UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0147

September Term, 2015

MARK PHILLIP FRENCH

v.

STATE OF MARYLAND

Meredith,
Eyler, Deborah S.,
Thieme, Raymond G., Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Meredith, J.

Filed: June 10, 2016

Following a three-day jury trial in the Circuit Court for Baltimore County in 1994, Mark Phillip French, appellant, was convicted of attempted first degree murder, armed robbery, and two counts of use of a handgun in the commission of a crime of violence. On May 25, 1994, appellant was sentenced to life in prison plus thirty-five years. French filed a direct appeal the day after sentencing; this Court affirmed his convictions in an unreported opinion filed on March 28, 1995. *French v. State*, No. 1277, September Term, 1994.

On June 5, 2014, appellant filed a petition for post-conviction relief, alleging ineffective assistance of appellate counsel. The circuit court conducted a hearing on February 6, 2015, and, on February 20, 2015, the circuit court granted appellant the right to file a belated appeal as to two issues, one relating to a pretrial request French made to discharge one of his defense attorneys, and the second relating to the manner in which the clerk received the jury's verdict.

QUESTIONS PRESENTED

Appellant presents the following two questions for our review:

1. Whether the trial court erred by failing to comply with Maryland Rule 4-215 after receiving a letter from appellant prior to trial that clearly expressed his desire to discharge counsel?

2. Whether the trial court erred by accepting a flawed verdict in violation of Maryland Rule 4-327(a) and Criminal Law Article § 2-302?

For the reasons that follow, we answer both questions in the negative, and affirm the judgments of conviction entered by the circuit court in 1994.

FACTS AND PROCEDURAL HISTORY

The underlying facts surrounding the armed robbery of Brian Sherry and the shooting of Baltimore County Police Officer James Beck are not at issue. But appellant asserts that there were two procedural errors at his trial, and that either or both require that he be granted a new trial.[1]

A. The motion to discharge counsel.

The first alleged procedural error has to do with a motion appellant submitted to the court a few days before trial was scheduled to begin, asking to dismiss one of his defense counsel. At the time the motion was submitted, appellant was represented by two counsel of record: John J. Henderson and Spencer Gordon. The handwritten motion was postmarked April 7, 1994, and appears to have been received by the clerk of court and stamped "CRIMINAL DEPT. APR. 8 1994." The document reads as follows:

> STATE OF MARYLAND –vs.— MARK P. FRENCH
> Balto. Co. CIRCUIT Case # 053562C5
> Court 401 Bosley Ave. Towson Md. 404 Kenilworth Dr Towson Md. 21204
>
> I the petitioner ask the court to hear my motion to dismiss John J. Henderson as my counsel. The reasons are as follows:

[1]It is mind-boggling that appellant is raising two procedural errors for the first time 20 years after the alleged errors were committed. But the State has raised no issue in this appeal as to untimeliness. *Cf. Jones v. State*, 445 Md. 324, 343 (2015), in which the Court of Appeals held "unequivocally" that "the doctrine of laches may, as an affirmative defense in a coram nobis action, bar an individual's ability to seek coram nobis relief."

> In Dec. 93 I asked John to file for a bail hearing and he said he would. He never did.
>
> At the same meeting I asked John for a copy of the contents of the discovery. He said as so [sic] as he got it he would copy it for me. I still do not have all of it.
>
> In Jan. 94 John came and read the contents of the discovery to me. And he said I should pled [sic] guilty as soon as possi[ble] before the vict[i]m dies. A week lat[]er he came out of the hospital. And I said I was not guilty of this crime he said I was lying. I feel this alone is a great conflict of interest. I asked him for my copy of the contents of the discovery. He didn't have it but said he would copy parts of it for me. And at the same meeting I asked him to file for a change in venue. He said he would.
>
> In March 94 John came to see me and s[ai]d he was not going to file a change of venue. I asked him why. He said he didn't feel a need to. I feel there is. He has not file[d] one motion to uliminate [sic] or anything in my case. At the same meeting he said he was going to start interviewing the witnesses in my case and start the investigation in my case. I feel that 20 day [sic] before tr[ia]l is late to start working on my case.
>
> I don't kno[w] if it is the nature of my charge or he knows the victim in my case but I know I don't have my counsel [sic] undivided loyalty to look out for my best interests.
>
> And for the reasons above I feel there would be a great injustice to have a trial with John as my counsel.
>
> Thank you
>
> Mark French
>
> [/s/]

On the morning of April 11, 1994, the case was called for trial before the Honorable James T. Smith, Jr. Both of appellant's defense counsel were in attendance. A reference in the transcript to discussions among the court and counsel "in camera" indicates that there had

been conversations in chambers before the case was called. At the outset of the pretrial proceedings on the record, Judge Smith confirmed that, except for two pending motions (namely, the defendant's motions for severance and for exclusion of his criminal record), and a motion for sequestration of witnesses, "all open motions" had been "withdrawn." There was no express discussion of appellant's motion to discharge Mr. Henderson, but appellant was present when Judge Smith confirmed that, other than the three motions he mentioned, all other open motions had been withdrawn. And the record reflects that appellant was provided numerous opportunities to speak to the court. The pretrial colloquy on the record was as follows:

> THE COURT: Counsel, identify yourselves for the record.
>
> MR. HENDERSON: John J. Henderson, Office of the Public Defender representing Mark French.
>
> MR. GORDON: Spencer Gordon also representing Mark French.
>
> THE COURT: The Defendant will be in momentarily.
>
> (WHEREUPON, THE DEFENDANT ENTERED THE COURTROOM AND THE FOLLOWING ENSUED.)
>
> THE COURT: Let the record reflect that the Defendant is present in court and counsel have identified themselves for the record.
>
> It is my understanding that there are two motions, in addition to a motion for sequestration of witnesses. One is a motion for severance of various counts, the Defendant's motion for severance of counts which I will have you describe in just a second, and another is a motion in limine relating to the criminal record of the Defendant.

Other than those two motions, are all open motions withdrawn?

MR. HENDERSON: **Yes, they are, Your Honor**.

THE COURT: Let the record reflect that all open motions are withdrawn other than those described by the court. I'll hear from you on your motion for severance, Mr. Henderson or Mr. Gordon.

MR. HENDERSON: Your Honor, I would first —

THE COURT: The Defendant can be seated.

MR. HENDERSON: I would first have the court rule on my motion for sequestration of witnesses.

THE COURT: I'm going to grant that. Do you want that granted before you argue on your other motions?

MR. HENDERSON: Yes, I do.

THE COURT: The motion for sequestration is granted. All of those persons that have been advised that you may be called as a witness for either the State or the defense, you are not to discuss your testimony with anyone except when you testify and you will have to remain outside the courtroom until you are called by the respective attorney to come in and testify.

So, all of those persons that have been advised that you may be called as witnesses, you have to remain outside the courtroom until you are called in to testify.

Counsel, satisfy yourselves that all of your prospective witnesses have responded to the sequestration order.

MR. HENDERSON: Yes, Your Honor. I would also like to put on the record that we will be making a motion in limine with respect to criminal records. We spoke about this in camera. The court had indicated that you would reserve that motion until later during the case in chief.

> THE COURT: Well, it is my understanding that the motion in limine relates to the event that the Defendant might testify and the Defendant hasn't made his election as to whether he is going to testify or not. So, rather than ruling on something that may or may not be a moot point, I'm going to reserve it until such time as the election is made and then I'll rule as you requested.
>
> MR. HENDERSON: With respect to the motion for severance of counts, Mr. Gordon will handle that motion for the defense.
>
> THE COURT: Mr. Gordon?
>
> MR. GORDON: Your Honor, there are, in essence, three separate criminal events charged in the indictment in this case. Reference to them was made in chambers.

(Emphasis added.)

Argument of Mr. Gordon and the prosecutor (Mr. Gentry) continued for 16 pages of transcript, after which the court took a brief recess to consider the issues, and the court then granted defense counsels' motion to sever two of the counts. The pretrial colloquy then continued:

> MR. GENTRY: Judge, because I want to make sure that I'm guided in what I'm going to do, unless I'm told otherwise, although they are severed I intend on introducing evidence of the burglary in the armed robbery and attempted murder prosecution.
>
> THE COURT: I'm not precluding you from offering evidence and there has been no motion in that respect. What I am doing is severing the trial of the B&E and burglary from the trial of the armed robbery and the attempted murder. We'll address issues on the basis of objections that counsel make at the time.
>
> Counsel, is your client familiar with the nature of the charges and waive the reading?

MR. HENDERSON: Yes, Your Honor Your Honor [sic].

THE COURT: And the pleas?

MR. HENDERSON: The plea is not guilty, Your Honor.

THE COURT: His election as to how he wants to be tried?

MR. HENDERSON: Your Honor, I would like to explain to him what a jury trial is.

THE COURT: Go ahead.

MR. HENDERSON: Mr. French, you have the right to have your case tried either by the court or by a jury. A jury would be made up of prospective jurors and they would be taken from the voter rolls of Baltimore County. In order to be found guilty by a jury there must be a unanimous verdict, which means that all twelve must find you guilty beyond a reasonable doubt and to a moral certainty. Also, to be acquitted it must be a unanimous verdict, all twelve must feel that you are not guilty of the charges.

The State has the burden of proof in this case and they must prove this case and each and every element of this case beyond a reasonable doubt and to a moral certainty. That is with respect to a jury trial.

You also have a right to a court trial. A court trial is where the judge alone would listen to the testimony, view the evidence, and based on what the judge heard and saw he would decide your guilt or innocence. The burden is the same, it must be beyond a reasonable doubt and to a moral certainty.

Do you understand what a court trial is?

THE DEFENDANT: Yes.

MR. HENDERSON: Do you understand what a jury trial is?

THE DEFENDANT: Yes.

MR. HENDERSON: What is your election this morning?

THE DEFENDANT: Jury trial.

MR. HENDERSON: Jury trial, Your Honor. Thank you.

THE COURT: Have a seat. The jurors are here.

* * *

MR. HENDERSON: Your Honor, before the actual —

THE COURT: Let the record reflect I don't think anybody from the Defendant's family is here.

MR. GENTRY: It is the family of Officer Beck.

THE COURT: So, the only people who have left the courtroom in response to the court's request are the family of the alleged victim in this case.

Go ahead, Mr. Henderson.

MR. HENDERSON: Your Honor, before the actual voir dire begins, I would ask the court if it would be permissible for us to sit on this side.

THE COURT: Sure. Absolutely. Let's get the jurors in. Are the jurors here?

* * *

Counsel, would you approach the bench? Mr. French, would you also approach the bench?

(WHEREUPON, COUNSEL AND THE DEFENDANT APPROACHED THE BENCH AND THE FOLLOWING ENSUED.)

THE COURT: Mr. French, I want you to understand that you have the absolute right to be present at all bench conferences when the lawyers come up to the bench. Do you understand that you have that right?

THE DEFENDANT: Yes, sir.

> THE COURT: I would like to have this understanding with you. If you want to attend a bench conference if we have a bench conference, you just come up with your lawyer. If you do not want to attend a particular bench conference, you just remain at the trial table. If you remain at the trial table I will assume that for that bench conference only you have elected to waive or give up your right to be present. Is that agreeable with you.
>
> THE DEFENDANT: Yes, sir?
>
> THE COURT: That does not mean that if you stay at the trial table for one bench conference that you can't come up afterwards. You can come up if you want or stay at the trial table if you want. Do you understand?
>
> THE DEFENDANT: Yes, sir.

B. The jury verdict.

For appellant's second alleged procedural error, he contends that the verdict was defective because the clerk did not specify the degree of attempted murder the first time the clerk asked for the jury's verdict on the first count on the verdict sheet. But the record reflects that the clerk corrected that omission when it asked the jury to hearken to the verdict.

At the conclusion of the trial court's instructions to the jury, the court told the jury about the formalities that would be followed when announcing its verdict:

> [THE COURT:] Also, in connection with the verdict, after you have retired and deliberated and arrived at your unanimous verdict, the verdict will be taken like this. You will knock on the door and let my clerk know you have arrived at a verdict. You will come back into the courtroom and although the verdict will be written out it will be taken verbally. I'll ask the clerk to take the verdict and he will turn to all of you and say, ladies and gentlemen, have you agreed upon your verdict. Assuming that you all have or you shouldn't be in here, you will all respond we have. Then the next question he will ask is who shall say for you and you will say our Foreperson.

> Now, Mr. Foreperson, you will be asked to rise and although it is written out you will actually deliver it verbally. The clerk does all the reading. He reads the title of the case and the charges. All you do is say not guilty or guilty. He will go to the first one and then goes to the second and third and read [sic] the charge. You just respond not guilty or guilty and so on until you finish the verdict. Then he will come over and ask you to give him the original of the verdict sheet which will actually be put with the court file.
>
> So, that is how the verdict will be taken . . . .
>
> I ask that the jury now retire to consider your verdict. The clerk will bring you back the original of the verdict sheet and all the exhibits excepting the bullets and guns as I have indicated.

When the jury indicated that it had reached a verdict, the jury returned to the courtroom with a verdict sheet that was marked as follows:

VERDICT SHEET

CHARGE	NOT GUILTY	GUILTY
Attempted 1st degree murder of James Beck	_____	X
Attempted 2nd degree murder of James Beck	_____	___
Use of a handgun in the commission of a felony, namely, attempted 1st degree or attempted 2nd degree murder	_____	X
Robbery of Brian Sherry with a dangerous and deadly weapon	_____	X
Use of a handgun in the commission of a felony, namely, robbery with a dangerous and deadly weapon	_____	X

The transcript reflects the following ensued:

> THE COURT: Mr. Clerk, please take the verdict.
>
> THE CLERK: Mr. Foreperson and ladies and gentlemen of the jury, have you agreed upon your verdict?
>
> THE JURORS: We have.
>
> THE CLERK: Mr. Foreman, would you stand. **What say you in case number 93-CR-4253, State of Maryland versus Mark P. French, as to attempted murder of James Beck.** Not guilt[y] or guilty as charged.
>
> THE FOREPERSON: Guilty as charged.
>
> THE CLERK: As to the use of a handgun in the commission of a felony, namely, attempted first degree or attempted second degree murder. Not guilty or guilty as charged?
>
> THE FOREPERSON: Guilty as charged.
>
> THE CLERK: As to robbery of Brian Sherry with a dangerous and deadly weapon. Not guilty or guilty as charged?
>
> THE FOREPERSON: Guilty as charged.
>
> THE CLERK: As to use of a handgun in the commission of a felony, namely, robbery with a dangerous and deadly weapon. Not guilty or guilty as charged?
>
> THE FOREPERSON: Guilty as charged.
>
> THE COURT: Do you wish the jury polled?
>
> MR. HENDERSON: No, sir[.]
>
> THE CLERK: **Harken [sic] to the verdict as the court has recorded it, in State of Maryland versus Mark P. French, your Foreperson has**

> **recorded that you find him guilty of attempted first degree murder of James Beck**; you find him guilty of use of a handgun in the commission of a felony, namely, attempted first degree or attempted second degree murder; you find him guilty of robbery of Brian Sherry with a dangerous and deadly weapon; and you find him guilty of use of a handgun in the commission of a felony, namely, robbery with a dangerous and deadly weapon.
>
> **And so say you all?**
>
> **THE JURORS: Yes.**
>
> THE COURT: Members of the jury, I want to thank you for the attention and deliberation that you gave to this case.

(Emphasis added.)

DISCUSSION

We review both of appellant's questions *de novo*. *See, e.g.*, *Gutloff v. State*, 207 Md. App. 176, 180 (2012); *Jones v. State*, 173 Md. App. 430, 451 (2007).

I. Discharge of counsel.

Appellant contends that he is entitled to a new trial because the trial court failed to comply with the mandatory requirements of Maryland Rule 4-215(e), which remains unchanged since the time of appellant's trial, and 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.

(Emphasis added.)

The Court of Appeals has held that, "when a defendant expresses a desire to discharge his or her counsel in order to substitute different counsel or to proceed self-represented, a court must ask 'about the reasons underlying a defendant's request to discharge the services of his trial counsel and provid[e] the defendant an opportunity to explain those reasons.'" *State v. Taylor*, 431 Md. 615, 631-34 (2013), quoting *Pinkney v. State*, 427 Md. 77, 93 (2012). The "trial court's failure to inquire into the reasons behind [the defendant's] request to discharge counsel" was held to be "reversible error" in *Williams v. State*, 435 Md. 474, 478 (2013).

Here, the State "concedes that, under *Williams*, [appellant's] motion [to discharge Mr. Henderson], at the time it was filed, was sufficient to trigger the trial court's obligation under Rule 4-215(e) to conduct a colloquy into the reasons for why French wished to discharge his counsel." But the State further argues that there was no reversible error in this case because the transcript makes plain that the motion was withdrawn, citing *Grandison v. State*, 305 Md. 685, 765 (1986) ("The right of appeal may be waived where there is acquiescence in the decision from which the appeal is taken or by otherwise taking a position inconsistent with the right to appeal. . . . By dropping the subject and never again raising it, Grandison waived

his right to appellate review of this issue.") ; *Malarkey v. State*, 188 Md. App. 126, 156 (2009) ("We agree with the State's waiver claim. To be sure, the defense repeatedly moved for acquittal, and the court repeatedly reserved. But, appellant never made known to the court that he was entitled to a ruling before submission to the jury. Had he done so, the court might well have been willing to rule. A party cannot complain about the court's failure to rule on a pending motion unless it has 'brought [it] to the attention of the trial court.'"); *Jackson v. State*, 52 Md. App. 327, 331-32 (1982) ("If a defendant, after filing a Rule 736 motion, fails to pursue it, a waiver may result."); and *White v. State*, 23 Md. App. 151, 156 (1974) ("The motion to be decided must be brought to the attention of the trial court. Appellant may not take advantage of an obscurely situate, undecided motion and stand mute in the face of repeated requests by the judge for all pending motions to be decided.").

In appellant's case, there was an affirmative statement that all other motions had been "withdrawn." "This Court specifically has stated that withdrawing a motion, an affirmative act of commission as opposed to an act of omission, constitutes a waiver rather than a forfeiture." *Carroll v. State*, 202 Md. App. 487, 514 (2011). At the time the trial judge in this case expressly confirmed in open court that all open motions (other than the three specifically identified) had been withdrawn, appellant was present and was also represented by a second attorney who was never the subject of a motion to discharge. Neither appellant nor Mr. Gordon took issue with the court's statement that all other motions had been withdrawn. And despite having numerous opportunities to renew the motion to discharge Mr. Henderson,

appellant never did so. Under the circumstances, he waived the motion to discharge Mr. Henderson, and the court did not err in failing to conduct further discussions on the record relative to the motion.

II. The verdict and hearkening

As noted above, appellant was charged with both attempted first-degree and attempted second-degree murder. In his second contention on appeal, appellant argues that the jury's verdict was fatally flawed because, when the clerk asked the foreman what the jury's verdict was on the first issue, the clerk omitted the words "first degree." But that omission was corrected when the jury was asked to hearken to the verdict. During the hearkening, the clerk asked the jury to hearken "to **the verdict as the court has recorded it**, in State of Maryland versus Mark P. French, **your Foreperson has recorded that you find him guilty of attempted first degree murder** of James Beck; . . . ." (Emphasis added.) And the jury responded affirmatively when the clerk asked: "And so say you all?"

Relying on *Williams v. State*, 60 Md. 402, 403-04 (1883), appellant now claims that the hearkening was insufficient to "fix" the jury's initial announcement. In *Williams*, when the jurors were polled, all of the jurors "responded 'guilty,' without specifying the degree of murder." *Id.* at 403. As in appellant's case, when the clerk hearkened the jury to the verdict of its foreman, the clerk specified the verdict was murder "in the first degree." The Court of Appeals held in 1883: "The fact that the clerk, immediately after polling the jury, called upon

them to hearken to the verdict, as the Court had recorded it [*i.e.*, 'guilty of murder in the first degree'] . . . does not affect the question." *Id*. at 403-04.

But the more recent cases from the Court of Appeals make clear that a verdict can be corrected during the hearkening. Indeed, that is the purpose of the hearkening procedure. *State v. Santiago*, 412 Md. 28, 38 (2009) (quoting *Givens v. State*, 76 Md. 485, 488 (1893), for the principle that **"[h]earkening 'enable[s] the jury to correct a verdict**, which they have mistaken, or **which their foreman has improperly delivered** . . . ." (emphasis added)).

In *State v. Santiago*, 412 Md. at 38-39, the Court of Appeals stated plainly:

> A verdict is not final "until after the jury has expressed their assent in one of [two] ways," by hearkening or by a poll. *Givens* [*v. State*], 76 Md. [485] at 487, 25 A. at 689 [(1893)]. We have said that "[u]ntil the case is removed from the jury's province the verdict may be altered or withdrawn by the jurors, or by the dissent or nonconcurrence of any one of [the jurors]." *Smith*, 299 Md. at 168, 472 A.2d at 992–93. If there is no demand to poll the jury, hearkening and the "ensuing acceptance of the verdict finally removes the matter from the jury's consideration." *Smith*, 299 Md. at 168, 472 A.2d at 993. If there is a demand to poll the jury, "it is the acceptance of the verdict upon the poll that removes the verdict from the province of the jury." *Id*. We summarized this concept of finality succinctly in *Smith*, stating:
>
> > [T]he jury has control of the verdict until it is final. Absent a demand for a poll, the verdict becomes final upon its acceptance when hearkened. When a poll is demanded, the verdict becomes final only upon its acceptance after the poll.
>
> *Id*.

In this case, the verdict was not finalized until the jury hearkened to it. At that point, the jury confirmed its verdict that appellant was guilty of attempted first-degree murder, as clearly reflected on the verdict sheet, and accurately stated in the clerk's hearkening inquiry. Appellant's claim that he is entitled to a new trial because of the manner in which the foreman responded to the clerk's initial question is without merit.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY IN CASE NO. 93-CR-4253 AFFIRMED. COSTS TO BE PAID BY APPELLANT.