UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 421

September Term, 2016

CHRISTOPHER LAMAR RICH

v.

STATE OF MARYLAND

Wright,
Berger,
Thieme, Raymond G., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Thieme, J.

Filed: March 15, 2017

Christopher Lamar Rich, appellant, was convicted, following a bench trial in the Circuit Court for Wicomico County, of rape in the second degree and sexual offense in the second degree, as well as other related offenses, and was sentenced to two concurrent twenty-year terms of imprisonment. Rich thereafter noted this appeal, raising the following two-part question for our review:

> Did the lower court violate Maryland Rule 4-246 and [Rich's] constitutional rights by failing to ensure that he knowingly and voluntarily waived his right to a jury trial?

We hold that any claim of a violation of Maryland Rule 4-246 was waived because neither Rich nor his counsel objected below to the waiver colloquy. We further hold that, although his constitutional claim was not waived, it, nonetheless, fails on its merits. Consequently, we shall affirm the judgments of conviction.

BACKGROUND

This was a case of "acquaintance-rape," committed against a woman, whom Rich had met during their attendance at meetings in a twelve-step recovery program. On July 15, 2015, Rich invited the victim, Heather H., to accompany him to "Rita's Italian Ice," to have a frozen dessert. The victim agreed and met him there at approximately 9:45 p.m., near closing time. After they purchased their desserts, Rich invited the victim to his apartment, and, since she "had been alone with him before," she agreed to do so, driving there in her own car.

Because Rich "had just moved there," he gave her "a tour" of his apartment. They then went to his bedroom and watched television "for like an hour or so." When the victim

got up to leave, Rich "closed the door," "sat [her] back down on the bed," and, "looking really angry," forcibly performed sexual acts on her against her will. After he was finished, the victim, "in shock" and "hysterically crying," drove to her stepmother's home and, subsequently, to her girlfriend's apartment.

Two days later, the victim contacted police and reported the sexual assault against her. Shortly thereafter, she sought and obtained a protective order, mandating that Rich have no contact with her. Nonetheless, on several occasions, according to the victim, he sought her out, at her "home group," that is, at a place and time he knew he would find her.

In September 2015, a nine-count indictment was returned by a grand jury, sitting in the Circuit Court for Wicomico County, charging Rich with: (1) rape in the second degree; (2) sexual offense in the second degree; (3) assault in the second degree; (4) reckless endangerment; (5) sexual offense in the fourth degree; (6) false imprisonment; and (7)-(9) three counts of violating a protective order.

Four months later, when Rich's case was called for trial, his defense counsel informed the court that his client wished to elect a bench trial. The ensuing colloquy is the subject matter of this appeal:

> THE COURT: Just make sure your client understands what it means to waive his right to a jury trial.
>
> [DEFENSE COUNSEL]: Sure, Your Honor, if you would like me to put that on the record.
>
> THE COURT: That one point.
>
> [DEFENSE COUNSEL]: Right.
>
> Chris, first of all what's your name?

THE DEFENDANT: Christopher Rich.

[DEFENSE COUNSEL]: Do you know what you're charged with?

THE DEFENDANT: Yes, sir.

[DEFENSE COUNSEL]: **Did we talk about the difference between a jury trial and a court trial?**

THE DEFENDANT: **Yes.**

[DEFENSE COUNSEL]: Do you understand first of all **a court trial would mean you'd either have a right, for example, to enter a plea in front of a Judge or you could have a trial in front of the Judge which would be the Court?**

THE DEFENDANT: **Yes.**

[DEFENSE COUNSEL]: **He would have the same, or she, but today it's he, would have the same burden of proof that a jury would.** Now a jury is 12 people picked from where?

THE DEFENDANT: Wicomico County.

[DEFENSE COUNSEL]: Voter registration or driving lists, right. **All 12 would have to find you guilty beyond a reasonable doubt. So if any one of them wasn't sure, that could be a hung jury. They would all either have to agree unanimously one way or the other. If it was a hung jury the State could elect, if it's declared a mistrial, to try you again, okay?**

THE DEFENDANT: Uh-huh.

[DEFENSE COUNSEL]: That with the jury you're allowed in the selection to help in the selection from the pool of jurors as I told you to like bring it down to 12. And, of course, the State's also allowed to do that. **We would have in this case ten strikes, they would have five strikes, we talked about that.**

THE DEFENDANT: **Yes.**

[DEFENSE COUNSEL]: **Have you been promised anything to waive your right to a jury?**

THE DEFENDANT: **No.**

[DEFENSE COUNSEL]: **Do you understand what a jury is?**

THE DEFENDANT: **Yes.**

[DEFENSE COUNSEL]: **Are you doing this freely and voluntarily of your own choice?**

THE DEFENDANT: **Yes.**

[DEFENSE COUNSEL]: No one has drugged you, beaten you, promised you anything else?

THE DEFENDANT: No.

[DEFENSE COUNSEL]: And that's how you want to proceed today?

THE DEFENDANT: Yes.

THE COURT: All right, the Defendant knowingly and voluntarily waives his right to a jury trial.

At the bench trial that followed, the victim testified that, after accepting Rich's invitation to visit him at his residence, he had pulled off her yoga pants, performed oral sex on her, and then had vaginal intercourse, all without her consent. She further testified that, on three different occasions, Rich had contacted her, in violation of the protective order, which she had obtained after the sexual assault against her.

Rich testified in his defense, contending that their sexual encounter had been consensual, but the trial court found otherwise, convicting Rich of all charges except

reckless endangerment. The court thereafter sentenced Rich to a term of twenty years' imprisonment for second-degree rape and a concurrent term of twenty years' imprisonment for second-degree sexual offense; the convictions for second-degree assault and fourth-degree sexual offense were merged, and the court did not impose sentence on the convictions for false imprisonment and violations of the protective order.[1] Rich thereafter noted this timely appeal.

DISCUSSION

I.

Before we address the question raised by Rich, in this appeal, we must answer an antecedent question—the State's contention that Rich's failure to object below, at any time, to the waiver colloquy, resulted in a waiver of his claims. As we shall explain, the answer to that antecedent preservation question depends upon the nature of the claim, that is, whether it asserts a rule violation or a violation of a fundamental constitutional right.

To "preserve for appellate review a claim of non-compliance with Maryland Rule 4-246(b), the defense is required to object at the time of the waiver inquiry. *Spence v. State*, 444 Md. 1, 14 (2015) (citing *Nalls v. State*, 437 Md. 674, 693-94 (2014), and *Szwed v. State*, 438 Md. 1, 5 (2014)). But the claimed rule violation, in *Spence*, *Szwed*, and *Nalls*, was a technical violation of the "determine-and-announce" requirement, not an allegation

[1] No term of probation was imposed. As a consequence of the convictions for second-degree rape and second-degree sexual offense, Rich was also ordered to register as a tier-three sex offender.

of a constitutionally deficient waiver colloquy. *See Spence*, 444 Md. at 14-15; *Szwed*, 438 Md. at 5; *Nalls*, 437 Md. at 681-82; *id.* at 83-84.

In contrast, in *Winters v. State*, 434 Md. 537 (2013), the most recent decision of the Court of Appeals to consider the validity of a jury trial waiver, in light of a purportedly deficient colloquy, the Court addressed the merits of the claim, despite there having been no objection below to the plea colloquy, *id.* at 531-33, although we hasten to add that preservation was not at issue. *Id.* at 530, 535-36. We note, however, that, in a long line of cases, the Court of Appeals has addressed similar claims, that a deficient colloquy rendered a defendant's purported waiver of a jury trial invalid, and, in none of those cases, was the issue of preservation raised, despite the absence, in each of those cases, of a contemporaneous objection to the waiver colloquies. *Walker v. State*, 406 Md. 369 (2008), *abrogated on other grounds as stated in Valonis v. State*, 431 Md. 551, 562-64 (2013); *State v. Bell*, 351 Md. 709 (1998); *Tibbs v. State*, 323 Md. 28 (1991); *State v. Hall*, 321 Md. 178 (1990); *Martinez v. State*, 309 Md. 124 (1987); *Countess v. State*, 286 Md. 444 (1979), *abrogated on other grounds as stated in Walker v. State*, 406 Md. 369.

In expressing disagreement with the majority's decision to reach the merits of unpreserved claims of "determine-and-announce" error in *Nalls* and *Szwed*, the three dissenting judges made the following suggestive observation:

> **It bears mention, however, what is not at stake in this appeal**—and in the related appeals in *Nalls*, *Melvin*, and *Morgan*. There is no dispute that each of these defendants desired to have a bench trial rather than a jury trial. There is no dispute that each of these defendants made that decision voluntarily and with knowledge of its consequences. **There is no complaint about the adequacy of the colloquies that the**

various trial judges conducted to confirm each defendant's knowing and voluntary waiver.

Unless we presume that the trial judges were not aware of the requirement that the waiver be knowing and voluntary—*i.e.*, that the judges did not know why they were engaging in the colloquy with the defendants to confirm that fact—it is evident that each of the judges determined that the waivers were knowing and voluntary because, however each articulated that determination, each judge proceeded to conduct a bench trial without a jury. The only issue in these cases concerns the trial judge's verbal documentation of the judge's determination. In this case, the issue is whether the judge's failure to include the word "knowing" in her finding at the end of the colloquy negates her considerable effort, on the record, to ensure that Mr. Szwed knew the consequences of his waiver and his affirmation, on the record, that he did.

In the course of reversing Mr. Szwed's conviction, as well as those of Mr. Nalls and Mr. Melvin, the Court modifies the *Valonis* holding to declare that, henceforth, a defendant must register a contemporaneous objection in the trial court to preserve any complaint concerning the trial court's finding. While I applaud the Court's decision, it does render *Valonis* a brief interlude in which the Court dropped the contemporaneous objection rule and then reinstated it, with the beneficiaries being certain random defendants, some of whom were convicted of very serious offenses, who happened to note an appeal during that period. I agree with Judge Watts, in her concurring and dissenting opinion in the companion cases of *Nalls & Melvin v. State*, that the Court need not reverse those convictions. 437 Md. 674, 89 A.3d 1126 (2014).

Presumably, under this new approach, the proliferation of *Valonis* appeals in this Court and in the Court of Special Appeals will abate. If a defendant must make a contemporaneous objection to an imperfect finding by the trial court to preserve the issue and does so, the trial court will inevitably correct any slip of the tongue and the desire for perfect documentation of the waiver will be satisfied.

> **Of course, even if the judge documents a waiver in whatever language we find acceptable, that is not necessarily the end of the story. For the same reason that a slip of the tongue in documenting a waiver should not result in reversal of a conviction, neither should a perfect rendition of the magic words render the substance of the colloquy immune from challenge.** *See Winters v. State*, 434 Md. 527, 76 A.3d 986 (2013) (even though trial judge found that defendant "knowingly and voluntarily" waived jury trial, erroneous explanation by judge of burden of proof undermined that finding).
>
> Finally, it is worth noting that the colloquy in this case covered the points suggested in the committee note to Rule 4-246, even though they are not required by the rule itself, to ensure that the waiver was Mr. Szwed's own decision and that he was aware of the consequences of his decision. . . . Substitute the word "knowing" for "free" at the end and we would have to score this colloquy a perfect "10." We can only hope to do as well ourselves.

Szwed, 438 Md. at 8-10 (McDonald, J., dissenting) (footnotes omitted) (emphasis added). Thus, even the dissenting judges, who, of course, opposed discretionary review of the unpreserved claims of "determine-and-announce" error in those cases, expressed a willingness to overlook preservation when faced with a claim of an inadequate waiver colloquy. And, moreover, one of the concurring judges, in those same cases, would have held that no objection below is necessary to preserve **any** claimed violation of Rule 4-246(b), whether or not of constitutional dimension. *See Nalls*, 437 Md. at 697-99 (Battaglia, J., concurring in the judgment).

In any event, and most critically, both the Supreme Court and the Court of Appeals have explained that the right to a jury trial is a fundamental constitutional right, subject to the "knowing and voluntary" waiver standard. *Adams v. United States ex rel. McCann*,

317 U.S. 269, 275-77 (1942); *Martinez*, 309 Md. at 133-34 & n.10 (noting the close relationship between the waiver standard set forth in *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), and the standard required under Rule 4-246). Moreover, such a right may not be waived by a mere procedural default. *Curtis v. State*, 284 Md. 132, 143 (1978) (observing that "[t]his high standard [of an intentional relinquishment or abandonment of a known right or privilege] has been applied regarding the waiver of the right to trial by jury") (citing *McCann*, 317 U.S. at 275). [2]

We conclude that, in the absence of a contemporaneous objection, a claim based upon a mere violation of a prophylactic rule, such as Rule 4-246(b), may not be raised, as of right, on appeal, but that a claim, based upon a constitutionally inadequate waiver colloquy, may. Because no objection was lodged below, the only claim that is properly before us is whether the waiver colloquy, in this case, was so deficient as to render Rich's waiver of jury trial not knowing and voluntary.

II.

According to Rich, the waiver colloquy in the instant case was "woefully deficient" and cannot support the trial court's finding that his waiver of jury trial was knowing and voluntary. Specifically, he asserts that he was never advised that he had a right to a jury

[2] We acknowledge that, in *Ray v. State*, 206 Md. App. 309, 350 (2012), *aff'd on other grounds*, 435 Md. 1 (2013), we said that a "defendant forfeits the right to appellate review of **any** issue as to the waiver of the right to a jury trial where the first complaint arises on appeal." (Emphasis added.) In light of *McCann* and *Curtis*, we believe that this statement is overbroad and cannot apply to constitutional violations of that right, and we therefore decline to follow it.

trial or that he would be presumed innocent; and, furthermore, Rich contends, "the advice concerning burden of proof, unanimity, a hung jury, and any retrial was confusing and misleading, if not incorrect."

The State counters that the record indicates that Rich was imparted with "some knowledge" of the right he was waiving and that, therefore, his waiver was constitutionally adequate. As for voluntariness, the State contends that, as there was no trigger to alert the court that the voluntariness of Rich's waiver could be at issue, no "specific questions about voluntariness" were required. *Aguilera v. State*, 193 Md. App. 426, 442 (2010).

A. Knowledge

We acknowledge that defense counsel's advisements regarding the nature of the rights that Rich was waiving were inartful. That does not mean, however, that Rich's constitutional rights were violated.

Whoever conducts the waiver colloquy, whether "the court, the State's Attorney," or "the attorney for the defendant," Rule 4-246(b), "need not recite any fixed incantation." *Winters*, *supra*, 434 Md. at 537 (quoting *Walker*, *supra*, 406 Md. at 378). To satisfy the rule (and therefore, the constitutional minimum required), it is sufficient if the record shows that "the defendant had 'some knowledge of the jury trial right before being allowed to waive it.'" *Walker*, 406 Md. at 378 (quoting *Abeokuto v. State*, 391 Md. 289, 317-18 (2006)). The "some knowledge" requirement includes

> an on-the-record showing that the defendant knows that (1) a criminal defendant is presumed to be innocent and cannot be convicted unless the trier of fact is persuaded beyond a reasonable doubt of the defendant's guilt, and (2) if the

> defendant did not waive a jury trial, his or her case would be tried by a jury of twelve persons[.]

Id. at 385.

During Rich's waiver colloquy, he was asked, among other things, whether he understood that "a court trial would mean" that he would "either have a right, for example, to enter a plea in front of a Judge or . . . have a trial in front of the Judge which would be the Court" and that, if he were to elect a "court trial," the judge "would have the same burden of proof that a jury would."[3] He replied that he understood. Rich was further informed that, if he were to elect a jury trial, "[a]ll 12 would have to find [him] guilty beyond a reasonable doubt" and that "if any one of them wasn't sure, that could be a hung jury." Moreover, he was told that a jury would be a group of twelve people "picked from" Wicomico County voter registration and motor vehicle registration records and that he, with the advice of counsel, would have the right to participate in the selection of those jurors, as would the State. We hold that these advisements were sufficient to satisfy the "some knowledge" requirement.

Furthermore, given that the only claim in this appeal that is properly before us is the claim of a constitutional, not merely a rule, violation, we think it significant that, more than once, defense counsel made specific reference to off-the-record conversations he had had with Rich, in which his decision whether or not to waive a jury trial clearly was discussed.

[3] Rich points out that the State, not the fact finder, has the burden of proof. We regard this, however, as merely a slip of the tongue. It is clear, from the context, that defense counsel was simply advising Rich that, regardless of whether he opted for a bench trial or a jury trial, the fact finder would be required to apply the same burden of proof.

For example, at the beginning of the waiver colloquy, Rich's counsel asked him, "Did we talk about the difference between a jury trial and a court trial?", and Rich replied that they had. Shortly thereafter, in response to defense counsel's query, "Now a jury is 12 people picked from where?", Rich correctly answered, "Wicomico County," an answer that strongly suggests that Rich had been advised by counsel off-the-record, especially given his limited education.[4] And finally, defense counsel advised Rich: "That with the jury you're allowed in the selection to help in the selection from the pool of jurors **as I told you** to like bring it down to 12. And, of course, the State's also allowed to do that. We would have in this case ten strikes, they would have five strikes, **we talked about that.**" (Emphasis added.) Although such off-the-record advisements are irrelevant in determining compliance with Rule 4-246(b), they are relevant in determining whether Rich's waiver satisfied the minimum constitutional standard, and they, in fact, bolster our conclusion that that standard was satisfied.

B. Voluntariness

The State asserts, in its brief, that, as there was no voluntariness trigger, there was no requirement that the circuit court inquire as to whether Rich was voluntarily waiving his right to a jury trial. Although that may be correct as far as it goes, *see Aguilera*, 193 Md. App. at 442, we need not rely upon that fallback position in upholding the voluntariness of Rich's waiver, as there is ample evidence to conclude that, from defense

[4] At sentencing, defense counsel informed the court that Rich "dropped out of ninth grade so his reading and writing is not great."

counsel's questioning as well as Rich's responses to those questions, Rich was, indeed, acting voluntarily in waiving his right.

Thus, when defense counsel asked Rich, "Have you been promised anything to waive your right to a jury?", he replied, "No." Then, when defense counsel followed that up with the query, "Are you doing this freely and voluntarily of your own choice?", Rich responded "Yes." In response to the question, "No one has drugged you, beaten you, promised you anything else?", Rich answered, "No." And, finally, when defense counsel asked Rich, "And that's how you want to proceed today?", Rich replied, "Yes." We take Rich at his word and conclude that he voluntarily waived his right to a jury trial and elected to be tried by the court.

JUDGMENTS OF THE CIRCUIT COURT FOR WICOMICO COUNTY AFFIRMED. COSTS ASSESSED TO APPELLANT.