Circuit Court for Prince George's County
Case No.: CT161541X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 909

September Term, 2018

EARL ELLWOOD KNIGHT

v.

STATE OF MARYLAND

Meredith,
Wells,
Gould,

JJ.

Opinion by Wells, J.

Filed: October 15, 2019

Appellant, Elmore Ellwood Knight, was indicted and charged in the Circuit Court for Prince George's County with second-degree burglary, theft between $10,000 and $100,000, and fourth degree burglary. His first two trials ended in deadlocked juries, necessitating mistrials due to manifest necessity. At his third trial, a jury convicted appellant on all counts. He was subsequently sentenced to fifteen years' incarceration, with all but five suspended for second-degree burglary, to be followed by a consecutive five years, all suspended, for theft, with the remaining count merged, and to be followed by five years' supervised probation. In this appeal, appellant presents the following questions for our review, which we have slightly rephrased:

> 1. Did the circuit court err in discharging defense counsel without following the dictates of Maryland Rule 4-215?
>
> 2. Did the circuit court commit plain error in admitting hearsay and other unfairly prejudicial evidence?
>
> 3. Was the evidence insufficient to sustain the convictions for second-degree burglary, fourth-degree burglary, and theft?

The State concedes error on the first question presented, and, because we agree with the State's concession, we shall vacate appellant's convictions and remand this case for further proceedings. Because we are remanding for a new trial, we decline to address the evidentiary issues raised in question two. As for question three, we conclude that the appellant's sufficiency arguments as to his burglary convictions are not preserved. As for the theft conviction, we conclude that the evidence was sufficient to sustain that conviction.

BACKGROUND

Tyler Baumler, the Director of Operations for Brother Jimmy's BBQ Restaurant, located at National Harbor in Oxon Hill, Maryland, testified that appellant was previously employed at the restaurant, first as a server and then later, as operations manager. As manager, appellant worked both the opening and closing shifts. Depending on his schedule, appellant's duties included: distributing and collecting cash banks to and from the bartenders for making change during service; distributing cash tips to servers at the end of their shifts; and, accounting for the cash proceeds at the end of the service day after the restaurant closed.

The restaurant accounted for its daily income via a handwritten log and a point-of-sale computer system which recorded the transactions each day. The proceeds were placed in a locked double-stacked safe with two compartments, and that safe was located in the office. Any cash taken in during the regular business day went into one locked compartment, while the money for the bar banks were kept after hours in the second locked compartment. The bar bank safe normally contained approximately $2,000. Appellant was one of five people who both had keys to the office and knew the combinations to the safe.

Several months after working at the restaurant, appellant was fired due to multiple incidents of drinking on the job. After he was terminated, appellant sent Baumler several text messages concerning the reasons for his termination. Those messages, included with the record on appeal, accuse Baumler of lying; warn that appellant was going to hire a lawyer; and, questioned what would happen "if someone gets killed over this?"

The underlying incident at issue in this case occurred on or about Monday, October 10, 2016. On that day, at approximately 10:30 a.m., after Baumler arrived to open the restaurant, he discovered that the cash proceeds from the restaurant's business on Friday, Saturday and Sunday were missing from the safe. Based on information in the safe's log, as well as information from the point-of-sale system, Baumler testified that $10,234.11 from three cash drops, as well as at least $2,000.00 for the bar banks, was missing from the safe. There were no signs of forced entry, either into the office or into the safe.

Before calling the police, Baumler reviewed the recorded video surveillance from the night before. According to Baumler, that video captured appellant walking through the kitchen earlier that day after the restaurant had closed, pulling out a set of keys, and then entering the office. The video revealed that appellant remained in the office for a short period of time, and then left the restaurant.

Baumler was certain that appellant was the person depicted in the surveillance video. Additionally, Baumler identified appellant as the person depicted on other surveillance photographs recorded around National Harbor at around the same time. He also testified that appellant was not authorized to take the money from the safe.

Appellant, apparently, gained entry to the closed restaurant because a cleaning crew and building maintenance personnel had left the door open while they were cleaning up after the accidental activation of the fire suppression system in the kitchen area. One of the maintenance workers, Ricardo Mejia, testified he saw appellant inside the closed restaurant. Mejia positively identified appellant at trial and in a double-blind photo array the police administered after the burglary.

Corporal Marcus Tibbs and Detective Dale Sollars, both officers from the Prince George's County Police Department, were involved in the investigation of this incident. At trial, these witnesses reiterated details of Baumler's account at trial, including the identification of appellant as the perpetrator. Detective Sollars also offered additional information concerning a comparison of the perpetrator's height to the known height for appellant. We shall include additional detail in the following discussion.

DISCUSSION

I.

Appellant contends that the circuit court violated Maryland Rule 4-215 when it discharged appellant's public defender because the court: (1) informed appellant that, if he discharged counsel he would have to represent himself; (2) failed to determine whether appellant's reasons for wanting to discharge counsel were or were not meritorious; and, (3) failed to ensure that appellant understood the maximum penalties for the three offenses in this case. More specifically with respect to the first two reasons, appellant asserts:

> "Never at any point did the court convey to Mr. Knight that if he had meritorious reasons for discharging his attorney, he would be entitled to an opportunity to obtain either another public defender, a panel attorney assigned by OPD, or court-appointed counsel. Second, and related to the first reason, the circuit court erred in failing to make a determination regarding whether Mr. Knight had meritorious reasons to fire his attorney."

The State does not address appellant's initial arguments, but instead, concedes that the court failed to inform appellant of the maximum penalties before discharging counsel. Therefore, due to the court's inadequate compliance with Maryland Rule 4-215 (a) (3), the State agrees that this case must be remanded for further proceedings. We concur.

By way of background, after appellant was charged, Janet Hart, the District Public Defender, entered an appearance on his behalf on January 12, 2017. [R. 18] Andrea Smith, from that same office, then was assigned to be appellant's public defender, on or around January 31, 2017. Less than two months later, on or around March 10, 2017, Alan D'Appolito, Assistant Public Defender, took over the case from Smith. D'Appolito was counsel of record when appellant's first two trials resulted in mistrials after those juries were unable to come to a unanimous verdict. Shortly following the second mistrial, D'Appolito requested that appellant's competency be evaluated for purposes of considering the entry of a plea of not criminally responsible. After the evaluators determined that appellant was competent to stand trial, and prior to appellant's third trial, appellant asked to discharge D'Appolito.

At the December 15, 2017 hearing on that request, appellant personally informed the court that he had "problems" with D'Appolito because he refused to subpoena evidence, namely a "handwritten safe logbook" that Baumler maintained. Appellant believed that the logbook would show that either Baumler, or one of seven other individuals, accessed the safe in question and stole the money. Appellant asserted that D'Appolito lied to him about whether he would ask Baumler at his previous trial about this safe logbook.

Appellant also claimed that D'Appolito failed to obtain the transcripts from the first trial in a timely fashion and failed to provide them to appellant for review. Appellant also asserted that D'Appolito did not provide him with copies of the evidence obtained during discovery, stating: "this is a major problem. I am 23 days away from being tried a third

time and the guy is withholding evidence that is potentially going to be used against me for a third time."

Appellant also took issue with D'Appolito's examination of him when he took the stand at the second trial. Appellant asserted that he and his attorney agreed that appellant would be asked a series of twenty questions at trial, and that D'Appolito only asked him six of those questions. Further, D'Appolito strayed into other matters, according to appellant, that they had previously agreed to avoid.

Appellant then turned to D'Appolito's examination of a detective, presumably, Detective Sollars, and whether that detective lied about the routine collection of DNA and fingerprint evidence in burglary cases. The court responded that, in its prior experience as a prosecutor, DNA and fingerprint evidence was not always readily available in time for trial, and even more so in cases involving violence, such as home invasions and sexual assaults.

Asked whether he had other reasons for wanting to discharge Mr. D'Appolito, appellant asserted that counsel failed to pursue "multiple inconsistencies" in various witness testimony at his prior trials. Appellant also questioned D'Appolito's decision to have him tested for competency after his second trial ended in another hung jury. Appellant believed that D'Appolito did so to "help" the prosecutor after appellant accused the prosecutor of lying to the jury during closing arguments. Appellant concluded:

> . . . [Y]ou know, I've been around long enough, Your Honor, to realize if you don't discredit the prosecutor's witness, most of the time the people on the jury are going to lean [sic] and give them more credit than they would me.

> And it's just by the hand of God, who has his hand on me, and I have his favor over this whole entire case which is why you all will never get a guilty verdict from me or from a jury. You all can't change what he has preordained.
>
> This is nothing but an insurance fraud cause [sic] and it will be proved at a third trial. But as far as him representing me, I don't want him and, you know, I would ask that you please order him to turn over everything he has to do with this case, most importantly, the transcripts so I can prepare for trial on the 8th, 9th, and 10th. I am not asking for a continuance.

The court asked for D'Appolito's response, and he replied:

> I am perfectly happy to be discharged from this case if that is Mr. Knight's wish. No other public defender will be assigned to him. I am actually a third. I have inquired they will not assign him anyone else.

The court and appellant then engaged in the following colloquy, reprinted in its entirety, concerning appellant's request to discharge D'Appolito:

> THE COURT: Okay. And, sir, do you understand what that means, Mr. Knight?
>
> THE DEFENDANT: Yes, ma'am, I do.
>
> THE COURT: Okay. So the Public Defender's Office is not going to reassign this case. Do you understand that?
>
> THE DEFENDANT: I don't want them to.
>
> THE COURT: Okay. So are you going to seek outside representation?
>
> THE DEFENDANT: Well, that depends on if I'm able to get out of here. If I'm held in jail until the 8th, Your Honor, I'm going to represent myself.
>
> THE COURT: Do you understand, sir, that -- and you have been through two trials now and you understand that it is extremely important to have an attorney because we have not had a guilty finding. You agree with me, correct?
>
> THE DEFENDANT: I would and, you know, that's part of the reason that I would like to get out and --

THE COURT: Let me finish.

THE DEFENDANT: Yes, ma'am.

THE COURT: Okay. And you understand that you would be held to the same standard that Mr. D'Appolito is held? You understand that?

THE DEFENDANT: Yes, ma'am, I do.

THE COURT: And you have not been to law school, is that correct?

THE DEFENDANT: I haven't been to law school.

THE COURT: And you have not passed the Bar exam, correct?

THE DEFENDANT: I haven't passed the Bar exam.

THE COURT: So you have not had any training on cross-examining witnesses, is that correct?

THE DEFENDANT: I have, Your Honor. I'm actually undefeated in representing myself in cases in Virginia.

THE COURT: Okay.

THE DEFENDANT: And will remain undefeated.

THE COURT: So my question was did you have any training in cross-examining witnesses?

THE DEFENDANT: I've had other attorneys that were friends.

THE COURT: Okay.

THE DEFENDANT: That coached me along before I went into the courtroom.

THE COURT: All right. And you also understand that an attorney could help you make the legal arguments that need to be made on your behalf in order to preserve your rights? Do you understand that?

THE DEFENDANT: I realize that.

THE COURT: Okay. You know, if you have counsel and you select a jury trial, you know, that counsel can help you pick a jury or you would help your counsel pick a jury. Do you understand that?

THE DEFENDANT: Yes, ma'am, I've done that two times.

THE COURT: And you understand that representing yourself at trial could possibly hurt you? Do you understand that?

THE DEFENDANT: In the eyes of some people but not in my eyes.

THE COURT: Okay.

THE DEFENDANT: But I do understand what you're saying, yes, ma'am.

THE COURT: And do you understand that this member of the Bench will not allow any outbursts as we had during the last trial? You understand that, correct?

THE DEFENDANT: I completely understand that, Your Honor. You won't have one moment's trouble with me.

THE COURT: Well, I am giving you a warning right now.

THE DEFENDANT: Thank you.

THE COURT: And you will have to comply with the rules of evidence. Is that a yes?

THE DEFENDANT: Yes, ma'am. I understand, yes, ma'am.

THE COURT: And if you do not understand them, that is all on you. You understand that?

THE DEFENDANT: Yes, ma'am.

THE COURT: And you understand that if you were to be convicted, that you could not later come back and say, well, I didn't have an attorney? You understand that? Because you are standing in front of me today asking me to discharge your attorney and if you show up on the 8th without an attorney, I am going to find that you waived your right to an attorney. You understand that?

THE DEFENDANT: I completely understand that.

THE COURT: Okay. All right. Mr. D'Appolito, I am going to discharge you at this time.

MR. D'APPOLITO: I am going to pass over to Mr. Knight all that I have on the case in the way of discovery and transcripts. I believe he already has a transcript of his own testimony from the first trial.

THE COURT: Okay.

MR. D'APPOLITO: I have received no transcript of the second trial. Thank you.

THE COURT: All right. Thank you, Mr. D'Appolito.

Approximately three weeks later, on January 8, 2018, appellant appeared by phone at a hearing on the State's motion for continuance. As part of the discussion on that motion, the following occurred:

THE COURT: All right, sir. I want to advise you, again, the last time we were here, when you were released on your own recognizance, I advised you – or that's when you determined or decided to fire Mr. D'Appolito. I advised you of the importance of getting an attorney. Do you have an attorney as of today?

THE DEFENDANT: No, ma'am.

THE COURT: So I just want to make sure that you understand that an attorney can be very helpful for you, because they will determine and identify any defenses, identify any mitigation of evidence, they can help you understand evidence, they can assist in locating witnesses that you may need and, quite honestly, as you know, I do believe we are still -- did they hang on all counts?

[PROSECUTOR]: I'm sorry.

THE COURT: They hung on all counts, correct?

[PROSECUTOR]: Uh-huh.

THE COURT: Okay. So you are still looking at, I believe, the most serious of the charges is first-degree burglary, which carries a maximum penalty of 15 years and/or a $15,000 fine.

> So it's extremely important, Mr. Knight, that you obtain counsel in this matter before the trial date.
>
> THE DEFENDANT: Yes, ma'am.
>
> THE COURT: Which means that you really should have an attorney, because they are going to need an opportunity to review the discovery and any transcripts that they believe are necessary. And so, it's really important that, if you are going to have an attorney represent you, that you hire them as soon as possible so that they can be prepared to go on January 29th.
>
> So what I am going to do, I am going to grant the State's continuance request to January 29th.
>
> Mr. Knight, if you show up without an attorney, you have been advised at least twice, if not more, about your right to an attorney and how important it is. If you show up on the 29th, I'm likely going to deem that you have waived your right to an attorney. Do you understand that, Mr. Knight?
>
> THE DEFENDANT: Yes, ma'am.

The right to counsel is guaranteed by the Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights. *See Gideon v. Wainwright*, 372 U.S. 335, 342-43 (1963); *accord Brye v. State*, 410 Md. 623, 634 (2009).[1] "If the defendant cannot afford private representation, then he or she is entitled to an effective defense from a public defender or court appointed attorney." *Gonzales v. State*, 408 Md. 515, 529-30 (2009); *see also Dykes v. State*, 444 Md. 642, 648 (2015) ("[T]he defendant has a right to counsel appointed at government expense" (citing *Gideon*, *supra*)). "If the defendant *can* afford private representation, however, then the defendant has a right to the attorney of his or her choice." *Gonzales*, 408 Md. at 530 (emphasis added).

[1] The right to counsel provisions of the Maryland Declaration of Rights, Article 21 are *in pari materia* with the Sixth Amendment to the federal constitution. *Parren v. State*, 309 Md. 260, 262-3 n.1 (1987).

A defendant in a criminal prosecution also has a constitutional right to have effective assistance of counsel and the corresponding right to reject that assistance and represent himself. *Powell v. Alabama*, 287 U.S. 45, 71 (1932) (recognition of the constitutional right to the effective assistance of counsel); *Dykes*, 444 Md. at 648 (same); *see also Gregg v. State*, 377 Md. 515, 548 (2003) (stating that the right "grants the accused not only the right to be represented by counsel, but also the right to make his [or her] own defense without the assistance of counsel") (citing *Faretta v. California*, 422 U.S. 806, 819 (1975)).

When an accused foregoes the benefit of assistance of counsel, a waiver of the right must be knowing and intelligent to be effective. *See Brye*, 410 Md. at 634-35 ("The accused 'should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that "he knows what he is doing and his choice is made with eyes open."'") (quoting *Faretta*, 422 U.S. at 835); *see also Dykes*, 444 Md. at 648 ("A defendant may waive the right to counsel if the defendant does so knowingly and voluntarily"); *Gonzales*, 408 Md. at 530 ("a defendant who wishes to assert the right to self-representation must knowingly and intelligently waive his or her right to an attorney"). But, "courts indulge every reasonable presumption against its waiver." *Dykes*, 444 Md. at 648 (quoting *Parren*, 309 Md. at 263).

As part of the protection of this fundamental right to counsel, 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 requirements of the Rule are "mandatory," require "strict compliance," and "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).

Further, the rule "is a bright line rule that requires strict compliance in order for there to be a 'knowing and intelligent' waiver of counsel by a defendant." *Johnson v. State*, 355 Md. 420, 452 (1999); *see also Gonzales*, 408 Md. at 530 ("Maryland Rule 4-215 ensures that a defendant's waiver of the right to counsel is knowing and voluntary by setting forth mandatory procedures that a trial court in this State must follow when a defendant seeks to assert this right"); *Broadwater*, 401 Md. at 182 ("Strict, not substantial" compliance with the advisement and inquiry terms of the Rule is required in order to support a valid waiver"); *Gregg*, 377 Md. at 554 ("[T]he trial court must comply with Rule 4-215 in order for defendant's waiver of counsel to be effective").

Our review of the circuit court's compliance with Rule 4-215 is *de novo*. *State v. Graves*, 447 Md. 230, 240 (2016). And, where the court has strictly complied with the rule, we review the court's decision regarding whether to grant or deny a defendant's request to discharge counsel for abuse of discretion. *State v. Taylor*, 431 Md. 615, 630 (2013). At issue is Maryland Rule 4-215 (e), which 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. [2]

For a Rule 4-215 (e) inquiry to be triggered, there first must be a request to discharge counsel, along with a present intent to seek new counsel or represent oneself. *State v. Davis*, 415 Md. 22, 33 (2010). "Once Rule 4-215 (e) is triggered, the trial court has an affirmative duty to address the defendant's request." *Williams v. State*, 435 Md. 474, 487 (2013); *accord State v. Weddington*, 457 Md. 589, 601 (2018). And, "[i]n light of the fundamental rights implicated, Md. Rule 4-215 (e) provides a 'precise rubric[ ]' with which we demand 'strict compliance.'" *State v. Graves*, 447 Md. at 241 (quoting *Pinkney*, 427 Md. at 87) (additional citations omitted).

[2] Subsections (a) (1)-(4) require that the court: "(1) Make certain that the defendant has received a copy of the charging document containing notice as to the right to counsel[;] (2) Inform the defendant of the right to counsel and of the importance of assistance of counsel[;] (3) Advise the defendant of the nature of the charges in the charging document, and the allowable penalties, including mandatory penalties, if any[; and,] (4) Conduct a waiver inquiry pursuant to section (b) of this Rule if the defendant indicates a desire to waive counsel." Md. Rule 4-215 (a). Although these advisements should be given at the defendant's first appearance without counsel, they may be given in a "piecemeal approach" where different judges of the same court have properly advised the defendant. *See Broadwater*, 401 Md. at 201-02 ("[T]he Rule contemplates that the mandatory advisements may be given by a court or courts over multiple encounters with a defendant, and that judges may supplement the advisements omitted or incorrectly given by their predecessors").

When a request to discharge is made prior to trial, the court must permit the defendant to explain his reasons, determine whether those reasons are or are not meritorious, and then should take certain actions depending on that determination. *Dykes*, 444 Md. at 652 (observing that "[t]he rule does not define 'meritorious.' This Court has equated the term with 'good cause'"). When the court finds a meritorious reason for the defendant to discharge counsel, it must "permit discharge of counsel[;]" "continue the action, if necessary[;]" "advise the defendant that, if new counsel does not enter an appearance, the defendant will be unrepresented[;]" and "conduct further proceedings in accordance with Rule 4-215 (a) . . . if there has not been prior compliance." *Dykes*, 444 Md. at 652 (citations omitted). When the court finds no meritorious reason to discharge counsel, it must "advise the defendant that the trial will proceed as originally scheduled[;]" "advise that the defendant will be unrepresented if the defendant discharges counsel and does not have new counsel[;]" and, "conduct further proceedings in accordance with subsection (a) of the rule . . if there has not been prior compliance." *Id*. at 653 (citations omitted).

The appellant argues that the circuit court failed to comply with several of these requirements, including, among other things, failing to announce whether the reasons for discharge were or were not meritorious and failing to advise appellant properly about his corresponding options. We need not decide the extent to which the court complied with those requirements because we are persuaded that, in this case, the court was required, and failed, to comply with Rule 4-215 (a) (3). *See Garner v. Archers Glen Partners, Inc*., 405 Md. 43, 46 (2008) ("[A]n appellate court should use great caution in exercising its

discretion to comment gratuitously on issues beyond those necessary to be decided"); *see also Pearson v. State*, 437 Md. 350, 365 n.5 (2014) ("Generally, where an appellate court reverses a trial court's judgment on one ground, the appellate court does not address other grounds on which the trial court's judgment could be reversed, as such grounds are moot"), *reconsideration denied* (Apr. 17, 2014).

As indicated, Rule 4-215 (e) concludes that, if the court permits the defendant to discharge counsel, then it must comply with subsections (a) (1)-(4) of the rule if the record does not reflect prior compliance. Of these, only 4-215 (a) (3) is at issue. That subsection requires the court to "[a]dvise the defendant of the nature of the charges in the charging document, and the allowable penalties, including mandatory penalties, if any." Md. Rule 4-215 (a) (3).[3]

Appellant was charged with second and fourth-degree burglary, and theft between $10,000 and $100,000. [R. 1-2] The penalty for second degree burglary is imprisonment not exceeding 15 years. *See* Md. Code (2002, 2012 Repl. Vol., 2016 Supp.), § 6-203 (c) of the Criminal Law Article ("Crim. Law"). The penalty for fourth degree burglary is imprisonment not exceeding 3 years. *See* Crim. Law § 6-205 (e). The applicable penalty for appellant's charge of theft is currently, according to the evidence presented,

[3] There is no claim that appellant was unaware of the nature of the charges. Indeed, the record reflects that appellant was present during his two prior jury trials when the court instructed on the elements of second-degree burglary, theft, and fourth-degree burglary. Thus, a fair reading of the record persuades us that appellant was aware of the nature of the charges against him.

(continued)

imprisonment not exceeding 5 years or a fine not exceeding $10,000 or both. *See* Crim. Law § 7-104 (g) (1) (i).[4]

Here, appellant was not advised of the possible penalties at the December 15, 2017 hearing when the court granted his request to discharge counsel. Indeed, we have reviewed the record and, as set forth herein, it appears that the first-time appellant was advised of any possible penalties occurred approximately three weeks later, on January 8, 2018, when the court addressed the State's motion to continue trial. At that time, the court informed appellant that he was facing a possible 15-year sentence and/or a $15,000 fine for first degree burglary, a charge not included in the indictment. Even to the extent that this was a partial advisement of the potential penalties, it was incomplete and inadequate. *See State v. Camper*, 415 Md. 44, 57-58 2010) (reaffirming that harmless error analysis does not apply to a claimed violation of Maryland Rule 4-215 (a) (3)) (citing *Brye*, *supra*, 410 Md. at 643-44, and *Moten v. State*, 339 Md. 407, 409 (1995)). In fact, the State concedes error in this case and agrees that a remand is necessary under these circumstances. We concur and shall vacate the judgments and remand this case for further proceedings.

[4] The applicable penalty cited is based on the evidence presented in this case indicating that appellant allegedly stole somewhere between $10,234.11 and $12,234.11. The original indictment, filed on December 20, 2016, charged appellant with theft between $10,000 and $100,000. The penalty at that time, under former Crim. Law 7-104 (g) (1) (ii) (2016 Supp., superseded), was imprisonment not exceeding 15 years or a fine not exceeding $15,000 or both. Effective October 1, 2017, the possible penalty for the applicable amount was reduced to 5 years or a $10,000 fine or both. *See* 2016 Md. Laws, ch. 515; *see also Waker v. State*, 431 Md. 1, 9-13 (2013) (holding, in a case involving an alleged illegal sentence for theft, that the court should apply the statutory penalty applicable at trial and sentencing, not the penalty that applied at the time the offense was charged).

II.

Appellant next claims the trial court committed plain error in: (1) permitting testimony from Corporal Tibbs and Detective Sollars regarding what Tyler Baumler told them about appellant's culpability and the amount of money stolen; and, (2) permitting Detective Sollars to testify about appellant's "booking" information from Virginia. Specifically, appellant asserts that even if the former evidence amounted to non-hearsay and was cumulative of the victim's testimony at trial, the evidence was unfairly prejudicial. As for the latter evidence, appellant argues this evidence was irrelevant and inadmissible due to its potential to create unfair prejudice in the minds of the jury. Acknowledging that there were no objections to this evidence, appellant requests that we exercise plain error review. The State responds that, because this case should be remanded for a new trial based on the Rule 4-215 violation, "there is no reason for this Court to exercise its plenary discretion to conduct plain-error review." We agree with the State.

At trial, Corporal Tibbs told the jury that he responded to Baumler's 911 call reporting the burglary and theft. Specifically, Corporal Tibbs testified, without objection, that there was a "report of a theft" from Baumler and that Baumler "advised that a former employee had entered the store or restaurant without permission and stole approximately $10,000 or more in cash dollars." Corporal Tibbs further testified, again, without objection, that Baumler identified appellant as that individual. Corporal Tibbs also testified, without objection, that Baumler told him that the amount stolen was $10,243.11.

Detective Sollars related that as part of his investigation he obtained photographs from other surveillance systems located throughout National Harbor. The detective

testified, without objection, that one of those photos was "[a] blurry image of someone wearing similar clothing to the person who committed the theft." The person depicted was riding a mountain bicycle, a common activity for appellant according to Baumler.

On cross-examination by appellant, Detective Sollars confirmed that the police did not recover any clothing, or the mountain bike seen in the surveillance video and photographs. Further cross-examination focused on a number of topics, including, the photo array shown to the maintenance worker, Mejia, who saw appellant inside the restaurant early on the day in question; and, pertinent to the issue raised, a comparison of appellant's and the suspect's height. Appellant asked whether the documents prepared by Detective Sollars in connection with this case listed appellant's height as being 6 feet tall. After the detective replied that he did not believe so, appellant showed the detective the application for an arrest warrant, which listed appellant's height as 6 feet. In response, Detective Sollars replied "You know where I obtained that information?" After appellant objected on the grounds that he did not ask the detective that question, the court ruled that the detective had to "wait for a question."

On redirect examination, the following colloquy occurred, again without objection:

> Q. You were asked about the reference to 6 feet on the original arrest warrant. Where did you get that information?
>
> A. From a Virginia driver's license. Virginia provided me with the height, weight and number for him.
>
> Q. Presumably that's provided by –
>
> A. Provided by the state of Virginia and a booking photo. That's where I get that information from. I believe I got his from an arrest booking information.

On recross-examination, appellant continued the discussion:

Q. You said you got that from the Virginia Motor Vehicle Registry?

A. Booking Registry.

Q. What does that say your height is?

A. Your identification card says you're 5-foot 8 inches.

On further redirect, the prosecutor elicited the following explanation, all without objection:

Q. Was that the source of information?

A. No. It was from Virginia booking records, because he does not have a driver's license.

Q. And do you know what his height really is?

A. 5-foot 8 inches.

Q. Would it make any difference if the height was incorrect on the arrest warrant?

A. No. It happens all the time.

Appellant's contention is that this testimony constituted inadmissible hearsay. Because we are remanding for a new trial for the reasons stated in Section I of this opinion, and the parties and the trial court will have the opportunity to raise and resolve these as well as any other evidentiary issues, at the retrial, we decline to address the issue of plain error in this appeal.

III.

Finally, appellant challenges the sufficiency of the evidence to support his convictions. Even though we are vacating on other grounds, we are required to consider

his sufficiency challenge on appeal. *See Benton v. State*, 224 Md. App. 612, 629 (2015) ("In cases where this Court reverses a conviction, and a criminal defendant raises the sufficiency of the evidence on appeal, we must address that issue, because a retrial may not occur if the evidence was insufficient to sustain the conviction in the first place") (citing *Ware v. State*, 360 Md. 650, 708-09 (2001)).

Appellant asserts three grounds in support of his sufficiency challenge. First, appellant makes the following contentions: the photographic and video evidence was "blurry;" the video was not an original; the evidence did not show, directly, that appellant committed any crime; the evidence failed to support the State's theory of the case; and, the State failed to recover "any of the missing funds, the bicycle ridden by the alleged culprit, or the clothes worn by the suspect." [Brief of Appellant at 31-32] Second, appellant asserts that, even accepting that he was the individual seen in the photographic and video evidence, the law is settled that a person may not be convicted based on mere presence alone. Finally, relying on *Kucharcyzk v. State*, 235 Md. 334 (1964), appellant maintains that the evidence was based on inconsistent statements by the witnesses. The State responds that these arguments are without merit. We agree.

Initially, and although the State does not raise preservation, we may address a procedural default on our own. *See* Md. Rule 8-131 (a) ("Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record *to have been raised in or decided by* the trial court . . .") (emphasis added); *Haslup v. State*, 30 Md.App. 230, 239 (1976) (appellate court may determine sua sponte whether party has preserved issue for appellate review). In *Hobby v. State*, 436 Md. 526, 539-40 (2014), the Court of Appeals

noted:

> Maryland Rule 4-324(a), concerning motions for judgment of acquittal, provides, in pertinent part: "The defendant shall state with particularity all reasons why the motion should be granted." "*Under [Maryland] Rule 4-324(a), a defendant is . . . required to argue precisely the ways in which the evidence should be found wanting and the particular elements of the crime as to which the evidence is deficient*." *Montgomery v. State*, 206 Md. App. 357, 385, 47 A.3d 1140, 1157, *cert. denied*, 429 Md. 83, 54 A.3d 761 (2012) (alteration and omission in original) (internal quotation marks omitted) (quoting *Fraidin v. State*, 85 Md. App. 231, 244-45, 583 A.2d 1065, 1072, *cert. denied*, 322 Md. 614, 589 A.2d 57 (1991)). And, "[t]he language of the rule *is mandatory*." *State v. Lyles*, 308 Md. 129, 135, 517 A.2d 761, 764 (1986).

(Emphasis added).

At the end of the State's case-in-chief, appellant made the following motion for judgment of acquittal:

> [APPELLANT]: Your Honor, the main thing here that the State has failed to do is show that an actual theft has taken place. Actually, there's no evidence that a theft took place. It's more so towards the fact that Tyler Baumler has orchestrated all this and controlled this from the very beginning. He has manipulated the video that he had, and we have a third copy of that to use. And the actual timeline of the video itself does correspond with the outside cameras being that it is at 45 minutes exactly. And I believe that the second will correspond with it, as well. And that shows that the person was outside 25 seconds later, Your Honor. Tyler Baumler said it takes 10 seconds to open up one safe. There are two safes. He also stated it takes probably 40 seconds for that person to be where the person is. So that eliminates any possibility whatsoever that a theft took place.
>
> Furthermore, the denominations of the money that was taken. You would have had to have a bag to carry this out, Your Honor. The person is not seen in any video.
>
> The fact that the witness who claims he was there and identified me, there's no video evidence whatsoever. He was let in through the front door, as the cleaning lady said. That was between 6:00 a.m. and 6:30, Your Honor. The video was saying that -- alleging it was me or the person who was there at 5:45 and we have the outside cameras that are very accurate to show that

> actually is the right time, I believe is what's outside. So he wasn't there, Your Honor.
>
> All the evidence shows that Tyler Baumler brought him in as the afterthought, the afterthought after he reported the money missing, which there's an unknown amount of money missing. And there's a 6-week time period in between him going and picking me out of the lineup.
>
> Then after bringing him in, the video clearly shows whoever this is on it turning back around, Your Honor. Mission complete. Go in, walk in, walk out. And, Your Honor, I say the evidence points to the reason Tyler Baumler edited the video, cut out the person leaving, is because the person did not stay inside long enough to commit the theft, and that's why he intentionally edited out the person leaving. And you put that with the shots of the person outside leaving, headed out the Harbor, the last one surely shows he changed his direction and turns back around. Nobody commits a crime stealing this money and decides to turn back around and go back towards the scene of the crime, unless it's all been orchestrated by Tyler Baumler. Furthermore, the evidence points to when detectives show up, Tyler directs them to go to National Harbor Security. They got videos. It's just uncommon all the things that he went and tried to do his own investigation if he did not orchestrate all this. And it is for those reasons I ask you to rule in favor of my judgment. Thank you.

[T2. 56-58]

And, at the close of all the evidence, appellant offered the following additional argument in support of his motion:

> [APPELLANT]: Okay. Yes, ma'am. I would substantiate the same facts, Your Honor, that he has failed to prove a theft actually took place. And being that there's no video evidence that any money was taken out, the person would need a bag to have carried it out. There's contradictory testimony from Tyler Baumler as to the amounts of money that was supposedly been in the safe. The evidence showed that there was at least $2,094 unaccounted for. Then you would add there's an unknown amount that was specifically missing which would have been in tips for servers and bartenders which has been testified to by Tyler Baumler. And $2,094 is a lot of money unaccounted for from the 911 call, the video has been edited, which jeopardizes the integrity of the video. There's evidence that the person leaving turned back around, was turning back around and not leaving out the Harbor, which is the

only way to get out, one. And, two, if I had done this, Your Honor, I would have kept going straight to get out the Harbor.

The overwhelming, just multiple stories from Tyler Baumler whether it be the time the person was in there. He said one minute the letter to the insurance company. He states two minutes on that. Then when he writes his statement for Detective Sollars, he states four minutes. It's just multiple inconsistencies with that, with the amounts of money. Detective Sollars has to prompt him. He writes ten thousand in cash and tips. He doesn't know the exact amount and has to be prompted. Was the exact amount $10,234.11. He did not have the insurance letter.

THE COURT: He didn't deny the insurance letter. He said he wrote it.

[APPELLANT]: After the fact.

THE COURT: But he didn't deny writing the letter, right?

[APPELLANT]: Right. But he was saying it was addressed to corporate. Then I pointed out to him with previous testimony on March 20th that he specifically stated it was to the insurance company. In that letter alone, Your Honor, it would prove that no theft took place for a number of reasons. First, it's not addressed to niche. Tyler signs it with thank you, Tyler. He doesn't include his full name. He does not include the restaurant he works for and what his position would have been. But the number one thing that he leaves out of it for to be a letter to the insurance company is the amount of money that was alleged to have been taken, Your Honor.

We know common sense you can't write a letter to an insurance company without including the amount of money that you claim to have been missing.

Furthermore, there's no evidence here of an actual insurance claim made. I would say the evidence supports due to this letter being falsely interpreted to the point that no insurance claim was ever made. I ask that you move in favor for my judgment.

[T2. 64-67]

Based on this, we conclude that several of appellant's arguments on appeal concerning the sufficiency of the evidence, specifically his conviction for the crimes of

second-degree and fourth-degree burglary, were not properly preserved because they were not made with the requisite particularity pursuant to Maryland Rule 4-324(a). However, we discern that appellant stated with sufficient particularity whether the evidence: (1) showed that he committed the crime of theft; (2) supported the State's theory of the case; and, (3) was based on inconsistent statements by the witnesses. Accordingly, these arguments are preserved for our review.

In considering a challenge to the sufficiency of the evidence, we ask "'whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Grimm v. State*, 447 Md. 482, 494-95 (2016) (quoting *Cox v. State*, 421 Md. 630, 656-57 (2011)); *accord Jackson v. Virginia*, 443 U.S. 307, 319 (1979). "[W]e defer to the fact finder's 'resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the credibility of witnesses.'" *Riley v. State*, 227 Md. App. 249, 256 (quoting *State v. Suddith*, 379 Md. 425, 430 (2004)), *cert. denied*, 448 Md. 726 (2016). We will not reverse a conviction on the evidence "'unless clearly erroneous.'" *Id.* (quoting *State v. Manion*, 442 Md. 419, 431 (2015)).

Appellant was charged with theft between $10,000 and $100,000. As the trial court instructed the jury, theft generally requires proof "that the defendant willfully or knowingly obtained or exerted unauthorized control over property of the owner; and that the defendant had the purpose of depriving the owner of the property;" and that the value of the property was within or exceeded the statutory limit. *See* Crim. Law § 7-104.

We are persuaded that appellant's contentions about alleged inconsistencies and defects in the evidence were issues properly left to the jury's consideration. It is, of course, "the role of the jury to resolve any conflicts in the evidence and assess the credibility of the witnesses." *Gupta v. State*, 227 Md. App. 718, 746 (2016) (citations omitted), *aff'd*, 452 Md. 103, *cert. denied*, 138 S.Ct. 201 (2017). In doing so, the jury is free to "accept all, some, or none" of a witness's testimony. *Correll v. State*, 215 Md. App. 483, 502 (2013), *cert. denied*, 437 Md. 638 (2014). Further, the evidence of a single eyewitness is sufficient to sustain a conviction. *See Branch v. State*, 305 Md. 177, 184 (1986) ("The issue of credibility, of course, is one for the trier of fact"); *Braxton v. State*, 123 Md. App. 599, 671 (1998) ("Maryland courts have long recognized that an 'identification by the victim is ample evidence to sustain a conviction.'" (citing *Branch, supra*)). This Court has explained:

> One of the jury's purposes is to resolve different issues of fact. When, as here, there is conflicting evidence, it is for the jury to pick and sift, to stress and ignore, to believe and disbelieve, to weigh and assess, and resolve the conflicts in reaching a final decision to acquit or convict.

Thomas v. State, 32 Md. App. 465, 477 (1976), *cert. granted*, 278 Md. 736 (1976), *cert. dismissed as providently granted*, (No. 109, Sept. Term, 1976 (March 4, 1977)).

Appellant also asserts that he could not be convicted just because he was merely present at the crime scene. [Brief of Appellant at 29, 32] Although "[i]t is a universally accepted rule of law that mere presence of a person at the scene of the crime is not of itself sufficient to prove the guilt of that person," *Fleming v. State*, 373 Md. 426, 433 (2003), it

is also true that presence "is an important element in the determination of the guilt of the accused." *Id*.

Appellant relies, in part, on the oft-cited case of *Wilson v. State*, 319 Md. 530 (1990). In *Wilson*, the Court of Appeals held that the evidence was insufficient to sustain Wilson's convictions of the theft of three rings from a bedroom in a house he was cleaning. *Wilson*, 319 Md. at 538-39. One witness testified that she had tried on the rings between 9:00 and 10:00 a.m. on the day in question, but found them missing at 10:30 p.m. that night. *Id.* at 533. The witness remembered a man cleaning the house that day, but she could not remember if Wilson was that man, because four or five people had cleaned the house on prior occasions. *Id.* Another witness identified Wilson as the cleaning person on the day in question, and was "pretty sure" that he was the only cleaning person there that day, but the witness also remembered a visitor who had used the bathroom adjacent to the bedroom where the rings were last seen. *Id.* at 534.

The Court of Appeals noted that the substance of the circumstantial evidence against Wilson consisted of the fact that Wilson was present at the residence on the date of the theft, that he had cleaned near the bedroom where the rings were kept, and that he had access to them. *Wilson*, 319 Md. at 537. The evidence also showed, however, that five other people were present in the residence and had access to the rings. *Id.* The Court held that "[w]hile a defendant's presence at the scene of a crime is a very important factor to be considered in determining guilt, it is elementary that mere presence is not, of itself, sufficient to establish that that person was either a principal or an accessory to the crime." *Id.* (citations and quotations omitted.). Because there was no evidence other than his

presence to implicate Wilson as the person who stole the rings, the evidence was insufficient to sustain his convictions. *Id.* at 538-39.

We conclude that *Wilson* is distinguishable, notably, due to the fact that appellant had been terminated and was not authorized to be in the office area, much less during the early morning hours when the restaurant was closed. Further, to the extent that appellant is conflating mere presence with the difference between direct and circumstantial evidence, this Court has explained that "the trier of facts must take into consideration all the attendant circumstances surrounding the presence of the accused at the scene in making the determination of guilt or innocence." *Chavis v. State*, 3 Md. App. 179, 182 (1968). Indeed, it is also well settled that "there is no difference between direct and circumstantial evidence" any attempt to distinguish between the two forms of evidence uniformly has been rejected. *Mangum v. State*, 342 Md. 392, 398-99 (1996) (quoting *Hebron v. State*, 331 Md. 219, 225-26 (1993)); *see also Corbin v. State*, 428 Md. 488, 514 (2012) (recognizing that "the inferences made from circumstantial evidence must rest upon more than mere speculation or conjecture") (citations and quotation marks omitted).

As a former manager for the restaurant, appellant knew where the safe was located in the office area and, indeed, used to have access as part of his job duties. The safe log corroborates that money was stolen from the safe in a certain amount, sometime between the time the restaurant closed on the evening of Sunday, October 9, 2016, and the morning of Monday, October 10, 2106, when Baumler and another manager arrived for the day. Appellant was identified by at least two witnesses, corroborated by surveillance video recordings and photographs, of being at the scene at around this same time, again, without

authorization. We conclude that resolution of appellant's criminal agency was properly left to the fact finder. As the Court of Appeals has explained: "the finder of fact has the 'ability to choose among differing inferences that might possibly be made from a factual situation . . . .' That is the fact-finder's role, not that of an appellate court." *Smith v. State*, 415 Md. 174, 183 (2010) (quoting *State v. Smith*, 374 Md. 527, 534 (2003)). Indeed, as this Court pointed out in *Evans v. State*, 28 Md. App. 640, 702-03 (1975), *aff'd*, 278 Md. 197 (1976):

> "In a real sense, the whole decision-making process is the process of drawing inferences. From fact A, we infer fact B. From a confession, we infer guilt. From the pulling of a trigger, we infer an intent to harm. From the possession of recently stolen goods, we infer the theft. From the motive, we infer the criminal agency. From the presence of the sperm, we infer the penetration. From the muddy footprints on the living room rug, we infer the unlawful entry. The whole phenomenon of circumstantial evidence is the phenomenon of inferring facts in issue from facts established.

Id.

Finally, we conclude that appellant's reliance on *Kucharcyzk* is misplaced. In that case, the State's main witness was "a mentally deficient 16-year-old boy." *Kucharczyk*, 235 Md. at 336. His testimony alternately: (1) supported the State's theory that he had been sodomized; and, (2) contradicted the State's theory suggesting that no crime had occurred (twice on direct examination he testified that "nothing happened in the public lavatory" and once on cross-examination he testified that "nothing happened in the garage"). *Id.* at 336-37. The Court of Appeals reversed Kucharczyk's conviction for assault and battery because of insufficient evidence. *Id.* at 337. The Court held that where a witness testifies to a critical fact and then gives directly contradictory testimony regarding

the same critical fact, the fact finder should not be allowed to speculate and select one or the opposite version. *Id.* at 337-38.

Maryland appellate courts have made clear that "[t]he doctrine set forth in *Kucharczyk* is extremely limited in scope." *Smith v. State*, 302 Md. 175, 182 (1985); *see also Turner v. State*, 192 Md. App. 45, 81 (2010) (*Kucharczyk* is to be "narrowly interpreted"); *Vogel v. State*, 76 Md. App. 56, 59-60 (1988).

More significantly, in *Rothe v. State*, ___ Md. App. ___ (2019), Sept. Term, No. 2454, WL 3519716, we "la[id] to rest" the so-called *Kucharczyk* doctrine, and re-emphasized what we said in *Bailey v. State*, 16 Md. App. 83 (1972), our first attempt to show that *Kucharczyck*'s holding was narrow and one of a kind.

> Some appreciation of the limited utility of the so-called *Kucharczyk* doctrine may be gathered from the fact that it was never applied pre-*Kucharczyk* in a criminal appeal and it has never been applied post-*Kucharczyk* in a criminal appeal.

Bailey,16 Md. App. at 94. *Bailey* catalogued numerous instances in which the *Kucharczyk* doctrine was invoked but found to have no application. *Id*. at 95-97. We then noted that,

> [i]n each of those situations, our system of jurisprudence places reliance on the fact finder to take contradictions or equivocations properly into account and then to make informed judgment in assessing a witness's credibility and in weighing that witness's testimony.

Id. at 97. We are not persuaded that appellant's arguments about inconsistencies in the evidence remotely approached the internal inconsistencies found in *Kucharczyk*, or, more importantly, were inconsistencies in testimony that a jury is routinely charged with

resolving. Accordingly, we hold that the evidence was sufficient to sustain appellant's conviction for theft between $10,000 and $100,000.

JUDGMENTS VACATED AND REMANDED FOR FURTHER PROCEEDINGS.

COSTS TO BE PAID BY PRINCE GEORGE'S COUNTY.