Circuit Court for Washington County
Case No. 21-K-17-53940

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2426

September Term, 2018

DENNIS VON GUNDY

v.

STATE OF MARYLAND

Berger,
Leahy,
Shaw Geter
(Senior Judge, Specially Assigned),

JJ.

Opinion by Shaw Geter, J.

Filed: October 1, 2019

A jury, in the Circuit Court for Washington County, convicted Dennis Von Gundy, appellant, of one count of armed robbery, two counts of robbery, one count of conspiracy to commit robbery, five counts of second-degree assault, two counts of theft, two counts of conspiracy to commit theft, one count of eluding, one count of reckless driving, and one count of negligent driving. The court sentenced appellant to a total of 53 years' imprisonment, with all but 30 years suspended. In this appeal, appellant presents three questions for our review:

1. Did the circuit court fail to comply with Maryland Rule 4-215(e)?

2. Pursuant to the "Prison Mailbox Rule," as set forth in *Hackney v. State*, 459 Md. 108 (2018), did the circuit court err in finding that appellant, who was *pro se* and incarcerated, did not timely file subpoenas for a motions hearing?

3. Did the circuit court commit plain error in making the jury deliberate from midnight until it reached a verdict at 2:30 a.m.?

For reasons to follow, we answer all questions in the negative and affirm the judgments of the circuit court.

BACKGROUND

In the early morning hours of August 1, 2017, two men entered a 7-Eleven store in Washington County, brandished a gun, and robbed the store's employee of cash. That same morning, a man, later identified as appellant, entered a Liberty gas station in Washington County, brandished a gun, and robbed the store's employee of cash. Appellant was later arrested and charged in connection with the two robberies.

Procedural History

Appellant was indicted on August 25, 2017, and on October 3, 2017, appellant made his initial appearance in the circuit court. Appellant returned to court on December 19, 2017, at which point he waived his right to counsel on the record in open court, asserted that he wanted to represent himself, and elected a jury trial. The court then continued the case "for good cause."

On January 19, 2018, an attorney with the Office of the Public Defender (hereinafter "defense counsel") entered his appearance on behalf of appellant, and, at the same time, filed a motion seeking to, among other things, suppress certain evidence and dismiss the charges. On February 15, 2018, appellant appeared in court with defense counsel for a motions hearing. The hearing was ultimately continued for "good cause."

Discharge of Counsel

On May 7, 2018, the parties returned to court for a continuation of the motions hearing. At the start of that hearing, the following colloquy ensued:

> THE COURT: Okay. All right Mr. Von Gundy . . . obviously this was a scheduled date for continuation of the motions hearings . . . in your case. My understanding, counsel tipped me off that you may be interested in discharging your attorney?
>
> [APPELLANT]: Yeah I will be firing him for ineffective assistance of counsel.
>
> THE COURT: Okay. Well there is a process that we have to go through . . . not that you don't have a right to fire him, but there are consequences if the reasons that you want to fire him aren't meritorious to the Court. Okay? And the important thing there being if . . . the Court finds that

> your desire to fire him is not based on . . . meritorious reasons, then you can still fire him but you wouldn't be entitled to a new . . . a new public defender or new attorney that's paid for by the State. You would, of course, still be entitled to hire your own attorney if you can do so. So that's – that's the reason we have to go through a little process, okay?

The court then engaged in a lengthy conversation with appellant regarding the reasons why defense counsel had been "ineffective." During that conversation, the court indicated that it wanted "to make sure [appellant had] a chance to put everything on the record why [he] wish[ed] to fire [defense counsel]" because it was "very important to [his] defense."

Following its conversation with appellant, the court questioned defense counsel about the grievances raised by appellant, and defense counsel responded accordingly. After permitting a few last words from appellant, the court ruled that appellant's reasons for wanting to discharge counsel were not meritorious. At that point, the court addressed appellant, and the following colloquy ensued:

> THE COURT: The question then goes to you. Do you wish to proceed without counsel and let me explain why. I believe I said this at the beginning but I'll . . . reiterate it now, you have a right [to] counsel. That right has been complied with by the Office of the Public Defender with [defense counsel's] appointment. You may fire him. But if you do, you do not have a right for the State or the Court to appoint you another attorney. You certainly can hire any attorney you want. But you will not get another public defender or appointed attorney if you do fire [defense counsel]. That's the decision you have to make.

[APPELLANT]: I thought the Court was – I thought the Court's duty was to appoint me a court appointed lawyer.

THE COURT: No. It is your . . . right[.] Your right to an attorney has been satisfied in this case.

[APPELLANT]: By?

THE COURT: Okay? So –

[APPELLANT]: By whom?

THE COURT: Your right to an attorney has been satisfied in this case. You need to answer the simple question –

[APPELLANT]: I don't understand.

THE COURT: - do you wish to fire [defense counsel] and continue as your own attorney? Or of course to have counsel brought into the case by being paid? Or do you wish to not fire [defense counsel] and he will continue in this case?

[APPELLANT]: I wish to file for an ineffective assistance of counsel[.]

THE COURT: Well ineffective assistance of counsel is generally something taken up either on appeal or . . . in a post-conviction matter. At this time, the Court does not find that [defense counsel] has been ineffective based on what the Court has observed and what's been placed on the record today. So your question is very simply – Do you hire an attorney to represent you? Do you proceed without an attorney? Or do you continue with [defense counsel]? Because there is no meritorious base to fire [defense counsel] at this time.

[APPELLANT]: Actually he's – he's not protecting my constitutional rights. That's a valid reason right there.

THE COURT: Mr. Von Gundy, quite frankly, if you're refusing to answer the question, the Court will have to answer it for you and that's not really something I want to do. Do

you wish to continue with [defense counsel] or do you wish to fire him and either hire an attorney on your own behalf or continue without an attorney?

[APPELLANT]: I wish to, uh, fire [defense counsel] for ineffective assistance of counsel.

THE COURT: You're firing [defense counsel]. All right. Well the Court has advised Mr. Von Gundy as best it can that by firing [defense counsel], you will not be appointed another taxpayer paid attorney and in fact he will have to either go it alone or hire an attorney to represent him. He will always have the right to have any attorney enter on his behalf if he can find one. But at this time, based on his allegations, uh, based on his assertions that he no longer wished the services of [defense counsel], [defense counsel] and the Office of the Public Defender is discharged in this case.

Defense counsel then reminded the court that "under the rules" there were certain steps that needed to be taken, and the court responded that it would "hold another initial appearance" and "move on from there." Appellant responded:

[APPELLANT]: So I'm not going to get a lawyer? . . . So are you making a decision that I'm – I'm not going to be represented?

THE COURT: I'm going to read you your rights again that you would have had . . . at the initial appearance hearing held back in October of 2017 as soon as I get one. I want to make sure we do everything by the book.

[APPELLANT]: Are you – Is my motion being – filing being what – I just filed the motion before you of ineffective assistance of counsel.

THE COURT: No sir. You asked to fire –

[APPELLANT]: Have you made a ruling?

THE COURT: You asked to fire your attorney.

[APPELLANT]: Ineffective assistance –

THE COURT: I heard that motion.

[APPELLANT]: You heard me say that I would like to fire any attorney based of ineffective assistance of counsel. That is the motion.

THE COURT: Mr. Von Gundy, I denied that motion. I did not believe he's been ineffective. I think he's been a very competent representative and unfortunately you're proceeding to go along –

[APPELLANT]: So fired [sic] my attorney then?

THE COURT: Mr. Von Gundy, enough.

* * *

[APPELLANT]: I just want to know if you fired my attorney, that's all.

THE COURT: You just fired your attorney.

[APPELLANT]: I did not, you did.

THE COURT: Yes you did.

[APPELLANT]: I did not make that judgment call, you did.

* * *

THE COURT: All right Mr. Von Gundy. Mr. Von Gundy, I need to advise you of certain rights you have [as] a criminal defendant, at this time, unrepresented by counsel. I'm sure . . . you've gone through this before but I have to make sure you understand the nature of the charges that are pending against you including any lesser offenses.

Have you received a copy of the charging document in this case, meaning the indictment?

[APPELLANT]: (No audible response.)

THE COURT: All right, the defendant appears not to be willing to answer. I have to advise you, you have a right to be represented by an attorney at every stage of these proceedings, which you did know. At this time the attorney, quite frankly, at this time you have to pay for an attorney or have someone hired who's willing to donate time to represent you.

* * *

[APPELLANT]: I object to the fact that you're supposed to advise me of my right to counsel only for the record.

THE COURT: Mr. Von Gundy, you do have the – you have a right –

[APPELLANT]: This is a initial appearance.

THE COURT: Mr. Von Gundy –

[APPELLANT]: This is not an initial appearance.

THE COURT: - you have a right to an attorney.

[APPELLANT]: Exactly.

THE COURT: That's right. You have –

[APPELLANT]: And I have the right to an attorney now.

THE COURT: You have fired the Public Defender's Office.

[APPELLANT]: That was before this initial appearance.

* * *

THE COURT: All right.

[APPELLANT]: You have yet to advise me of my right to counsel.

THE COURT: If the public defender refuses to provide you a lawyer, you need to notify the clerk of court so it can determine if the court should appoint a lawyer or not pursuant to . . . Article 27A, Section 6F of the Maryland Code. If a lawyer has not entered an appearance within 15 days, a plea of not guilty will be entered pursuant to Maryland Rule 242 or 4-242(b)(4) and this case [will] be scheduled for trial. Actually this case is already scheduled for trial. I'll give you those dates in a moment.

[STATE]: July 19th and July 20th.

THE COURT: Thank you sir. If you appear . . . without a lawyer at that trial, Court could determine that you have waived your right to counsel by neglecting or refusing to obtain a lawyer or to make timely application for public defender for a lawyer. And in that event, the case would proceed to trial . . . even though you're not represented by an attorney. And you're right, Mr. Von Gundy, let's see if you – if you find that you're financially unable to hire a lawyer, you should apply to the public defender as soon as possible for determination of eligibility to have a lawyer provided to him by the Public Defender's Officer. You can go ahead and do that, but they have been discharged from this case and no longer have an obligation to represent you and that is what I'm trying to get you to understand at this point.

The court then discussed, at length, the charges against appellant. Following that, the court, at the State's request, revisited the issue of appellant's discharge of counsel:

THE COURT: Well I think Mr. Von Gundy, you've been – at this point, you have fired your counsel . . . that was initially appointed by you.

[APPELLANT]: Objection your Honor. I have not fired my –

THE COURT: You have fired your attorney by your –

[APPELLANT]: Objection your Honor. I have not fired my attorney.

THE COURT: So do you intend to move forward with an attorney or do you plan to represent yourself?

[APPELLANT]: I would like the counsel of an attorney, please, thank you.

THE COURT: All right. Well you can certainly apply to the Public Defender's Office, although they have been discharged and may not represent you at this time. And also you can certainly have an attorney of your choosing . . . enter on – his or her appearance on your behalf if you can come to some financial arrangement with that attorney. I have already advised you that if you appear for trial, which is currently scheduled July 19 and 20th, that if you do not have counsel entered, you may be deemed to have waived counsel and may be forced to enter or conduct that trial on your own behalf.

On June 6, 2018, appellant appeared in court without counsel for a hearing to determine whether appellant intended to pursue any pretrial motions, including motions to suppress evidence. But, after appellant informed the court that he had not "seen all the evidence yet" and that he "can't really have a suppression without the evidence first," the court ordered a continuance "for the purpose of completing discovery with the now unrepresented defendant." The court, at the State's request, then readvised appellant:

THE COURT: Mr. Von Gundy . . . the State wants me to further advise you . . . of your waiver of counsel. I thought we covered it last time, but if not, that's fine, we can do it now since we're not going to conduct any substantive hearings today. Basically, I have to advise you that if trial is conducted on a subsequent date, meaning July, and . . . that if you do appear without an attorney at that trial and the trial right now is set for the 19th and 20th of July, that the Court could determine . . . that you have waived counsel and make you proceed to trial represented by yourself only. In other words, unrepresented by an

attorney. Also . . . let's see if you were charged with an offense that carries a penalty of incarceration, which these do, we went over them last time, as you know these are multiple felonies and misdemeanors carrying significant incarceration. Uh, let's see, you had appeared for an initial appearance prior.

[STATE]: I think it's just that you make a finding on the record that he has been advised of his right to counsel.

* * *

THE COURT: All right. All right so you have been previously advised, I re-advised you at this point.

Appellant thereafter represented himself for the remainder of the proceedings.

Motion to Suppress and Appellant's Filing of Subpoenas

During the hearing on June 6, 2018, appellant indicated that he wanted to have a suppression hearing. In so doing, appellant engaged in a conversation with the court about his ability to call witnesses for the suppression hearing:

[APPELLANT]: The next time I'm – So the next time – The next time I'm here, right, are we going to supposedly going [sic] forward with the suppression, right?

THE COURT: Correct.

[APPELLANT]: So that would mean the witnesses will be called before then, am I correct? All witnesses, even because as you say I (unintelligible) –

THE COURT: Sir, the State will bring the witnesses it believes are necessary to prosecute the suppression hearing. If there are other witnesses that you want there, it is your responsibility to request them.

[APPELLANT]: How do you go about doing that?

THE COURT: Sir, I'm sorry, you know this is why you don't fire lawyers. All right, that's the end of this hearing today.

On July 2, 2018, the parties returned to court to continue the motions hearing, and several witnesses testified for the State regarding a suppression issue.[1] At the conclusion of that testimony, the court again continued the hearing. Prior to that recess, appellant addressed the court:

[APPELLANT]: May I ask a question?

THE COURT: Yes you may.

[APPELLANT]: You said that I could subpoena my witnesses right? Since we're not done the suppression hearing as I understand it –

THE COURT: That's right.

[APPELLANT]: - I still have time to subpoena people to come?

THE COURT: You sure do.

* * *

[STATE]: And your Honor, just for clarity so everyone knows, this is on the 10th, the State does not plan on calling any other officers. In case Mr. Von Gundy summonsed anyone[.]

* * *

THE COURT: Okay. And that's fine. We understand. All right, uh, Mr. Von Gundy, also you need to, if you do want summonses you need to put your request in really quickly because the sheriff's department needs five straight days in order to process the service of subpoenas, meaning that we're looking at the 10th, you really need to get them in by Thursday, I assume.

[1] The nature of the suppression issue is not germane to the instant appeal.

[APPELLANT]: Okay[.]

When the parties returned to court on July 10, 2018, appellant presented argument regarding the suppression issue. During that argument, the following exchange occurred between appellant and the court:

> [APPELLANT]: Another question your Honor, I – I subpoenaed witnesses through the district court – I mean circuit court clerk. I don't –
>
> THE COURT: I've got that. It was filed yesterday. Not enough time to get anyone here.
>
> [APPELLANT]: I mailed it out the day I left.
>
> THE COURT: I saw that. You mailed it out on the 3rd, it got to Baltimore, which is the mail hub on the 5th. That's on the front of the envelope. It arrived back at the circuit court yesterday, the 9th, for filing. They need at least five days – five business days to get these processed. They only had less than one. So there are no – The summonses for today were not issued because they weren't timely requested. Now I did check with the clerk beforehand to see if they would – to make sure that they were being issued for the trial because you wanted these same people for trial too, right?
>
> [APPELLANT]: Of course.
>
> THE COURT: Okay. And she was checking on that to make sure they have been processed. But for the suppression, they weren't filed timely.
>
> [APPELLANT]: Okay.

Following that hearing, the circuit court issued an oral ruling denying appellant's pending motions, which included a motion to suppress, a motion to dismiss, and a motion to sever.

Trial, Jury Deliberations, and Verdict

Appellant's jury trial was held over two days, with the parties returning to court on the second day for the conclusion of the State's case-in-chief and the presentation of the defense's case-in-chief. Due to the volume of evidence presented,[2] closing arguments did not begin until approximately 11:00 p.m. At the conclusion of the State's argument, the following exchange occurred between the court and the jury foreman regarding a note that the court received from the jury:

> THE COURT: All right. Mr. Gundy, before you give your response or argument would you and [the prosecutor] approach and also the jury foreman? Mr. Foreman can you approach for a second?
>
> (Bench conference follows:)
>
> THE COURT: Just so you know, I was given the note after you started that you had concerns – you have travel plans and paid for tickets?
>
> FOREMAN: Yes.
>
> THE COURT: And when do you have to leave?
>
> FOREMAN: I'm supposed to start picking up children at 3:00 a.m. But I have to get the vehicle at the other end of the county –
>
> THE COURT: Okay.
>
> FOREMAN: - before that. I mean I can give you to 12:30.
>
> THE COURT: Okay, well why don't we do this, stay throughout the rest of argument. We may very well excuse you at that time, and that's why we have an alternate.

[2] Close to 30 witnesses testified.

FOREMAN: Okay.

THE COURT: But so, I just wanted to find out what the actual time line was.

FOREMAN: Yeah, I mean I would stay. I mean it's not that I don't want to. I would but I've got – I'm going to have a bunch of youth waiting on me with airline tickets to get on a plane with them.

THE COURT: Okay. We'll deal with it finally after argument's completed.

At the conclusion of that bench conference, appellant gave his closing argument, and, at approximately 11:47 p.m., the State gave its rebuttal argument. Immediately following that argument, the court stated that it was "prepared to send the jury back." At that point, the following colloquy ensued:

THE COURT: I know it's my understanding when I called you to the bench earlier [the jury foreperson], unfortunately, has a prearranged trip involving several youth and he needs to get on the road before 12:30. At this point there's no guarantee that deliberations could be completed by then. I am going to excuse your foreman because of that prearrange, preplanned trip and ask the alternate to step in. As far as the foreperson, I was going to ask, pardon me, Juror 28 if she would be willing to serve as foreperson?

JUROR NO. 28: Okay.

THE COURT: Would that be fine?

JUROR NO. 28: Sure.

THE COURT: Okay. So, is there . . . an objection?

[APPELLANT]: Yes, but not to you, ma'am. I was told that they were to choose amongst themselves a foreperson and not be told –

THE COURT: No, they can do it either way. They can choose or the Court can appoint. It's either way.

[APPELLANT]: So, why don't you let them choose?

THE COURT: At this point we're moving forward. If 28's willing to serve then we'll go with her.

The court then sent the jury to the jury room for deliberations. Prior to doing so, the court thanked the jurors for their service and stated that it did not want the jurors "to feel like [they had] to rush the verdict" and that "the defendant deserves better than that."

During deliberations, which lasted approximately two hours, the jury sent multiple notes to the court. One note asked for "drinks like Coke and Sprite," another asked if the jurors could review certain evidence, a third asked for the definition of assault, a fourth asked for the definition of robbery, a fifth informed the court that one of the jurors had a migraine and asked if the court could "lower the lights because the lights exacerbate the situation," and a sixth asked if the jurors could "have an escort to the parking lot." The court responded accordingly to each note, and at no point did appellant object or otherwise indicate that he wanted the court to take some alternative action. The jury thereafter returned its verdict, and the proceedings concluded at 2:34 a.m.

DISCUSSION

I.

Appellant contends that the circuit court "failed to comply with Maryland Rule 4-215" when it "permitted the discharge of counsel without first informing appellant that trial would proceed as scheduled with appellant unrepresented if appellant discharged counsel and did not have new counsel." Appellant also contends that the court committed reversible error when it erroneously construed appellant's request to discharge counsel as a knowing and voluntary waiver of counsel.

The State responds that, although the court may not have followed the precise language of Rule 4-215, the record nevertheless reflects that the court "effectively and repeatedly conveyed that [appellant] had three choices: to continue with his current counsel, to hire a new attorney, or to represent himself." The State maintains that "these repeated admonitions by the court were sufficient to apprise [appellant] that the trial would proceed as scheduled with [appellant] unrepresented if he discharged counsel and did not hire new counsel." The State also maintains that the court was not required to conduct any sort of inquiry into whether appellant knowingly and voluntarily waived his right to counsel because appellant never indicated that he had a desire to waive counsel.

"A defendant's request to discharge counsel implicates two fundamental rights that are guaranteed by the Sixth Amendment to the United States Constitution: the right to the assistance of counsel and the right of self-representation." *State v. Campbell*, 385 Md. 616, 626–27 (2005) (footnote omitted). "Maryland Rule 4-215(e) outlines the procedures a

court must follow when a defendant desires to discharge his counsel to proceed *pro se* or to substitute counsel[.]" *Id.* at 628. Under that Rule:

> 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.

Md. Rule 4-215(e).

Maryland Rule 4-215(a), which is referenced in Rule 4-215(e), provides, in relevant part:

> At the defendant's first appearance in court without counsel, or when the defendant appears in the District Court without counsel, demands a jury trial, and the record does not disclose prior compliance with this section by a judge, the court shall:
>
> (1) Make certain that the defendant has received a copy of the charging document containing notice as to the right to counsel.
>
> (2) Inform the defendant of the right to counsel and of the importance of assistance of counsel.
>
> (3) Advise the defendant of the nature of the charges in the charging document, and the allowable penalties, including mandatory penalties, if any.
>
> (4) Conduct a waiver inquiry pursuant to section (b)[3] of this Rule if the defendant indicates a desire to waive counsel.

[3] Maryland Rule 4-215(b) provides, in relevant part:

The Court of Appeals has stated that "the Maryland Rules are precise rubrics" and that "the mandates of Rule 4-215 require strict compliance." *Pinkney v. State*, 427 Md. 77, 87 (2012). "Thus, a trial court's departure from the requirements of Rule 4-215 constitutes reversible error." *Id.* at 88. We review a trial court's interpretation and implementation of Rule 4-215 *de novo*. *Id.*

"[T]he process outlined in 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." *Id.* at 93. "Next, the trial court must make a determination about whether the defendant's desire to discharge counsel is meritorious." *Gonzales v. State*, 408 Md. 515, 531 (2009). In so doing, "[t]he trial judge must give much more than a cursory consideration of the defendant's explanation." *Johnson v. State*, 355 Md. 420, 446 (1999). In other words, "the record 'must be sufficient to reflect that the court actually considered the reasons given by the defendant.'" *Pinkney*, 427 Md. at 93–94 (citing *Moore v. State*, 331 Md. 179, 186 (1993)).

"If the trial judge determines that the defendant's reasons are meritorious, he must grant the defendant's request to discharge counsel." *Id.* at 94. In addition, the trial judge must "continue the action if necessary" and "advise the defendant that if new counsel does

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> If a defendant who is not represented by counsel indicates a desire to waive counsel, the court may not accept the waiver until after an examination of the defendant on the record conducted by the court, the State's Attorney, or both, the court determines and announces on the record that the defendant is knowingly and voluntarily waiving the right to counsel.

not enter an appearance by the next scheduled trial date, the action will proceed to trial with the defendant unrepresented by counsel." Md. Rule 4-215(e).

If, on the other hand, the trial judge finds the defendant's reasons to be unmeritorious, the judge may: "(1) deny the request and, if the defendant rejects the right to represent himself and instead elects to keep the attorney he has, continue the proceedings; (2) permit the discharge in accordance with the Rule, but require counsel to remain available on a standby basis; (3) grant the request in accordance with the Rule and relieve counsel of any further obligation." *Williams v. State*, 321 Md. 266, 273 (1990). In addition, the trial judge has the option "to deny the request and go forth to trial." *Pinkney*, 427 Md. at 94. Regardless of the action chosen, if the trial judge determines the reasons to be unmeritorious, he "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." Md. Rule 4-215(e). In all cases, the trial court may not permit the discharge counsel without complying "with subsections (a)(1)–(4) of [Rule 4-215] if the docket or file does not reflect prior compliance." *Id.*

Here, the pertinent events occurred during appellant's pretrial hearing on May 7, 2018, at which appellant informed the court that he "will be firing [defense counsel] for ineffective assistance of counsel." Upon appellant making that assertion, the court informed appellant that it had to go through a "process" because there were "consequences" if appellant's reasons were not "meritorious to the court." The court added that if it found

appellant's reasons to be unmeritorious, appellant could "still fire him" but would not be entitled "to a new public defender or new attorney that's paid for by the State."

After the court engaged in a lengthy conversation with appellant about his reasons for wanting to discharge counsel, the court found that appellant's reasons were not meritorious. The court then asked appellant if he wanted to proceed without counsel, reiterating that, although appellant had a right to counsel, he would "not get another public defender or appointed attorney" if he fired his current counsel. In the exchange that followed, the court repeatedly told appellant that, at that point in the proceedings, he had three options: fire defense counsel and hire another attorney; fire defense counsel and proceed without an attorney; or continue with defense counsel as his attorney. Finally, after the court made the above comment for the third time, appellant stated that he wanted to "fire defense counsel for ineffective assistance of counsel." Following that, the court stated that, by firing defense counsel, appellant would "not be appointed another taxpayer paid attorney and in fact he [would] have to either go it alone or hire an attorney to represent him." The court then stated that "based on [appellant's] assertions that he no longer wished the services of [defense counsel], [defense counsel] and the Office of the Public Defender is discharged in this case."

From that, we hold that the circuit court properly complied with the provisions of Maryland Rule 4-215(e). Prior to discharging defense counsel, the court repeatedly told appellant that, if he fired his public defender, he would not get another court-appointed attorney and that, as a result, he could either hire outside counsel or proceed without an

attorney. Then, after appellant stated unequivocally that he wanted to fire defense counsel, the court, prior to discharging counsel, again told appellant that he would "not be appointed another taxpayer paid attorney" and would "have to either go it alone or hire an attorney to represent him." It is clear, therefore, that the court did 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." Md. Rule 4-215(e).

We also hold that the court did not, as appellant suggests, erroneously construe his request to discharge counsel as a knowing and voluntary waiver of counsel. As the record makes plain, the court construed appellant's request to discharge counsel as exactly that—a request to discharge counsel—which the court ultimately found to be unmeritorious. Based upon that finding, the court engaged in the necessary advisements pursuant to Rule 4-215(e). And, as previously discussed, we perceive no error in the court's handling of the matter to that point.

Then, once it made those advisements and discharged counsel, the court "compl[ied] with subsections (a)(1)–(4) of [the] Rule[.]" Md. Rule 4-215(e). That is, the court ensured that appellant had received a copy of the charging document; informed appellant of the right to and importance of counsel; advised appellant as to the nature of the charges; and informed appellant that if he appeared at trial without counsel, the court could determine that he had waived counsel and proceed to trial with appellant unrepresented. Although the court did not conduct a waiver inquiry pursuant to subsection (a)(4), such an inquiry

was unnecessary because, as appellant concedes, he never indicated a desire to waive counsel. *See Broadwater v. State*, 171 Md. App. 297, 303 (2006) ("If . . . the defendant does not 'indicate a desire to waive counsel,' requirement # 4 does not apply."), *aff'd* 401 Md. 175; *See also* Md. Rule 4-215(a)(4) (requiring a court to "[c]onduct a waiver inquiry pursuant to [Maryland Rule 4-215(a)(4)] *if the defendant indicates a desire to waive counsel*[.]") (emphasis added).

In short, the court did everything that was required of it pursuant to Rule 4-215. *See Argabright v. State*, 75 Md. App. 442, 452 (1988) (noting that "when the trial court has determined that a request to discharge counsel is non-meritorious and has informed the accused that the trial will proceed, as scheduled, with the accused unrepresented by counsel if the accused discharges counsel and does not have new counsel available to enter his appearance, and the record discloses that the accused was advised pursuant to Rule 4-215(a)(1)–(4), there has been compliance with the requirements of the Rule."). Not only that, but appellant, after receiving those advisements from the court, knowingly and intelligently represented himself in all subsequent proceedings, including at trial. *See Grandison v. State*, 341 Md. 175, 201 (1995) (where a defendant discharges an attorney for a non-meritorious reason, "a trial court may constitutionally require [the] defendant to choose between proceeding with current counsel and proceeding *pro se*; the defendant's knowing and intelligent refusal to proceed with current able counsel has repeatedly been deemed to constitute a voluntary waiver of the right to counsel.") (citations and quotations omitted). Given those circumstances, and given the fact that appellant has not provided,

and we could not find, any Maryland case in which a court was held to have committed reversible error under facts similar to those of the present case, we hold that the court did not err when it permitted appellant to discharge counsel.

II.

Appellant next contends that the circuit court erred when, during the pretrial motions hearing on July 10, 2018, the court determined that various subpoenas filed by appellant in preparation for the hearing "weren't timely requested." Appellant maintains that that finding by the court was erroneous because, under the "Prison Mailbox Rule," his subpoenas were timely filed and, as a result, "the failure to issue summons for his witnesses in time for the hearing was attributable to the court." Appellant maintains, therefore, that the court "committed prejudicial error" in holding the motions hearing without any of his witnesses present.

The State contends, and we agree, that this issue was unpreserved. At no time did appellant object or otherwise indicate that the court had acted erroneously when it informed him at the July 10 hearing that his subpoenas had not been filed in a timely manner. *See* Md. Rule 8-131(a) ("Ordinarily, the appellate court will not decide any [non-jurisdictional] issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]"). Moreover, at the time of the court's ruling, appellant gave no indication as to the nature of the subpoenaed witnesses' testimony. *See* Md. Rule 5-103(a)(2) ("Error may not be predicated upon a ruling that . . . excludes evidence unless the party is prejudiced by the ruling, and . . . the substance of the evidence was made known to the court by offer on

the record or was apparent from the context within which the evidence was offered."). Finally, at no point did appellant request a continuance so that he may be afforded additional time to procure his witnesses, nor did he signal that he was unable to proceed with the hearing without the subpoenaed witnesses. Accordingly, appellant's argument is not preserved for our review.

Even if preserved, appellant's claim is without merit. In *Hackney v. State*, the Court of Appeals adopted the "prison mailbox rule," which states that "the papers or pleadings of unrepresented, incarcerated litigants are deemed to be 'filed' when formally delivered to prison authorities for mailing to the circuit court." 459 Md. 108, 110 (2018). That case was decided, however, in the context of a petition for post-conviction relief, and there is no indication that the Court intended for the prison mailbox rule to apply to the filing of subpoenas. *Id.* at 132–33 n. 11. Thus, appellant's reliance on *Hackney* is misplaced.

Nevertheless, assuming without deciding that the prison mailbox rule applied in the instant case, we cannot say that the court erred in finding that appellant's filings were untimely. Maryland Rule 4-265(d) states that, "[u]nless the court waives the time requirement of this section, a request for subpoena shall be filed at least nine days before trial [or a hearing] in the circuit court, . . . not including the date of trial [or the hearing] and intervening Saturdays, Sundays, or holidays." By appellant's own admission, his subpoenas were not filed until July 3, 2018, or a mere seven calendar days before the hearing on July 10. Thus, even under the prison mailbox rule, appellant's filings were untimely.

III.

Appellant's final contention is that the circuit court erred when, after having the jury report to court at 9:00 a.m. on a Friday for the second day of trial, the court "sent the jury to deliberate at 12:12 a.m. on a Saturday and required it to continue deliberating until it reached a verdict at 2:22 a.m." Appellant maintains that the court's decision to have the jury begin deliberations at such a time and under those circumstances was "facially coercive" and "forced or helped to force an agreement which would not have otherwise been reached except for the intimidating or coercive effect of the charge upon some jurors." Conceding that he failed to lodge an appropriate objection at trial, appellant asks that we review the court's "error" for plain error.

We decline appellant's request. The Court of Appeals has "characterized the instances when an appellate court should take cognizance of unobjected to error as 'compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial,' and as those 'which vitally affect a defendant's right to a fair and impartial trial[.]'" *State v. Brady*, 393 Md. 502, 507 (2006) (internal citations omitted). On the other hand, plain error review is inappropriate "as a matter of course" or when the error is "purely technical, the product of conscious design or trial tactics or the result of bald inattention." *Id.* (citations and quotations omitted). Nevertheless, "[i]t is a discretion that appellate court's should rarely exercise, as considerations of both fairness and judicial efficiency ordinarily require that all challenges that a party desires to make to a trial court's ruling, action, or

conduct be presented in the first instance to the trial court[.]" *Chaney v. State*, 397 Md. 460, 468 (2007).

In *State v. Rich*, 415 Md. 567 (2010), the Court of Appeals set forth the following four-prong test regarding plain error review:

> First, there must be an error or defect – some sort of deviation from a legal rule – that has not been intentionally relinquished or abandoned, *i.e.*, affirmatively waived, by the appellant. Second, the legal error must be clear or obvious, rather than subject to reasonable dispute. Third, the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the [court] proceedings. Fourth and finally, if the above three prongs are satisfied, the [appellate court] has the discretion to remedy the error – discretion which ought to be exercised only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings.

Id. at 578–79 (quoting *Puckett v. U.S.*, 556 U.S. 129, 135 (2009)) (internal citations and quotations omitted).

Here, we are not persuaded that the court committed any error, much less plain error, in having the jury begin its deliberations at 12:12 a.m., nor are we persuaded that the court's actions affected the outcome of the case. To begin with, there is nothing in the record to suggest that, despite the late hour, the jury was unable or unwilling to discharge its duties prior to the start of deliberations. To the contrary, the record shows that the jury was ready and willing to begin deliberations. For instance, at the conclusion of the State's closing argument, when the court spoke with the jury's foreman regarding the possibility that he would be unable to partake in deliberations due to an impending trip, the foreman stated: "I mean I would stay. I mean it's not that I don't want to." Then, when the court ultimately excused the foreman prior to deliberations and asked another juror if she would be willing

to serve as the foreman, the juror responded in the affirmative and stated that it would be "fine."

The record is equally devoid of any indication that the jury was unable to deliberate effectively given the timing of the deliberations. During its deliberations, the jury sent at least six notes to the court, and none of those notes referenced either the late hour or long day, nor did any of the notes indicate that the jury had a desire to stop deliberating. *Cf. Huff v. State*, 23 Md. App. 211, 220 (1974) (holding that the trial court did not abuse its discretion in refusing to feed a deliberating jury where "[a]t no time did the jury indicate to the court that it was hungry or that it was otherwise adversely affected by the length and circumstances of the deliberations."). If anything, the notes showed that the jury was exercising its duties diligently and eagerly, as two of the notes asked the court to reread a prior instruction and one of the notes asked if the jury could review certain evidence. And, although one of the notes did state that a juror was suffering from a migraine, the record is silent as to what caused the migraine or when it began. Nevertheless, the juror who was suffering from the migraine did not ask to stop deliberating or otherwise indicate that the migraine was affecting her ability to reach a fair and impartial verdict.

Finally, we do not agree with appellant's contention that the court "repeatedly indicated its desire for trial to conclude that day." Although the court, during trial, did exercise its discretion in limiting certain testimony and in imposing a time constraint on the parties' closing arguments, *see Choate v. State*, 214 Md. App. 118, 151 (2013) ("The conduct of a criminal trial is committed to the sound discretion of the trial court[.]")

(citations and quotations omitted), the court also gave the jury frequent breaks throughout the day. Moreover, when the court sent the jury to the jury room for the start of deliberations, the court stated that it did not want the jurors "to feel like [they had] to rush the verdict" and that "the defendant deserves better than that."

In sum, we are not persuaded that the court's actions were "facially coercive" or that they "forced or helped to force an agreement" between the jurors. Accordingly, plain error review is unwarranted.

JUDGMENTS OF THE CIRCUIT COURT FOR WASHINGTON COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.