Circuit Court for Howard County
Case No. l3-K-16-057110

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2292

September Term, 2017

CRAIG WHITE

v.

STATE OF MARYLAND

Meredith,
Nazarian,
Arthur,

JJ.

Opinion by Meredith, J.

Filed: March 27, 2020

A jury in the Circuit Court for Howard County found Craig Dennis White, appellant, guilty of killing his parents, Glenn and Linda White. After the jury found that appellant was criminally responsible at the time of the killings, the court sentenced him to two consecutive life sentences without parole. This appeal followed.

QUESTIONS PRESENTED

Appellant presents three questions, which we have reordered:

1. Did the court err in denying appellant's suppression motion?

2. Did the court fail to comply with Maryland Rule 4-215(e) when appellant requested a postponement to hire private counsel?

3. Did the court commit reversible error in overruling appellant's objection to the prosecutor's reference in closing argument to appellant's failure to testify?

We answer "no" to question 1, and "yes" to questions 2 and 3. We shall vacate the judgments of the circuit court, and remand the case for a new trial.

FACTS AND PROCEDURAL BACKGROUND

The evidence in this case revealed the following. On the afternoon of September 1, 2016, a Howard County attorney who was representing appellant in connection with a charge of rape called 911 and asked that police conduct a welfare check on the White family. The attorney explained that she was concerned because appellant's parents had failed to show up for a meeting she had arranged with Howard County police at the parents' insistence. The attorney was concerned that she had been unable to contact the Whites for three days.

In response to the attorney's 911 call, Pfc. Christopher Cromwell, of the Howard County Police Department, was dispatched to the Whites' residence, and he arrived on the scene at around 6 p.m. Pfc. Cromwell saw two cars in the driveway, but no one responded to his knocks on the front door. He then walked around the exterior of the house and discovered that a sliding glass door at the rear of the house was closed but unlocked. Pfc. Cromwell called for backup and waited by the door until two additional police officers, Cpl. Laura Wilson and Pfc. Markley, arrived. After announcing themselves as Howard County police and receiving no response, the three officers entered the house together. Pfc. Cromwell went into the basement while Cpl. Wilson and Pfc. Markley explored the main level of the house.

Cpl. Wilson testified that, when she arrived on the scene, she observed two cars in the driveway and confirmed that their hoods were cold to the touch. As soon as she entered the house, she could smell a lemon-scented cleaning product, and she observed a bottle of lemon-scented cleaner in the middle of the kitchen floor. She and Pfc. Markley searched the upstairs to see if there was anyone in the house who needed help. Cpl. Wilson testified that she could smell blood as soon as she entered the upstairs hallway. She discovered the deceased body of Glenn White, appellant's father, in his bedroom. There was a "significant amount of blood" in the bedroom where Glenn White's body was found, and in the nearby bathroom.

In a room at the bottom of the stairs on the basement level—later identified as appellant's bedroom—Pfc. Cromwell discovered the deceased body of Linda White, appellant's mother.

According to Dr. Carol Allan, the assistant medical examiner who oversaw the autopsies of the Whites, Glenn White had received a total of seventy-four sharp-force injuries to his head and neck, and he bled to death on his bedroom floor after being attacked while sleeping in his bed. Linda White had been strangled and stabbed to death in appellant's bedroom.

Based on the 911 call, police understood that three people resided in the Whites' home, and they began looking for appellant. They located him about 9:35 p.m., and he was arrested without incident at a Wendy's drive-through in Columbia. His DNA was found in numerous locations throughout the crime scene. He was charged with the first-degree murder of his parents.

Prior to trial, appellant moved to suppress the evidence discovered pursuant to the warrantless entry into the house. This motion was denied, and is the subject of the first issue on appeal.

Appellant's second issue on appeal is his contention that the court committed reversible error in failing to comply with Rule 4-215(e) when appellant requested a postponement to hire private counsel. The State points out that appellant did not express a request to discharge his attorneys. But his attorneys *did* apprise the court that he had

expressed a desire to engage private counsel, and the court did not permit appellant to explain his reasons for wanting different counsel.

Finally, appellant complains that his objection to a comment made by the prosecutor during the State's closing argument regarding his failure to testify should have been sustained.

DISCUSSION

I. Motion to Suppress

Appellant argues that the trial court erred in failing to grant his pretrial motion to suppress evidence discovered as a result of the police officers' warrantless entry into his parents' house on September 1, 2016. When considering the denial of a motion to suppress, we review the record made at the suppression hearing, viewing the facts found therein in the light most favorable to the State, and giving "great deference to the suppression judge" with regard to the court's factual findings. *Brewer v. State*, 220 Md. App. 89, 99 (2014). We apply a *de novo* standard of review to legal conclusions, making our "own independent constitutional appraisal by reviewing the law and applying it to the facts of the case." *Id.* (citing *Bailey v. State*, 412 Md. 349, 362 (2010) (citations omitted), and *Grymes v. State*, 202 Md. App. 70 (2011)).

Pfc. Cromwell and Cpl. Wilson both testified at the suppression hearing. Pfc. Cromwell testified that the call for which he had been dispatched

> . . . came out originally as a check on the welfare. We were attempting to make contact with three subjects. . . . We were supposed to contact Glenn and Linda White and their son, Craig. The caller was their attorney and said they were supposed to be having a meeting with him [sic] at [the]

> Northern District [police station] because of charges of rape. However, they didn't show up and haven't answered their phone or e-mail for the last three days. And they wanted to contact back with the disposition whether we were able to make contact or not.

Pfc. Cromwell described his arrival on scene, his search of the perimeter of the house, and his discovery of an "unsecured door" at the rear of the house. He said he did not enter the house until backup officers, Cpl. Wilson and Pfc. Markley, arrived. Cpl. Wilson testified that, when she arrived, she saw two cars in the driveway and discovered that their hoods were cold. She noticed a Terminix receipt stuck in the front door, indicating that a Terminix representative had been at the house at 2:14 p.m. that day. She and Pfc. Markley then joined Pfc. Cromwell on the back deck, and together they entered through the unlocked sliding glass door. She testified that her purpose in entering the house was "[t]o check on the subjects inside" in response to their attorney's call for a welfare check.

Cpl. Wilson also testified that, on the evening of September 1, 2016, after police had put up crime-scene tape, "we made contact with two individuals who had come to take dance lessons and they had all the information [for the Whites] that we needed in their cell phones. They were there for an appointment. They never missed an appointment, et cetera." The couple stated that the senior Whites gave dance lessons in their home. They provided the police contact information for the elder Whites.

The 911 call requesting a welfare check on the White family was entered into evidence as State's Exhibit C at the suppression hearing. The caller identified herself as Debra Saltz, "their attorney." Ms. Saltz explained that she was "concerned" about the

White family because they failed to show up for a meeting that she had set up at their insistence at the Northern District police station in regard to a rape investigation. Ms. Saltz indicated that she had not heard from any of the Whites in a few days, which caused her concern because all three of the Whites had been "really pushing for this meeting," and had been "calling and calling me," yet had failed to appear at the meeting. None of the Whites had responded to any of her calls or emails.

Appellant argued that an attorney calling about a missed appointment did not rise to a level, under any theory, that would excuse a warrantless entry into his residence. The State argued that the officers' warrantless entry was permitted pursuant to the community caretaking exception to the warrant requirement, and also because exigent circumstances justified the entry. In its ruling denying the motion to suppress, the court explained:

> . . . What stands out to this court just a couple of things and then I'll get its analysis. Defense is making a big deal out of it's only an attorney and an appointment was missed. And when you're looking at I would say the totality of the situation and normal every day experiences, attorneys don't call the police if a client misses an appointment. Doctors don't do that. So when you hear an attorney was so concerned that they called the police for a welfare check that takes it to a different level.
>
> I don't know if I would say a family member. It may be a family member, but lawyers don't call the police when their attorneys [sic] don't show up. I mean, if that was the case police would be called every single day because their clients have missed appointments or case cases [sic] or something. That doesn't happen.
>
> And it says something to this court in this entire situation when the attorney was so concerned that she said I have been unable to reach them for three days and they missed an appointment that they were pushing for. I'm at Northern District. This is in reference to a rape and it was an ex-

girlfriend he said/she said thing, but she was so concerned. That throws up some kind of, quote, red flags. So I don't –

The question is going to be Number One, does that arises [sic] to the level of an exigent circumstance, but that is different in and of itself than somebody just calling and saying oh, my client missed an appointment. Can you do a welfare check? And that's one reason why I also asked the officer what was the nature of the call that he got and everybody followed up by playing the actual 911 call. And I think we have a transcript here.

But the court is considering the testimony. Specifically I'm first considering the testimony of Officer Cromwell who has been an officer for 11 years. He was working the dayshift on September 1st, 2016. He got this welfare check call for three people: Glenn and Linda White and Craig. They had missed a meeting with the attorney. Couldn't be reached for three days.

It says around 1800 hours he arrived. That there were two cars in the front of the house. He had knocked on the door. Got no answer. He went counter-clockwise I believe it was around the house to do a check. He did not --- no one answered the door when he knocked. The rear sliding door was found closed, but it was unlocked. He had called for backup. No one else was around in the area.

Somewhere around ten minutes or so [later] backup arrived. Two officers arrived. They opened the door. They entered. This was --- they had announced themselves when they entered. The sliding glass door was more of an entry to a sun room. The kitchen and other areas were on the left-hand side. When he turned left, it's a dining room area. He then went into the living room area. The other officers then began to search other rooms.

He then went down to the basement area where he found a white female who was deceased. Corporal . . . Wilson . . . [and Pfc. Markley] . . . finish clearing the house.

But he did in fact receive the info from dispatch. He knocked on the front door. Again, he walked around the house. Once --- he didn't go any further once he found the unlocked closed door. He waited for his back up to arrive. The basement was not visible from the door. He thought it was strange when he saw the Pepsi bottle on the floor near the kitchen area.

The court then it its [sic] considering the testimony of Officer Wilson who was an officer for 10 years. She was also working the dayshift. She confirmed they received a welfare call. They could not reach the family for three days in reference to a rape case that they were pressing for and obviously the officer [sic] was concerned. The attorney caller was so concerned that she did in fact call the police. That the other officer found the unlocked door.

When she arrived, she noted the two cars in the driveway. She had dispatch call the house. There was no answer. The cars were registered to the family that lives at that address. She touched the hoods of the cars. They were in fact cold. She could not see inside the windows because the blinds were closed. She then knocked on the door harshly. She also noted a Terminix receipt. And I believe that she said the time was 1414 hours. And actually when you look at that exhibit that's when the call --- he ended. I believe he arrived somewhere around --- or he or she arrived somewhere around 1:50 and then left about 15 minutes or so.

And that the court also finds that that added --- could add to the officer's observations concerning the nature of the situation because normally Terminix, they also go inside your house. Here, they obviously did not enter the house and left it on the front door.

So that just adds in to the totality of the situation and whether or not the officers' entry was reasonable. They then --- she then went around the opposite side of the house. Saw nothing else out of order. Out of the ordinary. Excuse me. Entered. They announced themselves. And she said in the middle of the floor was the Pepsi bottle. There was also the smell of lemon Lysol. And the bottle was in the middle of the floor. And then she walked a little bit further down the hall.

She could smell blood. She also saw there was blood on the wall. And then in what she would refer to as the master bedroom, there was a male lying face up. And the other officer found the woman downstairs. That they called for the paramedics to arrive. And after they --- I guess while waiting they continued to clear the scene because there was they found two people and they were looking for three. And the purpose was to look for all of the victims or any suspects that were in the house and none were found.

So now we have the issue of whether or not the police conducted what I would call and everybody would call an unreasonable search and

seizure because the Fourth Amendment protects us from unreasonable searches and seizures. Here we have a warrantless entry based on the police officers' observations. And the question is whether or not it was reasonable. Or whether or not there was an exception to the warrant requirement under the constitution.

The court does note and the court did review the cases that were submitted by the Defense. The State comments on it and says they're similar to their arguments. In the *Alexander* case, as it's been noted by both sides, that the police were responding to a burglary in progress. In the neighborhood there were recent burglaries and the front door was open. Here the door was not open. It was unlocked, but it was closed.

[In] *Carroll v. State* there was a missing screen door and window pane. The neighbor indicated that . . . the residents were not home. That's a little different. We have nothing. We know the officers could not see inside the home other than through the sliding glass door that they subsequently entered, but there was nothing else.

[In] *Miller v. State* there was a person living in the home. Was previously charged with false imprisonment. That it involved a civilian complaint where an individual accepted a babysitting job and the individual did not telephone which she said she would be [sic]. That's a little bit different here.

[In] *Grant v. State*, the 911 call in response to her noise and struggle. Defendant had blood stains without any reasonable explanation. That's more of an exigent circumstance.

[In] *Davis v. State*, the first responders reported to [sic] a report of a dead body. The dead body didn't come into play until the officers had entered into that home.

The State argues that there was --- that the search was reasonable when you consider the caretaking of the the [sic] community caretaking function and the police. I would agree with the State in their analysis and argument here. We have a situation where you have a concerned citizen and more specifically a concerned attorney concerned about the welfare of her clients. I don't recall her saying one client. She said all three. She said Mr. and Ms. White as well as Craig White. They were pressing for this appointment and did not show up especially at the police department for something that they wanted. So the police were under a duty and obligation

to at least go ahead and check. And when they found the open door, it was reasonable for them to go in further.

Here they entered. It was clear they did enter without a warrant and they were, as I said, they were exercising their community caretaking function by looking to see if anyone in that residence needed assistance. And then when they came upon the bodies, they then continued to look to see for the third person. So there was nothing in this court's opinion to find that that warrantless entry to be unreasonable by the police under the community caretaking function.

And the State also indicates that this [was] somewhat of an exigent or emergency situation in looking at the factors. I think it's a close call when you look at the cases on exigency. We have a situation where no one is answering the door. You have an unlocked door. You have the concerned call and whether or not there was some exigency. It's a close call, but I would give the exigent circumstances to the State in this situation because it could also be interpreted based on what you have that there could be some kind of exigency. Also, to see if any property needs to be protected, et cetera.

I'm not too sure about the inevitable discovery argument. I wouldn't say that it was going to be inevitably discovered especially seeing that there was no specific time when those people from the dance came up to the house. I can [sic] say that there would have been inevitable discovery at all.

And so, in looking at the situation the court is satisfied that the entry by the police was not in violation of the Fourth Amendment and is permitted. Therefore, the court is also going to deny the motion to suppress based on the violation of the Fourth Amendment as well as the Maryland Declaration of Rights. And also when considering the search warrant the court does in fact find that there is no fruit of the poisonous tree in this matter because the search warrant is valid. It was based on probable cause. And in looking at the four corners of the warrant, the court is satisfied that probable cause did in fact exist and there is as I said no violations.

"It is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable." *Peters v. State*, 224 Md. App. 306, 325 (2015) (quoting *Payton v. New York*, 445 U.S. 573, 586, 100 S.Ct.

1371, 63 L.Ed.2d 639 (1980) (citation omitted)). "Nevertheless, because the ultimate touchstone of the Fourth Amendment is 'reasonableness,' the warrant requirement is subject to certain exceptions." *Brigham City v. Stuart*, 547 U.S. 398, 403, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006). "Such reasonableness exceptions, however, must be narrow and well-delineated in order to retain their constitutional character." *United States v. Yengel*, 711 F.3d 392, 396 (4th Cir.2013). "The touchstone of Fourth Amendment compliance, of course, is reasonableness. Reasonableness, however, differs with its context. The reasonableness of police behavior is necessarily a function of what the police are doing and why they are doing it." *State v. Alexander*, 124 Md. App. 258, 265 (1998).

One exception to the warrant requirement recognized in Maryland is the community caretaking function. In *Alexander, supra*, 124 Md. App. at 267-78, Judge Moylan analyzed the community caretaking exception to the warrant requirement and, after surveying cases, distilled the crucial factor for determining whether the police acted in a permissible manner, stating:

> When the police cross a threshold not in their criminal investigatory capacity but as part of their community caretaking function, it is clear that **the standard for assessing the Fourth Amendment propriety of such conduct is whether they possessed a reasonable basis for doing what they did**.

Id. at 276-77 (emphasis added) (footnote omitted). Judge Moylan's analysis of the community caretaking exception included the following discussion summarizing Maryland cases:

> For an extended analysis of the various situations in which essentially non-investigative police conduct should be judged by the general

reasonableness standard, see the excellent opinion by Judge Smith in *Lebedun v. State*, 283 Md. 257, 259-78, 390 A.2d 64 (1978).

Davis v. State, 236 Md. 389, 204 A.2d 76 (1964), was also a case in which the Court of Appeals used the general reasonableness standard to assess the propriety of a warrantless entry into a defendant's home, when the purpose of that entry was to render aid to a possibly stricken victim of violence. After having discovered one homicide victim in the backyard of the premises, a police lieutenant "walked from the backyard where the deceased had been found to the front of the house, where he knocked on the door. Receiving no response, he looked into the window located to his left as he faced the door and noticed a pair of human feet." 236 Md. at 393, 204 A.2d 76. The lieutenant then entered the house through an unlocked kitchen door. What he found was the defendant sleeping on a couch and other evidence linking the defendant to the homicide. The Court of Appeals, speaking through Judge Marbury, held that under the circumstances the warrantless entry of the home was reasonable:

> We find that the entrance of the police officers into the house was reasonable under the circumstances then existing in order to determine whether the feet which were seen therein by Lt. Denell were those of a person in distress, immediate aid to whom might, under similar circumstances, have preserved a human life. *Basic humanity required that the officers offer aid to the person within the house on the very distinct possibility that this person had suffered at the hands of the perpetrator of the homicide discovered in the back yard.* The delay which would necessarily have resulted from an application for a search warrant might have been the difference between life and death for the person seen exhibiting no signs of life within the house. The preservation of human life has been considered paramount to the constitutional demand of a search warrant as a condition precedent to the invasion of the privacy of a dwelling house.

236 Md. at 395-96, 204 A.2d 76 (emphasis supplied). The analysis was not framed in terms of probable cause.

In *Oken v. State*, 327 Md. 628, 612 A.2d 258 (1992), as in this case, observations made during the initial warrantless entry of the defendant's home by the police led to the issuance of a search warrant for that home. There, as here, the defendant moved to suppress the evidence on the ground

that the warrant, based as it was on the earlier observations, was the fruit of the poisoned tree. There, as here, the police had come to the appellant's residence in response to a radio dispatch regarding a "suspicious condition" at the residence.

Arriving at the scene, a police sergeant spoke to a woman who reported that she had reason to believe that her sister was "missing," that harm had come to the sister, and that she (the woman speaking to the sergeant) had come to the defendant's house to check on her missing sister. She found no one at home, the door to the house "ajar," and she then entered the house. She found the house in disarray and blood on the floor near the entrance. There was no apparent inquiry by the sergeant as to why the woman believed her sister might have been in the defendant's home. Based on that report, the police warrantlessly entered the house for the primary purpose of locating and attending to a possible victim of violence. In affirming the decision of the trial judge that the warrant was not tainted by observations made during an improper entry, the Court of Appeals held that the initial police "decision to enter Oken's home was both reasonable and justifiable." 327 Md. at 646, 612 A.2d 258. The analysis was not framed in terms of probable cause.

This Court did not hesitate to hold that police at an accident scene, as part of their community caretaking function, may enter the otherwise constitutionally protected interior of an automobile to come to the aid of an injured occupant. *Ciriago v. State*, 57 Md. App. 563, 569-70, 471 A.2d 320 (1984).

In *Burks v. State*, 96 Md. App. 173, 195-98, 624 A.2d 1257, *cert. denied*, 332 Md. 381, 631 A.2d 451 (1993), this Court approved, as inherently reasonable, the warrantless entry by the police into a motel room to rescue two kidnapping victims. In a secondary sense, the entry was self-evidently investigative in that the kidnapper was apprehended *in flagrante delicto* in the motel room that was warrantlessly entered. That, however, did not make the entry the occasion for a probable-cause inquiry. The primary and "non-investigatory" purpose of the entry, by contrast, was to come to the aid of two endangered victims. At trial, Judge Hollander had "ruled that the police satisfied the Fourth Amendment merits by *searching and seizing in a reasonable manner*." (Emphasis supplied). 96 Md. App. at 195, 624 A.2d 1257. This Court affirmed that "ruling that *the warrantless entry into the motel room was reasonable*." (Emphasis supplied) 96 Md. App. at 198, 624 A.2d 1257.

Id. at 271-73.

In this case, it is clear that, when the three officers entered the house, they did not do so in furtherance of a criminal investigation. *See, e.g., Alexander, id*. at 277 n.2 ("where persons and/or property are in apparent danger, the police intervention is 'non-investigatory' in its purpose and the constraints and hesitation that routinely inhibit a criminal investigation are inappropriate").

The testimony of Pfc. Cromwell and Cpl. Wilson demonstrated that the officers had a reasonable caretaking basis for entering the house without a warrant. Dispatched to conduct a welfare check on three members of the White family, they found, when they arrived at the house, two cars in the driveway with cold hoods, registered to the homeowners. There was no response to any of the officers' knocks or entreaties, nor to a call from police dispatch to the home phone. They were aware of a 911 call from the family's concerned attorney, who was not merely complaining about clients missing an appointment, but who explained that these clients, in particular, had been "calling and calling" her until they abruptly stopped three days ago, and they had not, since then, responded to any of her calls or emails. Further, they had unexpectedly failed to show up for a meeting at the police station for which they had been "really pushing."

One category of police actions cited by Professor LaFave as being within the scope of the "infinite variety" of community-caretaking function is "to seek an occupant reliably reported as missing[.]" *Alexander, supra*, 124 Md. App. at 270, *citing* 3 WAYNE R. LAFAVE, A TREATISE ON THE FOURTH AMENDMENT, § 6.6, p. 396-400 (3d ed. 1996).

Ms. Saltz's call, and the reasons she articulated in it regarding these particular people, together with the observations made by the police on the scene, gave the police an objectively-reasonable basis to believe they were responding to a reliable report of the Whites being missing persons.

As Judge Moylan wrote for this Court in *State v. Brooks*, 148 Md. App. 374 (2002), when reviewing whether a police officer on the scene acted reasonably, "[t]he call that has to be made is not whether the officer on the scene **subjectively** believed that there was 'a need to act.'" Instead, "[i]t is whether the historic facts, as found to exist by the suppression hearing judge, established, **objectively,** circumstances 'which would lead a prudent and reasonable official to see a need to act.'" *Brooks*, 148 Md. App. at 389 (quoting *Alexander*, *supra*, 124 Md. App. at 277) (emphasis added in *Brooks*).

Our consideration of the undisputed "historic facts" in this case persuades us that the circumstances confronting the police officers when they performed the welfare check on September 1, 2016, would have led prudent and reasonable officers to conclude that they needed to enter the Whites' house. We conclude that the suppression court did not err in denying appellant's motion to suppress.[1]

II. Rule 4-215(e)

Rule 4-215(e) prescribes the actions that must be taken by the court if a defendant "requests permission to discharge an attorney." That subsection of Rule 4-215 provides:

[1] Given our conclusion that the suppression court did not err in finding the community-caretaking exception applicable, we need not address the court's alternative finding that the exigent circumstances exception also applied.

> **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.

(Emphasis added.)

Although the rule speaks only of requests for "permission to discharge an attorney," cases applying Rule 4-215(e) have interpreted that phrase expansively to include any statement from which "a court **could conclude** reasonably that **the defendant may be inclined** to discharge counsel." *Gambrill v. State*, 437 Md. 292, 302 (2014) (emphasis added). In *Gambrill*, the Court of Appeals provided the following guidance with respect to determining whether a defendant had made a request that invokes application of Rule 4-215(e):

> Rule 4–215(e), however, does not give definition to what constitutes a "request" to discharge counsel, thereby requiring the colloquy to secure the defendant's reasons, and the Rule's history "contains no commentary on the meaning of the phrase '*requests* permission to discharge an attorney'" *See State v. Campbell*, 385 Md. 616, 628 n.4, 870 A.2d 217, 224 n.4 (2005) (emphasis in original). We have established, nevertheless, that **a request to discharge counsel is "any statement from which a court could conclude reasonably that the defendant may be inclined to discharge counsel."** *Williams v. State*, 435 Md. 474, 486–87, 79 A.3d 931,

> 938 (2013) ("*Williams II*"), citing *Taylor,* 431 Md. [615,] 634, 66 A.3d at 710 [(2013)]; *State v. Hardy*, 415 Md. 612, 623, 4 A.3d 908, 914 (2010); *State v. Davis*, 415 Md. 22, 31, 997 A.2d 780, 785 (2010); *Leonard*, 302 Md. [111,] 124, 486 A.2d at 169 [(1985)]. A request to discharge counsel "need not be explicit", *Williams II,* 435 Md. at 486, 79 A.3d at 938, citing *Hardy,* 415 Md. at 623, 4 A.3d at 914, nor must a defendant "'state his position or express his desire to discharge his attorney in a specified manner' to trigger the rigors of the Rule." *Williams II,* 435 Md. at 486, 79 A.3d at 938, quoting *Davis,* 415 Md. at 32, 997 A.2d at 786.

Id. at 302 (emphasis added).

Similarly, in *State v. Taylor*, 431 Md. 615, 632 (2013), the Court of Appeals said:

> **Md. Rule 4–215(e) does not compel a defendant to utter any particular magical incantation or "talismanic phrase"** in order to invite the court's interest in whether the defendant is pondering his or her right to counsel of choice, whether by choosing to discharge his or her attorney and replacing that attorney with new counsel or by choosing self-representation. *State v. Campbell,* 385 Md. 616, 629–30, 870 A.2d 217, 224–25 (2005) (quoting *Leonard v. State,* 302 Md. 111, 124, 486 A.2d 163, 169 (1985)). It is well established, however, that 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. *Hardy,* 415 Md. at 622, 4 A.3d at 914 (quoting *Snead v. State,* 286 Md. 122, 127, 406 A.2d 98, 101 (1979)).

(Emphasis added.)

"Any statement that would reasonably apprise a court of defendant's wish to discharge counsel will trigger a Rule 4-215(e) inquiry regardless of whether it came from the defendant or from defense counsel." *State v. Davis*, 415 Md. 22, 32 (2010). And the Court of Appeals has been quite strict in requiring that a court follow the steps mandated by Rule 4-215(e) in response to a request to change counsel. "Once Rule 4–215(e) is triggered, the trial court has an affirmative duty to address the defendant's request." *Williams v. State*, 435 Md. 474, 485–87 (2013). "The failure to inquire into a defendant's

reasons for seeking new counsel when the proper request has been made to the court is reversible error." *Snead v. State*, 286 Md. 122, 131 (1979). And in *Davis*, *supra*, 415 Md. at 35, the Court cautioned: "**Any court that fails to follow-up with the defendant following a possible, albeit unclear, Rule 4-215(e) request risks appellate reversal of its judgment**. Thus, erring on the side of caution is advised." (Emphasis added.)

We conclude that this case is controlled by *Gambrill, supra*, 437 Md. 292. In *Gambrill*, defense counsel requested a postponement and told the postponement judge that the defendant "indicates he would like to hire private counsel in this matter." *Gambrill*, *supra*, 437 Md. at 305. Although that was not an express request to discharge counsel, the Court of Appeals found reversible error in the circuit court's failure to conduct further inquiry of the defendant as mandated by Rule 4-215(e). The *Gambrill* Court stated: "Although Gambrill's request to hire a new attorney was coupled with a request for a postponement and may not have been a paradigm of clarity, its inherent ambiguity did not relieve the judge of his obligation to comply with Rule 4–215(e); **its ambiguity mandated judicial inquiry followed by a determination**." *Id*. at 305 (emphasis added).

The postponement judge's failure to conduct any inquiry of White in this case is eerily similar to the lack of follow-up inquiry that led to reversal in *Gambrill*. The record in White's case reflects that, on the morning of the first day of appellant's trial, after appellant elected a jury trial, he said to the trial judge: "Your Honor, I wish to speak to

you before we proceed." At the court's suggestion, appellant conferred briefly with his counsel, who then addressed the court:

> [COUNSEL FOR APPELLANT]: Your Honor, if it please the court. **Mr. White is very concerned at this moment. He's going to request a postponement**. He's very concerned because of his circumstances that while he was in lockup he was in segregation and suicide watch for a significant amount of time. That that did not give him sufficient time to prepare the case in a manner that he wanted to. **And also he had some interest in hiring private counsel, which I know he did investigate**. And he feels that he hasn't had sufficient time to prepare properly for this case and for that reason he's asking for a postponement.
>
> Does that summarize it?
>
> [APPELLANT]: Yes, Your Honor. And for ---
>
> [COUNSEL FOR APPELLANT]: And attendant concerned [sic] was that for a significant amount of time, he says three months, he was unable to have phone calls. And that put a damper on some of his opportunities to prepare. I think that summarizes it, Your Honor. He has a number of specifics he would tell the court, but I think the court has the idea about the concerns at this time.
>
> [THE TRIAL JUDGE]: All right. Well --- all right. As it relates or concerns rather that request for a postponement, I am not the primary criminal judge even though this matter is especially [sic] assigned to me. I think this would probably have to go before either Judge McCrone or the admin administrative [sic] judge. But I'm going to step down and find out if I'm even authorized. Okay?
>
> [COUNSEL FOR APPELLANT]: Thank you, Your Honor.
>
> [THE TRIAL JUDGE]: If not, I will have to send you to the postponement judge. Okay?
>
> [COUNSEL FOR APPELLANT]: Thank you, Your Honor.

(Emphasis added.)

After a six-minute recess, a different judge took the bench to handle the postponement request, and the following colloquy ensued:

> [POSTPONEMENT JUDGE]: Thank you. The reason I was asked to come in is because **it's my understanding that the Defense is asking for a postponement. First of all, is that correct?**
>
> [COUNSEL FOR APPELLANT]: **Yes, it is, Your Honor.**
>
> [POSTPONEMENT JUDGE]: Okay. **What's the reason?**
>
> [COUNSEL FOR APPELLANT]: Your Honor, this morning . . . Mr. White said that he was interested in a postponement because **he is concerned that he has not had sufficient amount of time to prepare for the case**. He has --- as you can see, he takes lots of notes and he tries to prepare very sinuously [sic] I would say for his case. He tells me that there was a point of time about two months ago when a bag of his was lost at the jail and --- pardon me?
>
> [BY APPELLANT]: By staff.
>
> [COUNSEL FOR APPELLANT]: Okay. And he believes that ---
>
> [POSTPONEMENT JUDGE]: All right. **Let me just hear from counsel. Okay?** Thank you.
>
> [COUNSEL FOR APPELLANT]: He believes that it was from the staff at the jail who lost it. He had no control over it at a certain point. And in that bag were a number of papers and notes that he had made, taken lots --- while taking lots of notes and planning for his case.
>
> Additionally he was in segregation and on suicide watch for a significant period of time somewhere on and off throughout the proceedings and throughout the time he was in Howard County Detention Center. And he felt that that denied him the opportunity to be able to speak on the telephone, use the telephone. Prepare with family members, with counsel in a timely manner.
>
> He has sought the opportunity --- or **he has sought counsel, additional counsel, private counsel at times. Feels that he would like more opportunity to do tha**t. And he believes that there's a --- despite

having the opportunity to speak with all of us, counsel, that the loss of those documents that he prepared and the information that he had in those bags was significant to his defense.

[POSTPONEMENT JUDGE]: So let me ask you this question. Even for sake of our discussion if those documents that he prepared were lost, **how does a postponement assist him?**

[COUNSEL FOR APPELLANT]: Your Honor, that is a question that is --- that **he believes that he might be able to work out if he had the opportunity to have a different counsel** or that we could talk more about those documents. We ---

[POSTPONEMENT JUDGE]: And when were those documents lost?

[COUNSEL FOR APPELLANT]: Two months ago ---

[APPELLANT]: Two months ago.

[COUNSEL FOR APPELLANT]: --- he says.

[APPELLANT]: A little bit less than two months.

[POSTPONEMENT JUDGE]: **Sir, just talk to your attorney. Don't direct yourself to the court unless the court asks you to.**

[COUNSEL FOR APPELLANT]: Those are concerns that --- **I don't think it's unfair to say that Mr. White has had concerns all along.** That he would have sufficient time and sufficient information prepared in time for the trial.

(Emphasis added.)

The court then questioned all three of appellant's public defenders as to whether each felt prepared for the double homicide trial that was scheduled to begin that day; each attorney responded in the affirmative. The State expressed its opposition to a postponement. The court then asked appellant's counsel if there was anything else *they* would like to add, and the same attorney who had been speaking on appellant's behalf

said: "I can just say that Mr. White is wanting me to let the court know that he had -- his original attorney was Clark[e] Ahlers and then he was -- became ill. That was a concern of him [sic]. He has had other people as well." Without asking appellant if he wanted to add anything, the court then denied the postponement request, commenting that it knew appellant's counsel to be highly experienced, "well-prepared," and "thorough." Consequently, the court stated, "**I don't find that the Defendant's stated reason for a postponement is persuasive** at all. It's denied." (Emphasis added.) No further inquiry was made regarding appellant's desire to obtain private counsel.

The State argues in its brief:

> At best, White's fragmented statements indicated that if a postponement were granted, he might continue to explore seeking additional counsel or private counsel, as he had been doing all along, but he did not indicate that he had a *present* desire to hire private counsel, nor did he indicate that he had a *present* desire to discharge his attorneys or express any dissatisfaction with them.

Although we acknowledge that neither White nor his attorneys expressly told the court that he wanted to discharge present counsel, it is clear that the court never gave White himself any opportunity to explain what he meant when he had told his present counsel that "he has sought counsel, additional counsel, private counsel at times[; f]eels that he would like more opportunity to do that," and that "he believes that he might be able to work out if he had the opportunity to have a different counsel." What the Court of Appeals said in *Gambrill* seems equally applicable to this case, and leaves us no other option but to remand for a new trial. In the closing paragraph of *Gambrill*, the Court of Appeals stated:

> Gambrill's request, perhaps ambiguous, was a statement from which the trial judge could have reasonably concluded that Gambrill wanted to discharge his public defender, triggering the inquiry and determination by the court under Rule 4–215(e). When an ambiguous statement by a defendant or his or her counsel is made under Rule 4–215(e), the fulcrum tips to the side of requiring a colloquy with the defendant.

437 Md. at 306-07.

Accordingly, in light of the similar error in this case, we are compelled to vacate appellant's convictions and remand the case for a new trial.

III. Closing Argument

In his third argument, appellant contends that the trial court erred by overruling his objection to a remark made by the prosecutor during closing argument that appellant complained was an impermissible comment on his right to remain silent. We agree that the objection to the argument highlighting White's failure to testify should have been sustained.

In the opening statement for the State, the prosecutor described the evidence and the witnesses the State planned to present, and asserted that the story that would emerge from the State's witnesses would prove, beyond a reasonable doubt, that appellant murdered his parents. In appellant's opening statement, defense counsel told the jury that, while it is natural to "like things in our lives that add up . . . [and] to fit together nicely . . . [and] to conform to expectations that we set forth," in this case they should be "look[ing] at what isn't there," because here, they would see neither a motive nor any history of prior domestic unrest in the house. Appellant's counsel further urged the jury to consider the lack of an eyewitness to either parent's homicide:

> And ask yourself, does this add up? Does this conform with what should be? Does it make sense? And that's the most important part, because **the State is asking you to determine what happened at two very, very specific moments, two. Without an eyewitness**, with circumstantial evidence. **They're asking you to determine**, in a moment o[r] two specific moments in time, **what had occurred**. It's extremely important as a jury for you to take the State's case, to review it, to look at all the evidence and determine does this add up? Does it --- does it make sense? Is it something that conforms with what I believe happened on this date. As a jury that's your responsibility, you determine what happened.

(Emphasis added.)

After the close of evidence, the State began its closing argument by reminding the jury that the State did not have to prove a motive. The State then reviewed the evidence, pointing out that appellant had gashed himself deeply with the knife with which he stabbed his parents, that his DNA was found in many areas of the house, and that he had tracked blood into multiple areas of the house during his "massive, massive efforts to clean up." The portion of the State's closing argument to which appellant later objected was this reference to appellant's opening statement:

> In their opening statement **Defense said, the State is not going to be able to call any witnesses that can testify to [the] last moments of Glenn and Linda's lives**, what happened to them. **Of course we can't. There's only three people that know the exact details of what happened in those last moments. Two of them are dead. The third one sits before you on trial.**
>
> During their cross-examination[,] the Defense implied that perhaps there was a fourth person in the house and possibly a fifth person in the house committing these murders. Other than Glenn White and Linda White's DNA the only other DNA profile that was found anywhere in that house on any items of evidence was Craig White's. There was no results from Bode Cellmark that said we found this profile. Doesn't match [any] of the three people's. A different person. There wasn't a single result like that.

> How is it possible that Ghost Suspect Number 4 and Ghost Suspect Number 5 could commit a crime like that, attempt all of that quick messy cleanup, fail miserably, and not leave a single trace of themselves? No DNA. No fingerprints. It's because they don't exist. There's only one killer of Glenn and Linda White and it's the Defendant.

(Emphasis added.)

At a bench conference after the conclusion of the State's closing argument, defense counsel placed the following objection on the record:

> [COUNSEL FOR APPELLANT]: Your Honor, at this time I want to note my objection to the State's reference. The State said – and I'm not directly quoting, but I took notes. The State . . . The State has no witnesses who will testify about the last moments of Glenn and Linda's life. The State said, of course we can. [sic] There were three people there. One person is still here, the Defendant. That's a comment on the Defendant's right to - -
>
> [PROSECUTOR]: Of course we can't. Not can. Can't.
>
> [COUNSEL FOR APPELLANT]: Either way even if it's we can't that is part of Defendant's right, constitutional right to remain silent and not testify[. S]o I'd like to note my objections at this time.
>
> THE COURT: And your objection is noted. . . . It's overruled.

Counsel did not request a curative instruction or a mistrial.

In *Smith v. State*, 367 Md. 348, 353-54 (2001), the Court of Appeals reiterated that it is improper for a prosecutor to comment on a defendant's silence or failure to testify:

> Comment upon a defendant's failure to testify in a criminal trial was prohibited in Maryland before the United States Supreme Court, in *Griffin v. California,* 380 U.S. 609, 85 S.Ct. 1229, 14 L. Ed2d. 106 (1965), held that the federal constitutional right against compelled self-incrimination prohibits prosecutorial comment on the accused's silence or failure to testify. *See e.g., Woodson v. State,* 325 Md. 251, 265, 600 A.2d 420, 426 (1992) (citing *Barber v. State,* 191 Md. 555, 62 A.2d 616 (1948); *King v. State,* 190 Md. 361, 58 A.2d 663 (1948); *Smith v. State,* 169 Md. 474, 182

> A. 287 (1936)). Today, **the privilege against self-incrimination is protected by the Fifth Amendment of the United States Constitution, Article 22 of the Maryland Declaration of Rights, and Maryland Code (1957, 1998 Repl.Vol., 2000 Cum. Supp.) § 9–107 of the Courts and Judicial Proceedings Article**. *See Woodson*, 325 Md. at 264–65, 600 A.2d at 426 (1992).
>
> Despite our long history of protecting defendants' right not to testify, a prosecutor may summarize the evidence and comment on its qualitative and quantitative significance. *See Wilhelm v. State*, 272 Md. 404, 412–13, 326 A.2d 707, 714 (1974). In closing argument, lawyers have wide latitude to draw reasonable inferences from the evidence, and discuss the nature, extent, and character of the evidence. *See Ware v. State*, 360 Md. 650, 681–82, 759 A.2d 764, 780 (2000); *Degren v. State*, 352 Md. 400, 429–30, 722 A.2d 887, 901 (1999).
>
> **In evaluating whether a prosecutor's comments are improper, this Court long ago set forth the following test: is the remark "*susceptible of the inference* by the jury that they were to consider the silence of the traverser in the face of the accusation of the prosecuting witness as an indication of his guilt**." *Smith v. State*, 169 Md. 474, 476, 182 A. 287, 288 (1936) (emphasis added).

(Bold emphasis added; footnotes omitted.)[2]

[2] Although Judge Battaglia wrote a concurring opinion in *Smith*, 367 Md. at 361, in which she urged the Court to adopt the test she described as "unanimously adopted in all federal circuits" and "nearly every state court in resolving claims of improper prosecutorial comment on the defendant's failure to testify," *id*. at 363-365, it appears that the Court of Appeals has not wavered from the "susceptible" test quoted above. *See also Molina v. State*, 244 Md. App. 67, 175-76 (2019) (applying the principles articulated in *Smith*). But, in Judge Battaglia's view, the more commonly applied test "for ascertaining when a prosecutor's argument constitutes improper comment on a defendant's exercise of his Fifth Amendment right to remain silent is **whether the language used manifestly intended to be a comment on the failure of the accused to testify**, or **whether the language was of such character that the jury would naturally and necessarily take it to be such a comment**." *Id*. at 363 (emphasis added). If we had applied the more widely-used standard advocated by Judge Battaglia to assess whether the argument made by the prosecutor in White's case "was of such character that the jury

continued…

The *Smith* Court concluded that the trial court committed reversible error in that case by overruling an objection, made in the presence of the jury, when the prosecutor asked the jury during closing argument, "'what explanation has been given to us by the Defendant.'" *Id*. at 358. The Court of Appeals ruled that the prosecutor's own "answer, 'zero, none,' referred to the defendant's decision to exercise his constitutionally afforded right to remain silent." *Id*. By making that argument, "the prosecutor referred to the failure of the defendant alone to provide an explanation." *Id.* Such an argument, the Court held, was "susceptible of the inference by the jury that it was to consider the silence of the defendant as an indication of his guilt, and, as such, the comments clearly constituted error." *Id.* And the Court further held that it could not conclude that the error in overruling the objection was harmless because the trial judge compounded the problem by overruling the objection in the presence of the jury and stating: "'I think that's a comment on the evidence. Overruled. I think he was as much referring to any explanation to the police.' [sic]" *Id*. at 352.

In contrast to the facts that required reversal in *Smith*, the prosecutor in appellant's case did not explicitly ask the jury what explanation had been given "by the defendant." But the manner in which the prosecutor referred directly to White as the third witness to the murders—"only three people . . . know the exact details of what happened . . . . The

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continued…
would naturally and necessarily take it to be . . . a comment" on White's failure to testify, we would have come to the same conclusion in this case.

third one sits before you on trial"—did have the effect of directing the jury's attention to the fact that White could have, but did not, testify.

In support of appellant's contention that the trial court erred by overruling his objection to the prosecutor's comment, appellant points to three Maryland cases: *Smith, supra*, 367 Md. 348; *Marshall v. State*, 415 Md. 248 (2010); and *Woodson v. State*, 325 Md. 251 (1992). We are not persuaded that these cases are directly on point with the prosecutor's comment in this case, although all stand for the proposition that a prosecutor may not comment on a defendant's failure to testify.

In *Smith*, a theft case, the State argued to the jury, as noted above: "What explanation has been given to us *by the defendant* for having the [stolen] goods? Zero, none." *Smith*, 367 Md. at 352 (emphasis added). The Court of Appeals held that the trial court erred in overruling Smith's objection to this statement because the prosecutor referred directly and "explicit[ly]" to the lack of an explanation being "given . . . *by* the defendant," and not just "the defense." The Court of Appeals ruled that the prosecutor had "insinuated [a] duty of the defendant personally to offer an explanation for his possession of the property," and "effectively suggested that the defendant had an obligation to testify at trial." *Id*. at 359.

In *Marshall*, a drug case, the prosecutor expressly told the jury: "Mr. Marshall did not take the stand . . . . We don't have Mr. Marshall's thoughts[.]" *Marshall, supra*, 415 Md. at 255-56. In reversing and remanding for a new trial, the Court of Appeals

characterized those remarks by the State as "highlight[ing] the fact that the defendant did not testify in an effort to rebut the State's evidence." *Id*. at 263.

An improper argument that emphasized the defendant's failure to testify was commented upon in *Woodson*, although the Court there decided the appeal on another ground and remarked that it had "no need here to pass upon the matter." Nevertheless, the Court was clearly critical of the fact that the prosecutor, during his closing rebuttal, had pounded his fist *on the witness stand* and then, while pointing to the defense trial table, said, "they have sat there for 6 days, not here." 325 Md. at 265. The prosecutor also told the jury that the defense had "tried to baffle you with bologna from that trial table and from in front of here today and . . . that is not evidence . . . . [W]e gave you evidence and we kept our promise." *Id*. Observing that the only person at counsel table who *could have* taken the witness stand was Woodson, the Court of Appeals noted that "the prosecutorial comment therefore invited attention to the fact that Woodson did not testify. By pointing out to the jury that the prosecution 'gave you evidence,' and that Woodson did not, the jury may well have gleaned from that sharp contrast that it might infer guilt from Woodson's silence." *Id*. at 267.

But we reached a different conclusion in a case in which the prosecutor did not explicitly urge the jury to draw a negative inference from the defendant's silence in *Choate v. State*, 214 Md. App. 118 (2013), a rape case in which the defendant did not testify. In rebuttal closing, the State told the jury:

> [W]hen a rape occurs, . . . [t]here's only two people there. In this case, the two people who were there were [the victim] and the defendant. And

> yesterday, [the victim] came in and she sat here and she told you what happened.

Id. at 135. Choate objected and argued that the prosecutor's comments "create[d] an inference that the defendant should have gotten on the stand and told his story." *Id.* Choate's request for a mistrial was denied. He was convicted, and he appealed, arguing, *inter alia*, that the above-quoted remark impermissibly highlighted his failure to testify. Applying the standard enunciated in *Smith*, *supra*, 367 Md. at 352, this Court affirmed the denial of a mistrial, explaining:

> In this case, the prosecutor's comments were not susceptible of the inference that the jury should consider the appellant's silence as evidence of guilt. . . . **The prosecutor did not suggest that the jury should take any negative inference from the fact that the appellant chose not to testify, or that the appellant had any burden to tell his side of the story.** The court did not abuse its discretion in denying the appellant's second motion for mistrial.

Id. at 137 (emphasis added).

We note that, in *Wise v. State*, 132 Md. App. 127 (2000), as in this case, the prosecutor drew the jury's attention to a comment made by defense counsel during the opening statement. We concluded that, under the circumstances of that case, the prosecutor did not make an impermissible closing argument by pointing out that the defense counsel had not kept the promise he had made to produce witnesses. We said:

> Maryland prosecutors, in closing argument, may not routinely draw the jury's attention to the failure of the defendant to call witnesses, because the argument shifts the burden of proof. On the other hand, a defense attorney's promising in opening statement that the defendant will produce evidence and thereafter failing to do so does open the door to the fair comment upon that failure, even to the extent of incidentally drawing attention to the defendant's exercising a constitutional right not to testify.

Id. at 148. *Cf. Mitchell v. State*, 408 Md. 368, 390 (2009) ("a prosecutor may comment on the defendant's subpoena power after defense counsel has 'opened the door'").

But we also pointed out in *Wise* that there is a critical difference between commenting on deficiencies in the defense presented by defense counsel and a lack of testimony by the defendant. We noted:

> [C]ourts since *Griffin* have distinguished those comments by prosecutors about the failure to offer evidence regarding matters for which the defendant is the only witness and those for which the evidence is available from other defense witnesses as well. The decisions, in other words, have distinguished between those comments about a defendant's failure to explain by testifying and those comments about the failure of the defendant to explain through other witnesses. *U.S. v. Mayans*, 17 F.3d 1174, 1185 (9th Cir. 1994).

132 Md. App. at 143. In the *Mayans* case cited by this Court in *Wise* in the passage just quoted, the court stated: "While a prosecutor may not draw attention to a defendant's silence, prosecutors are entitled to call attention to the defendant's failure to present exculpatory evidence more generally. Thus courts have maintained a distinction between comments about the lack of explanation provided *by the defense*, and comments about the lack of explanation furnished *by the defendant.*" 17 F.3d at 1185 (emphasis added; citations omitted).

It is that critical distinction between criticizing *the defense* and criticizing the lack of testimony *by the defendant* that leads us to conclude that the prosecutor's argument in White's case was an impermissible comment on his failure to testify. Here, it was clear that the prosecutor's comment in closing argument was not merely addressing a weakness

in White's defense, but was specifically directing the jury's attention to the fact that White had not testified even though the State argued he was an eyewitness to the murders. Applying the test described in *Smith*, *supra*, 367 Md. at 354—*i.e.*, whether the prosecutor's remark was "*susceptible of the inference by the jury that they were to consider the silence of the* [*appellant*] . . . as an indication of [appellant's] guilt" (emphasis added)—we conclude that the prosecutor's argument was "susceptible of the inference" that the jury could consider appellant's failure to testify. That was an impermissible argument, and the trial court should have sustained the objection.

JUDGMENTS OF THE CIRCUIT COURT FOR HOWARD COUNTY VACATED. CASE REMANDED FOR A NEW TRIAL. COSTS TO BE PAID BY APPELLANT.