Circuit Court for Montgomery County
Case No. 132312

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2963

September Term, 2018

MARCUS CLARK

v.

STATE OF MARYLAND

Fader, C.J.
Shaw Geter,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Shaw Geter, J.

Filed: December 16, 2019

A jury, in the Circuit Court for Montgomery County, convicted Marcus Clark, appellant, of two counts of second-degree assault and one count of malicious destruction of property. The Court sentenced appellant to a term of 23 years' imprisonment, with all but ten years suspended. In this appeal, appellant presents three questions, which we have rephrased for clarity:[1]

1. Did the trial court err in not conducting an inquiry pursuant to Maryland Rule 4-215(e)?

2. Did the trial court err in admitting, in the form of a statement of judicial notice, evidence of flight?

3. Did the trial court err in admitting evidence of a conversation between appellant and the victim in which appellant may have indicated that he did not believe Bill Cosby's accusers?

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

[1] Appellant phrased the questions as:

1. Did the trial court err when it failed to comply with Maryland Rule 4-215 after defense counsel informed the court that appellant "may want … different counsel?"

2. Did the trial court abuse its discretion by admitting, in the form of a statement of "judicial notice," flight evidence that was significantly more prejudicial than probative?

3. Did the trial court err by admitting irrelevant evidence that appellant did not believe Bill Cosby's accusers?

BACKGROUND

In late 2016, appellant began communicating with a woman, Edwidge Deshby, whom he met through an electronic dating application. A few weeks later, the two made arrangements to go to a movie together. On the day of the date, Ms. Dehsby drove her vehicle to a neighborhood in Germantown, where she picked appellant up, and the two traveled to a local movie theater. Upon arriving at the movie theater, Ms. Dehsby and appellant sat in the car for a short while and talked. During the conversation, appellant asked Ms. Dehsby "different questions about social issues." According to Ms. Dehsby, whenever she answered appellant's questions, he would become "upset" and "agitated." As the conversation progressed, appellant became "more and more agitated," so Ms. Dehsby decided to end the date, at which point she informed appellant that she was "just going to drop [him] off home." After calling Ms. Dehsby "names" and "cussing [her] out," appellant told Ms. Dehsby to drive him to the bus depot across from the movie theater. Ms. Dehsby agreed.

Upon arriving at the bus depot, appellant exited the vehicle, opened the rear door, and retrieved his coat from the backseat. Before Ms. Dehsby could drive off, appellant "rushed back into the front door," punched Ms. Dehsby in the face twice, spit on her, and punched her again. Appellant then "slammed" the door closed and "started kicking" the door, at which point Ms. Dehsby drove her vehicle a short distance to a taxicab stand to "get some help." Appellant followed and, upon reaching Ms. Dehsby's vehicle, "body slammed" the vehicle, causing one of the vehicle's windows to shatter. After Ms. Dehsby

exited the vehicle and tried to call 9-1-1 on her cellphone, appellant pushed her, punched her on the arm, and slapped her phone out of her hand. Appellant then "ran off." Eventually, the police responded to the scene, and Ms. Dehsby reported the attack. Appellant was later arrested and charged.

Appellant's "Request" to Discharge Counsel

On the morning of trial, but before appellant was brought into the courtroom, defense counsel informed the trial court that there was an issue with the clothes that appellant intended to wear during trial. After discussing that matter for a brief moment, the court had the following exchange with defense counsel:

[DEFENSE]: So … we can work on that, but there are –

THE COURT: Okay.

[DEFENSE]: - other issues as well.

THE COURT: Okay.

[DEFENSE]: The State has some preliminary issues [and] I think that [appellant] may want either different counsel or to make some statements to the Court.

THE COURT: All right. Well, let's bring him out then and then –

[DEFENSE]: Okay.

THE COURT: - we'll go from there.

[DEFENSE]: Thank you.

Shortly thereafter, appellant was brought into the courtroom, and the following colloquy ensued:

THE COURT: Okay. So, let me know what the issues are that you wanted to raise.

[DEFENSE]: Certainly. So, Your Honor, the first issue was, I don't know if we said it before or after we put it on the record, but [appellant] will need to get some clothing for the trial.

THE COURT: Yes. Yes.

[DEFENSE]: I think [appellant] would like to address the Court.

THE COURT: All right.

Appellant then addressed the trial court, discussing, in great detail, the problems he was having with obtaining certain clothes for trial. During that discussion, appellant asked the court, "Is there any way I can speak to my attorney?" The court then went off the record so that appellant could speak with defense counsel, and, upon going back on the record, the parties continued discussing the issue with appellant's clothing.

As the parties were figuring out the best way to obtain appropriate clothing for appellant, the trial court asked if they were "going to talk about the other things, the other issues that [they] wanted to raise." The parties agreed, and a discussion of the other matters, none of which concerned a request by appellant to discharge counsel, ensued. At the conclusion of that discussion, the court had the following exchange with defense counsel:

THE COURT: Anything else?

[DEFENSE]: Not from the defense, Your Honor, thank you.

THE COURT: Okay. So, let's –

> [DEFENSE]: Actually, there, there may be – there is one small part, no, no, there's not, Your Honor. Withdrawn. Withdrawn.

Thereafter, appellant's trial commenced. Appellant was ultimately convicted, as noted. Additional facts will be supplied below.

DISCUSSION

I.

Appellant first contends that the trial court erred when it failed to comply with Maryland Rule 4-215 after defense counsel informed the court at the start of trial that appellant "may want … different counsel." Appellant maintains that defense counsel's statement constituted a request to discharge counsel and that, as a result, the trial court was required to comply with the requirements of Maryland Rule 4-215(e). Appellant asserts that the trial court's failure to comply with Rule 4-215(e) mandates reversal.

"A defendant's request to discharge counsel implicates two fundamental rights that are guaranteed by the Sixth Amendment to the United States Constitution: the right to the assistance of counsel and the right of self-representation." *State v. Campbell*, 385 Md. 616, 626–27 (2005) (footnote omitted). "Maryland Rule 4-215(e) outlines the procedures a court must follow when a defendant desires to discharge his counsel to proceed *pro se* or to substitute counsel[.]" *Id.* at 628. Under that Rule:

> If a defendant requests permission to discharge an attorney whose appearance has been entered, the court shall permit the defendant to explain the reasons for the request. If the court finds that there is a meritorious reason for the defendant's request, the court shall permit the discharge of counsel; continue the action if necessary; and advise the defendant that if new counsel does not enter an appearance by the next scheduled trial date, the action will

> proceed to trial with the defendant unrepresented by counsel. If the court finds no meritorious reason for the defendant's request, the court may not permit the discharge of counsel without first informing the defendant that the trial will proceed as scheduled with the defendant unrepresented by counsel if the defendant discharges counsel and does not have new counsel. If the court permits the defendant to discharge counsel, it shall comply with subsections (a)(1)–(4) of this Rule if the docket or file does not reflect prior compliance.

Md. Rule 4-215(e).

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

"A request for permission to discharge counsel triggering the process mandated by Md. Rule 4-215(e) is 'any statement from which a court could conclude reasonably that the defendant may be inclined to discharge counsel.'" *State v. Graves*, 447 Md. 230, 241-42 (2016) (citing *Gambrill v. State*, 437 Md. 292, 302 (2014)). "Such a statement does not need to be in writing or worded in a particular manner, and may come from defense counsel as opposed to the defendant." *Id.* at 242. "Such a request will be sufficient 'even when the defendant's statement constitutes more a declaration of dissatisfaction with counsel than an explicit request to discharge.'" *Bey v. State*, 228 Md. App. 521, 530 (2016) (citing *State v. Hardy*, 415 Md. 612, 623 (2010)). "Where the court is unsure about whether the defendant is dissatisfied with his or her counsel, the court should clear up any ambiguity

by questioning the defendant regarding the statement to avoid the risk of reversal on appeal." *Graves*, 447 Md. at 242.

We hold that the trial court did not err in failing to engage in the procedures set forth in Rule 4-215(e), as neither appellant nor defense counsel made any statement from which the court could conclude *reasonably* that the defendant may have been inclined to discharge counsel. *See generally* Black's Law Dictionary, 11th ed. (2019) (defining "reasonable" as "[f]air, proper, or moderate under the circumstances; sensible."). To be sure, at the start of trial, before appellant was brought into the courtroom, defense counsel did make a statement to the court regarding "different counsel." That statement, however, was not that appellant "may want … different counsel," as appellant suggests. Rather, defense counsel stated that he *thought* that appellant *may* want *either* different counsel *or* to make some statements to the court. When appellant was brought into the courtroom immediately thereafter and the court asked him what "the issues" were, appellant did not indicate that he wanted "different counsel" but instead made "some statements to the court," namely, that he was having issues with obtaining certain clothing for trial. From that point forward, nothing appellant said or did gave any indication that he was dissatisfied with present counsel or that he wanted different counsel. To the contrary, appellant, who showed a clear willingness to speak up when he had a problem, remained silent as defense counsel made several arguments on his behalf. Appellant even referred to defense counsel as "my attorney" when he addressed the court during the discussion of the clothing issue. In short,

everything appellant said and did refuted defense counsel's "thought" that appellant wanted "different counsel."

For those reasons, defense counsel's statement was inadequate to constitute a request to discharge counsel, particularly when compared to the statements made in the cases on which appellant relies. *See e.g. Graves*, 447 Md. at 235–26 (Rule 4-215(e) implicated where defense counsel informed the court that the defendant "prefer[red] to have [private counsel] represent him in this matter as opposed to [present counsel]" and that the defendant wanted a postponement to "hire [private counsel] to represent him in this matter[.]"); *State v. Davis*, 415 Md. 22, 27, 33 (2010) (Rule 4-215(e) implicated where defense counsel informed the court that the defendant "didn't like [defense counsel's] evaluation" of the case and "wanted a jury trial and new counsel."); *Gambrill*, 437 Md. at 293–96 (Rule 4-215(e) implicated where, after defense counsel informed the court that the defendant wanted a postponement to hire private counsel, the court took a two-hour recess, after which defense counsel reiterated that the defendant "would like to hire private counsel in this matter."); *Joseph v. State*, 190 Md. App. 275, 287–88 (2010) (Rule 4-215(e) implicated where, after the prosecutor informed the court that the defendant "said something about 'the release of his counsel,' the court responded, '[t]hat's not going to happen,' which clearly indicated that the court "understood from the prosecutor's remarks that [the defendant] had expressed a desire to 'release' counsel."). Thus, the trial court did not err in failing to follow the procedures set forth in Rule 4-215(e).

II.

Appellant's next contention concerns evidence introduced at trial regarding several bench warrants that were issued after appellant failed to appear at two prior trial dates that had been scheduled in the instant case. On the second day of trial, the trial court was informed that the State intended to introduce two exhibits. The first exhibit was a docket entry from the District Court showing, among other things, that appellant failed to appear on the first trial date and that a bench warrant was issued for his arrest. The second exhibit was a docket entry from the Circuit Court showing, among other things, that appellant failed to appear on the second trial date, that a bench warrant was issued, and that a "governor's warrant" was issued from the governor of Maryland to the governor of New York requesting that appellant be extradited to Maryland to face charges in the instant matter. The State proffered that the victim, Ms. Dehsby, would testify that, on the first trial date, she saw appellant "during the check in" and that, when she saw him, appellant "winked" at her and then left. The State argued that, in conjunction with Ms. Dehsby's testimony, the two exhibits concerning the bench warrants constituted evidence of flight.

Defense counsel, who had already lodged an objection to the evidence, responded that the exhibits were more prejudicial than probative because there was "a lot of hearsay information encompassed in [the exhibits]" and because there was no evidence that appellant knew about the second court date. After considering those arguments, the court suggested that it "take judicial notice of the records," which, according to the court, would be "less prejudicial" because it would exclude "all [the] extra information." Although

defense counsel maintained her objection, she admitted that the court's suggestion was "the clearest or cleanest way of doing it."

Later, Ms. Dehsby testified that, on February 24, 2017, she appeared in district court to testify in the matter; that, as she was standing in line to check in, she observed appellant walk into the courtroom; that, upon seeing appellant, she observed him "smile" at her and "wink;" that, when the case was called a short time later, appellant was no longer in the courtroom; and that, after the case was postponed, appellant failed to appear at the second trial date. At that point in Ms. Dehsby's testimony, the court read the following "judicial notice" to the jury:

> On February 24, 2017, at the first trial date in this matter a bench warrant was issued for [appellant] for failing to appear. On May 16, 2017, upon motion of counsel on behalf of [appellant], that bench warrant was recalled by the Court
>
> On June 29, 2017, the second trial date, a bench warrant was once again issued for [appellant] for his failure to appear. On May 24, 2018, a governor's warrant was issued by Governor Larry Hogan to the governor of New York requesting the extradition of [appellant] back to Maryland to face charges[.]

Appellant now claims that the trial court erred in reading that "judicial notice" to the jury. Appellant notes that, when the notice was read, the State had already established, through the testimony of Ms. Dehsby, that appellant had fled the scene of the crime. Appellant contends, therefore, that the evidence of his failure to appear at the two prior court dates was "overkill" and that the court "abused its discretion by failing to recognize that the cumulative prejudicial evidence of the extensive flight evidence in the court's 'judicial notice' was substantial, significantly outweighing its probative value."

Maryland Rule 5-403 provides, in pertinent part, that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]" "We determine whether a particular piece of evidence is unfairly prejudicial by balancing the inflammatory character of the evidence against the utility the evidence will provide to the jurors' evaluation of the issues in the case." *Smith v. State*, 218 Md. App. 689, 705 (2014). In so doing, "[w]hat must be balanced against 'probative value' is not 'prejudice' but, as expressly stated by Rule 5-403, only 'unfair prejudice.'" *Newman v. State*, 236 Md. App. 533, 549 (2018). Moreover, "[t]o justify excluding relevant evidence, the 'danger of unfair prejudice' must not simply outweigh 'probative value' but must, as expressly directed by Rule 5-403, do so 'substantially.'" *Id.* at 555. "This inquiry is left to the sound discretion of the trial judge and will be reversed only upon a clear showing of abuse of discretion." *Malik v. State*, 152 Md. App. 305, 324 (2003).

We hold that the trial court did not abuse its discretion in informing the jury, by way of a "judicial notice," that appellant came to court on the day of trial, left before the case was called, and then failed to show up again after the initial trial date was postponed to a later date. As appellant concedes, the evidence was probative of appellant's "consciousness of guilt." *Decker v. State*, 408 Md. 631, 643–48 (2009). Moreover, we cannot say that the resulting prejudice, if there was any, was unfair or that it substantially outweighed the evidence's probative value. That the evidence may have ultimately been unnecessary or redundant was not, absent a finding of unfair prejudice, reason to exclude the evidence. *See Ford v. State*, 462 Md. 3, 59 (2018) ("The mere fact that evidence may

be cumulative does not mean that the evidence is unfairly prejudicial."); *See also Oesby v. State*, 142 Md. App. 144, 166 (2002) ("In terms of legitimate prejudice … the State is not constrained to forego relevant evidence and to risk going to the fact-finder with a watered-down version of its case.").

III.

Appellant's final contention concerns testimony given by Ms. Dehsby regarding the substance of the conversation that she and appellant had in her vehicle just prior to the assault. That testimony was as follows:

[STATE]: Okay. What did you talk about?

[WITNESS]: Social issues, you know, any and everything which is mainly social issues, yeah.

[STATE]: Did there come a time when sort of a problem developed?

[WITNESS]: Yes. We started talking, he started asking me different questions about social issues and whenever I would answer he just got upset and you know like more and more agitated and I and then we got to the topic of Bill Cosby and I voiced my opinion about that and he didn't seem to agree with my opinion. Just got more and more agitated and I, I kind of froze and made, made a decision not to continue with the date.

[STATE]: At the time was Bill Cosby in the news a lot, is that how it came up?

[WITNESS]: Yes, sir.

* * *

[STATE]: Talking about that conversation you said he was getting upset. What were you saying to him, what was he saying back to you? How did that interaction go?

[WITNESS]: I was, I gave my opinion and said that I believed the women.

[DEFENSE]: Objection, Your Honor, as to what the substance of the opinion was. It's not relevant.

THE COURT: Overruled.

[WITNESS]: I believed the women that had come forward and that I would never be someone that would not believe women. Even, even with the notoriety that the man had and the respect that he had in our particular community I still believed the women so that's what I said. So that's what we just went back and forth with that and he didn't like my opinion and just started, can I say cussing here?

THE COURT: Yes.

[WITNESS]: Cussing me out and calling me names and you know calling me stupid because of my opinion. He just got more and more agitated.

Appellant now claims that the trial court erred in permitting Ms. Dehsby to testify as to the substance of appellant's opinion regarding Bill Cosby and his accusers. Appellant asserts that the evidence was irrelevant, as it had no bearing on the jury's determination of appellant's guilt or innocence. Appellant also asserts that the evidence was unfairly prejudicial because it portrayed him as "someone who does not believe the victims of sexual assault and rape," which "would reflect poorly on him" and "engender inappropriate sympathy for Ms. Desbhy."

Evidence is relevant if it makes "the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Md. Rule 5-401. Evidence that is relevant is generally admissible; evidence that is not relevant is not admissible. Md. Rule 5-402. That said, establishing relevancy "is a very low bar to meet." *Williams v. State*, 457 Md. 551, 564 (2018). We review the court's determination of relevancy under a *de novo* standard. *State v. Simms*, 420 Md. 705, 725 (2011).

We hold that the court did not err in admitting the disputed testimony. To begin with, appellant has mischaracterized the objected-to testimony. When the State initially asked Ms. Dehsby about the substance of her conversation with appellant prior to the assault, she responded that they talked about "social issues" and that, when "the topic of Bill Cosby" came up, she "voiced [her] opinion about that and [appellant] didn't seem to agree with [her] opinion." Then, after Ms. Dehsby indicated that appellant had become "agitated" during the conversation, the State asked about the substance of that "interaction." Ms. Dehsby responded that she "gave [her] opinion and said that [she] believed the women." At that point, appellant objected, and the court overruled the objection. Following that, Ms. Dehsby reiterated that she "believed the women," noting that appellant "didn't like [that] opinion."

From that, it is clear that the objected-to testimony concerned Ms. Dehsby's opinion and not appellant's. Moreover, Ms. Dehsby never testified that appellant did not believe Bill Cosby's accusers, only that he "didn't like" that she "believed the women." To the

extent that the jury may have inferred from that testimony that appellant did not believe Bill Cosby's accusers, any claim that the trial court erred in admitting the testimony would be unpreserved, as appellant did not object to that testimony. *See* Md. Rule 4-323(a) ("An objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived.").

Regardless, the evidence was relevant. Ms. Dehsby testified that appellant became agitated during their discussion of social issues and that his agitation became more intense after Ms. Dehsby stated that she believed Bill Cosby's accusers. That agitation led directly to Ms. Dehsby ending the date early, which ultimately led to appellant striking Ms. Dehsby and breaking her vehicle's window. Thus, Ms. Dehsby's narrative about the substance of her conversation with appellant, including any reference to appellant's opinions regarding Bill Cosby's accusers, was relevant to show appellant's motive in committing the crime. *See Ross v. State*, 232 Md. App. 72, 90 (2017) ("A motive to commit a crime … is most assuredly a factor in the burden of persuasion [] and may influence a jury in deciding which inferences to draw.").

As for appellant's claim that the evidence was unfairly prejudicial, we hold that that issue was not preserved for our review. When defense counsel objected to Ms. Dehsby's testimony, defense counsel argued that the evidence was "not relevant." Therefore, any other grounds for the objection were waived. *See State v. Jones*, 138 Md. App. 178, 218 (2001) ("[W]hen particular grounds for an objection are volunteered or requested by the

court, that party will be limited on appeal to a review of those grounds and will be deemed to have waived any ground not stated.") (citations and quotations omitted), *aff'd* 379 Md. 704.

Even if preserved, appellant's claim is without merit. Although appellant's purported opinion that he did not believe Bill Cosby's accusers may have, as appellant claims, "reflect[ed] poorly on him," we cannot say that the resulting prejudice was unfair or that it substantially outweighed the evidence's probative value. *See Ford,* 462 Md. at 58-59 ("[T]he fact that evidence prejudices one party or the other, in the sense that it hurts his or her case, is not the undesirable prejudice referred to in Maryland Rule 5-403.") (citations and quotations omitted); *See also Newman,* 236 Md. App. at 550 ("Probative value is outweighed by the danger of 'unfair' prejudice when the evidence produces such an emotional response that logic cannot overcome prejudice or sympathy needlessly injected into the case."). The trial court did not abuse its discretion in admitting the evidence.

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