UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1385

September Term, 2014

GUY THOMAS

v.

STATE OF MARYLAND

Nazarian,
Leahy,
Davis, Arrie, W.
(Retired, Specially Assigned),

JJ.

Opinion by Leahy, J.

Filed: August 26, 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.

In 2012, Appellant Guy Thomas was charged with the first-degree murder of Dexter Jones, related firearms offenses, and with drug-related charges after 10 bags of marijuana were recovered from his person near the scene of the murder. In his second jury trial in the Circuit Court for Baltimore City, Appellant twice explored the possibility of discharging his assigned public defender, but decided, upon advisement by the court, to retain counsel. After a lengthy trial, Appellant was acquitted of the murder of Mr. Jones but convicted of possession of a firearm by a prohibited person; carrying a handgun; possession of marijuana with the intent to distribute; and possession of marijuana.[1] Appellant presents the following questions on appeal, which we have slightly re-phrased:

I. Did the hearing court err when it failed to inquire under Md. Rule 4-215(e) into Appellant's reasons for wanting to discharge counsel?

II. Was Appellant denied his constitutional right to a speedy trial?

III. Did the trial court err when it denied Appellant's motion for mistrial based on the State's allegedly improper closing argument?

IV. Did the trial court err in denying Appellant's motion for judgment of acquittal on the charge of possession of marijuana with the intent to distribute because the State failed to prove Appellant intended to distribute?

V. Did the sentencing court err when it failed to merge Appellant's sentence for possession of a firearm into his sentence for carrying a handgun?

[1] The jury acquitted Appellant of first-degree murder, second-degree murder, first-degree assault, and possession of a firearm during a drug trafficking crime. Appellant was sentenced by the court to five years of imprisonment for possession of a firearm, to be served concurrently with his prior sentences, and consecutive sentences of three years of imprisonment for carrying a handgun and five years for possession of marijuana with the intent to distribute. Appellant's possession of marijuana conviction was merged for sentencing purposes.

For the reasons that follow, we find no error or abuse of discretion in the determinations of the circuit court. We affirm.

BACKGROUND

On the evening of March 20, 2012, Dexter Maurice Jones, was fatally shot near the intersection of North Avenue and Ashburton Avenue in Baltimore City. Appellant was arrested nearby while attempting to flee the area. The police searched Appellant and recovered ten baggies of marijuana from his pant pocket. Appellant was charged with crimes related to the shooting and the recovered controlled dangerous substance ("CDS"). The two indictments, dated April 17, 2012, charged Appellant with (1) possession of a regulated firearm by an individual previously convicted of a disqualifying crime; (2) wearing, carrying, and transporting a handgun on or about his person; (3) first-degree murder; (4) first-degree assault; (5) use of a firearm in the commission of a crime of violence; (6) possession of a firearm during and in relation to a drug trafficking crime; (7) possession of CDS (marijuana) with intent to distribute; and (8) possession of CDS (marijuana). An attorney for the Office of the Public Defender entered his appearance on Appellant's behalf on May 21, 2012.

For reasons not relevant here, Appellant's first trial ended in a mistrial on March 14, 2013. After numerous postponements, Appellant's case was called for re-trial on March 19, 2014. At that time, Appellant requested that the case be postponed to "the week of March 31st or April the 4th" because a defense witness was unavailable due to a family death out of State. The State responded that it was ready to proceed immediately

but, if the trial was postponed, it would need a bit more time to make sure the medical examiner (who had taken a position as a "professor at a University in Washington") could be available for trial. The State suggested that a postponement to May 6 would allow time to secure the necessary witness. After further discussion, during which the court and the parties attempted to find a mutually convenient trial date, the court granted the postponement and reset the trial for May 6, 2014. The Court stated:

> . . . Well, I'm prone to do the May 6th date just because I'm sensitive to both sides' need to coordinate matters. And the State's ready today, they're going to need to marshal their forces, may take more time than just 10 days to two weeks to be able to do that. . . .
>
> * * *
>
> For the reasons outlined at the bench, I will find good cause for the postponement request in this matter. There's an available date of May the 6th, 2014, Part 46 at 2:00 p.m. And understand counsel for [Appellant] in this matter wanted the postponement but didn't want to put it off so far. So, there was an objection if you want to articulate further, feel free to do so.

Appellant's attorney objected to the trial date, stating:

> [DEFENSE COUNSEL]: . . . And I would note that [Appellant] now has been incarcerated for two years. This case has been tried once before . . . one year ago. But, he is very anxious to go to trial. And it's upsetting for him to come to [c]ourt expecting to go forward and then last minute information comes forward which prevents us from doing so. So, I'd most respectfully object to such a lengthy postponement, I would ask that this case be held until next week.

Following the court's grant of Appellant's requested postponement, Appellant requested the opportunity to address the court:

> [APPELLANT]: Your Honor, can I speak, can I say something?

THE COURT: Yeah. I would suggest you talk to counsel before you say something.

[APPELLANT]: But (inaudible) I want my attorney. I (inaudible) want to fire my attorney.

THE COURT: If you want --

[APPELLANT]: I represent myself until I get a paid attorney.

THE COURT: Well, sir, that's something you should talk to your attorney about before [] articulating in here.

[APPELLANT]: That's -- that's a choice I want to make.

THE COURT: I understand and you have that right to make that choice. Are you indicating that you want to fire counsel of record at the moment?

[APPELLANT]: Yes.

THE COURT: Do you realize that may postpone even further your trial date?

[APPELLANT]: Yes.

THE COURT: Are you indicating that you want to represent yourself or that you want to hire an attorney of your own choosing through your own funds?

[APPELLANT]: Yes.

THE COURT: Now, which is it? You know, are you going to represent yourself or –

[APPELLANT]: I will represent myself until I get a paid attorney.

THE COURT: So you're not waiving an attorney is what you're saying?

[APPELLANT]: Huh?

THE COURT: You're not indicating that you want to waive an attorney to represent you?

> [APPELLANT]: Yeah, until further notice.
>
> THE COURT: Well, let me – let me explain this a little better than I am. Are you indicating that you want to represent yourself in trial or are you indicating that you want to have time to get a new attorney?
>
> [APPELLANT]: I mean, as for now, if I don't have a paid attorney I represent myself.
>
> THE COURT: Well, here's what I'm going to do. I'm going to hold your motion in that regard, what we call sub curia. I'm not going to rule on it right now. I'm [going to] allow counsel of record to stay as counsel of record. If in the meanwhile you, A) either want to hire your own attorney, you're free to do so. But in the meanwhile, there will be someone [who] will be standing by to represent you in case a trial becomes necessary. And you decide in the future that you don't want to represent yourself, that you want competent counsel, and I can tell you that you have very competent counsel. That being said, you can always opt on the eve of trial, if you haven't hired an attorney in the meanwhile to represent yourself. That is a constitutional right as much as it is to have representation on your behalf.
>
> So you don't have to make that decision right now. And in the meanwhile it will facilitate two things. One, perhaps you'll be able to have a reappraisal of whether you want this particular counsel or not. Or B) go out, hire your own attorney of your own choosing with your own money, and be hopefully satisfied with your choice in that regard. And actually, C) when the day comes for the trial, which I think is pretty firm on going forward on the 6th of May, you can at that point opt not to have any representation whatsoever. All right?
>
> [APPELLANT]: All right. I just --
>
> THE COURT; So you're no worse off at this stage, in fact you are better off by not firing your attorney at this time. You can fire your attorney at the time of the trial if you so choose. And in the meanwhile, you are certainly free to hire your own representation.

A pretrial motions hearing was held on May 5, 2014, in which Appellant was represented by the same public defender as in the March 19 hearing. However, Appellant

did not, at that time, reiterate his request to discharge counsel. Rather, Defense Counsel, in Appellant's presence, proceeded to represent Appellant through the motions hearing.

At the outset of the hearing on May 6, 2014, Appellant moved to dismiss the case, arguing that Appellant had been denied his right to a speedy trial. Appellant argued that his first trial ended in a mistrial and the commencement of the retrial approximately 14 months later was a delay of constitutional dimension. Noting the numerous postponements attributed to both the State and Appellant, the circuit court stated:

> Looking at the factors -- the *Barker v. Wingo* factors -- first, the Court does agree that the length of the delay itself is of constitutional dimension, which then gets us to look at other factors.
>
> Certainly the right was asserted on five occasions that were set forth and proffered by Counsel, on May the 21st, 2012; June the 7th, 2013; January the 10th, 2014; February the 4th, 2014; and March the 19th, 2014.
>
> With respect to the reasons for the delay, the Court agrees with the State's assessment of the reasons and the weight to be assigned to those reasons.
>
> The June 7th -- the first trial date when it was postponed -- it was over objection. There was an unavailable State's witness.
>
> But as proffered by the State today, the reason for the State's request for the postponement was a legitimate reasonable request that would be weighted against the State, but not heavily.
>
> On August the 15th, the Defense Attorney was in trial. So, even if the State -- and there was a State's witness unavailable -- but even if the State had the witness available, the case could not have conceivably gone forward without Defense Counsel. The same applies to the October the 16th date.
>
> January the 10th, 2014, the State was in trial. The Defense objected. Again, the case could not reasonably go forward without the assigned prosecutor available. Although there are many attorneys in the State's Attorney's Office, they're not fungible. So the Court finds that that is a neutral event.
>
> With respect to February the 4th, again the Defense Counsel was unavailable. Although, we'll say, Defense Counsel was essentially placed in a position of being made unavailable by the Court because there was an assignment of the case with insufficient time for this case to be finished before the next specially set trial.

> So, I would say that would weigh slightly in favor of the Defense, because it was a position that was essentially created by the Court.
>
> March the 19th, again it was a Defense request, because there was a Defense witness that was unavailable that was needed to introduce exculpatory evidence. So that would weigh against the Defense.
>
> With respect to the assertions that the Defense was requesting earlier trial dates, or to be held over for a shorter turnaround, the Court's unpersuaded that those requests in any way bolster the speedy-trial argument. The reality is that trials get set in due course. These aren't -- as the State noted, these aren't lengthy delays between trial dates. It's not as if in January, the case is now being set out to September for trial. So, the Court finds that overall, the reasons-for-delay factor, in large part, weighs against the Defense.
>
> Lastly with respect to the prejudice argument, there was an argument that there was anxiety as a result of the pretrial incarceration. And the case law is pretty clear that the assertion on its face, without any supporting evidence or information -- other than the mere assertion -- is not sufficient.
>
> The State argues and the Court agrees that there's no allegation of, and there's no appearance that there was any intentional effort to sabotage the Defense. There's been no prejudice as far as the Court can see to the Defense's ability to put on a defense.
>
> So, for those reasons, the Court finds that the motion must fail; and the motion's considered and denied.

A jury was empaneled and sworn on May 6, 2014, and Appellant's trial on the merits began the next day.

On May 7, 2014, the State called Baltimore City Police Officer Chris Timms, who testified that, on the evening of March 20, 2012, he and two other officers responded in an unmarked cruiser to the area on the 2700 block of North Avenue where Mr. Jones was shot. They saw Appellant on the street looking over his shoulder, looking nervous, and "trying to cover something in his waistband on the right side." When the officers pulled up to Appellant and asked to speak with him, Appellant "took off running." Officer Timms testified he then observed Appellant discard a handgun:

> [OFFICER TIMMS]: I saw [Appellant] remove a handgun from his right-hand side and throw it to the ground.
>
> [THE STATE]: Now how does that relate to where you said he had his arm locked and a hat?
>
> [OFFICER TIMMS]: It was from his right-hand side that he pulled the gun out.
>
> [THE STATE]: And when you saw that, what did you do, exactly?
>
> [OFFICER TIMMS]: I exited the vehicle and went over to the gun.
>
> [THE STATE]: . . . Was [Appellant] running when he threw it or was he walking or was he standing still?
>
> [OFFICER TIMMS]: No, he was running.
>
> [THE STATE]: And when the gun dropped, how long did it take you to get to the gun?
>
> [OFFICER TIMMS]: Seconds.

The handgun, along with three live cartridges and one spent cartridge, collected by Officer Timms was admitted in evidence as State's Exhibits 3A and 3B.

Officer Donald Medtart, who was present in the car with Officer Timms, also testified that he witnessed Appellant remove a gun from his waistband and discard it. While Officer Timms retrieved the discarded handgun, Officer Medtart pursued Appellant into a small wooded area. Officer Medtart described how he found the bags of marijuana on Appellant's person:

> [OFFICER MEDTART]: [I c]hased the person back about -- I mean, [Appellant] back about 20 yards or so and . . . I told him to halt, stop. Police, and he did. He stopped. I told him to roll over on his stomach, put his hands behind his back and he did.

* * *

> He was placed in handcuffs. He was walked -- he was searched there and then . . .

* * *

> He had $68.00 of U.S. currency in one pocket and 10 bags of marijuana in the other pocket that were concealed inside a plastic sandwich bag.

Officer Medtart then identified a Polaroid photograph he took of the ten bags of marijuana recovered from Appellant and that photograph was admitted as State's Exhibit 8.

During the afternoon of May 7—after the trial court heard testimony from six witnesses and accepted numerous exhibits into evidence—Appellant sought to discharge his appointed counsel. The following exchange occurred:

> [DEFENSE COUNSEL]: Your Honor, I have something I need to address the Court about first.
>
> THE COURT: Okay
>
> MOTION TO DISCHARGE COUNSEL
>
> [DEFENSE COUNSEL]: [Appellant] wishes to discharge me. He wishes to represent himself. So I think he wants to address the Court about that.
>
> THE COURT: Okay. Yes, sir?
>
> STATEMENT BY [APPELLANT]
>
> Everything going my case, I feel uncomfortable with him defending me, like, how everything is set up. It's going in a whole wrong direction. Like, you might, not understand how the case is from how my last case was. There's a lot of stuff going on that you might not know. I gave him another chance with my case. Last time went to court in front of the last judge, I asked the judge could I dismiss him in my case but the judge told me to hold on to him. So I gave him another chance. But how everything is playing out, everything is going in the wrong direction, like this was planned to happen this way.

As if, opening statements. If you see how opening statements was, the State Attorney never explained to the jury nothing about my taped statement of a confession. So no one knows if he was going to bring that evidence to trial.[2] So now [Defense Counsel] come through with the opening statement and [Defense Counsel] just put out there to the jury that I made a taped confession saying that I committed the murder. So now –

THE COURT: I don't believe – I don't believe that's what he said.

[APPELLANT]: He did. He said that. If you was listening he said that all in the opening. So now [Defense Counsel] told the jury that I made a taped confession saying that I committed the murder.

Not only that, now, two SWAT members get on the stand, which there's three of them, with three different inconsistent statements. First one was Timms gets on the stand. In his last testimony saying that I dropped the gun from my waistband. Medtart, second, was saying that I underhand tossed the gun into the grass. Third one would be Archambault. He's the one saying I threw the gun and it strikes off the wall. Not only that, Archambault, the same one whose testimony in the last trial saying that it was several females and one unknown male in the same location where I threw the firearm and they ran past me, and all that. So he knows -- they know that that statement will hurt the other two statements that the other two SWAT members gave.

So everything, it seems like, is planned to happen this way, to me. So I feel uncomfortable with him testifying or with him defending me.

THE COURT: Do you understand, sir, that if you discharge him, and I agree that that's appropriate, you're going to have to follow all the same rules that an attorney would have to follow, in representing yourself?

[APPELLANT]: Yes, sir. I feel comfortable handling my situation because this is my life, instead of him doing it his way because of how everything is planned out is going in the wrong direction.

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[2] The taped statement referenced by Appellant was the subject of a lengthy motion to suppress on May 5, 2014. In that statement—admitted for the purposes of the motions hearing and played during that hearing—Appellant told police that he shot Dexter Jones in self-defense. Appellant sought to suppress the statement arguing that it was the product of coercion and inducements. Although appellant's motion to suppress was ultimately denied, the State chose not to use the taped confession in its presentation of the evidence for reasons not entirely clear in the record. The contents of the taped statement were never presented to the jury.

> THE COURT: All right, is there any other reason you wanted to state, sir?
>
> [APPELLANT]: Say that again?
>
> THE COURT: Is there any other reason that you wanted to state? Those are your reasons for wanting to discharge counsel?
>
> [APPELLANT]: That's the main reasons?

The court then took a brief recess. When the proceedings resumed, the court again questioned Appellant about his request to discharge counsel:

> THE COURT: All right. Mr. Thomas, I need to go through a few things with you, with respect to your desire to represent yourself, or to discharge [Defense Counsel]. . . . First of all, you do understand that this trial will continue today. This won't be postponed. Do you understand that, sir?
>
> [APPELLANT]: (No response.)
>
> [THE COURT]: If [Defense Counsel] is discharged this case will continue today, with you representing yourself. And just to explain why, I don't find that it would be in the interest of justice to postpone the case. This is a retrial. You've had ample opportunity prior to the commencement of this trial to discharge [Defense Counsel] if you were unhappy with him. You had opportunity during Motions. You had opportunity during voir dire. There's been no correspondence from you prior to trial, indicating that you wished to discharge counsel. Frankly, if you were to discharge him and seek postponement (a) I'm saying it would be denied and (b) I believe it would be a delay tactic.
>
> I also indicate -- would also indicate to you that when you fire someone from the Office of the Public Defender, such as [Defense Counsel], you do not get to choose another public defender. Do you understand that?
>
> [APPELLANT]: Yeah, I understand but I'm saying that if -- I'm saying that I didn't fire him before this, like, but I'm seeing everything now, how everything is playing out, how everything is working out now. Everything is going in the wrong direction. This is my life on the line.
>
> * * *

> [THE COURT]: All right, Mr. Thomas, if you -- I want you to understand that if you fire [Defense Counsel] we will continue the trial today, and unless, you have another lawyer standing by, you'll be representing yourself. Do you understand that?
>
> [APPELLANT]: I ain't ready to represent myself today.
>
> [THE COURT]: All right, well, I'm not postponing the case. Your choice is either to continue with [Defense Counsel] or represent yourself today. If you're able to secure the services of another attorney to step in, midstream, which I think is highly unlikely, you certainly can have them come tomorrow and take over, but I highly doubt any lawyer would take a case when it's mid-trial. So those are your options.
>
> Do you wish to discharge [Defense Counsel] and continue by representing yourself for the remainder of the trial or would you like to have [Defense Counsel] stay in the case?
>
> [APPELLANT]: I don't have no choice but to let him stay in the case now. You ain't giving me no options, no choice.

Thereafter, Appellant continued the trial with defense counsel. The State presented several more witnesses, including Detective Robert A. Burns. Detective Burns testified that several additional baggies of marijuana were found lying in the street near the crime scene. He also identified photographs of the victim's property recovered from the scene. Those photographs were admitted into evidence as State's Exhibits 13A through 13M. Among the photographs was State's Exhibit 13G, a picture of suspected marijuana recovered from a plastic tub found in the victim's pocket.

At the close of the State's case-in-chief, Appellant motioned for judgment of acquittal, which was denied by the circuit court. Thereafter, Appellant called Police Agent Jeffrey P. Archambault, the third officer and driver of the unmarked vehicle that pursued Appellant. Regarding his initial interaction with Appellant, Agent Archambault stated:

> As I pulled up next to him, we came to a stop, the window was already down. I can't remember exact words I said to him but maybe something like can I talk to you or something of that nature. [Appellant] looked at me for one second and took off running.

Agent Archambault also testified that as Appellant was running "eastbound up Baker Street [Appellant] proceeded to reach into his waistband area, pull [the gun] out and throw it over towards a wall."

After calling several other witnesses, including a serologist and a DNA analyst, Appellant closed his case-in-defense and renewed his motion for judgment of acquittal. That motion was also denied.

On May 12, 2014, the jury heard closing arguments. Regarding the marijuana evidence the State argued:

> [THE STATE]: There's also no dispute that after the chemist came in and testified that he examined the marijuana, which he was asked to examine, and he found that the marijuana that was submitted by Officer Medtart, which is the numerous bags, and the marijuana that was submitted by Officer Reed, which is the two bags, . . . it was in fact all marijuana.
>
> Now I've been doing this a long time but have never, never done a perfect case, don't think I ever will. I've always forgotten a question here or something that I wanted to say there, I forgot to ask the officers who may have been experts in drug laws, is this consistent, is the ten bags consistent with possession for distribution.
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.
>
> [THE STATE]: But that's luckily -- that's why we have 12 of you. . . . And your common sense, by your common sense, after applying your common sense you know that [State's Exhibit] 13g, that shows the two little bags inside that plastic container, that's what possession for personal use looks like.

> Your common sense also tells you that [State's Exhibit] 8, that that's what possession with intent to distribute looks like. Personal use, possession with intent.
>
> A person might have one, they might have two, they might even have three or four. That's for their own personal use. A person with ten, that's not for personal use, ladies and gentlemen, that's for distribution.

Regarding the sufficiency of the evidence for the handgun related charges, the State argued:

> [THE STATE]: Now based upon that evidence and that consideration of the evidence, [Appellant] is guilty of first-degree murder. He's guilty of possessing a handgun in the commission of a crime of violence. He's guilty of possessing a handgun after being disqualified. He's guilty of felony possession of narcotics. And he's guilty of using that handgun in a drug trafficking crime.
>
> I don't think I've spoken about that yet. You got him with drugs that are clearly for distribution and you have him with a gun. Again, common sense.
>
> Ladies and gentlemen, why does a person whose dealing drugs also have a gun? You might say that they go hand in hand. A drug dealer, it's the norm for a drug dealer to have a gun to protect his stash, protect himself.
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.
>
> [THE STATE]: Now, His Honor talked to you about motive. And that's a hard one. Because human nature we want to understand. Everybody wants to understand how this could happen.

Turning back to the weight of the evidence, the State instructed the jury that it need not prove a particular motive and that the evidence was sufficient for "all of the things [Appellant wa]s charged with." The State articulated the following:

> Now against that you have -- Well, in his opening statement [defense counsel] gave you a prelude of what he believed the case would be. Again, a couple of times in this case I was asleep at the switch, I let things get by me.

> Now [defense counsel] tells you -- told you that the Defendant is an innocent man. Now technically that could be considered vouching. Which --
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.
>
> [THE STATE]: You can't -- the attorney's [sic] can't say this is what I think and you should think too. It has to be based upon the evidence.
>
> So a proper statement would, the evidence will show that he's an innocent man. But they can't say that because the evidence doesn't show he's an innocent man. The evidence shows he's a guilty man.
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.

Concerning Appellant's attempts to impeach the testimony of the arresting officers, and particularly the testimony by Agent Archambault, that none of the other people near the area where Appellant was apprehended ran from the scene, the State remarked:

> [THE STATE]: [Agent Archambault] said that he never noticed [another person] running away. He didn't really notice him in particular, he didn't perceive them as a threat so he wasn't paying particular attention to them, but he does not remember them running away.
>
> They were in the same area in the sense that they were in the same block, but they were never closer to the gun than the police were. They were always nearer to the railroad tracks, the over pass.
>
> And the last question Mr. [Defense Counsel] asked him, you didn't chase after the man who ran away? And he said no. Well I should have objected because from his -- from his testimony there was no evidence of anybody running away.
>
> But with 36 hours. 34 hours without sleep and a sly question, if you will, he --
>
> [DEFENSE COUNSEL]: Objection.
>
> [THE STATE]: - said something-

> THE COURT: Overruled.
>
> [THE STATE]: -- that wasn't in fact supported by evidence. Because he never said he saw anybody, he never noticed anybody running away.

Finally, regarding the State's burden and the sufficiency of the evidence, the State argued:

> [THE STATE]: . . . [A]s His Honor told you in the instructions, beyond a reasonable doubt, which is a very high burden. A burden that the State's Attorney's Office carries on a daily basis, we do not have to prove beyond a mathematical certainty. We do not have to prove beyond all doubt.
>
> So when you go back there and you have come to the conclusion and you final [sic] get to the place were [sic] you say, well it's totally unreasonable to think a guy whose running away less than four minutes from a murder with the murder weapon isn't actually the murderer. If you say, well we know he did it but the State didn't have enough evidence, that's wrong. Because when you say --
>
> [DEFENSE]: Objection.
>
> THE COURT: Overruled.
>
> [STATE]: When you say we know, I in my heart of hearts, I know he did it. And I'm saying that as one of you. When you say that to yourself, the State has met its burden.
>
> [DEFENSE]: Objection.
>
> THE COURT: Overruled.

Bringing its closing argument to an end, the State reiterated that:

> the State has the burden of proof and we have to prove beyond a reasonable doubt that [Appellant] was guilty before you all will be satisfied that he should be found guilty. That is a very, very heavy burden.

Following Appellant's closing argument and the State's rebuttal, Appellant moved for mistrial as follows:

> [DEFENSE COUNSEL]: Your Honor, I respectfully ask for a mistrial. There were a number of times in the State's opening and close was, as well as rebuttal close, where the State kept on stating that evidence came in that should have been objected to by the State but that the State just didn't bother to object.
>
> It's inappropriate to argue that evidence did come in but shouldn't have come in because it was inadmissible. And it's also inappropriate to argue these legal matters in front of a jury. It also leaves the jury with the improper impression.
>
> [THE STATE]: Could you perhaps speak a little bit less loudly?
>
> [DEFENSE COUNSEL]: Your Honor, it also leaves the jury with the improper impression that a tricky Defense Attorney, you know, snuck in inadvertent -- inadmissible evidence. And if the attorney is -- the Defense Attorney is implied to be acting improperly, then that rubs off on my client and that could hurt him as well and hurt my ability to reply to [an] ineffective assistance of counsel [claim].
>
> So, Your Honor, on those grounds I would move for a mistrial. Thank you.
>
> [THE STATE]: Didn't say you acted improperly. I said there were things that I wish I could have objected to and I should have objected to. That doesn't mean he did anything improper. He was just zealously representing his client and I never said or suggested that what he did was improper. It was my mistake for not making the objection.
>
> THE COURT: All right, the motion is denied.

On May 13, 2014, the jury returned its verdicts. Appellant was found guilty of possession of marijuana with intent to distribute; possession of marijuana; carrying a handgun concealed or open; and possession of a firearm by a prohibited person. Appellant was found not guilty of the murder or assault of Dexter Jones and not guilty of use of a firearm in relation to a drug trafficking crime.

At the July 28, 2014 sentencing hearing, the circuit court noted that Appellant was serving 15 years of incarceration on a separate conviction. Taking that sentence into account, the circuit court sentenced as follows:

> With respect to the firearm, felony possession of a firearm, I'm going to impose a sentence of a five year sentence that will run concurrent to his sentence being served [in the other case].
>
> However, the other sentences that I'm going to be imposing will be consecutive. With respect to handgun on person, which I believe has a statutory maximum of three years, I will impose the three year maximum. That will run consecutive to the sentence he's currently serving.
>
> And then with respect to the possession with intent, I'm going to impose a sentence of five years which will then run consecutive to that sentence in the handgun on person.

Appellant filed a timely notice of appeal on August 21, 2014. Additional facts will be introduced as the discussion requires.

DISCUSSION

I.

Request to Discharge Counsel

Appellant argues that the court erred when it failed to comply with Maryland Rule 4-215(e) by failing to inquire into why Appellant wanted to discharge his counsel when his case was first called for re-trial back on March 19, 2014. He maintains that the circuit court "may have simply assumed that it knew the reason for Appellant's request." However, he asserts that, without asking Appellant why he wanted to discharge counsel, the court could not be aware of Appellant's precise complaints or judge whether the request was meritorious.

The State responds that it was unnecessary for the court to directly inquire because it was clear from the record that Appellant wanted to discharge his counsel because Appellant was displeased with his case being continued after he had been in prison for two years. The State argues that the court implicitly found Appellant's request to be non-meritorious and adequately advised Appellant as to his options.

Pursuant to Article 21 of the Maryland Declaration of Rights and the Sixth Amendment to the United States Constitution, an accused citizen has two independent rights: "the right to have the assistance of counsel and the right to defend Pro se." *Snead v. State,* 286 Md. 122, 123 (1979); *see also Faretta v. California*, 422 U.S. 806, 819 (1975) ("The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense."). These rights "are mutually exclusive and [a] defendant cannot assert both simultaneously." *Leonard v. State*, 302 Md. 111, 119 (1985).

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

> (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) (1)-(4) of this Rule if the docket or file does not reflect prior compliance.

"In addressing the circuit court's compliance with Md. Rule 4–215(e), we apply a *de novo* standard of review." *State v. Graves*, 447 Md. 230, 240 (2016) (citing *Davis v. Slater,* 383 Md. 599, 604 (2004)).

"'[A]ny statement from which a court could conclude reasonably that the defendant may be inclined to discharge counsel[,]'" triggers the process mandated by Maryland Rule 4–215(e). *Gambrill v. State,* 437 Md. 292, 302 (2014) (quoting *Williams v. State,* 435 Md. 474, 486-87 (2013)). Application of Rule 4–215(e) "'begins with a trial judge inquiring about the reasons underlying a defendant's request to discharge the services of his trial counsel and providing the defendant an opportunity to explain those reasons.'" *Graves*, 447 Md. at 242 (quoting *Pinkney v. State,* 427 Md. 77, 93 (2012)). "This first step imposes an affirmative duty on the circuit court to provide a 'forum' in which the defendant can 'explain the reasons for his or her request.'" *Id.* (quoting *State v. Taylor*, 431 Md. 615, 631 (2013)).

In *State v. Taylor*, the public defender, during a pre-trial postponement request hearing, explained that the respondent was requesting a postponement because he wished to replace his public defender with a private attorney who had successfully defended him in an unrelated matter. 431 Md. at 622-23. Noting that the case had already been postponed repeatedly, the circuit court denied the postponement and, subsequently, the respondent requested a postponement at the hearing the following day. *Id*. at 623-24. The circuit court again denied the request. *Id*. at 624-25. At a third pre-trial hearing, the State requested

that the circuit court resolve the respondent's request to discharge his public defender and retain private counsel pursuant to Rule 4-215. *Id*. The circuit court addressed the respondent, summarized his stated reasons for replacing counsel and asked "'am I missing anything?'" *Id*. at 625. The respondent responded "'Um—that pretty much sums it up.'" *Id*. at 626. The circuit court then allowed the public defender to question the respondent about the reasons for discharge and advised respondent that his choice was either to keep the public defender or proceed *pro se*. *Id*. Stating that he would proceed with the public defender if he didn't have another choice, the respondent opted to keep the public defender as counsel. *Id*. Later, in a separate hearing, the court found that "there [was] no meritorious reason for the discharge" and explained that respondent could replace counsel, but that the private counsel had to take over the case immediately. *Id*. at 627.

The Court of Appeals in *Taylor* concluded that the circuit court complied with Rule 4–215(e) "by providing Taylor a forum in which to provide an explanation." *Id*. at 640. The Court concluded that "[a] trial judge has no affirmative duty to rehabilitate a defendant's expression of why he or she may desire to discharge his or her counsel; rather, the trial judge has the duty to listen, recognize that he or she must exercise discretion in determining whether the defendant's explained reasons are meritorious, and make a rational decision." *Id*. at 642 (citation omitted).

In *State v. Graves*, the respondent's defense counsel indicated to the motions court that the respondent "would like to postpone the motions hearing and the trial date to have the opportunity to essentially become removed from incarceration and hire John Robinson

to represent him in this matter." 447 Md. at 236. Thereafter, the court asked the respondent whether he understood the consequences of firing his attorney; however, the court did not hear from the respondent himself regarding his reasons for requesting a postponement and/or discharging counsel. *Id.* at 237-38. Rather, the court inquired as to the respondent's understanding of the charges against him and any steps he had taken toward hiring private counsel. *Id.*

On appeal, the State argued that the circuit court initially treated the respondent's motion as a postponement request, and, only after denying that request did the court ask "'Do you want me to fire [your public defender]?'" *Id.* at 244. The Court of Appeals noted that "there was no ambiguity about whether Rule 4-215(e) was implicated" under the facts of that case. *Id.* The Court also noted, however, that "[a]ssuming, *arguendo,* that the circuit court was uncertain regarding Respondent's desire to discharge counsel, the court was required to resolve any ambiguity regarding that request *before* denying the motion to postpone." *Id.* at 245 (emphasis in original). The circuit court in *Graves* did not seek to clarify the ambiguity regarding the respondent's request. Nor did the court grant a postponement or provide a forum for the respondent to explain his reasons. In the absence of such clarification, where the court did not provide the respondent with the opportunity to explain his reasons for requesting to discharge counsel and only questioned the respondent regarding his understanding of the charges and any steps he had taken toward hiring private counsel, the circuit court failed to comply with Rule 4-215(e). *Id.* at 251-52.

In the present case, before Appellant raised this issue with the court, the court granted a postponement—setting the case for trial 49 days from the hearing. Without a doubt, Appellant's statement to the court "I want my attorney. I (inaudible) want to fire my attorney," was sufficient to trigger the process mandated by Md. Rule 4–215(e). *See Gambrill*, 437 Md. at 302. Thereafter, the court sought to clarify whether Appellant was "indicating that [he] want[ed] to represent [him]self or that [he] want[ed] to hire an attorney of [his] own choosing through [his] own funds?" Appellant responded, "I will represent myself until I get a paid attorney." Recognizing some confusion on the part of Appellant regarding whether he was waiving the right to counsel—and having already granted a postponement of 49 days—the court determined to hold the motion *sub curia* and allow Appellant time to obtain private counsel or reconsider his decision. However, the circuit court reiterated to Appellant that

> when the day comes for the trial . . . you can at that point opt not to have any representation whatsoever. . . . You can fire your attorney at the time of the trial if you so choose. And in the meanwhile, you are certainly free to hire your own representation.

Importantly, Appellant agreed to the court's proposal, stating "all right." We note also that neither Appellant nor his defense counsel lodged any objection to the circuit court's handling of the request. *See State v. Westray*, 444 Md. 672, 686 (2015) (citing *Nalls v. State,* 437 Md. 674, 691-94 (2014)) ("[C]onsistent with Rule 8–131(a), [] a defendant who seeks to overturn a conviction on the ground that the court did not make the requisite finding on the record must preserve the issue before the circuit court by making a contemporaneous objection.").

Rule 4-215(e) requires that a trial court provide a defendant with the opportunity to offer an explanation for discharging counsel, consider the merits of the defendant's stated reasons, and decide rationally whether the reason is meritorious. *See Graves*, 447 Md. at 242. The circuit court in this case provided Appellant a forum in which to provide that explanation. Although the "trial judge has no affirmative duty to rehabilitate a defendant's expression of why he or she may desire to discharge his or her counsel," when the court recognized some ambiguity regarding Appellant's request it sought to clarify any misunderstandings. *Taylor,* 431 Md. at 642. Unlike in *Graves*, here the circuit court did seek to clarify the ambiguity surrounding Appellant's request and did provide Appellant the opportunity to explain his reasons for requesting to discharge counsel. 447 Md. at 251-52. In such a situation, "the trial judge has the duty to listen, recognize that he or she must exercise discretion in determining whether the defendant's explained reasons are meritorious, and make a rational decision." *Taylor,* 431 Md. at 642 (citation omitted).

Here, the rational decision reached by the court was to hold the motion *sub curia*—recognizing that an adequate postponement had already been granted, there were no further proceedings on that day, and acknowledging that Rule 4-215's requirements can be satisfied in a "piecemeal, cumulative" fashion by multiple circuit court judges over multiple hearings, *see Broadwater*, 401 Md. 175, 200-02 (2007). Following the 49-day postponement, at the start of trial, Appellant failed to raise the issue again. Rather, Appellant having failed to obtain private counsel proceeded to trial represented by the public defender whom he had contemplated discharging. Moreover, when Appellant

eventually renewed his request at the end of the second day of his trial, the court halted the proceedings and allowed Appellant to explain his reasons for wanting to discharge counsel at length, as reproduced above.

"Rule 4-215(e) does not apply literally once voir dire begins, and, therefore, the trial judge was not obliged necessarily to adhere to the Rule's strict procedural requirements in considering [a defendant's] request." *State v. Hardy*, 415 Md. 612, 624 (2010): *see also Bey v. State*, 228 Md. App. 521, __ (2016) ("To prevent confusion on the part of a jury as to why a defense lawyer was first 'in' the case and then 'out,' and to reduce the potential for a mistrial, 'the right to substitute counsel and the right to self-representation are, of necessity, curtailed once trial begins.'" (quoting *State v. Brown,* 342 Md. 404, 426 (1009))). Nevertheless, the circuit court in this case adhered to the procedure reiterated in *Westray*, as three key steps:

> *(1) The defendant explains the reason(s) for discharging counsel*
>
> * * *
>
> *(2) The court determines whether the reason(s) are meritorious*
>
> * * *
>
> *(3) The court advises the defendant and takes other action*[.]

444 Md. at 674-75 (italics in original) (quoting *Dykes v. State*, 444 Md. 642, 651-54 (2015)).

Here, the court twice asked Appellant if there were any additional reasons he wanted to state for discharging counsel. Following a brief recess, the court addressed Appellant and implicitly determined that his reasons were not meritorious—informing Appellant that

"if you were to discharge him and seek postponement (a) I'm saying it would be denied and (b) I believe it would be a delay tactic." Then the court advised Appellant stating "I want you to understand that if you fire [Defense Counsel] we will continue the trial today, and unless, you have another lawyer standing by, you'll be representing yourself. Do you understand that?" Thereafter, Appellant again chose to retain his assigned counsel and move forward with the trial.

Maryland Rule 4-215(e) demands strict compliance. *Gonzales v. State*, 408 Md. 515, 530 (2009) (citation and internal quotation marks omitted). However, we decline to graft onto the Rule a requirement that a court affirmatively rehabilitate a defendant's expression of why he or she may desire to discharge his or her counsel, *see Taylor,* 431 Md. at 642; especially where the court has already provided a postponement sufficient to allow the defendant the opportunity to obtain new counsel. The court, in this case, provided ample opportunities for Appellant to articulate his reasons for requesting to discharge counsel. Given the language of the Rule and the safeguards it was designed to protect, we perceive no error on the part of the circuit court.

II.

Speedy Trial

Appellant argues that he was denied his constitutional right to a speedy trial. He maintains that the delay of over a year in bringing his case to retrial was "especially egregious." Although Appellant acknowledges that the State did not seek "deliberate delay

for tactical advantage," he asserts that he suffered actual prejudice "in the form of oppressive pretrial incarceration for two years."

The State argues that, "[w]hile the delay in this case is presumptively prejudicial, it is far shorter than delays which Maryland courts have found not to violate a defendant's speedy trial right." The State maintains that the reasons for delay in this case were largely neutral. Further, the State argues that Appellant's claim of prejudice in the form of "'anxiety and concern of the accused' due to pretrial incarceration" was a mere assertion, lacking any supporting evidence or other information.

The Sixth Amendment to the United States Constitution, as well as Article 21 of the Maryland Declaration of Rights, guarantee the right to a speedy trial. *Nottingham v. State*, 227 Md. App. 592, 613 (2016) (citing *State v. Kanneh,* 403 Md. 678, 687 (2008)). We review a circuit court's judgment on a motion to dismiss claiming deprivation of that right making "our own independent constitutional analysis." *Randall v. State*, 223 Md. App. 519, 538 (2015) (citing *Glover v. State,* 368 Md. 211, 220 (2002)). "We perform a *de novo* constitutional appraisal in light of the particular facts of the case at hand; in so doing, we accept a lower court's findings of fact unless clearly erroneous." *Id.* (citing *Glover*, 368 Md. at 221).

We must first determine whether there was a sufficient delay to trigger a constitutional speedy trial analysis. *Nottingham*, 227 Md. App. at 613. "Ordinarily, in a case in which there was a retrial following the declaration of a mistrial, the starting point for computing the length of delay begins at the time when the mistrial was declared, and

the relevant time period runs until the commencement of the retrial." *Id.* (citing *Icgoren v. State,* 103 Md. App. 407, 420 (1995)). Generally, a delay approaching one year in length triggers a speedy trial analysis. *Doggett v. United States,* 505 U.S. 647, 652 n.1 (1992). *See also Divver v. State,* 356 Md. 379, 389–90 (1999) (stating that a delay of eight months could trigger speedy trial analysis); *State v. Ruben,* 127 Md. App. 430, 440 (1999) (stating that "delay of nearly 11 months from arrest to trial was of constitutional dimension, albeit barely so"); *Icgoren,* 103 Md. App. at 423 (stating that a delay of eleven months and thirteen days was "barely" of constitutional dimension)

Once the need for constitutional speedy trial analysis is apparent, we apply the four-factor balancing test articulated by the Supreme Court in *Barker v. Wingo,* 407 U.S. 514 (1972). *Nottingham*, 227 Md. App. at 613. "Those factors are: (1) the '[l]ength of delay'; (2) the 'reason for the delay'; (3) the 'defendant's assertion of' his speedy trial right; and (4) 'prejudice to the defendant.'" *Id.* (quoting *Barker,* 407 U.S. at 530). "None of these factors is, in itself, either necessary or sufficient to find a violation of the speedy trial right" *Id.* (citation omitted). Rather, they are considered together, along with the attendant circumstances and the conduct of both the State and the defendant. *Id.* (citations omitted).

a. Length of Delay

In the present case, Appellant's first trial ended in a mistrial on March 14, 2013. Appellant's retrial commenced on May 6, 2014. This delay of 13 months and 22 days is sufficient to trigger a speedy trial analysis. We note, however, and agree with the State, that, in the context of the speedy trial analysis, much longer delays have been deemed not

to be a violation of the right to a speedy trial. *See, e.g.*, *Barker*, 407 U.S. at 536 (holding that, under the facts of that case, a five-year delay was not a deprivation of the right to a speedy trial). Nevertheless, "'[t]he Court of Appeals has consistently held . . . that a delay of more than one year and fourteen days is 'presumptively prejudicial' and requires balancing the remaining factors.'" *Randall,* 223 Md. App. at 544-45 (citing *Lloyd v. State,* 207 Md. App. 322, 328 (2012)). Thus, although the length of delay in this case is not by itself egregious, we must consider it in the context of the remaining three factors.

b. Reasons for the Delay

Looking to the reasons for delay, we first note that on March 14, 2013, after the court declared the mistrial, it cautioned both Appellant and the State that it may take some time to schedule the retrial and stated "[y]ou get back in the queue [of cases] and there are other people who have not even had an effort at trial so be mindful of that." The period of time from the March 14 mistrial to Appellant's first scheduled trial date on June 7—two months and twenty-four days—is accorded neutral weight because the timing was primarily controlled by court availability.

We find no error in the circuit court's findings regarding the subsequent postponement requests. The June 7 postponement was requested by the State because the medical examiner who conducted the autopsy of the victim was unavailable due to military service. The circuit court concluded that this "was a legitimate reasonable request that would be weighted against the State, but not heavily." On August 15 and October 16, defense counsel was in trial and unavailable, and there was a State's witness who was

unavailable. Thus, those postponements are accorded neutral weight. On January 10, 2014, the prosecutor was in another trial and the circuit court found that to be a neutral event. On February 4, 2014, defense counsel was unavailable due to be scheduled to start another trial without sufficient time to try this case first. About this delay the circuit court determined that it "would weigh slightly in favor of the Defense, because it was a position that was essentially created by the Court." The final postponement on March 19, 2014 was requested by defense counsel because of an unavailable defense witness and, as the circuit court found, "would weigh against the Defense."

As the State points out in its brief, Appellant was responsible for a portion of the delay and the State was responsible for a portion of the delay; however, the bulk of the delay was properly attributed neutral weight. Here, it cannot be said that there was any "deliberate attempt to delay the trial in order to hamper the defense [that] should be weighted heavily against the government." *See Barker,* 407 U.S. at 531. Further, "a valid reason, such as a missing witness, should serve to justify appropriate delay." *Id.* We are not persuaded that the circuit court's findings were clearly erroneous, and we agree with the circuit court's finding that "overall, the reasons-for-delay factor, in large part, weighs against the Defense."

c. Defendant's Assertion of the Right

There can be no doubt, and the State concedes, that Appellant asserted his right to a speedy trial. As the circuit court correctly found, Appellant asserted the right on five occasions: May 21, 2012; June 7, 2013; January 10, 2014; February 4, 2014; and

March 19, 2014. "The defendant's assertion of his speedy trial right . . . is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right." *White v. State*, 223 Md. App. 353, 385 (2015). This factor weighs in favor of Appellant.

d. Prejudice to the Defendant

"[A] court should consider if the delay impacted the three interests that the right to speedy trial was designed to protect: '(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired.'" *Randall*, 223 Md. App. at 553 (quoting *Barker,* 407 U.S. at 532). In the case at bar, Appellant argued before the circuit court that "the prejudice in this case is inherent, based on oppressive pretrial incarceration, and anxiety, and concern of the accused." However, Appellant presented no specific arguments regarding his incarceration, his "concerns," or any detrimental effect the delay may have worked on his ability to mount a defense.

We have recognized that "not every accused must present an affirmative demonstration of prejudice to prove a denial of the right to a speedy trial." *Id.* at 554 (citing *Davidson v. State,* 87 Md. App. 105, 115 (1991)). *See also State v. Lawless,* 13 Md. App. 220, 233 (1971) ("That critical point on the delay scale where the presumption arises and where the burden shifts has been denominated the point of 'substantial' delay. To rebut the presumption, the State must persuade the hearing judge that the accused suffered no serious prejudice beyond that resulting from ordinary and inevitable delay."). Thus, courts are entrusted to "'recognize that excessive delay presumptively compromises the reliability

of a trial in ways that neither party can prove or, for that matter, identify.'" *Randall*, 223 Md. at 554 (quoting *Doggett v. United States*, 505 U.S. 647, 648 (1992)). "The Supreme Court has clarified, however, that presumptive prejudice alone cannot establish a speedy-trial violation; it is a part of the mix of relevant facts, and its importance **increases with the length of the delay.**" *Id.* (emphasis in *Randall*) (citations and internal quotation marks omitted). *See also Ratchford v. State*, 141 Md. App. 354, 360 (2001) ("Presumed prejudice simply enjoys a weight proportionate to the length of delay itself, a factor that we have observed as being in this case very marginal.").

In the present case, although the length of the delay was sufficient to trigger the speedy trial analysis, the reasons behind the delay and the length of the delay are not sufficiently weighed against the State to warrant a presumption of prejudice requiring the burden to shift onto the State to prove there was no prejudice. *See, e.g.*, *Lawless*, 13 Md. App. at 243 (holding that the defendant was not denied his speedy-trial right despite the lapse of 18 months from his indictment to his arraignment). The burden of proving prejudice in this case is left to Appellant, and we agree with the circuit court's observation that the assertion of prejudice "without any supporting evidence or information -- other than the mere assertion – is not sufficient." *Cf. Ratchford*, 141 Md. App. at 360-361 ("In terms of this variety of actual prejudice, the appellant does not make much of a case. In terms of showing actual prejudice, moreover, the burden is on the defendant."). We accord the prejudice factor neutral weight.

e. Balancing

After examining the four *Barker* factors and balancing all of the facts and circumstances we conclude that Appellant's right to a speedy trial was not violated. Although the delay totaled almost 14 months, only 3 of those months were potentially attributable to the State. Weighing the particular circumstances of this case, including the lack of any demonstrated prejudice, we conclude that the circuit court did not err in denying Appellant's motion to dismiss.

III.

Motion for Mistrial

Appellant argues that the circuit court abused its discretion in denying his motion for a mistrial based on the State's closing arguments. In his brief, Appellant points to "several improper, closing arguments by the State." Appellant's argument presented in the motion for mistrial was that "a number of times . . . the State kept on stating that evidence came in that should have been objected to by the State" and "it [] leaves the jury with the impression that a tricky Defense attorney . . . snuck in [] inadmissible evidence." Nevertheless, on appeal Appellant adds to his argument, claiming that additional objected-to statements "engaged in improper vouching for the credibility of police officers" and that "the State improperly urged the jury to ignore the burden of proof beyond a reasonable doubt." As the State points out, these issues were not presented to the court for consideration in the motion for mistrial.

When challenging the circuit court's ruling on the motion for mistrial, Appellant is limited to the grounds specified in the motion. *See Klauenberg v. State*, 355 Md. 528, 555 (1999) ("[B]y stating his ground for the motion for mistrial to the court, [the appellant] is limited to that ground on appeal."). Notwithstanding that the statements that form the bases for Appellant's additional allegations of improper closing argument were the subjects of contemporaneous general objections, they were not part of the circuit court's consideration of Appellant's motion for mistrial. "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[.]" Md. Rule 8-131(a). We decline to add new grounds to the motion for mistrial not considered by the trial court. *See Klauenberg*, 355 Md. at 555. Accordingly, we will address only those statements identified by Appellant that were pertinent to Appellant's argument presented to the trial court.

"A mistrial is an extreme remedy and it is well established that the decision whether to grant it is within the sound discretion of the trial court." *Walls v. State*, ___ Md. App. ___, ___, No. 1085, Sept. Term 2014, slip op. at 20 (July 27, 2016) (citing *Carter v. State,* 366 Md. 574, 589 (2001)). "'In the environment of the trial the trial court is peculiarly in a superior position to judge the effect of any of the alleged improper remarks.'" *Simmons v. State*, 436 Md. 202, 212 (2013) (quoting *Wilhelm v. State,* 272 Md. 404, 429 (1974)). Moreover, the Court of Appeals has consistently held that prosecutors are afforded "liberal freedom" when presenting closing arguments. In *Donaldson v. State*, the court stated:

> "The prosecutor is allowed liberal freedom of speech and may make any comment that is warranted by the evidence or inferences reasonably

> drawn therefrom. In this regard, generally, . . . the prosecuting attorney is as free to comment legitimately and to speak fully, although harshly, on the accused's action and conduct if the evidence supports his comments, as is accused's counsel to comment on the nature of the evidence and the character of witnesses which the prosecution produces.
>
> * * *
>
> While arguments of counsel are required to be confined to the issues in the cases on trial, the evidence and fair and reasonable deductions therefrom, and to arguments of opposing counsel, generally speaking, liberal freedom of speech should be allowed. There are no hard-and-fast limitations within which the argument of earnest counsel must be confined—no well-defined bounds beyond which the eloquence of an advocate shall not soar. He may discuss the facts proved or admitted in the pleadings, assess the conduct of the parties, and attack the credibility of witnesses. He may indulge in oratorical conceit or flourish and in illustrations and metaphorical allusions."

416 Md. 467, 488-89 (2010) (alterations in original) (quoting *Spain v. State*, 386 Md. 152-53 (2005)). Where statements made by a prosecutor in closing are the subject of a motion for mistrial, the Court of Appeals has observed that the trial court is afforded broad discretion in determining whether the prosecutor's statement were improper and "[o]n review, an appellate court should not reverse the trial court unless that court clearly abused the exercise of its discretion and prejudiced the accused." *Degren v. State*, 352 Md. 400, 431 (1999) (citations omitted).

In his brief, Appellant identifies four statements—made by the State in closing argument and rebuttal—that could support the argument that the State left the jury with the impression that defense counsel had improperly admitted inadmissible evidence or otherwise disparaged defense counsel.

First, Appellant cites the State's comment in closing that

> [Defense counsel] told you that [Appellant] is an innocent man. Now technically that could be considered vouching. Which . . . You can't -- the attorneys can't say this is what I think and you should too. It has to be based on evidence.

Appellant maintains that this remark was a "personal attack on the defense attorney" and calculated to unfairly prejudice the jury against the defendant. We note, however, that this statement (although perhaps poorly phrased) is merely a reiteration of the court's instruction already given to the jury that "[o]pening statements and closing argument of the lawyers are not evidence." The State was permitted to address the arguments of opposing counsel and to argue the evidence and fair and reasonable deductions therefrom. *Donaldson*, 416 Md. at 488.

Second, concerning the testimony of Agent Archambault, the State remarked:

> And the last question Mr. [Defense Counsel] asked him, you didn't chase after the man who ran away? And he said no. Well I should have objected because from his -- from his testimony there was no evidence of anybody running away.

Placed in context, however, it is clear that this statement was a clarification that Agent Archambault's testimony was that he never saw anyone running from or near the scene apart from Appellant. The comment was not directed toward attacking defense counsel's conduct. Rather, it addressed an issue raised by defense counsel regarding Agent Archambault's testimony. *See State v. Gutierrez*, 446 Md. 221, 242 (2016) ("The prosecutor is permitted to address issues raised by the defense." (quoting *Mitchell v. State,* 408 Md. 368, 389 (2009))).

Third, Appellant objects to the State's comment on rebuttal:

> [Defense counsel] points to [Exhibit] 2A and says that this fresh track indicates that the police were going [at] a high rate of speed when they were going around that corner.
>
> Problem with that is, there's no evidence that it's fresh. So that's assuming a fact not in evidence. That's essentially you -- he's inviting you to be tricked by . . . the terminology that he uses.

Again, in context, it is plain that the State was addressing an issue raised by defense counsel in his own closing and directly related to the inferences that could be drawn from the evidence before the jury. *See Donaldson*, 416 Md. at 488–89. The State's caution to the jury not to be "tricked . . . by the terminology" may have been an "indulge[nce] in oratorical conceit or flourish." *Id.* at 489. However, "[t]his determination of whether the prosecutor's comments were prejudicial or simply rhetorical flourish lies within the sound discretion of the trial court." *Dregen*, 452 Md. at 431.

Fourth, Appellant cites to the State's rebuttal argument that:

> Another one that I missed that [Defense] Counsel brought up, should have objected when he asked where [Appellant] said he lived . . . because that's hearsay. . . . And it's objectionable hearsay. That was self . . . reporting. That was [Appellant] saying where he lives.

Here again, the State was responding to an issue raised by defense counsel in closing. *See Gutierrez*, 446 Md. at 242. Rather than attacking defense counsel for presenting inadmissible hearsay evidence—as Appellant construes the statement—the State accepted the evidence as before the jury and sought to attack the credibility of the underlying hearsay. Arguing the evidence before the jury, the State continued: "Do you [the jury]

have any other actual proof of that? It fits in with [Appellant's] story, is there any proof of it?"

We note also that defense counsel failed to request any curative instruction, either at the time of his general objections to these statements or in the motion for mistrial. In the context in which these statements were made, and recognizing that the trial court is in a superior position to judge the effect of any of the alleged improper remarks, we cannot say that the trial court abused its broad discretion in determining that the prosecutor's statements were not improper. Indeed, as the Court of Appeals observed in *Beads v. State*:

It is well settled . . . that

> [n]ot every improper remark [made by a prosecutor during closing argument], however, necessarily mandates reversal, and "what exceeds the limits of permissible comment depends on the facts in each case." We have said that "reversal is only required where it appears that the remarks of prosecutor actually misled the jury or were likely to have misled or influenced the jury to the prejudice of the accused." This determination of whether the prosecutor's comments were prejudicial or simply rhetorical flourish lies within the sound discretion of the trial court. On review, an appellate court should not reverse the trial court unless that court clearly abused the exercise of its discretion and prejudiced the accused. *Degren v. State,* 352 Md. 400, 430–31, 722 A.2d 887, 902 (1999) (internal citations omitted).

422 Md. 1, 10-11 (2011) (bracketed alterations in *Beads*). We find no abuse of discretion in the trial court's ruling denying Appellant's motion for mistrial.

IV.

Sufficiency of the Evidence for CDS Distribution

At the end of the State's case, Appellant moved for judgment of acquittal on, among other things, the charge of possession with intent to distribute a controlled dangerous

substance. Appellant argued that the amount of marijuana found on his person was small and there was no expert testimony that possession of ten baggies was consistent with selling. The circuit court denied the motion, ruling that the evidence was sufficient based on the nature of the area, the way the marijuana was packaged, and because "there's no magic number" for which intent either appears or disappears. After the defense presented its witnesses, Appellant again moved for judgment of acquittal on the same ground, which the court denied.

Now before this Court, Appellant argues that the evidence was insufficient to sustain his conviction for possession of marijuana with the intent to distribute because "there was no expert (or lay) testimony [] that the quantity of 'ten small baggies' of marijuana was consistent with intent to distribute." Appellant also argues that "there was no expert (or lay) testimony that 'the way [the marijuana] was packaged' somehow indicated intent to distribute the marijuana." Additionally, Appellant maintains that no evidence was presented that the "area where this transpired" was known for drugs or that the other attendant circumstances—$68 recovered from Appellant, the size of the baggies, the recovered handgun—were consistent with an intent to distribute CDS. Thus, Appellant asserts that the State failed to prove he intended to distribute the marijuana and the circuit court erred by not granting his motion for judgment of acquittal as to the CDS distribution offense.

The State disagrees and argues that "there is no particular minimal amount of drugs below which a jury cannot infer an intent to distribute." The State maintains that whether

the quantity of CDS possessed and the attendant circumstances demonstrates an intent to distribute is for the jury to decide. The State asserts that the jury had sufficient evidence—in the form of the ten separately packaged bags found in Appellant's pocket—to reasonably infer that Appellant had the intent to distribute.

We review evidentiary sufficiency asking "'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.'" *Taylor v. State*, 346 Md. 452, 457 (1997) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). "That standard applies to all criminal cases, regardless of whether the conviction rests upon direct evidence, a mixture of direct and circumstantial, or circumstantial evidence alone." *Smith v. State*, 415 Md. 174, 185 (2010) (citation omitted). "Where it is reasonable for a trier of fact to make an inference, we must let them do so, as the question is not whether the [trier of fact] could have made other inferences from the evidence or even refused to draw any inference, but whether the inference [it] did make was supported by the evidence." *State v. Suddith*, 379 Md. 425, 447 (2004) (brackets in *Suddith*) (quotation marks and citation omitted). The fact finder "possesses the ability to 'choose among differing inferences that might possibly be made from a factual situation,'" and the appellate court "must give deference to all reasonable inferences [that] the fact-finder draws, regardless of whether [the appellate court] would have chosen a different reasonable inference." *Id*. at 430 (citations and footnote omitted). Thus, "the limited question before an appellate court 'is not whether the evidence *should have or probably would have* persuaded the majority of fact finders but

only whether it *possibly could have* persuaded *any* rational fact finder.'" *Allen v. State*, 158 Md. App. 194, 249 (2004) (quotation marks and citation omitted). It is long settled that "[w]eighing the credibility of witnesses and resolving any conflicts in the evidence are tasks proper for the fact finder." *State v. Stanley*, 351 Md. 733, 750 (1998) (citing *Binnie v. State*, 321 Md. 572, 580 (1991)).

Maryland Code (2002, 2012 Repl. Vol.) Criminal Law Article ("CL"), §5-602 provides:

> Except as otherwise provided in this title, a person may not:
> (1) distribute or dispense a controlled dangerous substance; or
> (2) possess a controlled dangerous substance in sufficient quantity reasonably to indicate under all circumstances an intent to distribute or dispense a controlled dangerous substance.

When a defendant is charged with possession with intent to distribute, "the element of intent is generally proved by circumstantial evidence." *Johnson v. State*, 142 Md. App. 172, 203 (2002) (citation omitted). "'As to proof of intent, we have stated that an intent to distribute controlled dangerous substances is seldom proved directly, but is more often found by drawing inferences from facts proved which reasonably indicate under all the circumstances the existence of the required intent.'" *Id*. (quoting *Smiley v. State*, 138 Md. App. 709, 716 (2001)).

Here, the State presented evidence that Appellant was arrested shortly after and near the scene of the shooting when he attempted to flee the area on foot. While he ran, Appellant threw a handgun to the ground. Upon Appellant's arrest, the police recovered ten baggies of marijuana and $68.00 in cash from the pocket of his pants. The State

introduced into evidence a photograph of the ten, individual baggies of marijuana. Further, Officer Medtart, one of the arresting officers, did testify that the area where Appellant was arrested was known as a "high drug area."

"'In Maryland, no specific quantity of drugs has been delineated that distinguishes between a quantity from which one can infer [intent to distribute] and a quantity from which one cannot make such an inference.'" *Purnell v. State*, 171 Md. App. 582, 612 (2006) (quoting *Collins v. State,* 89 Md. App. 273, 279 (1991)). However, "'[t]he quantity of drugs possessed is circumstantial evidence of intent.'" *Id.* (quoting *Collins*, 89 Md. App. at 279). We are persuaded that the evidence that Appellant possessed ten, individual baggies of marijuana both suggest a quantity and manner of packaging from which a rational juror could draw a reasonable inference of an intent to distribute. Moreover, there was additional circumstantial evidence that suggests an intent to distribute. Contrary to Appellant's argument on appeal, the State introduced evidence that the area where Appellant was arrested was a "high drug area." Additionally, Appellant possessed drugs *and* a handgun. We have acknowledged that there is a "nexus between drug distribution and guns[.]" *Whiting v. State*, 125 Md. App. 404, 417 (1999) ("observing that a person involved in drug distribution is more prone to possess firearms than one not so involved) (citations omitted). *Cf. Dashiell v. State*, 143 Md. App. 134, 153 (2002) (citation omitted) ("[p]ersons associated with the drug business are prone to carrying weapons"); *Banks v. State*, 84 Md. App. 582, 591 (1990) (acknowledging that possession of a firearm "is commonly associated with the drug culture" so that it follows that one involved in the

distribution of drugs would be more prone to possess a firearm than a person not so involved).

While expert testimony on this matter may have established intent more readily, we are persuaded under the circumstances presented that a rational juror would not have to resort to conjecture to infer that Appellant possessed the ten, individually packaged baggies of marijuana with the intent to distribute. "When it comes to suspicious circumstances, the whole is frequently greater than the sum of its parts." *Burns v. State*, 149 Md. App. 526, 543 (2003). Accordingly, we find no error by the trial court in denying Appellant's motion for judgment of acquittal on that count.

V.

Merger

On May 13, 2014, Appellant was convicted of both wearing, carrying, and transporting a handgun on his person in violation of CL § 4-203 and possession of a regulated firearm by a person convicted of a disqualifying crime pursuant to Maryland Code (2003, 2011 Repl. Vol.) Public Safety Article ("PS"), § 5-133.[3] Appellant was sentenced for both convictions. Appellant argues that the two sentences must merge for sentencing purposes because only a single instance of "possession" provides the basis for both convictions. Appellant further asserts that the rule of lenity requires that any ambiguity regarding the sentencing should be resolved in favor of Appellant. The State

[3] The parties stipulated that Appellant had been convicted of a disqualifying crime for the purpose of PS § 5-133.

disagrees, arguing that the Court of Appeals has made clear that convictions under these two statutes do not merge and the rule of lenity does not apply because the General Assembly clearly evinced "an intent that merger not occur."

The State is correct. Prior to recodification, CL § 4-203 and PS § 5-133 were codified as Maryland Code Article 27 §§ 36B and 445(c), respectively. Addressing whether those two offenses should merge for sentencing, the Court of Appeals, in *Frazier v. State*, concluded:

> With respect to Article 27, § 445(c) and § 36B(b), there is every indication that the Legislature intended that separate sentences may be imposed for the two offenses.
>
> * * *
>
> . . .[E]ven if offenses are deemed the same under the required evidence test, the Legislature may punish certain conduct more severely if particular aggravating circumstances are present, by imposing punishment under two separate statutory offenses. *See Newton v. State,* 280 Md. 260, 274 n.4, 373 A.2d 262 (1977). The Legislature's concern about the possession of a handgun, and its additional concern about the aggravating circumstance of the handgun being possessed by a person who has been convicted of a crime of violence, is not unreasonable. When all of this is viewed in the light of the legislative policy declared in § 36B(a), *see supra,* it is plain that the Legislature did not intend to prohibit separate penalties for violation of the two statutes.

318 Md. 597, 613-15 (1990). Upon revisiting this issue, following amendments enacted through the Maryland Gun Violence Act of 1996 and the Responsible Gun Safety Act of 2000, the Court of Appeals in *Pye v. State*, stated:

> The General Assembly has not seen fit to modify this Court's interpretation of the statutes at issue in *Frazier,* even though it has twice addressed similar issues. Rather than inserting a provision prohibiting duplicative sentencing, which it could have done in either of the subject

> enactments, 1996 or 2000, on which [the respondent] relies, it simply increased the permitted sentences.
>
> Moreover, and perhaps as important, it is most unlikely that the General Assembly would promulgate, on the one hand, a statutory scheme designed, in part, to increase sentences, while, on the other hand, and at the same time, intending that the doctrine of merger would apply and, thereby, reduce the total sentences. The legislature's actions in enacting the 1996 and 2000 legislation are consistent with our holding in *Frazier,* which we reaffirm.

397 Md. 626, 636-37 (2007). "[T]he offenses of carrying a handgun and possession of a firearm by a convicted person do not merge." *Id.* at 642.

JUDGMENTS AFFIRMED.

COSTS TO BE PAID BY APPELLANT.