UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0547

September Term, 2014

MONTE PIERRE FORTUNE

v.

STATE OF MARYLAND

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*Zarnoch,
Leahy,
Sharer, J. Frederick,
(Retired, Specially Assigned),

JJ.

Opinion by Leahy, J.

Filed: May 3, 2016

*Zarnoch, Robert A., J., participated in the hearing and conference of this case while an active member of this Court; he participated in the adoption of this opinion as a retired, specially assigned member of this Court.

Appellant Monte Pierre Fortune was convicted of one count of robbery and two counts of attempted robbery by a jury in the Circuit Court for Baltimore County on December 18, 2013. Prior to beginning the trial, Appellant sought to discharge the counsel provided to him by the Maryland Office of the Public Defender. The circuit court allowed Appellant to discharge counsel and Appellant proceeded to trial *pro se* on December 16, 2013. Appellant now challenges, *inter alia*, the circuit court's compliance with Maryland Rule 4-215.

Appellant presents the following questions:

I. Is reversal required inasmuch as the trial court did not comply with Md. Rule 4-215?

II. Was the evidence insufficient to sustain [Appellant's] convictions for robbery and attempted robbery because the State did not establish that [Appellant] used force or the threat of force?

III. Did the trial court err in refusing to instruct the jury regarding what constitutes reasonable fear?

IV. Did the trial court err by permitting the jury to deliberate on robbery and attempted robbery when the lesser included offenses of theft and assault had previously been entered nolle prosequi by the State?

For the reasons that follow we affirm the judgments of the circuit court.

BACKGROUND

Adam Zenich testified at trial on December 16, 2013, that he and several other young people—including Frank Velasco, Daquan Shell, Liam O'Toole, Natalia Coleman, Brittany Crossman, Elizabeth Paige Novak, Travis Torres and Brandon Saintsing—were "hanging out" in a playground area behind Seneca Elementary School in Baltimore County on the evening of July 8, 2010. At approximately 11 p.m. they were approached by a man

in a black sleeveless t-shirt with another shirt tied over his face. The man, later identified as Appellant, pointed a gun at the small group and instructed them to "give me what you have in your pockets."

Zenich, who was nineteen years old at the time of the incident, testified that Appellant pointed the gun at each person present as he spoke to them. Zenich elaborated:

> Well he pointed the gun at the first person he saw. Honestly, I can't remember who the first person was. Pointed at them and he continued to walk between us. It was myself, Frankie and his brother all standing by this monkey bar construction and then everybody else was sitting on the balance beam that was directly across from myself. Oh and there was probably about a six foot space between myself and everybody else and he continued to walk between us, pointing the gun, demanding our personals.

Mr. Zenich also testified that he believed Appellant took a cell phone from one of the other people present.

Five of the other victims also testified regarding the attack. Travis Torres testified that the attacker first "walked causally pas[t] the park and . . . out of sight." However, moments later the man "came around the building with a gun and . . . the man had a . . . the same shirt [he had been wearing] around his face." Torres testified that the attacker pointed the gun directly at him, but moved on when Torres had nothing to surrender.

Brittney Crossman testified that the attacker "had a gun in his hand[, a]nd he said he d[id]n't want . . . our keys o[r] anything, he would just want our money and our phones. So he came down the line, holding the gun up asking everybody for their phones." She also recalled that Natalia Coleman gave her phone to the attacker and that both Coleman and Saintsing asked for their SIM cards back.

Natalia Coleman also testified that the attacker approached the group with a gun and demanded their phones. She verified that she gave him her phone because she was scared by the gun he was pointing at them. Frank Velsco testified that the attacker "had a gun in his hand," and ". . . started waving it around and telling us to empty our pockets." Elizabeth Novak testified that the attacker "held [them] at gun point[, a]nd he was asking for money and phone[s], anything we had." She stated, "And he pointed [the gun] at all of us. And then each time he went up to each person to ask them to give him money or whatever [they] had, he pointed it at them."

At some point during the robbery, the attacker turned his back to the young men on or near the monkey bars, including Zenich. According to his testimony, and corroborated by others, Zenich "jumped on [Appellant's] back and wrestled him to the ground." Once on the ground, Zenich and his friends managed to take the weapon from Appellant, and upon doing so, discovered that it was an empty, plastic BB gun. While still on the ground, Zenich tossed the weapon away to his right.

According to Zenich's testimony, at this point, several of the other victims sensibly fled the scene. Thereafter, Ms. Novak called police from a nearby residence to report the armed robbery. However, several of the young men remained and spoke with Appellant, who was then unmasked and within two to three feet of them. Zenich testified to the following:

> Well once I got the gun away from him, we let him up and we actually continued to talk for a minute. Asking him, you know, why would you do this. You know, there's eight people around, why would you try and rob eight people with what we now know is an empty BB gun. He continued to say that, you know, I need the money, I'm hungry. You know, this, that and

> the other. Which is no reason to do this. And we said you know, if you honestly needed money for food you should have just asked. And after that we let him go.

Appellant and the young men then went their separate ways.

Shortly thereafter, Detective George Koller of the Baltimore County Police Department responded to the robbery call to set up a perimeter. According to his testimony at trial on December 17, 2013, Detective Koller noticed a nearby vehicle—driven by a black male wearing a black sleeveless t-shirt—begin to pull away from the area. Detective Koller decided to make an investigatory stop. Upon approaching the vehicle, he observed that there was a second individual in the vehicle in a seat "reclined almost completely horizontally[.]" Detective Koller then attempted to obtain identification from both of the individuals in the stopped vehicle.

At that same time, Zenich, O'Toole, and Shell were in a car leaving the neighborhood when they noticed Appellant in the car that had been stopped by Detective Koller. Officer Koller's spotlight was shining into the vehicle. Zenich testified:

> [A]n officer had a white car pulled over. And we just happened to glance in the car and see[] the same guy who tried to rob us. So, we pulled up to the officer, hey we almost got robbed back there. And the guy who did it is sitting in that car. And so the officer told us to pull over and we . . . gave him our statements.

Zenich then accompanied Detective Koller to the stopped vehicle and identified Appellant as the attacker. According to Detective Koller's testimony, O'Toole and Shell also individually identified Appellant as the man who robbed them.

Appellant was taken into custody. A search of the vehicle, incident to arrest, revealed another t-shirt draped over the center console. Within minutes, several of the

other victims—Saintsing, Velasco, Torres—had also positively identified Appellant as the attacker.

On August 2, 2010, Appellant was indicted by a grand jury on 36 counts, including robbery and attempted robbery with a dangerous weapon and lesser related charges regarding the nine victims. Appellant's first trial was in January 2011, however, the resulting conviction was reversed on appeal by this Court for failure to comply with Rule 4-215(e). *Monte Pierre Fortune v. State*, No. 102, Sept. Term 2011 (filed Apr. 23, 2013). Appellant's case was remanded for a new trial.

On November 12, 2013, Appellant appeared before the circuit court to address the State's request for a postponement. He was represented by two attorneys from the Office of the Public Defender. Because the case was on remand following Appellant's request to discharge counsel in his first case and his public defender was the same individual on remand, Appellant's counsel alerted the court that an inquiry into whether Appellant still wanted to discharge counsel was likely appropriate. Thereafter, the following colloquy occurred:

> [COURT]: . . . you're scheduled for trial today.
>
> [APPELLANT]: Yes.
>
> [COURT]: And you're represented by the Office of the Public Defender.
>
> [APPELLANT]: Yes.
>
> [COURT]: Okay. Now, I understand that before the other trial, you had perhaps said words to the effect of I want to fire my lawyer?
>
> [APPELLANT]: Yes.

[COURT]: All right and the reason that the Court of Special Appeals sent the case back to be retried is because that Court felt that there should have been more questions asked about why.

[APPELLANT]: Yes.

[COURT]: Okay. So, and now I guess, you're just in front of me for the State's request for a postponement but the Office of the Public Defender might not be clear on how you want to proceed.

[APPELLANT]: Yes.

[COURT]: So did you, do you currently wish to discharge your lawyer?

[APPELLANT]: Well, currently, --

[COURT]: That means now.

[APPELLANT]: Currently I wish to ask for a change of venue.

[COURT]: Okay. Well, that's not in front of me, but I'm asking –

[APPELLANT]: I know –

[COURT]: -- I'm asking you do you want to discharge Mr. Sorenson and Ms. Otvos?

[APPELLANT]: Well, if I can't get a change of venue, I would ask that I get a change of public defenders.

* * *

[COURT]: All right. Tell me why.

* * *

[APPELLANT]: I had personal, Mr. Sorenson, he said things to me in my initial appearance when I, when he came to see me and . . . he said things to me in my initial appearance that, you know, I didn't agree with and I felt as though he wasn't, he didn't have my best interest so when I went in front, when I went in front of the Administrative Judge, [] he was asking me more things that was not in my interest and I asked to fire him. So, you know, and some, some of the things he did was like, you know, he told me that he

> believed, he told me that he believed, the State believed and the Judge believed that I am guilty. So, with that, you know, I already knew I didn't want him representing me. And I was, I was trying to ask, I know you can't hear my, my argument about the change of venue today but today I would like to go in front of the Administrative Judge and try to get a change of venue because I believe I have good grounds on that.

The circuit court then walked Appellant through the requirements of Rule 4-215(e), and made clear that the court had to afford Appellant the opportunity to explain his reasons for wanting to discharge counsel but that "[i]f [the court] do[es]n't find the reasons are meritorious, [Appellant] c[ould] still discharge but [would] be going it alone." The court then asked Appellant three separate times whether he had any additional reasons for the requested discharge of counsel. After the court's third inquiry, the following exchange took place:

> [APPELLANT]: Other than what [Mr. Sorenson] said [in] the first trial and, nothing else pertaining to him, Your Honor.
>
> [COURT]: Okay. What about Ms. Otvos?
>
> [APPELLANT]: I don't know her.
>
> [MR. SORENSON]: They just met this morning.
>
> [COURT]: Okay.
>
> [APPELLANT]: Oh, excuse me. Your Honor, [Mr. Sorenson] did tell me at my visit recently that he has been promoted and that if he doesn't represent me, he gets to choose who will.
>
> [COURT]: Okay. Anything else from you, [Appellant], sir?
>
> [APPELLANT]: No, ma'am.

The circuit court then found on the record that Appellant failed to provide any meritorious reason for the requested discharge, but informed Appellant that he was free to

discharge counsel anyway if he chose to represent himself. Appellant responded by asking, "I don't have to make that decision today, do I?" The circuit court then granted the State's requested postponement over the objection of defense counsel.

At the outset of the next hearing, on December 16, 2013, Appellant indicated his continued desire to discharge counsel. The following ensued:

> [APPELLANT]: Well, my last court appearance I tried to get new counsel because I believe Mr. Sorenson is ineffective. He's been misleading me this whole trial. He, he lies to me and he also told me that I was guilty. The last, the postponement judge said I didn't have any merit to get new counsel so therefore I'd like to represent myself.
>
> [COURT]: Are you ready to proceed today?
>
> [APPELLANT]: Yes.
>
> [COURT]: And you understand that counsel could help you present any defense that you might have to these charges? And you understand that if you couldn't afford counsel the Public Defender's Office would provide you with counsel? And it's your decision to proceed without counsel?
>
> [APPELLANT]: I understand.
>
> [COURT]: And do you have any training that could help you to cross examine witnesses?
>
> [APPELLANT]: A little bit.
>
> [COURT]: Well, I think that it's a mistake on your part, but if this is what you want to do and it's free and voluntary decision on your part then I won't insist that you have counsel.
>
> [APPELLANT]: Thank you, Your Honor.

After further discussion on the matter, the circuit court and Appellant again addressed Appellant's decision, stating:

> [COURT]: And you understand that you'll go from here up to another judge and this case will be tried today and you'll be representing yourself?
>
> [APPELLANT]: Yes.
>
> [COURT]: And that is what you want to do? And that's your free and voluntary decision and what you believe to be in your best interest?
>
> [APPELLANT]: Yes.
>
> [COURT]: All right. And you understand that in all likelihood at a subsequent date you will not be able to complain that you were not represented by counsel?
>
> [APPELLANT]: I know.
>
> [COURT]: You understand that?
>
> [APPELLANT]: I understand I can't complain.

Defense counsel was then discharged and left the courtroom.

Appellant's trial proceeded over the next three days, December 16 through 18, 2013, during which the previously summarized testimony was presented. In his own defense, Appellant testified that, contrary to the testimony of the victims, he went to the playground to sell marijuana to Zenich but was assaulted by the group after Appellant was given what he believed to be counterfeit money.

On December 18, during discussions regarding jury instructions, Appellant made a number of requests, including the following:

> [APPELLANT]: . . . [C]an you instruct [the jury] on what constitutes reasonable fear?
>
> [COURT]: Well you're not being charged with assault or the State is not pursuing you for assault.
>
> [COURT]: Yes, but I'm pretty sure that they also not --

[COURT]: I'll hear from [the State].

> THE STATE: Your Honor, I think that the, the, the Jury can determine what -- how much fear the witnesses described. But it's not a part of any element of robbery or attempted robbery. And so I think the instructions that are present are appropriate.

[COURT]: I agree. And so I'm gonna deny that Motion as well. . . .

After a short deliberation, the jury returned a verdict of guilty as to the robbery of Natalia Coleman, and guilty as to the attempted robberies of Adam Zenich, Travis Torres.[1] On May 6, 2014, Appellant was sentenced to (1) eight years with all but five years suspended for the robbery of Natalia Coleman; (2) eight years with all but five years suspended for the attempted robbery of Adam Zenich; and (3) eight years with all but five years suspended for the attempted robbery of Travis Torres. These sentences were imposed to run consecutively and result in an aggregate of 15 years of imprisonment.

On May 8, 2014, the Office of the Public Defender filed a notice of appeal on Appellant's behalf. On May 14, 2014, Appellant filed a timely notice of appeal.

Additional facts will be introduced as the discussion requires.

[1] Before the case reached the jury in Appellant's first trial, the State nol prossed all the theft and assault charges, and some of the robbery/attempted robbery charges in Appellant's indictment. Only four counts remained when the case was submitted to the jury on retrial.

DISCUSSION

I.

Compliance with Maryland Rule 4-215

Appellant argues that the circuit court erred by failing to strictly comply with the requirements of Rule 4-215. Appellant argues that although the circuit court on November 12, "permitted [Appellant] to explain his reasons for wanting to discharge counsel and expressly found those reasons to be unmeritorious, she . . . did not, in fact, discharge his attorneys." Thus, Appellant maintains that in the December 16 proceeding he set forth new reasons for discharge and the court should have made a finding as to whether those reasons were meritorious. Appellant also maintains that the court erred by failing to make a finding that Appellant's waiver of counsel was knowing and voluntary.

The State argues that "[b]ecause [the circuit court on November 12] had previously determined that the reasons advanced by [Appellant] for wanting to discharge his attorney were not meritorious, there was no reason for the court [on December 16] to revisit this issue." The State points out that Appellant did not ask for reconsideration of the issue or indicate that he was advancing additional reasons for discharge. Additionally, the State asserts that Rule 4-215(e) does not require a "specific announcement on the record in a particular form" that Appellant's waiver of counsel was knowing and voluntary. The State maintains that, after an appropriate inquiry, the determination may be implied.

"We review *de novo* whether the circuit court complied with Rule 4-215." *Gutloff v. State*, 207 Md. App. 176, 180 (2012). However, so long as the court has strictly complied with Rule 4-215(e), we review the court's decision regarding whether to grant or deny a

defendant's request to discharge counsel for abuse of discretion. *See State v. Taylor*, 431 Md. 615, 630 (2013); *State v. Brown*, 342 Md. 404, 413 n.3 (1996) (citing *United States v. Allen*, 789 F.2d 90, 93, *cert. denied*, 479 U.S. 846 (1986)); *McKee v. Harris*, 649 F.2d 927, 932 (2d Cir. 1981), *cert. denied*, 456 U.S. 917 (1982).

Regarding a defendant's right to discharge his or her counsel, Maryland Rule 4-215(e) provides:

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

The Rule essentially gives "practical effect" to a defendant's constitutional choices, as "[i]t requires the defendant to decide if he will continue with present counsel or proceed *pro se*[.]" *Williams v. State*, 321 Md. 266, 273 (1990).

A. Meritorious Reason

In order to comply with Rule 4-215(e), the Court of Appeals identified a strict procedure for considering a defendant's request to discharge counsel:

> [U]pon a defendant's request to discharge counsel, the court must provide the defendant an opportunity to explain his or her reasons for seeking the change. *See Gonzales v. State*, 408 Md. 515, 531 (2009). "Next, the trial court must make a determination about whether the defendant's desire to discharge

> counsel is meritorious." *Gonzales*, 408 Md. at 531; *see also Moore v. State*, 331 Md. 179, 186-87 (1993) (articulating the rule that the record must reflect that the trial court actually considered the merit of the defendant's explanation for wanting to proceed without counsel).

State v. Davis, 415 Md. 22, 31 (2010). Regarding the requirement that the court permit the defendant to explain the reasons for his request the Court of Appeal in *Williams* stated:

> Where the trial judge finds a defendant's reasons to be meritorious, he must grant the request and, if necessary, give the defendant an opportunity to retain new counsel. When a defendant makes an unmeritorious request to discharge counsel, the trial judge may proceed in one of three ways: (1) deny 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 the discharge in accordance with the Rule, but require counsel to remain available on a standby basis; (3) grant the request in accordance with the Rule and relieve counsel of any further obligation.

Williams, 321 Md. at 273 (citing *Fowlkes v. State*, 311 Md. 586, 604-05 (1988)). Importantly, Rule 4-215's requirements can be satisfied in a "piecemeal, cumulative" fashion by multiple circuit court judges over multiple hearings. *See Broadwater v. State*, 401 Md. 175, 200-02 (2007).

This Court has stated that "the onus is on the trial judge to ensure the reason for requesting dismissal of counsel is explained." *Joseph v. State*, 190 Md. App. 275, 285-88 (2010) (citing *Hawkins v. State*, 130 Md. App. 679,687 (2000)). In the present case, there is no dispute that on November 12, 2013, the circuit court gave Appellant ample opportunity to explain his reasons for wanting to discharge counsel and the court found that those reasons lacked merit. On December 16, the circuit court again asked Appellant why he wanted to discharge counsel. In response, Appellant briefly reiterated the reasons he had given at his last court appearance and acknowledged that the court found that those

reasons "didn't have any merit." Appellant then stated, ". . . therefore I'd like to represent myself." Appellant did not provide any indication to the court that he was putting forth new reasons for wanting to discharge counsel nor did he challenge the earlier determination that his request was without merit.

B. Knowing and Voluntary

Recently, in *State v. Westray*, the Court of Appeals considered whether the trial court, under the circumstances there presented, was required pursuant to Rule 4-215(b) to determine and announce on the record that the defendant was knowingly and voluntarily waiving the right to counsel. 444 Md. at 685-87. The Court concluded that it would "not resolve whether the 'determine and announce' requirement of section (b) always applies when a court is carrying out the dictates of Rule 4-215(e)[,]" because Westray was required to make a contemporaneous objection to preserve the issue. Nevertheless, the Court of Appeals made the following instructive observation:

> It is true that the court did not explicitly state that it found Westray to be acting knowingly and voluntarily, but the court clearly was exploring those issues at the hearing and, just as clearly, concluded that Westray was acting knowingly and voluntarily when it permitted the discharge of counsel.

Id. at 687.

In the present case, the circuit court at the December 16 hearing clearly explored Appellant's decision to waive counsel and gave him several opportunities to reconsider. As set out in the testimony quoted above, on two separate occasions the circuit court asked Appellant if the decision to waive counsel was a "free and voluntary decision." On both occasions Appellant responded affirmatively. Moreover, the circuit court outlined the

potential consequences of Appellant's decision. In response, as reproduced in part *supra*, Appellant unequivocally communicated his understanding of those potential consequences and his desire to continue without counsel. Only after an extended colloquy with Appellant regarding his decision did the circuit court permit the discharge of counsel. Here, as in *Westray*, the court clearly explored the issues and, "just as clearly, concluded" that Appellant was acting knowingly and voluntarily. *See Westray*, 444 Md. at 687.

In summary, the circuit court properly conducted the inquiry into Appellant's reasons for wanting to discharge counsel on November 12, 2013, and found those reasons to be without merit. On December 16, 2013, with no additional reasons for discharge being advanced by Appellant, the circuit court proceeded to determine whether Appellant's waiver of counsel was knowing and voluntary. Because the requirements of Rule 4-215 may be satisfied by multiple circuit court judges over multiple hearings, *see Broadwater v. State*, 401 Md. at 200-02, and the record in this case plainly reflects that the circuit court made the appropriate inquiries and findings, we conclude that the court properly complied with Rule 4-215.

II.

Force or the Threat of Force

Appellant contends that "the State did not prove that he applied or threatened the victims with force in order to sustain his convictions for attempted robbery." Appellant argues that "there was no evidence that [Appellant] actually applied force to any of the victims." Therefore, he maintains that the evidence presented must have established that he "threatened or attempted to threaten the victims with force." The State responds, noting

that "the victims testified unequivocally that [Appellant] approached them brandishing a gun while demanding that they turn over their personal property."

The Court of Appeals has defined robbery as "the felonious taking and carrying away of the personal property of another, from his person or in his presence, by violence or putting in fear[.]"[2] *West v. State*, 312 Md. 197, 202-03 (1988). "[T]he 'hallmark of robbery, which distinguishes it from theft, is the presence of force or threat of force . . . .'" *Fetrow v. State*, 156 Md. App. 675, 687 (2004) (quoting *Coles v. State*, 374 Md. at 123 (2003)). In *Fetrow*, this Court stated:

> As we stated in *Douglas v. State,* 9 Md. App. 647, 653, 267 A.2d 291 (1970), "actual violence is not required; constructive violence, which is present through intimidation, is sufficient."
>
> At one end of the spectrum, then, the use of a deadly weapon generally constitutes "the necessary element of force or violence or putting in fear sufficient to raise the taking of property from the person from larceny to robbery." *Bowman* [*v. State*], 314 Md. [725] at 730, 552 A.2d 1303 [(19890].

[2] Maryland Code, (2002, 2012 Repl. Vol.) Criminal Law Article ("CL"), § 3-401(e) provides:

> "Robbery" retains its judicially determined meaning except that:
>
> (1) robbery includes obtaining the service of another by force or threat of force; and
>
> (2) robbery requires proof of intent to withhold property of another:
>
> (i) permanently;
>
> (ii) for a period that results in the appropriation of a part of the property's value;
>
> (iii) with the purpose to restore it only on payment of a reward or other compensation; or
>
> (iv) to dispose of the property or use or deal with the property in a manner that makes it unlikely that the owner will recover it.

> Constructive force, i.e., intimidation or the intent to frighten, occupies the other end of the spectrum.

Id. at 688.

In the present case, six trial witnesses testified that Appellant approached them with what appeared to be a deadly weapon (i.e., a gun) and used it to frighten them into surrendering their personal property to Appellant. We conclude that, viewing the evidence presented in the light most favorable to the prosecution, as we must, there is sufficient evidence from which a jury could have found the essential elements of the crimes of robbery and attempted robbery beyond a reasonable doubt. *See Fetrow*, 156 Md. App. at 685 (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

III.

Reasonable Fear Instruction

Appellant contends that the trial court erred by refusing to instruct the jury on "what constitutes reasonable fear." However, as the State points out, this argument was not preserved and is not properly before this court. Maryland Rule 4-325(e) provides:

> No party may assign as error the giving or the failure to give an instruction unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection. Upon request of any party, the court shall receive objections out of the hearing of the jury. An appellate court, on its own initiative or on the suggestion of a party, may however take cognizance of any plain error in the instructions, material to the rights of the defendant, despite a failure to object.

"Although the trial court's failure to give a requested instruction may constitute error, the rules go on to indicate that such error is ordinarily not preserved for appellate review unless

the requesting party objects after the trial court instructs the jury." *Johnson v. State*, 310 Md. 681, 686 (1987). Appellant failed to object after the circuit court instructed the jury.

Although the issue is not preserved, we observe that whether the victims' fear was reasonable is not a matter that would require an instruction because we trust "[j]urors routinely [to] apply their common sense, powers of logic, and accumulated experiences in life to arrive at conclusions from [a] demonstrated sets of facts." *Bruce v. State*, 318 Md. 706, 730 (1990) (quoting *Robinson v. State*, 315 Md. 309, 318 (1989)). Moreover, to the extent that our case law recognizes that robbery may be accomplished "by violence or putting in fear," *West*, 312 Md. at 203, the pattern instructions given by the circuit court in this case adequately covered the matter before the jury. The court emphasized three times that the defendant must have used "force or threat of force."

In reviewing a request for a jury instruction, "we consider whether the instruction was generated by the evidence, whether it was a correct statement of the law, and whether it was otherwise covered by the instructions given by the trial court." *Hosmane v. Seley-Radtke*, 227 Md. App. 11, 26 (2016) (Citing *Johnson v. State*, 223 Md. App. 128, 138,*cert. denied*, 445 Md. 6 (2015)). Additionally, "[t]he burden is on the complaining party to show both error and prejudice." *Id.* (citing *Farley v. Allstate Ins. Co.*, 355 Md. 34, 47 (1999)). We perceive no error in the court's decision not to give an instruction on reasonable fear.

IV.

Lesser-Included Offenses

Appellant argues that, by entering nolle prosequi as to the lesser-included offenses of theft and assault and only proceeding with robbery and attempted robbery, the State

violated Appellant's right to a fair trial. Appellant maintains that the "lesser included charges would have been [] appropriate offense[s] to submit to the jury, but that the offense[s] of robbery and attempted robbery, were lacking in an evidentiary foundation." Appellant argues that when presented with the choice to either convict him of robbery or acquit, a jury would choose to convict even where the evidence might only support conviction on a lesser-included offense.

The State contends that Appellant's arguments are not preserved. The State maintains that "[a]t trial, [Appellant] claimed that his robbery charges should be dismissed because theft and assault were 'essential elements' of robbery[,]" and Appellant argued that those offenses were barred by the statute of limitations. The State asserts that the trial court understood Appellant to be complaining that those lesser-included offenses could not be submitted to the jury. The State argues that, even though Appellant's first claim of error—that the court improperly denied his motion to dismiss because the State nol prossed the lesser-included charges—"may be the same as the one he initially raised at trial, the trial court did not decide that issue." Further, the State contends that Appellant waived the right to raise the issue on appeal by failing to "disabuse the trial court of its incorrect understanding."

Regarding Appellant's second contention of error, the State argues that it was neither raised in nor decided by the trial court. The State points out that Appellant did not, and could not have, objected to the State's nol pros of the lesser charges in the December 2013 trial because those charges were dismissed without objection at Appellant's first trial. *Monte P. Fortune v. State*, No. 102, Sept. Term 2011 (filed January 6, 2011. Moreover,

Appellant failed to appeal the nol pros of lesser charges before this Court in the 2011 Term case. *Id.*

At the beginning of the 2013 trial, Appellant moved to dismiss the charges against him. Appellant stated:

> The first preliminary issue I have, is in my first trial before the jury went to deliberate, [the judge] [nol prossed] all the thefts and all the assaults in this matter before they went to deliberate. So, being as though that he [nol prossed] . . . all the thefts and all the assaults . . . he nol [prossed] all the assaults and the thefts without good cause Your Honor. I believe that the Statute of Limitation is up on the assaults. I don't know the Statute of limitations on theft. And I also know that a person cannot stand trial for something if he's not charged with each essential element. And I have documents saying that those charges were [nol prossed] against me before -- and these were lesser accounts, before they reached the deliberating room. And you know, I'm pretty sure the State doesn't have any evidence of good cause of why he [nol prossed] lesser offenses. His sole reason for [nol prossing] those lesser offense was so that the jury could only deliberate on armed robbery and robbery.

We agree with the State that Appellant cannot, for the first time in his second appeal, challenge the State's decision to nol pros charges during the earlier proceeding. However, to the extent that Appellant raised the issue as to whether the State's decision to proceed to the jury on limited charges, not including lesser offenses, deprived him of a fair trial, we will briefly address that contention.

Maryland Rule 4-247 provides:

> **(a) Disposition by Nolle Prosequi.** The State's Attorney may terminate a prosecution on a charge and dismiss the charge by entering a nolle prosequi on the record in open court. The defendant need not be present in court when the nolle prosequi is entered, but if neither the defendant nor the defendant's attorney is present, the clerk shall send notice to the defendant, if the defendant's whereabouts are known, and to the defendant's attorney of record. Notice shall not be sent if either the defendant or the defendant's attorney was present in court when the nolle prosequi was entered. If notice

> is required, the clerk may send one notice that lists all of the charges that were dismissed.
>
> **(b) Effect of Nolle Prosequi.** When a nolle prosequi has been entered on a charge, any conditions of pretrial release on that charge are terminated, and any bail bond posted for the defendant on that charge shall be released. The clerk shall take the action necessary to recall or revoke any outstanding warrant or detainer that could lead to the arrest or detention of the defendant because of that charge.

The Court of Appeals has recognized that "[t]he entry of a nolle prosequi is generally within the sole discretion of the prosecuting attorney, free from judicial control and not dependent upon the defendant's consent." *Burrell v. State*, 340 Md. 426, 430 (1995) (citations and internal quotation marks omitted). However, "if the right to a fair trial is clearly offended by the State's Attorney's decision to nolle pros a charge, the court may intervene[.]" *Id.*

In *Burrell*, the Court of Appeals provided the applicable test:

> In considering whether an entry of nolle prosequi to a lesser included offense is unfair to the defendant, it is not enough to determine that the evidence would be sufficient for the jury to convict on that offense; rather, the evidence must also be such that the jury could rationally convict *only* on the lesser included offense. If there is no rational basis for the jury to convict a defendant of the lesser offense without also convicting of the greater offense, the State may use its discretion to withdraw that verdict option from the jury by nolle prossing the lesser included offense.

Id. at 434 (emphasis in original). Recognizing the inverse of the fairness argument, like that presented by Appellant in this case, the Court observed:

> Just as jurors may not want to *acquit* a "plainly guilty" defendant altogether, they also may not want to *convict* a defendant, plainly guilty of the more serious charge, when he appears sympathetic for some reason. If nolle prossing the less serious charge is precluded, the jury may select the option of convicting the defendant of a less serious crime than is warranted by the evidence. Attempting to prevent this type of "compromise" verdict is fair.

> Justice is no more done when a defendant is wrongly acquitted of a crime than it is when the defendant is wrongly convicted of that crime. As this Court stated recently, "Justice is not a one-way street. 'A fair trial is the entitlement of the "People" as well as of an accused.' " *Whittlesey v. State*, 326 Md. 502, 534, 606 A.2d 225, 240 (1992) (quoting *Gonzales v. State*, 322 Md. 62, 74, 585 A.2d 222, 228 (1991)).

Id. at 434-35 (emphasis in original).

The charge of "assault" "may connote any of three distinct ideas: 1. A consummated battery or the combination of a consummated battery and its antecedent assault; 2. An attempted battery; and 3. A placing of a victim in reasonable apprehension of an imminent battery.'"[3] *Cruz v. State*, 407 Md. 202, 209 n.3 (2009) (quoting *Lamb v. State*, 93 Md. App. 422, 428 (1992), *cert. denied*, 329 Md. 110 (1993)). The primary elements of theft are: "willfully and knowingly obtaining unauthorized control over the property or services of another, by deception or otherwise, with the intent to deprive the owner of his property by using, concealing, or abandoning it in such a manner that it probably will not be returned to the owner."[4] *Gamble v. State*, 78 Md. App. 112, 118, *aff'd*, 318 Md. 120 (1989).

[3] CL § 3-201(b) provides that "'Assault' means the crimes of assault, battery, and assault and battery, which retain their judicially determined meanings."

[4] CL § 7-101(m)(1) provides that "'Theft' means the conduct described in §§ 7-104 through 7-107 of this subtitle." Regarding the "unauthorized control over property" modality of theft, CL § 7-104(a) provides:

> (a) A person may not willfully or knowingly obtain or exert unauthorized control over 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.

In the present case, as we determined *supra*, the evidence presented was sufficient to allow the jury to find the essential elements of robbery and attempted robbery beyond a reasonable doubt. There was a clear *rational* basis for the jury to convict on *both* the lesser-included offenses and robbery. *Cf. West*, 312 Md. at 202-03 (defining robbery as "the felonious taking and carrying away of the personal property of another, from his person or in his presence, by violence or putting in fear"). Thus, it cannot be said that "the evidence [was] such that the jury could rationally convict *only* on the lesser included offense[s]." *See Burrell*, 340 Md. at 434 (emphasis in original). Accordingly, the State's withdrawal of the lesser-included offenses did not deprive Appellant of the right to a fair trial.

JUDGMENTS AFFIRMED.
COSTS TO BE PAID BY APPELLANT.