UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2326

September Term, 2014

MARQUIS EVANS

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Arthur,
Salmon, James P.
(Retired, Specially Assigned),

JJ.

Opinion by Arthur, J.

Filed: July 20, 2016

This case is before us for the second time. After a jury trial in 2010 in the Circuit Court for Baltimore City, appellant Marquis Evans was convicted of felony murder and other crimes in connection with the 2008 shooting death of Thaddeus McCauley. In an unreported opinion, this Court reversed those convictions. *Evans v. State*, No. 1980, Sept. Term 2010 (filed Nov. 14, 2011).

Evans was retried in 2014, and he was convicted of felony murder, robbery with a dangerous weapon, first-degree assault, and use of a handgun in the commission of a crime of violence. On December 1, 2014, the court sentenced him to life imprisonment for the felony murder conviction and a consecutive term of 20 years, the first five to be served without the possibility of parole, for the handgun conviction. The remaining convictions merged for sentencing purposes.

This timely appeal followed.

QUESTIONS PRESENTED

Evans presents the following four questions for our consideration:

I. Was the evidence presented at trial insufficient to support convictions for robbery and, by necessity, felony murder because the State never proved that anything was stolen from Thaddeus McCauley?

II. Did the trial court repeat its error from Evans's first trial by admitting the very evidence that this Court held was "clearly inadmissible other crimes evidence"?

III. Did the trial court abuse its discretion in permitting the State to argue in closing an expert opinion not given at trial?

IV. Did the trial court err in failing to fulfill its duty under Maryland Rule 4-215 by refusing to make a merits decision on Evans's multiple requests to discharge counsel?

For the reasons explained in this opinion, we answer no to the first three questions but yes to the final question. The circuit court committed reversible error by failing to comply with Md. Rule 4-215(e) in response to Evans's pretrial requests to discharge defense counsel. We therefore reverse the judgments and remand the case for a new trial. Because we also conclude that the State produced sufficient evidence to support Evans's convictions, the State may retry Evans on all charges, including the charges for robbery and for felony murder.

FACTUAL BACKGROUND

On the morning of December 19, 2008, police officers discovered the body of Thaddeus McCauley on Homestead Street in Baltimore City. McCauley had died as a result of a gunshot wound to the torso.

The police officers found twenty dollars in McCauley's possession. Near the body, the police also found a cell phone and a small, plastic bag containing marijuana. The officers did not locate any eyewitnesses to the shooting. The only biological evidence recovered from the scene was McCauley's blood.

At the 2014 trial, the State played a recording of the prior testimony of Taray Jefferson, McCauley's girlfriend at the time of the shooting. Jefferson lived with McCauley at 1436 Homestead Street in Baltimore City along with some of her family members. McCauley made money by selling small amounts of marijuana, and he used his cell phone to conduct his drug-dealing business.

On the night of December 18-19, 2008, McCauley received a call on his cell phone from someone who wanted to purchase marijuana. Thereafter, he left the house

and never returned. After some time, Jefferson called McCauley's cell phone, but he did not answer. Jefferson left the house and saw police officers and neighbors outside. She later learned that McCauley was dead.

At the time of the shooting, Evans lived with his mother on Gorsuch Avenue in Baltimore City. Evans's home was about a seven-minute walk from the place where McCauley was shot.

The State offered testimony from two witnesses who had interacted with Evans on the night of the shooting: Evans's long-time friend, Antoine Whitaker; and Whitaker's aunt, Tonya Batson.

According to Whitaker, in December 2008 he lived on Flamepool Way in Columbia with Batson and her children. On December 18, 2008, Evans called Whitaker several times to ask if he could spend a couple of days with him in Columbia. Whitaker told Evans that he would need to pay fifty dollars for someone to drive into the city to pick him up. Evans responded that he did not have the money, but that he could "get a sedan and pull a heist on a sedan." Whitaker understood Evans to mean that he would either jump out of a taxicab and run away or that he would rob a cab driver. Whitaker told Evans that "it was stupid and he shouldn't do it."

Later, Evans called Whitaker again and asked him to set up a three-way phone call with someone at a specified phone number. That phone number was identified as the one belonging to the cell phone found near McCauley's body. During the three-way phone call, Whitaker heard Evans tell the other person that he wanted two bags of marijuana.

Sometime after that call was completed, Evans again called Whitaker and told him that he now had gas money and wanted someone to come pick him up in Baltimore City. Whitaker and a person named "Jarrett" drove to pick up Evans from his house.

After Whitaker left, Whitaker's aunt, Tonya Batson, received a phone call from Evans. Evans asked Batson to stay on the phone with him until Whitaker arrived to pick him up. According to Batson, Evans was "[o]ut of breath" and sounded like he just "finished having sex or something."

Whitaker said that when he arrived to pick up Evans, Evans entered the front passenger seat of the car carrying an overnight bag. Whitaker recalled that Evans was "smoking a blunt" in the car. Despite Batson's statement that Evans was "[o]ut of breath," Whitaker claimed that Evans appeared to be normal.

Once Evans had arrived at Whitaker's house in Columbia, Evans asked Batson if she was a nurse. She responded that she was a nursing assistant.

Evans went into the bathroom. Shortly thereafter, Whitaker heard a "thump." He pushed the door open and found Evans on the floor bleeding from his leg. Batson saw "a lot of blood" and saw that Evans was "blacking out." Batson told Whitaker to take Evans back to his mother's house or to a hospital. Whitaker took Evans to Howard County General Hospital and left him there because he "didn't want anything to do with it." Evans had suffered a gunshot wound to his right leg.

After being treated at the hospital, Evans made a series of statements to the police about his wound. His statements differed regarding the location of the shooting, the description of the shooter, and what had occurred before the shooting.

On the night of December 18-19, 2008, Howard County Police Officer Jeremiah Poehlman spoke with Evans at the hospital. After falsely identifying himself as "Devon Dixon," Evans told Officer Poehlman that he had been at a friend's house near Tamar Drive in Columbia when he decided to accompany two friends to a nearby Exxon gas station to purchase cigarettes. On the way back, they observed several persons fighting, one of whom reached into his waistband. Evans and his friends ran back to his friend's house, where Evans noticed that he had been shot in the leg.[1]

Detective Vicki Shaffer of the Howard County Police Department's violent crimes section also spoke with Evans at the hospital. Evans told Detective Shaffer that he had been shot while walking back from a gas station in Columbia. Detective Shaffer went to the gas station and spoke with an employee who had worked the night shift. Although Evans had claimed to have gone to the station with two friends to buy cigarettes, the station employee did not recall seeing three people come in for that purpose. Detective Shaffer confirmed that there were no 911 calls related to a shooting in the Tamar Drive area of Columbia.

During the course of her investigation, Detective Shaffer learned that Evans had connections to an address on Flamepool Way in Columbia. She went there and met with Whitaker, Batson, and a man named Jerred or Gerrard Williams.[2] The information she

[1] Evans's friend Whitaker denied ever going to a gas station with Evans.

[2] "Jerred" or "Gerrard" Williams may have been the man named "Jarrett" who went with Whitaker to take Evans out of Baltimore City.

received from them was inconsistent with the information that she had received from Evans.

When Detective Shaffer confronted Evans with the inconsistencies in his story, he admitted that he had been shot in Baltimore City, but was concerned about reporting it to the police there. He told Detective Shaffer that he had been walking from his home to a Citgo gas station on Greenmount Avenue and 33rd Street. He said that when he got to the 700 block of Belle Terre Avenue, a black male in his teens, wearing jeans and a dark colored hoodie, approached him, pulled out a gun, and said, "[g]ive me everything." Evans said that he turned, heard two or three gunshots, and ran home. After realizing he had been shot, he decided to call his friends in Howard County to pick him up. Upon hearing Evans's new version of events, Detective Shaffer called the Baltimore City Police Department.

Baltimore City Police Detective Joel Hawk interviewed Evans at a station house in Baltimore City. Evans said he was walking on Belle Terre Avenue toward his home when two persons walked up behind him and made him nervous. Someone made a "hissing" noise, and Evans took off running. Moments later, Evans heard two to three gunshots. Evans realized he had been shot once he arrived at home.

Detective Hawk examined Evans's gunshot wounds during the interview. At trial, Detective Hawk stated that Evans "was hit on the outside of his right hip leg area" and that the shot "went through inside his groin area on his left side and into his left leg interior." Detective Hawk believed that Evans's wounds were inconsistent with his

statement that the gunman was about a half a block behind him when the shots were fired.

Baltimore City Police Detective James Lloyd was assigned to investigate McCauley's murder. Detective Lloyd testified that no other shootings were reported in the area where McCauley was shot on December 18-19, 2008. Detective Lloyd also testified that he obtained a search warrant for Evans's home on Gorsuch Avenue based on the phone records for McCauley's cell phone, statements from Jefferson (McCauley's girlfriend), and statements from Batson and Whitaker. Thereafter, Evans was charged with numerous crimes arising out of the shooting of McCauley.

Detective Lloyd had interviewed Evans on March 5, 2009, and a recording of the interview was played for the jury. In that interview, Evans admitted that his initial report was untruthful. Evans stated that he left his home on Gorsuch Avenue to purchase a few "nickel bags" of marijuana. He said that he had received about thirty dollars from his family because he "just came home." He mentioned that he was carrying a "Dutch Master" cigar at the time and that he planned to "put weed in it." Along the way to meet the dealer, he encountered three men, heard gunshots, and started running. He did not know that he had been shot until he got home. He said that he was concerned about how his mother would react to the sight of blood, and so he called his friend, Whitaker, who agreed to drive from Howard County to help him.

We shall provide additional facts as necessary in our discussion of each of the issues presented.

DISCUSSION

In this appeal, Evans raises three challenges regarding the events of his trial and one challenge based on his pretrial proceedings. Our ultimate conclusion is that the judgments must be reversed because the circuit court did not comply with Md. Rule 4-215(e) before trial.

Notwithstanding that conclusion, double jeopardy principles require us to address Evans's first challenge, regarding the sufficiency of the evidence underlying some of his convictions. *See, e.g.*, *Winder v. State*, 362 Md. 275, 324-25 (2001) (explaining that appellate courts will address sufficiency challenges even when the court reverses on another ground because a holding that the evidence was legally insufficient to support a conviction on any count bars retrial on that count). In addition, we shall address the two remaining issues, regarding certain evidence and arguments offered at trial, in the event that those issues might recur on remand. *See, e.g.*, *Taylor v. State*, 226 Md. App. 317, 371 (2016) (citing *Perez v. State*, 168 Md. App. 248, 286 (2006); *Odum v. State*, 156 Md. App. 184, 210 (2004)).

I.

Evans contends that the evidence was insufficient to support his conviction for robbery because the State failed to prove that anything was stolen from McCauley. In

addition, Evans maintains that because the State failed to establish a robbery, his conviction for felony murder, which was based on the robbery, cannot stand.[3]

In deciding a challenge to the sufficiency of the evidence, we consider "'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.'" *Smith v. State*, 415 Md. 174, 184 (2010) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)); *see Hobby v. State*, 436 Md. 526, 537-38 (2014). We give "due regard to the [factfinder's] findings of facts, its resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the credibility of witnesses." *Harrison v. State*, 382 Md. 477, 487-88 (2004) (quoting *Moye v. State*, 369 Md. 2, 12 (2002)) (quotation marks omitted). In performing its function, the jury is free to accept the evidence it believes and reject evidence that it does not believe. *Coleman v. State*, 196 Md. App. 634, 649 (2010) (citing *Muir v. State*, 64 Md. App. 648, 654 (1985)).

The sufficiency standard applies without regard to whether the State presented direct or circumstantial evidence of guilt, as "proof of guilt based in whole or in part on circumstantial evidence is no different from proof of guilt based on direct eyewitness accounts." *State v. Smith*, 374 Md. 527, 534 (2003) (citation omitted). Although

[3] In his prior appeal, Evans also argued that the State failed to prove that he took any property from McCauley. This Court did not reach that issue, because he had moved for a judgment of acquittal during the first trial only on the theory that there was insufficient circumstantial evidence that he shot McCauley. *Evans v. State*, No. 1980, Sept. Term 2010, slip op. at 57. Based on the evidence at the first trial, this Court held that "a reasonable jury could conclude that [Evans] intended to and did commit an armed robbery of Mr. McCauley, resulting in Mr. McCauley's death." *Id.* at 60.

circumstantial evidence alone may be sufficient to sustain a conviction, the inferences made from circumstantial evidence must rest upon more than mere speculation or conjecture. *Bible v. State*, 411 Md. 138, 157 (2009) (citing *Taylor v. State*, 346 Md. 452, 458 (1997)). We "view the evidence, and all inferences fairly deducible from the evidence, in a light most favorable to the State." *Hackley v. State*, 389 Md. 387, 389 (2005) (citations omitted).

After the State rested its case, defense counsel moved for a judgment of acquittal as to the robbery count, arguing that there was "no evidence before the Court that any of the victim's property was actually taken[.]" The State responded that the jury could infer that Evans possessed neither money nor marijuana before meeting with McCauley, but that he possessed both money and marijuana afterwards. The court denied the motion.

On appeal, Evans again contends that the State failed to produce evidence that any property was taken from McCauley. He argues that the State did not establish whether McCauley possessed anything at the time of the shooting besides the cell phone and bag of marijuana that the investigators found next to his body. Evans points out that McCauley's girlfriend, Taray Jefferson, testified that McCauley sold small amounts of marijuana, that he used his cell phone to conduct business, and that McCauley left the home on the night of the shooting after receiving a call on his cell phone from "[s]omeone wanting to buy marijuana." She did not, however, testify about either the quantity of marijuana or the amount of money, if any, that McCauley had with him when he left the house.

In response, the State asserts that the jury could reasonably conclude that Evans met McCauley in accordance with their prearranged plan and that, when they did, Evans shot and killed McCauley. According to the State, the jury did not have to speculate that Evans took money and marijuana from McCauley, because Whitaker testified that Evans told him that he did not have money before he arranged to meet McCauley, but thereafter, Evans possessed both money and marijuana.[4]

The essential elements of robbery are "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[.]" *West v. State*, 312 Md. 197, 202 (1988) (citations omitted). Robbery with a dangerous or deadly weapon is simply a robbery "aggravated by the use of a 'dangerous or deadly weapon.'" *Fetrow v. State*, 156 Md. App. 675, 687 (2004) (and cases cited therein).[5]

In support of his argument, Evans relies on two Maryland cases in which the Court concluded that the State produced sufficient evidence of the "felonious taking and

[4] The State also argues that, because Evans has not challenged the sufficiency of the evidence as to his "criminal agency," Evans "concedes" that the evidence would permit a trier of fact to find that Evans was the person who shot and killed McCauley. Evans made no such concession.

[5] Maryland's robbery with dangerous weapon statute states that "[a] person may not commit or attempt to commit robbery . . . with a dangerous weapon[.]" Md. Code (2002, 2012 Repl. Vol.), § 3-403(a)(1) of the Criminal Law Article ("CL"). First-degree murder includes a murder "committed in the perpetration of or an attempt to perpetrate . . . robbery" under CL § 3-403. The State did not charge Evans with attempted robbery and did not ask for a jury instruction about attempt.

carrying away" element: *Jones v. State*, 217 Md. App. 676, *cert. denied*, 440 Md. 227 (2014), and *Conyers v. State*, 345 Md. 525 (1997).

In *Jones*, this Court addressed whether a jury could infer a taking in a robbery case. In that case, two men had been shot inside a car. *Jones*, 217 Md. App. at 683-87. The investigators found a dead body in the front passenger's seat and two cell phones and five dollars in the back seat. *Id.* at 687. A surviving victim identified Jones as the assailant. *Id.* at 687-88.

At trial, the surviving victim explained that Jones had been in the back seat of the car when he produced a gun and demanded that the two front-seat passengers toss their cell phones and cash into the back seat. *Id.* at 684. After the passengers complied, Jones shot them and fled. *Id.* The surviving victim stated that he threw about sixteen dollars into the backseat and that the deceased victim also threw a couple of dollars into the backseat. *Id.* at 702. Jones denied any involvement in or knowledge of the shootings and claimed that he merely engaged in a five-minute drug deal inside the car before going back into his home. *Id.* at 685-86. No physical evidence connected Jones to the murder, and the case turned on whether the jury believed Jones or the surviving victim. *Id.* at 689.

On appeal, Jones argued that the State produced insufficient evidence to prove that he actually took any of the items thrown into the back seat of the car and that such an inference was mere speculation. *Id.* at 699, 702. We disagreed, explaining that "[i]f the State introduced evidence showing that [the victims] threw money and/or items into the back seat in excess of that recovered, it follows logically that a rational juror could have

found that the alleged robber took their property." *Id.* at 702. Because the victims had thrown more than sixteen dollars into the backseat, but only five dollars remained at the scene, the jury could infer Jones had taken some of the money. *Id.* at 703. It did not "matter if Mr. Jones took less than all of the property the victims threw into the back seat – if he robbed them of some of it and left some, he still robbed them." *Id.* at 702.

In *Conyers*, the Court of Appeals held that it was reasonable to infer that the defendant took some amount of money from the victim's wallet during a home invasion. *Conyers*, 345 Md. at 558-59. In that case, the State presented testimony that the murder victim had had twenty dollars and that she customarily kept a small amount of money in her wallet. *Id.* at 535. After the crime, the victim's wallet was found empty on top of a dresser. *Id.*

Conyers challenged the sufficiency of the evidence underlying his convictions for robbery and robbery with a dangerous and deadly weapon, both of which were predicates for his felony murder conviction. *Id.* at 556. Specifically, Conyers argued the State produced no evidence that he had removed any property from the victim's possession. *Id.* at 558. The Court of Appeals disagreed, reasoning that, because of the testimony that the victim generally kept currency in her wallet and had twenty dollars at the time of the crime, it was reasonable for the jury to infer that Conyers had taken some amount of money, most likely twenty dollars, from the wallet during the home invasion. *Id.* at 558-59.

On the basis of *Jones* and *Conyers*, Evans argues that a jury may infer that an item was taken only if the evidence shows that "some item in the victim's possession . . . was

missing after the events of the alleged crime[.]" He argues that in this case the State failed to show that McCauley possessed anything at the time of the shooting other than the cell phone and a bag of marijuana that were found near his body. His argument fails because the State presented evidence from which a jury could infer that McCauley possessed more than one bag of marijuana when he left to meet with Evans.

As recounted previously, the jury heard testimony that Evans told his friend Whitaker that he did not have money to pay for gas, but he could "pull a heist on a sedan." At Evans's request, Whitaker initiated a three-way phone call with himself, Evans, and McCauley. Whitaker heard Evans ask for "two bags of marijuana." In addition, in one of his statements to the investigators, Evans told Detective Lloyd that he went out on the night of the shooting to purchase "two or three" "nickel bags" of marijuana. Evans stated that he left his home for the purpose of purchasing marijuana and that he was in close proximity to the scene of the shooting. Through the testimony of McCauley's girlfriend, the jury could conclude that McCauley received Evans's request and left his home with his cell phone and at least two bags of marijuana to complete the sale. It was undisputed that investigators found one bag of marijuana near McCauley's body and that McCauley had been shot to death. According to Whitaker, Evans was "smoking a blunt" – a cigar hollowed out and filled with marijuana – after he was picked up in Baltimore City.

From this evidence, a reasonable juror could infer that Evans had no marijuana before the call to McCauley; that McCauley left his house with more than one bag of marijuana to satisfy Evans's stated request for two, or possibly, three bags; and that

Evans took at least one of those bags from McCauley and was smoking some of its contents when Whitaker arrived to pick him up. Because the evidence therefore showed that McCauley probably left his home with a number of bags "in excess of that recovered" from his body, "a rational juror could have found that the alleged robber took [McCauley's] property." *Jones*, 217 Md. App. at 702.

Because the trial court did not err in denying Evans's motion for judgment of acquittal, the State is not barred from retrying Evans on the charges of robbery and felony murder. *See Winder*, 362 Md. at 324.

II.

Evans contends that the trial court erred in admitting the same evidence that we determined in a prior appeal was "clearly inadmissible other crimes evidence." Specifically, Evans argues that the trial court erred in admitting Evans's statement to detectives that he "just came home." We disagree.

In *Evans v. State*, No. 1980, Sept. Term 2010 (filed Nov. 14, 2011), we addressed Evans's contention that, in his first trial, the court erred in admitting "'[t]hree discrete pieces of evidence . . . [that] Mr. Evans (1) had just got home; (2) was on parole; and (3) was supervised by the violence prevention unit [VPU]' as each 'repeated reference' to his status as such, was prejudicial 'other crimes' evidence . . . ." *Evans*, No. 1980, Sept. Term 2010, slip op. at 46-47 (footnotes omitted). The references occurred in connection with Evans's explanation about why he falsely claimed to have been shot in Howard County: he said that he was concerned it would result in a parole violation if he disclosed that he had been shot in Baltimore City. This Court concluded that "any reference to

parole, probation, or VPU was clearly inadmissible other crimes evidence." *Id.* at 51. We explained:

> [T]he jury heard references to parole and probation on more than one occasion, even if not actually admitted into evidence. The jurors also heard references to VPU, which references were admitted into evidence and, while they might have known what VPU meant, even if they did not, in context, they had to believe it was associated with a criminal record. The court's attempts to ameliorate the prejudice caused by the admission of and/or the placing of the non-admitted references before the jury, . . . by instructing the jury to disregard the references, were insufficient to overcome Evans's right to a fair trial. The information was prejudicial to Evans, no matter how it was elicited, and requires reversal.

Id. at 51.

We went on to say that "the State could have simply put into evidence Evans's statement without any reference to parole, probation, and VPU and called Detective Shaffer to testify that Evans told her different versions, without reference to parole, probation, and VPU." *Id.* We added that defense counsel did not waive the objection to the statements through later attempts to "defuse any harmful effect from the words parole, probation, and VPU[.]" *Id.* at 52.

On the first day of Evans's second trial, defense counsel made a motion in limine to exclude "references [that] were made to [Evans] being at the time of this event on VPU, violence prevention unit, [or] parole, [or] having recently been discharged to the supervision of the parole department." The prosecutor responded that after the first trial the State had redacted the recorded statements to remove the objectionable references, but requested clarification on whether the recordings could include Evans's statement that he "just came home." Defense counsel argued that the phrase was a "code . . .

referring to some form of incarceration." The court concluded, however, that the phrase was "in and of itself an innocuous phrase, without more[.]" When the State offered the recording as evidence, defense counsel asked for a continuing objection based on the "prior reasons."

The trial court allowed the jury to hear the redacted statements that Evans made to police. During an interview, Evans stated that he had about thirty dollars in his possession at the time he was shot. When asked where he got the thirty dollars, Evans said, "I get money from my family since I just came home."

On appeal, Evans contends that the court's rulings ran afoul of the law of the case doctrine. Under that doctrine, "[o]nce an appellate court has answered a question of law in a given case, the issue is settled for all future proceedings." *Stokes v. American Airlines, Inc.*, 142 Md. App. 440, 446 (2002) (citations omitted). The doctrine, however, is limited to the specific holding of the earlier case; it does not apply when the evidence admitted in a subsequent trial is substantially different from the evidence in the earlier trial. *Garner v. Archers Glen Partners, Inc.*, 405 Md. 43, 56 (2008); *Tu v. State*, 97 Md. App. 486, 497 (1993).

Contrary to Evans's assertion, this Court's prior opinion did not hold that the statement that he "just came home" was inadmissible other-crimes evidence. Rather, after recounting each of the statements that Evans had argued were inadmissible, this Court held that any reference to his "parole, probation, or VPU was clearly inadmissible other crimes evidence." *Evans*, No. 1980, Sept. Term 2010, slip op. at 51. At Evans's second trial, the State made no mention of his probation or parole status or his

supervision by VPU. Standing alone, Evans's statement that he "just came home" is not a reference to probation, parole status, or VPU, which is the evidence that we held to be inadmissible. As a result, the law of the case doctrine did not require the exclusion of Evans's statement that he "just came home."

Although Evans's challenge focuses on the law of the case doctrine, he also argues in an extended footnote that, "independent of this Court's prior pronouncement, the 'just got home' statement qualified as inadmissible other crimes evidence." In general, evidence of other wrongs is inadmissible unless it is relevant to an issue other than a defendant's propensity to commit a crime and the trial court finds that its probative value outweighs its prejudicial effect. Md. Rule 5-404(b). The trial court rejected defense counsel's argument that the statement "just came home" was generally understood as "code" for returning home from incarceration. The court concluded that, standing alone, that phrase was not evidence of a prior wrong, was not prejudicial, and did not convey any conduct that impugned Evans's character. We see no error in that conclusion.[6]

In sum, neither the law of the case doctrine nor Rule 5-404(b) precludes the State, on remand, from introducing Evans's recorded statement that he had "money from [his] family since [he] just came home."

[6] The evidence at trial supplies an example of why the statement that someone "just came home" is innocuous. Whitaker's aunt, Batson, testified without objection that Evans had not been calling Whitaker too often because "[h]e just came in from Alabama." (It is unclear whether she was talking about Evans or Whitaker "coming in" from Alabama.) Standing alone, such a statement is not evidence of any wrong.

III.

At trial, the prosecutor attempted to elicit testimony from Detectives Shaffer and Hawk that Evans's gunshot wound was self-inflicted. The court sustained objections as to both witnesses on the ground that neither was properly qualified as an expert to give such an opinion. Nevertheless, the jury received evidence of Evans's wounds, including his medical records from the night he was treated at the hospital in Howard County and Detective Hawk's testimony regarding his observations of contradictions between Evans's version of the shooting and his injuries.

Throughout Detective Hawk's testimony, the court did not permit him to testify that he believed it was "impossible" that Evans's injuries resulted from a shooter firing from a half a block away. Near the end of redirect examination, however, the following testimony was admitted without objection:

> [PROSECUTOR:] Now, regarding . . . the injuries the Defendant sustained and the way in which he described sustaining those injuries, what, if anything, was inconsistent with the two?
>
> [DET. HAWK:] The – the track pattern of the wound. Where he places the shooter in shooting him at the time. His motions.
>
> [PROSECUTOR:] Can you explain in greater detail to the Jury? The track pattern was the first thing you said.
>
> [DET. HAWK:] Bullets go in straight lines. They can't go around corners. They can't curve. They can't go up. They can't come down like that. They go in straight lines. So if I'm running and someone is shooting behind me, I'm going to be struck from the rear. I'm going to be hit – I can be hit anywhere in the body. But if I'm going to be hit at a downward angle on the side, you've got to be either right up on top of me, or I've got to do it myself.

In the rebuttal portion of his closing argument, the prosecutor argued that Evans's gunshot wound was self-inflicted. Evans contends that the trial court abused its discretion in allowing that argument. He maintains that the State presented no evidence that his gunshot wound was self-inflicted because no witness was qualified to render such an expert opinion. Recognizing that the prosecutor's argument relied on an inference, Evans asserts that the argument was "off-limits to the prosecution because of its nature as an expert opinion." He argues that allowing the State "to draw and communicate any-and-every inference it desired during closing argument" would "subvert Maryland Rule 5-702, and the very idea of 'expert' witnesses[.]"[7] We disagree.

The prosecutor made the following comments in rebuttal:

> [PROSECUTOR]: . . . Important to remember, Defense Counsel, you know, doesn't touch it at all, is that when Antoine Whitaker picked up the Defendant, I asked him, did you see anything wrong? Did you see blood spurting from him? No. He didn't see any. There was no sign of any injury.
>
> Nothing indicated – there was no blood on his clothes. I didn't see anything wrong with him at all. What does that mean? Well, if he was bleeding – well, actually, we know he did something to stop the blood from forming on his clothes. Because he actually put something – they said a shirt – but he bandaged his wounds. He covered his legs before going to Howard County.

[7] Maryland Rule 5-702 provides:

> Expert testimony may be admitted in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making that determination, the court shall determine (1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, (2) the appropriateness of the expert testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony.

But also, it means that he wasn't just spouting blood, pooling all over the place. But there's no blood trail, does not mean that he didn't shoot himself. And again, when you look at the injury – and there are photographs, which are in evidence, which you could examine up close of his legs (indicating) right?

The angle of the wound, as denoted everywhere, is this way (indicating) through his legs. Consistent with a gun being in the pocket, and it either going off when he was putting the gun away after shooting and killing Thaddeus McCauley. Or when he's taking it out to rob Thaddeus McCauley.

* * *

Boom. Gun goes off. I don't know – again, I submit the State cannot say whether the bullet was fired into his legs when he was taking the gun out or putting the gun away. But there's no way you get an injury like this (indicating) traveling downward through your legs, in that area, without the gun being – without the gun being fired at this angel [sic], this way (indicating). Important in that, is how the Defendant described incurring these injuries.

In every version of events, in every version the Defendant told – whether it be the Howard County; or he was by Tamar [Drive], and he saw two people arguing and he started running, and he was shot; whether it was what he told Detective Joel Hawk, where there was [sic] some guys walking there about 40 feet behind him, he heard the hiss, he began to run, he heard shots fired; or he tells James Lloyd that he saw someone who looked just like him committing a robbery; or engaged in some kind of, you know, physical altercation on Homestead Street, and he turned to run, he got shot – in each and every fact pattern, the Defendant gave to account for his injuries, he's turning to run, and gets shot.

Well, you aren't going to have a wound going through your side and downward. I mean, you're talking more magical than the JFK bullet. Bullets travel in straight lines. All right. For a bullet to go out, and then turn, and then go down, that is what Detective Joel Hawk was finding incredulous [sic], when he said it didn't –

[DEFENSE COUNSEL]: Objection, Your Honor.

THE COURT: Overruled

[DEFENSE COUNSEL]: Your Honor, I'm asking to approach.

THE COURT: Overruled. Continue. That's argument.

* * *

[PROSECUTOR]: – the way he described incurring the injuries, doesn't make sense. And if you look at the medical records the Defense Counsel put into evidence, all right, they indicate – and detectives talked to hundreds of those reports, and he took a – he argued that it was incomplete – they indicated wounds to the inside of his legs.

Different story, same result. You're not going to get wounds to the inside of your legs, parallel wounds going downward on the inside of your legs, without there being this trajectory (indicating). So, different story, same result. Self-inflicted gunshot wound, is what it's evidence of.

According to Evans, this argument shows that the prosecutor "designated himself an expert during summation to complete an end-run around the judge's qualification ruling."

Attorneys are afforded great leeway in presenting closing arguments to the jury. *Degren v. State*, 352 Md. 400, 429 (1999).

> 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 case 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.

Id. at 429-30.

"[J]urors may be reminded of what everyone else knows, and they may act upon and take notice of those facts which are of such general notoriety as to be matters of common knowledge," even though evidence of such facts has not been formally introduced. *Wilhelm v. State*, 272 Md. 404, 439 (1974). In addition, the State may respond to issues and arguments raised by the defense. *Donaldson v. State*, 416 Md. 467, 493 (2010).

That said, the scope of what counsel may argue is not boundless. *Henry v. State*, 324 Md. 204, 230 (1991). Counsel may not "comment upon facts not in evidence or . . . state what he or she would have proven." *Smith v. State*, 388 Md. 468, 488 (2005) (citing *Wilhelm*, 272 Md. at 414-15).

Reversal is warranted when the State's arguments "actually misled or were likely to have misled the jury to the defendant's prejudice" (*Wilhelm*, 272 Md. at 415-16), or where the arguments "trespass[ed] upon a defendant's Constitutional rights." *Wise v. State*, 132 Md. App. 127, 142 (2000). At least in the first instance, however, the "determination of whether the prosecutor's comments were prejudicial or simply rhetorical flourish lies within the sound discretion of the trial court." *Degren*, 352 Md. at 431 (citations omitted). An appellate court should not reverse the trial court's decision unless it clearly abused its discretion and prejudiced the accused. *Id.* (citing *Hunt v. State*, 321 Md. 387, 435 (1990); *Wilhelm*, 272 Md. at 413).

As a preliminary matter, we note that defense counsel did not object to any statements until the prosecutor argued about what Detective Hawk found to be "incredulous" [sic][8] about Evans's version. As a result, Evans waived any arguments concerning the propriety of the prosecutor's previous statements. *See Grandison v. State*, 341 Md. 175, 224 (1995) (citing Md. Rule 8-131(a)); *Shelton v. State*, 207 Md. App. 363, 385 (2012). Nor did Evans object to the prosecutor's later statement, "[s]elf-inflicted gunshot wound, is what it's evidence of." As a result, he has also waived any argument about that statement.[9]

Even if defense counsel's single objection was sufficient to preserve issues pertaining to other statements by the prosecutor, Evans would fare no better. When the prosecutor stated that just because "there is no blood trail, does not mean that [Evans] did not shoot himself[,]" he was responding to an argument by defense counsel about the lack of a blood trail at the crime scene. Moreover, the prosecutor based the statement, in part, on evidence that Evans had bandaged his legs to stop the flow of blood. Even if Evans had lodged a timely objection to that statement, the trial court would have been well within its discretion to overrule it.

[8] The prosecutor probably meant "incredible." Bryan A. Garner, *A Dictionary of Modern English Usage* 288 (1987) ("*Incredulous* (= skeptical) is sometimes misused for *incredible*").

[9] At the conclusion of the State's rebuttal argument, defense counsel moved for a mistrial on the ground that the prosecutor had argued facts that were not in evidence. The court denied the motion, and Evans does not appear to challenge that ruling in this appeal.

When the prosecutor commented that the bullet's downward trajectory suggested that a gun had accidentally gone off while it was being taken out of or put back into a pocket, his statements were proper inferences taken from facts that were in evidence – specifically, Evans's medical records and Detective Hawk's testimony. Detective Hawk testified that Evans "was hit on the outside of his right hip leg area" and that the bullet "went through inside his groin on his left side and into his left leg interior" at a "downward angle." According to Detective Hawk, the injuries were inconsistent with the type of wound he would expect to see if a victim was running away from a shooter. The prosecutor never suggested that Detective Hawk was an expert, nor would one need to be an expert to infer that bullets typically travel in the direction in which they are fired. The rebuttal argument was not an improper comment on the detective's testimony.

Finally, there was nothing improper about the prosecutor's statements concerning Detective Hawk's belief that Evans's version of the shooting was "incredulous" [sic]. This argument did nothing more than remind the jury that, because bullets usually travel in straight lines, Evans's version defied common sense. The trial court did not abuse its discretion in overruling Evans's objection to that portion of the State's rebuttal argument.

In summary, whether the prosecutor's comments are considered individually or collectively, he did not mislead the jury by positing inadmissible expert testimony about whether Evans's wounds were self-inflicted. Accordingly, we reject Evans's challenge concerning the statements in rebuttal closing.

IV.

Evans contends that the circuit court failed to comply with Maryland Rule 4-215(e) in addressing his several requests to discharge his assigned counsel. He is correct that, on more than one occasion, the court did not strictly follow the procedures mandated by Rule 4-215(e). These errors require this Court to reverse his convictions.

The right of a defendant in a criminal case to counsel is guaranteed by the Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights.[10] That right also includes the right to reject the assistance of counsel and to represent oneself. *Williams v. State*, 321 Md. 266, 270-71 (1990). Although it might be an unwise choice, a defendant in a criminal case cannot have counsel forced upon him or her. *Dykes v. State*, 444 Md. 642, 650 (2015) (citing *Faretta v. California*, 422 U.S. 806, 826 (1975)).

"The right to counsel guarantee[s] an effective advocate for each criminal defendant," but does not guarantee "that a defendant will inexorably be represented by the lawyer whom he prefers." *Dykes*, 444 Md. at 648 (internal quotation marks omitted); *see Fowlkes v. State*, 311 Md. 586, 605 (1988) ("for indigent defendants unable to retain private counsel, the right to counsel is but a right to effective legal representation; it is not a right to representation by any particular attorney"). An indigent defendant may receive representation from the Office of the Public Defender, through either its own staff of

[10] The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Const. amend. VI. Article 21 provides "[t]hat in all criminal prosecutions, every man hath a right . . . to be allowed counsel." Md. Decl. of Rts., Art. 21.

assistant public defenders or a panel attorney, but in either case, "an indigent defendant is not entitled to a specific appointed attorney." *Dykes*, 444 Md. at 648-49 (citing *State v. Campbell*, 385 Md. 616, 627-28 (2005)).

Maryland Rule 4-215(e) "gives practical effect" to a defendant's constitutional choice of whether to continue with present counsel. *Williams*, 321 Md. at 273. This provision governs situations in which a defendant who is represented by counsel seeks to discharge his or her attorney. It 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.

Rule 4-215(e) itself "does not give definition to what constitutes a 'request' to discharge counsel[.]" *Gambrill v. State*, 437 Md. 292, 302 (2014). The Court of Appeals has "established, nevertheless, that a request to discharge counsel is 'any statement from which a court could conclude reasonably that the defendant may be inclined to discharge counsel.'" *Id.* (quoting *Williams v. State*, 435 Md. 474, 486-87 (2013)); *see also State v. Hardy*, 415 Md. 612, 622 (2010) (explaining that "[t]here is no 'talismanic phrase' that a defendant must utter to make such a request; rather, the defendant need only indicate

reasonably to the court a desire to discharge his or her counsel in order to engage the requirement that the court consider the defendant's motion") (citations omitted). When a defendant or defense counsel makes an ambiguous statement regarding a desire to discharge counsel, the balance "tips to the side of requiring a colloquy with the defendant." *Gambrill*, 437 Md. at 306-07.

In *Dykes*, the Court of Appeals explained that Rule 4-215(e) can be broken down into the following three steps:

> *(1) The defendant explains the reason(s) for discharging counsel*
> While the rule refers to an explanation by the defendant, the court may inquire of both the defendant and the current defense counsel as to their perceptions of the reasons and need for discharge of current defense counsel.
>
> *(2) The court determines whether the reason(s) are meritorious*
> The rule does not define "meritorious." This Court has equated the term with "good cause." This determination – whether there is "good cause" for discharge of counsel – is an indispensable part of subsection (e) and controls what happens in the third step.
>
> *(3) The court advises the defendant and takes other action*
> The court may then take certain actions, accompanied by appropriate advice to the defendant, depending on whether it found good cause for discharge of counsel – *i.e.*, a meritorious reason.

Dykes, 444 Md. at 652 (citations and quotation marks omitted).

"When applicable, Rule 4-215(e) demands strict compliance." *Hardy*, 415 Md. at 621. "'The provisions of the rule are mandatory[,]' and a trial court's departure from them constitutes reversible error." *Id.* (quoting *Williams*, 321 Md. at 272). We conduct a de novo review of whether a circuit court has complied with Rule 4-215(e), but when the court has complied with the rule, we review the court's decision to grant or deny a

defendant's request to discharge counsel for an abuse of discretion. *See State v. Taylor*, 431 Md. 615, 630 (2013); *Gutloff v. State*, 207 Md. App. 176, 180 (2012).

May 8, 2012: Hearing before Judge Heard

In the case at hand, Evans first expressed a desire to discharge his counsel at the May 18, 2012, rearraignment following the reversal of his convictions. Evans was represented by Mr. Frank Cappiello, the assistant public defender who had served as defense counsel in the first trial.

At that hearing, before Judge Wanda Keyes Heard, Evans stated: "[M]y attorney, today . . . I don't want him on the case; I don't want him to represent." This unambiguous request was enough to trigger the court's duty to inquire into the defendant's reasons for the request. *See Williams*, 321 Md. at 267 (applying Rule 4-215(e) where defendant said during arraignment, "'I want another representative'").

Before permitting Evans to explain his request, however, the judge immediately advised Evans that if he discharged his public defender then he would "fire all the public defenders" because "you don't get to pick which public defender represents you." The court told Evans that, unless he had money to hire a private attorney, he would either have the assigned public defender or he would have no representation at all.[11]

[11] Under a subsequent decision by the Court of Appeals, these statements may have been inaccurate. If the court finds that a defendant's reasons for discharging counsel are meritorious, "the situation reverts – insofar as concerns the right to counsel – to that of a freshly arraigned, unrepresented defendant." *Dykes*, 444 Md. at 653. "In the case of an indigent defendant, this means an opportunity for new appointed counsel." *Id.* Thus, Evans would have been entitled to another attorney (and a continuance, if necessary) if the court found good cause to discharge his counsel.

Although the judge did not ask Evans to explain the reasons for his request, Evans volunteered that he believed that he had been wrongly convicted at his first trial because his public defender had not objected "to certain things," had not "interviewed witnesses" and otherwise had not "properly prepared [his] case[.]" He complained that the public defender would not visit to the correctional facility where he was being held. The public defender stated that he planned to visit Evans and that he was taking steps to get Evans moved to a more conveniently located correctional facility.

After that exchange, the judge asked: "So, we've covered all your issues, right?" Evans responded by asking the court to appoint a panel attorney. The judge replied that "[t]he Public Defender's Office only panels a lawyer when they have a conflict of interest within their office." Evans inquired as to whether a conflict of interest would arise if he filed a petition regarding his assigned public defender's ineffectiveness, and the court responded that it "depends on the circumstances[.]" Thereafter, Evans reiterated that he was not satisfied with his assigned public defender, that he did not "want this man representing" him, and that he "would represent [him]self at trial" if necessary.

Eventually, the judge told Evans that if he was not comfortable being represented by the assigned public defender, he should file a motion with Judge Doory, who would strike the appearance of counsel. *But see Davis*, 415 Md. at 31 ("[a] petition for new counsel need not be made in writing or even formally worded"). Addressing the public defender, the judge said "if you want to file your motion to have your appearance stricken – based on this record – you're welcome to do that, as well." The judge again warned Evans that the granting of such a motion would result in him defending himself at trial.

July 11, 2012: Letter to the Clerk of the Circuit Court

One month later, on June 18, 2012, Evans wrote a letter to the clerk of the circuit court. His letter indicated his belief that the court had already granted his request to discharge counsel. On the first page of the letter, Evans said that he had "explained to the court that [he] didn't want to be represented by" his assigned public defender, that the judge had told the public defender "to file a motion withdrawing his appearance," and that the judge had told him that he would be representing himself if he did not retain private counsel. Evans made various discovery requests in his letter and added that he "ha[d] no attorney" and that he would be "doing things on [his] own behalf."

On July 11, 2012, the clerk docketed the letter as "Letter from Def requesting to remove APD Frank Cappiello also requesting most recent dockets on stated case; CC: Judge Young." A written letter from the defendant to the trial court on its own may be sufficient to constitute a request to discharge counsel under Rule 4-215(e). *See Williams*, 435 Md. at 492-94.

July 17, 2012: First Hearing Before Judge Doory

Judge Timothy J. Doory presided over the next hearing on July 17, 2012. Before Evans arrived for that hearing, the prosecutor advised the court that Evans had been asking defense counsel to get him transferred to the Baltimore City Detention Center and stating that he "did not want Counsel to assist him at all" and "wanted to represent himself going forward." The prosecutor asked the court to determine whether the public defender would represent Evans or whether Evans would represent himself. Judge Doory

responded by stating that the assigned public defender would continue to represent Evans "unless he specifically moves to terminate that relationship[.]"

The public defender replied that Judge Heard had "pushed [Evans] to th[e] point" of terminating the relationship, but that Evans "wouldn't take that last step." The public defender added that his communication with Evans had "broken down completely." He hoped that the transfer to Baltimore City would allow him "at least [to] be able to visit [Evans] easily[] and re-establish something resembling an attorney-client relationship." He warned the judge that Evans "might well want to deliver himself with another politic [sic][12] today concerning my ineptitude."

It is unclear from the record whether the attorneys or the court were aware of the letter to the clerk, in which Evans wrote that he "ha[d] no attorney" and that he would be "doing things on [his] own behalf."

When Evans arrived a few moments later, Judge Doory informed him that the court would sign an order to transfer him to the Baltimore City Detention Center. The prosecutor then reminded the judge that Evans had "raised issues with having Mr. Cappiello as Counsel," but he suggested that those issues "may have been cured at this point in time." The court expressly refused to make an inquiry into the matter:

> THE COURT: I am not inquiring. If in fact there is a situation where you wish to take action that would cause Mr. Cappiello to no longer be associated with the case, you have to file a motion and move for that.
>
> At this point, Mr. Cappiello is your lawyer. Public Defender's [sic] are representing you, as they have throughout this process. And I need not

[12] The public defender probably meant (and may well have said) "polemic" rather than "politic."

> inquire about that. I encourage you both to work together so that when you come back on September the 14th, you can have a joint presentation that you're both in agreement about what you want done. It's your case, Mr. Evans, but you have a talented lawyer. Please be wise and make good use of your talented lawyer.

The combination of statements from the prosecutor and public defender at the hearing on July 17, 2012, were sufficient to trigger the court's duty to determine whether Evans wished to discharge counsel and to inquire into the reasons for the request. *See Gambrill*, 437 Md. at 304-05 (defense counsel's statement to trial judge that defendant "indicate[d] he would like to hire private counsel in this matter" triggered court's obligation to comply with Rule 4-215(e)); *Davis*, 415 Md. at 32-35 (defense counsel's statements to administrative judge that defendant "didn't like" counsel's evaluation of the case and "[w]anted a jury trial and new counsel" were sufficient to require judge to follow the Rule 4-215(e) inquiry procedure); *Joseph v. State*, 190 Md. App. 275, 280, 287 (2010) (prosecutor's statement to motions-hearing judge that defendant had "stated something . . . about the release of his counsel" was sufficient to alert judge that defendant requested discharge of counsel).

The judge failed to comply with Rule 4-215(e) when he did not make the inquiry mandated by the Rule. *See Hawkins v. State*, 130 Md. App. 679, 688 (2000) (holding that administrative judge failed to comply with Rule 4-215(e) by interjecting "[w]e are not getting into that issue" when responding to defendant's discharge request).

Additional Hearings in 2012 and 2013

At a hearing on September 14, 2012, the prosecutor again informed the court that Evans had "expressed desire to have new Counsel" at the previous hearing, but that

Evans "didn't actually state for himself what his position was." The prosecutor wanted to "figure out where we stand" on that issue. The public defender responded that he had made efforts to repair the attorney-client relationship, but that "there just seems to be this block that has emerged" since the first trial. Evans did not appear in court that day, and the court had no opportunity to make an inquiry about what he wanted and why.

The parties did not revisit the issue at either of the next two proceedings: a hearing regarding scheduling and plea negotiations on June 14, 2013; and a hearing regarding a postponement request on August 26, 2013.

November 1, 2013: Second Hearing before Judge Doory

Several months later, at a hearing on November 1, 2013, the public defender informed the court that Evans had "retreated to a pose of complete silence" with him. The prosecutor added that Evans had "wanted to release" the public defender, but that he had gone "back and forth" and that the issue had never been resolved. The following exchange occurred at the end of the hearing:

> [DEFENSE COUNSEL]: Your Honor, I believe Mr. Evans would like to be heard on the subject of discharging his Counsel.
>
> THE COURT: And what would you like to say?
>
> MR. EVANS: I don't want Mr. Cappiello representing me.
>
> THE COURT: Who do you want?
>
> MR. EVANS: (Inaudible)
>
> THE COURT: Do you want a private attorney?

MR. EVANS: I can't afford one. But I just don't feel comfortable with, you know, communicating with him about this case. He hasn't been to the Baltimore Detention Center.

I have no way – he seemed to always be able to tell me what [the prosecutor] said, or somebody else. He don't communicate with me. I don't know what his plans are for this case. And I just don't feel comfortable with him representing me.

THE COURT: Well, [your assistant public defender] is a particularly talented, aggressive, and committed lawyer from the Public Defender's Office. You're entitled to a committed, talented lawyer from the Public Defender's Office.

This Court cannot pick a different lawyer for you. Your choices are: either getting a private attorney to become involved; getting an attorney from some form of project if you cannot afford one; petitioning the Court to appoint a lawyer for you; or representing yourself.

They're all difficult choices to make. But so long as you have a talented lawyer who is still representing your interests, I am not going to strike him from the case. I would encourage you two to work more closely together –

[EVANS]: I don't want work –

THE COURT: – and write back and forth to each other between now and the trial date. But when the time comes to go to trial, if you wish to strike your attorney, and think you could represent yourself better, then you can do that. But not now. That wouldn't be at all in your interests.

At this hearing, the court evidently recognized that Evans wanted to discharge his counsel. But although the court asked Evans some questions, "the questions did not concern" the central issue of "*why* [Evans] wanted to discharge his counsel." *State v. Graves*, 447 Md. 230, 252 (2016). Even without prompting from the court, however, Evans discussed lack of communication with his counsel as the source of his dissatisfaction.

It is arguable that the court responded, as the rule requires, by evaluating whether Evans's reasons were meritorious and advising him accordingly. When the court told Evans that his choices were to get a private attorney, to get an attorney from some form of pro bono project, to petition the court to appoint a lawyer, or to represent himself, it did give Evans the type of advice that the rule requires it to give if his reasons are unmeritorious. Hence, the court's advice suggests that it may have implicitly found that Evans's reasons were unmeritorious. Nevertheless, the court's ambiguous statements did not definitively resolve the matter.

February 7, 2014: First Hearing before Judge Cox

Judge Sylvester B. Cox presided over a hearing on February 7, 2014. The public defender asked Evans to clarify on the record whether he was "satisfied" to have the public defender represent him in the case. This exchange ensued:

> THE COURT: What? What do you want to say, sir?
>
> [EVANS]: What [defense counsel] just asked me. I don't feel comfortable with him representing me. I don't want him representing me, but –
>
> THE COURT: Have you hired counsel of your own choosing?
>
> [EVANS]: – I'm not able to represent myself. What's that sir?
>
> THE COURT: Have you hired counsel of your own choosing?
>
> [EVANS]: No, I haven't, sir.
>
> THE COURT: Has your family made arrangements for you for counsel of your own choosing?
>
> [EVANS]: I'm not sure.

> [DEFENSE COUNSEL]: (Looking back in the courtroom audience) They're indicating not, Your Honor.
>
> THE COURT: Well, until counsel of your own choosing comes in here to substitute [the assigned public defender], he's your attorney.
>
> [DEFENSE COUNSEL]: And, Your Honor, for the record, despite our differences – I'm perfectly happy representing Mr. Evans the second time around.
>
> THE COURT: Let me continue. He's your attorney, particularly with regard to this kind of charge. This is the number one charge that is charged in any jurisdiction in the United States. If it were a mere possession of half of a joint, on some corner, maybe the Court, maybe, would allow you to waive his appearance at this time. You're charged with murder. And you got a murder Defense Counsel beside you, who's appointed by the Public Defender's Office to represent people who cannot afford counsel of their own choosing. And until that occurs, counsel of your own choosing, [your assigned public defender] represents you.

After that exchange, the prosecutor asked the court to give Evans the opportunity to declare on the record his willingness to have the public defender continue representing him. The judge responded: "The gentleman has already indicated to the Court that he does not wish to have Mr. Cappiello represent him."

Despite Evans's unambiguous request for a discharge of his counsel, the court did not "permit the defendant to explain the reasons for the request" as mandated by Rule 4-215(e). *See Graves*, 447 Md. at 246; *Williams*, 321 Md. at 270; *Joseph*, 190 Md. App. at 287-88; *Hawkins*, 130 Md. App. at 687-88.

At an ensuing bench conference, the prosecutor stated that "at some point in time before proceeding" Evans himself would need to "express his willingness to accept Counsel as representation in this case." On behalf of Evans, the public defender asked whether the judge would be willing to appoint different counsel. The court replied that it

would be "very difficult for the Court to appoint Counsel." The judge, prosecutor, and public defender each commented that they had "never seen it done before." After the conversation moved onto different topics, the case was postponed again, with the issue of Evans's representation left unresolved.

April 25, 2014: Second Hearing before Judge Cox

Evans did not appear in court again until April 25, 2014, when a hearing was held to set a new trial date. At that hearing, the prosecutor mentioned that "this is a case where the Defendant has made statements in open court about releasing Counsel." The public defender told the judge that "this was before you on a prior occasion[,] [b]ut the Court indicated no willingness to entertain the issue of discharge, or not, of Counsel." The judge responded that that position was "still the Court's position, until it gets before the trial court."

The attorneys' statements were sufficient to trigger the court's obligations under Rule 4-215(e). *See Davis*, 415 Md. at 32-33; *Joseph*, 190 Md. App. at 287-88. The judge's refusal under those circumstances to "entertain the issue of discharge" did not satisfy the court's obligations under the Rule. *See Hawkins*, 130 Md. App. at 687-88.

Summary of Pre-Trial Appearances

In total, Evans argues that the court failed to take appropriate steps under Rule 4-215(e) on five separate occasions: on May 18, 2012; July 17, 2012; November 1, 2013; February 7, 2014; and April 25, 2014. The State argues: "All of the above exchanges between the court, Evans[,] and counsel evidence that each time Evans expressed a desire to discharge counsel, the court addressed the request, provided Evans the opportunity to

explain his reasons and plainly determined that Evans's reasons were nonmeritorious because the court, at that time, did not permit Evans to discharge his counsel." We are not convinced by the State's argument.

At each of those five hearings, Evans, defense counsel, the prosecutor, or some combination thereof made statements that should have reasonably apprised the court that Evans wished to discharge counsel. On none of those occasions did the judge directly ask Evans "*why* [he] wanted to discharge his counsel." *Graves*, 447 Md. at 253. Still, without being asked, Evans offered some reasons for his request to discharge counsel at the hearings on May 18, 2012 (in some detail), and on November 1, 2013 (in considerably less detail). Yet at none of the hearings did the court expressly determine whether Evans's reasons were meritorious. Some of the judges made no ruling at all, while others made comments that (at most) indicated that they intended to deny his discharge request without prejudice.

Even if we agreed that the court substantially complied with Rule 4-215(e) at the hearing on November 1, 2013, when Judge Doory may have implicitly found his reasons to be unmeritorious, Evans subsequently expressed a continued (or renewed) desire to discharge counsel on February 7, 2014. The attorneys resurrected the issue again on April 25, 2014, reasonably believing that it had never been resolved. The court did not adequately address either of those requests. Nor did any judge of the court ever act on Evans's letter to the clerk, which had been docketed as a motion "requesting to remove APD Frank Cappiello," and which expressed Evans's dissatisfaction with counsel. *See Williams*, 435 Md. at 492-94 (reversing conviction for failure to comply with Rule 4-

215(e) after defendant sent letter to court expressing dissatisfaction with counsel). It proves too much to say, as the State does, that because none of the various circuit court permitted Evans to discharge his counsel, they must have found Evans's reasons to be unmeritorious.

The Court of Appeals has consistently maintained that a court's departure from the requirements of Rule 4-215(e) is a reversible error. *See, e.g.*, *Williams*, 435 Md. at 486. Based on the record from these pretrial proceedings, this Court ordinarily would be required to reverse Evans's convictions and to remand the case for a new trial.

The record in this case illustrates the following observation from Judge Moylan: "For a judge to traverse Rule 4-215 is to walk through a minefield. A miracle might bring one across unscathed. For mere mortals, the course will seldom be survived." *Garner v. State*, 183 Md. App. 122, 127 (2008), *aff'd*, 414 Md. 372 (2010). Recently, in a case involving the rights of an indigent defendant in a situation not explicitly addressed by the Rule itself, Judge Watts commented, "[r]egrettably, despite having been amended three times since [the *Garner* case], Maryland Rule 4-215 remains a minefield." *Dykes*, 444 Md. at 671 (Watts, J., concurring). The circuit court had already set off more than one mine before this case reached the trial judge.

September 22, 2014: Trial Before Judge Howard

On September 22, 2014, Evans appeared with counsel for the first day of trial.[13] Judge John Addison Howard presided. At the beginning of the proceedings, the public

[13] The court heard motions for a full day on September 22, 2014. Jury selection occurred on the next day.

defender advised the court that Evans "might yet want to be heard on the subject of whether I remain his counsel[.]" The following discussion ensued:

> [DEFENSE COUNSEL:] Mr. Evans do you wish to be heard on the subject of my remaining as your counsel or your satisfaction with me? Is there anything you need to get off your chest?
>
> [EVANS:] No.
>
> [DEFENSE COUNSEL:] Okay. If I may proceed –
>
> THE COURT: Mr. Evans, and I know, I know it's difficult, he can remain seated. I know it's difficult when essentially you are provided with an attorney to know whether or not the attorney is competent or at least would be one you would employ. I've known [defense counsel] a very long time. [Defense counsel] does a very good job for his clients. I mean obviously it depends on the case, it depends on a whole lot of factors, but [defense counsel] is not somebody that clients generally have a significant difference of opinion with once they've seen how he works. I just share that with you if you have any lingering concerns in that area. That's my personal opinion, it's, you know, not a judgment of this Court. You are free to do whatever you wish. Yes, sir.
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> [PROSECUTOR]: Your Honor, in order to protect the record, due to the fact that Mr. Evans, the Defendant has made open statements on the record in the past about wanting to have new counsel and wanting to release [defense counsel], in order to ensure that we're not trying this a third time in the future, I would suggest the Court to inquire specifically along the lines you have mentioned in the past that you have issues, do you have any issues –
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> THE COURT: I know nothing about that. I think [defense counsel] covered the question as to whether or not Mr. Evans wanted to address the Court. There's no need to go in it further than I believe what his response was, that he did not wish to address the Court about any issues with regard to [defense counsel]. Beyond that, we're just gilding the lily and there's no real need in my view to do that.
>
> [PROSECUTOR]: I –
>
> THE COURT: There's no need in other words, when someone, if someone wishes to represent themselves, there is an incredible series of concerns that

> the courts have and there are very specific rules. There are no rules that I understand that would govern an inquiry into having an attorney.
>
> [PROSECUTOR]: There's actually, there actually, and I unfortunately didn't bring it. Your Honor, I apologize for that. There's case law on point which deals directly with when a defendant wishes to release counsel . . . .
>
> THE COURT: But he doesn't, he's indicated he doesn't wish to even raise that issue, Mr. [Prosecutor]. So, let's move on to something else.
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> [PROSECUTOR]: The reason why I say that, Your Honor, is because the person inquiring does drive the, the person doing the inquiry does drive the analysis. In this case the inquiry came from [defense counsel] as opposed to from the Court. So procedurally,
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> THE COURT: If I asked Mr. Evans the question with regard to his continued representation by [defense counsel], I don't think I would have phrased it any differently than, and possibly not as directly as [defense counsel] did. So I think we've covered the subject. We will proceed.

As discussed previously, the prior instances of the court's noncompliance with Rule 4-215(e) ordinarily would require reversal. The remaining issue is whether this colloquy on the morning of trial was sufficient to remedy the prior errors. For the purposes of this discussion, we shall assume that a violation of Rule 4-215(e) can be remedied by the court's subsequent compliance with the Rule before trial.[14]

Evans asserts that, "[o]ver a span of two years, [he] essentially watched the court aggressively ignore his request to discharge his counsel." He argues that "[i]t is therefore no surprise that [he] forfeited on September 22, 2014, when asked if there was anything [he] wished to 'get off his chest.'" Evans contends that his answer to the question was

[14] The constitutional right to counsel exists not only at trial but also during any "critical stage" of a criminal prosecution. *See, e.g.*, *McCarter v. State*, 363 Md. 705, 712-13 (2001).

effectively "coerce[d]" by the court's prior treatment of his requests, and so it would be "fundamentally unfair" to treat his statement as a waiver of this appellate issue.

The State argues that the circuit court satisfied the requirements of Rule 4-215(e) because Evans "did not express a present intent to discharge counsel when asked specifically at trial[.]" In support of its argument, the State relies on *State v. Davis*, 415 Md. 22 (2010).

In *Davis*, 415 Md. at 25, the Court of Appeals affirmed this Court's reversal of a defendant's robbery convictions on the ground that an administrative judge had failed to make the inquiry required by Rule 4-215(e). On the morning of Davis's trial, defense counsel (speaking in the past tense) informed the administrative judge that the defendant did not like counsel's evaluation of the facts of the case, that the defendant "'[w]anted a jury trial and new counsel[,]'" and that counsel had told the defendant that the court was unlikely to grant him another attorney. *Id.* at 26-27. The administrative judge made no inquiry into the matter, and Davis was tried before a different judge. *Id.* at 28. Seeking to uphold the convictions, the State argued that the administrative judge could have interpreted the attorney's statements to mean "that Davis no longer sought counsel's discharge, despite an earlier fallout between the defendant and his attorney." *Id.* at 33.

The Court of Appeals rejected that argument and explained: "Although we agree with the State that a Rule 4-215(e) inquiry is not mandated unless counsel or the defendant indicates that the defendant has a present intent to seek a different legal advisor, we believe that here, the Court at least was required to inquire further so it could determine whether Davis still maintained that intent." *Id.* The Court further commented:

> . . . Even if the court was conflicted as to whether Davis was truly dissatisfied with present counsel . . . , it could have easily eliminated its uncertainty by questioning Davis himself about the reasons for his attorney's statement. Any court that fails to follow-up with the defendant following a possible, albeit unclear, Rule 4-215(e) request risks appellate reversal of its judgment. Thus, erring on the side of caution is advised.
>
> . . . The defense attorney never told the court that Davis had changed his mind, and thus, at a minimum, the court should have asked Davis if he wished to proceed with his appointed representative. . . . [W]ith a simple inquiry, the administrative judge could have addressed Davis's concerns and possibly corrected any error. This is not too much to ask of a judge when the protection of a fundamental constitutional right is at issue.

Id. at 35.

The Court revisited the holding of *Davis* in *Williams v. State*, 435 Md. 474 (2013), a case that involved a written request to discharge counsel. In *Williams*, the defendant wrote a letter to the court asking to discharge his public defender. *Id.* at 479. The letter was filed in the court jacket and docketed as "'Letter of Defendant requesting new representation from the public defender's office.'" *Id.* Neither the attorneys nor the circuit court judges addressed the defendant's request at a series of hearings or at trial over the subsequent 16 months. *Id.* at 479-80. Under those circumstances, the Court of Appeals concluded that the letter was sufficient to qualify as a request to discharge counsel, and therefore "the onus was on the Circuit Court to 'permit the defendant to explain the reasons for the request.'" *Id.* at 492 (quoting Md. Rule 4-215(e)). The Court reasoned: "[E]ven if we were to accept the argument that Williams's aged request reflected a past desire, *Davis* requires that the court determine, at some point prior to trial, whether Williams continued to harbor an intent to discharge counsel." *Id.* at 491.

In the present case, the trial court did not satisfy its obligations to inquire further to determine whether Evans had changed his mind about his attorney. We certainly cannot fault the trial judge for not knowing about the series of on-the-record discussions about Evans's desire to discharge his public defender. An examination of the docket, however, would have alerted a judge that the court had received a letter from the defendant on July 11, 2012, "requesting to remove APD Frank Cappiello." *See Williams*, 435 Md. at 492 (reasoning that docket entry from 16 months before the trial reflecting the filing of a 'Letter of Defendant requesting new representation from the public defender's office'" refuted any argument that court should not have recognized the defendant's request to discharge counsel). The docket here did not reflect any resolution of that request.

On the morning of trial, both the public defender and the prosecutor made statements indicating that Evans had in the past wished to discharge his counsel. After telling the judge that Evans "might yet want to be heard on the subject of whether I remain his counsel[,]" the public defender asked Evans whether he "wish[ed] to be heard" on the subjects of the public defender remaining as his counsel or his satisfaction with the public defender. Even after Evans answered, "No," the judge evidently recognized that Evans still might wish to discharge his counsel. The judge attempted to reassure Evans about any "lingering concerns" with the attorney and advised Evans that he was "free to do whatever [he] wish[ed]" in that area. Immediately afterwards, the prosecutor informed the judge that Evans "ha[d] made open statements on the record in the past about wanting to have new counsel and wanting to release" his public defender.

The court rejected the prosecutor's suggestion to ask additional questions to clarify whether Evans still maintained his prior intent to discharge counsel.

At the very least, this exchange was sufficient to inform the court that Evans had expressed a past desire to discharge counsel. Consequently, the trial judge "at least was required to inquire further so it could determine whether [Evans] still maintained that intent." *Davis*, 415 Md. at 33; *see also Williams*, 435 Md. at 491. Without some express statement that Evans had changed his mind, "at a minimum, the court should have asked [Evans] if he wished to proceed with his appointed representative." *Davis*, 415 Md. at 35. The court should have asked Evans whether he still maintained the desire to discharge his attorney that he had expressed in the past, and then (if necessary) the court could have determined the reasons for his request. The prosecutor even suggested a simple inquiry that would have made the record clear on the issue of whether Evans had actually changed his mind about his representative.

The trial judge reasoned that there was no need to make that minimal inquiry because Evans had already answered "no" after the attorney asked these questions: "Mr. Evans do you wish to be heard on the subject of my remaining as your counsel or your satisfaction with me? Is there anything you need to get off your chest?" Under the circumstances, Evans's one-word response to a question from the same attorney with whom he had a fraught relationship and whom he had repeatedly asked to discharge was not enough to relieve the court of its obligation to inquire whether Evans had a present intent to discharge counsel. With no further explanation of his rights, Evans might reasonably have believed that his only choices, on the morning of trial, were either to

accept an attorney with whom he was dissatisfied or to defend himself against charges of first-degree murder.

Contrary to the trial judge's comments, the questions posed by the attorney did not "directly" address whether Evans still maintained his past desire to discharge his counsel. The attorney's questions invited Evans to speak generally on the subjects of the attorney's continued representation and Evans's satisfaction with the attorney. A defendant might be disinclined to repeat a discharge request because the defendant actually has "changed his mind," or because the defendant thinks that the court has already "denied implicitly his request" or "that pressing the issue further would anger the court or [the attorney.]" *Williams*, 435 Md. at 493. There is a distinct possibility here that Evans still wished to discharge his attorney, but that he believed that prior judges had "made it clear that no reason [he] might give for wanting to discharge his counsel would be considered." *Joseph*, 190 Md. App. at 288. Even though the judge here seemed to recognize that Evans still had "lingering concerns" and that he may have "wish[ed]" to do something other than to proceed with his current representative, the judge expressly declined to conduct a colloquy to settle the issue on the record. Overall, the trial judge's response appears to have been less an actual attempt to determine whether Evans had a present desire to discharge his counsel, and more of an effort to avoid making that determination.

Understandably, the trial court here attempted to avoid altogether the "minefield" (*Garner*, 183 Md. App. at 127) that is Rule 4-215. Yet the court failed to recognize that it was already inside that minefield, with no choice but to navigate through it. At a

minimum here, the court should have asked Evans if he presently wished to proceed with the representative that he had asked to discharge in the past. *See Davis*, 415 Md. at 33; *see also Williams*, 435 Md. at 491. Consequently, even if we assume that the trial judge could have remedied the court's past violations of Rule 4-215(e) on the morning of trial, the exchange between Evans and his attorney was not enough to do so.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY REVERSED; COSTS TO BE PAID BY MAYOR AND CITY COUNCIL OF BALTIMORE.