UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 401

September Term, 2016

EDWARD LEO ZEPP, JR.

v.

STATE OF MARYLAND

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

JJ.

PER CURIAM

Filed: April 5, 2017

*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.

Convicted of second degree assault, following a bench trial, in the Circuit Court for Anne Arundel County, Edward Leo Zepp, Jr, appellant, contends that he did not knowingly and voluntarily waive his right to a jury trial and that the evidence was insufficient to sustain his conviction. For the reasons that follow, we affirm.

I.

Zepp contends that the colloquy preceding his jury trial waiver was not knowing and voluntary because (1) he was "not given any information regarding the presumption of innocence"; (2) "he was not told that the trier of fact must be persuaded beyond a reasonable doubt of his guilt"; and (3) he was not informed that "he could only change his election for good cause." This issue was not preserved for our review.

To preserve, for appellate review, the issue of whether a trial judge has complied with the procedure for accepting a jury trial waiver under Md. Rule 4-246(b), a contemporaneous objection must be made. *Nalls & Melvin v. State*, 437 Md. 674, 693 (2014). Consequently, when a defendant does not object to the waiver procedure, its content, or the trial court's announcement that the jury trial waiver was made knowingly and voluntarily, the effectiveness of that waiver is not preserved for appellate review. *Meredith v. State*, 217 Md. App. 669, 674-75, *cert. denied*, 440 Md. 226 (2014). Because Zepp did not make an objection, contemporaneous or otherwise, to the court's acceptance of his jury trial waiver, his claim, on appeal, that the waiver was invalid was not preserved for our consideration.

In any event, even if the issue had been preserved, there is no merit in Zepp's claim. "[I]n determining whether the defendant has knowingly and voluntarily waived his right to

a jury trial, the questioner need not recite any fixed incantation[.]" *Boulden v. State*, 414 Md. 284, 323 (2010) (citation omitted). The court must, however, "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." *Nalls*, 437 Md. at 687 (citation omitted). "[W]hether there has been an intelligent waiver of the jury trial right depends on the facts and circumstances of each case." *Walker v. State*, 406 Md. 369, 380 (2008) (citation omitted).

Under the facts and circumstances of the instant case, it is clear that Zepp had "some knowledge" of his right to a jury trial. He was advised that he had the right to choose between a jury trial and a bench trial; that a jury would be comprised of 12 people from a pool of approximately 50 randomly selected residents of Anne Arundel County; that if he elected a jury trial, he and his attorney would be able to participate in the selection of the jurors from that pool; and that the jury would have to find him guilty unanimously or a mistrial would be declared. Moreover, the record reflects that Zepp and his attorney "had the opportunity to talk and . . . strategize" with respect to whether a jury trial or bench trial would "be better for [him,]" before making his election. *See Walker*, 406 Md. at 382-83 (fact that defendant is represented by counsel is a factor supporting a determination that they had "some knowledge" of their jury trial rights).

Furthermore, in making a determination that a defendant has made a knowing waiver of their right to a jury trial, the "ultimate inquiry" is "whether there has been an intentional *relinquishment or abandonment* of a known right or privilege." *Winters v. State*, 434 Md. 527, 537 (2013) (citing *Boulden*, 414 Md. at 295) (emphasis added). In electing

a bench trial, Zepp did not waive the requirement that the State establish his guilt beyond a reasonable doubt or that he be presumed innocent, nor did he waive his right to change his election for good cause. These legal precepts applied to Zepp's case regardless of whether he was tried by a jury or by a judge. *See Commonwealth of Pennsylvania v. Quarles*, 456 A.2d 188, 191 (Pa. 1983) ("By definition, a waiver is a relinquishment of a right or remedy. . . . The [defendant] never relinquished his right to have a factfinder determine his guilt beyond a reasonable doubt . . . [but] merely relinquished his right to have a jury as a factfinder as opposed to a judge.").

II.

Zepp next contends that the evidence was insufficient to support his conviction for second degree assault. Specifically, Zepp claims that the evidence supported the defense theory that he and the victim, Damian Johnson, were engaged in a "mutual affray," and that the State failed to prove that Johnson did not consent to the assault. We conclude that the evidence was legally sufficient.

"The test of appellate review of evidentiary sufficiency is whether, 'after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Donati v. State*, 215 Md. App. 686, 718, *cert. denied*, 438 Md. 143 (2014) (citation omitted). "The test is 'not whether the evidence *should have or probably would have* persuaded the majority of fact finders but only whether it *possibly could have* persuaded *any* rational fact finder.'" *Anderson v. State*, 227 Md. App. 329, 346 (2016) (citations omitted) (emphasis

in original). Moreover, "[w]e 'must give deference to all reasonable inferences [that] the fact-finder draws, regardless of whether [we] would have chosen a different reasonable inference.'" *Donati*, 215 Md. App. at 718 (citation omitted). We do not consider evidence tending to support the defense theory of the case, as exculpatory inferences are not part of the version of the evidence most favorable to the State. *Cerrato-Molina v. State*, 223 Md. App. 329, 351, *cert. denied*, 445 Md. 5 (2015). "Further, we do not 'distinguish between circumstantial and direct evidence because [a] conviction may be sustained on the basis of a single strand of direct evidence or successive links of circumstantial evidence.'" *Id*. (citation omitted).

At trial, the State introduced evidence that Zepp showed up at Johnson's house "late" at night and "bang[ed]" on the door. Zepp was accompanied by an unidentified male individual who held a shotgun. Johnson was "frightened" of Zepp, and ran out of the house and away from him. Zepp then chased after Johnson, eventually caught up with him, and punched Johnson twice. Johnson stated that he did not hit or strike Zepp, and did not tell Zepp that he could punch him. Johnson's grandmother testified that she did not see Johnson strike or attempt to strike Zepp. This evidence, viewed "in the light most favorable to the prosecution," was sufficient to support a reasonable inference that Johnson did not consent to the assault.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.