Circuit Court for Wicomico County
Case No. C-22-CR-18-000509

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 250

September Term, 2019

PERCY LEE MILBOURNE

v.

STATE OF MARYLAND

Fader, C.J.,
Reed,
Shaw Geter,

JJ.

Opinion by Shaw Geter, J.

Filed: April 30, 2020

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

A jury, sitting in the Circuit Court for Wicomico County, convicted Percy Lee Milbourne, appellant, of second-degree assault. On March 15, 2019, the court sentenced him to ten years' incarceration. On appeal, he presents the following two questions for our review:

1. Did the circuit court violate Maryland Rule 4-215(e) when it failed to conduct an adequate inquiry into appellant's reasons for wanting to discharge his attorney and failed to meaningfully consider those reasons?

2. Did the trial court improperly restrict appellant's cross-examination of a witness for the State when it precluded him from eliciting that the witness felt pressured to incriminate him?

We answer appellant's initial question in the affirmative, and shall, therefore, reverse the judgment of the circuit court.

BACKGROUND

The facts underlying appellant's conviction of second-degree assault are largely irrelevant to the issues he presents on appeal. We shall, therefore, forgo a detailed recitation of those facts. *See Kennedy v. State*, 436 Md. 686, 688 (2014).

At approximately 1:30 on the morning of June 26, 2018, Peter Battle, and his brother, Brandon Battle, were assaulted by several men outside of MoJo's, a restaurant in Salisbury, Maryland.[1] During a show-up conducted by the police later that day, Peter identified appellant as having been among a crowd of men, many of whom participated in the assaults. Peter was initially unable to affirm that appellant had been one of the men

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[1] We shall refer to Peter and Brandon Battle by their first names in order to distinguish between them.

who had struck him. However, upon viewing video footage depicting that morning's events, Peter confirmed that appellant had indeed struck him, and he further testified at trial.

Karesha Kellam, the girlfriend of one of the alleged assailants, also testified to the events that transpired on June 26th. In a statement to the police and an Assistant State's Attorney, Ms. Kellam claimed to have seen appellant strike Peter. At trial, however, she retracted that statement, testifying that, although appellant was present during the incident, she did not witness him assault Peter. On cross-examination, the defense asked Ms. Kellam whether, in giving her statement, she had felt "under pressure to give [the police and prosecutor] certain answers they had wanted." The State objected to defense counsel's question and the court sustained the objection.

DISCUSSION

I

Appellant first contends that the court violated Maryland Rule 4-215(e) by neglecting to conduct an adequate inquiry into the reasons for his request to discharge counsel and by failing to meaningfully consider those reasons.

The Request to Discharge Counsel

On November 15, 2018, in anticipation of appellant's trial, which had initially been scheduled for December 3, 2018, the court held a motions hearing.[2] The morning of that

[2] Although trial was initially scheduled for December 3, 2018, the State moved to postpone the proceedings after it obtained new evidence. Trial was not, therefore, held until February 5, 2019.

hearing, the State offered appellant an amended "one-time, take it or leave it" plea deal, whereby he would plead guilty to second-degree assault in exchange for receiving a sentence of ten years, as well as a consecutive term of five years for having violated his probation.[3] Defense counsel requested that the court permit him to discuss the plea offer with appellant, and the court agreed. When the hearing reconvened, appellant expressed a desire to discharge his privately-retained defense attorney, saying: "I'm gonna fire my lawyer, he owe me, he said he gonna give me $1,500 back." Defense counsel then sought to address the difficulties that had arisen between appellant and him.

> [DEFENSE COUNSEL]: Judge, I think we've met some resistance in the trial strategy. I don't think that, I think it's—
>
> THE DEFENDANT: He not doing his job.
>
> [DEFENSE COUNSEL]: — irreconcilable, my client has identified motions issues that I am not aware of, and he doesn't like the plea that's been offered. So I would be happy to return his aforementioned $1,500, I'll return it to him today.
>
> I'd ask to have my appearance stricken and wish him the best.

Reminding appellant that trial was scheduled for December 3rd, the court asked him whether he understood that he would have little time during which to retain substitute

[3] According to the terms of the State's original plea offer, in exchange for appellant's pleading guilty to first-degree assault, the State would recommend a sentence of twenty years, suspend all but ten, and a consecutive five-year term for his probation violation.

counsel. Appellant replied, "[y]eah, it don't take that long." The following colloquy ensued:

> THE DEFENDANT: Today was motions. I want to have a motions. He don't want to, for whatever reason, I don't know. But I'm not going to trial without knowing what kind of evidence, they don't have no evidence because I didn't do anything.
>
> THE COURT: The State would have provided that to [defense counsel], I believe, in discovery.
>
> Did the State—
>
> THE DEFENDANT: I don't have a discovery pack. I have nothing. He don't come see me. He don't tell my family nothing. I don't get nothing.

Citing Maryland Rule 4-215, the court properly noted that it had "to go through the litany of the rule with respect to terminating" appellant's attorney. Though defense counsel agreed, saying: "I ask that you do that, Your Honor," he added: "I'm not going to get in depth on these allegations unless Your Honor would like me to." The court then asked appellant whether there were any additional reasons why he wanted to discharge defense counsel. Appellant answered:

> I just feel like he not doing his job. I don't have a discovery packet, which I'm, I think I need if we're ready to go to trial. I don't know what's going on. He's not letting my family or me know what's going on in this case. I'm going to trial and I feel like I'm blind.
>
> And he just want me to come in here and take ten years. I'm not doing that.

Again, the court cautioned appellant that "trial is . . . just over two weeks away." Appellant then asked the court whether it was possible to postpone trial for at least two weeks in order

to afford him the opportunity to obtain substitute counsel and to familiarize that attorney with the facts of the case. The court answered:

> [F]irst of all, I don't have the power to postpone. As a senior judge, I don't. I can't postpose a case. All I can do is give some guidance with respect to what might happen.
>
> Now, you can fire [defense counsel]. Right now I don't think you have a meritorious reason to terminate his representation.
>
> * * *
>
> THE COURT: [Defense counsel] is a competent attorney, and he's had plenty of criminal trial experience. So, I don't think your reason is meritorious.
>
> However, you're free to terminate his representation. You can fire him if you want. But you understand you run a big risk if you do that. Because whoever the judge is on the trial date may say, too bad, you have to represent yourself. And you don't want to represent yourself.

After being cautioned by the court as to the seriousness of the proceedings and obtaining clarification regarding the terms of the proposed plea agreement, appellant said: "[i]f it's impossible for me to get a postponement so I can get a new lawyer, then I guess I don't . . . got no choice but to go to trial with it." In its response, the court elaborated upon its initial ruling, saying:

> First of all, I don't have the power to postpone the trial date. And, secondly, even if I did, I would not postpone the trial date. You've had enough time to figure out who you want to represent you.
>
> I guess for the umpteenth time [defense counsel] can go back and talk to him.

Once again, appellant conferred with his attorney. Though he expressed continued dissatisfaction with his representation, appellant declined to discharge counsel. Thereafter, appellant, through his counsel, rejected the State's plea offer and withdrew his motions.[4]

Standard of Review

We review a court's interpretation and application of Maryland Rule 4-215(e) *de novo*. *Weathers v. State*, 231 Md. App. 112, 131 (2016). The requirements of Rule 4-215(e) are mandatory and require "strict compliance." *State v. Hardy*, 415 Md. 612, 621 (2010). Any departure therefrom constitutes reversible error. *Id*. We review for abuse of discretion, however, the court's decision to grant or deny a defendant's request to discharge counsel. *Id*.

Maryland Rule 4-215(e)

The Sixth Amendment to the United States Constitution, applicable to the States through the Fourteenth Amendment, and Article 21 of the Maryland Declaration of Rights guarantee the right to counsel in criminal prosecutions. That right "carries with it the defendant's freedom to release or discharge counsel because '[a]n unwanted counsel "represents" the defendant only through a tenuous and unacceptable legal fiction.'" *Holt v. State*, 236 Md. App. 604, 615 (2018) (quoting *Snead v. State*, 286 Md. 122, 128 (1979)). "Maryland Rule 4-215(e) outlines the procedures a court must follow when a defendant desires to discharge his [or her] counsel to proceed *pro se* or to substitute counsel[.]" *State v. Campbell*, 385 Md. 616, 628 (2005). That rule provides, in pertinent part:

[4] It is unclear from the record what motions appellant withdrew.

> 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.

Md. Rule 4-215(e).

In order to comply with this Rule, a court must engage in a three-step process. First, it must "inquir[e] about the reasons underlying a defendant's request . . . and provid[e] an opportunity to explain those reasons." *Pinkney v. State*, 427 Md. 77, 93 (2012). It must then carefully consider each of the reasons given by a defendant to determine whether they have merit. *Id.* Finally, a court must rule on whether a defendant's reasons are meritorious. *Id.* Though Rule 4-215 does not define "meritorious," the Court of Appeals "has equated the term with 'good cause.'" *Dykes v. State*, 444 Md. 642, 652 (2015). "'Good cause' to discharge counsel may be found when there is a 'conflict of interest, a complete breakdown of communication, or an irreconcilable conflict which leads to an apparently unjust verdict.'" *State v. Brown*, 342 Md. 404, 415 (1996) (quoting *McKee v. Harris*, 649 F.2d 927, 931 (2d Cir. 1981). *See also Cousins v. State*, 231 Md. App. 417, 439 (2017) (citing *Weathers v. State*, 231 Md. App. 112, 149 (2016)), *cert. denied*, 453 Md. 13 (2017) ("A complete breakdown in communication is considered 'good cause' to discharge counsel.").

Where a court determines that a defendant's reasons lack merit, it may proceed in one of the following ways:

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

Gonzales v. State, 408 Md. 515, 531–32 (2009) (quoting *Williams v. State*, 321 Md. 266, 273 (1990)). Alternatively, the court may "deny the request and go forth to trial." *Pinkney*, 427 Md. at 94.

The Adequacy of the Court's Inquiry

Although appellant does not deny that the court afforded him an opportunity to explain the reasons for his request to discharge counsel, he contends that it failed to conduct a sufficient inquiry into the adequacy of those reasons.

Though Maryland Rule 4-215(e) does not require a court "to conduct . . . an inquiry in any particular form," *Moore v. State,* 331 Md. 179, 187 (1993), such an inquiry must be sufficient to allow the court to exercise its discretion. *See Grant v. State*, 414 Md. 483, 491 (2010). A circuit court must, therefore, "make a further inquiry if necessary to determine whether those reasons are meritorious." *State v. Graves*, 447 Md. 230, 244 (2016) (citations omitted).

The alleged inadequate communication between appellant and his attorney constituted a facially meritorious, albeit somewhat vague, reason to discharge counsel. *Weathers*, 231 Md. App. at 139. In addressing this reason, appellant advised the court: "I

don't have a discovery packet, which I'm, I think I need if we're ready to go to trial. *I don't know what's going on. He's not letting . . . me know what's going on in this case. I'm going to trial and I feel like I'm blind*." (Emphasis added). While the record reflects that appellant conferred with counsel prior to the court's ruling on his request, it does not otherwise indicate whether, or to what extent, he and his attorney discussed the case. Further inquiry by the court may well have elicited additional information on the basis of which it could have more meaningfully considered the merits of appellant's request. The court did not, however, inquire further so as to determine whether appellant's facially meritorious reason for wishing to discharge counsel was indeed meritorious, as would have been the case if appellant's concerns regarding lack of communication with counsel rose to the level of a "complete breakdown of communication." *Brown*, 342 Md. at 415.

We need not base our holding on the inadequacy thereof, because the record is not "'sufficient to reflect that the court actually considered th[e] reasons' given by the defendant." *Pinkney*, 427 Md. at 93 (quoting *Moore*, 331 Md. at 186). *See also Johnson v. State*, 355 Md. 420, 446 (1999) ("The trial judge must give much more than a cursory consideration of the defendant's explanation." (citation omitted)).

The Adequacy of the Court's Consideration

In support of his contention that the court inadequately considered the reasons underlying his Rule 4-215(e) request, appellant argues that, rather than ruling on the merits of his request, the judge based his decision on the belief that he, as a senior judge, lacked the authority to grant a continuance. In so doing, appellant analogizes this case to *Hawkins*

v. State, 130 Md. App. 679 (2000), where we held that the court had violated Rule 4-215(e) by failing to meaningfully consider the defendant's reasons for his request to discharge counsel.

In *Hawkins*, the State was the first to inform the court that the defendant wished to discharge his court-appointed attorney. *Id.* at 683. The court responded, "[n]o, I'm not going to let him." *Id.* Thereafter, the defendant attempted to explain the reason for his request, saying: "I never got a chance to talk to her about the case. That is why I sat there and told her that yesterday, I only seen [sic] her once since I been home, and that was in April, and then I seen [sic] her yesterday." *Id.* at 684. Again, the court denied the defendant's request, ruling:

> You can't get a continuance. *I don't continue cases*. That is a game that was played for many many years. You are either going to represent yourself or you are going to hire a lawyer, but you are going to hire a lawyer between now and Tuesday. It is that easy. You just tell me what you want to do.

Id. at 684 (emphasis added).

In reversing the judgments of the circuit court, we held that there was no indication that the court took any of the steps required by Rule 4-215(e). *Id.* at 678. Rather, the court "made its initial ruling before either listening to or considering any explanation." *Id.* By refusing "to get into" the reasons for the defendant's request, the court expressly refused to address "the very thing that the court was required to ask him about and carefully consider." *Id.* at 688.

In attempting to distinguish this case from *Hawkins*, the State contends that "the motions court did not rule on the merits of [appellant's] stated reasons until after [he] was

given a full opportunity to articulate them." The State further argues that unlike in *Hawkins*, where the court refused to address the merits of the defendant's request, in this case the court's ruling "included an express finding that [appellant's] reasons lacked merit." It emphasizes that after denying appellant's request on the basis that it lacked the power to postpone the case, the court said: "[r]ight now I don't think you have a meritorious reason to terminate [counsel's] representation."

The mere fact that a court claims to have ruled on the merits of a Rule 4-215(e) request does not necessarily evince its having carefully considered the reasons advanced by a defendant. *See, e.g., Weathers*, *supra* (reversing the circuit court's denial of the defendant's Rule 4-215(e) request despite its having ruled, "I won't discharge him because I don't find a meritorious reason."). Nor does Rule 4-215(e) merely require that a court consider the merits of *some* reasons for discharging counsel. Rather, it requires that a court "consider whether *the reasons given by the defendant* are meritorious." *Pinkney*, 427 Md. at 93 (emphasis added).

In this case, the court's stated reasons for denying appellant's request were that defense counsel was "a competent attorney" and that he "had plenty of criminal trial experience." On the basis of those findings, it concluded: "[s]o, I don't think your reason is meritorious." Granted, attorneys have a duty to provide their clients with competent representation, and the failure to do so constitutes a facially meritorious reason for a defendant to discharge counsel. *Williams v. State*, 321 Md. 266, 273–74 (1990). Incompetency of counsel was not, however, among the reasons given by appellant for his

request. Nor did appellant allege that his attorney lacked the criminal trial experience necessary to provide adequate representation. Rather, he complained that counsel had neither kept him informed about the status of his case, nor provided him with information necessary for him to make decisions with regard to this case. The record does not, therefore, reflect that the court addressed—much less carefully considered—the actual reasons underlying appellant's request.

Even if an attorney's competence or experience somehow supported an inference regarding the adequacy of his or her client communications, the record does not provide a factual basis from which we can assess counsel's competence or experience. As addressed above, our determination of whether a court complied with the requirements of Rule 4-215(e) turns, in relevant part, on whether "the record [is] 'sufficient to reflect that the court actually considered th[e] reasons' given by the defendant." *Pinkney*, 427 Md. at 93 (quoting *Moore*, 331 Md. at 186). In this case, however, we are unable to ascertain from the record the factual foundation for the court's findings, and cannot, therefore, determine whether the court meaningfully considered the merits of appellant's reasons.

Given that the record does not reflect that the circuit court carefully considered the reasons for appellant's Rule 4-215(e) request, we shall reverse its judgment. Though it is unnecessary for us to address appellant's second contention, we shall briefly do so.

II

Appellant further contends that the court both erroneously restricted his cross-examination of Ms. Kellam and abused its discretion by denying his request to introduce the entire transcript of her police statement.

Ms. Kellam's Prior Inconsistent Statements

At trial, Ms. Kellam provided a vague narrative of what had transpired at MoJo's on the evening of June 15, 2018. When asked who she had seen assault Brandon Battle, Ms. Kellam testified that she was unable to identify any members of the group who had done so. The State then asked her whether she recalled having previously identified individuals who had been present during the assaults. Ms. Kellam answered, "I don't remember saying individual names[.] I remember someone asking me and specifically asked me was Mr. Milbourne there and I said no. But then it was stated to me that he was already identified but I never identified Mr. Milbourne, no." The State persisted in its line of questioning, asking Ms. Kellam: "[d]id you say to me that Percy Milbourne was there?" Ms. Kellam responded that though she had told the State that appellant was present during the assaults, she had "state[d] that [she] did not see him do anything."

After further questioning, the State referred Ms. Kellam to a transcript of her prior interview, purportedly to refresh her recollection.

> [THE STATE:] I'm going to ask you to look at line 16 to line 20 and read it to yourself.
>
> [MS. KELLAM:] Okay.

* * *

[THE STATE:]	Does that refresh your recollection about what you said during the interview?
[MS. KELLAM:]	It does, yes.
[THE STATE:]	You say you saw Percy Milbourne hit Peter Battle?
[MS. KELLAM:]	Yes.
[THE STATE:]	I'm going to show again the same State's Exhibit No. 6. I'm going to point you to page 17. It's going to end up being page 16 into page 17. Page 16 line 21 into page 17 line 1, and onward down to line 10. Okay. Does that help refresh your recollection about who you said you saw hitting?
[MS. KELLAM:]	I honestly don't remember giving you a name but if you say it's in the paper, I guess yes.
[THE STATE:]	No, the question is after reviewing the transcript of the interview, does this help refresh your recollection?
[MS. KELLAM:]	I said yes, but I don't remember giving you a name, but yes.
[THE STATE:]	It doesn't help refresh your recollection? You have to answer yes or no, ma'am, I'm sorry.
[MS. KELLAM:]	This is frustrating, I don't want to be here.
[THE STATE:]	I know, but I need you to answer yes or no.
[MS. KELLAM:]	I don't want to.

During an ensuing bench conference, the State argued:

I think the proper inquiry at this point is to confront her with what she said and give her the opportunity to own it or deny it. If she owns it then I have

> nowhere to go, if she denies it then I'm able to impeach her with her prior time.

The court agreed with the State's assessment, as did defense counsel. Thereafter, the State read aloud an excerpt from Ms. Kellam's police statement, in which she identified several of the individuals who had participated in the assaults. Ms. Kellam denied having made the statement read by the State, saying: "Right, you guys stated that they were out there, I didn't know." With no objection from defense counsel, the State entered the excerpted portion of Ms. Kellam's statement into evidence. That excerpt read:

> [THE STATE]: Can you think of anybody else who was out there? I mean—I mean, there's lots of people hitting him, so—
>
> [MS. KELLAM]: Yes.
>
> [THE STATE]: —I'd like to know who's hitting him. I mean, that we have—
>
> [MS. KELLAM]: We have, you know, China, *Percy*, Jay, Marcus, Broff already.

(Emphasis added).

On cross-examination, defense counsel asked Ms. Kellam whether she had felt "under pressure" to give the police and the prosecutor "certain answers they wanted[.]" Before Ms. Kellam could answer, the State objected, and the court sustained its objection. Defense counsel continued to cross-examine Ms. Kellam, without proffering the content or relevance of the testimony he had attempted to elicit.

After the State rested its case and the defense informed the court that it would not call any witnesses, defense counsel moved to admit the entire transcript of Ms. Kellam's

police interview into evidence. The court denied his request. Again, the defense made no proffer as to the relevance or content of the excluded portions of Ms. Kellam's statement.

Preservation

"Where evidence is excluded, a proffer of substance and relevance must be made in order to preserve the issue for appeal." *Pickett v. State*, 222 Md. App. 322, 345 (2015) (citation omitted). "[A] principal purpose of the preservation requirement is to prevent 'sandbagging' and to give the trial court the opportunity to correct possible mistakes in its rulings." *Bazzle v. State*, 426 Md. 541, 562 (2012) (citing *Fisher v. State*, 367 Md. 218, 240 (2001)). No formal proffer is required, however, where "'the substance of the evidence . . . was apparent from the context within which the evidence was offered.'" *Devincentz v. State*, 460 Md. 518, 536 (2018) (quoting Md. Rule 5-103(a)(2)).

Appellant contends that the court abused its discretion in sustaining the State's objection to his asking whether she had felt pressured to give the police and prosecutor certain answers during her interview. The State responds that this issue is not preserved because appellant failed to make a proffer as to the substance and the relevance of the testimony appellant sought to elicit.

We agree with the State that appellant's failure to proffer the content and relevance of the testimony he sought to elicit from Ms. Kellam deprived the trial court of an opportunity to meaningfully assess the admissibility of that prospective testimony. We are, therefore, unable to "discern what that answer may have been, whether favorable or unfavorable to the defense." *Merzbacher v. State*, 346 Md. 391, 416 (1997). This is

particularly so given the inconsistent—and self-contradictory—nature of Ms. Kellam's testimony, as well as her admitted reluctance (if not outright refusal) to provide inculpatory testimony. Given that appellant failed to preserve this issue for our review, we decline to address the merits thereof.

Finally, citing the doctrine of verbal completeness, appellant claims that the court erroneously denied his request to introduce into evidence the transcript of Ms. Kellam's police interview.[5] This contention is likewise unpreserved for our review. As the State rightly notes, at no point did appellant proffer the substance or the relevance of the remainder of the transcript, nor did he identify the grounds for its admissibility. *See Campbell v. State*, 243 Md. App. 507, 532 (2019) ("[T]he proponent of evidence that has been excluded must proffer what that evidence would have been." (citation omitted)); *Pickett*, 222 Md. App. at 345 ("Where evidence is excluded, a proffer of substance and relevance must be made in order to preserve the issue for appeal." (citation omitted)). Absent such a proffer, appellant failed to preserve this issue for our review.

JUDGMENT OF THE CIRCUIT COURT FOR WICOMICO COUNTY REVERSED. CASE REMANDED FOR A NEW TRIAL. COSTS TO BE PAID BY WICOMICO COUNTY.

[5] Appellant neglected to expressly raise this issue in the "Questions Presented" section of his brief. By failing to do so, appellant appears to have waived appellate review of the issue. *See* Md. Rule 8-504(a)(3); *Peterson v. Evapco, Inc.*, 238 Md. App. 1, 62 (2018); *Green v. N. Arundel Hosp. Ass'n, Inc.*, 126 Md. App. 394, 426, *aff'd*, 366 Md. 597 (2001).