UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0798

September Term, 2014

EFREM Z. JOHNSON

v.

STATE OF MARYLAND

Leahy,
Reed,
Eyler, James R.
(Retired, Specially Assigned),

JJ.

Opinion by Leahy, J.

Filed: March 2, 2016

On February 25, 2013, Oscar Gaimaro was robbed and stabbed in the neck following a drug deal gone awry. Authorities arrested Appellant Efrem Johnson in connection with this incident in June 2013, and on May 19, 2014, following trial in the Circuit Court for Anne Arundel County, a jury convicted Appellant of attempted second-degree murder and armed robbery, as well as other related offenses. The circuit court imposed an aggregate sentence of 23 years, with 10 years suspended, on June 11, 2014. Appellant filed this timely appeal, raising two questions for our review:

> I. Did the [circuit] court violate Maryland Rule 4-215 by failing to rule on [Appellant's] meritorious requests to discharge his attorney and by failing to appoint substitute counsel?
>
> II. Did the [circuit] court abuse its discretion by refusing to grant a mistrial after inappropriately commenting during the testimony of the State's expert witness, who[se testimony], if believed, demonstrated serious bodily injury, intent to cause serious bodily injury, and intent to kill?

We conclude that the circuit court complied with Maryland Rule 4-215(e) and did not err in declining to appoint substitute counsel, because, although the court did not explicitly state that Appellant's reasons for seeking discharge of his public defender were not meritorious, the court "clearly was exploring those issues at the hearing and, just as clearly, concluded that [Johnson] was acting knowingly and voluntarily when it permitted the discharge of counsel." *State v. Westray*, 444 Md. 672, 687 (2015). We further conclude that court did not abuse its discretion in refusing to grant a mistrial because the court's comment during the expert witness's testimony did not create prejudice amounting to manifest necessity to require a mistrial. We affirm.

BACKGROUND

Following his arrest, a grand jury indicted Appellant for attempted first-degree murder; attempted second-degree murder; armed robbery; robbery; first-degree assault; second-degree assault; reckless endangerment; openly carrying a weapon with the intent to injure; theft of property with a value less than $1,000; conspiracy to commit first-degree murder; and conspiracy to commit armed robbery. Although Appellant does not challenge the sufficiency of the evidence to support his convictions, we briefly summarize the facts presented at Appellant's jury trial held May 13 through 16, 2014, for context. *See Goldstein v. State*, 220 Md. 39, 42 (1959); *Washington v. State*, 180 Md. App. 458, 461-62 n.2 (2008).

At trial, Mr. Gaimaro testified that throughout February 2013, he frequently sold flavored crack cocaine to Appellant. On February 25, 2013, at around 2:00 a.m. Mr. Gaimaro drove to meet Appellant and Christine Bright at G&M Restaurant to sell them about six grams of cocaine, valued at about $450.00. Once he parked in the G&M parking lot, he watched as Appellant and another man exited Ms. Bright's vehicle and walked toward his car. Appellant jumped into the passenger-side front seat, put a knife to Mr. Gaimaro's throat, and said "You know what time it is. . . . Give me all your money and give me the drugs." Appellant pushed the knife into his neck. Mr. Gaimaro began to fight Appellant off and successfully pulled the blade out of his neck, which fell into the back of the vehicle, but Appellant "kept pouncing [him] in the face." Appellant went through Mr. Gaimaro's pockets, took all his money, and then said to the other man, "Kill him. He knows who I am. Shoot him in the head." The other man tried to shoot Mr.

Gaimaro twice, but Mr. Gaimaro first knocked the gun from the man's hand and next the gun jammed. The two men then fled the scene in Ms. Bright's vehicle.

Mr. Gaimaro, bleeding and feeling faint, managed to drive to his home nearby. There, his wife helped him to control the bleeding and called 911. Mr. Gaimaro was later transported to a hospital, where he was interviewed by Corporal Bethea of the District Detective Unit of the Northern District for Anne Arundel County. Mr. Gaimaro named Appellant (or "Pie") and Christine Bright as the persons involved in the attack, and later identified Appellant in a photo array. [1]

Appellant's jailhouse bunk-mate testified that Appellant told him on multiple occasions that he stabbed Mr. Gaimaro in the neck. Christine Bright also testified. She averred that on the night of February 25, 2013, she, Appellant, and two others (one male and one female) went to buy drugs from Mr. Gaimaro. After she pulled into the G&M Restaurant parking lot and parked her car, they waited for Mr. Gaimaro to arrive. Once he did, Appellant and the other male exited her vehicle, with the male friend approaching Mr. Gaimaro's driver's side and Appellant approaching the passenger side. She maintained that she did not see what happened, as she was looking at the front entrance in case police arrived. Then, about less than five minutes later, Appellant got back into her car in "[k]ind of a rush" and said "go, go, go" in an elevated voice. She stated that there was no agreement to harm or rob Mr. Gaimaro.

[1] During his initial conversations with police, Mr. Gaimaro did not admit that he was at the G&M Restaurant parking lot to conduct a drug deal.

Ms. Bright also testified about an incident that had occurred one to two months after the February 25th incident, when she was with Appellant using drugs in a hotel room and Mr. Gaimaro and his wife arrived. Mr. Gaimaro's wife had a knife to Appellant's neck, and Mr. Gaimaro then grabbed Ms. Bright and put a knife to her neck. Appellant was then able to break free and ran out of the room, and Ms. Bright was released.

DNA analysis of the knives found in Mr. Gaimaro's car, as well as the passenger-side handle thereof, were inconclusive. Corporal Bethea testified that he observed a surveillance video from G&M Restaurant that reflected a scuffle at an unknown vehicle and two people running from one car to another, but no faces could be observed, and the video was not played for the jury.[2]

Following trial, the jury acquitted Appellant of attempted first-degree murder, conspiracy to commit first-degree murder, and conspiracy to commit armed robbery, but convicted Appellant of all remaining charges. On June 11, 2014, the court imposed a sentence of 20 years for attempted second-degree murder, with all but 10 years suspended, a concurrent sentence of 5 years for armed robbery, and a consecutive sentence of 3 years for openly wearing and carrying a dangerous weapon with the intent to injure. The court also ordered 5 years of supervised probation following Appellant's release. All other counts merged for sentencing. Appellant filed a motion to modify his sentence on June 13, 2014, which the circuit court denied on June 24, 2014.

[2] It appears that attempts to copy the video were unsuccessful.

We will discuss additional facts below as necessary to our resolution of the issues presented.

DISCUSSION

I.

Appellant contends the circuit court violated Maryland Rule 4-215(e) by failing to rule on his meritorious requests to discharge his assigned public defender and by failing to appoint a substitute public defender before his trial. The State responds that the court made implicit findings that the reasons for Appellant's request were not meritorious and that the court did not have a duty to appoint substitute counsel.

Proceedings Relating to Discharge of Counsel

On January 31, 2014, the circuit court held a hearing to discuss the status of Appellant's case. An assigned attorney from the Public Defender's Office represented Appellant. During the court's discussion with defense counsel about scheduling, Appellant interrupted and stated that he would like his trial date moved from March 11 to April 5. When the court asked defense counsel if she had discussed this change with her client, she responded, "I don't know why he wants it moved to April 5." Defense counsel declined the court's offer to have "private time" off the record to speak with Appellant. In response to the court's further questioning, Appellant explained that he wanted his trial rescheduled so his family could retain another attorney, stating, "I just don't want to go to trial with like as far as my attorney, I don't want to go to trial (inaudible)." The court responded:

> Well, here's the choice you have. You can go to trial with your attorney, or you can go to trial without your attorney. I'm not going to postpone the case when you've had plenty of time to be represented by counsel, and I haven't heard a good reason of why you wouldn't want to have . . . [your current counsel] represent you.

Appellant then proceeded to clarify, contending, "my reason was my counsel haven't [sic] been coming to discuss my case with me . . . I never know anything." Appellant's counsel interjected, "Actually that's not true, Mr. Johnson. I have visited you at the jail numerous times. I haven't visited you since the last status conference because nothing new is happening in your case." The court then resolved,

> All right. So you're going to talk to each other and you know, mend some fences, okay? Maybe you don't understand some of the things that she's done for you, but you're being represented by a very capable lawyer, and the fact that she didn't come visit you may be distressing to you, but there wasn't any activity in the last period of time.

Appellant then charged that he had not received various items from his counsel. Upon further probing from the court, Appellant claimed that he had not received "his motion for discovery." Appellant's counsel represented to the court that she had sent him all discovery. The court gave the following explanation to Appellant:

> You don't receive a motion. You receive a document or a paper in response to the motion. Your attorney is telling me that you have gotten everything that has been received. So you may have something in mind that doesn't exist. Tell me what document you think you should have gotten that you have not gotten.

Appellant responded that he did not receive photographs or the victim's hospital records. Defense counsel then admitted that she had not given the photographs to him at that point, but advised that she would do so. She also explained that she had not sent him a copy of the victim's hospital records, as she was not permitted to, but had discussed them

with Appellant; however, Appellant contended that she had not. After this discussion, the court asked Appellant if he was going to hire someone, and Appellant responded that his sister was going to hire an attorney named "Keats." The court then stated, "Fine, Okay. I'll postpone the trial and give him 30 days to hire somebody."

Despite the grant of a postponement, Appellant continued the dialogue, stating that he was "not disputing at all that [his] attorney is a good attorney." He said, "It [is] just that I don't feel really that she has my best interest[,]" and claimed that his counsel had said that if she had been his co-defendant's lawyer, she would get the co-defendant a plea bargain in exchange for testimony against him. Defense counsel clarified that she simply shared the possibility that his co-defendant could testify against him. The court advised Appellant, "[t]hat's exactly what she's supposed to tell you . . . [s]he's supposed to tell you what you're facing." Appellant and his counsel then disputed exactly what counsel had said to him, and the court responded, "you guys obviously [have] a failure to communicate." The record then reflects that there was crosstalk, and defense counsel then stated, "I don't want to talk, Mr. Johnson."

The court then addressed defense counsel: "candidly, your demeanor is not appropriate. Okay? I mean I'm getting the hostility vibe here so thick that I can understand your client's position. You don't seem to . . . want to communicate." His counsel then apologized to the court, claiming that "[i]t hasn't been this . . . way until today[.]" The court then stated, "I understand. Okay? I think your client ought to hire somebody. I'm going to postpone your trial. You tell me how much time you need to

hire somebody." The court added, "[b]ecause the public defender . . . is not going to give you another lawyer. Okay?" Thereafter, the following colloquy occurred:

> THE COURT: All right. I'll set this matter in for April 8. Get yourself an attorney, if you'd like. . . . Until then, [your current counsel]'s going to represent you. If you don't want her to represent you, you tell me - -
>
> [APPELLANT]: I don't.
>
> THE COURT: -- I'll excuse her.
>
> [APPELLANT]: I don't. I don't.
>
> THE COURT: You don't want her to represent you?
>
> [APPELLANT]: No. sir.
>
> THE COURT: You understand the public –
>
> [APPELLANT]: I don't feel as though –
>
> THE COURT: Listen.
>
> [APPELLANT]: I don't feel –
>
> THE COURT: Listen. You understand that the public defender is not going to represent you if I excuse [your current counsel], and if you don't hire somebody privately, you're going to end up representing yourself. Do you understand that?
>
> [APPELLANT]: There's no way as if I don't - -
>
> THE COURT: You don't get a choice of lawyers at the Public Defender's Office. They assigned [your current counsel] that's it. If you don't like [your current counsel], you know that's your call, but I can't say go and get somebody else.
>
> [APPELLANT]: I don't think she have my best interest to go to trial with, Your Honor.
>
> THE COURT: Her interest is in protecting your Constitutional rights –

[APPELLANT]: (Inaudible.)

(Crosstalk)

THE COURT: -- and presenting the evidence against you. Okay? When you go to a doctor, and you say, "Doctor, I've got a problem. Tell me what's wrong with me." And he says, "Mr. [Johnson], you've got cancer and if you don't take this medication you're going to die," are you going to get upset at the doctor because he's giving you bad news?

[APPELLANT]: No.

THE COURT: Well, that's what she's telling you. She's telling you the lay of the land. She's telling you, you've got a problem and she's trying to tell you what the problems are. She's not making these problems.

She's trying to tell you that you've got the possibility of a co-defendant testifying against you and that's something you need to take into consideration when you make decision about your case.

At which point, the court set the case in for April 8 and stated, "[i]f you want to hire a lawyer that's fine, but I need to know sometime in the next 30 days, whether you're going to have her represent you or not. And I would encourage you all to talk to each other and try to figure out if you've got some better way to communicate with each other." The hearing then concluded.

On March 6, 2014, the court received a hand-written letter from Appellant. In this letter, he complained that his counsel did not respond to his attempts to contact her; that she was withholding evidence; that she failed to explain his case to him (i.e. the witnesses against him, whether his co-defendant was testifying, and whether he should call witnesses); that she told him a letter in which the victim recanted his story identifying Appellant as his assailant did not mean anything; and that she declined to subpoena a witness he requested. He requested that the "Public Defender Office . . . appoint [him]

new counsel" but that he did not "want to go to trial without [an] attorney." He felt that she was not fulfilling his right to counsel and that he wanted to be assigned new counsel. In response, on March 11, the court filed a document stating the following:

> Defendant's Request for New Public Defender is noted. All appointments of counsel are made by the Office of the Public Defender. Please refer a copy of Defendant's Request to William Davis, Esq., Office of the Public Defender.[3]

The court scheduled a hearing for March 27.

At that hearing, the State began by reminding the court that the purpose of the hearing was to address Appellant's letter. The following colloquy then occurred:

> THE COURT: Okay. M[r]. Johnson, you wrote a letter indicating the issues that you have with your counsel, and I'm here to give you an opportunity to tell me what, you want the Court, to do. **If you're asking that your counsel be discharged, I have to go through that process with you and advise you that it's possible that if I don't find there's a good reason for it, then you're going to have to represent yourself.** So I don't know.
>
> Did you, [defense counsel], have a chance to talk to [Appellant] yesterday?
>
> [DEFENSE COUNSEL]: Yes, Your Honor. I went there yesterday evening and spoke with him.
>
> THE COURT: Are we still in the same status?
>
> [DEFENSE COUNSEL]: (No response.)
>
> THE COURT: Or do you know? You don't know.
>
> [DEFENSE COUNSEL]: I don't know, Your Honor.

[3] At the March 27, 2014, hearing, the State indicated that the court also may have sent a responsive letter to Appellant that "indicated that some of what he was discussing was a public defender's administrative issue[.]" A copy of this letter is not in the record.

THE COURT: [Appellant], **your attorney . . . is present. She is ready to represent you competently** and you've got a case that is scheduled for when now, [State?]

[THE STATE]: April 8.

THE COURT: That's for trial?

[THE STATE]: Yes.

THE COURT: Okay. That's your trial date. Is it your intention to go forward and have [defense counsel] represent you, or did you have to have some other plan?

[APPELLANT]: Yes. I'll have -- **I'll have her represent me.**

THE COURT: I'm sorry, sir?

[APPELLANT]: Yes. I'll have her represent me.

THE COURT: Okay. So she's going to represent you. You're okay with that right?

[APPELLANT]: Yeah.

THE COURT: Okay. Very good.

(Emphasis added). After a motion for postponement by Appellant was thereafter granted, Appellant's trial ultimately began on May 13, 2014.

Maryland Rule 4-215(e)

The Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights "'guarantee a right to counsel, including appointed counsel for an indigent, in a criminal case involving incarceration.'" *Broadwater v. State*, 401 Md. 175, 179 (2007) (quoting *Parren v. State*, 309 Md. 260, 262 (1987)). Two independent constitutional rights stem from these provisions: an accused "has both the

right to have the assistance of counsel and the right to defend Pro se." *Snead v. State*, 286 Md. 122, 123 (1979). The Court of Appeals adopted Maryland Rule 4-215 to implement these constitutional guarantees. *Williams v. State*, 321 Md. 266, 271 (1990). Regarding a defendant's right to discharge his or her counsel, Maryland Rule 4-215(e) 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.

The Rule essentially gives "practical effect" to a defendant's constitutional choices, as "[i]t requires the defendant to decide if he will continue with present counsel or proceed *pro se*[.]" *Williams*, 321 Md. at 273.

In order to comply with Rule 4-215(e), the Court of Appeals identified a strict procedure for considering a defendant's request to discharge counsel:

> [U]pon a defendant's request to discharge counsel, the court must provide the defendant an opportunity to explain his or her reasons for seeking the change. *See Gonzales v. State*, 408 Md. 515, 531 (2009). "Next, the trial court must make a determination about whether the defendant's desire to discharge counsel is meritorious." *Gonzales*, 408 Md. at 531; *see also Moore v. State*, 331 Md. 179, 186-87 (1993) (articulating the rule that the record must reflect that the trial court actually considered the merit of the defendant's explanation for wanting to proceed without counsel).

State v. Davis, 415 Md. 22, 31 (2010). The requirement that the court permit the defendant to explain the reasons for his request is integral and indispensable to the functionality of the Rule, as "it essentially leads the trial judge into the various options set forth therein":

> Where the trial judge finds a defendant's reasons to be meritorious, he must grant the request and, if necessary, give the defendant an opportunity to retain new counsel. When a defendant makes an unmeritorious request to discharge counsel, the trial judge may proceed in one of three ways: (1) deny the request and, if the defendant rejects the right to represent himself and instead elects to keep the attorney he has, continue the proceedings; (2) permit the discharge in accordance with the Rule, but require counsel to remain available on a standby basis; (3) grant the request in accordance with the Rule and relieve counsel of any further obligation.

Williams, 321 Md. at 273 (citing *Fowlkes v. State*, 311 Md. 586, 604-05 (1988)).

"When applicable, Rule 4-215(e) demands strict compliance." *State v. Hardy*, 415 Md. 612, 621 (2010). "'The provisions of the rule are mandatory[,]' and a trial court's departure from them constitutes reversible error." *Id.* (quoting *Williams*, 321 Md. at 272). Accordingly, "[w]e review *de novo* whether the circuit court complied with Rule 4-215." *Gutloff v. State*, 207 Md. App. 176, 180 (2012). However, so long as the court has strictly complied with Rule 4-215(e), we review the court's decision regarding whether to grant or deny a defendant's request to discharge counsel for abuse of discretion. *See State v. Taylor*, 431 Md. 615, 630 (2013); *State v. Brown*, 342 Md. 404, 413 n.3 (1996) (citing *United States v. Allen*, 789 F.2d 90, 93, *cert. denied*, 479 U.S. 846 (1986)); *McKee v. Harris*, 649 F.2d 927, 932 (2d Cir. 1981), *cert. denied*, 456 U.S. 917 (1982).

1. Meritorious Reason

i. The January 31, 2014, Hearing

There is no dispute that at the January 31, 2014, status hearing, the circuit court properly permitted Appellant to explain his reasons for wanting to discharge his counsel *fully*. Indeed, the onus is on the trial judge to ensure that the defendant explains his or her reasons for requesting discharge of counsel, *Brown*, 342 Md. at 431 (citation omitted), and certainly here, the court engaged in a discussion with Appellant and defense counsel to develop and understand Appellant's grievances. Appellant contends, however, that the court failed to rule whether his request was meritorious or not meritorious as required by the Rule.

It is true, as Appellant argues, that a circuit court must make a determination about whether a defendant's request to discharge counsel is meritorious. *See, e.g.*, *Gonzales*, 408 Md. at 531 ("[T]he trial court must make a determination about whether the defendant's desire to discharge counsel is meritorious." (citing *Moore*, 331 Md. at 186-87); *Hawkins v. State*, 130 Md. App. 679, 687 (2000) ("The court should first ask the defendant why he wishes to discharge counsel, give careful consideration to the defendant's explanation, and then rule whether the explanation offered is meritorious.")). We also must be satisfied that the record reflects that the court heard *and* considered the defendant's reasons for seeking discharge. *See Taylor*, 431 Md. at 708 ("The record also must 'be sufficient to reflect that the court actually considered th[e] reasons' given by the defendant.'" (quoting *Pinkey v. State*, 427 Md. 77, 93-94 (2012)) (internal quotation marks omitted)).

Rule 4-215(a), however, does not, on its face, require a court to expressly rule on the record that a defendant's rationale for discharge is meritorious or not. This contrasts, for example, Rule 4-246(b), which requires the court to "determine[] *and announce*[] on the record that the waiver of a jury trial is made knowingly and voluntarily." (Emphasis added); *see also Nalls v. State*, 437 Md. 674, 685 (2014). Although it may be best practice for a court to employ the word "meritorious" in rendering a ruling, this Court has not found any reported decision requiring the court to do so, and we do not consider that such express wording is required. For example, pursuant to Rule 4-215(d),[4] governing waiver of counsel by inaction in the circuit court, a circuit court is similarly required to determine whether the defendant had a meritorious reason for appearing before the circuit court without counsel. In that context, we have rejected various appellants' arguments that the court erred by failing to render an "explicit" ruling; instead, we have determined

[4] Rule 4-215(d) provides:

> If a defendant appears in circuit court without counsel on the date set for hearing or trial, indicates a desire to have counsel, and the record shows compliance with section (a) of this Rule, either in a previous appearance in the circuit court or in an appearance in the District Court in a case in which the defendant demanded a jury trial, the court shall permit the defendant to explain the appearance without counsel. *If the court finds that there is a meritorious reason for the defendant's appearance without counsel*, the court shall continue the action to a later time and advise the defendant that if counsel does not enter an appearance by that time, the action will proceed to trial with the defendant unrepresented by counsel. *If the court finds that there is no meritorious reason for the defendant's appearance without counsel*, the court may determine that the defendant has waived counsel by failing or refusing to obtain counsel and may proceed with the hearing or trial.

(Emphasis added).

that a court may implicitly find a defendant's reason to be meritorious or non-unmeritorious. *See, e.g.*, *Broadwater v. State*, 171 Md. App. 297, 326-28 (2006) (rejecting the appellant's argument that the circuit court erred by failing to make an explicit finding that the reason given for appearing without counsel was meritorious), *aff'd,* 401 Md. 175 (2007); *Webb v. State*, 144 Md. App. 729, 747 (2002) ("The court, after listening to the explanation, implicitly found the reason was non-meritorious."). Both subsection (e) and subsection (d) create a fork in the road, and the road the court must take depends on whether the court finds the defendant's reason—either to discharge counsel or to have appeared without counsel—to be meritorious or unmeritorious. Because an implicit finding is sufficient for purposes of subsection (d), we reach a similar conclusion here.

Recently, in *State v. Westray*, *supra*, the Court of Appeals considered whether the trial court, under the circumstances there presented, was required pursuant to Rule 4-215(b) to determine and announce on the record that the defendant was knowingly and voluntarily waiving the right to counsel. 444 Md. at 685-87. The Court concluded that it would "not resolve whether the 'determine and announce' requirement of section (b) always applies when a court is carrying out the dictates of Rule 4-215(e)[,]" because Westray was required to make a contemporaneous objection to preserve the issue. Nevertheless, the following observation made by the Court is instructive:

> It is true that the court did not explicitly state that it found Westray to be acting knowingly and voluntarily, but the court clearly was exploring those issues at the hearing and, just as clearly, concluded that Westray was acting knowingly and voluntarily when it permitted the discharge of counsel.

Id. at 687.

We note that specifically in the context of Rule 4-215(e), this Court has faced a situation where an explicit ruling was lacking *and* the record did not otherwise permit an inference regarding which way the court ruled. *See Argabright v. State*, 75 Md. App. 442, 461 (1988) (discussed in detail *infra*). There we stated, "[w]hile the trial judge's comments at the initial hearing may be susceptible to the inference that the reason for the requested discharge was meritorious, subsequent events, specifically, his comments at the next hearing, indicate that this may not have been so." *Id.* In that case, we concluded that the circuit court failed to comply with Rule 4-215(a) when the court actually permitted discharge of counsel, thus requiring reversal. *Id.*

Synthesizing the foregoing, we conclude that the circuit court must make a finding on the record whether or not a defendant has offered meritorious reasons for discharge of counsel pursuant to Rule 4-215(a), and that where a court does not state such finding in explicit terms, the record must be clear that the court clearly explored and decided the issue. Indeed, depending on which way the court rules, different requirements arise, and we must be able to determine, based on the record, that the court complied with the requirements of Rule 4-215. Here, the circuit court did not render an explicit finding regarding whether Appellant's reasons for seeking discharge of his public defender were meritorious or not; however, this alone does not mean that the court erred.

At the threshold of our review of the January 31, 2014 status hearing, we note that the court did not discharge counsel, but rather, postponed Appellant's trial for 30 days to permit Appellant to hire new counsel, keeping his public defender as his counsel until then. This preserved Appellant's right not only to get another attorney, but to discharge his counsel if he so wished. Indeed, where a court finds a defendant's request to discharge counsel non-meritorious, the court is permitted to deny the request, to permit discharge and require counsel to remain on standby, or grant the request anyway, so long as the court delivers the proper advisements required under Rule 4-215(a). *Williams*, 321 Md. at 273.

When the court prompted Appellant to provide a "good reason" as to why he wanted to discharge his public defender, Appellant urged that his counsel failed to discuss his case with him. To that, the court responded that both Appellant and counsel should speak to each other, that Appellant was "being represented by a very capable lawyer," and that although the lack of visitation may be distressing, as the public defender explained, "there wasn't any activity in the last period of time." This response reflects the court's disagreement with Appellant's position. Similarly, when Appellant said he had not received his "motion of discovery," the court explained to Appellant that the motion was filed, and that the only thing he should receive is the discovery divulged pursuant to that motion, again reflecting disagreement with Appellant's position. When the court asked Appellant if he had not received certain discovery, Appellant responded that he had not received photographs and the victim's hospital records. The court explained that he could not receive the hospital records because of privacy concerns, but

he could know about relevant portions thereof, which defense counsel submitted she had discussed with him. The court also determined that Appellant had not yet received photographs, and his defense counsel advised that she would provide them immediately, thereby resolving that issue. Appellant did not dispute that his attorney "is a good attorney[,]" but that she did not have his best interests in mind because she had told him, "if I was your co-defendant's lawyer, I will . . . get a plea bargain with the State to testify against you." The court explained that his attorney is supposed to tell him what he's facing and warn him that his co-defendant may testify against him, and that it was "exactly what she's supposed to tell you." This reflects further disagreement with Appellant's rationale for seeking dismissal.

All of these advisements reflect that the court did not find merit in Appellant's desire to discharge his public defender. We recognize that the court did appreciate a "failure to communicate" and that defense counsel's demeanor appeared hostile, but defense counsel asserted that it had not been that way until that day. Although it is true that a breakdown in communication may warrant discharge, *see State v. Brown*, 342 Md. 404, 415 (1996), the record, at the time of the January hearing, did not reflect a breakdown incapable of repair. The court encouraged counsel and Appellant to "talk to each other and try to figure out if you've got some better way to communicate." The court warned, "You understand that the public defender is not going to represent you if I excuse [your current counsel], and if you don't hire somebody privately, you're going to end up representing yourself. Do you understand that?" The court concluded the hearing by reiterating to Appellant that his public defender was simply telling him about the

problems he faced and that she was not creating those problems. It is apparent from the transcript that the court felt that the attorney-client relationship was still intact, and the decision regarding whether a defendant's reason for seeking discharge of counsel is meritorious is left to the court's discretion. *Brown*, 342 Md. at 413 n.3. Considering the court's ruling from an objective standard, *see id.*, we see no abuse of discretion in the court's implicit ruling that Appellant's motivations for seeking discharge were unmeritorious.

ii. The March 6, 2014, Letter and March 27, 2014, Hearing

Appellant sent a letter to the circuit court dated March 6th explaining that his problems with his public defender continued and advising the court that he still no longer wished to retain his public defender as counsel. In response, the circuit court scheduled a hearing for March 27, 2014. We conclude that the court complied with Rule 4-215(e) at that point as well.

At that hearing, the court advised Appellant:

> Okay. M[r]. Johnson, you wrote a letter indicating the issues that you have with your counsel, and **I'm here to give you an opportunity to tell me what, you want the Court, to do.** If you're asking that your counsel be discharged, **I have to go through that process with you** and advise you that it's possible that if I don't find there's a good reason for it, then you're going to have to represent yourself. So I don't know.

(Emphasis added). When the court asked Appellant whether he would like to continue representation by his public defender or if he had another plan, Appellant responded that he would continue to have the public defender represent him. Thus, at that juncture, the court was prepared to go through the Rule 4-214(e) requirements preceding discharge of

counsel, but Appellant decided that he no longer wanted to discharge his counsel. The record also reflected that the public defender had met with Appellant the day prior to the proceeding.

A defendant must have a present intent to discharge his or her counsel to trigger the Rule 4-215(e) inquiry. In *State v. Davis*, for example, defense counsel advised the court on the morning of trial that he had spoken with the defendant and that the defendant "didn't like [his attorney's] evaluation [of the facts of his case]" and wanted a jury trial and new counsel. 415 Md. 22, 27 (2010). The court ignored the request for new counsel and instead granted only his request for a jury trial. *Id.* at 27-28. The defendant was then sent to another judge for trial, and at that time, defense counsel advised the new judge that the defendant "did wish to have new counsel. But that was denied." *Id.* at 28. The Court of Appeals held that "a Rule 4-215(e) inquiry is not mandated unless counsel or the defendant indicates that the defendant has a present intent to seek a different legal advisor"; however, the Court clarified that under the facts of that case, the court "at least was required to inquire further so it could determine whether [the defendant] still maintained that intent." *Id.* at 33; *cf. Gambrill*, *supra*, 437 Md. at 305 (establishing that ambiguity in a request for discharge of counsel "mandate[s] judicial inquiry followed by a determination"). Indeed, "[t]he defense attorney never told the court that [the defendant] had changed his mind, and thus, at a minimum, the court should have asked [the defendant] if he wished to proceed with his appointed representative." *Id.* at 35.

Here, the court advised Appellant that the hearing was scheduled in response to his letter, advised him that it would give him the opportunity to discuss what he wants to do,

and asked him whether he still wanted to discharge his public defender. To that, Appellant responded that he did not wish to discharge his counsel. The court clarified, again, whether Appellant was okay with that, and Appellant responded affirmatively. We conclude that the court's inquiry into whether Appellant still maintained the present intent to discharge his counsel was sufficient.[5]

2. Appointment of a Public Defender

Appellant also argues that circuit court "misled" Appellant regarding the court's authority to appoint a substitute public defender and maintains that given the meritorious reasons for discharge of counsel that were proffered, the court was obligated to do so to protect his right to effective assistances of counsel.

[5] In his Reply brief, Appellant argues that a letter that he wrote to defense counsel, copied to the court, dated April 29, 2014, was sufficient to trigger the inquiry required by Rule 4-215(e). In this letter, Appellant stated that he had not received his "motions of discovery" yet and that he had not heard from or seen his counsel since the March 27, 2014, hearing. He listed a variety of requests and stated "I'm trying to communicate with you [i]n every way."

At oral argument, the State moved to strike reference to the April 29, 2014 letter because it was raised for the first time in Appellant's reply brief. The State is correct that ordinarily an appellant cannot raise new issues in his or her reply brief. *See Gazunis v. Foster*, 400 Md. 541, 554 (2007). However, we deny the motion to strike reference to the letter. Although it is true that "[a] reply brief cannot be used as a tool to inject new arguments[,]" *Strauss v. Strauss*, 101 Md. App. 490, 509 n.4 (1994), *cert. denied*, 337 Md. 90 (1995), appellate courts do have discretion to hear such issues, despite the general rule that we "ordinarily do not consider issues that are raised for the first time in a party's reply brief." *Gazunis*, 400 Md. at 554 (citation omitted).

We do not conclude that the letter was sufficient to constitute a request for discharge. Although it is true that a declaration of dissatisfaction with counsel rather than an explicit request to discharge may be sufficient to prompt the Rule 4-215(e) inquiry, *see Hardy*, 415 Md. at 623, the letter did not reasonably indicate to the court that he desired to discharge his counsel at that time. *See id.* at 622-23

Generally, the law provides that "for indigent defendants unable to retain private counsel, the right to counsel is but a right to effective legal representation; it is not a right to representation by any particular attorney." *Fowlkes*, 311 Md. at 605 (citing *State v. DeLuna*, 520 P.2d 1121, 1124 (Ariz. 1974); *State v. Harper*, 381 So.2d 468, 470 (La. 1980)). "[W]hen an indigent defendant discharges appointed counsel without a meritorious reason, the court may regard the discharge as a waiver of counsel, if it is done knowingly and voluntarily." *Westray*, 444 Md. at 687-88 (citing *Fowlkes*, 311 Md. at 604). "The trial court has no obligation to exercise its inherent authority to appoint substitute counsel when it finds that an indigent defendant lacks good cause to discharge appointed counsel." *Id.* at 688 (citing *Dykes v. State*, 444 Md. 642, 669 n.19 (2015)). Thus, "*unless the defendant can show a meritorious reason for the discharge of current counsel*, the appointment of substitute counsel is simply not an option available to the defendant." *Fowlkes*, 311 Md. at 605-06 (emphasis added).

Appellant relies on *Argabright*, *supra*. In that case, the defendant wanted to discharge his then-current counsel, a public defender, because counsel did not subpoena a witness that the defendant wanted to subpoena. *Id.* at 446. The defendant maintained that he did not want to proceed *pro se* and that he wanted another attorney appointed by the public defender or the court. *Id.* at 447. The court responded, "[w]ell, I don't have any control over that. You either have to take the attorney assigned by the Public Defender or not. If you're not satisfied with [your counsel] you can ask [the Public Defender's Office] to assign you another one, but that's entirely up to [that office]." *Id.* The court then discharged the public defender, recognizing that the defendant should

have the opportunity to subpoena his witness "[i]f [his] attorney refused to." *Id.* at 448. When trial began, the defendant appeared unrepresented and asked the court, again, to appoint him counsel, but the circuit court refused. *Id.* at 449-50.

On appeal, this Court first concluded that the circuit court failed to comply with the proper procedure required by Maryland Rule 4-215(a) when it discharged the defendant's counsel, and we reversed on that ground. *Id.* at 457-58. We proceeded, however, to address the defendant's second question: whether the court was required to appoint substitute counsel in light of the Public Defender's refusal to do so. *Id.* at 458. In doing so, we explained the implications resulting from a discharge for a non-meritorious reason and discharge for a meritorious one:

> Requiring the court to conduct an inquiry to determine whether to appoint counsel and, perhaps, requiring that it do so, **when counsel has been non-meritoriously discharged** and the Public Defender's office has declined to appoint a substitute **would directly conflict with a firmly settled principle of Maryland law**: ". . .for indigent defendants unable to retain private counsel, the right to counsel is but a right to effective legal representation; it is not a right to representation by any particular attorney."

Id. at 459 (citing *Fowlkes*, 311 Md. at 605). However, we explained:

> The situation is vastly different when a discharge has been determined by the court to have been for a meritorious reason. A request to discharge counsel is ordinarily motivated by an accused's contention that he or she is not receiving effective assistance of counsel or by his or her desire to enhance the quality of the assistance he or she is receiving; it is, in other words, addressed to the accused's right to effective assistance of counsel. This is consistent with the purpose of Rule 4-215-"to protect that most important fundamental right to effective assistance of counsel, which is basic to our adversary system of criminal justice, and which is guaranteed by the federal and Maryland constitutions to every defendant in all criminal prosecutions." When, therefore, a court determines that such a request is meritorious, it presumably legitimizes both the premises on which the request is based and the good faith of the accused in making the request.

Id. at 459-60 (internal citation omitted). Accordingly, we concluded that because the defendant "was financially and otherwise entitled to have counsel appointed to assist him, a finding by the court that the request was meritorious would impose upon the court the obligation of appointing counsel to replace discharged counsel, the Public Defender's office having declined to do so." *Id.* at 460-61 (citing *Thompson v. State*, 284 Md. 113, 128 (1978)). Because it was unclear whether the court determined the defendant's request to be meritorious or non-meritorious, we stated that if appointment of counsel was still an issue on remand, the court would have to "specifically address the nature of the discharge and, having done so, determine whether to appoint counsel to represent appellant." *Id.* at 461.

We consider the instant case to be distinguishable. As we concluded *supra*, the record in this case reflects the court's disagreement with Appellant's reasons for seeking discharge of his public defender. The court declined to discharge counsel, but did continue the proceedings to permit Appellant to hire private counsel if he so wished. In contrast, the circuit court in *Argabright* actually discharged the defendant's counsel after concluding that he had a right to subpoena a witness if his attorney refused to. *Id.* at 448.

Moreover, unlike the circuit court in *Argabright*, which stated several times that it had *no control* over appointing a public defender, absent any qualifiers, before agreeing with the defendant and discharging his counsel, the court here did not make such repeated misstatements. At the January 27, 2014, hearing, the court made the following statements regarding appointment of substitute counsel:

> Well, here's the choice you have. You can go to trial with your attorney, or you can go to trial without your attorney. I'm not going to postpone the case when you've had plenty of time to be represented by counsel, **and I haven't heard a good reason of why you wouldn't want to have . . . [your current counsel] represent you.**
>
> * * *
>
> THE COURT: Listen. You understand that the public defender is not going to represent you if I excuse [your current counsel], and if you don't hire somebody privately, you're going to end up representing yourself. Do you understand that? . . . . You don't get a choice of lawyers at the Public Defender's Office. They assigned [your current counsel] that's it. **If you don't like [your current counsel]**, you know that's your call, but I can't say go and get somebody else.

Upon receiving Appellant's letter, the court "noted" his request for a new public defender and stated that all appointments are made by the public defender. At the March 27, 2014, hearing, held in response to the letter, the court similarly stated:

> THE COURT: Okay. M[r]. Johnson, you wrote a letter indicating the issues that you have with your counsel, and I'm here to give you an opportunity to tell me what, you want the Court, to do. If you're asking that your counsel be discharged, I have to go through that process with you and advise you that **it's possible that if I don't find there's a good reason for it, then you're going to have to represent yourself**. So I don't know.

(Emphasis added). Thus, unlike the court in *Argabright*, the court did not repeatedly say that it had no control over substitution of counsel; rather, the court's overall statements conveyed that no substitution could be made absent good reason.

There is a presumption that trial judges know the law and apply it correctly, absent a record indicating the contrary. *See Medley v. State*, 386 Md. 3, 7 (2005) ("[A]bsent a misstatement of law or conduct inconsistent with the law, a '[t]rial [judge is] presumed to know the law and apply it properly.'" (quoting *State v. Chaney*, 375 Md. 168, 179

(2003))); *John O. v. Jane O.*, 90 Md. App. 406, 429 (1992) (holding that, "[u]nless it is clear" from the record that a trial judge does not know the law, the presumption remains that the judge knows and applies correctly the law), *abrogated on other grounds by Wills v. Jones*, 340 Md. 480, 493 (1995). Here, we are unable to conclude, based on the overall statements made by the court, that the court misunderstood or misapplied the law. The record as a whole reflects that the court did not find Appellant's reasons for seeking discharge of his counsel to be meritorious and, therefore, advised that the Public Defender's Office alone had the power to appoint alternative counsel, not the court. This is a correct statement of the law absent a good reason for the discharge. We perceive no error.

II.

Next, Appellant argues that the circuit court abused its discretion in denying his motion for a mistrial based on its inappropriate comment during the testimony of the State's expert witness. The State argues that the court properly exercised its discretion because the court's statement did not express an opinion as to a relevant fact and that the court delivered a curative instruction.

A. Relevant Testimony

Dr. Adam Weltz, admitted as an expert in the area of emergency medicine and trauma care, was Mr. Gaimaro's treating physician on February 25, 2013, at the University of Maryland's Shock Trauma Center. When Dr. Weltz first treated Mr. Gaimaro, he observed a "clear" stab wound to the neck a few centimeters in length and, after immediate labs, performed surgery because the location of the injury (in the middle

of the neck) created a likelihood of injury to an important structure. He identified injury to one of the large muscles in the neck. He explained that had the injury been to the carotid artery, Mr. Gaimaro would have died at the scene, and an injury to the esophagus or trachea would have compromised his airways, so "he was somewhat fortunate that it was just a muscle that was injured." "A few millimeters or centimeters up or down could have made a fatal impact." Dr. Weltz explained that had Appellant not received medical treatment, "the natural history would be that he would have continued to bleed in that area and could have potentially suffocated to death" and that it was "very unlikely that the bleeding would have stopped on its own." He opined that the injury was a serious bodily injury and could have resulted in his death.

During cross-examination, the follow colloquy occurred:

> [DEFENSE COUNSEL]: In fact, what you said, fortunately it was just a muscle that was injured?
>
> [DR. WELTZ]: Fortunately it was just a muscle that was injured. I think that there's still a severity to that, but in the whole scheme of where you want to get stabbed in the neck, you'd probably rather get stabbed in the muscle than in the artery.
>
> [THE COURT]: I don't think I'd want to be stabbed in either.
>
> [DR. WELTZ]: Correct.
>
> (Laughter).
>
> [THE COURT]: Any other questions?
>
> [DEFENSE COUNSEL]: No, but I am going to object, Your Honor.

After a brief recess and before the jury re-entered the courtroom, Appellant's counsel moved for a mistrial:

[DEFENSE COUNSEL]: . . . I would make a Motion for Mistrial at this time based on Your Honor's comments to the jury several minutes ago, based on my questioning of Dr. Weltz, excuse me, and during that questioning as I was between questions, Your Honor commented jovially to the jury that you wouldn't want to get stabbed in the neck, anywhere in the neck.

[COURT]: It's denied. You want to be heard?

[DEFENSE COUNSEL]: I do. I think that that comment on its face was inappropriate by a judicial member of the bench, with all due respect, during our trial, especially during a witness who the Defense is cross examining. I think that that –

[COURT]: Well, separate and apart from your view on how I should do my job, do you have anything else, Counsel?

[DEFENSE COUNSEL]: I do, Your Honor, if I may continue for the record, please? I think that that comment can be seen by the jury as endorsing the testimony of a particular witness or endorsing the testimony of a particular side and my fear in this matter is that by that statement, the jury could be seen as looking at a position of authority, Your Honor, and feeling that my client is the one who stabbed this individual based on that comment and endorsing the testimony of Doctor –

[COURT]: Well, it's true, in my opinion everybody would agree you don't want to be stabbed in the neck by anybody.

[DEFENSE COUNSEL]: I think that that would be an issue for the jury to determine whether or not –

[COURT]: Somebody wants to be stabbed in the neck.

[DEFENSE COUNSEL]: I don't know how that issue is appropriate is relevant in the middle of an expert doctor's testimony.

[COURT]: Call the jury down. Motion is denied.

[DEFENSE COUNSEL]: Thank you, Your Honor. And in light of the fact that you denied my motion, I would ask for a curative instruction to the jury based on that comment.

[COURT]: Yeah, I intended to do that.

[DEFENSE COUNSEL]: Thank you, Your Honor.

[COURT]: I don't want to emphasize that particular remark by referring to it. I'll give a general instruction.

[DEFENSE COUNSEL]: Thank you.

Whereupon, the jury re-entered the courtroom, and the court gave the following instruction:

> Ladies and gentlemen of the jury, you may recall that in the beginning of this case I gave you some instructions regarding objections, for instance, taking notes. One of the instructions that I neglected to tell you was that if I make comments during the case or ask witnesses questions, none of that is to be interpreted by you as a reflection of my views of the case or the witness or of the lawyer or frankly anything else.
>
> Typically, a judge might ask a question to elucidate some point or to allow a jury to hear something that wasn't particularly loud, but anything I say should not influence, from the bench, should not influence our deliberations. You're the folks who decide the facts in this case.
>
> I'll tell you what the law is, but it's up to you to determine the evidence and, I'm sorry, the facts of the case and to weigh[] that evidence as far as your, how you -- as far as when your determination is as to the credibility of a witness. A long story short, you decide the facts, I'll instruct you about the law. When I make a comment or ask a question, it's not a reflection on my views as to the evidence, the witness, a lawyer or the case.

Appellant did not object to this instruction or request another one.

B. Motion for Mistrial

Appellant argues that this witness provided critical testimony on the issue of serious bodily injury and that the court's "sarcastic" interjection revealed to the jury its opinion that a knife wound in the neck constituted serious bodily injury. According to Appellant, the comment furthered the State's theory that because the victim received a serious bodily injury, his assailant (Appellant) intended to cause such an injury.

"Generally, appellate courts review the denial of a motion for a mistrial under the abuse of discretion standard, because the 'trial judge is in the best position to evaluate whether or not a defendant's right to an impartial jury has been compromised.'" *Dillard v. State*, 415 Md. 445, 454 (2010) (quoting *Allen v. State*, 89 Md. App. 25, 42-43 (1991); *State v. Hawkins*, 326 Md. 270, 277 (1992)). "The right to a fair trial guaranteed by the Sixth Amendment of the United States Constitution and Article 21 of Maryland's Declaration of rights requires that judges refrain from making comments which potentially may improperly influence the jury or a specific juror or jurors." *Butler v. State*, 392 Md. 169, 192 (2006). We adhere to the principle that "[t]he grant of a mistrial is considered an extraordinary remedy and should be granted only 'if necessary to serve the ends of justice.'" *Carter v. State*, 366 Md. 574, 589 (2001) (quoting *Klauenberg v. State*, 355 Md. 528, 555 (1999)). The grant of a mistrial must be out of manifest necessity. *Cornish v. State*, 272 Md. 312, 317 (1974).

In determining whether Appellant was prejudiced by the court's statement, we consider the following five factors:

> [W]hether the reference . . . was repeated or whether it was a single, isolated statement; whether the reference was solicited by counsel, or was an inadvertent and unresponsive statement; whether the [person] making the reference is the principal witness upon whom the entire prosecution depends; whether credibility is a crucial issue; and whether a great deal of other evidence exists.

Wilson v. State, 148 Md. App. 601, 666-67 (2002) (quoting *Carter*, 366 Md. at 590).

Here, although sarcasm or scorn of a party's position or of a witness is an "egregious" manner of judicial intervention, *see Smith v. State*, 182 Md. App. 444, 487

(2008), this Court does not see how the court's comment—albeit making light of the expert's testimony—caused such dire prejudice to warrant the manifest necessity of a mistrial. The court made a single comment to a witness whose *credibility* was not a crucial issue, and we disagree with Appellant that the court opined on *a matter of fact* of legal significance to the conviction. None of the crimes with which Appellant was charged required the State to prove *actual* serious bodily injury; instead, the State was required to demonstrate *intent* to kill (second-degree attempted murder is a specific-intent crime; an intent to commit grievous bodily harm will not suffice, *see Harrison v. State*, 382 Md. 477, 488 (2004)) or *intent* to cause serious bodily injury (first-degree assault, *see* Md. Code (2002, 2012 Repl. Vol.), Criminal Law Article § 3-202(1)(a)). Although defense counsel was trying to discredit Dr. Weltz's testimony that the injury was a serious bodily injury, Appellant fails to recognize that this would only be relevant if the injury itself was an element of the crime. Here, the issue for the jury was one of intent.

To that point, Appellant emphasizes that the State theorized that because the victim suffered serious bodily injury, Appellant must have intended to cause that serious bodily injury. Certainly, that the victim suffered a serious bodily injury helps support the theory of intent, but we consider the act of stabbing itself to be most supportive of the State's theory. Indeed, a jury may rationally draw an inference that the act of stabbing someone in the neck alone reflects an intent to seriously injure or kill that person. Absent facts suggesting the occurrence of an accident, consent, or self-defense, this Court cannot conjure a scenario in which a stab wound to the neck would be done with any other intent based on the facts of that case.

Although the court's comment made light of the expert's testimony about where one would "rather" be stabbed in the neck, it did not prejudice Appellant as to establish manifest necessity for a mistrial. Moreover, the court issued a curative instruction that the jury is presumed to follow, and Appellant has not otherwise demonstrated that the prejudice he suffered transcended the curative effect of the instruction.

In addition, the evidence was otherwise substantial to support Appellant's convictions. Mr. Gaimaro, the victim, testified about the events of February 25, as did Ms. Bright. Appellant's jailhouse bunkmate also testified that Appellant had confessed committing the crimes to him. Although Appellant argues in his briefing that the testimony from these witnesses lack credibility based on their character and motivations for testifying, we stress that credibility assessments are for the jury. *See Robinson v. State*, 354 Md. 287, 313 (1999) ("In a jury trial, judging the credibility of witnesses is entrusted solely to the jury, the trier of fact; only the jury determines whether to believe any witnesses, and which witnesses to believe." (citations omitted)).

Absent prejudice amounting to manifest necessity, the circuit court did not abuse its discretion in denying the motion for a mistrial.

JUDGMENTS AFFIRMED;

COSTS ASSESSED TO APPELLANT.