Circuit Court for Saint Mary's County
Case No. C-18-CR-18-000257

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1431

September Term, 2019

DEANDRE MARQUISE ROBINSON

v.

STATE OF MARYLAND

Fader, C.J.,
Beachley,
Woodward, Patrick L.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Woodward, J.

Filed: January 13, 2021

On February 6, 2019, Deandre Marquise Robinson, appellant, was convicted of robbery and second degree assault after a bench trial in the Circuit Court for Saint Mary's County. On May 16, 2019, the court sentenced appellant to six years of incarceration for the robbery conviction and a concurrent six years for the second degree assault conviction. The court also entered a money judgment as restitution for the victim's medical expenses, stolen property, and lost wages. In the instant appeal, appellant raises three questions for our review:

> 1. Did the absence of a valid jury trial waiver violate [a]ppellant's constitutional right to trial by jury?
>
> 2. Did the absence of a valid jury trial waiver violate Maryland Rule 4-246?
>
> 3. Should the sentence for assault merge into the sentence for robbery?

As we shall explain, we reverse and remand this case for a new trial.

I. BACKGROUND

This appeal arises from an assault and robbery that took place on August 20, 2017, outside the Wawa on Route 235 in Saint Mary's County, Maryland. The victim, Reginald Sesker, II, testified that he entered the Wawa to pay for gas, and as he left the store, he was struck by an unknown assailant and fell unconscious. When he awoke, he was bleeding from the mouth and realized that one of his teeth had been knocked out. He also discovered that his phone and wallet were missing. Sesker declined to leave in an ambulance and drove to a nearby friend's house to contact his mother about the incident. He later learned from his doctors that he had sustained nerve damage requiring four root canals and the replacement of several teeth.

An eyewitness, Joshua Austin, testified that he was present at the Wawa at the time of the incident. He explained that he saw someone "come up and hit" Sesker "very hard." Sesker fell and "his head smacked the back of the ground." The person who hit Sesker got into a black Volvo and left the scene "[i]n a hurry." Austin then called 911 to report the crime. At trial, Austin identified appellant as the attacker.

Trooper Allison Oyler testified that she heard a description of the black Volvo over a police dispatch. She then observed a black Volvo near the Wawa, followed it, and ultimately stopped the vehicle for an unsafe lane change. Appellant was the driver of the Volvo and Trooper Oyler smelled the odor of an alcoholic beverage on his breath. Trooper Oyler administered field sobriety tests to appellant, and he passed. She then called the sheriff's office about the police dispatch and learned that the sheriff's office had yet to contact the victim. Trooper Oyler issued appellant a traffic citation and a warning and released him.

Deputy Andrew Budd reported to the scene as a result of Austin's 911 call and obtained two videos of the incident from the surveillance cameras at Wawa. Deputy Budd testified that he later contacted Sesker and discussed the incident and his injuries. After learning of Trooper Oyler's stop of the black Volvo and identifying appellant in the video taken from the Wawa, Deputy Budd made an application for a statement of charges against appellant. Appellant was arrested and charged with robbery, first degree assault, and second degree assault.

On January 11, 2019, appellant appeared before the circuit court for a pre-trial

hearing. At the hearing, defense counsel indicated that appellant was waiving his right to a jury trial. After a colloquy with defense counsel and appellant, which will be discussed in detail *infra*, the court determined that appellant had waived his jury trial right. On February 6, 2019, a bench trial was held, at the conclusion of which appellant was convicted of robbery and second degree assault.[1] On May 16, 2019, the court sentenced appellant to six years for robbery and six years for second degree assault, to run concurrently. The trial court also ordered appellant to pay $12,040 in restitution for Sesker's medical bills, stolen property, and lost wages. Appellant filed this timely appeal. Additional facts shall be provided as necessary to our resolution of the questions presented.

II. DISCUSSION

A. Waiver of Appellant's Constitutional Right to a Trial by Jury

Appellant argues *first* that he was deprived of his constitutional right to a trial by jury. He explains that under the U.S. Constitution and the Maryland Declaration of Rights, the right to a trial by jury is "fundamental" and "may be waived only through an express, personal, knowing and voluntary waiver." Appellant contends that the record does not reflect *any* explicit waiver by him and further that "there was no inquiry to determine whether [a]ppellant's decision to proceed [without a trial] was knowing or voluntary." The State responds that the colloquy was sufficient and met the constitutional standard. Appellant is right.

[1] Appellant was acquitted of the charge of first degree assault.

The Sixth Amendment to the United States Constitution[2] and Articles 5 ("[T]he inhabitants of Maryland are entitled to . . . trial by jury . . . ."), 21 ("[I]n all criminal prosecutions, every man hath a right to . . . a speedy trial by an impartial jury, without whose unanimous consent he ought not to be found guilty."), and 24 (due process) of the Maryland Declaration of Rights guarantee criminal defendants the right to a jury trial. A criminal defendant may nonetheless choose to waive his or her right and proceed with a bench trial. *Boulden v. State*, 414 Md. 284, 294 (2010).

Certain constitutional rights are "fundamental," including the right to trial by jury, the right to counsel, and rights under the double jeopardy clause. *McElroy v. State*, 329 Md. 136, 140 n.1 (2010). Because the right to a jury is fundamental or "absolute," *Robinson v. State*, 410 Md. 91, 107 (2009), (1) the defendant's "*personal* waiver [shall] be reflected on the record," *McElroy*, 329 Md. at 140 (emphasis added), and (2) the waiver must be knowing and voluntary, *Abeokuto v. State*, 391 Md. 289, 316 (2006).

"In Maryland, a defendant's right to waive a trial by jury may be exercised *only by the defendant*." *Nalls v. State*, 437 Md. 674, 685 (2014) (emphasis added); *see Martinez*

[2] The Sixth Amendment states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

v. State, 309 Md. 124, 133 (1987) ("[O]nly [the defendant] can waive his right to a jury trial."). In *Hersch v. State*, the Court of Appeals stated:

> [A]lthough there are a number of "rights" possessed by a defendant that may be waived by the action or inaction of counsel, there [are] certain fundamental rights that can be waived only where the record affirmatively discloses a voluntary, knowing, and intelligent relinquishment of the right **by the defendant himself**.

317 Md. 200, 205 (1989) (emphasis added); *Abeokuto*, 391 Md. at 317 ("The defendant must directly respond to the court's examination because the waiver must come from the defendant."); *cf. Parker v. State*, 160 Md. App. 672 (2005) (holding that where the trial court accepted a guilty plea from defense counsel when the defendant was not present, the defendant's plea was not knowing and voluntary and thus the plea was constitutionally defective).

In addition, "[s]uch a waiver is valid and effective *only* if made on the record in open court and if the trial judge determines, after an examination of the defendant on the record and in open court, that it was made 'knowingly and voluntarily.'" *Nalls*, 437 Md. at 685 (emphasis added). In determining whether the waiver was knowing and voluntary, the 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) (emphasis omitted). Although there is no "specific litany" in which the court must engage, the record must show that the defendant has "some knowledge of the jury trial right before being allowed to waive it." *Abeokuto*, 391 Md. at 318, 320. A waiver is voluntary "if the conduct constituting the waiver is the

product of a free and deliberate choice, rather than based on duress or coercion." *Aguilera v. State*, 193 Md. App. 426, 436 (2010).

Although Maryland Rule 4-246 governs the procedure that the trial court must follow in order for the waiver to be valid, the constitutional assessment exists independently. *See Boulden*, 414 Md. at 296 ("Although Rule 4-246 provides the procedures for waiver of the right to trial by jury, the ultimate inquiry regarding the validity of the waiver is whether 'there has been an intentional relinquishment or abandonment of a known right or privilege.'"); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Finally, "[i]f 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).

During the pre-trial hearing in the instant case, the trial court asked defense counsel about a possible waiver of appellant's jury trial right:

> [THE STATE]: But also, Judge, I guess I should add, we had also talked about whether or not we're having a jury trial. I don't know if that has changed, but that might—
>
> THE COURT: Do you want a jury, [defense counsel]?
>
> [DEFENSE COUNSEL]: No. We would waive our right to—
>
> THE COURT: The jury is waived, Madam. And I have to voir dire that, so remind me.

After this brief exchange, the trial court and the attorneys began discussing the existence of a superseding indictment, the status of plea negotiations, and the scheduling of the trial date. The court then addressed appellant for the first time about his jury trial right:

> THE COURT: On the jury trial, [appellant], do you know

> what a jury trial is, sir?
>
> [APPELLANT]: Yeah. That's, like, when it's, like, 12 people sitting up there and, you know, they ask you—
>
> THE COURT: And they have to conclude beyond a reasonable doubt from the evidence and testimony from the State and exhibits that you are guilty of robbery, first degree assault, or second degree assault. And all 12 have to agree; it has to be unanimous. Do you understand that?
>
> [APPELLANT]: Yes, sir.
>
> THE COURT: If one juror says, "I don't believe they proved that case or that count," you can't be convicted. Do you understand that?
>
> [APPELLANT]: Yes, sir.
>
> THE COURT: The judge has the same burden, beyond a reasonable doubt. If the judge concludes that they haven't proved it, then the judge would have to acquit you. **And on February 6, if this case is set in, it will be before a judge. Do you understand that?**
>
> [APPELLANT]: **Yes, sir.**

(emphasis added). The court did not ask appellant any additional questions about the waiver of his jury trial right.

In assessing the constitutional validity of appellant's waiver, we look *first* to whether there was an affirmative waiver by appellant of his right to a trial by jury on the record. *See McElroy*, 329 Md. at 140. Quite simply, nowhere does the record reflect that *appellant* decided to waive his right to a trial by jury. In the first portion of the colloquy, the court did not communicate with appellant at all. Instead, the court asked defense counsel: "Do you want a jury[]?" Once the court learned from counsel that appellant wanted a bench trial, the court needed to solicit an affirmative waiver from appellant himself of his fundamental right to a jury trial. *See Abeokuto,* 391 Md. at 318. In the first

portion of the colloquy, the court did no such thing.

Moreover, even when the trial court later communicated with appellant directly, it failed to ask him whether he wanted to waive his jury trial right. The court asked appellant if he "kn[e]w what a jury trial [was]," and then advised appellant of the burden of proof to convict on each charge, the requirement of a unanimous decision by all twelve jurors, and the same burden of proof required in a bench trial. But the court failed to ask appellant what might have been the most straightforward question: "Do you wish to waive your right to a trial by jury?" In the absence of any inquiry of appellant about his desire to waive a jury trial or any expression of such desire by appellant on the record, we cannot conclude that appellant waived his right to a trial by jury.[3] Further, absent an actual waiver by appellant himself, we need not analyze whether the waiver was knowing and voluntary, as the predicate requirement that there be a personal waiver by appellant has not been met. Accordingly, we must reverse appellant's convictions and remand for a new trial. *See Smith*, 375 Md. at 381.

B. Waiver of Appellant's Jury Trial Right Under Rule 4-246

We note briefly that appellant argues that the circuit court also violated Rule 4-246

[3] In contrast, in *Kang v. State*, the Court of Appeals held that the defendant's waiver of his right to a jury trial was constitutional. 393 Md. 97, 109 (2006). There, defense counsel started the discussion with the court by stating, "I just wanted to put on the record that Mr. Kang had agreed with the waiver of the jury trial." *Id.* However, the court still engaged in a colloquy with defendant himself, eventually asking, "And is it your decision to waive the jury trial to have a trial before me today in this court?" to which defendant responded, "Yes." *Id.* at 110. Here, the trial court never asked appellant, in any terms, whether he wished to waive his right to a jury trial.

for the same reasons set forth above. Rule 4-246 sets forth the procedure regarding the waiver of a defendant's constitutional right to a jury:

> (a) Generally. In the circuit court, a defendant having a right to trial by jury shall be tried by a jury unless the right is waived pursuant to section (b) of this Rule. The State does not have the right to elect a trial by jury.
>
> (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.

Although we hold that appellant's constitutional right to a jury trial was not waived, appellant did not preserve his procedural Rule 4-246 argument for review by this Court. In *Nalls v. State*, the Court of Appeals held that "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." 437 Md. at 693; *see* Rule 8-131(a) ("Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]"). Defense counsel did not object to the trial court's failure to comply with Rule 4-246(b) at any time during the proceedings below.

C. Merger of Sentences for Robbery and Second Degree Assault

Appellant argues that his sentences for second degree assault and robbery should have been merged by the sentencing court under the required evidence test. The State responds by conceding that the sentences should have been merged. Considering our

reversal of appellant's convictions, none of appellant's sentences survive this appeal. We note, however, that if we had not reversed appellant's convictions on constitutional grounds, we would agree with the parties that the sentences should have merged under the required evidence test. In *Clark v. State*, we stated that, "'if each offense contains an element which the other does not, the offenses are not the same for double jeopardy purposes . . . . But, where only one offense requires proof of an additional fact, so that all elements of one offense are present in the other, the offenses are deemed to be the same for double jeopardy purposes.'" 246 Md. App. 123, 132 (2020) (quoting *Thomas v. State*, 277 Md. 257, 267 (1976)). It is well established that second degree assault is a lesser included offense of robbery. *Middleton v. State*, 238 Md. App. 295, 310 n.15 (2018) ("It is true [that] assault in the second degree is a lesser-included offense of robbery . . . .") (emphasis omitted); *Wallace v. State*, 219 Md. App. 234, 252 n.15 (2014) ("Simple assault is a lesser included offense of both robbery and armed robbery."); *see* Md. Code, § 3-402 of the Criminal Law Article ("CR") (robbery); CR 3-203 (second degree assault).

JUDGMENTS OF THE CIRCUIT COURT FOR SAINT MARY'S COUNTY REVERSED. CASE REMANDED FOR A NEW TRIAL. COSTS TO BE PAID BY SAINT MARY'S COUNTY.