Circuit Court for Prince George's County
Case No.: CT190418X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 500

September Term, 2021

BERNARD EUGENE ALEXANDER

v.

STATE OF MARYLAND

Fader, C.J.,
Friedman,
Meredith,
(Senior Judge, Specially Assigned),
JJ.

Opinion by Meredith, J.
Concurring opinion by Friedman, J.

Filed: March 21, 2022

At the conclusion of a jury trial in the Circuit Court for Prince George's County, Bernard Eugene Alexander, appellant, was found guilty of attempting to kidnap a seven-year-old girl. The jury heard evidence that Alexander had approached a child he did not know while she was playing on a playground within the subdivision where she resided, that he had taken her by the hand or wrist, and then led her away from the playground and walked toward the exit of the subdivision. When the child's *de facto* stepfather saw the young girl with a man who was unknown to either him or the girl's mother, the stepfather ran to confront the stranger and asked what he was doing. After Alexander provided no satisfactory explanation for his presence in the subdivision or his physical contact with the seven-year-old girl, police were called, and Alexander was arrested and charged with numerous offenses. He was convicted of attempted kidnapping, and attempted kidnapping of a person under the age of 16. After sentencing, Alexander noted this direct appeal in which he raises the following questions for our review:

> 1. Did the court err and abuse its discretion in prohibiting defense counsel from arguing a non-incriminating explanation [for] evidence [of] flight?
>
> 2. Did the court err in admitting irrelevant evidence?
>
> 3. Did the court abuse its discretion in failing to address Appellant's [post-trial] letter, in which he made statements indicating that he may be inclined to discharge counsel?

For the reasons explained in this opinion, we find that the issue raised in Question 1 was not preserved; and we answer "no" to Question 2. We shall affirm the judgments of

conviction. But, with respect to Question 3, we conclude that we must vacate the sentences and remand the case to the Circuit Court for Prince George's County for resentencing.

FACTS

On March 14, 2019, the seven-year-old girl who is the subject of the attempted kidnapping charges in this case was playing at a playground located within the townhouse subdivision where she resided. She was approached by Alexander, a 38-year-old man who did not reside in that subdivision. She did not know Alexander. In fact, he had never had any prior contact with her or other members of her family. Alexander took hold of the seven-year-old girl's wrist or hand and led her away from the playground, walking in the direction of the exit from the subdivision. She tried to pull away, but could not.

A nine-year-old boy who was a friend and neighbor of the girl had been playing at the same playground when he saw Alexander grab the girl "by the wrist." The boy shouted at Alexander: "Don't touch her." But the man kept walking away from the playground with the girl. The boy ran to his own home and, in an agitated state his mother described as a "panic attack," told his mother that a man was trying to kidnap the little girl. The boy's mother called 911 and reported the incident.

In the meantime, Alexander and the seven-year-old girl had walked from the playground to a point that was near the spot where her stepfather's truck was parked, within sight of her family's townhouse. At that point, Alexander paused, and knelt down beside the child. He put his arm around her shoulder and began showing her his flip-phone. He was still holding her tightly enough that she could not get away. At about that time, the

girl's mother happened to look out a window of their townhouse, and she became alarmed when she saw her daughter talking to Alexander, a man she did not recognize. She asked her fiancé—whom most of the witnesses referred to as the seven-year-old girl's "stepfather," and the girl referred to as "my dad"—if he recognized Alexander as a neighbor. Because the stepfather did not recognize the man, the stepfather quickly put on shorts and slippers, and ran out of the townhouse to confront Alexander.

As soon as the stepfather reached Alexander, the girl was able to free herself and run home to her mother. The mother described her daughter as "crying hysterical." The girl recalled that she had been "crying" and "scared."

When the stepfather asked Alexander what he was doing in the subdivision, Alexander's first response was that he lived there. But when pressed for his address, Alexander claimed he lived at a street number that the stepfather knew did not exist. When the stepfather told Alexander that he did not live in that subdivision, Alexander replied that he worked there. But the stepfather told him he knew that was also untrue because the stepfather himself worked there. Alexander then asked if the stepfather could get him a job. At that point, the stepfather told Alexander that he had no business in the subdivision and needed to leave.

Alexander did not begin walking toward the exit from the subdivision—which was approximately a quarter of a mile away—and the stepfather began pushing him toward the exit. The mother of the 9-year-old boy, after calling 911, got in her vehicle and began following alongside of the stepfather and Alexander. When they reached the exit, she told

the stepfather not to let Alexander leave because she had called the police. Alexander then began to run, but the stepfather tackled him and held him in an ankle lock until police officers arrived on the scene. While the stepfather held Alexander, the mother of the 9-year-old boy "went into Mr. Alexander's pocket and pulled out [his] ID[.]" After the police arrived and the seven-year-old girl identified Alexander as the stranger who had grabbed her wrist and led her away from the playground, the police arrested Alexander.

At the conclusion of a jury trial, Alexander was found guilty of attempted kidnapping, and attempted kidnapping of a child under the age of 16. He was found not guilty of kidnapping, kidnapping a child under the age of 12, kidnapping a child under the age of 16, and second-degree assault. For the offense of attempted kidnapping of a child under the age of 16, the court sentenced Alexander to 30 years, but suspended all but 20 years, to be followed by 5 years of probation. The conviction of attempted kidnapping was merged for sentencing purposes.

This appeal followed.

DISCUSSION

1. Alexander's closing argument regarding flight.

After the close of evidence, the court's instructions to the jury included Maryland Criminal Pattern Jury Instructions ("MPJI-Cr") 3:24, advising the jury that, under some circumstances, a person's flight immediately after being accused of committing a crime "is

a fact that may be considered by you as evidence of guilt" if you conclude "the flight shows a consciousness of guilt."[1]

During the State's closing argument (opening portion), the prosecutor made two statements that Alexander asserts were intended to draw the jury's attention to flight that should be considered evidence of guilt. In its brief in this Court, the State quotes those portions of the prosecutor's argument and emphasizes that the prosecutor did not expressly "argue that the jury should infer from the evidence of flight that Alexander was conscious of his guilt of the offenses." The State recounts:

> The prosecutor twice mentioned Alexander's flight in the State's initial closing argument, and not at all in the rebuttal closing argument, but each time the prosecutor simply recounted the evidence without arguing that a particular inference should be drawn. The prosecutor's mentions of Alexander's flight were as follows:
>
> > . . . [The stepfather] may have had the most up-close look at the Defendant of everyone other than [the seven-year-old girl]. He saw her … out the window, he ran, he's talking to him [Alexander]. They have a whole conversation back and forth. He escorts him all the way out. Remember, [Alexander]'s not wanting to leave, **he's not wanting to leave; and oh, wait, the police are coming; now I want to leave**. And he [stepfather] tackled him, and as Officer Downs told, he

[1] Except for omitting the inapplicable references to "concealment," the court's instruction was taken verbatim from pattern instruction MPJI-Cr 3:24, which states:

> A person's flight [concealment] immediately after the commission of a crime, or after being accused of committing a crime, is not enough by itself to establish guilt, but it is a fact that may be considered by you as evidence of guilt. Flight [concealment] under these circumstances may be motivated by a variety of factors, some of which are fully consistent with innocence. You must first decide whether there is evidence of flight [concealment]. If you decide there is evidence of flight [concealment], you then must decide whether this flight [concealment] shows a consciousness of guilt.

> had him in [an] ankle lock. He was standing kind of just holding his legs waiting for the police to get there. And Officer Downs identified him [Alexander] . . . .
>
> [* * *]
>
> . . . . [Alexander]'s not leaving. And [the stepfather]'s like, "I had to grab his arm, and I'm escorting him all the way down that street," and he gets him out of the neighborhood. Remember, [stepfather] said then [Alexander] turned around and came back. [Stepfather]'s like, "I got a piece of wood because he's coming back." That's when the neighbor comes up, and [the nine-year-old boy's mother] tells you herself she was following along behind them until they get to the end of the neighborhood, and **she pulls up with the truck and is like, "I called the police. They are on their way." At that point, what are the Defendant's actions? He takes off running**. . . .

(Emphasis added.)

During the closing argument of Alexander, defense counsel made a very brief argument regarding "Alexander running" after the mention of "the police." The court sustained an objection made by the prosecutor, and Alexander argues on appeal that the court's ruling was a reversible error. The objection occurred as follows during defense counsel's argument:

> [DEFENSE COUNSEL:] There was talk about Mr. Alexander running. Well, first, Mr. Alexander refuses to leave, then he's told to leave again, then he's pushed off of the property. And so then as he's being pushed off the property, based on the testimony, he's got a woman driving along in a car beside him while he's being pushed off the property, however you believe it occurred. **When he finally gets to the edge, he's pushed and told to leave. He says "No." Then you heard testimony that he was told, ["]Oh, we're calling the police,["] and then he started to run**. Well, he's already been hassled already, so that's reason for him to just decide, **well, now you're calling the police. These days, a man of color in our community –**

[PROSECUTOR]: **Objection**.

THE COURT: **Sustained**.

[DEFENSE COUNSEL]: **There are other reasons why you would run and would not want to talk to the police in our community and you're on foot and you've already been hassled by people telling you to get off property, and then they tell you they're calling the police. I would submit to you and ask you to consider that.**

(Emphasis added.)

Defense counsel did not ask to be heard further regarding the argument she had intended to make, and, at no time before or after the jury retired did defense counsel make any proffer of what additional comments would have been argued if the court had not sustained the State's objection to the sentence that began "These days, a man of color in our community." But on appeal, appellant argues that there were material additional arguments he would have made about incidents of police brutality against persons of color if his attorney had not been "prohibit[ed]" from doing so by the trial court.

With respect to appellate review of a trial court's rulings upon objections to closing arguments, we observed in *Beckwitt v. State*, 249 Md. App. 333, 385 (2021), *aff'd on other grounds*, ___ Md. ___, No. 16, Sept. Term, 2021, slip op. at 1-3; 2022 WL 260176, *1-2 (filed January 28, 2022):

> "Where an objection to opening or closing argument is *sustained*, we agree that there is nothing for this Court to review unless a request for specific relief, such as a motion for a mistrial, to strike, or for further cautionary instruction is made." *Hairston v. State*, 68 Md. App. 230, 236, 511 A.2d 73 (1986) (citing *Blandon v. State*, 60 Md. App. 582, 586, 483 A.2d 1320 (1984)).

(Emphasis in original.) *Cf. Bing Fa Yuen v. State*, 43 Md. App. 109, 118-19, (1979) (upholding trial court's refusal to allow reading from the transcript absent a proffer, and stating "[j]ust as discretion should not be arbitrarily withheld, it can not be unexplainedly demanded"), *cert. denied*, 286 Md. 756, *cert. denied*, 444 U.S. 1076 (1980).

Appellant asserts in his brief: "The court erred and abused its discretion in sustaining the objection to defense counsel's closing argument because a Black man's fear of abuse, mental or physical, at the hands of police is a matter of common knowledge." (Citing, *inter alia*, *Dozier v. United States*, 220 A.3d 933, 944-45 (D.C. 2019), and *Commonwealth v. Warren*, 58 N.E.3d 333, 342 (Mass. 2016).) Appellant further contends:

> When defense counsel attempted to offer a specific, non-incriminating explanation of flight-evidence based on a matter of common knowledge—a Black man's fear of abuse at the hands of police—the court would not allow it. Moreover, by sustaining the objection to defense counsel's argument, the court completely nullified the argument, leaving Appellant with a generic and ineffectual "other reasons" comment. There were only two plausible reasons for the explanation of flight, and the court allowed the jury to consider only the prosecutor's reasons. In a case that came down to Appellant's intent, about which the evidence was by no means overwhelming, that error cannot be deemed harmless.

The State responds, in part, that, as a matter of appellate procedure, the argument about Alexander's fear of being abused by police—now spelled out in great detail in appellant's brief—was never articulated by defense counsel during the trial, and is therefore not preserved. The State asserts:

> [W]hen the trial court ruled on the objection, it was unclear what the nature of defense counsel's argument was or that it was a matter of common knowledge. In the absence of a proffer by defense counsel as to those matters, Alexander's appellate claim is unpreserved and the trial court's

> ruling, based on what was apparent to the court at the time, was not an abuse of discretion.

Appellant rejoins: "There was no need for a proffer because what defense counsel 'was trying to accomplish was obvious.'" (Citing *Jorgensen v. State*, 80 Md. App. 595, 601 (1989).) Appellant also provides this citation: "*See* Maryland Rule 4-323(c) ('it is sufficient that a party, at the time the ruling or order is made or sought, makes known to the court the action that the party desires the court to take')."

But Rule 4-323(c) is of little help to appellant because defense counsel did not make known to the trial court that the argument that she wished to make to the jury was that a person of color might run to avoid contact with police out of fear of being abused by police. As the Court of Appeals observed in *Lopez-Villa v. State*, ___ Md. ___, No. 22, September Term, 2021, slip op. at 12, 2022 WL 765741 *6 (filed March 14, 2022): "Without a contemporaneous objection or expression of disagreement, the trial court is unable to correct, and the opposing party is unable to respond to, any alleged error in the action of the court."

We view the preservation obligation as analogous to the requirements of Maryland Rule 5-103(a)(2):

> Error may not be predicated upon a ruling that admits or excludes evidence unless the party is prejudiced by the ruling, and
>
> (1) . . .
>
> (2) *Offer of Proof*. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer on the record or was apparent from the context within which the evidence was offered. . . .

See also Md. Rule 8-131(a) ("Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal."); *Hartman v. State*, 452 Md. 279, 299 (2017) ("We made clear in *State v. Bell*, 334 Md. 178, 638 A.2d 107 (1994)[,] that our review of arguments not raised at the trial level is discretionary, not mandatory.").

In his reply brief, Alexander insists that it was obvious from the context of the fragmentary statement of his counsel that the partial sentence referred to fear of being abused by police. He states:

> Against the backdrop of the flight instruction, defense counsel obviously was attempting to use a specific piece of common knowledge—the reasonable, non-incriminating fear that people of color, i.e., Black men (Appellant is a Black man) feel toward police—to give a non-incriminating explanation for the flight evidence[.]
>
> * * *
>
> [I]t is simply implausible that the court did not understand that defense counsel was trying to argue that Appellant, as a "man of color" (State's Exhibit 14), started to run from police because, as a "man of color in our community," he feared abuse by police.

But, notwithstanding the eloquence with which appellate counsel fleshes out such an argument in his briefs as well as during oral argument in this Court, because Alexander's trial counsel never made a proffer that this was the intended point she was trying to address, we do not know how the trial court would have responded if given the opportunity, nor do we know what specific statements counsel would have made. *See Lopez-Villa*, ___ Md. at ___, slip op. at 20, 2022 WL 765741 *9 (because appellant's trial counsel did not assert an

objection after the trial court failed to read a requested *voir dire* question, the alleged error could not be raised on appeal; the Court of Appeals held that trial counsel did not "satisfy either the plain language requirements of Md. Rule 4-323(c) or the Rule's purpose of providing the trial court with the opportunity to correct, and the opposing party the opportunity to respond to, any perceived errors.").

Although appellant urges us to assume that the court could have inferred only one possible statement from defense counsel, we conclude that it is at least equally plausible, given the court's immediate response to the objection, that the court was concerned that defense counsel was about to make an improper appeal to the jury's bias or prejudice, either by injecting a racial issue that had not been a focus of the trial up to that point, or by urging the jury to nullify Alexander's criminal conduct. *Cf. State v. Sayles*, 472 Md. 207, 239 (2021) ("it is improper for an attorney to argue jury nullification to a jury"). If counsel had finished the sentence by suggesting that, these days, a man of color can never get a fair trial, the court would have had to deal with how to cure an improper argument that urged the jury to redress other incidents of racial injustice rather than decide this case based solely upon the evidence presented regarding Alexander. In *Sayles*, the Court of Appeals stated: "Here, we unequivocally hold that . . . jury nullification is not authorized in Maryland and a jury does not have the right to engage in jury nullification." *Id*. at 245.

And closing arguments that encourage jurors to abandon their objectivity are inappropriate. Although the general rule is that "counsel has the right to make any comment or argument that is warranted by the evidence proved or inferences therefrom[,]"

Wilhelm v. State, 272 Md. 404, 412 (1974), the Court of Appeals observed in *Mitchell v. State*, 408 Md. 368, 381 (2009): "It is also improper for counsel to appeal to the prejudices or passions of the jurors, *Wood v. State*, 192 Md. 643, 652, 65 A.2d 316, 320 (1949), or invite the jurors to abandon the objectivity that their oaths require, *Lawson v. State*, 389 Md. 570, 594, 886 A.2d 876, 890 (2005)."[2]

As a consequence, it is, in general, not error for a trial judge to sustain an objection to an argument that urges jurors to be swayed by sympathy, bias, or prejudice for any party. The court had admonished the jurors in accordance with MPJI-Cr 2:04: "You must consider and decide this case fairly and impartially. You are to perform this duty without bias or prejudice as to any party. You should not be swayed by sympathy, prejudice, or public opinion."

In this case, in the absence of clarification by trial counsel that the reference to the defendant's race was not going to be an appeal to bias or prejudice, the court did not err in sustaining the prosecutor's preemptive objection. And, in the absence of any proffer by defense counsel reassuring the court that any argument about "a man of color in our

[2] The State also points out that, in making closing arguments to a jury, trial counsel are not permitted to argue facts that are not in evidence. The State cites *Small v. State*, 235 Md. App. 648, 697 (2018), *aff'd on other grounds*, 464 Md. 68 (2019), wherein this Court observed: "The freedom to make arguments to the jury during closing 'is not unlimited and does not include the right to discuss facts not in evidence.'" (quoting *Ware v. State*, 360 Md. 650, 682 (2000)). In the absence of a proffer, the trial court might have sustained the objection due to concern that Alexander's reference to "a man of color in our community" was an introductory reference to facts that were not in evidence. *But cf.* MPJI-Cr 3:00 (instructing a jury: "You may draw any reasonable conclusion from the evidence that you believe to be justified by common sense and your own experiences.").

community" would not encourage the jurors to abandon their duty to decide the case "without bias or prejudice" as to either party, we conclude there was no error on the part of the trial judge in sustaining the objection.

2. Admitting in evidence the contents of Alexander's wallet.

Alexander contends that the trial court erred in admitting into evidence State's Exhibit 11, which was a sealed clear evidence-baggie containing the contents of Alexander's wallet at the time of his arrest. He asserts: "The items were irrelevant and, thus, inadmissible [pursuant to Maryland Rules 5-401 and 5-402]."

The item that was eventually admitted as State's Exhibit 11 was marked for identification during the examination of Officer Cody Downs, who was one of the Prince George's County Police officers who responded to the 911 call. Officer Downs described Exhibit 11 as "some belongings that were inside of [the defendant's] wallet." When the State moved to admit Exhibit 11, defense counsel objected, and asserted "it's irrelevant to the facts in this case." The prosecutor replied that "these are the items that were on him at the time of arrest." Much of the argument focused on a wrapped condom that was initially included in the exhibit, but the court ordered that item be excluded because it was "more prejudicial than probative."

After the court ruled that the condom would be excluded, defense counsel stated: "I'm still objecting to [State's Exhibit] 11 without the condom because I haven't had the ability to see all of the items in there, maneuvering the bag, to know what the actual items

are." The court inquired: "Well, I'll ask you, did you ask to inspect?" The colloquy continued:

> THE COURT: When you got the discovery, did you ask – did you go make arrangements to go see –
>
> [DEFENSE COUNSEL]: No, I didn't.
>
> * * *
>
> [DEFENSE COUNSEL]: I'm still arguing these things are not relevant as to –
>
> THE COURT: What else is in there?
>
> [DEFENSE COUNSEL]: There are a number of cards with his name on it, and I don't know what else is in here because some of –
>
> THE COURT: When you say "cards," what do you mean? Business cards?
>
> [DEFENSE COUNSEL]: It looks like it.
>
> THE COURT: **Is any of it prejudicial?**
>
> [DEFENSE COUNSEL]: It looks like a magnetic card in here of some sort. There are several copies of business cards.
>
> THE COURT: **Is there anything prejudicial?**
>
> [DEFENSE COUNSEL]: I don't know without looking at the individual items in the bag. They're sealed, and so that's why –
>
> THE COURT: It's relevant because he's [sic] alleging they were taken off of him at the scene of the crime. The condom is prejudic[ial]. **There's been no articulated prejudice to the card with the magnetic strip or the business cards or whatever these cards are.** The Defense had an opportunity to examine the contents before trial[;] so I'm going to admit, again, all contents other than the condom.

(Emphasis added.)

Alexander argues that the exhibit did not meet the definition of "relevant" evidence set forth in Maryland Rule 5-401 because it did not have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." He asserts that neither the fact that the items contained in Exhibit 11 were in his possession at the time of the incident, nor the fact that the cards contained identification information made the exhibit relevant because, he contends, "identity was not an issue in this case." He points out: "That identification information was taken from Appellant is as undisputed as is the issue of identity itself."

But the fact that a defendant chooses not to contest a point does not make evidence on that point irrelevant and inadmissible. *Cf. State v. Broberg*, 342 Md. 544, 554 (1996) ("photographs do not lack probative value merely because they illustrate a point that is uncontested"). As the State points out, the contents of Alexander's wallet were relevant because the identifying information—including a driver's license with an address—confirmed his identity as the person who had contact with the seven-year-old girl, and supported the assertion of the State that Alexander had no legitimate business even being in the neighborhood. Even though this may have been of minimal importance to the outcome of this case because Alexander did not ultimately contest either his identity or the fact that he resided at some distance from the seven-year-old girl's playground, the trial judge did not err in concluding that the exhibit had sufficient relevance to be admissible.

Although defense counsel did not tell the trial court that any of the items in Exhibit 11 (other than the excluded condom) were prejudicial, Alexander argues in his appellate brief in this Court that he was prejudiced by the admission of Exhibit 11 because one of the items in the sealed baggie "is a business card embossed with the Anne Arundel County, Maryland logo. Under the printed name of a person presumably employed by Anne Arundel County are printed the words 'Pretrial Supervised Release Unit.'" As the above excerpt of the trial transcript illustrates, however, no such claim of prejudice was made during trial. When the trial judge pressed counsel to identify anything that was prejudicial, the card from Anne Arundel County was not mentioned. Accordingly, the argument raised on appeal regarding prejudice was not preserved for our review. *See Mines v. State*, 208 Md. App. 280, 291 (2012) (concluding that argument that witness's testimony was prejudicial was unpreserved absent argument on that ground), *cert. denied*, 430 Md. 346 (2013).

3. Post-trial letter complaining about counsel.

Alexander's trial began on February 19, 2020, and concluded on February 21, 2020. After the jury had been released, the court and counsel discussed sentencing. It was agreed that a long-form presentence investigation would be ordered, and the parties would return for sentencing (approximately two months later) on April 23, 2020. The court also granted the State's request that Alexander's pretrial release be revoked and that he be held on a no-bond status.

But sentencing did not proceed as anticipated. A global pandemic caused by the spread of the COVID-19 virus disrupted many schedules, including some court proceedings. By administrative order issued March 13, 2020, the Chief Judge of the Court of Appeals of Maryland ordered, in part: "All courts in the Maryland Judiciary, court offices, administrative offices, units of the Judiciary, and the Offices of the Clerks of the Circuit Courts shall be closed to the public on an emergency basis, effective March 16, 2020[.]"

Alexander's sentencing did not take place until June 4, 2021, and even then, Alexander appeared at the proceeding via remote video transmission. During the interim, Alexander wrote several letters that appear in the record. In a letter dated December 7, 2020, Alexander expressed concern about COVID and its impact upon his health, and asked that he be released on bond pending sentencing. Alexander followed up with another letter, dated December 14, 2020, in which he supplemented his request for release until his sentencing. In both of these letters, Alexander stated that he had been prepared to appeal his case since the day of his trial, but could not do so because he had not yet been sentenced. Neither of these letters mentioned counsel.

But a letter Alexander sent dated February 22, 2021, addressed to two of the circuit court's judges (other than the judge who conducted his trial and sentencing), stated:

> I have been awaiting sentencing since 02-21-20. Since that time representation has not been present in my case. Her name is [Trial Counsel] and a part of Public Defenders Office. Ms. [Trial Counsel] was appointed to handle my case 2 years ago. (04-17-19) During that time Ms. [Trial Counsel] was cordial and professional until the date of my verdict. 02-21-20 I have not heard or spoken with or received any legal mail informing me of the

> status of my case. I would like to appeal the case but have not been sentenced. I have sent emails and tried to contact [Trial Counsel] by phone. So I reapplied for a public defender. I was appointed her again. **I think their [sic] may be a[] conflict of interest concerning my disposition.** The reason being that she advised me to accept a plea-deal for 2nd degree assault. I denied the offer and took it to trial. I was found guilty of [two counts] out of a 7 count indictment. **My opinion is that [my Trial Counsel]** made progress, but **was underprepared** for my decision to take it to trial. According to Ms. [Trial Counsel], plea of 2nd degree assault was the premise of my defense. **I would ask for the intervention of the court to address this issue concerning counsel**.[3]

(Emphasis added.)

After the letter dated February 22, 2021, was received by the circuit court, one of the two judges to whom the letter was addressed made a notation on the letter indicating: "seen in chambers on 3/3/21." No other response to the letter appears of record.

[3] Although Alexander suggests in this letter that he harbored a concern that Trial Counsel "was underprepared for my decision to take it to trial[,]" he had expressed no similar concern regarding Trial Counsel to the trial judge during trial. And, on the first day of trial, when the trial judge conducted *voir dire* to consider whether Alexander had knowingly and freely rejected the State's plea offer, the trial judge asked: "Have you been satisfied with the work of [Trial Counsel] up until today?" Alexander replied: "Yes."

After the prosecution concluded presenting its case in chief, the trial judge conducted another *voir dire* regarding Alexander's decision not to testify:

> THE COURT: So, you've had an opportunity to speak to your attorney. Have you been satisfied with the work she's been putting forth in your case?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: Has she answered all your questions?
>
> THE DEFENDANT: Yes, Your Honor.

Alexander did not then, and does not now, contend that counsel's representation was deficient during the proceedings that took place through the date of the verdict.

But Alexander's trial counsel filed a motion on March 4, 2021, requesting permission for presentence medical consultation. The trial judge signed an order granting that motion on March 9, 2021.

Prior to the sentencing hearing, Alexander wrote another letter to the trial judge, providing comments he wanted the court to consider prior to sentencing. In that letter, received by the court on May 19, 2021, Alexander made no mention of concern about being represented by Trial Counsel at sentencing.

When Alexander appeared for sentencing represented by Trial Counsel, the trial judge did not ask him whether his letter dated February 22, 2021, was an indication that he wished to discharge Trial Counsel from representing him at the sentencing hearing. But, at some point during the sentencing hearing, the court did make a reference to "one of the letters [in the court file] that Mr. Alexander wrote," apparently referring to the February 22 letter (based upon the court's comment that the letter discussed "a plea offer that he says Ms. [Trial Counsel] suggested that he take[.]"). The court also said to the defendant at the outset of the sentencing hearing: "Mr. Alexander, if something happens that you want to speak or speak to your attorney, raise your hand to get our attention." And, after Trial Counsel argued for a lighter sentence than the State requested, the court again offered Alexander an opportunity to speak, asking him: "Do you wish to say something to me?"

On appeal, Alexander contends that an inquiry by the court into whether, and if so why, Alexander wanted to discharge his Trial Counsel from representing him during the sentencing hearing was required by "constitutional standards" relative to right to counsel.

Appellant asserts: "[T]he court was required to allow Appellant *an opportunity to give his reasons for wanting to discharge counsel* and to rule *on that request* by exercising its discretion in compliance with 'constitutional standards.'" (Emphasis added.) (Citing *State v. Brown*, 342 Md. 404, 428 (1996).) As a consequence, Alexander contends: "Appellant is entitled to a new sentencing."

The State disagrees, and asserts: "Because Alexander did not make a statement that he wanted to discharge counsel for purposes of sentencing and he did not indicate a present intent to seek new counsel, the court did not abuse its discretion in not making an inquiry."

Maryland Rule 4-215(e) prescribes actions that must be taken by the court if a defendant "requests permission to discharge an attorney" before trial commences. That subsection of Rule 4-215 provides:

> **If a defendant requests permission to discharge an attorney whose appearance has been entered, the court shall permit the defendant to explain the reasons for the request**. If the court finds that there is a meritorious reason for the defendant's request, the court shall permit the discharge of counsel; continue the action if necessary; and advise the defendant that if new counsel does not enter an appearance by the next scheduled trial date, the action will proceed to trial with the defendant unrepresented by counsel. If the court finds no meritorious reason for the defendant's request, the court may not permit the discharge of counsel without first informing the defendant that the trial will proceed as scheduled with the defendant unrepresented by counsel if the defendant discharges counsel and does not have new counsel. If the court permits the defendant to discharge counsel, it shall comply with subsections (a)(1)-(4) of this Rule if the docket or file does not reflect prior compliance.

(Emphasis added.)

Although the rule speaks only of requests for "permission to discharge an attorney[,]" cases applying Rule 4-215(e) have interpreted that phrase expansively to

include any statement from which "a court **could conclude** reasonably that **the defendant may be inclined** to discharge counsel." *Gambrill v. State*, 437 Md. 292, 302 (2014) (emphasis added) (quotation marks and citations omitted). In *Gambrill*, the Court of Appeals provided the following guidance with respect to determining whether a defendant had made a request that invokes application of Rule 4-215(e):

> Rule 4-215(e), however, does not give definition to what constitutes a "request" to discharge counsel, thereby requiring the colloquy to secure the defendant's reasons, and the Rule's history "contains no commentary on the meaning of the phrase '*requests* permission to discharge an attorney.'" *See State v. Campbell*, 385 Md. 616, 628 n.4, 870 A.2d 217, 224 n.4 (2005) (emphasis in original). We have established, nevertheless, that **a request to discharge counsel is "any statement from which a court could conclude reasonably that the defendant may be inclined to discharge counsel."** *Williams v. State*, 435 Md. 474, 486–87, 79 A.3d 931, 938 (2013) ("*Williams II*"), citing [*State v.*] *Taylor*, 431 Md. [615,] 634, 66 A.3d at 710 [(2013)]; *State v. Hardy*, 415 Md. 612, 623, 4 A.3d 908, 914 (2010); *State v. Davis*, 415 Md. 22, 31, 997 A.2d 780, 785 (2010); *Leonard* [*v. State*], 302 Md. [111,] 124, 486 A.2d at 169 [(1985)]. **A request to discharge counsel "need not be explicit"**, *Williams II*, 435 Md. at 486, 79 A.3d at 938, citing *Hardy*, 415 Md. at 623, 4 A.3d at 914, nor must a defendant "'state his position or express his desire to discharge his attorney in a specified manner' to trigger the rigors of the Rule." *Williams II*, 435 Md. at 486, 79 A.3d at 938, quoting *Davis*, 415 Md. at 32, 997 A.2d at 786.

Id. at 302 (emphasis added). *Accord State v. Weddington*, 457 Md. 589, 601 (2018) (citing *State v. Graves*, 447 Md. 230, 241-42 (2016)).

Similarly, in *State v. Taylor*, 431 Md. 615, 632 (2013), the Court of Appeals said:

> **Md. Rule 4-215(e) does not compel a defendant to utter any particular magical incantation or "talismanic phrase" in order to invite the court's interest in whether the defendant is pondering his or her right to counsel of choice**, whether by choosing to discharge his or her attorney and replacing that attorney with new counsel or by choosing self-representation. *State v. Campbell*, 385 Md. 616, 629–30, 870 A.2d 217, 224–25 (2005) (quoting *Leonard v. State*, 302 Md. 111, 124, 486 A.2d 163, 169

> (1985)). It is well established, however, that a defendant must provide a statement "from which the court could reasonably conclude" that the defendant desires to discharge his or her attorney, and proceed with new counsel or self-representation. *Hardy*, 415 Md. at 622, 4 A.3d at 914 (quoting *Snead v. State*, 286 Md. 122, 127, 406 A.2d 98, 101 (1979)).

(Emphasis added.)

"**Any statement that would reasonably apprise a court of defendant's wish to discharge counsel will trigger a Rule 4-215(e) inquiry** regardless of whether it came from the defendant or from defense counsel." *State v. Davis*, 415 Md. 22, 32 (2010) (emphasis added). And the Court of Appeals has been quite strict in requiring that a court follow the steps mandated by Rule 4-215(e) in response to a request to change counsel before trial commences. Under those circumstances: "Once Rule 4-215(e) is triggered, the trial court has an affirmative duty to address the defendant's request." *Williams v. State*, 435 Md. 474, 487 (2013); *see also Snead v. State*, 286 Md. 122, 131 (1979) (concluding that the failure to inquire into a defendant's reasons for seeking new counsel when the proper request has been made to the court is reversible error). And in *Davis*, *supra*, 415 Md. at 35, the Court cautioned: "Any court that fails to follow-up with the defendant following a possible, albeit unclear, Rule 4-215(e) request risks appellate reversal of its judgment. Thus, erring on the side of caution is advised."

As Alexander concedes in his brief, however: "The court was not required to strictly follow the dictates of Rule 4-215(e) because the request to discharge counsel embodied in the letter came after 'meaningful trial proceedings' had begun. *Marshall v. State*, 428 Md. 363 (2012)." Despite that concession, Alexander contends that the court was obligated to

conduct some inquiry regarding any desire to discharge his counsel prior to conducting the sentencing hearing. He states in his brief:

> Nonetheless, the court was required to allow Appellant an opportunity to give his reasons for wanting to discharge counsel and to rule on that request by exercising its discretion in compliance with "constitutional standards." *State v. Brown*, 342 Md. 404, 428 (1996) ("Although we conclude that Rule 4-215(e) does not apply to decisions to discharge counsel after trial has begun, the trial court must determine the reason for the requested discharge before deciding whether dismissal should be allowed. . . This inquiry must meet constitutional standards."). The exercise of discretion includes consideration of the factors set forth in *Brown*. *Id*. at 428.
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> * * *
>
> Appellant is entitled to a new sentencing. *Catala v. State*, 168 Md. App. 438, 468-69 (2006).

In *Catala*, 168 Md. App. 438, we reviewed a case in which the defendant's trial counsel had withdrawn prior to sentencing, and the defendant appeared at the sentencing hearing without counsel. We held that, even though Rule 4-215 did not apply, the sentencing court erred in proceeding without adequately exploring the defendant's reasons for appearing without counsel. Judge James Salmon wrote for our Court:

> In *State v. Brown*, 342 Md. 404, 426, 676 A.2d 513 (1996), the Court of Appeals was presented with the issue of whether the trial court was obliged to follow Maryland Rule 4-215 when (after trial had commenced) the defendant asked but was denied permission to discharge counsel. The *Brown* Court said that, once trial began, the dictates of Maryland Rule 4-215 no longer governed the proceedings, "although the court must still adhere to constitutional standards." *Id*. The *Brown* Court held that in order to follow "constitutional standards" the trial court was required to determine the reason for the requested discharge "before deciding not to allow the dismissal." *Id*. at 412, 676 A.2d 513.
>
> By parity of reasoning, it is clear that, when a defendant appears at sentencing after his trial counsel has withdrawn, the sentencing judge may

> not force an unrepresented defendant to proceed without counsel unless the court first gives the defendant a fair opportunity to explain why he or she has not retained new counsel.
>
> * * *
>
> [T]he court asked appellant if it was correct that he had "made no effort to get counsel." The defendant said that he had made an effort to obtain counsel but then said, ambiguously, that he "did not feel comfortable speaking to them." Whether he was "uncomfortable" because of the language barrier, or for some other reason, is unclear. The court next asked appellant if he had spoken to anyone in the Public Defender's Office; when the defendant answered in the negative, the court concluded the discussion and, at least impliedly, decided that appellant had waived counsel by inaction.
>
> Based on *Brown*, the sentencing judge was justified in failing to comply with the strict requirements of Rule 4-215. But, the court was still required to give appellant some meaningful opportunity to explain why he had not retained counsel and then make a decision as to whether the right to counsel had been waived by inaction. Here, appellant was afforded no such opportunity. And, as a consequence, we have no idea why counsel was not retained. Under these circumstances, we hold that appellant is entitled to a new sentencing hearing.

Id. at 468-69.

We conclude that this case is sufficiently analogous to *Catala* to grant Alexander's request that the case be remanded for a new sentencing hearing, at which time he would have the opportunity to explain whether he wished to discharge Trial Counsel or proceed with resentencing otherwise. We recognize that the concern Alexander expressed about his Trial Counsel's "conflict" in his letter dated February 22, 2021, was not an unambiguous request to discharge counsel. But we also note that the Court of Appeals in *Gambrill* found reversible error in the circuit court's failure in that case to conduct further inquiry of the defendant regarding an indication of desire to hire new counsel (which the

Court of Appeals said "may not have been a paradigm of clarity" 437 Md. at 305), and held that inquiry is required if the defendant makes any statement from which a court could reasonably conclude the defendant "may be inclined to discharge counsel." *Id.* at 302 (quotation marks and citations omitted).

The absence of any inquiry on the record in this case about Alexander's possible desire to discharge Trial Counsel is similar to the lack of follow-up inquiry that led to reversal in *Gambrill* and the insufficient inquiry that led to reversal in *Catala*. Consequently, we conclude we are required to vacate appellant's sentences and remand the case for a new sentencing hearing.

JUDGMENTS OF CONVICTIONS AFFIRMED; SENTENCES VACATED; CASE REMANDED TO THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY FOR RESENTENCING.
COSTS TO BE PAID TWO-THIRDS BY APPELLANT AND ONE-THIRD BY PRINCE GEORGE'S COUNTY.

Circuit Court for Prince George's County
Case No. CT190418X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 500

September Term, 2021

BERNARD EUGENE ALEXANDER

v.

STATE OF MARYLAND

Fader, C.J.
Friedman,
Meredith, Timothy E.
(Senior Judge, Specially Assigned),

JJ.

Concurring Opinion by Friedman, J.

Filed: March 21, 2022

I concur. I write separately to emphasize my view that, but for counsel's failure to proffer, discussed in the majority opinion, Slip Op. at 7-13, she could well have made the arguments to the jury that are now urged on appeal. There are, I think, three aspects to this. *First*, when the trial court gave the jury the instruction on flight, the State was free to argue that Alexander's flight from police gave rise to an inference of consciousness of guilt. It also allowed defense counsel the opportunity to argue the opposite inference, that Alexander had another, non-incriminating reason to flee. *Second*, it is beyond dispute that many members of the Black community in Prince George's County (and beyond) have justified fear of interaction with the police. The State does not contest this point, writing, "it is documented that [B]lack people may be the object of racial profiling and that abusive conduct by police, including excessive force resulting in death, disproportionately affects [B]lack people." Appellee's Br. 13 (footnote omitted). And, *third*, the existence of this fear of police is "common knowledge" such that it may be argued to the jury without the necessity of prior introduction of facts to support the existence of such fears or evidence that Alexander himself had such fears. Trial Tr. 8, Feb. 21, 2020 ("In evaluating the evidence, you should consider it in light of your own experiences. You may draw any conclusion from the evidence that you believe to be justified by common sense and your own experiences.") (quoting MPJI-Cr. 3:00); *Smith v. State*, 388 Md. 468, 487 (2005) ("In closing argument, jurors may be reminded of what everyone else knows, and they may act upon and take notice of those facts [that] are of such general notoriety as to be matters of common knowledge.") (cleaned up). Thus, on the evidentiary record presented (and but

for the failure to proffer), defense counsel was entitled to argue to the jury that it should draw the non-incriminating inference that Alexander was fleeing based on a fear of the police.