

UNREPORTED  
IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND

No. 1370

September Term, 2015

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TERRY LYNN BOHENICK

v.

STATE OF MARYLAND

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Krauser, C.J.,  
Nazarian,  
Moylan, Charles E., Jr.  
(Retired, Specially Assigned),

JJ.

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Opinion by Krauser, C.J.

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Filed: July 8, 2016

\*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Following a bench trial, in the Circuit Court for Cecil County, Terry Lynn Bohenic, appellant, was convicted of theft under \$1,000. She then received a suspended sentence of 90 days' imprisonment and was placed on supervised probation for one year. Bohenic appeals, contending that her conviction should be reversed because the record does not support the trial court's determination that she knowingly and voluntarily waived her right to a jury trial. The State agrees.

For the reasons to be discussed, we hold that, because Bohenic did not object at trial, the issue is not preserved for appellate review. Nonetheless, we shall exercise our discretion and address the issue under the plain error doctrine and vacate the judgment and remand for a new trial.

### **BACKGROUND**

On December 26, 2014, Bohenic was charged in the District of Maryland for Cecil County with theft of property (an iPhone 6) having a value less than \$1,000. Bohenic prayed a jury trial and the matter was transferred to the Circuit Court for Cecil County. On July 23, 2015, Bohenic, represented by counsel, appeared in court for trial. The record reflects the following then occurred:

DEFENSE COUNSEL: Thomas Klenk, Your Honor, on behalf of Mrs. Bohenic who is approaching the table. Your Honor, this appears like, it appears it is going to be a trial. **I've talked to Ms. Bohenic about her right to a jury trial and her right to a court trial. My understanding is that she would be willing to waive her right to a jury trial and proceed today by way of a court trial.** Inasmuch as the hour is 12 o'clock and we've got two more pleas to do, I was assuming the court would want to start that trial after lunch.

THE COURT: Okay.

DEFENSE COUNSEL: **I'd be willing to qualify her and waive her right to a jury trial now so that we can come back after lunch and have a court trial right away.** Are you alright with that Ms. Bohenick?

BOHENICK: Yes.

DEFENSE COUNSEL: Alright. If that's okay with the court?

THE COURT: Alright. **The court does find that Ms. Bohenick is knowingly and voluntarily waiving her right to a jury trial.** And the court will have you come back at 1:30 and we'll start up with the court trial at that time.

BOHENICK: 1:30?

THE COURT: 1:30.

DEFENSE COUNSEL: Thank you, Your Honor. <sup>[1]</sup>

(Emphasis added.)

When the case was later called for trial, there was no further on-the-record discussion of Bohenick's waiver of her right to a jury trial. After the case was tried, the court found Bohenick guilty of the theft charge.

### DISCUSSION

“A criminal defendant's right to a jury trial is a fundamental right under both the United States and Maryland Constitutions.” *Valonis & Tyler v. State*, 431 Md. 551, 560

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<sup>1</sup> The parties stipulate that the above exchange “completely and accurately reflects” the only part of the court's “morning proceedings” pertaining to Bohenick's decision to be tried by the court instead of a jury.

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(2013) (citations omitted). “In Maryland, a defendant’s right to waive a trial by jury may be exercised only by the defendant.” *Id.* (citing *Smith v. State*, 375 Md. 365, 379 (2003)). The waiver of a jury trial “is valid and effective,” the *Valonis* Court said, “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.’” *Id.* (quoting Md. Rule 4-246(b); other citations omitted).

“Rule 4-246 sets the procedural standard for the waiver of a jury trial in a criminal case.” *Id.* at 561 (citing *Boulden v. State*, 414 Md. 284, 294 (2010)). The Rule, in pertinent part, provides:

(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.**

(Emphasis added.)

The Court of Appeals has aptly summarized the purpose of this Rule as follows:

The Rule is designed to ensure that a criminal defendant who “expresses a desire to be tried by the court be afforded an opportunity to waive his right to a jury trial. That opportunity is afforded when the nature of a jury trial is explained to him [or her] along with some explanation of the nature of a court

trial and/or the distinction between the two modes of trial.” *Thomas v. State*, 89 Md. App. 439, 446 (1991).

*Valonis, supra*, 431 Md. at 561.

The Court further noted that, “‘for a waiver to be valid, the court must be satisfied that the defendant’s election was made knowledgeably and voluntarily.’” *Id.* at 562 (quoting *Martinez v. State*, 309 Md. 124 (1987)). “In other words, the waiver must have been ‘an intentional relinquishment or abandonment of a known right or privilege.’” *Id.* (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). Moreover, the trial court must also “‘satisfy itself that the waiver is not the product of duress or coercion and that the defendant has some knowledge of the jury trial right before being allowed to waive it.’” *Id.* (quoting *State v. Hall*, 321 Md. 178, 182-83 (1990)).

The State points out that Bohenic did not object to the “failure to place the waiver colloquy on the record” and, therefore, asserts that she waived “her right to complain that the lack of an on-the-record waiver colloquy violated Rule 4-246.” Nonetheless, the State agrees that, because of the lack of an on-the-record examination of Bohenic, “the trial court could not have reasonably concluded that Bohenic’s waiver was knowing and voluntary.” As such, the State acknowledges that the court did not “satisfy constitutional due process standards” because it could not have determined that Bohenic’s jury trial waiver was “‘an intentional relinquishment of a known right or privilege.’” The State notes that, “[a]ll the record reveals is that defense counsel ‘talked to’ Bohenic about ‘her right to a jury trial and

her right to court trial,”” but it does not “demonstrate that Bohenic understood what a jury trial was.” Accordingly, the State agrees with Bohenic that the record does not support the trial court’s conclusion that she freely and voluntarily agreed to forgo her right to a jury trial and, for that reason, the State submits that Bohenic’s “conviction should be overturned and the case remanded for a new trial.”

We are less sure than the State that the issue has not been waived for appellate review. In *Nalls & Melvin v. State*, 437 Md. 674 (2014), and again in *Szwed v. State*, 438 Md. 1 (2014), and *Spence v. State*, 444 Md. 1 (2015), the Court of Appeals made clear that, in order to challenge the validity of a jury trial waiver, there must have been a contemporaneous objection in the trial court. Absent an objection the issue will not be addressed on appeal, unless the reviewing Court exercises its discretion to do so under Rule 8-131. Although *Nalls & Melvin*, *Szwed*, and *Spence* all concerned the trial court’s announcement of its determination that the defendant’s jury trial waiver was knowing and voluntary – whereas here the issue is the complete lack of an on-the-record examination of Bohenic from which the determination could have been made – the Court of Appeals did not appear to limit the need for a contemporaneous objection to a technical violation of Rule 4-246. Accordingly, because Bohenic failed to object at trial, we hold that the issue is not preserved for appeal.

Nonetheless, given the importance of the constitutional right to a jury trial – and the complete lack of any on-the-record examination of Bohenic – we shall exercise our discretion and review the issue as plain error.

The error in this case was not a mere technical violation of Rule 4-246. Bohenic was not examined in open court about her right to a jury trial, and, therefore, there is nothing to support the trial court’s conclusion that she knowingly and voluntarily waived this right. Defense counsel merely informed the court that he had “talked to Ms. Bohenic about her right to a jury trial and her right to a court trial.” There is no indication that she understood those rights or that her decision to be tried without a jury was voluntary. Thus, it cannot be said that Bohenic’s decision was “an intentional relinquishment or abandonment of a known right or privilege.” Accordingly, we agree that the conviction must be reversed and the case remanded for a new trial. *Smith v. State*, 375 Md. 365, 381 (2003) (“If the record in a given case does not disclose a knowledgeable and voluntary waiver of a jury trial, a new trial is required.”) (citations omitted)).

**JUDGMENT OF THE CIRCUIT  
COURT FOR CECIL COUNTY  
VACATED. CASE REMANDED FOR  
A NEW TRIAL. COSTS TO BE PAID  
BY CECIL COUNTY.**