Circuit Court for Caroline County
Case No. C-05-CR-20-000019

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1102

September Term, 2021

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SHAWN G. WISEMAN

v.

STATE OF MARYLAND

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Graeff,
Ripken,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Raker, J.

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Filed: July 11, 2022

A jury of the Circuit Court for Caroline County convicted appellant Shawn G. Wiseman for reckless endangerment, driving in excess of a posted speed limit, driving in excess of a reasonable and prudent speed, driving without a license, driving without current tags, unauthorized display and use of a registration plate, negligent driving, reckless driving, driving a vehicle while under the influence of alcohol, driving a vehicle while impaired by alcohol, attempting as a driver to elude a uniformed police officer by fleeing on foot, and attempting as a driver to elude a police officer in an official police vehicle by fleeing on foot.[1] He presents the following questions for our review:

> "1. Was the evidence insufficient to support Mr. Wiseman's conviction for reckless endangerment?
>
> 2. Did the trial court err when it failed to comply with Md. Rule 4-215?
>
> 3. Did the trial court err in finding that Mr. Wiseman's waiver of his right to testify was knowing and voluntary?
>
> 4. Must the fines the court imposed for driving in excess of the posted maximum speed and driving in excess of reasonable and prudent speed be merged into his fine for reckless driving?"

The evidence was insufficient to support the judgment of conviction for reckless endangerment and we shall reverse. As to question four, the fines imposed for driving in

[1] The jury acquitted appellant of the following charges: second-degree assault, displaying registration plates issued to another person, and operating an unregistered motor vehicle. The State dismissed the following charges: carrying a concealed dangerous weapon, failing to display one's license on demand, failing to display one's vehicle registration card on demand, knowingly driving an uninsured vehicle, driving a vehicle while impaired by drugs or alcohol that one cannot drive safely, and owner of a vehicle who fails to maintain the required security for a vehicle during the registration period.

excess of a posted speed limit and for diving in excess of a reasonable and prudent speed, we agree with appellant that the sentences should merge. We shall otherwise affirm the circuit court.

I.

On October 25, 2019, State Troopers Shane Hansley and Douglas Prince arrested appellant. That same day, the State filed, in the District Court of Maryland, a statement of charges. Appellant prayed a jury trial, and the case was transferred to the circuit court for trial. Appellant was convicted, and the trial judge imposed a term of incarceration of five years and a fine of $500.[2]

During a pre-trial hearing, defense counsel told the judge that appellant "wishe[d] to address the Court with regard to my continued representation on his behalf." Appellant told the judge: "just the relationship that I've had with my attorney over this period of time has been rocky and I, I would like to ask the Court to please to change my attorney." The judge stated as follows:

[2] The trial judge imposed the following sentences: three years for reckless endangerment; sixty days, concurrent, for driving a vehicle without a license or authorization; two years, consecutive, for driving a vehicle while under the influence of alcohol; one year, concurrent, for attempting as a driver to elude a uniformed police officer by fleeing on foot. The trial judge merged for sentencing purposes the driving a vehicle while impaired by alcohol conviction with the driving a vehicle while under the influence of alcohol conviction. The trial judge imposed the following fines: $100 for driving in excess of a posted speed limit; $100 for driving in excess of a reasonable and prudent speed; $100 for driving without current tags; $100 for displaying or using an unauthorized registration plate; and $100 for reckless driving.

> "So, I'm going to explain to you the policy of the Public Defender's Office is that they determine who represents somebody.
>
> ***
>
> They do occasionally change for legal purposes and other ones. I don't have any input on that. So, your only options today are three I can think of off the top of my head. One is you can stay with the Public Defender's Office and whomever they decide to assign to the case, whether it's [defense counsel] or somebody else. Two, you can discharge or fire the Public Defender's Office. If you do that, they will not assign another attorney to represent you even if you go back and reapply, which would mean that your other options at that point would be to either represent yourself or you could hire a private attorney."

After that exchange, the judge confirmed the trial date, stating as follows:

> "Yeah, week from today, next Wednesday. So, that's the only reason I'm stopping you because again there's some misconception that people are able to pick and choose amongst the Public Defender's staff or their panel attorneys and that's not really a viable option if there's not any, I mean, again, if they do it's their decision. It's not anything that the Court is going to direct them to do. Okay?
>
> ***
>
> All right, so do you, so your options are you can stay with the Public Defender's Office. You can discharge them and if you discharge them, then your options are you can represent yourself or you can seek private counsel, which means probably coming up with a fee to pay somebody and, and again, at the moment I don't know how long it's going to take for this dash camera to show up, but I've not heard anybody request a postponement up to this point."

Appellant stated: "I'm trying to seek a fair trial and based on the relationship I have with my attorney at this point, I don't feel comfortable with my representation. And I don't feel it's adequate." The following exchange then occurred:

> "THE COURT: Was there something you've asked him to do that he has not done?
>
> [APPELLANT]: Well, first time that I, you know, heard him reach out to my father as my witness was yesterday in this whole period of time. And my grandmother's in the hospital with Stage 4 brain cancer, so he wasn't available yesterday and . . .
>
> THE COURT: Is he going to be available next Wednesday?
>
> [APPELLANT]: I, well, I assume. I hope so. But, you know, in order to have a fair trial, I mean, the Defense . . .
>
> THE COURT: Was your father in the car? I mean this is the driving thing, he was in the car with you?
>
> [APPELLANT]: No, no. He was at home. I was at home and he was home with me. I was at home with him. He's handicapped and I was there with him."

Later, the following exchange occurred:

> "[APPELLANT]: No. I've yet to speak to an investigator once. I, I've, I haven't had a chance to really explain myself and, or my story in, with his due diligence. So, I don't want to, excuse me.
>
> [DEFENSE COUNSEL]: Your Honor, I'll dispute that point.
>
> [APPELLANT]: You see, Your Honor, this is what I've been having to put up with and that's why I, I'm worried that I'm not going to get fair representation and because I just can't even get a sentence out without being interrupted. And I'm sorry to come to the Court with this.
>
> THE COURT: Well, look, Mr. Wiseman, you have a constitutional right to represent yourself. You have a constitutional right to counsel. And you can secure counsel in one of two ways. One is to apply to the Public Defender's Office and work with them and the other would be to hire a

> private attorney. So, which of those three options would you like to proceed with?"

The judge told appellant how appellant could contact the Public Defender's Office. The following occurred:

> "[DEFENSE COUNSEL]: Your Honor, I would just note for the record that as Your Honor already advised Mr. Wiseman, the general office of our policy, the general policy of our office is to not permit clients to pick and choose their attorneys. They're assigned an attorney and that's the attorney that will remain with them throughout the duration of their proceeding.
>
> THE COURT: No, I, I did. As I explained, I mean . . .
>
> [APPELLANT]: I don't, I don't . . .
>
> THE COURT: There are, there are occasions when someone else is assigned for a variety of different reasons and that's, but again, that's not anything I could or would order them to do, not based on what I've heard so far. I'm actually a little more concerned about whether there's some dashcam that shows or doesn't show something and if the State's not aware or thinks it exists, but they just haven't had a chance to get it."

Appellant, defense counsel, the prosecutor, and the judge discussed issues related to that potential video evidence. The judge said that he would postpone the case, and told appellant he could "take that time to, to plead [his] case to the Public Defender's Office." The judge said that he was "[r]elatively sure what their answer is going to be, so you come back here, that's what I'm advising you of these other options today because if you come back here and I'm not, I'm not going to discharge [defense counsel] or the Public

Defender's Office today." The judge re-scheduled the case, and the hearing was concluded.

On September 9, 2021, appellant next appeared in court. He told the court "I'm going to keep the Office of the Public Defender as my representation" and "[t]hey work hard. They're very good."

Immediately thereafter, appellant's trial started. Trooper Hansley, the State's first witness, testified about the night of appellant's arrest. Around 2:20 a.m. on October 25, 2019, Trooper Hansley was on patrol on Ridgley Road in Caroline County when a pickup truck passed him. He could not read the truck's license plate, and he then made a u-turn to follow it. When he did so, the truck "accelerate[d] at a high rate of speed." Trooper Hansley activated his radar, which indicated that the truck was traveling at seventy-one miles per hour in a thirty mile per hour zone. Trooper Hansley activated his lights and his siren.

After the truck made several turns, it turned right into a residence driveway at 10 8th Street. As Trooper Hansley pulled into the driveway, he saw the cargo light in the truck come on, a man exit the driver's side door, and that man take off running. Trooper Hansley testified as to what happened next:

> "So, I immediately gave chase. I observed the subject run. There's a six-foot privacy fence on the property and then there's a row of evergreens or pine trees that is close to that privacy fence. I observed a subject run through the opening there, at which time I gave chase as well. I ran directly to where I seen the suspect run and during that chase, there, I had hit, at which time I thought was a metal pipe. Later it

> was determined that it was a wooden support pole for the privacy fence.
>
> ***
>
> So after I hit the, the fence post, I flew back, I obviously got stopped, basically clotheslined. I crawled underneath the post. I picked up my flashlight and got back up and continued running to the edge of the privacy fence. As I was approaching, as I got to the edge of the privacy fence is when I observed the suspect actually had his hands up and was walking back towards my location."

Trooper Hansley told the man to get on the ground, and the man, who was later identified as appellant, complied. Trooper Hansley handcuffed appellant and walked him to the trooper's car. He noticed a strong odor of alcoholic beverage on appellant's breath and person, and appellant's speech was slow and slurred.

Once Trooper Hansley returned to his car, he experienced chest pain and had trouble breathing. Another trooper took over the investigation, and Trooper Hansley was taken to Shock Trauma. Trooper Hansley described his injuries. He explained that he sustained an AC separation in his left shoulder as well as down his lower back. Because of the injury, he was out of work for about month and a half, "where he was on light duty where he couldn't do any patrolling," and he required sixteen sessions of physical therapy. Trooper Hansley was still experiencing pain during the trial, and he anticipated that he would have to return to his doctor.

The State played, before the jury, Trooper Hansley's cruiser video camera recording, which had captured a portion of the trooper's interaction. According to the transcription of the video from the camera, an officer asked, "[s]o, why'd you take off?"

Appellant responded: "[c]ause I was afraid (inaudible)." Appellant told the officer he lived at the location of his arrest.

Trooper Prince, who took over the investigation after Trooper Hansley left, testified that he smelled a "strong odor of alcohol" on appellant's breath, that appellant's eyes were "bloodshot" and "glassy," and that appellant was "kind of staggering when he walked." As part of his field sobriety testing, Trooper Prince attempted to perform a horizontal nystagmus gaze test on appellant, but, when he asked appellant to follow his finger, appellant did not respond to the request. Appellant refused to perform the walk and turn test. Trooper Prince stopped the field sobriety tests and arrested appellant. Appellant refused a breath test.

At the conclusion of the State's case, appellant moved for a judgment of acquittal as to all counts. As to reckless endangerment and the assault in the second degree, defense counsel argued as follows:

> "The testimony of the officer was that, of Officer, Trooper Hansley, was that Mr. Wiseman didn't have any harmful or offensive contact and for that reason I would ask that that count be stricken, or be found not guilty as to that count. And the same is true for the same reasons as to the reckless endangerment charge."

The State countered as follows:

> "Your Honor, as far as the assault on Trooper Hansley, we heard that that was an area where someone would need to be familiar with. We heard the testimony that Trooper Hansley followed him directly behind and then ran into the pole. The State, in the light most favorable to the State, we could say that he led Trooper Hansley into this area that he didn't know

> to get hurt and to slow him down at least, so he could continue running."

The trial judge denied the motion for judgment of acquittal. In pertinent part, he ruled as follows:

> "I'm going to deny your Motion for Judgment of Acquittal. I believe that there's enough testimony that's been advanced to suggest that the Defendant knew the area, that he couldn't have gone where he went without knowing the area and it was property where it's alleged that he lived and knew the property, knew of the support beam that was propping up the fence and the jury could find that he led him into it. So, I'll deny your motions."

Appellant called one witness: his father. Then, appellant and his counsel informed the court that appellant would not testify. The judge questioned appellant, as follows:

> "[DEFENSE COUNSEL]: [Y]ou're not under the influence of any drugs or alcohol this afternoon or suffering any symptoms of withdrawal?
>
> [APPELLANT]: No.
>
> [DEFENSE COUNSEL]: And no one, I've advised you not to testify previously in this case, isn't that correct?
>
> [APPELLANT]: Yes, that's correct.
>
> [DEFENSE COUNSEL]: And having had an opportunity to discuss that with me and consult with me as to whether or not you wish to testify and in consideration of my advice as to whether or not to testify, what's your election here this afternoon? And if you need to take a moment, we can step back from the recording device.
>
> [APPELLANT]: If I can just have a sip of water. I, I'm sorry, I'm really (unintelligible). If your counsel to me is to not testify, that it wouldn't be helpful to do so, then I will do . . .

[DEFENSE COUNSEL]: Can, can we just step back briefly, Your Honor?

THE COURT: Sure.

***

[DEFENSE COUNSEL]: Thank you, Your Honor, for the moment of indulgence. If we could approach the bench one more time.

THE COURT: All right.

[DEFENSE COUNSEL]: And just so the record's clear, Mr. Wiseman, you and I have had a chance to consult with whether or not you wish to elect to testify, is that right?

[APPELLANT]: Yes.

[DEFENSE COUNSEL]: And having considered all that, it's your, it's my understanding and belief that it's your intention not to take the stand and testify in your own defense, is that right?

[APPELLANT]: That's correct.

[DEFENSE COUNSEL]: And is there anything about invoking your right to remain silent and electing to take, not to take the stand and testify or taking the stand to testify that you don't understand?

[APPELLANT]: No, there's not. Yeah, if I took the stand and testify it would be . . .

THE COURT: I can't hear you.

[APPELLANT]: Excuse me.

THE COURT: Take the mask off.

[APPELLANT]: The only thing I . . .

[DEFENSE COUNSEL]: Well, if there's questions, it, it's really a yes or no. If you have questions, we can take a step

> back, but the Judge just needs to know, we need to put on the record whether or not you wish to testify or not.
>
> [APPELLANT]: No.
>
> THE COURT: He does not wish to testify. All right, the Court finds that he's knowingly, intelligently and voluntarily waived his right to testify. We'll talk about the jury instructions, if you want that instruction in, when we retire to look at the jury instructions."

Appellant did not testify and again moved for judgment of acquittal, which the court denied. The jury convicted appellant. Following sentencing, appellant noted this timely appeal.

II.

Appellant argues that the evidence was insufficient to support the judgment of conviction for reckless endangerment because the State's evidence failed to show that appellant engaged in conduct that created a substantial risk of death or serious physical injury to another and failed to show that appellant acted recklessly. Appellant maintains that his flight from a police officer in the dark in between a fence and a row of trees does not create a substantial risk of serious physical injury as defined by the statute, even though it might cause some injury to an officer. Appellant further maintains that this flight cannot prove beyond a reasonable doubt that he was aware of and consciously disregarded a substantial risk to another of serious physical injury.

Appellant recognizes that the State raises a genuine preservation argument as to the sufficiency of the evidence of the reckless endangerment charge. Appellant points

out, however, that even though he presents arguments before this Court different from those he raised in his motion for judgment of acquittal, the trial judge in fact addressed his current arguments and ruled on them. As an alternative basis for this Court to consider the sufficiency of the evidence argument, appellant argues ineffective assistance of counsel in failing to make the appropriate arguments below.

Next appellant argues that the circuit court erred when the judge failed to comply with Rule 4-215 after appellant asked to discharge his attorney. He maintains that neither judge asked appellant why he wished to discharge his counsel. The court asked appellant only if there was "something you've asked him to do that he has not done," and the court never asked him the reason he wished to discharge his counsel. In his reply brief, appellant argues that even if he withdrew his motion to discharge counsel before the judge ruled on it, the judge nonetheless was required to comply with the requirements of Rule 4-215.

Appellant argues that the court erred in finding that appellant's waiver of his right to testify was knowing and voluntary. He argues that after he attempted to ask a question about his right not to testify, the court was obligated to take steps to ensure that appellant's question was answered and that appellant understood his rights.

Finally, appellant argues that the trial court should have merged the sentences for evading the posted maximum speed limit and the sentence for driving in excess of reasonable and prudent speed into the reckless driving sentence. As to this argument, little need be said because the State agrees that the sentences merge.

The State responds to appellant's sufficiency of the evidence argument on preservation grounds. The State maintains that because appellant did not argue below that there was insufficient evidence of reckless conduct and of a substantial risk of serious physical injury or death, he cannot raise those issues on appeal. Appellant and the State differ in their interpretations of the judge's ruling. In the State's view, the trial court did not decide whether appellant acted recklessly and whether his conduct created a substantial risk of serious physical injury or death to Trooper Hansley. The State points out that in his motion for judgment of acquittal, defense counsel merged his argument on assault on a police officer with his reckless endangerment argument, and as a result, the trial judge did not decide whether appellant's conduct satisfied the higher standard of substantial risk of serious physical injury for reckless conduct (as opposed to the lesser standard for simple assault) and whether appellant's conduct was reckless. The State explains the trial judge's ruling as follows:

> "The question raised by the motion of acquittal was how, absent 'any harmful or offensive contact' between Wiseman and Trooper Hansley, could there have been an assault? The judge addressed the causality issue raised by the motion, concluding that Wiseman assaulted Trooper Hansley by leading him into the area of the fence. But that ruling, while it may have addressed Wiseman's intent to injure Trooper Hansley physically, did not address whether Wiseman recognized and consciously disregarded a substantial risk of serious injury or death to Trooper Hansley."

In sum, the State argues the sufficiency of the evidence issue is not preserved for our review because it was neither raised below nor decided below. As to the ineffective

assistance of counsel claim, the State relies on the general rule that an ineffective assistance of counsel claim is best addressed in post-conviction proceedings.

On the merits, the State maintains that the evidence was sufficient to prove reckless endangerment. The State argues that appellant created an unnecessary risk that might cause serious physical injury or death to the trooper by fleeing at night, leading the trooper through a wooded area containing a six-foot privacy fence next to thick growing trees. According to the State, appellant knew that he was creating this risk for the trooper, and consciously disregarded it.

As to appellant's request to discharge his counsel, the State asserts that the court complied with the requirements of Rule 4-215, as evidenced by the colloquies between appellant and the court wherein the judge inquired about the reasons appellant wished to discharge his counsel and gave appellant the opportunity to explain them. The State interprets the language of the Rule referring to the "trial judge inquiring" about the reasons underlying the defendant's request to require the court to provide an opportunity to the defendant to explain an explanation. Alternatively, assuming *arguendo* that the trial court did not rule properly on appellant's request, appellant withdrew his request to discharge his counsel, thereby obviating the need for the judge to rule.[3]

[3] At a hearing on June 2, 2021, appellant asked the trial court to continue the case to enable him to change counsel. The court postponed the case until September 9, 2021. In granting the postponement, the court told appellant "if you want to take that time to, to plead your case to the Public Defender's Office, that's fine." On September 9, 2021, appellant told the court "I'm going to keep the Office of the Public Defender as my representation . . . they work hard. They're very good."

As to appellant's right to testify, the State argues that, along with the presumption that a represented defendant has been advised properly about the choice whether to testify, he knowingly and voluntarily waived his right to testify. He repeatedly and consistently affirmed that he understood his rights to testify or remain silent and that he did not wish to testify.

III.

The burden is on the State to prove all the elements of an offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970). To determine whether the evidence is sufficient to support a conviction, we consider whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *State v. Morrison*, 470 Md. 86, 105 (2020). A "modicum" of evidence does not meet this standard. *Jackson v. Virginia*, 443 Md. at 320. On an evidentiary sufficiency review, we review the trial judge's ruling on the defendant's motions for judgment of acquittal. *State v. Payton*, 461 Md. 540, 557 (2018). In reviewing the sufficiency of the evidence, we view the evidence in the light most favorable to the State. We give due regard to the trial court's finding of facts, resolution of conflicting evidence, and opportunity to observe and assess the credibility of witnesses. *State v. Albrecht*, 336 Md. 475, 478 (1994).

The crime of reckless endangerment, found at § 3-204(a)(1) of the Criminal Law Article, states that "[a] person may not recklessly . . . engage in conduct that creates a substantial risk of death or serious physical injury to another." Md. Code (2002, 2012 Repl. Vol.), § 3-204(a)(1) of the Criminal Law Article ("Crim. Law").[4] Crim. Law § 3-201(d) defines "serious physical injury" to mean "physical injury that: (1) creates a substantial risk of death; or (2) causes permanent or protracted serious: (i) disfigurement; (ii) loss of the function of any bodily member or organ; or (iii) impairment of the function of any bodily member or organ."

We reiterate the oft-stated purpose of Maryland's reckless endangerment statute: "deterring the commission of potentially harmful conduct before an injury or death occurs." *Albrecht*, 336 Md. at 500-01. The elements of a *prima facie* case of reckless endangerment are: (1) that the defendant engaged in conduct that created a substantial risk of death or serious physical injury to another; (2) that a reasonable person would not have engaged in that conduct; and (3) that the defendant acted recklessly. *Holbrook v. State*, 364 Md. 354, 366-67 (2001); *Jones v. State*, 357 Md. 408, 427 (2000). Whether the defendant engaged in conduct that created a substantial risk of death or serious physical injury to another is "an objective determination, to be made by the trier of fact from all the evidentiary circumstances in the case." *Minor v. State*, 326 Md. 436, 443 (1992).

[4] Unless otherwise noted, all subsequent statutory references herein shall be to Md. Code (2002, 2012 Repl. Vol.), § 3-204(a)(1) of the Criminal Law Article ("Crim. Law").

Guilt under the statute does not depend upon whether the accused intended that his reckless conduct create a substantial risk of death or serious injury to another but rather, whether objectively viewed, "the appellant's misconduct was so reckless as to constitute a gross departure from the standard of conduct that a law-abiding person would observe, and thereby create the substantial risk that the statute was designed to punish." *State v. Pagotto*, 361 Md. 528, 549 (2000) (quoting *Minor*, 326 Md. at 443).

We address first the State's preservation argument. Md. Rule 8-131(a) governs issue preservation, providing as follows:

> ". . . Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in *or decided by the trial court*, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal." (Emphasis added.)

An issue is therefore unpreserved if it is neither "raised in" nor "decided by" the trial court.

The parties agree that below defense counsel never "raised" the arguments he now presents before this Court. As to reckless endangerment, defense counsel argued "Mr. Wiseman didn't have any harmful or offensive contact" with Officer Hansley, an argument addressed obviously to the assault charge.[5] Appellant's current evidentiary sufficiency arguments have nothing to do with "harmful or offensive conduct."

[5] "[H]armful or offensive contact" is not an element of reckless endangerment. *See* Crim. Law § 3-204.

The trial judge, however, "*decided*" that the State presented evidence sufficient to support a finding of guilty beyond a reasonable doubt on the creation of the requisite risk element and the recklessness element, which appellant now challenges. The trial judge stated as follows:

> "I believe that there's enough testimony that's been advanced to suggest that the Defendant knew the area, that he couldn't have gone where he went without knowing the area and it was property where it's alleged that he lived and knew the property, knew of the support beam that was propping up the fence and *the jury could find that he led him into it*."

Inasmuch as the trial judge decided the issue raised by appellant herein, we exercise our discretion to consider the issue and argument. *Moosavi v. State*, 355 Md. 651, 661 (1999). To assess whether a defendant's conduct was reckless, we consider "whether the appellant's misconduct, viewed objectively, was so reckless as to constitute a gross departure from the standard of conduct that a law-abiding person would observe, and thereby create the substantial risk that the statute was designed to punish." *Pagotto*, 361 Md. at 549 (quoting *Minor*, 326 Md. at 443). Judge Charles E. Moylan, Jr., writing for the Court in *Williams v. State*, 100 Md. App. 468, 490 (1994), explained the *actus reus* and *mens rea* of the crime of reckless endangerment:

> "The *actus reus* of reckless endangerment is the creation of a substantial risk of death or serious bodily harm to another. The *mens rea* of recklessness involves the conscious disregard or wanton indifference to the creation of such a risk."

We turn to whether the evidence was sufficient to support the conviction for reckless endangerment. We hold that the evidence was not sufficient to support the

judgment of conviction beyond a reasonable doubt because the State's evidence did not establish that appellant created a substantial risk of death or serious physical injury to Trooper Hansley (an objective determination) or that appellant consciously disregarded or was wantonly indifferent to the creation of a risk of death or serious physical injury.

We consider first whether the "defendant engaged in conduct that created a substantial risk of death or serious physical injury to another." *Holbrook*, 364 Md. at 366.

As to the *actus reus,* the conduct of appellant, the trial judge stated there was a "support beam that was propping up the fence and the jury could find that [appellant] led [Trooper Hansley] into it." The rest of the trial judge's ruling on reckless endangerment concerned what appellant "knew," the *mens rea* component of recklessness. We hold the trial judge implicitly concluded that a rational jury could find that leading Trooper Hansley into the support beam "created a a substantial risk of death or serious physical injury to another."

The question is whether fleeing from the police into a wooded area, knowing there is a six-foot fence behind trees, in the nighttime, objectively poses a "substantial risk of death or serious physical injury" to another person. *Minor*, 326 Md. at 443. We answer that question in the negative. Merely running (or fleeing) from the police into a backyard in the nighttime does not, objectively speaking, create a substantial risk of death or serious bodily harm, even if appellant subjectively knew of the existence of the trees and fence. It would be a serious stretch of logic to conclude that an intoxicated person,

fleeing from the police, created this risk by fleeing into this area. And as to the *mens rea*, there is scant to no evidence to establish that appellant was conscious of any substantial risk to the pursuing trooper posed by the fence beam or fence.

The State did elicit testimony about Trooper Hansley's injuries. However, the resultant injuries do not bear on whether the defendant created the risk. The statute criminalizes the *creation* of the risk, not the injuries that result from the conduct. *See* Crim. Law. § 3-204(a)(1). "It is the reckless conduct and not the harm caused by the conduct, if any, which the statute was intended to criminalize." *Minor*, 326 Md. at 442.

IV.

We turn now to whether the trial court erred in failing to comply with Rule 4-215. We hold the court did not fail to comply with the Rule. Appellant argues that the circuit court failed to comply with Rule 4-215 when the court considered appellant's motion to discharge his defense counsel. The question becomes whether the trial judge properly complied with Rule 4-215.

We agree with the State that appellant withdrew his request to discharge counsel when he told the court he was satisfied with the public defender and wished to keep his attorney. After reviewing the record and colloquy between the court and appellant, we conclude that the court considered appellant's reasons for wishing to discharge his attorney and that the court did not "prejudge" appellant's discharge request before hearing his reasons. The court told appellant that he could secure counsel in two ways:

by applying to and working with the public defender's officer or by hiring a private attorney. The court did not violate Rule 4-215.

V.

We turn now to whether the trial court erred in finding that appellant's waiver of his right to testify was knowing and voluntary. We hold that the court did not err.

Appellant argues that he neither knowingly nor voluntarily waived his right to testify, noting the following exchange:

> "[DEFENSE COUNSEL]: And is there anything about invoking your right to remain silent and electing to take, not to take the stand and testify or taking the stand to testify that you don't understand?
>
> [APPELLANT]: No, there's not. Yeah, if I took the stand and testify it would be . . .
>
> THE COURT: I can't hear you.
>
> [APPELLANT]: Excuse me.
>
> THE COURT: Take the mask off.
>
> [APPELLANT]: The only thing I . . .
>
> [DEFENSE COUNSEL]: Well, if there's questions, it, it's really a yes or no. If you have questions, we can take a step back, but the Judge just needs to know, we need to put on the record whether or not you wish to testify or not.
>
> [APPELLANT]: No.
>
> THE COURT: He does not wish to testify. All right, the Court finds that he's knowingly, intelligently and voluntarily waived his right to testify. We'll talk about the jury

> instructions, if you want that instruction in, when we retire to look at the jury instructions."

In appellant's view, this exchange evinces a misunderstanding by appellant of both his right to testify and his purported waiver of the right. The State argues that appellant knowingly and voluntarily waived his right to testify.

A criminal defendant has a constitutional right to testify in his or her defense. *Rock v. Arkansas*, 483 U.S. 44, 49 (1987). The recognition of this right by the United States Supreme Court was a change from the common law view, which disqualified criminal defendants from testifying because of their interest in the outcome of the trial. *Id.*; *see also Jackson v. State*, 340 Md. 705, 711–12 (1995) (noting that at common law, a person convicted of an infamous crime or a crime involving dishonesty was incompetent to testify); *see generally* 2 J. Wigmore, *Evidence in Trials at Common Law* §§ 576, 579 (Chadbourn ed. 1979). The Supreme Court explained that a defendant's right to testify at trial, although not found in the text of the Constitution, "has sources in several provisions of the Constitution," including the Due Process Clause of the Fifth and Fourteenth Amendments, and the Compulsory Process Clause of the Sixth Amendment. *Rock*, 483 U.S. at 51–52. And "[t]he opportunity to testify is also a necessary corollary to the Fifth Amendment's guarantee against compelled testimony." *Id.* at 52. Because the right to testify is fundamental to a fair trial, the defendant must waive that right knowingly and voluntarily. *Gregory v. State*, 189 Md. App. 20, 32 (2009).

Courts around the country differ in how the defendant's right is protected. Some courts assign the protection of this right to the court, some to defense counsel, and others

leave it to the defendant. *See, e.g.*, *Brown v. Artuz*, 124 F.3d 73, 78–79 (2d Cir. 1997). In Maryland, when a defendant is represented by counsel, there is no obligation on the court to advise the defendant of the right to testify or to remain silent. *Stevens v. State*, 232 Md. 33, 39 (1963); *Tilghman v. State*, 117 Md. App. 542, 554 (1997). We recognize a presumption, premised on the permitted inference that an attorney, as an officer of the court, follows the law and performs his or her duties, that a represented defendant has been told by counsel of his or her constitutional rights. *Tilghman*, 117 Md. at 554–55. Even though the right to testify is personal to the defendant, and must be waived by the defendant personally, the trial court may assume that counsel has advised the defendant about that right, the correlative right to remain silent, and, if the defendant does not testify, that the defendant has effectively waived the right to do so. *Id.* at 555.

At trial, appellant was represented by counsel. The record reflects that appellant consulted with counsel as to whether he wished to testify. Appellant's response to his counsel's inquiry about his intention not to testify was unequivocal and clear—he did not wish to testify. The record shows neither confusion, misunderstanding, nor any misstatements by his counsel as to his rights. The trial judge had no duty to independently advise appellant of his rights, and the presumption remains that appellant was advised properly of his rights by his counsel and that he knowingly and voluntarily elected to waive his right to testify. The trial judge did not err.

VI.

We turn to whether the sentences for driving in excess of a posted speed limit and driving in excess of a reasonable and prudent speed merge into the sentence for reckless driving. The State and appellant are on the same page here—merger is appropriate.

VII.

The State asks us, based upon *Twigg v. State*, 447 Md. 1, 28 (2016), to vacate all the sentences and to remand to the circuit court for resentencing. In *Twigg*, the Court of Appeals, joining the view of the federal appellate courts, recognized that sentencing on multiple counts is a package, explaining as follows:

> "In imposing sentences for multiple convictions in a single case, a trial judge considers not only the sentence for each conviction, but also the total sentence for all of the convictions together. Indeed, the Maryland Sentencing Guidelines are structured to reflect such dual consideration. The sentencing guidelines provide a guideline range for each conviction, and then an overall guideline for all of the convictions, viewed as a whole."

*Id*. at 27 (citing the Maryland Sentencing Guidelines Manual, §§ 3, 9 (2014)). The Court quoted *United States v. Fowler,* 749 F.3d 1010, 1015 (11th Cir. 2014), noting that the federal court explained "sentencing on multiple counts is an inherently interrelated, interconnected, and holistic process which requires a court to craft an overall sentence—the 'sentence package'—that reflects the guidelines and the relevant [sentencing] factors." *Twigg*, 447 Md. at 39. Because the appellant here was convicted of multiple offenses, and the circuit court imposed multiple sentences, we view the sentences imposed as an inter-related scheme.

When an appellate court removes one or more sentences from a sentencing scheme, the court has the discretionary authority to remand the entire case for resentencing. *See Id; see also Johnson v. State*, 248 Md. App. 348, 357 (2020) (noting *Twigg* stands for the proposition that appellate courts have the *discretionary* authority to remand cases for resentencing in response to their decision that the trial court's sentencing package has been disrupted by mergers the trial court didn't anticipate or consider). This is because the removal of one or more sentences could disturb the trial court's intended sentencing scheme. Though *Twigg* held that an appellate court has the discretionary authority to remand a case when a merger of two sentences disturbs the sentencing scheme, "nothing in *Twigg* appears to preclude an appellate court from ordering a *Twigg* remand in a case where the sentencing package was disturbed by a decision to reverse a conviction." *Twigg*, 447 Md. At 39; *Johnson*, 248 Md. App. at 357. Here, the reversal of appellant's reckless endangerment conviction likely disturbed the trial court's intended sentencing scheme because it was the largest sentence imposed within the scheme. The trial court should be allowed to reconsider its sentencing scheme in light of the reversal of this conviction. Accordingly, we exercise our discretion and shall vacate all sentences and remand for the court to resentence on all convictions. *See Johnson v. State*, 248 Md. App. 348, 357 (2020).

**JUDGMENT OF THE CIRCUIT COURT FOR CAROLINE COUNTY FOR RECKLESS ENDANGERMENT REVERSED. ALL SENTENCES**

**VACATED AND CASE REMANDED TO THAT COURT FOR RESENTENCING. COURT TO MERGE FOR SENTENCING PURPOSES SENTENCE FOR DRIVING IN EXCESS OF A POSTED SPEED LIMIT AND SENTENCE FOR DRIVING IN EXCESS OF A REASONABLE AND PRUDENT SPEED. COSTS TO BE DIVIDED EVENLY BETWEEN APPELLANT AND CAROLINE COUNTY.**