UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0410

September Term, 2013

ON REMAND

CHRISTOPHER DAVID MANION

v.

STATE OF MARYLAND

Meredith,
Zarnoch,
Eyler, James R.
(Retired, Specially Assigned),

JJ.

Opinion by Eyler, J.

Filed: July 10, 2015

Christopher David Manion, appellant, was convicted, non-jury, by the Circuit Court for Charles County of five counts of theft by deception and two counts of conspiracy. The charges arose out of contracts that appellant, a home improvement contractor, entered into with five homeowners between 2009 and 2011. Appellant was convicted of theft, in violation of Md. Code (2002, 2012 repl. Vol.) section 7-104(b) of the Criminal Law Article, and common law conspiracy. The convictions were as follows: (1) theft in excess of $500 from Sue and Michael Murphy from August 8 to August 10, 2009; (2) theft in excess of $100,000, and conspiracy to commit theft, from Pat and Frank Russell from November 1, 2009 to December 31, 2011; (3) theft between $1,000 and $10,000 from Clovia James from February 28, 2011 to April 4, 2011; (4) theft between $1,000 and $10,000 from Geraldine Harsha on March 1, 2011; and (5) theft between $1,000 and $10,000. and conspiracy to commit theft, from Sharon and Kenneth Lake from September 15, 2011 to November 16, 2011. The court sentenced appellant to a term of sixty-five years imprisonment, thirty years suspended.

Background

On appeal, appellant contended (1) in accepting appellant's waiver of a jury trial, the court erred in not announcing that the waiver was made knowingly and voluntarily; (2) the court erred in denying appellant's motion to sever the charges; and (3) the evidence was legally insufficient to sustain the convictions because (a) it failed to support a finding of the necessary intent, and (b) as to the Russells, it failed to establish value.

In an unreported opinion, *Manion v. State*, No. 0410, September Term, 2013, filed March 21, 2014, this Court held that the evidence of an intent to commit theft at the time appellant obtained money was legally insufficient and reversed the convictions. In doing so, this Court did not reach appellant's other contentions.

The Court of Appeals granted the State's petition for certiorari with respect to the issue of intent to deprive homeowners of property. *State v. Manion*, 439 Md. 327 (2014). Subsequently, the Court of Appeals held that the evidence was legally sufficient to support the finding that appellant intended to deprive homeowners of property and sustain convictions for theft by deception. The Court remanded the case to this Court to address appellant's other contentions. *State v. Manion*, 442 Md. 419 (2015).

Prior to trial, appellant filed a motion to sever, for separate trials, the counts addressing each of the five homeowners. The court denied the motion.

On the first day of trial, the court accepted appellant's waiver of his right to a trial by jury. In doing so, the court stated: "I'm satisfied that the Defendant has waived his right to trial by jury and wants to go forward with the court trial."

At trial, the State's theory was that appellant represented himself to be a licensed contractor when he was not and that he took money from homeowners with the intent to not deliver materials or perform the home improvement work that he had promised.

The evidence relating to each of the five homeowners was summarized in this Court's prior opinion and also in the Court of Appeals' opinion. Legal sufficiency of the evidence is no longer an issue. Thus, it is unnecessary to duplicate the prior summaries.

Discussion

Waiver of a Jury Trial

Appellant argues that, in violation of Maryland Rule 4-246 and *Valonis v. State*, 431 Md. 551 (2013), the trial court did not announce on the record that his jury trial waiver was knowing and voluntary. Acknowledging that he did not raise an objection at trial, appellant argues that we should reach the issue, despite the holding in *Nalls v. State*, 437 Md. 674 (2014) that an objection is required to preserve appellate review. We answered the argument made by appellant, in *Meredith v. State*, 217 Md. App. 669 (2014).

> We turn to appellant's argument that the trial court erred by failing to announce on the record a determination that he voluntarily waived his right to a jury trial. Maryland Rule 4–246(b) provides, in pertinent part, as follows:
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> > "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.*" (Emphasis added).
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> The waiver of a jury trial is a two-step process. The trial judge must determine that the waiver is knowing and voluntary. And the trial judge must make that finding on the record.

> In *Valonis & Tyler v. State*, 431 Md. 551, 567, 66 A.3d 661, 670 (2013), the Court of Appeals left no doubt that the trial judge must make a determination, on the record, that the defendant's waiver is both *knowing* and *voluntary*. In order to guide the trial courts, the Court of Appeals in that consolidated case exercised its discretion under Rule 8–131 and addressed appellants' argument even though there was no contemporaneous objection lodged in the trial court. The Court did so "to review the merits ... due to our perception of a recurring problem—namely, the failure of trial judges to follow Rule 4–246(b)—and to further encourage trial judges to adhere to the letter of the Rule." *Nalls & Melvin v. State*, 437 Md. 674, 693, 89 A.3d 1126, 1137 (2014). Post *Valonis*, there can be no doubt that, even though no specific litany is required, the record must reflect that the trial judge explicitly found that the defendant waived a jury both *knowingly* and *voluntarily*.
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> What was less clear following *Valonis* was whether an appellate court would review a jury trial waiver absent a contemporaneous objection in the trial court. In *Nalls & Melvin v. State*, the Court of Appeals spoke loud and clear that a contemporaneous objection in the trial court is a necessary predicate for appellate review. After exercising its discretion under Rule 8–131 to review the trial court's compliance with Rule 4–246(b), the Court stated as follows:
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> > "Going forward, however, the appellate courts will continue to 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 appellate review."
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> *Id.* (Emphasis added).

Meredith, 217 Md. App. at 673-74; *accord*, *Clark v. State*, 218 Md. App. 230, 245-246 (2014).

Severance

Appellant argues that the evidence relating to each homeowner is not admissible as to other homeowners, and thus, the charges relating to each homeowner should have been tried separately. The law applicable to severance/joinder differs depending on the type of

fact finder. If the fact finder is a jury, a trial court cannot join cases when the evidence relevant to the offenses is not mutually admissible at separate trials. *Reidnauer v. State*, 133 Md. App. 311, 318 (2000). If the fact finder is a judge, the court may, in the exercise of its discretion, join offenses even if the evidence is not mutually admissible. *Id*. at 320. This latitude is permitted because a judge can weigh the factors of efficiency and economy against possible prejudice and can segment fact finding into compartments. *Wieland v. State*, 101 Md. App. 1, 13 (1994). In a non-jury trial, prejudice is not assumed if offenses are joined and the evidence is not mutually admissible. In that event, the question is whether the record demonstrates that defendant was in fact prejudiced or not prejudiced. *Graves v. State*, 298 Md. 542, 547 (1984). Evidence of offenses is mutually admissible if it tends to show, *inter alia*, intent or a common scheme. *Emory v. State*, 101 Md. App. 585, 613 (1994). Similarity of offense or closeness in time is not in and of itself sufficient. *Id*. If the evidence relevant to the charges against one homeowner is relevant to the charges against the other homeowners, it is mutually admissible. *Wieland*, 101 Md. App. at 15.

The parties differ as to whether the evidence is mutually admissible. As the Court of Appeals pointed out in holding that the evidence of appellant's intent was sufficient as to all charges, in each instance he misrepresented that he was a licensed contractor and he gave similar excuses-false in nature-explaining why he did not perform as agreed. The evidence may well be mutually admissible, but we need not decide that issue because, even if it is not,

the record establishes that the defendant was not in fact prejudiced. As the Court of Appeals explained in *Graves*:

> The question then is whether a given defendant is in fact prejudiced by the joinder. In order for a judgment to survive in the face of a similar offense joinder with evidence not mutually admissible, we think that the record must be sufficient to show that the defendant was not in fact prejudiced by the joinder. This would not be feasible as to a jury trial. The transcript of the proceedings of a trial by jury does not show how the verdicts were reached. It does not show what evidence the jurors actually considered, what weight they gave it, how they evaluated it, what credibility they gave the witnesses. There is no way to ascertain from the record whether they cumulated the evidence of the various crimes charged to find guilt or used evidence of one of the crimes charged to infer a criminal disposition on the part of the defendant from which they found him guilty of the other crimes charged. Their deliberations remain locked in the jury room.
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> On the other hand, in a trial by the court sitting without a jury, the court may state the grounds for its decision either in open court or by written memorandum. Md. Rule 760. Either way his comments are part of the record and can be perused by the reviewing court. In determining prejudice *vel non*, an appellate court is able to consider the grounds for decision advanced by the trial court, giving due regard to the assumed proposition that "judges are men of discernment, learned and experienced in the law and capable of evaluating the materiality of evidence...."

Graves, 298 Md. at 547-548.

In the case before us, the court addressed the charges against each homeowner and made findings as to each. We discern no prejudice.

Theft in Excess of $100,000

Appellant argues that the evidence was legally insufficient to find theft in excess of $100,000 with respect to the charges arising out of the contract with the Russells.

Value in this context means "the market value of the property or service at the time and place of the crime" or if market value cannot be ascertained, the replacement cost of the property or service. Md. Code, Criminal Law Article, section 7-103 (a).

The Russells hired appellant and his partner, Albert Styles, to perform extensive renovations of their home. The Russells paid $350,000. Mr. Styles testified that he and appellant performed approximately $150,000 worth of work. This testimony is sufficient to support the trial court's finding. *State v. Manion*, 442 Md. at 429. ("...[R]oughly $150,000 of the more than $350,000 paid by the time of termination represents work not performed and materials not delivered").

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