UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0591

September Term, 2015

MARIO MALIK WHITE

v.

STATE OF MARYLAND

Krauser, C.J.,
Berger,
Reed,

JJ.

Opinion by Reed, J.

Filed: May 11, 2016

Following a bench trial in the Circuit Court for Prince George's County, Mario Malik White, appellant, was convicted of two counts of indecent exposure and one count each of disorderly conduct and disturbing the peace.[1] Appellant asks essentially two questions on appeal:

> I. Did the trial court err under Md. Rule 4-246 and federal/state constitutional law when it proceeded to a bench trial even though appellant had never waived his right to a jury trial?
>
> II. Was the evidence legally sufficient to sustain his two convictions for indecent exposure when appellant allegedly engaged in only a single course of exposure?

We shall reverse appellant's convictions on the first question. Because appellant's second question may not arise on appeal, we shall decline to address it.

FACTS

The State's theory of prosecution was that on the morning of March 15, 2014, appellant exposed himself within a 10 minute time period to two women. Testifying for the State, among others, were the two women to whom appellant exposed himself and the responding police officer. The theory of defense was he did not expose himself. Appellant testified in his defense. Viewing the evidence in the light most favorable to the State, the following was established.

[1] The court sentenced appellant to consecutive three-year terms of imprisonment for each indecent exposure conviction and merged his remaining two convictions.

At 7:56 a.m. on March 15, 2014, Charlene Davis, a social worker at Doctor's Community Hospital in Lanham, Maryland, drove into the hospital parking lot. As she parked her vehicle, she noticed a man, later identified as appellant, wearing "all Redskin gear." As he walked past the front of her car, she noticed that he "had his penis out." She did not notice any gauze or bleeding in his crotch area. She went into the hospital and reported the incident to the security guard.

Around 8:00 a.m., Dinyell Jenkins dropped off her roommate Alexia Marks at the hospital because her roommate was experiencing severe back pain. Jenkins then parked the car and, as she went inside the hospital, she noticed a man, later identified as appellant, walk in behind her. Appellant was wearing a Redskins onesie and other Redskins regalia. Jenkins walked into the emergency room waiting room area and sat down next to her roommate. About eight other people were sitting in the room. Appellant entered the room and chose to sit in a chair next to a woman with a blanket over her face. Appellant's chair faced the roommates and was less than 100 feet away from them.

Jenkins testified that she saw appellant "lean[] back in the chair with his left hand covered over his eyes and he was jerking his penis." She did not see any gauze on his penis or any bleeding. Marks testified that appellant was lying back in his chair with his hand over his crotch. She also did not see any blood in appellant's crotch area. When a security guard approached appellant and handed him a gown, appellant became upset and began yelling and cursing. The disturbance lasted about five minutes, after which appellant left the hospital.

Appellant was arrested several minutes later while sitting at a bus stop across the street from the hospital. When the arresting officer asked appellant what he had been doing at the hospital, appellant said he had been with a friend who was seeking medical attention. The officer testified that he saw no injuries or blood in appellant's groin area.

Appellant testified that he went to the hospital about 11:00 p.m. the night before he was arrested because he had "zipped my groin." He testified that the wound bled "[q]uite a bit," soaking through his Redskins onesie, but he was able to control it with several pieces of gauze and tape. Nonetheless, he went to an emergency room where he checked in at the front desk and was told to sit in the waiting room. Although he waited nine hours, he did not receive any medical treatment. Around 8:00 a.m., he walked outside to the hospital parking lot to call his wife. He then went back inside, at which point a security guard brought him a gown and told him "what everyone was saying." Angry and frustrated, he left the hospital. He testified that he had no intent to expose himself.

DISCUSSION

I.

Appellant argues on appeal that his convictions should be reversed because there is no evidence that he waived his right to a jury trial. The State agrees, as do we.

An accused's right to a trial by jury is guaranteed by the Sixth Amendment to the United States Constitution, as applied to the States by the Fourteenth Amendment. *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968). Similar protection is given to criminal defendants in the Articles of the Maryland Declaration of Rights, specifically Articles 5, 21, and 24.

Boulden v. State, 414 Md. 284, 293-94 (2010). A defendant also has the corresponding right to waive the right to a jury trial and instead elect to be tried by the court. *Id*. at 294 (citations omitted).

To pass constitutional muster, the waiver of the right to a jury trial must be knowledgeable and voluntary, that is, it must amount to an "intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). It is now long-established that a court need not advise the accused of the details of the jury selection process or of a jury trial. Nevertheless, a court must "satisfy itself that the waiver is not a product of duress or coercion and further that the *defendant has some knowledge* of the jury trial right before being allowed to waive it." *State v. Bell*, 351 Md. 709, 725 (1998) (quotation marks and citations omitted) (emphasis in original). Thus, while courts need not engage in any "specific litany," the record must show that the defendant has some information regarding the nature of a jury trial. *See Abeokuto v. State*, 391 Md. 289, 320 (2006) (quoting *Martinez v. State*, 309 Md. 124, 135-36 (1987)). "Whether there is an intelligent, competent waiver must depend on the unique facts and circumstances of each case." *Valiton v. State*, 119 Md. App. 139, 148, *cert. denied*, 349 Md. 495 (1998). "If the record in a given case does not disclose a knowledgeable and voluntary waiver of a jury trial, a new trial is required." *Smith v. State*, 375 Md. 365, 381 (2003) (citations omitted).

The above constitutional rights are protected and amplified in Md. Rule 4-246, which governs the waiver of trial by jury in the circuit court. The Rule provides, in pertinent part:

> (b) **Procedure for acceptance of waiver.** A defendant may waive the right to a trial by jury at any time before the commencement of trial. The court may not accept the waiver until, after an examination of the defendant on the record in open court conducted by the court, the State's Attorney, the attorney for the defendant, or any combination thereof, the court determines and announces on the record that the waiver is made knowingly and voluntarily.
>
> * * *
>
> (c) **Withdrawal of a waiver.** After accepting a waiver of jury trial, the court may permit the defendant to withdraw the waiver only on motion made before trial and for good cause shown. . . .

Id.

Given recent developments in the law, a contemporaneous objection is required to preserve the sufficiency of the "examination of the defendant on the record in open court . . . [or] the court['s] determin[ation] and announce[ment] on the record that the waiver is made knowingly and voluntarily." Md. Rule 4-246(b). *See Meredith v. State*, 217 Md. App. 669, 674-75, *cert. denied*, 440 Md. 226 (2014) (where a defendant makes "no objection below to the waiver procedure, to its content, or to the trial court's announcement as to the 'knowingly and intelligently' made waiver of his right to a jury trial[,] his challenge to the effectiveness of his waiver is not preserved for our review and is not properly before this Court."). That requirement, however, does not apply where the record is completely and utterly devoid of any examination of the defendant and/or announcement by the court that the waiver was made "knowingly" and "voluntarily." We have expressly recognized that "Rule 735(d) [(the Rule from which Rule 4-246(b) was derived)] has a constitutional aspect similar to that of a guilty plea[,] . . . and a failure of [a waiver of a constitutional right to

appear affirmatively on the record] is not grounds for dismissal of the appeal." *Biddle v. State*, 40 Md. App. 399, 407 (1978) (internal citations omitted). *See Curtis v. State*, 284 Md. 132, 143 (1978) (the right to a trial by jury can only be waived through "'the exercise of a free and intelligent choice.'" (quoting *Adams v. United States ex. rel. McCann*, 317 U.S. 269, 275 (1942))).

At the start of appellant's trial, defense counsel introduced himself and his client to the court. Defense counsel then stated: "[Appellant] pleads not guilty to the charges, asks that the charges be read, waives his right to a trial by jury, elects to be tried by this Court, and we'd ask for a rule on witnesses." The court gave the requested rule on witnesses, informed appellant of the charges, and the parties proceeded to opening statements. At no time was appellant examined to ensure he understood the consequences of waiving his right to a jury trial. Nor did the court at any time announce that it was satisfied that the appellant's waiver was made "knowingly" and "voluntarily." Generally, "appellate courts will . . . [only] review the issue of a trial judge's compliance with Rule 4-246(b) provided a contemporaneous objection is raised in the trial court to preserve the issue for appellant review." *Nalls v. State*, 437 Md. 674, 693 (2014). However, a silent record cannot be the basis for a constitutional waiver of one's jury trial right, and, therefore, we must reverse appellant's convictions. *See Biddle*, 40 Md. App. at 407 ("Because the record in the case *sub judice* unequivocally shows a non-compliance with Md. Rule [4-246(b)'s predecessor], the trial on the merits should not have proceeded. *Ergo*, the judgment must be reversed and

the case remanded for a new trial."). *Cf. Carnley v. Cochran*, 369 U.S. 506, 516 (1962) ("Presuming waiver [of the right to counsel] from a silent record is impermissible.").

When we reverse the judgment of the trial court and appellant raises the sufficiency of the evidence on appeal, we must address the sufficiency issue raised because retrial is not permitted if the evidence is insufficient to sustain appellant's conviction. *Ware v. State*, 360 Md. 650, 708-09 (2000) (citing *United States v. DiFrancesco*, 449 U.S. 117, 130 (1980)).

II.

Appellant was convicted, among other things, of two counts of indecent exposure. Appellant argues on appeal that the evidence was legally insufficient to sustain more than one conviction and sentence for indecent exposure. Citing *People v. Smith*, 147 Cal.Rptr. 3d 314 (Cal. Ct. App. 2012), and *State v. Vars*, 237 P. 3d 378 (Wash. Ct. App. 2010), appellant reasons that the unit of prosecution for indecent exposure "is the act of exposing oneself, not the number of people who observe it." The State argues that we should decline to address appellant's argument because it is premature as it may never arise on remand. We agree with the State.

Although appellant's argument is framed as a sufficiency of the evidence issue, it is not. Appellant's argument is an issue regarding duplicity in the pleading. *See Albrecht v. State*, 105 Md. App. 45, 51-52 (1995) (stating that appellant's unit of prosecution argument is a pleading problem). *Cf. Handy v. State*, 175 Md. App. 538 (addressing appellant's sufficiency of the evidence argument and unit of prosecution argument as two separate

arguments), *cert. denied*, 402 Md. 353 (2007) and *Sullivan v. State*, 132 Md. App. 682, 687-90, *cert. denied*, 362 Md. 36 (2000) (same). We agree with the State that it is premature to resolve appellant's argument because "[t]here can be no guarantee that the evidence adduced at [appellant's] retrial will be identical to the evidence adduced at the first trial." Accordingly, we decline to address appellant's pleading argument.

ALL CONVICTIONS REVERSED. CASE REMANDED TO THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY FOR RE-TRIAL. COSTS TO BE PAID BY PRINCE GEORGE'S COUNTY.