Circuit Court for Prince George's County
Case No. CT-18-1262X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1738

September Term, 2019

ALFRED LEWIS, JR.

v.

STATE OF MARYLAND

Reed,
Ripken,
Battaglia, Lynne A.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Ripken, J.

Filed: February 3, 2022

In April 2019, a jury in the the Circuit Court for Prince George's County found Alfred Lewis, Jr. ("Lewis") guilty of assault in the second degree. The Court sentenced Lewis to ten years in prison with no probation, and Lewis noted a timely appeal of his conviction. On appeal, Lewis argues (1) that he received ineffective assistance of counsel; and (2) that the court erred in failing to comply with Maryland Rule 4-215(e), which governs a request to discharge counsel. For the reasons to follow, we shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Lewis was tried for several offenses arising from a violent physical altercation with Cedric Smith ("Smith") and Smith's girlfriend, Renee Brock ("Brock"), which occurred in August 2018.

Brock testified that, on August 23, 2018, she and Smith were in their apartment located at 11206 Cherry Hill Road in Beltsville, Maryland when she received a phone call from Lewis[1] asking of her whereabouts. She told Lewis she was not in her apartment. Brock testified that she lied to Lewis because she felt threatened by Lewis's demeanor. Later that day, as Brock opened the front door of her apartment to leave, she saw Lewis crouched to the left of the door. Brock testified that Lewis put his hand over her mouth, pressed a gun against the back of her head, and led her into the master bedroom, where Smith was sitting.

[1] At the time of the incident on August 23, 2018, Smith and Brock knew Lewis as "Boo" and did not know his real name until they were shown confirmatory pictures of Lewis during police interviews. When police interviewed Brock after the altercation, she told them that "Boo" was the person who attacked her and Smith. Based on Brock's description, the police searched various law enforcement databases and obtained a photo of Lewis. The police showed the photo to Brock and she confirmed that Lewis was "Boo." Approximately two days after speaking with Brock, police showed Smith a photo of Lewis and Smith also confirmed that Lewis was "Boo" and was the person who "robbed him" and "stabbed him."

Smith testified that he could not see the object pointed at Brock's head because there was a towel draped over it. Lewis pushed Brock into the master bathroom and pulled the bathroom door shut, leaving Lewis and Smith alone in the bedroom.

Smith testified that Lewis then confronted him about a debt that he owed to Lewis. Smith indicated that he owed Lewis about $900 to $1000 and stated that Lewis had called him earlier that month to collect the debt.[2] Smith further testified that, on August 23rd, when he told Lewis that he did not have the owed money, Lewis hit him across the mouth with "something very, very hard." Smith testified that he did not know what the object was and that he did not see a gun. Smith responded by punching Lewis and they "tussled from one wall in the bedroom to another wall in the bedroom[.]" During the altercation, Smith felt Lewis reach his arms around his body and stab him with an object, which Smith later identified to be a tire hole plunger.

Brock testified that she exited the bathroom when she heard a "loud eruption of voice and . . . sounds like banging around." Brock observed that Smith was bleeding and was trying to push Lewis away. She grabbed Lewis from behind and jumped on his back. Brock testified that Lewis bit her hand and then struck her "in the face with whatever he had in his hand." When Lewis asked Smith again for the money, Smith took all the money from his pocket and threw it on the floor. Lewis grabbed the money from the floor and left the apartment. Smith testified that he had "a lot of problems breathing" and "really thought [he] was going to die" after Lewis left the apartment.

[2] Lewis testified that he had loaned Smith $1,000 and Smith agreed to pay back $1,500.

After Lewis left the apartment, Brock called 911 and Smith was subsequently transported to the Washington Hospital Center where he had surgery to treat his wounds. Approximately two days after Smith's surgery, police interviewed him in the hospital. Smith was shown a photo of Lewis, and Smith indicated that Lewis was the person who entered his apartment and stabbed him. Smith was also shown a photograph of several tools, and he identified the weapon that was used to stab him. Smith told the police that he was stabbed with "a tool that you use to plug your tire" and indicated that the tool he was stabbed with did not come from inside his apartment.

At trial, in addition to the testimony of Smith and Brock, the State presented evidence that police found a tire hole plunger that had blood stains on the pointy metal end. This was located in the driver's side door compartment of Lewis's car. The State obtained a DNA sample from the handle of the tool and from the metal end with the blood stains. A forensic scientist testified that the sample from the metal end matched Smith's DNA profile. The DNA from an additional sample on the handle yielded a mixed DNA profile of three people that was not suitable for comparison. Police also found $1,765 in cash in Lewis's car, but did not recover a gun during the investigation.

The State's evidence also included statements, over Lewis's objection, that Smith made to the police at the hospital prior to surgery.[3] After Smith testified that he could not

[3] The police officer who spoke with Smith before his surgery testified to Smith statements: "He just said the suspect demanded money from him, struck him with a weapon. And he told me that he had $200 in his front pocket and that he proceeded to try to tell the suspect that he had money in his front pocket. After that, he said the suspect proceeded to assault him." The officer also testified that Smith said he was struck in the head with a revolver and stabbed with a sharp object.

remember the conversation with the police prior to his surgery, the State sought to admit Smith's statements pursuant to the dying declaration exception to hearsay.[4] When the State asked Smith if he continued to believe that he was going to die prior to his surgery, defense counsel objected and stated, "His thoughts while he's in the hospital are not relevant to the issues that the jury needs to decide[.]" The State responded that because Smith testified that he did not remember speaking to police, the State needed to ask Smith if he continued to believe that he was going to die in the hospital to lay the foundation for admissibility pursuant to the dying declaration exception. Defense counsel stated, "[T]he dying declaration goes to the identification. There's already enough evidence that's come out as to who allegedly did this. [Smith's] already testified that it was [Lewis]." The court overruled the objection and permitted the State to ask Smith the question, to which he replied, "I didn't think I was going to make it. I thought I was going to die."

Later at trial, the State called, as a witness, the officer who interviewed Smith at the hospital to offer testimony regarding Smith's statements prior to being rushed into surgery. Defense counsel objected to the admission of Smith's statements as a dying declaration:

> [DEFENSE COUNSEL]: It's based on the previous objection that we had earlier regarding the dying declaration.
>
> [THE COURT]: What's your position on that.
>
> [DEFENSE COUNSEL]: We're still objecting to it.

[4] In a homicide prosecution, a statement admitted as dying declaration requires that (1) the declarant is unavailable; (2) the declarant made the statement under a belief of impending death; and (3) the statement concerns the cause or circumstances of the believed impending death. Md. Rule 5-804(b)(2). A witness is "unavailable," in situations, among others, "in which the declarant…testifies to a lack of memory of the subject matter of the declarant's statement[.]" Md. Rule 5-804(a)(3).

> [THE COURT]: Okay. Because you think it is not a dying declaration?
>
> [DEFENSE COUNSEL]: Correct.
>
> [THE COURT]: And what's your basis for thinking that? The testimony was he was being rushed into the hospital. I think earlier testimony was prior to surgery—
>
> [DEFENSE COUNSEL]: That's the Court's recollection. I'm objecting.
>
> [THE STATE]: And I do recall on direct examination when I rephrased the question, what was your understanding of the condition? He said very clearly I thought I was going to die.
>
> [THE COURT]: That's what I recall. So, overruled.

Following the court overruling the objection, defense counsel did not state any further basis of objection.

Lewis testified in his own defense at trial. Lewis testified that went to the apartment to inquire about renting a spare bedroom after Brock called him on the phone and told him that she and Smith were at home. Lewis testified that Brock let him into the apartment and that he walked to the master bedroom where he saw Smith sitting without a shirt on. After discussing how much rent Smith would charge for the spare room, Lewis asked Smith about the debt Smith owed. Lewis testified that when he and Smith began to argue over the money, Smith "raised up his shirt, reached behind his back and pulled out a pistol" and Brock screamed and ran into the bathroom. Lewis maintained that he punched Smith in response to Smith's initial approach and that he acted in self-defense. Lewis testified that as Smith "bull rushed" him, Lewis "simultaneously" grabbed "the [tire] plunger off the table." Lewis testified that he never had a handgun in his possession during the fight and

that he did not take any money when he left the apartment. Lewis also testified that he took the tire plunger with him when he left the apartment and that he put it in the driver's side door compartment of his car.

At the conclusion of the trial, the jury found Lewis guilty of assault in the second degree on Smith.[5] Lewis's timely appeal of his conviction followed.

Additional facts will be included as they become relevant to the issues.

ISSUES PRESENTED FOR REVIEW

Because we must address a threshold question for each issue that Lewis presents on appeal, we have rephrased the two issues for review: [6]

I. Whether it is appropriate on direct appeal to review Lewis's ineffective assistance of counsel claim.

II. Whether Lewis's pretrial motions and statements required the court to follow the procedure for a request to discharge counsel pursuant to Maryland Rule 4-215(e).

[5] Lewis faced thirteen additional charges. On the counts related to Smith, the jury found Lewis not guilty of attempted first-degree murder; attempted second-degree murder; use of a firearm in the commission of a crime of violence; robbery with a dangerous weapon; and robbery. The jury was unable to reach a verdict as to attempted voluntary manslaughter and first-degree assault. With respect to the counts related to Brock, the jury found Lewis not guilty of first-degree assault and use of a firearm in the commission of a crime of violence, and it was unable to reach a verdict as to second-degree assault. The jury also found Lewis not guilty of home invasion; illegal possession of a regulated firearm; and carrying a dangerous weapon with the intent to injure.

[6] Rephrased from:

I. Did Mr. Lewis receive ineffective assistance of counsel when his trial attorney neglected to object to the introduction of a dying declaration by a witness who testified and so was not unavailable?

II. Did the trial court err in failing to comply with the requirements of Rule 4-215(e) where Mr. Lewis expressed dissatisfaction with his attorney orally and in writing before trial?

For the reasons discussed below, we hold that it is not appropriate on direct appeal to review Lewis's ineffective assistance of counsel claim, and that Lewis's pretrial motions and statements did not implicate Maryland Rule 4-215(e).

DISCUSSION

I. IT IS NOT APPROPRIATE ON DIRECT APPEAL TO REVIEW LEWIS'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM.

Lewis first argues that he received ineffective assistance of counsel when defense counsel failed to object to Smith's statements to police at the hospital on the basis that the declarant, Smith, was present at trial and, thus, not unavailable. Lewis claims that there is no suggestion defense counsel failed to assert this objection as a matter of strategy and the prejudice is clear because counsel made an erroneous objection as opposed to no objection. The State responds that Lewis's claim is not properly before this Court in a direct appeal of his conviction. We agree with the State and decline to review Lewis's claim.

The most appropriate method to resolve an ineffective assistance of counsel claim is a postconviction proceeding pursuant to the Maryland Uniform Postconviction Procedure Act. *Mosley v. State*, 378 Md. 548, 558–59, 560 (2003) ("Ineffective assistance of counsel is one of the claims cognizable under the Act, and it is the one most commonly raised."); *see generally* Md. Code, Criminal Procedure Article ("CP") §§ 7-101 to 109 (2018 Repl. Vol.). A postconviction proceeding is preferred—over a direct appeal of a conviction—because "the trial record rarely reveals why counsel acted or omitted to act, and such [a] proceeding[] allow[s] for fact-finding and the introduction of testimony and evidence directly related to [the] allegations of the counsel's ineffectiveness." *Mosley*, 378

Md. at 560. As a result, review on direct appeal of ineffective assistance of counsel occurs in "extremely rare situations." *Crippen v. State*, 207 Md. App. 236, 251 (2012).

We review a claim for ineffective assistance of counsel on direct appeal only when "the critical facts are not in dispute and the record is sufficiently developed to permit a fair evaluation of the claim." *In re Parris W.*, 363 Md. 717, 726 (2001); *Mosley*, 378 Md. at 563 (internal quotations omitted) (explaining that "there may be exceptional cases where the trial record reveals counsel's ineffectiveness to be so blatant and egregious that review on [direct] appeal is appropriate").

Here, the trial record is not sufficiently developed to demonstrate whether Lewis received ineffective assistance of counsel. It is undisputed that while defense counsel objected to Smith's statements made to police prior to his surgery, he did not object on the basis that Smith, the declarant, was not unavailable. Certainly, the declarant must be "unavailable" at trial in order for such statements to be admissible as a dying declaration. Md. Rule 5-804(b)(2). However, a witness who testifies at trial can be deemed to fit the statutory definition of "unavailable" in specified situations, among them being the situation "in which the declarant . . . testifies to a lack of memory of the subject matter of the declarant's statement[.]" Md. Rule 5-804(a)(3). Smith was present at trial and testified to a lack of memory of the statements he made prior to his surgery. Thus, it is not clear that defense counsel's failure to object to the unavailability requirement would render ineffective assistance of counsel. Moreover, the record does not reveal defense counsel's reasons for not objecting to the unavailability element, which could be clarified in a postconviction proceeding. Defense counsel's failure to make this objection is not "so

blatant and egregious that review on [direct] appeal is appropriate." *Mosley*, 378 Md. at 563 (internal quotations omitted).

II. THE TRIAL COURT WAS NOT REQUIRED TO APPLY RULE 4-215.

Lewis's second argument is that the trial court committed reversible error when it failed to comply with Maryland Rule 4-215(e)'s procedure on a request to discharge counsel. Lewis claims that his pretrial motions and statements "were sufficient to put the court on notice that he might want to discharge his attorney" and required the court to follow Rule 4-215(e). The State responds that Lewis's motions and statements should not have been construed as a request to discharge his counsel. Before addressing the parties' arguments, we first describe the additional relevant facts.

A. Factual Background

On March 22, 2019, several days prior to trial, Lewis filed three handwritten motions *pro se*: (1) "Motion For Dismissal For Due Process Violation by Defective Indictment;" (2) "Motion For Dismissal for Due Process Violation by Improper Identification;" and (3) "Motion to Object." The first motion claimed that the indictment lacked a valid signature, and the second motion claimed that the pretrial witness photo identifications of Lewis were unconstitutional. The Motion to Object stated the following:

> Now comes Alfred Lewis in pro se format in accordance to Maryland Rule & Procedure now move in pursuant to Maryland Rule to objection to <u>All</u> unreasonable delay, in which to include counsel in which has made postponement without consulting defendant, in which has cause unwanton delay. Petitioner was not allowed to be present nor fully understood any/or all postponement that has put in jeopardy his rights to Speedy Trial that is protected under United States Constitution 6 Amendment & of Maryland Declaration of Rights Art 21 in which is protect by due process of Maryland

> Declaration of Right Art 24 & 5th & 14th Amendment of the United State Constitution.
>
> Petitioner himself wish to put the Courts on point that he wish on record, that he protest/or Object to all postponement, to ensure No upset to his Hick's date.

On April 1, 2019—the first day of trial—the court addressed Lewis's three *pro se* motions before the trial proceedings began. Defense counsel argued the first two motions, which the court denied. The court ruled that the indictment was properly signed and that Lewis did not meet his burden on the photo identification argument. The court permitted Lewis to argue the "Motion to Object" on his own behalf, and he complained of his lack of presence in the courtroom:

> [LEWIS]: First and foremost, I would like to say that the last time I was in Court was the only time I was in court. I've been locked up since August and that was the first time I ever been in the courtroom when I went in front of Judge Pearson.
> THE COURT: So you would be transported to court, but not brought upstairs?
> [LEWIS]: I've never been in the courtroom. This is my second time in courtroom.

The court responded that it understood Lewis's protest and then asked Lewis, "What else would you like to tell me?" Lewis then expressed his disagreement with the court's decision to deny his "Motion For Dismissal" concerning the pretrial photo identification. The court then asked defense counsel to explain to Lewis that the photos shown in the pretrial witness photo identification were not line-ups and were confirmatory photos. After defense counsel finished his explanation to Lewis, the court asked Lewis, "Anything else on your motion to object? Would you like to be heard on anything else, any other points?" Lewis did not make any other statements, and the court dismissed the Motion to Object:

> I don't find there needs to be necessarily a decision based on the motion, but I did want to give the defendant an opportunity to air out his concerns. We have done that. I don't see where there's a particular request, so the motion is dismissed, no request made, defendant heard on the motion.

B. Lewis's Pre-Trial Motions and Statements Did Not Express a Desire to Discharge his Counsel.

We review a trial court's compliance with Maryland Rule 4-215(e) *de novo* and determine whether the court was legally correct. *State v. Graves*, 447 Md. 230, 240 (2016).

Maryland Rule 4-215(e) details the court procedure "when a defendant desires to discharge his counsel to proceed *pro se* or to substitute counsel." *State v. Campbell*, 385 Md. 616, 628 (2005). The Rule provides:

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

Md. Rule 4-215(e). The purpose of the Rule is to protect a defendant's rights to the effective assistance of counsel and to self-representation. *Campbell*, 385 Md. at 629. The Rule "demands strict compliance [from the court]," *State v. Hardy*, 415 Md. 612, 621 (2010),

when a defendant's desire to discharge counsel is made before "meaningful trial proceedings have begun[.]"[7] *State v. Brown*, 342 Md. 404, 426 (1996).

The Rule does not define "what level of discourse is required to discharge counsel [to initiate the Rule's procedure]," *Campbell*, 385 Md. at 629, and there is often the threshold issue of "whether [a defendant's] statements should have been construed as a request to discharge counsel," *id.* at 628. *See Hardy*, 415 Md. at 622. A defendant's request to discharge counsel "need not be explicit," *Williams v. State*, 435 Md. 474, 486 (2013), and the Rule "does not compel a defendant to utter any particular magical incantation or 'talismanic phrase' in order to invite the court's interest . . .[,]" *State v. Taylor*, 431 Md. 615, 632 (2013) (quoting *Campbell*, 385 Md. at 630).

However, to trigger the Rule, "a defendant must provide a statement 'from which the court could reasonably conclude' that the defendant desires to discharge his or her attorney, and proceed with new counsel or self-representation." *Taylor*, 431 Md. at 632 (quoting *Hardy*, 415 Md. at 622); *Williams*, 435 Md. at 486–87 (2013). Here, there is no basis in Lewis's pretrial motions and statements from which the trial court could have reasonably concluded that Lewis desired to proceed *pro se* or with new counsel to implicate Rule 4-215(e).

[7] Rule 4-215(e) "does not apply to requests to discharge counsel made after voir dire has begun." *State v. Hardy*, 415 Md. 612, 624, 621 (2010) ("Where a motion to discharge counsel is made during trial, however, Rule 4-215(e) does not apply, and we evaluate the trial court's ruling on a motion to discharge counsel under the far more lenient abuse of discretion standard.").

With respect to the text of Lewis's three motions, the two "Motions For Dismissal" concerned only the indictment document and photo identification. Neither stated a dissatisfaction with defense counsel's representation nor made any mention of defense counsel. The "Motion to Object" stated that Lewis objected "to [a]ll unreasonable delay, in which to include counsel in which has made postponement without consulting defendant, in which has cause unwanton delay." The text of the Motion to Object complained of delays, was pled to prevent future delays in the case, and the sole reference to defense counsel was too vague to reasonably conclude that Lewis sought to discharge counsel. *See State v. Northam*, 421 Md. 195, 206 (2011) (reasoning that the defendant's "vague request that he wanted a 'Court appointed attorney,' buried in the final sentence of the final paragraph of what was captioned and pled specifically and solely as a change of venue motion" did not mandate a Rule 4-215 inquiry). The refence to counsel was embedded "within extraneous matter in an unrelated written motion." *Williams*, 435 Md. at 489. The mere fact that the motions were filed *pro se* is insufficient for the court to reasonably conclude that Lewis desired to discharge his counsel.

With respect to Lewis's pretrial statements, his statements in support of his Motion to Object related only to his lack of presence in the courtroom and to the denial of his motion concerning photo identification. The court asked Lewis, "Anything else on your motion to object? Would you like to be heard on anything else, any other points?" Lewis made no further statements. Reviewing the entirety of the discussion related to the Motion to Object, there was no statement from which the court could reasonably conclude that

Lewis expressed a desire to change his defense counsel or to proceed *pro se*. Accordingly, the trial court was not required to undertake a Rule 4-215(e) inquiry.[8]

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

[8] On the third day of trial, after the close of evidence, Lewis addressed the court out of the jury's presence and stated that he felt "bamboozled and hoodwinked" by defense counsel, that defense counsel did not properly review or use evidence, and that he felt defense counsel "was inadequate and insufficient in defending [him]." Lewis then requested a mistrial, which the court denied and explained that Lewis and defense counsel's difference of trial strategy did not warrant a mistrial on the third day of trial after all the evidence was presented. We note that Lewis does not assert any error with the court's inquiry into his dissatisfaction with defense counsel. Lewis only asserts that the inquiry occurred too late and relies on *State v. Weddington*, 457 Md. 589 (2018).

Lewis's reliance on the holding in *Weddington* is misplaced. In *Weddington*, the Court of Appeals held that the trial court could not cure its failure to comply with Rule 4-125(e) by conducting a post-trial hearing on the defendant's request to discharge counsel. 457 Md. at 606. However, the holding in *Weddington* was based on the prerequisite fact that the defendant sufficiently made a request to discharge counsel *before trial*, thus, triggering the Rule. *Id.* at 602. Here, unlike in *Weddington*, we conclude that the Rule does not apply because Lewis's pretrial motions and his statements did not constitute a request to discharge counsel.