Circuit Court for Prince George's County
Case No. CT05-0210X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 785

September Term, 2016

COREY WILLIAM PHELPS

v.

STATE OF MARYLAND

Woodward, C.J.,
Meredith,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Kenney, J.

Filed: March 12, 2018

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Following a retrial, a jury in the Circuit Court for Prince George's County, Maryland found appellant, Corey William Phelps, guilty of second degree murder of Dwayne McClaine and use of a handgun in commission of a crime of violence.[1] He was sentenced, with credit for time served, to thirty years, all but twenty suspended, for second degree murder and a consecutive twenty years for use of a handgun to be followed by five years supervised probation. In this timely appeal, appellant asks the following questions:

1. Did the trial court err in denying Appellant's motion to suppress evidence?

2. Did the circuit court err in failing to address the requests to discharge counsel and proceed pro se that Appellant made on September 24, 2008 and July 1, 2014?

3. Did the trial court err in allowing the prosecutor to make improper and prejudicial statements at closing argument?

4. Did the trial court err in denying Appellant's motion for mistrial?

For the following reasons, we answer each question "no" and shall affirm.

BACKGROUND

The Motions Hearing

Prior to trial, appellant challenged the seizures of a gun and a jacket from Apartment 302 in the Raleigh Court Apartments located at 4437 23rd Parkway in Temple Hills, Maryland. The State argued that appellant, who was arrested at that address on January 6,

[1] This Court reversed appellant's previous convictions for first degree murder and use of a handgun in the commission of a crime of violence on evidentiary grounds in an unreported opinion. *See Phelps v. State*, No. 1533, Sept. Term 2005 (filed March 20, 2007, mandate issued April 19, 2007).

2005, did not have standing to challenge a search of the apartment and any resulting seizure.

At the motions hearing, Bruce Branch testified that, beginning sometime in 2003, after a friend working at the apartment complex offered him a "pretty good deal," he lived in Apartment 302. The apartment, however, was leased in the name of his mother, Eleanor Kelly. Ms. Kelly resided in South Carolina and never lived in the apartment.

By January 2005, the lease was on a month-to-month basis. Branch testified on direct examination that he believed that he was current on his rent payments. According to Branch, he stayed at the apartment until mid-January 2005. When he moved out, he left behind some furniture, including a television, a stereo and a couple beds, and permitted several young men, including appellant, to stay in the apartment because the lease had not expired.[2]

Branch kept one key to the apartment and gave the men a "second key that they were supposed to split among themselves." Branch was aware that instead of using the key, the men would enter the apartment through the broken patio/balcony door.[3]

The only restriction Branch placed on appellant's use of the apartment was not to bring women or drugs there. Appellant was allowed to have visitors and could deny entry had he so desired. Branch believed that appellant kept clothing in the apartment.

[2] Branch testified he believed he told appellant that he could stay at the apartment "some time late December" and "[a]fter Christmas[.]"

[3] Throughout the proceedings, the parties refer to the area adjacent to this door as a "balcony" and/or a "patio." We will refer to this door as a "patio/balcony" door.

In late January 2005, Branch told appellant that the lease was going to expire at the end of the month and that he had to leave the apartment. He knew that appellant's arrest in this case occurred at around this same time. Branch was never contacted by either the apartment management or the police for permission to search the apartment.

On cross-examination, when presented with documentary evidence from the apartment complex, Branch conceded that his last rental payment was on October 31, 2004 and that eviction was scheduled on February 3, 2005. He also confirmed that neither his name nor appellant's was on the lease and that entry into the apartment could be made through the broken patio/balcony door.

On redirect, the parties stipulated that, at appellant's prior bail review hearing, Branch testified that he told appellant he could stay in the apartment and that, "if he couldn't open the door to go in through the patio door." He also testified at this prior hearing that neighbors had called the police after seeing appellant enter the apartment through the patio/balcony door.

Jeene'A Cannon, the property manager for Raleigh Court Apartments, testified it was the policy of her company that anyone living in the apartments be listed on the lease as either a leaseholder or an occupant. Neither appellant nor Branch were listed as the leaseholders or occupants in 2004 or 2005.

During argument on the motion, defense counsel agreed that appellant had only been staying in the apartment for "[a] period of one to two weeks" when he was arrested on January 6th, but that, counsel argued, gave appellant standing to contest the search:

[DEFENSE COUNSEL]: . . . In this case I would argue that Mr. Phelps was able to make use of a week and could bring invitees other guests [sic] over. Whether he was allowed to exclude people from the residence or the apartment, and those are all factors that in this case weigh heavily towards finding that Mr. Phelps was a valid overnight guest and then has standing to challenge the search of the apartment on January 6th.

Then, there is a second search on the apartment which depending on the Court's ruling would come into play after the search done on January 6th.[4]

Another factor, Your Honor, that Mr. Branch's testimony indicates is that Mr. Phelps was allowed to be in that apartment even when Mr. Branch or a leaseholder was not there. So that's a factor.

THE COURT: He can't – how does he give permission, period? You're saying it's because however he did this and it was under the table in my opinion kind of a lease because he put his mother's name on it knowing that she lived in South Carolina and was never going to live there.

I don't know why he couldn't put his name on the lease. I really wasn't clear as to why he made this arrangement and didn't when he had a personal friend who was giving him this option of staying somewhere else that he had to use his mother's name. That was kind of strange to me to be honest with you.

It goes to credibility. I'm going to be honest with you. It goes to his credibility as to all that he is saying because his name was never on the lease. And then he says he paid rent up until the end, and the record says no. No payments were received for anyone to be in there to be honest with you after October. I wrote it down somewhere. I know he did. October 31st.

So, that was November, December, January. So, you get permission to someone who you don't even have permission to be in a residence. I don't know how you do that.

[4] Evidence about the recovered items was not elicited during the motions hearing, but at trial, witnesses testified that a black handgun was recovered from the apartment during a search the day appellant was arrested, and a camouflage jacket was recovered the next day during a second search undertaken with the consent of the management of the apartment complex.

> You can [sic] say that legally he is an occupant. He is not even listed as an occupant.

After hearing further argument from both appellant and the State, the court agreed to reopen the evidentiary portion of the hearing to let defense counsel call appellant to the stand. Appellant testified that he knew Branch and had visited him in Apartment 302 some time in the summer of 2004. In December of that same year, Branch gave him permission to stay overnight in the apartment. According to appellant, he often visited the apartment, and he had stayed overnight approximately six or seven different times. It was his understanding that he could stay there, without Branch being present, as often as he liked through the end of February.

When asked how he gained entry to the apartment, appellant testified that either he would call first and was let in through the front door, or, as Branch had told him, he "would have to climb on the balcony entrance and get entrance through that way because the door and the balcony were, hum, broken." Appellant confirmed that he had let female guests visit him when he stayed overnight, and that he and Monique Sophia were alone in the apartment on January 6, 2005 when he was arrested.

When asked if Branch was ever present when he stayed overnight, appellant replied, "I can't – I can't really – I can't really recall." He testified that Branch stayed at the apartment prior to December 2004. When asked what his understanding was with respect to staying at the apartment when Branch was not there, appellant testified "my understanding is that I will be safe. I would be safe at his – at his – hum – residence." Appellant understood this to mean that he was allowed to be in the apartment.

On cross-examination, and without objection, appellant was shown testimony from his first 2005 trial. He agreed that his mother, Terry Herring, had testified that appellant stayed with her at her residence at 423 71st Avenue, Seat Pleasant, Maryland, from December 2004 until January 6, 2005.[5] On redirect, appellant took issue with his mother's testimony, and testified that he actually was staying overnight at various locations at that time.

After hearing from appellant, defense counsel maintained that it was appellant's understanding that he had permission to stay at Apartment 302 as an overnight guest with an expectation of privacy:

> I'm saying in looking at the time span that's an issue here, looking at the number of times he did spend the night, looking at the permission that was given him, looking at his right to exclude people from coming into the apartment, bringing other people to the apartment, his permission to be present when no one else was present, when Mr. Branch was not present, that those are all factors that point to his status as an overnight guest at this apartment, despite the fact that he was not living there, as the Court I think understands it, on a consistent basis, which I would agree with.
>
> I'm only talking about this time span of maybe as much as two weeks but maybe less than that.

The State responded that there was no evidence that appellant was an "overnight guest," because "[a]n overnight guest is simply one that's staying for that night. You don't get to have a perpetual overnight guest." For that reason, the State argued that appellant did not have any expectation of privacy in the apartment.

[5] Herring did not testify at appellant's second trial.

After the State's response, defense counsel agreed with the motions court that, hypothetically, if there had been a search warrant for the apartment in question, then Branch's mother, who lived in South Carolina, would have likely been listed as the leaseholder. Defense counsel also agreed that if Branch's mother had given consent, the police would not have needed a search warrant.

The court then ruled:

> But they couldn't do that, because she never really lived there. Mr. Branch did right off, and he should never have been there because he wasn't a legal occupant or leaseholder.
>
> This ripple effect where you can be illegal and give someone else a legal right, I'm not really understanding how that works. And that's why the policy is so foreign. You say it's not important, but if you are illegally in a residence, how do you give legal permission to someone else to stay there? I don't know how you do that.
>
> You don't do it in this case. Mr. Branch couldn't do it. He does not have standing. Thank you.

The Trial

Claradean McClaine testified that, on December 22, 2004, she heard appellant, a neighbor whom she had known for years, speaking to her son, Dwayne McClaine, over a speakerphone. In that conversation, appellant demanded that McClaine take him to Marcus Butler's house to confront Butler regarding the sale of a 1981-82 Audi 5000. McClaine, who had planned to go to a Christmas play with his mother and his son, told his mother that he had changed his plan and that he would escort appellant to Butler's residence. Ms. McClaine saw her son and appellant meet in the street. She testified that her son "was walking up the street when [appellant] was walking down to meet him. I saw both of them

together when [appellant] was with him as we were driving to the school." Appellant was wearing a distinctive Army fatigue jacket, khaki pants and boots at the time.

Marcus Butler testified that he had agreed to sell appellant an Audi for $600. But, after taking possession of the car, appellant had only paid him between $80 and $100. Appellant, claiming that Butler stole some drugs from him, refused to pay because the value of stolen drugs accounted for any difference in the purchase price of the Audi. Butler denied having anything to do with the stolen drugs, and, because he had retained the title and a spare key to the vehicle, he repossessed it from appellant, apparently without appellant's knowledge. This occurred two days before the phone call to McClaine on December 22, 2004.

Butler testified he had been out Christmas shopping on the evening of December 22nd. When he returned to his apartment building, the area was blocked off by police tape. He later learned that McClaine had been murdered in that area. Butler confirmed that he had seen appellant with a black handgun on a prior occasion, and that appellant was known to wear an Army fatigue jacket.

Although Butler was not home at the time of the murder, his girlfriend, Charla Fletcher was. Around 7:30 p.m., Fletcher was inside her residence attending to their daughter, when she heard "[a] loud bang noise in the hallway." When she looked out the peephole in the door, she saw a man sitting straight up against a wall. And, when the man slumped over, she saw "blood oozing out from up by the head and then that's when [she] realized that it was somebody who was shot." Fletcher's 911 call was played for the jury.

Kimberly Kelly testified that, at some time before 7:00 p.m. on December 22nd, she was with appellant in her home. Appellant told Kelly that the car he bought from Butler was gone, and she overheard appellant call McClaine and asked him where Butler lived. When he left Kelly's home, appellant was wearing an Army fatigue jacket and tan pants.

He returned "agitated" at approximately 8 or 9 p.m. with red spots on his pants. Kelly believed the spots were blood. Appellant showed her a small handgun and told her that it was a "powerful" gun and that "it knocked him back." Appellant initially did not say who the "him" was that was "knocked" back, but he told Kelly that he had discharged the gun inside the hallway of Butler's apartment building.

Two days later, appellant admitted to Kelly that he killed McClaine. He told her that he did it for her because she had told him that she thought McClaine had broken into her house and stolen her children's Christmas gifts. Kelly later told Butler about appellant's admission.

Tokitha Green, another of appellant's girlfriends, testified that, after appellant was arrested in January 2005, she went to the police and gave them a box of bullets belonging to appellant. She, like others, testified that appellant usually wore an Army fatigue jacket, and identified for the jury the jacket recovered from Apartment 302 as appellant's jacket.

Dr. James Locke, an assistant medical examiner with the State of Maryland, testified that McClaine died from a gunshot wound to the head, and that the manner of death was homicide.

Officer Lynn Grant testified that, on January 6, 2005, and unrelated to the McClaine murder investigation, she and Corporal Paul O'Tooni responded to 4437 23rd Parkway,

Apartment 302, to a call for a burglary in progress. After knocking on the door of that apartment and announcing that she was with the Prince George's County Police, Officer Grant heard the "distinct" sound of "metal on metal of a slide to a semiautomatic handgun" that occurs "when someone wants to chamber a round or a bullet into a gun[.]" The door opened slightly but then slammed shut, and Officer Grant heard someone running away from the door. Corporal O'Tooni apprehended appellant near the patio/balcony door as he was trying to flee the apartment.

After appellant was in custody, a black .40 caliber loaded semiautomatic handgun was recovered from inside the apartment. The apartment was searched again the next day with permission of the apartment management. Police recovered an Army fatigue camouflage jacket, which witnesses identified as belonging to appellant.

The gun was tested for DNA. According to Sarah Chenowith, who was accepted as a DNA expert, mixtures of DNA were found on the trigger and slide of the handgun. Appellant could not be included or excluded as a possible source of DNA found on the trigger, and he could not be excluded as a source of the DNA found on the slide of the handgun. Chenowith testified that the statistical likelihood of a random DNA profile matching the major component of the mixture found on the slide was 1 in 2.6 million white Americans, and 1 in 860,000 African-Americans.

Terry Eaton was accepted as an expert in firearms and firearms examination. He examined the .40 caliber Smith & Wesson semiautomatic pistol, as well as the 10-capacity magazine and 11 Winchester cartridges recovered in this case. He also examined lead bullet fragments and bullet jacket fragments that were recovered from the victim's skull

during the autopsy. In addition, he examined a fired Winchester cartridge casing collected from the murder scene.

He confirmed that the box of ammunition that was given to the police by Tokitha Green contained .40 caliber Winchester bullets with a similar design as the ones found with the pistol. And, he determined that the handgun found at the time of appellant's arrest was operable, and concluded that one of the bullet jacket fragments found in the victim's skull was fired from that gun. He was also of the opinion that the cartridge casing found at the scene of the murder was fired from this handgun.

We shall include additional details in the following discussion.

DISCUSSION

I.

Standing

Appellant contends that the court erred in denying his motion to suppress based on his lack of standing to challenge the search because he was an invited overnight guest at Apartment 302. The State disagrees.

In reviewing a denial of a motion to suppress, we "rely solely upon the record developed at the suppression hearing." *Barnes v. State*, 437 Md. 375, 389 (2014) (internal citations omitted). We will not disturb the factual findings of the suppression court unless they are clearly erroneous, and, we view the evidence and inferences that may be drawn from the evidence in the light most favorable to the prevailing party, which, in this case, is the State. *Briscoe v. State*, 422 Md. 384, 396 (2011). But we review legal questions de novo. *Grant v. State*, 449 Md. 1, 14 (2016). In other words, we make an independent

constitutional evaluation by reviewing the relevant law and applying it to the unique facts and circumstances of the case. *Id*. at 14-15.

The Fourth Amendment to the U.S. Constitution was made applicable to the States through the Fourteenth Amendment in *Mapp v. Ohio*, 367 U.S. 643 (1961), and guarantees, *inter alia*, " [t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fourth Amendment does not proscribe all searches but only "those which are unreasonable." *Florida v. Jimeno*, 500 U.S. 248, 250 (1991). The "reasonableness" of a search involves " 'a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers.'" *Wilson v. State*, 409 Md. 415, 427-28 (2009) (quoting *Maryland v. Wilson*, 519 U.S. 408, 411 (1997) (internal citation omitted)).

Standing is the "threshold question of [one's right] to litigate the merits of [a] search and seizure," *Bates v. State*, 64 Md. App. 279, 282 (1985). When standing is challenged, "[t]he proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure." *Rakas v. Illinois*, 439 U.S. 128, 130 n.1 (1978).

Standing does not depend "upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." *Rakas*, 439 U.S. at 143 (discussing *Katz v. United States*, 389 U.S. 347, 353 (1967)). As the Court of Appeals has explained:

> The determination whether a legitimate expectation of privacy exists embraces two discrete questions, as stated in *Smith v. Maryland*, *supra*, 442 U.S. [735], 740, 99 S. Ct. [2577], 2579 [1979], viz: the first is whether the

> individual, by his conduct, has exhibited a subjective expectation of privacy (that he seeks to preserve something that is private), and the second question is whether the individual's subjective expectation of privacy is one that society is prepared to recognize as reasonable (whether the individual's expectation, viewed objectively, is justifiable under the circumstances). A legitimate expectation of privacy by definition means more than a subjective expectation of not being discovered. *Rakas*, 439 U.S. at 143 n. 12, 99 S. Ct. at 430 n. 12.

Ricks v. State, 312 Md. 11, 27 (1988); *see also State v. Savage*, 170 Md. App. 149, 182-83 (2006) ("to enjoy Fourth Amendment standing, a defendant must have both 1) an actual subjective expectation of privacy and 2) an expectation that is objectively reasonable") (citing *Minnesota v. Carter*, 525 U.S. 83, 88 (1998)).

This Court has stated "[w]hether one's expectation of privacy is legitimate is in 'large measure a function of its reasonableness, and that, in turn, is determined to some extent by the elements of time, place, and circumstance,'" *Joyner v. State*, 87 Md. App. 444, 450-51 (1991) (quoting *McMillian v. State*, 65 Md. App. 21, 31 (1985)), which include:

> "[T]he appellant's possessory interest in the premises; appellant's right to and duration of stay at the searched premises; whether or not he had unlimited access to the searched premises; whether appellant had a right to exclude others from access to the searched area; what precautions he took to maintain his privacy there; appellant's subjective expectation of privacy in the area searched; the location of the property at the time of the search; [and] ownership of the evidence seized . . . ."

Joyner, 87 Md. App. at 451 (quoting *McMillian*, 65 Md.App. at 32-33) (other citations omitted).

In *Minnesota v. Olson*, 495 U.S. 91 (1990), the Supreme Court discussed the reasonableness of an overnight guest's expectation of privacy.[6] Following a fatal shooting during a robbery of a gas station, police learned where Olson was staying. 495 U.S. at 94. Police entered that residence without a warrant and arrested Olson, who then gave an inculpatory statement. *Id.* Olson argued that the police illegally entered the residence because there were no exigent circumstances justifying entry without a warrant. *Id.* The Supreme Court agreed, holding that "Olson's status as an overnight guest is alone enough to show that he had an expectation of privacy in the home that society is prepared to recognize as reasonable." *Id.* at 96-97; *see also Alston v. State*, 159 Md. App. 253, 264 (2004) ("[T]he [*Olson*] Court adopted a *per se* rule that a person who is an overnight guest in the premises at the time of the search has a reasonable expectation of privacy in the premises"), *rev'd on other grounds*, 433 Md. 275 (2013). The Court explained:

> To hold that an overnight guest has a legitimate expectation of privacy in his host's home merely recognizes the everyday expectations of privacy that we all share. Staying overnight in another's home is a longstanding

[6] In *State v. Savage*, Judge Moylan noted several varieties of standing developed under the Fourth Amendment. *State v. Savage*, 170 Md. App. at 177-82 (discussing *Jones v. United States*, 362 U.S. 257 (1960), and, *Rakas, supra*). In regard to an overnight guest, he explained the variety referred to as "derivative standing":

> This latter was called "derivative standing" because it derived through the property owner to the guest. The guest merely enjoyed, to some extent, what the host enjoyed. The right of the guest was never independent of that of the host. If the host, for instance, consented to a police entry, that would override any objection on the part of the guest. The guest's right was truly derivative.

170 Md. App. at 177 (citations omitted).

> social custom that serves functions recognized as valuable by society. We stay in others' homes when we travel to a strange city for business or pleasure, when we visit our parents, children, or more distant relatives out of town, when we are in between jobs or homes, or when we house-sit for a friend. We will all be hosts and we will all be guests many times in our lives. From either perspective, we think that society recognizes that a houseguest has a legitimate expectation of privacy in his host's home.

495 U.S. at 98. *Cf. United States v. Berryhill*, 352 F.3d 315, 317 (6th Cir. 2003) (rejecting "the proposition that an individual staying at a residence at the invitation of a guest without the permission or knowledge of the lawful tenant or owner holds a reasonable expectation of privacy in the residence"), *cert. denied*, 542 U.S. 944 (2004); 6 LaFave, *Search and Seizure*, § 11.3 (b), at 205 (5th ed. 2012) ("Usually, what is required is a showing that *a person authorized to do so* (which apparently does not include a person who himself is only a guest) gave permission for the defendant to be present on that particular occasion, . . .") (emphasis added).

Whiting v. State, 389 Md. 334 (2005), is also instructive. There, the issue was whether the defendant had an objectively reasonable expectation of privacy in a room in a house which he occupied as a squatter. 389 Md. at 337. The Court of Appeals concluded that the evidence at the suppression hearing demonstrated that Whiting had a subjective expectation of privacy in the room in question because there was a lock on the door to the room in question to which Whiting had the only key and that the room contained his personal property, including letters addressed to him as well as a college registration form. *Id*. at 358. The Court, however, concluded that Whiting did not have standing because he:

> neither lawfully owned, leased, controlled, occupied, nor rightfully possessed [the premises], or any part of the premises therein. Accordingly, we find that Whiting lacked standing to challenge the . . . searches because,

> although he may have possessed a subjective expectation of privacy, that expectation was not objectively reasonable.

Id. at 363.

In *Simpson v. State*, 121 Md. App. 263 (1998), we examined Simpson's connection with a Baltimore City residence owned by Kenneth Steele. Steele let his niece, Cherese Rogers, stay rent-free in a second-floor bedroom for a couple months prior to January 20, 1996. 121 Md. App. at 273. On that day, Simpson was arrested in that room after Baltimore City police received a tip, corroborated by independent observations, that illegal drugs were being sold on the premises. *Id.* at 272-73.

Simpson and Rogers provided conflicting stories about why Simpson was present in her bedroom at the time of his arrest. According to Rogers, Simpson and another individual had paid her to use the bedroom to count drugs and money. *Id.* at 273. According to Simpson, he was there to collect on a promise of sex from Rogers in exchange for money that he had given her. *Id*. at 274. Both Rogers and Steele testified that, although he had been in the bedroom on prior occasions, Simpson did not live there, did not have a key, and did not have permission to sleep there overnight. *Id*.

We held that Simpson did not have a reasonable expectation of privacy in Roger's room because, although he had spent time there and was in it when he was arrested, there was no indication that, on the day in question, he was there as an overnight guest. *Simpson*, 121 Md. App. at 282-83. Further, addressing Simpson's argument that he had "leased" the room, we stated that "stashing drugs in another person's room [does not] gives the person

who stashes the drugs an expectation of privacy that society regards as reasonable." *Id*. at 282. And, Simpson had no control over the premises. The *Simpson* Court concluded:

> [T]he evidence showed that, at best, appellant had an agreement with Rogers. Both Rogers and Steele testified, however, that Steele owned the premises. Steele testified that he did not permit visitors after 11:00 p.m. and that he did not permit overnight guests. Thus, it was Steele, not Rogers, who had primary control of the premises. Although the evidence established that Rogers could have visitors, appellant failed to present any evidence that Rogers had authority to "lease" the premises. In fact, Steele testified that appellant had not rented a room in the house.
>
> We hold that [Simpson] lacked standing to complain that his Fourth Amendment rights had been violated by the search.

Id. at 282-83.

In this case, the evidence at the motions hearing did not establish where in the apartment the seized items, *i.e*., the jacket and gun, were found. For that reason, we are unable to consider several of the aforementioned "elements of time, place, and circumstance." *Joyner*, 87 Md. App. at 450-51. We can, however, consider appellant's possessory interest in the premises, his right to and duration of stay at the searched premises, and whether he could legitimately exclude others and maintain his privacy.

Looking at the evidence in the light most favorable to State as the prevailing party, neither appellant nor Branch were listed as leaseholders or occupants of the apartment. And, even if we assume that Branch had a right to use the apartment through an arrangement with his mother, he himself was essentially a guest and did not have the legal right to extend overnight guest status to someone else. Moreover, appellant's right to access Apartment 302 was either via a key shared with two other individuals, a phone call, a knock on the door, or through a broken patio/balcony doorway. In other words, the

apartment was open not only to several other persons and their guests but to anyone aware of the unlocked patio/balcony door.

Appellant's reliance on *United States v. Sangineto-Miranda*, 859 F.2d 1501 (6th Cir. 1988), is, in our view, misplaced. In that case:

> Carl R. Glen, the lessee, testified that Betts had a key to the Pidgeon Perch apartment for about a year, and was afforded unrestricted access "just as any part of our family." The appellant was allowed to stay overnight "[a]s often as he felt," even without the lessee's knowledge or consent. Betts also kept clothes and other items in the apartment. Glen estimated that Betts remained overnight at least eight times within a one-month period.
>
> For his part, Betts testified that he had gained access to the Pidgeon Perch apartment with his key "numerous times." He did so on April 28, the date of his arrest. Betts expected to exclude others from entering the apartment when he locked the front door from the inside, and he was never restricted from using the residence.

Sangineto-Miranda, 859 F.2d at 1510.

Unlike Betts, appellant could not exclude others from entering by locking the front door because the patio/balcony door was always open. And, unlike the squatter in *Whiting*, he produced no evidence of a locked room or other secured space for his personal effects that he controlled.

In short, based on these facts, we hold that any subjective expectation of privacy that appellant might have had in the apartment was objectively unreasonable.

II.

Maryland Rule 4-215(e)

Before setting out the contentions of the parties in regard to Rule 4-215(e), we will provide for context a summary of the long procedural history of this case. The record

reflects multiple instances where appellant: (1) suggested that his assigned attorneys were ineffective; (2) requested to discharge his attorneys; and (3) expressed a desire to proceed *pro se*. In addition, there were multiple times during this same period when appellant was found incompetent to stand trial and was committed to Clifton T. Perkins Hospital Center, Maryland's forensic psychiatric hospital, for treatment and evaluation.

At his initial appearance in the District Court before his first trial, appellant declined to be interviewed by the Public Defender's Office, indicating a preference to represent himself. Appellant apparently changed his mind and, on February 17, 2005, Dent Lynch, an Assistant Public Defender, entered his appearance on appellant's behalf in the Circuit Court for Prince George's County.

On or around June 23, 2008, appellant sent a letter to the circuit court judge who presided over his 2005 trial, the Honorable Thomas P. Smith, informing him that he intended to file a case of ineffective assistance of counsel against Mr. Lynch and that he was "not going to trial with Dent Lynch." The judge noted receipt of the letter on June 24, 2008, writing "No action" and initialing it for the record.[7]

On or around August 14, 2008, appellant informed Judge Smith that he was representing himself and that he wanted copies of the docket entries and transcripts from his earlier trial. He also stated "I'm firing Dent Lynch before 9-4-08 motions." Appellant wrote another letter informing the judge that he was representing himself. That letter was

[7] The record reveals that appellant has mailed numerous letters to the clerk and various judges on the Circuit Court for Prince George's County. We have included only information from letters that appear to be pertinent to the issue before us.

filed at a status conference hearing before Judge Smith on September 4, 2008. At that same hearing, the following transpired:

> MR. LYNCH: On behalf of Mr. Phelps, Your Honor, present in court, Dent Lynch. We are here primarily on our Motion to Dismiss for lack of speedy trial and prosecution of Mr. Phelps in this case. However, preliminarily, I don't know how the Court wants to address this. Mr. Phelps has communicated to me he no longer orally -- he communicated previously and within the last month in writing he no longer wants my services. He indicated, and I have a letter here, "you're fired."
>
> He wrote a letter to Brian Denton, the District Public Defender, indicating he no longer wants my services, and wants to represent himself, and does not want me to be his attorney in this particular matter.
>
> THE COURT: Mr. Phelps.
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Your counsel indicates that you want to terminate his representation. Is that correct?
>
> THE DEFENDANT: Well, Your Honor, my whole thing with Mr. Lynch, sir, basically he's misrepresenting me. Back in 2005, I didn't even receive a motions hearing, July, July the 11th -- my whole thing was how come this case couldn't have been dismissed on July 11 because of lack of evidence.
>
> My whole thing is I went for a whole lot of problems where I'm being housed with, sir. I am not a layman to the law, and I am basically trying to get this case alleviated, so I can basically proceed with my life and, so, he's not doing a good job representing me, sir. I am not a laymen to the law. I have motions prepared to proceed in this case.

The court then addressed appellant as follows:

> THE COURT: Are you going to then try to represent yourself or will you be securing other counsel?
>
> THE DEFENDANT: I will be representing myself, sir.
>
> THE COURT: All right. Well, have a seat, then. We'll need to go over a number of things, make sure we have complied. Let me start with --

this case has already been tried, appealed, and sent back for another trial, correct?

THE DEFENDANT: Yes, sir.

THE COURT: So, you received a copy of the charging document, the indictment in this case, and you also received a notice as to your right to counsel, correct?

THE DEFENDANT: Yes, sir.

THE COURT: Now, you have a right to counsel, and if you cannot afford counsel, counsel will be appointed for you. Do you understand that right?

THE DEFENDANT: Yes, sir.

THE COURT: I want you to think through the motions and the trial. For instance, do you believe you will be able to represent yourself? You said you have motions to file. And if they are not granted, do you believe you would be able to represent yourself at trial? I realize you have been through a trial, and I do have your request for a copy of the trial transcript. I will see if it is in our record, which it should be, that a copy is made if your lawyer doesn't already have a copy that he intends to turn over to you.

THE DEFENDANT: Yes.

THE COURT: So that would give you the trial transcript, correct?

THE DEFENDANT: Yes, sir.

THE COURT: That's what you've asked for.

THE DEFENDANT: Yes, sir.

THE COURT: You asked for the opportunity to file motions on your own.

THE DEFENDANT: Yes, sir. I am already prepared, sir.

THE COURT: Okay. Well, stay with me. I need to make sure that you have a knowing, intentional, voluntary waiver of counsel, and that you understand the nature of these proceedings, the charges against you, the possible penalties, and determine that you, in reality, wish to represent

yourself, and that you believe that you have that ability because it is your right to represent yourself. You understand me?

THE DEFENDANT: Yes, sir.

The court explained that "[a] lawyer can be of significant benefit, pre-trial, in getting information, and subpoenas, and the ability to talk to witnesses, the ability to actually get into the law library and research issues." The court continued:

THE COURT: You do understand that is something a lawyer could do for you, correct?

THE DEFENDANT: I did not get that type of information from Dent Lynch, sir. I did not get this type of information to proceed with my defense, sir, or really not even my defense, just me wanting to know the law, sir.

THE COURT: Well, a knowledge of the law is something that a lawyer brings to the case and something you would have to teach yourself because I can't become involved in being your lawyer. You understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And you understand that if you represent yourself the Public Defender's Office will not just have Mr. Lynch sit here during the trial so you could ask him questions. You either represent yourself or he represents you. Do you understand that?

THE DEFENDANT: Yes, sir.

The court then consulted with defense counsel about the remaining charges in the case, and informed appellant as follows:

THE COURT: All right. Mr. Phelps, I know I went over this with you earlier that you did have a copy of the indictment. You were charged with murder in count one, which includes first degree murder and second degree murder. You understand that?

THE DEFENDENT: Yes, sir.

THE COURT: You were charged with use of a handgun in the commission of a crime of violence. You understand that?

THE DEFENDANT: Yes, sir.

THE COURT: You were also charged with third degree burglary, fourth degree burglary, and carrying a handgun, but it appears that I granted a Motion for Judgment of Acquittal as to third degree burglary, fourth degree burglary, and carrying a handgun. So, those charges no longer remain in this case. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Now, the penalty for first degree murder could be life imprisonment, the penalty for second degree murder is a sentence up to 30 years, and use of a handgun in a crime of violence has a sentence of up to 20 years and that could be consecutive to the sentence for life imprisonment or for second degree murder -- I'm sorry -- for first degree murder or second degree murder. Five years of that 20 year sentence which have – are without the possibility of parole.

So, do you understand those are the charges and those are the possible sentences?

THE DEFENDANT: Yes, sir.

And, the court informed appellant:

THE COURT: You might be convicted of nothing, I don't know, but if you were convicted of, for example, first degree murder, you could receive a sentence of life imprisonment, and then you could receive an additional 20 years consecutive sentence for the use of a handgun in the commission of a crime of violence. You understand that?

THE DEFENDANT: Yes, sir.

THE COURT: If you were convicted of second degree murder and use of a handgun in the commission of a crime of violence, you could be sentenced to 30 years, and 20 years for the handgun violation consecutive to the 30 year sentence for second degree murder, and, again, five years of the sentence for the handgun is without possibility of parole. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: So, those are the sentences for the crimes that are still in existence in this case. . . .

At this point in the hearing, and for the first time, appellant indicated that he did not want a jury trial and wanted to be tried by the court. The court informed appellant that was his decision, but he should file a motion so the issue of whether he wanted a jury trial could be fully addressed and ruled on at a subsequent proceeding. The court then continued its inquiry concerning appellant's request to discharge counsel and represent himself:

> THE COURT: Okay. Now, we will need a motions date, but let me get there in a moment.
>
> Whether you decide -- and it is your decision that you want a jury trial or a non-jury trial -- you will be bound by the Rules of Evidence just like the lawyer. Do you understand that?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: At your last trial, your lawyer objected to certain evidence. I didn't sustain the objection, and the Appellate Court said I should have, so the case came back for a retrial or further proceedings. You understand that?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: But if you don't have a lawyer, do you feel comfortable that you will be able to make the objections and preserve your record so that an appellate Court could, if necessary, review what has happened?

At this point, appellant changed his mind about discharging his appointed public defender:

> THE DEFENDANT: Sir?
>
> THE COURT: Yes, sir.
>
> THE DEFENDANT: Could I just alleviate this whole thing? We can proceed with Dent Lynch because I am starting to feel that I'm holding up this process, and that's basically the last thing I want to do. I have been down for three-and-a-half years. I'm basically trying to get this thing over with as quickly as possible. I would like to keep Dent Lynch if he's willing to give me a – if he agrees to be as competent as possible in representing me.

The court took a brief recess, and then the following ensued:

> THE COURT: Just before we had a break, Mr. Phelps indicated that he did not want to represent himself now. Is that correct, Mr. Phelps?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: You wish Mr. Lynch to represent you?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Nobody has pressured you into making this decision or made you promises with regard to this decision, have they?
>
> THE DEFENDANT: No, sir. I just feel as though that time is basically of the essence, and I just basically want to get this thing going. I just basically want to get this thing, this motions hearing alleviated. He has the experience, and I'm not a layman, but I figure as though I am wasting time, just me talking, you know, me just learning the law and so forth. So, being as though you are the arbiter of the facts, I feel as though in respect to the Court, I would like Dent Lynch to represent me further until --
>
> THE COURT: All right. Well, with that in mind, Mr. Lynch will proceed in this case. . . .

The case was scheduled for another motions hearing before Judge Smith on September 24, 2008. At that hearing, the court denied appellant's speedy trial motion. The court then informed appellant that the trial in this case was scheduled to commence on November 4, 2008, at which time the court would address appellant's request to have a court trial. The following then transpired:

> THE DEFENDANT: Excuse me, Your Honor. Judge Smith, I would like to fire my lawyer, Dent Lynch, and proceed pro se with my case.
>
> THE COURT: We had such a hearing on the last occasion that we were here. I will deal with that issue on November 4th also. But, if you fire Mr. Lynch, you will be required to go forward on trial on November 4th so we understand each other.
>
> THE DEFENDANT: Yes, sir.

The November 4th trial date was continued to February 9-11, 2009 at the request of defense counsel. On November 21, 2008, Mr. Lynch's appearance was stricken in favor of a new assistant public defender, Richard Rydelek.

Approximately two months later, on January 30, 2009, Mr. Rydelek filed a Motion for a Competency Examination of appellant.[8] The motion alleged, among other things, that appellant had "not successfully communicated with counsel, in spite of counsel's repeated efforts" and had "made statements and displayed behavior that cause undersigned counsel to have serious concerns regarding [appellant's] mental health and his capacity to assist counsel in his own defense, both in preparing for trial and in meaningfully participating in the trial process itself." Judge Smith granted the motion on February 2, 2009 and ordered the Department of Health and Mental Hygiene (the "Department") to examine appellant to determine whether he was competent to stand trial. Trial was reset for May 18-20, 2009.

[8] A "person accused of a crime is presumed to be competent to stand trial." *Peaks v. State*, 419 Md. 239, 251 (2011). If the issue of a defendant's competency is in play, a protocol to be followed is set forth by statute:

> (a) If, before or during a trial, the defendant in a criminal case or a violation of probation proceeding appears to the court to be incompetent to stand trial or the defendant alleges incompetence to stand trial, the court shall determine, on evidence presented on the record, whether the defendant is incompetent to stand trial.
>
> (b) If, after receiving evidence, the court finds that the defendant is competent to stand trial, the trial shall begin as soon as practicable or, if already begun, shall continue.
>
> (c) At any time before final judgment, the court may reconsider the question of whether the defendant is incompetent to stand trial.

Md. Code Ann. (2001, 2008 Repl. Vol.), § 3-104 of the Criminal Procedure Article.

On April 17, 2009, following a hearing, Judge Smith found appellant incompetent to stand trial and committed appellant to the Department.

On or around November 29, 2010, apparently following a report from the Department, Judge Smith scheduled a status hearing regarding appellant's competency to stand trial. At that hearing on March 10, 2011, Judge Smith found appellant competent to stand trial, and trial was reset for September 26, 2011.

On August 3, 2011, Mr. Rydelek filed a new suggestion of incompetency, asserting that "defense counsel's contact with [appellant] as well as his history as a patient at Perkins Hospital has caused counsel to become concerned about the competency of the defendant to stand trial." Appellant was evaluated by Dr. Robert Katz, a licensed psychologist, who, on or around August 17, 2011, opined that appellant was competent to stand trial. Upon request by defense counsel, the case was continued with motions scheduled for March 26, 2012, and trial set for March 27-29, 2012 before the Honorable Beverly J. Woodard. The court ordered the Prince George's County Detention Center to permit appellant to be evaluated by Dr. Thomas Goldman, a psychiatrist retained by the Office of the Public Defender. Following a joint request for a continuance, trial was reset for June 4, 2012.

On March 28, 2012, appellant wrote a letter to the Honorable Sheila Tillerson Adams, the Circuit Administrative Judge for the Seventh Judicial Circuit. In that letter, appellant alleged that Mr. Rydelek was "ineffective" and requested Judge Tillerson Adams "to take over my case, if not then re-assign another judge, and re-assign R. Rydelek for ongoing maltreatment and ineffectiveness of counsel and extreme conflicts of interests." Two days later, on March 30, 2012, appellant again wrote Judge Tillerson Adams and

stated that "Richard Rydelek will not stop hurting me physically and mentally I'm handcuffed to a wall because I won't accept his torturous methods of practice." Judge Tillerson Adams acknowledged receipt of appellant's letters, indicating she would "respond accordingly within 30 days."

On May 16, 2012, Mr. Rydelek again filed a suggestion of incompetency and a plea of not criminally responsible, asserting that "defense counsel's contact and communications with [appellant] have ground to a halt; [Appellant] refuses to cooperate with counsel while at the same time attempting repeated communications with the prosecutor's office." On June 6, 2102, Judge Tillerson Adams, having reviewed correspondence from Dr. Katz, ordered a new evaluation of appellant's competency, and a trial was set for September 24, 2012. It was later reset by a consent motion to March 19, 2013.

On July 25, 2012, Judge Tillerson Adams responded to appellant's earlier correspondence regarding his assigned public defender, Mr. Rydelek. Judge Tillerson Adams informed appellant that "I have no authority to assign attorneys in the Office of the Public Defender. That authority rests with Mr. Paul B. DeWolfe, Jr., Chief Public Defender."

On September 18, 2012, following a new competency evaluation, Dr. Danielle R. Robinson and Dr. Muhammed Ajanah informed Judge Tillerson Adams that they were of the opinion that appellant was "not competent to stand trial and is dangerous due to a mental disorder." They recommended that he be committed to the Department for inpatient treatment and care. Judge Woodard found appellant incompetent to stand trial and

committed him to Perkins on October 2, 2012. Following a new competency hearing held on April 30, 2013, Judge Woodard found appellant competent to stand trial and set trial for October 22, 2013.

On July 19, 2013, the appearance of Mr. Rydelek was stricken and Bethany L. Skopp and Laura Fuggitti[9], Assistant Public Defenders, were substituted as counsel of record for appellant.

Appellant wrote to Judge Woodard on or around December 11, 2013:

> My case is frail my problem is I had white people as lawyers I had to work with who lie to me and who act ineffectively when it comes to filing the proper motions and representing me and working on this case to the fullest of a professional lawyer's capacity. Being from D.C. I'm used to a lawyer fighting their best for a favorable outcome in a defendant's case.

Appellant wrote again to Judge Woodard on or around December 23, 2013, stating that "I had ineffective assistance of counsel, the P.D. I had in '05' was Dent Lynch. I had a visit with my present lawyer and I truly don't know whether she's in my defense or the opposition."

A motions hearing was held before Judge Woodard on January 23, 2014. After appellant's motions to suppress were denied, trial was set for March 24-27, 2014. Later, at the request of defense counsel, trial was reset for July 8-10, 2014.

On or around March 25, 2014, appellant sent a letter addressed to the "Upper Marlboro Courthouse Clerk" stating "defense attorneys in my case didn't appeal to Chief Judge about miscarriages and travesties of justice in this case and wrongful imprisonment.

[9] Beginning with a motion filed on January 14, 2014, counsel provided her name as Laura Novello.

Bethany Skopp and Laura Novello are attorneys in case." The appellate record also includes a letter, received on May 6, 2014 by the Clerk of the Circuit Court, in which appellant states that his mail was being "tampered with" by defense counsel, and that "I told Lisa Robinson about defense counsels conduct but not the tampering with mail. For defense counsel to say I made a confession to a killing of an almost 10 year case is government terrorism by this judicial system."[10]

Appellant filed an inmate grievance against his former defense counsel, Mr. Rydelek, on April 8, 2014, alleging that he was "negligent and discriminate against me and not giving me law info civil, criminal or otherwise."

On June 27, 2014, Dr. Joanna Brandt, an expert retained by appellant's defense counsel, contacted appellant's attorneys and opined that appellant was again not competent to stand trial. And, on July 1, 2014, defense counsel Bethany Skopp requested and was granted an emergency hearing before Judge Woodard:

> THE COURT: All right, this is your request for an emergency hearing, correct?
>
> MS. SKOPP: It is, Your Honor. Dr. Grant, retained by my office, has examined Mr. Phelps and offered an opinion that at this time he is not competent to stand trial and would be better treated and housed were he sent to Perkins, which is why we ask that this be set in before our current trial date.
>
> I think for today's purposes, the State is willing to submit on the report that we have and I've submitted a copy to the Court as well --

[10] It is unclear who "Lisa Robinson" is. We note that, on September 18, 2012, the Department sent a letter, co-signed by the Department's Director of Pretrial Services, Dr. Danielle R. Robinson, to Judge Tillerson Adams informing her that appellant was not competent to stand trial.

THE COURT: Where is it?

MS. SKOPP: -- as a proposed order. And what we'd like the Court to do is sign off on the order today so that Mr. Phelps can be transported to Perkins and then begin being evaluated there. We'd like to set a status relatively quickly about a month or so out, once we anticipate Perkins would have had an opportunity to evaluate him and the Court can have the benefit of two evaluations before it.

I don't know if the State --

At this point, appellant interjected:

MR. PHELPS: I have an objection. I'm Mr. Phelps and I'd like to object now.

THE COURT: Everything goes -- should be through your attorneys, Mr. Phelps.

MR. PHELPS: Well, I'd like to fire my attorneys because they're in incompetent.

THE COURT: Excuse me, sir? What did you want to do?

MR. PHELPS: I'd like to fire my attorneys because they're not competent. They're inadequate, you know, and I'd like to represent myself.

THE COURT: Well, the problem with that Mr. Phelps is that we're not sure that you're competent to represent yourself. Even if I were to agree with you and release your attorneys from representing you, I have to first under the law make sure that you have the ability to represent yourself as well. Do you understand that?

MR. PHELPS: Yes, ma'am. I've studied law for the past ten years. I know my case inside and out. I basically would like the opportunity to represent myself because again my lawyers are inadequate. Under the 6th Amendment I believe that I'm granted this right and I would like to afford myself the abilities to humble myself before the Court, can I basically receive a chance to maybe go home because the case I have is basically a 8th Amendment violation. We have in my case --

THE COURT: The 8th Amendment?[11]

MR. PHELPS: Yeah, because I was unrightly -- excuse me, unconstitutionally challenged and this case has no merit to even be tried, so how would, if no co-defendant there's no substantial evidence for it to even go to trial.

THE COURT: Well, that's the substance of the case and that's a separate issue of whether or not you're able to represent yourself. And what your attorneys are asking is that I send you for an exam to Perkins for that determination to be made to see if you are in fact can be competent to stand trial.

MR. PHELPS: Okay. . . .

After further unrelated discussion, appellant and the court returned to the subject of his representation:

MR. PHELPS: Excuse me, I stand corrected. You as a judge now, you're the (indiscernible) and arbiter of fact. You know the case; you should as well as anybody else here. The Defense as well as this woman here which is State --

THE COURT: Ms. Skopp. These two attorneys are really fighting hard for you. Believe me, they are.

MR. PHELPS: They're not. I'm telling you they're not. I'm trying to defend myself.

THE COURT: Oh yeah. I think they are.

MR. PHELPS: They're not because if that was the case the case would be gone. I know my rights.

THE COURT: The case wouldn't be gone, no. No. They're not the reason why this case is still pending, I can assure you of that. They are not the reason.

[11] The Eighth Amendment to the U.S. Constitution provides as follows: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

MR. PHELPS: Okay, so what is the reason?

THE COURT: The reason is that to be honest with you you cannot go to trial until you are found legally competent to stand trial. That's the law in the State of Maryland. They can't change the law. They can't. Your [sic] attorneys can't do that.

MR. PHELPS: All right. But I mean, we're supposed to uphold the law.

THE COURT: They're upholding the law by asking for an evaluation and for assistance so you will become competent to stand trial.

Actually we'll say this though this time, as soon as he is competent we need to set the trial as soon as possible after that because I think this gap every time in between is really one of the problems for Mr. Phelps, because if he takes the medication and he's competent we need to go to trial as soon as possible.

Judge Woodard ultimately found that appellant was "incompetent to stand trial by reason of a mental disorder." And, for what appears to be the third time, appellant was committed to the Department for evaluation. A new status conference was scheduled for August 20, 2014.

The appearances of Ms. Novello and Ms. Skopp were later stricken, and, on July 29, 2014, Allen Wolf, Assistant Public Defender, was substituted as defense counsel. The August 20, 2014 status conference was continued to February 12, 2015. On that date, although the record is unclear, appellant apparently was declared competent to stand trial because a new trial date was set for October 5-8, 2015.[12] That trial date was later continued,

[12] As noted by both parties, the record only includes a one-page form and an entry from the docket entries indicating that a hearing was held without a court reporter. Neither that form nor the docket entries include an express finding by the court that appellant was competent for trial.

and a jury trial commenced on March 28-30, 2016, before Judge Woodard, with Mr. Wolf representing appellant.

Appellant contends that the trial court erred by not addressing the requests to discharge counsel and to represent himself that were made on September 24, 2008, and July 1, 2014. The State responds that: (1) the court informed appellant on September 24th that, should he discharge his attorney, he would have to represent himself; (2) intervening events, namely multiple determinations that appellant was incompetent to stand trial, rendered null his requests to discharge counsel; and, (3) once appellant was found to be competent prior to the March 2016 trial, he never requested to discharge the attorney who represented him at the retrial. Appellant replies that the court's findings that he was incompetent to stand trial merely deferred the court's need to satisfy the requirements of Rule 4-215(e), and that the court's failure to address the earlier requests to discharge counsel was reversible error.[13]

[13] The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution "prohibits the criminal prosecution of a defendant who is not competent to stand trial." *Medina v. California*, 505 U.S. 437, 439 (1992) (citing *Drope v. Missouri*, 420 U.S. 162 (1975). The Court of Appeals has explained "that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to trial." *Kennedy v. State*, 436 Md. 686, 692 (2014) (citation and internal quotations omitted). Under Maryland's statute, "incompetent to stand trial" means one is not able:

> (1) to understand the nature or object of the proceeding; or
> (2) to assist in one's defense.

Md. Code Ann. (2001, 2008 Repl. Vol., 2017 Supp.), § 3-101(f) of the Criminal Procedure Article.

The right to counsel is guaranteed by the Sixth Amendment to the U.S. Constitution and Article 21 of the Maryland Declaration of Rights. *See Gideon v. Wainwright*, 372 U.S. 335, 342-43 (1963); *Walker v. State*, 391 Md. 233, 245 (2006). Defendants in a criminal prosecution have both the constitutional right to the effective assistance of counsel and the corresponding right to reject that assistance and to represent themselves. *Powell v. Alabama*, 287 U.S. 45, 71 (1932) (recognition of the constitutional right to the effective assistance of counsel); *Dykes v. State*, 444 Md. 642, 648 (2015) (same). But, any waiver of the right to the assistance of counsel must be knowing and intelligent to be effective. *See Dykes*, 444 Md. at 648 ("A defendant may waive the right to counsel if the defendant does so knowingly and voluntarily"). And, because the assistance of counsel is so important, "courts indulge every reasonable presumption against its waiver." *Dykes*, 444 Md. at 648 (quoting *Parren v. State*, 309 Md. 260, 263 (1987)).

To implement and protect this right, the Court of Appeals adopted Maryland Rule 4-215, "which explicates the method by which the right to counsel may be waived by those defendants wishing to represent themselves . . . ." *Broadwater v. State*, 401 Md. 175, 180 (2007); *accord Dykes*, 444 Md. at 651. The rule "provides an orderly procedure to insure that each criminal defendant appearing before the court be represented by counsel, or, if he is not, that he be advised of the Sixth Amendment constitutional right to the assistance of counsel, as well as his correlative constitutional right to self-representation." *Broadwater*, 401 Md. at 180-81 (citation omitted). The rule's requirements are "mandatory," and require "strict compliance." "[A] trial court's departure from the requirements of Rule 4-

215 constitutes reversible error." *Pinkney v. State*, 427 Md. 77, 87-88 (2012) (citations omitted).

In regard to the discharge of counsel, Maryland Rule 4-215(e), 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.

Compliance with Rule 4-215(e) is triggered by a request to discharge counsel with a present intent to seek new counsel or to represent oneself. *State v. Davis*, 415 Md. 22, 33 (2010). Yet, neither the rule nor its drafting history expressly define or explain what constitutes a "request." *See Gambrill v. State*, 437 Md. 292, 302 (2014). That said, the Court of Appeals has consistently championed substance over form. *Id.*; *see also Williams v. State*, 435 Md. 474, 486-87 (2013) ("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"); *State v. Hardy*, 415 Md. 612, 623 (2010) (suggesting that even a "declaration of dissatisfaction" may trigger the rule); *State v. Weddington*, No. 52, Sept. Term 2017, 2018 WL 991687, at *5 (Md. Feb. 21, 2018) ("This Court has espoused a broad interpretation of what constitutes a request to discharge counsel."). And, even an expression of a prior intent

to discharge counsel may require a subsequent inquiry under the rule. *See Williams*, 435 Md. at 491 (citing *Davis*, 415 Md. at 33).

Once a request has been made:

> [T]he court must provide the defendant an opportunity to explain his or her reasons for seeking the change. *See Gonzales v. State*, 408 Md. 515, 531, 970 A.2d 908, 917 (2009). "Next, the trial court must make a determination about whether the defendant's desire to discharge counsel is meritorious." *Gonzales*, 408 Md. at 531, 970 A.2d at 917; *see also Moore v. State*, 331 Md. 179, 186-87, 626 A.2d 968, 971-72 (1993) (articulating the rule that the record must reflect that the trial court actually considered the merit of the defendant's explanation for wanting to proceed without counsel). "The goals of Rule 4-215(e), and of Rule 4-215, in general, are to protect the defendant's fundamental rights involved, to secure simplicity in procedure and to promote fairness in administration." *Gonzales*, 408 Md. at 532, 970 A.2d at 917-18 (quotation marks and citation omitted). The failure to inquire into a defendant's reasons for seeking new counsel when the proper request has been made to the court is a reversible error. [*Snead v. State*, 286 Md. 122, 131 (1979)].

State v. Davis, 415 Md. at 31; *accord Pinkney*, 427 Md. at 93.

The record in this case reflects that appellant either specifically asked to discharge counsel, expressed dissatisfaction with and/or the ineffectiveness of counsel, or asked to proceed *pro se* on: September 4, 2008; September 24, 2008; March 28 and 30, 2012; December 23, 2013; March 25, 2014; May 6, 2014; and, July 1, 2014.[14] With the exception of the express request to discharge Mr. Lynch and proceed *pro se* on September 4th, 2008,

[14] On December 23, 2013, March 25, 2014, and May 6, 2014, appellant wrote letters, to both Judge Woodard and Clerk of the Court, generally expressing dissatisfaction with counsel. There was no specific request to discharge counsel in any of those letters and we conclude they did not constitute requests under Rule 4-215. *See Wood v. State*, 209 Md. App. 246, 287-88 (2012) (concluding that the appellant's written and oral communications were not sufficient to apprise the court of a desire to discharge counsel), *aff'd on other grounds*, 436 Md. 276 (2013).

which we conclude was subsequently withdrawn by appellant before Judge Smith, there was no express inquiry by the court as to appellant's remaining requests.

The record also shows that, between 2009 and 2014, there were three periods of appellant's incompetency to stand trial: April 17, 2009 to March 10, 2011; October 2, 2012 to April 30, 2013; and, July 1, 2014 to February 12, 2015. In addition, the record further shows that appellant never requested the discharge of Mr. Wolf, the attorney who ultimately represented him at the March 28-30, 2016 retrial before Judge Woodard. As we will explain, we deem this latter fact to be determinative in this case.

As to the State's argument that appellant's requests discharge counsel or to proceed *pro se* after September 24, 2008 were nullified by appellant's incompetency, it is clear that only a competent defendant can decide fundamental issues related to his or her representation in a criminal trial. *See Massey v. Moore*, 348 U.S. 105, 108 (1954) (stating that if a criminal defendant was "insane as claimed, he was effectively foreclosed from defending himself"); *Treece v. State*, 313 Md. 665, 674 (1988) ("[T]he defendant ordinarily has the ultimate decision when the issue at hand involves a choice that will inevitably have important personal consequences for him or her, and when the choice is one a competent defendant is capable of making") (discussing *Faretta v. California*, 422 U.S. 806, 834-35 (1975)); *see also Indiana v. Edwards*, 554 U.S. 164, 171 (2008) (ultimately concluding "that the Constitution permits judges to take realistic account of the particular defendant's mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so"); *Mann v. State's Attorney for Montgomery Cty.*, 298 Md. 160, 169 (1983) (concluding that a finding of incompetency to stand trial supports a

conclusion that one is incompetent "to knowingly and intelligently waive substantial rights relating to the criminal prosecution"). And, even a suggestion of incompetency raises concern for the defendant's competency. *See Kennedy v. State*, 436 Md. 686, 692-93 (2014) ("Once the issue of a defendant's competency has been raised, the proceedings cannot continue until the trial judge determines that the defendant is competent to stand trial beyond a reasonable doubt") (citing *Peaks v. State*, 419 Md. 239, 252 (2011)).

The record in this case establishes that the majority, but not all, of appellant's requests to discharge or expressions of dissatisfaction with his attorneys were made either when appellant would have been presumed competent or after the court had expressly found him competent to stand trial. *See Peaks*, 419 Md. at 251 (reaffirming that a person is presumed competent to stand trial). Indeed, only on July 1, 2014 did appellant's request to discharge defense counsel (Ms. Skopp and Ms. Novello at the time) occur at the same hearing as the finding of incompetency.

The State's argument that the ongoing determinations of appellant's incompetency were intervening events nullifying appellant's requests to either discharge counsel or to represent himself is appealing. But, it would require us to ignore the fact that appellant was expressly determined to be competent at certain times and was presumed competent before a determination of incompetency, which we are not prepared to do.

On the other hand, appellant's argument that his recurring periods of incompetency only deferred his requests is also not persuasive and his reliance on *Williams, supra*, is, in our view, misplaced. In *Williams*, the defendant, charged with various possession offenses,

was represented by Assistant Public Defender John Janowich. *Williams*, 435 Md. at 479. On January 27, 2010, Williams sent a letter from jail that read as follows:

> Case No 12–K–08–1673
>
> The Honorable Judge? ? 1/27/2010
>
> My name is Melvin Williams JR Im writting to request New representation From the Public defender's office. Pending me being able to afford an attorney. MR John Janowich has truly No interest on my behalf in trying to help me on my case. I truly feel Im being mis-represented. May U please remove him from my case. I'll truly be appreciated.
>
> Sincerely Melvin Williams

Williams, 435 Md. at 479.

The letter was received by the court clerk on January 29, 2010 and entered on February 17, 2010. It was sent to the State's Attorney and the Public Defender, but no action was ever taken on the letter. *Id*. As summarized by the Court of Appeals:

> There was utterly no response to Williams's letter documented. Mr. Janowich continued to represent Williams over the course of the next sixteen months, including a hearing in the Circuit Court on 7 June 2010, three subsequent hearings, and a two-day jury trial. There is no further mention in the record of Williams's letter by any of the four judges who presided over those various proceedings, by Janowich, by the assistant state's attorney who prosecuted the case, or by Williams.

Williams, 435 Md. at 479-80.[15]

The issue on appeal was whether the January 27, 2010 letter triggered Rule 4-215(e) inquiry. *Id.* at 484. The Court of Appeals, distinguishing *State v. Northam*, 421 Md. 195

[15] The Court noted that "[t]he Circuit Court held the additional hearings on 21 September 2010, 12 January 2011, and 10 March 2011. Williams's trial occurred on 4-5 May 2011." *Williams*, 435 Md. at 480 n.2.

(2011), concluded that it did. *See Williams*, 435 Md. at 487-492. It rejected this Court's conclusion that "it was reasonable for the trial court to infer that any issues between the appellant and Mr. Janowich had been resolved, and that [Williams] was assenting to his continued representation by Mr. Janowich." 435 Md. at 492 (citing *Williams v. State*, 208 Md. App. 622, 634 (2012)). According to the Court of Appeals, our conclusion "assume[d] too much" and, even if a circuit court judge had actually read Williams' letter, "that judge could not assume that Williams and Janowich ever discussed, and resolved subsequently, the reasons for the discharge request." *Id.* at 492-93. The Court explained:

> Based on the record in the present case, we do not know whether the absence of a Rule 4-215(e) inquiry by the Circuit Court was the result of an oversight, a mistake, the adoption of what Williams calls a "wait-and-see approach," or some other reason. Similarly, we do not know whether Williams refrained from repeating his desire in open court because he changed his mind, thought the court denied implicitly his request, thought that pressing the issue further would anger the court or Janowich, or he was adopting his own "wait-and-see approach," hoping to use the court's failure to respond to his letter as grounds to reverse a potential conviction. Most importantly, we do not know all of Williams's reasons for requesting the discharge in January 2010 and whether they were meritorious - the purpose behind the mandates of Rule 4-215(e).
>
> We hold that Williams's unambiguous and to-the-point letter was sufficient, on its own, to constitute a request to discharge counsel under Rule 4-215(e). The Circuit Court's failure to inquire into the reasons for that request before trial, in accordance with the Rule, is reversible error.

Id. at 493-94.

Williams indicates that a Rule 4-215(e) inquiry should be made to an outstanding request to discharge an attorney who continues to represent the defendant even when the request is not renewed at subsequent proceedings. But, whereas Williams was represented throughout the proceedings by the same attorney about whom he had earlier

complained, appellant in this case was represented by five different attorneys, only four of whom did he want to discharge. His last attorney, Allen Wolf, entered his appearance on July 29, 2014 and represented appellant until the end of the proceedings in the trial court. Appellant never complained about Mr. Wolf or requested his discharge. In short, any lingering issues, whatever their merit, between appellant and prior counsel were effectively resolved with the entry of Mr. Wolf's appearance on appellant's behalf.

Appellant reminds us in his reply brief that his argument is not limited to discharge of his attorneys, but that he also asked to represent himself at the September 24, 2008 and July 1, 2014 hearings. We agree with the State that Judge Smith complied with Maryland Rule 4-215 when, on September 4, 2008, he painstakingly went through the requirements of the rule with appellant in open court, and, in the end, appellant agreed to Mr. Lynch's continued representation. When on September 24, 2008 appellant raised the issue again, Judge Smith deferred the matter to the November 4, 2008 trial date. That date was moved to February 9, 2009, and on November 21, 2008, Mr. Lynch's appearance was stricken in favor of Mr. Rydelek. Between September 24, 2008 and July 1, 2014, multiple attorneys represented appellant without appellant expressing a desire to represent himself.

As for the hearing on July 1, 2014, appellant did ask to represent himself, but that request was essentially contemporaneous with Judge Woodard's finding that he was incompetent to stand trial. We are persuaded that a request to represent one's self or to discharge counsel by someone, who is found not competent to stand trial in that same hearing, is not a request that a trial judge would need to address if the request is not renewed after competency is later established.

III.

Closing Argument

Appellant next asserts that the prosecutor's closing argument was improper because it mischaracterized the law regarding the credibility of expert witnesses. The State responds that permitting the argument was a proper exercise of the trial court's discretion.

During trial, the State offered Terry Eaton as an expert in firearms and firearms examination. Defense counsel declined to conduct any *voir dire*, and informed the court that "I'll cross-examine him about his expertise later. So I'm not going to challenge it at this moment, but I will bring up some things for the jury to consider." The court responded: "All right. He's accepted as an expert then. Thank you."

During cross-examination, defense counsel noted that Eaton had been employed with the Prince George's County Police Department for the majority of his professional career. Counsel also elicited that there are no standards for comparing fired cartridge cases and that the comparisons were based simply on an expert's training and expertise. When counsel asked if he just "eyeballed" the evidence to make a comparison, Eaton replied affirmatively. On redirect examination, Eaton explained that there were times when items of evidence did not match and that his analysis or opinion would not be affected by a detective standing nearby when he made his analysis.[16]

During the State's initial closing argument, the prosecutor argued:

[16] Although Detective Jarriel Jordan, the lead investigator in this case, brought the handgun to Eaton for analysis, there is no evidence that the detective remained at Eaton's side as he compared the gun to the ballistics evidence recovered in this case, or that he otherwise supervised Eaton's analysis.

> You heard from Terry Eaton yesterday. You heard that this gun, this gun right here, fired this shell casing, left this shell casing behind, the shell casing that was in the hallway where Dwayne McClaine was left to die. But more than that, you heard that this gun, this gun that was found where he was, where the defendant was, fired the bullet that went in Dwayne's skull that had to be removed from his skull. This gun, the gun that was with him.

In response, defense counsel compared Eaton's analysis and opinions to those of the State's DNA expert, Sarah Chenowith. More particularly, defense counsel noted that the work of the Prince George's County firearms lab is not overseen like that of the DNA lab, and that Eaton, unlike Chenowith, is not subject to proficiency testing. And, although there is an established database that Eaton could have used to compare his observations about the markings on a cartridge fired from a gun, he declined to use it. Instead, according to defense counsel, Eaton simply "put it in a microscope" and "said match." Further, Eaton, unlike Chenowith, did not note differences between the samples he examined. Defense counsel presented that argument in the form of a colloquy between himself and Eaton:

> Were there differences?
>
> I wouldn't know. There are often differences, but I'm looking at it and I decide match or not match.
>
> What objective standards do I apply? How many differences make no match?
>
> Oh, we don't do it that way.
>
> How many similarities make a match?
>
> Oh, I don't do it that way.

Defense counsel also suggested that Eaton was told by the detective who had called him in from home to make the evidence in this case, *i.e.*, the gun and the ballistic evidence, match:

> And let's understand what bias can mean because sometimes where bias is like, oh, yeah, I'm going to do whatever Detective Jordan says, I don't care who he puts in jail or anything, that's one kind of bias. But another kind of bias is knowing what result is desired, is knowing what answer everybody wants, having that in your mind when you look at something and having that affect your analysis especially when you don't record differences, you don't record similarities, you can't state a standard. You don't have anything to show you to say, here, take a look at the two. This is why I compared them and said they were the same. It's just a matter of, yeah, trust.

Defense counsel concluded by insisting there was reasonable doubt in this case based, in part, on Eaton's testimony: "When Terry Eaton's testimony is based on such sloppy work and ignores the most basic scientific standards of objective analysis, that's reasonable doubt."

The State, in rebuttal, acknowledged that Eaton did not compare the evidence to a national ballistics database, but contended that the evidence he needed to compare was "in front of him in two different pieces." According to the prosecutor, Eaton "had the gun and he had some bullets and shell casings. Why does he need to enter his notes into a computer and then enter his own notes again? The evidence is sitting in front of him."

The prosecutor also responded to the issue of Eaton's bias in favor of reaching an opinion favorable to the State. The prosecutor reminded the jury that Eaton testified that, sometimes, the evidence does not, in fact, match, and in this case, he acknowledged that only one piece of evidence, a bullet fragment recovered from the victim, matched the remaining ballistics evidence.

The State continued with the comments that are the subject of the issue now before us:

[PROSECUTOR]: And how do you know that you can trust what Terry Eaton said? Well, think about a few things. First, we offered Mr. Eaton as an expert. We asked the Court to accept him.

[DEFENSE COUNSEL]: Objection. Objection. Objection. That's a mischaracterization.

THE COURT: Overruled.

[DEFENSE COUNSEL]: May we approach?

THE COURT: Sure, approach.

(Counsel and the defendant approached the bench, and the following ensued:)

THE COURT: This is closing argument.

[DEFENSE COUNSEL]: An argument that the Court's accepting someone as an expert at that point is a misstatement of the law and is a –

THE COURT: How is it a misstatement of the law that she offered him as an expert?

[DEFENSE COUNSEL]: She's using it to say that means he's credible and that means he's believable.

THE COURT: That's for them to decide, [Defense Counsel].

[DEFENSE COUNSEL]: That's bringing the Court in –

THE COURT: I'm not being a witness for the State and I disagree totally. Overruled. Thank you.

(Counsel and the defendant returned to the trial tables, and the proceedings resume in open court.)

[PROSECUTOR]: And when I offered Mr. Eaton as an expert, what did the defense say? We accept him.

[DEFENSE COUNSEL]: Objection. That's a mischaracterization.

THE COURT: Overruled again.[17]

Because "[a] trial court is in the best position to evaluate the propriety of a closing argument," *Ingram v. State*, 427 Md. 717, 726 (2012) (citing *Mitchell v. State*, 408 Md. 368, 380-81 (2009)), trial courts have broad discretion in determining the propriety of closing arguments. *See State v. Shelton*, 207 Md. App. 363, 386 (2012). And, we do not disturb the trial court's ruling "unless there has been an abuse of discretion likely to have injured the complaining party." *Grandison v. State*, 341 Md. 175, 243 (1995) (citing *Henry v. State*, 342 Md. 204, 231 (1991), *cert. denied*, 503 U.S. 192 (1992)).

Both the defense and prosecution are given "wide range" in closing argument and are free to "state and discuss the evidence and all reasonable and legitimate inferences which may be drawn from the facts in evidence." *Wilhelm v. State*, 272 Md. 404, 412 (1974). There are, however, limitations upon the scope of a proper closing argument. For example, the State may not vouch for the credibility of a witness, *Spain v. State*, 386 Md. 145, 153-54 (2005), appeal to the prejudice or passions of the jurors, *Mitchell*, 408 Md. at 381, or argue facts not in evidence or materially misrepresent the evidence introduced at trial, *Whack v. State*, 433 Md. 728, 748-49 (2013). Nor is counsel permitted to argue the law:

> [W]here there is no dispute as to the law, counsel will not be permitted to argue law even where the argument is 'consistent' with the court's

[17] We note that, contrary to the prosecutor's argument, defense counsel did not expressly "accept" Eaton as an expert. But, defense counsel did not *voir dire* or "challenge" his qualifications when Eaton was offered as an expert, indicating he would cross-examine him on "his expertise later" and "bring up some things for the jury to consider." Appellant's argument on appeal concerns the prosecutor's first comment regarding the trial court's acceptance of Eaton as an expert.

> instructions. Arguing law includes stating, quoting, discussing, or commenting upon a legal proposition, principle, rule, or statute. Counsel are provided input as to the content of the instructions before they are given, and also may object if an instruction is not to counsel's satisfaction. To allow counsel to embellish the trial court's instructions is fraught with the danger that the trial judge's binding instructions will be manipulated by counsel, resulting in the jury applying law different than that given by the trial court.

White v. State, 66 Md. App. 100, 118 (1986) (internal quotations and citations omitted).

Even when a prosecutor's remark is improper, it will ordinarily merit reversal only " 'where it appears that the remarks of the prosecutor actually misled the jury or were likely to have misled or influenced the jury to prejudice the accused.' " *Lawson v. State*, 389 Md. 570, 592 (2005) (quoting *Spain*, 386 Md. at 158-59). And, under certain circumstances, a prosecutor's otherwise improper argument made in rebuttal to defense counsel's closing may be considered proper. *See Degren v. State*, 352 Md. 400, 431-32 (1999) (concluding that prosecutor's comment that criminal defendants have motive to lie did not constitute reversible error when "made in response to the defense counsel's comments during closing argument that the jury should not believe the State's witnesses because they had various motives to lie").

Here, the underlying issue is witness credibility:

> In a criminal case tried before a jury, a fundamental principle is that the credibility of a witness and the weight to be accorded the witness' testimony are solely within the province of the jury. Therefore, the general rule is that it is error for the court to make remarks in the presence of the jury reflecting upon the credibility of a witness. It is also error for the court to permit to go to the jury a statement, belief, or opinion of another person to the effect that a witness is telling the truth or lying.

Bohnert v. State, 312 Md. 266, 277 (1988) (citations and footnote omitted).[18]

Appellant characterizes the prosecutor's remarks as a comment on the court's instructions and the law governing expert witnesses. The court instructed the jury that they were "the sole judge of whether a witness should be believed." And, with respect to the law applicable to expert opinion, it instructed:

> An expert is a witness who has knowledge, skill, experience, education or special training in a given field. You should consider an expert's opinion together with all the other evidence.
>
> In weighing the opinion of an expert in addition to the factors that are relevant to any witness' credibility, you should consider the expert's knowledge, skill, experience, training or education as well as the expert's knowledge of the subject matter about which the expert is expressing an opinion. You should give expert testimony the weight and value you believe it should have. You are not required to accept any expert's opinion.

See Maryland State Bar Ass'n, *Maryland Criminal Pattern Jury Instructions* 3:10, at 263, and 3:14, at 279 (2012) ("MPJI-Cr").

Even though an expert's credibility is for the jury, "[q]uestions of the qualifications of expert witnesses are for the court to decide as a preliminary matter of law." *Trimble v. State*, 300 Md. 387, 404 (1984), *cert. denied*, 469 U.S. 1230 (1985). Here, the prosecutor, in rebuttal to defense counsel's challenge to Eaton's expertise and credibility, stated to the jury that one thing to consider in knowing that they "can trust what Terry Eaton said," was that "we offered Mr. Eaton as an expert. We asked the Court to accept him." We are not persuaded that, in the context of rebuttal in this case, this represented improper commentary

[18] Although it was raised in that case, the *Bohnert* Court declined to address the propriety of the State's closing argument concerning the expert's credibility. *Bohnert*, 312 Md. at 279.

on the law or an argument that the court, in accepting him as an expert, had vouched for Eaton's credibility. The Court of Appeals has explained:

> The court's threshold determination simply represents a finding that the expert has the minimum degree of expertise necessary to allow him to state an opinion as to a given set of facts; it does not mean that the jury is bound to believe all or any part of his testimony. Rather, the quality, bias, strength, basis, and sincerity of an expert opinion can still be attacked before the jury as a matter of credibility.

Trimble, 300 Md. at 404 (concluding that, even when an expert has been qualified by the court, the parties are free to challenge the expert's qualifications during closing argument).

Because we conclude that the prosecutor's remarks were not improper, the trial court did not abuse its discretion in overruling appellant's objections. But had we concluded otherwise, we would hold that reversal is not required because the remarks were, beyond a reasonable doubt, unlikely to have misled or influenced the jury to the prejudice of appellant in this case. As the Court of Appeals said in *Degren*:

> This Court has long held that in determining whether an error prejudiced the defendant, that is, whether the error was harmless, "the determinative factor ... has been whether or not the erroneous ruling, in relation to the totality of the evidence, played a significant role in influencing the rendition of the verdict, to the prejudice of the [defendant]." *Dorsey v. State*, 276 Md. 638, 653, 350 A.2d 665, 674 (1976). *See also Evans v. State*, 333 Md. 660, 679, 637 A.2d 117, 126 (1994) ("[T]he mere fact that a remark made by the prosecutor to the jury was improper does not necessarily require a conviction to be set aside. Reversal is only required where it appears that the remarks of the prosecutor actually misled the jury or were likely to have misled or influenced the jury to the prejudice of the accused." (quoting *Jones*, 310 Md. at 580, 530 A.2d at 748)).

352 Md. at 432. "[T]he State bears the burden of proving that an error is harmless and must prove beyond a reasonable doubt that the contested error did not contribute to the

verdict." *Fuentes v. State*, 454 Md. 296, 321 (2017) (quoting *Lee v. State*, 405 Md. 148, 174 (2008)).

IV.

Mistrial

Finally, appellant contends that the court erred in not granting a mistrial in response to testimony that could be construed as inadmissible "other crimes" evidence. The State responds that the court properly exercised its discretion in denying a mistrial.

On the second day of trial, both parties agreed that Officer Lynn Grant would not mention that the police reported to Apartment 302 in response to a burglary call. During her testimony, when she was discussing the collection of the handgun from the apartment where appellant was found, Officer Grant testified that she "responded to District IV and I placed – well, I believe that Corporal Montgomery, who was our burglary prevention officer at the time, did process the weapon and then I secured it in a locked box in District IV."

Defense counsel immediately objected and asked for a bench conference, wherein the following ensued:

> [DEFENSE COUNSEL]: Thank you, Your Honor. Pretrial we reached agreements that the fact that this was a burglary investigation was not admissible, it wasn't relevant, and she's just referred to giving the weapon to the burglary investigation officer, Officer Montgomery.
>
> [PROSECUTOR]: I thought she said the evidence.
>
> THE COURT: Who she gave it to?
>
> [DEFENSE COUNSEL]: And she said – but she referred to – I'm moving for a mistrial.

THE COURT: Oh, no. Step back.[19]

"We review a court's ruling on a mistrial motion under the abuse of discretion standard." *Nash v. State*, 439 Md. 53, 66-67, *cert. denied*, 135 S.Ct. 284 (2014). As we have explained:

> "A mistrial is an extreme remedy and it is well established that the decision whether to grant it is within the sound discretion of the trial court." *Walls v. State*, 228 Md.App. 646, 668, 142 A.3d 631 (2016) (citing *Carter v. State*, 366 Md. 574, 589, 785 A.2d 348 (2001)). " 'In the environment of the trial the trial court is peculiarly in a superior position to judge the effect of any ... alleged improper remarks.' " *Simmons v. State*, 436 Md. 202, 212, 81 A.3d 383 (2013) (quoting *Wilhelm v. State*, 272 Md. 404, 429, 326 A.2d 707 (1974)). "[T]he key question for the appellate court is whether the defendant was so prejudiced by the improper reference that he was deprived of a fair trial." *Parker v. State*, 189 Md.App. 474, 494, 985 A.2d 72 (2009) (citing *Kosmas v. State*, 316 Md. 587, 594, 560 A.2d 1137 (1989)).

Howard v. State, 232 Md. App. 125, 161, *cert. denied*, 453 Md. 366 (2017).

The Court of Appeals has identified five factors relevant to a mistrial determination. They include "whether the reference to [the inadmissible evidence] was repeated or whether it was a single, isolated statement; whether the reference was solicited by counsel, or was an inadvertent and unresponsive statement; whether the witness making the reference is the principal witness upon whom the entire prosecution depends; whether credibility is a crucial issue; [and] whether a great deal of other evidence exists." *Rainville v. State*, 328 Md. 398, 408 (1992) (*quoting Guesfeird v. State*, 300 Md. 653, 659 (1984); *accord Carter v. State*, 366 Md. 574, 590 (2001); *see also McIntyre v. State*, 168 Md. App.

[19] After Officer Grant testified, Sergeant O'Tooni referred to the police response to Apartment 302, as a "burglary type of situation[.]" Defense counsel's objection to that characterization was sustained, and appellant has made clear that Sergeant O'Tooni's testimony is not being challenged in this appeal. Instead, appellant maintains that his argument is that the court erred in not granting a mistrial following Officer Grant's testimony.

504, 524 (2006) ("[N]o single factor is determinative in any case, nor are the factors themselves the test . . . Rather, the factors merely help to evaluate whether the defendant was prejudiced").

Here, Officer Grant's remark was an isolated, unsolicited reference that was not responsive to the State's question. Moreover, Officer Grant was not the primary witness in this case and her testimony concerning appellant's apprehension was cumulative to the corroborating testimony provided by her partner, Sergeant O'Tooni. We hold that the trial court properly exercised its discretion in denying the motion for mistrial.

JUDGMENTS AFFIRMED.
COSTS TO BE PAID BY APPELLANT.