UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0295 & 0500

September Term, 2015

JOSEPH RUSSELL GEAR

v.

STATE OF MARYLAND

Wright,
Graeff,
Davis, Arrie W.
(Retired, Specially Assigned),

JJ.

Opinion by Davis, J.

Filed: January 4, 2016

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

Appellant, Joseph Russell Gear, was tried and convicted by a jury in the Circuit Court for Anne Arundel County of credit card theft, credit card fraud, two counts of rogue and vagabond and three counts of theft of property worth less than $1,000. Appellant's convictions for credit card theft and credit card fraud were merged, with all but five years suspended for credit card fraud and he was sentenced to ten years. He was also sentenced to a concurrent three-year term for rogue and vagabond, a concurrent term of eighteen months for one theft conviction, a suspended three-year term for the second rogue and vagabond conviction, a consecutive, suspended eighteen-month term for the second theft conviction and a concurrent, suspended eighteen-month term for the final theft conviction. The court also ordered that appellant be placed on probation for five years and ordered that appellant pay $1,976.00 in restitution. Appellant filed the instant appeal, raising the following questions, which we quote:

> 1. Did the lower court err in denying the request for a postponement without following the procedure mandated by Maryland Rule 4-215(e)?
>
> 2. Did the lower court deprive Mr. Gear of a fair trial by permitting the State to introduce irrelevant and highly prejudicial "other crimes" evidence, and by refusing to declare a mistrial when the prosecutor improperly asserted that Mr. Gear had committed an uncharged crime?
>
> 3. Was the evidence insufficient to prove that Mr. Gear stole Clarence Ingle's property?
>
> 4. Did the lower court err in ordering Mr. Gear to pay $1,930 of the restitution amount?

FACTS AND LEGAL PROCEEDINGS

On the first day of trial, April 2, 2015, the parties appeared before an administrative judge, who denied a request for postponement by an assistant public defender representing appellant. The following colloquy transpired between appellant's counsel and the trial judge:

> [APPELLANT'S COUNSEL]: We are here for trial today. It has been Mr. Gear's intention from the first day that I met him to hire private counsel. He has told me that he has wanted to hire private counsel. I spoke -
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> THE COURT: But he hasn't yet apparently.
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> [APPELLANT'S COUNSEL]: He has not yet.
>
> THE COURT: Okay.
>
> [APPELLANT'S COUNSEL]: I spoke this morning with an attorney by the name of Burridge DuBois. His (sic) office, I believe, is in Bowie — who told me that Mr. Gear had, in fact, consulted with her and he has not hired her yet. It is Mr. Gear's intention. He had wanted to hire her and in talking to Mr. Gear, he tells me that he did not do so for a couple of reasons mainly because his girlfriend, who is in court today — now his legal wife, who is in court today, did have some medical problems. She had an extended procedure. I believe it was open heart surgery. And Mr. Gear tells me, and his wife confirms, that she was essentially in the hospital for about a month. And he was, for that month, by her bedside taking care of her as well as taking care of her when she was released from the hospital which obviously had a detrimental effect on his ability to obtain work. So he tells me it's just a situation where he could not come up with the funds in a timely manner.
>
> THE COURT: Okay.
>
> [APPELLANT'S COUNSEL]: He has pretty much been adamant that he wants private counsel, again, since the first day that I met him.
>
> THE COURT: Well, a lot of talk and no action from what I gather. So what's the State's position?

> [PROSECUTOR]: State vehemently opposes. We have ten witnesses here. Many of them have taken off work multiple days and this case has been going on long enough. The incidents date back to July.
>
> THE COURT: Yeah. These cases go back to June and July of last year and Mr. Gear is fortunate to have one of the finest lawyers in the State of Maryland representing him. So the case is set for trial and you're going to be scheduled . . . this morning. Okay? Thank you.
>
> [APPELLANT'S COUNSEL]: Thank you, Your Honor.
>
> THE COURT: Your request for a postponement is denied.

Appellant's trial involved four cases charging burglary and theft from Catherine McDermott, Cole Tasker, Clarence Ingle and Thomas Drewery. The State's first witness, Catherine McDermott, testified that she discovered her 2002 silver Honda "disheveled" in front of her home in Lothian, Maryland, on the morning of July 2, 2014. Several items "[were] strewn about inside of [the] car," and the following items were missing: a Coach purse containing several smaller Coach bags, an iPhone, a bracelet, a gold Benrus wristwatch, two pairs of glasses, a MasterCard credit card, over $300, a Redskins bag, a flashlight and beer from the garage attached to her home. The approximate value of the missing items, according to McDermott, was "around $1700" dollars. The police recovered McDermott's wristwatch, the Coach purse, one of the smaller Coach bags, her bracelet, her glasses and the Redskins bag and returned those items to her. The police, however, were not able to recover the approximately $300 dollars in cash.

Cole Tasker testified that, on the morning of July 1, 2014, when he exited his home in Dunkirk, he found that "some things weren't where they[] [were] supposed to be" in his

2010 Nissan Altima. His iPod Touch, an amplifier and subwoofer, Nike Air Jordan 13 sneakers and "Nike Foamposites" were missing. The police recovered Tasker's sneakers, amplifier and the subwoofer and returned them to him.

According to Lisa Ingle, on the morning of July 2, 2014, when she exited her home in Lothian, Maryland, the Dodge Caliber automobile, which she shared with her husband, Clarence, "had been gone through." A Ford Ranger, which Ingle's daughter shared with Clarence Ingle, had also been "gone through." Items missing from the Ford Ranger were two pairs of Oakley sunglasses and an Oakley "pillbox," a Garmin navigational system, a Bluetooth device, a key to the vehicle, a purse containing makeup and Ingle's driver's license and credit cards. Ingle testified that the missing property was worth "[a]round $1100, $1200." The police recovered Ingle's "daughter's sunglasses, [Ms. Ingle's] wallet, [her] purse, [and] one of the bluetooth[]" devices.

Thomas Drewery testified that, on the morning of July 1, 2014, when he exited his home in Friendship, Maryland, he discovered that papers in the center console of his Ford Explorer "had been strewn all over the seat" and an orange mini M&M's tube containing $30 to $40 in quarters was missing.

On July 2, 2014, Catherine McDermott reported that one of her credit cards had been used at a BP gas station in Lothian, Maryland. Detective Brian Kriewald responded to the station and obtained surveillance video footage of the transaction. Detective Kriewald testified that the video depicted appellant buying cigarettes and gas. Louis Johnson, an

employee at the BP gas station, testified that, on July 2, 2014, the station sold $46.55 worth of gas and cigarettes in a credit card transaction that was later invalidated.

Detective Kriewald testified that he "developed" appellant as a suspect and later learned that he had been arrested. The following colloquy transpired during Detective Kriewald's testimony:

> [DETECTIVE KRIEWALD]: I got the video, I came back to the station, reviewed it and then learned that Joseph Gear had been arrested on-
>
> [APPELLANT'S COUNSEL]: Objection.
>
> [THE COURT]: Overruled.
>
> [DETECTIVE KRIEWALD]: I'm sorry.
>
> [PROSECUTOR]: No it's okay. He had been arrested on an unrelated matter.
>
> [DETECTIVE KRIEWALD]: Right. He'd been arrested on an unrelated matter at McKenzie Road at Peggy Stack's . . . house.

Appellant's counsel requested permission to approach the bench. He renewed his objection and moved for a mistrial, arguing that evidence of appellant's arrest in an unrelated matter should not be admitted because it was more prejudicial than probative. The Court, in denying the motion for mistrial, instructed the jury to "ignore that last question and answer by the witness." The court further admonished the jury as follows:

> THE COURT: It relates to another matter. It's not to be considered in any way by you. The fact that any defendant in any case might have — might be facing difficulty in another scenario is not at all come [sic] into this case in any way or any fashion. We don't — a lot of people can be accused of things they don't commit.

Detective Kriewald testified that he drove to the home of Peggy Stack and advised her that items had been stolen from area vehicles and asked her to contact him if she saw the items.

Stack testified that, in June and July 2014, her daughter, Blair, was dating appellant. Blair lived in the basement of Stack's home in Dunkirk and appellant "sometimes" lived there from "[m]aybe April or May" until June or July. On July 3, 2014, when Stack looked in her daughter's room, she saw "expensive tennis shoes, expensive sunglasses, Oakleys," a laptop computer and "some cell phones," most of which were the items that had been listed by Detective Kriewald. Some of the items were stuffed in the mattress, some of the items, including the shoes, were in the corner. Ms. Stack called Detective Kriewald, who returned to the home.

Detective Kriewald testified that Blair Stack gave him permission to search her room, where he found three bags. The officer described the contents of one of the bags as follows:

> A shirt - t-shirt, white t-shirt, pair of blue jeans or blue jean shorts, another camouflage long-sleeve shirt, empty wallet, purse change thing, and then we got a little wireless Motorola thing. I really don't know what it is. 9/11 memorial coin, some electronic club, some type of military ribbons, light bulbs, sunglasses, empty glasses pouch case, some kind of tire pressure gauge in a case, an empty wallet, phone charger, Under Armor glove, some flashlights, another charger that plugs into a car, another Under Armor glove, another car charger, soft case or hard zipper case, just miscellaneous (indiscernible) toothbrush, Gerber multi-tool knife, another eye-glass case.
>
> * * *
>
> RSA secure I.D. token that was (indiscernible), [and] a black elastic arm band . . . .

Although there was no objection at the beginning of the testimony, when Detective Kriewald was asked to describe the contents of another bag, appellant's counsel objected:

> [APPELLANT'S COUNSEL]: I'm a little bit perplexed as to the relevance, with this bag and the previous bag. I mean, these items don't appear to be —
>
> [PROSECUTOR]: Your Honor, may we approach? May we approach?
>
> [APPELLANT'S COUNSEL]: — items that were stolen or items that are Mr. Gear's. I'm not sure the relevance [sic].

At a bench conference, the State's Attorney argued, "[t]his is all stuff that's — there is a link to this [appellant] inside this room." The court overruled the objection, whereupon Detective Kriewald testified that the second bag contained "multiple purses, wallets, Oakley sunglasses, a (indiscernible) gold watch, reading glasses and other miscellaneous items." Over the objection of appellant's counsel, Detective Kriewald testified that a third bag contained "an electronic adapter, [and] black and yellow (indiscernible) sunglasses."

Among the items found in Blair Stack's room were Cole Tasker's Air Jordan sneakers, amplifier and subwoofer, Catherine McDermott's purse, wallets, jewelry, glasses and a Redskins bag. Also recovered were Lisa and Clarence Ingle's property, which consisted of a purse, wallet, Bluetooth speakerphone, Oakley sunglasses and a case for sunglasses. Detective Kriewald testified that he was not able to find the owners of all the property in Blair Stack's room.

In addition to these items, Detective Kriewald found mail addressed to appellant and a cell phone, the property of James Wilchner. The cell phone contained "numerous photos

of appellant and Blair Stack," including a photograph of appellant with Tasker's sneakers, subwoofer and amplifier. Displayed on one of the photographs was a man's hands, which had tattoos "extremely similar" to those on appellant.

Blair Stack testified that appellant kept clothing, a book bag and a guitar in her room. She said that many of the items in her room did not belong to her, but she did not know who put them there:

> [T]here were a couple of my friends that would come in and out there and there, like neighbors and stuff, but I can't determine whether they brought anything in my room or not.
>
> * * *
>
> I never saw [Gear] bring anything in my room, either.

One of appellant's friends, Brendan Genovese, testified that, on July 1, 2014, he picked up appellant and they were listening to an iPod. Appellant and Genovese spent the night at a friend's house. The next morning, Genovese slept in the back seat of his burgundy 2002 Honda Civic while appellant drove to the BP station in Lothian to buy gas. Genovese did not see how appellant paid for the gas.

Detective Kriewald testified that he searched Genovese's car and found McDermott's business card, a receipt for jewelry she had had repaired, an iPod and an orange M&M's tube.

The prosecutor made the following comments in his closing argument:

> When Detective Kriewald took over all the items, he also found a cell phone. And a cell phone is not an issue as something that was taken, it was taken from another county. It was taken from somebody in Calvert County. But when Detective Kriewald got down to it, he had the phone analyzed and he had the phone downloaded.

Subsequent to the prosecutor's argument, appellant's counsel moved for a mistrial, positing that the prosecutor had improperly argued to the jury that the phone was stolen from someone. According to counsel, "[i]t's an inference that he's now committing crimes in other jurisdictions," and "that just wasn't put into evidence." The court denied the motion for mistrial.

The trial court gave the jurors instructions before their deliberations that "it was their duty 'to decide the facts,' and that 'during [their] deliberations, [they] must decide this case based only on the evidence that [they] heard together in the courtroom.'" Additionally, the trial court instructed:

> Opening statements and closing arguments of the lawyers are not evidence. They are intended only to help you to understand the evidence and to apply the law. Therefore, if your memory of the evidence differs from anything the lawyers or I may say, you must rely on your own memory of the evidence.

At sentencing, the State requested that the Court order restitution to the victims in the following amounts:

Catherine McDermott	- $1,580
Clarence and Ms. Ingle	- $727.95
Cole Tasker	- $350
BP Gas Station	- $55

Appellant's counsel objected to the restitution awarded to McDermott, arguing that appellant had been charged with theft of property worth more than $1,000, but the jury had found him guilty only of theft of property worth less than $1,000.

> [APPELLANT'S COUNSEL]: So I think that in and of itself tells you that the request for $1,580 is too high. And I think it was very confusing and convoluted and not clear at all in any of these cases in terms of what was recovered and what wasn't recovered. It seems like almost everything was recovered.

With respect to the Ingles, appellant's counsel argued that Lisa Ingle was not entitled to any restitution because she had not been charged "as the actual victim of the crime." With respect to Tasker, appellant's counsel argued that the State had provided no basis for $350 in restitution because "everything appellant was accused of taking had been returned to Tasker." Finally, with respect to the BP gas station, appellant's counsel argued that the evidence established that appellant had obtained items valued at $46, rather than $55, the amount that the State requested. The State conceded the restitution requested for Lisa Ingle and the court ordered appellant to pay restitution in the amount of $1,976.

DISCUSSION

I. Maryland Rule 4-215(e) and Discharge of Counsel

This Court reviews *de novo* whether an attorney's statements constituted a request to discharge counsel that triggered the requirements of Rule 4-215(e) and, if so, whether the trial court complied with those requirements. *E.g., Williams v. State,* 435 Md. 474, 483- 84 (2013). Review of a possible violation of the constitutional rights protected by a Maryland Rule is reviewed *de novo*, with acceptance of the lower court's findings of fact unless clearly erroneous. *State v. Davis*, 415 Md. 22, 29 (2010). "The failure to inquire into a defendant's reasons for seeking new counsel when the proper request has been made to the court is a reversible error." *Id.* at 31 (citing *Snead v. State*, 286 Md. 122, 131 (1979)).

Appellant argues that the trial court erred by not following the procedural mandates of Md. Rule 4-215(e) once it was made aware of appellant's intention to hire private counsel. Appellant asserts that the desire to hire private counsel is "an action that require[s] the discharge of the assistant public defender."

The State argues, however, that the trial court was within its discretion "in denying [appellant's] eleventh-hour request for a postponement to secure private counsel as nothing in counsel's exchange with the court indicated that [appellant] was inclined to discharge his current attorney," thereby not engaging the procedural mandates of Md. Rule 4-215(e).

"A criminal defendant's right to counsel is guaranteed by the Sixth Amendment, made applicable to the States through the Fourteenth Amendment, and by Article 21 of the Maryland Declaration of Rights." *Davis*, 415 Md. at 29. A defendant has the ability to discharge counsel, because "[a]n unwanted counsel 'represents' the defendant only through a tenuous and unacceptable legal fiction. Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not *his* defense." *Snead*, 286 Md. at 128 (emphasis in original).

"Md. Rule 4-215(e) governs court procedure when a defendant expresses a desire to discharge his or her current counsel." *Davis*, 415 Md. at 30. Md. Rule 4-215 (e) states in pertinent part:

> (e) **Discharge of Counsel – Waiver.** 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)(l)–(4) of this Rule if the docket or file does not reflect prior compliance.

As the rule makes plain that:

> [W]hen a defendant expresses a desire to discharge his or her counsel in order to substitute different counsel or to proceed self-represented, a court *must* ask about the reasons underlying a defendant's request to discharge the services of his trial counsel and provide the defendant an opportunity to explain those reasons.

State v. Taylor, 431 Md. 615, 631 (2013) (quotations omitted) (Emphasis added).

> As part of the implementation and protection of this fundamental right to counsel, the Court adopted Rule 4-215. 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 his Sixth Amendment constitutional right to the assistance of counsel, as well as his correlative constitutional right to self-representation.

Gutloff v. State, 207 Md. App. 176, 191 (2012) (citing *Broadwater v. State*, 401 Md. 175, 180 (2007) (quotation omitted)).

> Before a court may find that a defendant has waived the right to counsel, the court must be satisfied that the defendant is informed of the risks of self-representation, and of the punishments which may be imposed. The Rule 'exists as a checklist that a judge must complete before a defendant's waiver can be considered valid; as such, it mandates strict compliance.'

Id. (quoting *Johnson v. State*, 355 Md. 420, 426 (1999)).

Rule 4-215(e) iterates the procedure governing the discharge of a defense counsel who has already entered an appearance. First, a defendant must make a *request* to discharge counsel. After that initial request by the defendant, the court then permits the defendant to *explain* the reasons for the request. The court then makes a *determination* if that request is meritorious. If the court determines that the reasons for the request are meritorious, then the court "shall comply" with subsections (a)(1)-(4) of Rule 4-215. If the court does not find the reasons meritorious, then, before the court can permit the discharge of defense counsel, it must *first inform defendan*t that the trial will proceed as originally scheduled with defendant unrepresented by counsel if the defendant proceeds with discharging his or her counsel and does not have new counsel.

1. "Request" to Discharge Counsel

Although Rule 4-215(e) does not expressly dictate what constitutes an adequate request to discharge counsel, case law is instructive. "[A] request to discharge counsel is any statement from which a court could conclude reasonably that the defendant may be inclined to discharge counsel." *Gambrill v. State*, 437 Md. 292, 302 (2014) (citations and quotations omitted). "A request to discharge counsel need not be explicit . . . nor must a defendant state his position or express his desire to discharge his attorney in a specified manner to trigger the rigors of [Md. Rule 4-215(e)]." *Id.* at 302. A defendant need not express a "'clear intent' to discharge or replace his attorney." *Id.* at 296–97. The guiding inquiry is whether the "request to discharge counsel is '[a] statement from which a court could conclude reasonably that the

defendant may be inclined to discharge counsel.'" *Id*. at 302 (quoting *Williams v. State*, 435 Md. 474, 486–87 (2013)).

Where a trial court is confronted with an ambiguous request to discharge counsel, a Rule 4-215(e) colloquy is required. *Id.* at 305 (*Snead,* 286 Md. at 127). If a court is conflicted regarding a defendant's request to discharge counsel, *i.e.*, whether a defendant is "truly dissatisfied with present counsel or merely want[s] a continuance," it can simply question the defendant. *Davis*, 415 Md. at 35. "Any court that fails to follow-up with the defendant following a possible, albeit unclear, Rule 4-215(e) request risks appellate reversal of its judgment. Thus, erring on the side of caution is advised." *Id.*

In the case *sub judice*, appellant, through counsel, requested a postponement to hire private counsel. Although arguably incidental to his intent, appellant's statement could reasonably lead a trial judge to conclude that he wanted to discharge counsel, similar to the facts in *Gambrill.* Gambrill's attorney stated, "[y]our honor, on behalf of Mr. Gambrill, I'd request a postponement. He indicates he would like to hire private counsel in this matter." *Gambrill*, 437 Md. at 304–05. In the instant case, although appellant's counsel did not expressly state appellant's clear intent to discharge counsel, the statement concerning postponement of the proceedings and the desire to hire private counsel triggered the Rule 4-215(e) colloquy.

2. Permitting Defendant to Explain Request to Discharge Counsel

When a court makes the determination that a defendant's request adequately invokes the application of the Rule, the court "shall permit the defendant to explain the reasons for the request." Md. Rule 4-215(e).

> This requirement is an indispensable part of Maryland Rule 4-215 subsection (e) in that it essentially leads the trial judge into the various opinions set forth therein . . . allowing a defendant to specify the reasons for his request is an integral part of the Rule and cannot be dismissed as insignificant.

Williams v. State, 321 Md. 266, 272-73 (1990). Moreover, the Md. Rule 4-215(e) inquiry assists the trial court in determining if a defendant is actually requesting to discharge counsel and not merely petitioning for a continuance to engage a new attorney. *Id.*

In the case *sub judice*, appellant was permitted to explain the reasons prompting the request to discharge counsel, as required by Rule 4-215(e). Appellant's counsel explained that appellant always wanted to hire private counsel. Furthermore, appellant explained, through counsel, why he had not hired the preferred private counsel, specifically, because of the illness of appellant's girlfriend. Therefore, the court complied with Rule 4-215(e) when it permitted appellant to provide an explanation of the reasons for his request to discharge counsel.

3. Determining Whether the Reasons are Meritorious

After the court permits the appellant to explain the reasons for requesting a discharge of counsel, it must then make a determination.

> If the court determines that the request is supported by meritorious reasons, it must (1) permit the discharge; (2) order a continuance, if necessary; and, (3) 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.

Taylor, 431 Md. at 631 (citing MD Rule 4-215(e)) (quotations omitted).

> In contrast, if the court finds that the defendant's reason for discharging his defense counsel is not meritorious, it must inform 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.'

Taylor, 431 Md. at 632 (quoting Md. Rule 4-215(e)).

> Once the defendant is informed, the court may proceed by:
>
> (1) deny[ing] the request and, if the defendant rejects the right to represent himself and instead elects to keep the attorney he has, continue the proceedings; (2) permit[ting] the discharge in accordance with the Rule, but require counsel to remain available on a standby basis; [or] (3) grant[ing] the request in accordance with the Rule and relieve counsel of any further obligation.

Id. (quoting *Williams*, 321 Md. at 273).

In the case *sub judice*, after permitting appellant to explain the reasons for his request to discharge counsel, the court made a determination that both the reasons for the request and delay were not meritorious. Thereafter, further procedural mandates under Rule 4-215(e) are required only if the defendant proceeds with the discharge of counsel, which is not the circumstance in the instant case. Therefore, the court was compliant with the procedural requirements of Rule 4-215(e) in denying the request for postponement and did not commit error.

II. "Other Crimes" Argument

Appellant argues that the trial court deprived him of a fair trial by permitting the State to introduce irrelevant evidence that effectively functioned as "other crimes" evidence and was highly prejudicial to appellant. Specifically, appellant cites Detective Kriewald's testimony concerning items found in Blair Stack's room that were consistent with items stolen in the area, as well as the prosecutor's remarks made during closing arguments that referenced a stolen but unrelated cell phone. Furthermore, appellant contends that the trial court erred in denying appellant's motion for mistrial made after the State's closing arguments.

The State asserts that appellant waived his opportunity to appeal admission of Detective Kriewald's testimony because it was admitted into evidence without objection and, when the appellant did object, it was untimely. The State also contends that appellant did not preserve the "prejudicial effect" issue because the stated grounds for the objection were regarding relevancy only. Furthermore, the State argues that Detective Kriewald's testimony is relevant because it creates a link between appellant and Blair Stack's room. Regarding the prosecutor's remarks during closing arguments, the State avers that the remarks were proper comment on uncontested evidence and that, even if they were not, they were harmless because they were "isolated and mild," having no prejudicial effect on the verdict.

1. Testimony of Detective Kriewald

Prior to our analysis, we address the State's argument that appellant failed to preserve the argument for appeal. "An objection to the admission of evidence shall be made at the

time the evidence is offered *or as soon thereafter as the grounds for objection becomes apparent*." Md. Rule 4-323(a) (Emphasis added). In the instant case, appellant objected during the offering of the evidence, *i.e.*, during Detective Kriewald's testimony. The State argues that each bag of items constitutes separate evidence and appellant only objected during the testimony pertaining to the second bag. We are persuaded that appellant made a timely objection to Detective Kriewald's testimony as soon as the question of its relevancy became apparent to appellant. Therefore, we hold that the issue is preserved for our review.

As to preservation of the "prejudicial effect" of the evidence, we note that the record does not reflect the express objection of appellant regarding this issue. Md. Rule 8-131(a) states in pertinent part:

> (a) Generally. The issues of jurisdiction of the trial court over the subject matter and, unless waived under Rule 2-322, over a person may be raised in and decided by the appellate court whether or not raised in and decided by the trial court. *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). However, Md. Rule 4-323(a) instructs:

> **(a) Objections to Evidence.** An objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived. *The grounds for the objection need not be stated unless the court, at the request of a party or on its own initiative, so directs.* The court shall rule upon the objection promptly. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court may admit the evidence subject to the introduction of additional evidence sufficient to support a finding of the fulfillment of the condition. The objection is waived unless, at some time before final argument in a jury trial or before the entry of judgment in a court

> trial, the objecting party moves to strike the evidence on the ground that the condition was not fulfilled.

(Emphasis added). The State did not request and the court did not instruct appellant to state the grounds for the objection. Therefore, appellant was not obliged to state the grounds for the objection. Appellant, however, volunteered the grounds for the objection as "relevancy." In examining Md. Rule 4-323(a), this Court has held:

> If a general objection is made, and neither the court nor a rule requires otherwise, it is sufficient to preserve all grounds of objection which may exist. *But, when particular grounds for an objection are volunteered or requested by the court, that party will be limited on appeal to a review of those grounds and will be deemed to have waived any ground not stated.*

State v. Jones, 138 Md. App. 178, 218 (2001) (citations and quotation omitted) (Emphasis added). Since appellant volunteered the grounds for the objection only as to "relevancy," he is limited on appeal to a review of only those grounds and, therefore, the issue of "prejudicial effect," is waived. Accordingly, our review will be confined to the question of relevancy.

Undergirding all evidentiary matters is that the evidence sought to be admitted must be relevant. Md. Rule 5-401 defines 'relevant evidence' as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Md. Rule 5-402 states that, "[e]xcept as otherwise provided by constitutions, statutes, or these rules, or by decisional law not inconsistent with these rules, all relevant evidence is admissible. Evidence that is not relevant is not admissible."

"'The general rule in this State is that all evidence that is relevant to a material issue is admissible except as otherwise provided by statutes or by rules applicable to Maryland courts.'" *Zografos v. Mayor and City Council of Baltimore*, 165 Md. App. 80, 102 (2005) (quoting *Bern-Shaw Ltd. Partnership v. Mayor of Baltimore*, 377 Md. 277, 289–90 (2003).

Although we review legal conclusions whether evidence is relevant *de novo*, (*Wagner v. State*, 213 Md. App. 419, 453 (2013)), "[t]rial judges generally have 'wide discretion" when weighing the relevancy of evidence." *State v. Simms*, 420 Md. 705, 724 (2011) (citing *Young v. State*, 370 Md. 686, 720 (2002)).

> It is well established in Maryland that the admission of relevant evidence, the admissibility of which is not prohibited by a specific rule or principle of law, is committed to the considerable and sound discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion.

Fenner v. State, 381 Md. 1, 25 (2004).

> A ruling reviewed under an abuse of discretion standard will not be reversed simply because the appellate court would not have made the same ruling. The decision under consideration has to be well removed from any center mark imagined by the reviewing court and beyond the fringe of what the court deems minimally acceptable.

Gray v. State, 388 Md. 366, 383 (2005) (citations and quotation omitted).

In the case *sub judice*, the trial court overruled appellant's objection to Detective Kriewald's testimony, finding it relevant in establishing a "link" between appellant and the room where the alleged stolen items from the four victims were found. Connecting appellant to the room where the stolen items were found is a material issue. In rendering its determination, the trial court did not abuse its discretion or, as stated *supra*, wander far from

"any center mark" or beyond what we deem is "minimally acceptable." Accordingly, the trial court properly determined to admit into evidence Detective Kriewald's testimony as relevant.

Appellant's contention that Detective Kriewald's testimony constituted "other crimes" evidence is based solely on inference. During the testimony, it was never stated that appellant stole the items or was arrested in connection with the items. Furthermore, it was never stated that the items were actually stolen, rather, they were described in Detective Kriewald's testimony as "property consistent with what was reported stolen [from] numerous theft of motor vehicles in Lothian, Dunkirk, and Lothian Dunkirk area." Although the inference is arguably prejudicial to appellant, as stated *supra*, appellant waived review of prejudicial effect on appeal and did not preserve an "other crimes" argument.

2. Prosecutor's Closing Arguments

During closing argument, the prosecutor stated the following:

> When Detective Kriewald took over all the items, he also found a cell phone. *And a cell phone is not an issue as something that was taken, it was taken from another county. It was taken from somebody in Charles County*.

(Emphasis added).

Appellant made a motion for mistrial after the prosecutor's closing arguments, arguing that the prosecutor was asserting that appellant "had stolen the cell phone from a person who had nothing to do with the charged crimes . . . [and] improperly suggested that [appellant] deserved punishment for other bad acts." Appellant alleged the severity of the remarks was

potentiated by earlier testimony that he was arrested in an unrelated case. Therefore, appellant contends that the trial court erred in denying his motion for a mistrial.

"A mistrial is no ordinary remedy[.]" *Cooley v. State*, 385 Md. 165, 173 (2005). Granting a motion for a mistrial is "an extreme sanction that courts generally resort to only when no other remedy will suffice to cure the prejudice." *Rutherford v. State*, 160 Md. App. 311, 323 (2004) (citations and quotations omitted). The prejudice must be "clear and egregious," essentially depriving the defendant of his right to a fair trial. *Allen v. State*, 89 Md. App. 25, 42 (1991). This Court gives deference to the trial court, who is in the best position to assess whether the grant of mistrial is appropriate, and will review under the abuse of discretion standard. *Browne v. State*, 215 Md. App. 51, 57 (2013).

"Closing arguments serve an important purpose at trial. Counsel use that portion of the trial to sharpen and clarify the issues for resolution by the trier of fact in a criminal case and present their respective versions of the case as a whole." *Whack v. State*, 433 Md. 728, 742 (2013) (citations and quotations omitted). Attorneys are afforded "great leeway in presenting closing arguments to the jury[,]" *Degren v. State*, 352 Md. 400, 429 (1999), but the scope of comments made during closing arguments is not limitless. *Wilhelm v. State*, 272 Md. 404, 412 (1974). Although "[t]here are no hard-and-fast limitations within which the argument of earnest counsel must be confined . . . ." *Degren*, 352 Md. at 429–30, "not every ill-considered remark made by counsel . . . is cause for challenge or mistrial." *Wilhelm*, 272 Md. at 415. Accordingly, we will not disturb the trial court's decision unless there has been

an abuse of discretion and, "[i]n deciding whether there was an abuse of discretion, we examine whether the jury was actually or likely misled or otherwise influenced to the prejudice of the accused by the State's comments." *Whack*, 433 Md. at 742 (citations and quotations omitted).

In the case *sub judice*, the prosecutor made improper remarks concerning offenses not pertinent to the trial, *i.e.*, the cell phone stolen in another county. Although the State contends that "[t]he prosecutor simply mentioned that the phone was taken from someone in another county with no reference as to who took the phone or from whom it was taken," the remarks were made during closing arguments at appellant's trial. The implication is that there is a nexus between the stolen cell phone and appellant. The State contends that the remarks were a "fair comment on the evidence," because

> [a]ll of this uncontested evidence alluded to the fact that other stolen items were located in Blair Stack's bedroom that were not related to this case. [Therefore], the prosecutor's comment in closing argument was warranted by the evidence.

The State concedes that the remarks were about matters unrelated to the case, despite the fact that the prosecutor is required to confine remarks during closing argument only to issues at trial. *Degren*, 352 Md. at 429–30. Therefore, we hold that these remarks concerning the unrelated stolen cell phone were improper and the trial court erred by not issuing contemporaneous and specific jury instructions to ameliorate any prejudicial effect. We must also address whether this error was harmless or constituted reversible error.

In *Dorsey v. State*, 276 Md. 638, 657, 659 (1976), the Court of Appeals articulated the test that this State applies for assessing harmless error in criminal cases:

> [W]hen an appellant, in a criminal case, establishes error, unless a reviewing court, upon its own independent review of the record, is able to declare a belief, *beyond a reasonable doubt*, that the error in no way influenced the verdict, such error cannot be deemed 'harmless' and a reversal is mandated. Such reviewing court must be satisfied that there is *no reasonable possibility that the evidence complained of*—whether erroneously admitted or excluded—may have contributed to the rendition of the guilty verdict.

Id. at 659 (Emphasis added).

"The determination whether a prosecutor's comments were sufficiently prejudicial to warrant a mistrial lies within the sound discretion of the trial court." *Washington v. State*, 191 Md. App. 48, 108 (2010). "Comments made in closing argument must be weighed in their context." *Id.* at 109 (citing *Clermont v. State*, 348 Md. 419, 455 (1998)).

The Court of Appeals has outlined when improper statements at closing arguments constitute reversible error:

> To determine whether improper comments influenced the verdict, we look to the facts of the case at hand. In particular, we consider the severity of the remarks, the measures taken to cure any potential prejudice, and the weight of the evidence against the accused . . . . *we look at the cumulative effect of all errors on the ability of a jury to render a fair and impartial verdict on the context of the case*.

Donaldson v. State, 416 Md. 467, 497 (2010) (citations and quotations omitted) (Emphasis added). *See Miller v. State*, 380 Md. 1, 35–37 (2004) (holding that the trial court properly denied a motion for a mistrial based upon the prosecutor's comments because it properly sustained the defenses' objections, granted the defense motions to strike and immediately

instructed the jury to disregard the specific comments); *Dunn v. State*, 140 Md. 163 (1922) (holding that a trial court did not err in overruling objection and denying a motion for mistrial because the trial court promptly admonished the prosecutor and told him to refrain from making improper statements).

In the case *sub judice,* appellant argues that the trial court abused its discretion by denying the motion for mistrial despite the fact that appellant was prejudiced, thereby depriving him of the right to a fair trial. Although we agree that the remarks during closing arguments were improper and, in effect, created a nexus between appellant and an unrelated stolen cell phone, we do not agree that the prosecutor's remarks were so prejudicial that the jury was misled, thereby denying the appellant of his right to a fair trial. We find our analysis in *Shelton v. State*, 207 Md. App. 363 (2012) instructive:

> Here, it is particularly unlikely that the jury was misled by the prosecutor . . . . The prosecutor's remarks were not severe as it was an isolated remark and Shelton's counsel had an opportunity in her closing argument to bring any additional pertinent facts to the jury's attention and to explain their significance in his closing argument. Moreover, the court instructed the jury before closing arguments that the arguments presented by each side were not evidence in the case.

Id. at 387–88.

> [T]he trial court's instructions to the jury concerning statements and arguments of counsel not to be considered evidence, and . . . direction that they find their facts only from 'what you have heard from the witness stand and the exhibits which have been received,' sufficiently eliminated any possibility of prejudice."

Witcher v. State, 17 Md. App. 426, 439 (1973) (cited by *Wilhem v. State*, 272 Md. 404 (1974)). In the instant case, the remarks were isolated and appellant's counsel had an

opportunity to clarify appellant's connection, or lack thereof, to the referenced stolen cell phone. Although the trial judge did not address the remarks with contemporaneous and specific jury instructions, the court did address the role of closing arguments and how the jury should evaluate the evidence during their deliberations:

> Opening statements and closing arguments of the lawyers are not evidence. They are intended only to help you to understand the evidence and to apply the law. Therefore, if your memory of the evidence differs from anything the lawyers or I may say, you must rely on your own memory of the evidence.

Additionally, the court instructed the jurors that it was their duty to "decide the facts," and that, "during [their] deliberations, [they] must decide this case based only on the evidence that [they] heard together in the courtroom." As in *Witcher*, the jury instructions in the instant case sufficiently eliminated the possibility of any prejudice, thus rendering the error harmless.

Appellant also argues that the prejudicial effect of the prosecutor's improper remarks, made at closing argument, was potentiated by the testimony of a prior arrest. As stated *supra*, we take a cumulative look at any prejudices; we also look at efforts to cure that prejudice. Regarding the testimony of the prior arrest, the trial judge issued contemporaneous and specific jury instructions:

> It relates to another matter. It's not to be considered in any way by you. The fact that any defendant in any case might have — might be facing difficulty in another scenario is not at all come [sic] into this case in any way or any fashion. We don't — a lot of people can be accused of things they don't commit.

These instructions cured any prejudicial effect that the testimony of Detective Kriewald may have had and negated any potentiating effect. Therefore, we hold that any prejudicial effect that may have resulted from the prosecutor's improper remarks was ameliorated by the court's instructions to the jury and the trial court did not abuse its discretion in denying the appellant's motion for a mistrial or deny the appellant his right to a fair trial.

III. Sufficiency of the Evidence

The standard for appellate review of evidentiary sufficiency was recently reiterated by the Maryland Court of Appeals in *Derr v. State*. 434 Md. 88, 129 (2013):

> When determining whether the State has presented sufficient evidence to sustain a conviction, we have adopted the Supreme Court's standard articulated in *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (citation omitted), namely, "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." *See Yates v. State*, 429 Md. 112, 125 (2012), *Titus v. State*, 423 Md. 548, 557 (2011). In applying this standard we have stated:
>
> > The purpose is not to undertake a review of the record that would amount to, in essence, a retrial of the case. Rather, because the finder of fact has the unique opportunity to view the evidence and *to observe first-hand the demeanor and to assess the credibility of witnesses* during their live testimony, we do not re-weigh the credibility of witnesses or attempt to resolve any conflicts in the evidence. We recognize that the finder of fact has the ability to choose among differing inferences that might possibly be made from a factual situation, and we therefore defer to any possible reasonable inferences the trier of fact could have drawn from the admitted evidence and need not decide whether the trier of fact could have drawn other inferences from the evidence, refused to draw inferences, or whether we would have drawn different inferences from the evidence.
>
> *Titus*, 423 Md. at 557–58 (citations and quotations omitted) (emphasis added).

Appellant argues that the evidence presented was insufficient to prove that he stole Clarence Ingle's property. Appellant notes that, at the close of the State's case, the prosecutor moved to amend the charging document to designate the witness, Lisa Ingle, as the victim of theft rather than her husband Clarence. Appellant argues that substitution of the victim's name on the charging document constituted a change of an essential element of the offense of theft. This material variance, asserts appellant, requires reversal of the theft conviction against appellant regarding the property of Clarence Ingle.

The State responds that Lisa and Clarence were married and, therefore, property is jointly considered 'martial property.' Furthermore, argues the State, the amendment to the charging document was motivated by "an abundance of caution," and did not constitute a change to a critical element of the charge of theft.

Md. Rule 4-202 governs the required contents of a charging document and states in pertinent part:

> **(a) General Requirements**. A charging document shall contain the name of the defendant or any name or description by which the defendant can be identified with reasonable certainty . . . . It shall contain a concise and definite statement of the essential facts of the offense with which the defendant is charge and, with reasonable particularity, the time and place the offense occurred. An allegation made in one count may be incorporated by reference in another count.

The Court of Appeals has held that charging documents must comply with constitutional notice requirements, but do not need to expressly state each element.

> A primary purpose to be fulfilled by a charging document under Maryland law is to satisfy the constitutional requirement of Article 21 of the Declaration of Rights that each person charged with a crime to be informed of the accusation against him, first,

> by characterizing the crime, and second, by describing it as to inform the accused of the specific conduct with which he is charged. The common law rule in Maryland . . . is that a charging document must allege the essential elements of the offense charged. All essential elements of the crime need not, however, be *expressly* averred in the charging document; elements may be implied from language used in the indictment or information.

Jones v. State, 303 Md. 323, 336–37 (1985) (citations omitted) (Emphasis in original).

"'It is, of course, well settled that the evidence in a criminal case must not vary from those allegations in the indictment which are essential and material to the offense charged.' When there is a material variance between the *allegata* and the *probata,* the judgment must be reversed." *Green v. State*, 23 Md. App. 680, 685 (1974) (quoting *Melia and Shelhorse v. State*, 5 Md. App. 354, 363 (1968)). *See Savage v. State*, 212 Md. App. 1, 14 (2013) (quoting *United States v. Abbamonte*, 759 F. 2d 1065, 1068 (2d Cir. 1985) ("When a defendant 'urges that, though the indictment alleged one conspiracy, the evidence showed at least two,' he may 'challenge [the] conviction on the ground of variance[.]'").

Md. Code (2012), Crim. Law Art. § 7-104 governs general provisions of the offense of theft and provides, in pertinent part, that a person may not willfully or knowingly obtain or exert unauthorized control over property, with or without deception and may not possess stolen property if the person:

> (1) intends to deprive the owner of the property;
>
> (2) willfully or knowingly uses, conceals or abandons the property in a manner that deprives the owner of the property; or
>
> (3) uses, conceals, or abandons the property knowing the use, concealment, or abandonment probably will deprive the owner of the property.

An 'owner' of property is defined in, Md. Code (2012), Crim. Law Art. §7-101(h) as:

> [A] person, other than the offender: (1) who has an interest in or possession of property regardless of whether the person's interest or possession is unlawful; and (2) without whose consent the offender has no authority to exert control over the property.

In *Corbin v. State*, 237 Md. 486, 490 (1965), the Court of Appeals held that "changing the name of the owner of the property . . . was a change in form and not substance, since *none of the essential elements of the offense was changed*, and therefore the amendment was properly allowed and resulted in no prejudice to the rights of the accused." (Emphasis added). *See also Albrecht v. State*, 105 Md. App. 45, 68 (1995) (holding that amending a charging document to change the name of a property owner in a theft case constituted "merely changes of form" and not substance).

In the case *sub judice*, there was no variance between the charging document and the evidence presented to prove the allegation. The amendment concerned changing the name of the owner of marital property from the husband (Clarence Ingle) to the wife (Lisa Ingle). This change in the name of the property owner on the charging document constituted only a change in form, not substance, and is not considered an 'essential element' of the offense of theft. Therefore, the amendment is valid and appellant's argument that the State lacked sufficient evidence to prove he stole property from Clarence Ingle is legally unsubstantiated.

IV. Restitution Order

The grant, *vel non*, of a restitution order is within the trial court's discretion and we review the decision under the abuse of discretion standard. *Stachowski v. State*, 213 Md. App. 1, 13 (2013) (citing *Silver v. State,* 420 Md. 415, 427 (2011)).

Appellant argues that the trial court erred in ordering him to pay $1,930 in restitution. The State, appellant maintains, did not provide competent evidence for any of the claimed monetary loss except for $46 requested on behalf of BP. Furthermore, appellant argues that the court excessively ordered $1,580 restitution to Catherine McDermott, when the charged offense was theft under $1,000, and that there is no clear accounting of what items have been recovered by the victims. Specifically, appellant argued at sentencing:

> [APPELLANT'S COUNSEL]: So I think that in and of itself tells you that the request for $1,580 is too high. And I think it was very confusing and convoluted and not clear at all in any of these cases in terms of what was recovered and what wasn't recovered. It seems like almost everything was recovered.

The State responds that appellant's argument concerning the restitution order was not preserved and, therefore, should not be considered by this Court. The State further argues that, if appellant's argument is preserved, this Court should remand the case for re-sentencing and correction of the restitution order, because the State concedes that the restitution order is not supported by competent evidence and most of Ms. McDermott's and Mr. Tasker's items were recovered and returned.

> Maryland Criminal Procedure Article § 11-603 governs the grounds for restitution.
>
> [Section] 11-603(a) allows a court to enter a judgment of restitution if 'as a direct result of the crime,' the victim (2) suffered: '(i) actual medical, dental, hospital, counseling, funeral, or burial expenses or losses; (ii) direct out-of-pocket loss; (iii) loss of earnings; or (iv) expenses incurred with rehabilitation' or (3) incurred medical expenses that were paid by a governmental unit. Section 11-603(b) provides that a victim 'is presumed to have a right to restitution under subsection (a) of this section if: (1) the victim or the State requests restitution; and (2) the court is presented with competent evidence of any item listed in subsection (a) of this section."

Chaney v. State, 397 Md. 460, 469 (2007) (quoting MD. CODE, CRIM. PROC. § 11-603(a–b)).

> Because restitution is part of a criminal sentence, as a matter of both Constitutional due process and criminal procedure, such an order may not be entered unless (1) the defendant is given reasonable notice that restitution is being sought and the amount that is being requested, (2) the defendant is given a fair opportunity to defend against the request, and (3) there is sufficient admissible evidence to support the request—evidence of the amount of a loss or expense incurred for which restitution is allowed and evidence that such loss or expense was a direct result of the defendant's criminal behavior.

Id. at 470.

Although Md. Code § 11-603(b) creates a presumption that a victim is entitled to restitution if requested, this will only be engaged if the court is presented with competent evidence. *Id*. at 471. "[Section] 11-615 relaxes both the evidentiary burden and the hearsay rule with respect to restitution requests by making written statements for bills . . . admissible and legally sufficient evidence of the amount . . . ." *Id.* (citing MD. CODE, CRIM. PROC. § 11-615(a)). Accordingly, the Court of Appeals has determined that requesting restitution and providing competent evidence "is not an onerous burden; indeed, it should be a relatively simple one." *Id.*

Restitution ordered without evidentiary foundation laid to support it is not "intrinsically illegal," rather it would be required of the reviewing court to vacate the order. *Chaney*, 397 Md. at 467.

In the case, *sub judice*, we are unpersuaded by the State's argument that appellant did not preserve the issue of competent evidence on appeal. Appellant did not solely argue that the restitution ordered was incorrect because some of the items had been recovered and returned. Appellant also argued that because of the jury conviction of theft under $1,000, a restitution order exceeding $1,000 for Ms. McDermott was unreasonable. Ultimately, appellant was contesting the amounts of the restitution ordered. The State had the burden to provide competent evidence to support the requested amounts, but the State conceded that the order was not based on competent evidence. Therefore, we are persuaded by appellant's argument and hold that the restitution order for the aforementioned amounts be reversed and remanded for reconsideration.

CONCLUSION

In conclusion, we hold that the lower court did not err in denying appellant's postponement, having complied with the procedural mandates of Md. Rule 4-215(e). The State's amendment of the charging document pertaining to Lisa and Clarence Ingle did not render the evidence presented insufficient. The restitution order for $1,580 to be paid to Catherine McDermott and $350 to be paid to Cole Tasker was not supported by competent evidence, as the State concedes, and must be reversed and remanded for consideration.

We further hold that the trial court did not abuse its discretion in admitting relevant evidence in Detective Kriewald's testimony or in denying appellant's motion for mistrial after the prosecution's improper remarks during closing arguments. Therefore, appellant's conviction is affirmed, and the restitution order is vacated and remanded to the Circuit Court for reconsideration.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY REVERSED IN PART, AND AFFIRMED IN PART. THE CASE IS REMANDED FOR RESENTENCING.

COSTS TO BE PAID THREE FOURTHS BY APPELLANT AND ONE FOURTH BY APPELLEE.