being mis-represented" and asking the trial court to "please remove him from my case."); *Hardy*, 415 Md. at 618-19, 624 (treating as a request to discharge counsel defendant's statement: "I'm thinking about changing the attorney or something" where defendant set forth the following two reasons over several typed trial transcript pages: "[My attorney's] asked me to take time for something I didn't do." and "I've had her for a year. I haven't even talked to my lawyer one hour.")(italics omitted); *State v. Campbell*, 385 Md. 616, 632 (2005)(treating as a request to discharge counsel defendant's statement: "I don't like this man as my representative. . . . We had conflicts way before this ever started[.]"); *Fowlkes v. State*, 311 Md. 586, 591 (1988)(treating as a request to discharge counsel defendant's statement that "I don't think [my attorney] is any help to me anyway. If possible I would rather get rid of her, get [a] new attorney."); *Snead*, 286 Md. at 131 (treating as a request to discharge counsel defendant's statement, "I don't want no attorney then.").

Appellant directs us to the following highlighted passages as evidence of his intent to discharge counsel. We note that the passages came during the testimony of Taylor, the State's fourth witness on the first day of trial. Taylor testified on direct examination that he did not remember making a statement to the police and, when shown a portion of his video statement to the police, he testified that he did not recognize the person, himself, in the video. At that point, the State called Detective McMillan, out of turn, to testify about the video. After his testimony and before the State resumed questioning of Taylor, the court took a brief recess and at an ensuing bench conference, defense counsel advised: "My client would like to address the judge." Appellant then told the court:

> All right. When I asked – I been having questions that I feel as though should be addressed to the Court and *I feel as though my attorney isn't really like even taking into consideration what I'm saying*. Like I asked her to ask – I wanted to know why was this guy – I wanted to ask McMillan why was [Taylor] – why did you promise [Taylor] that he wouldn't be in the statements but yet he was in the statements?
>
> And then – I mean, just the simple – and they do the objection. I just want to know why did you promise this guy that he wouldn't be in the statement, but yet he's in the statements. And then [McMillan] said that he's – he's not identical twins. If you show two pictures of these people, they are identical twins and he doesn't say in the interview, she – in the transcripts that his name is Ladell Taylor, he never says – so how do we know – even on the video, he never says, yeah, I'm Ladell Taylor.
>
> If he said that he asked him before and then he didn't realize that [t]he video was on and he left back out, when he came back in he should have started over. He should have said, okay, sorry, how are you doing, my name is – my name is Det. McMillan and you are? You know what I mean? Some type of formal introduction. There's no formal introduction to say who is this people. He come in talking about Ben, I'm professional, yeah, I had to take a piss, my bad. You know what I mean?
>
> And then you don't really understand what he's even saying in that statement. You know what I mean? *And then I'm asking my attorney to help*

> *me and it's like I'm not getting the right answers. I don't – like I'm confused. I'm confused about a lot*.

(Emphasis added). In response, the trial court advised appellant, "I understand you have a lot at stake here" and reassured him that Detective McMillan would return to the stand. When appellant responded, "Yeah, but it's painting a picture[,]" the court again assured him that Detective McMillan would be back on the stand and added: "There are a lot of – the problem is, the rules of evidence, things are sometimes counterintuitive. Sometimes it seems logical that it should be this way, but under the rules, it's not." The following colloquy then occurred:

> [APPELLANT]: Yeah. I understand. No, I'm saying. I mean, I'm saying as far as – like, she – they're painting a picture to the jury that I'm this – I've done this thing and for him to say – this dude, I don't even know this – and this dude just sit there and say he don't know me.
>
> He made up the story, mind you, he was investigated by the police from the beginning because they thought that he was involved in getting this guy killed and he just go up there and say that. The whole time this guy – I don't know what these – I don't know what -- I don't like how that – it's not making enough sense.
>
> THE COURT: All right.
>
> [APPELLANT]: Like you said, it's not logical. It's not the rules, but the rule --- they breaking, I know some type of rule gotta be breaking with him saying yeah, I'm interviewing you because I think that you had something to do with getting this guy killed.
>
> THE COURT: And that may very well be true, but it's not the issue. It's not the legal issue right now. The legal issue is the reliability of an out-of-court statement. And it was recorded verbatim and identified by the detective, whether they believe the detective or not, that's for the jury.
>
> [APPELLANT]: All right.
>
> THE COURT; I'm sorry, I can't –

> [APPELLANT]: I understand.
>
> THE COURT: I'm really trying to give you fairest trial I can't. I know what's at stake for you.

At no other time during trial, did appellant indicate that he was confused or less than satisfied with his counsel.

Appellant then directs our attention to a colloquy between the court and defense counsel during a bench conference on the second day of trial after the parties had discussed jury instructions:

> THE COURT: I don't know what they pay you, but I just want to say respect, truly. Oh my God.
>
> [DEFENSE COUNSEL]: I – I (indiscernible).
>
> THE COURT: We can talk later.
>
> [DEFENSE COUNSEL]: The detective was like nice job on baiting my guy because he didn't get him going. That's why I needed that half hour. *Thank you, Your Honor, because I talked him down to act in his best interest*.
>
> THE COURT: I had thought I had it rough when I would try a case with a partner and an associate and they would be whispering in my ear or writing me a note. I thought that was tough. This is – I don't know how you're doing it really.
>
> [DEFENSE COUNSEL]: He insisted on reading my closing [argument] and critiquing it. Critiquing it.
>
> THE COURT: All right.
>
> [DEFENSE COUNSEL]: I hope I get an opportunity to say all the things I didn't say.
>
> THE COURT: I just wanted to tell you because really – I really respect that. I really admire that. Public defenders, I mean –

> [DEFENSE COUNSEL]: It's – when your bottom line is best interests of the client, *because I could have talked him into firing me long ago*.
>
> THE COURT: Yeah.
>
> [DEFENSE COUNSEL]: Like it's not his best interest. It's not in his best interest and I just keep that mantra in my head. Not in his best interest.
>
> THE COURT: After the case is over, we'll order a psychiatric evaluation of you.

(Emphasis added).

In light of the above case law, we are persuaded that appellant's statements were not a request to discharge counsel. At most, appellant was expressing his confusion regarding the testifying out of turn by State's witness Detective McMillan and his unhappiness that damaging evidence, Taylor's statement to the police, was brought before the jury. Appellant never explicitly stated that he wanted to discharge his counsel, and we interpret his statements as more an expression of his unhappiness and confusion regarding trial procedures and the admission of Taylor's video statement that he shot and killed Hebron, than any dissatisfaction with counsel. Additionally, defense counsel's statement that she could have talked appellant into firing her a long time ago, was not a present request to discharge counsel nor a suggestion that appellant wanted to discharge counsel. Defense counsel's remarks suggest only that appellant was very engaged, perhaps even strident, in his desire to know and understand the details of the trial proceedings, and that this was, at times, apparently trying for defense counsel.

Even if appellant's statements could be viewed as a request to discharge counsel, we are persuaded that the trial court did not commit reversible error because it allowed

appellant to explain his confusion and unhappiness regarding Taylor's testimony and the admissibility of Taylor's prior recorded statement.

When a defendant mid-trial makes a request to discharge counsel, "[t]he court must conduct an inquiry to assess whether the defendant's reason for dismissal of counsel justifies any resulting disruption[.]" *Hardy*, 415 Md. at 628 (quotation marks and citation omitted). "The court's burden in making this inquiry is to provide the defendant the opportunity to explain his or her reasons for making the request; in other words, the court need not do any more than supply the forum in which the defendant may tender this explanation." *Id*. (citing *Campbell*, 385 Md. at 635)(stating that "the trial judge was not required to make any further inquiry" after the defendant made clear his reasons for wanting to dismiss his counsel); *Brown*, 342 Md. at 430(describing court's burden as duty to "provide an opportunity for [the defendant] to explain his [or her] desire to discharge counsel"). "If the court provides this opportunity, how to address the request is left almost entirely to the court's sound discretion." *Id*. at 629 (quotation marks and citation omitted). The court should consider six non-exhaustive factors in exercising its discretion:

> (1) the merit of the reason for discharge; (2) the quality of counsel's representation prior to the request; (3) the disruptive effect, if any, that discharge would have on the proceedings; (4) the timing of the request; (5) the complexity and stage of the proceedings; and (6) any prior requests by the defendant to discharge counsel.

*Id*. (citing *Brown*, 342 Md. at 428). In sum, a trial court abuses its discretion when it fails "to allow a defendant any opportunity to explain his or her request at all, thus making it impossible to consider the six factors[.]" *Id*.

In *North v. North*, 102 Md. App. 1 (1994), Judge Wilner set forward a helpful explanation of the abuse of discretion standard:

> Abuse of discretion . . . has been said to occur where no reasonable person would take the view adopted by the [trial] court, or when the court acts without reference to any guiding rules or principles. It has also been said to exist when the ruling under consideration appears to have been made on untenable grounds, when the ruling is clearly against the logic and effect of facts and inferences before the court, when the ruling is clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result, when the ruling is violative of fact and logic, or when it constitutes an untenable judicial act that defies reason and works an injustice.

*North*, 102 Md. App. at 13–14)(internal citations and quotation marks omitted).

Over three typed pages of transcript, the trial court allowed appellant to explain without interruption his unhappiness and confusion regarding trial procedures and the admissibility of the prior recorded statement. While allowing appellant an opportunity to air his grievances, the court responded and answered his questions. Accordingly, even if appellant's comments could be viewed as a request to discharge counsel, the timing of the comments (mid-trial) placed the decision within the sound discretion of the trial court as to what, if any, action to take. Under the circumstances, we cannot conclude that the trial court abused its discretion in not granting appellant's request to discharge counsel, if that was what appellant was asking.

**II.**

At trial, the court admitted into evidence a video recording of Taylor's statement to the police following the murder. The court ruled that the statement was admissible as a prior-inconsistent statement. Appellant argues that the trial court's finding that Taylor deliberately feigned lack of memory at trial was in error because it was based "on nothing

more than speculation[.]" The State argues that appellant has not preserved this argument for our review because he did not raise it below, and in any event, appellant's argument lacks merit. We agree with the State.

Taylor testified that he was "not particularly happy" about testifying at appellant's trial. As to the events surrounding the murder, he testified, among other things, that he knew Hebron had been killed but he did not know who killed him; that he had been present and had heard a shot but did not remember how many he had heard; that he did not know any of Hebron's girlfriends but knew he was in a special relationship with Witherspoon; that she had a child but he did not know the father of the child; that he did not remember talking to a detective about Hebron's murder; and that he did not know appellant's name. When the State asked Taylor, after he read part of his transcribed videotaped statement to the police, whether it refreshed his memory, he said it did not. After asking Taylor whether he had any head injuries or illnesses, which Taylor denied, the State asked the court to admit the videotape because Taylor was feigning memory loss. The court agreed to allow the State to play Taylor's videotaped statement, ruling: "I do find that he does remember some of it. He doesn't remember others. It really strains the credibility some of the things he says he does not know or remember. I do find that the memory is feigned." Appellant objected to admission of the video on grounds that Taylor did not know that his statement to the police was being recorded. The court denied the objection, and the video was played for the jury.

Ordinarily, the appellate court will not decide any issue "unless is plainly appears by the record to have been raised in or decided by the trial court[.]" Md. Rule 8-131(a).

Md. Rule 4-323(a) provides: "An objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived." "It is well-settled that when specific grounds are given at trial for an objection, the party objecting will be held to those grounds and ordinarily waives any grounds not specified that are later raised on appeal." *Klauenberg v. State*, 355 Md. 528, 541 (1999)(citations omitted). *See also DeLeon v. State*, 407 Md. 16, 25 (2008)(an appellant who specified one objection at trial is limited to that same objection on appeal). Appellant objected at trial to the admission of the videotape on grounds that Taylor was unaware that his statement was being recorded, but on appeal appellant argues that the videotape was inadmissible because the trial court erred in finding that Taylor feigned memory loss. Because appellant raises a different argument on appeal than he did below, he has waived his appellate argument for our review. Even if appellant had preserved his appellate argument, however, we would have found it without merit.

"Hearsay" is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Md. Rule 5-801(c). Hearsay is generally inadmissible at trial because of its inherent untrustworthiness, unless some exception applies. *See* Md. Rule 5-802 and *Parker v. State*, 365 Md. 299, 312-13 (2001). The hearsay exception found in Rule 5-802.1(a) applies here: A statement, made by a witness at trial who is subject to cross-examination where the statement "is inconsistent with the declarant's testimony, if the statement was …

recorded in substantially verbatim fashion by stenographic or electronic means contemporaneously with the making of the statement[.]"

"Inconsistency includes both positive contradictions and claimed lapses of memory." *Nance v. State*, 331 Md. 549, 564 n.5 (1993)(citation omitted). An inconsistency may be implied where a witness's claim of memory loss at trial is feigned. *Corbett v. State*, 130 Md. App. 408, 425-26, *cert. denied*, 359 Md. 31 (2000). A feigned lack of memory may be implied where a witness claims that he does not remember an event when under the circumstances he would be reasonably expected to do so, or where he remembers only part of an event but the circumstances suggest he has the ability to testify fully about the event but is unwilling to do so. *Id*. at 425. "[T]he decision [about] whether a witness's lack of memory is feigned or actual is a demeanor-based credibility finding that is within the sound discretion of the trial court[.]" *Id*. at 426.

Appellant argues that the trial court's finding of feigned memory loss was an abuse of discretion because it is not uncommon for a person present at a crime scene to remember some, but not all, of what occurred or for a person to not remember what a person told the police in the days following a crime. Appellant's argument notwithstanding, we find no abuse of discretion by the trial court. As stated above, Taylor's feigned memory loss was a demeanor-based credibility finding left to the discretion of the trial court. Additionally, Taylor did not remember things one would have expected – appellant's name and whether he gave a statement to the police at the police station following Hebron's murder – and his statement was inconsistent with his trial testimony. Also, Taylor's motive for feigning memory loss was obvious – he was clearly unhappy about testifying at appellant's trial and

had gone so far as to tell the police he did not want his name associated with his police statement. Under the circumstances we are persuaded that the trial court's finding was not an abuse of discretion.

**JUDGMENTS AFFIRMED.**

**COSTS TO BE PAID BY APPELLANT.**