UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 447

September Term, 2016

TYLER EVAN BREEN

v.

STATE OF MARYLAND

Meredith,
Beachley,
Eyler, James R.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Beachley, J.

Filed: May 5, 2017

Following a bench trial, the Circuit Court for Carroll County convicted Tyler Evan Breen, appellant, of first-degree assault, second-degree assault, and reckless endangerment. Appellant raises three questions on appeal, which we have rephrased and consolidated as follows:[1]

1. Did the trial court err in accepting appellant's waiver of trial by jury?
2. Was the evidence sufficient to sustain appellant's convictions for first-degree assault and reckless endangerment?

For the reasons stated below, we affirm the judgments of the circuit court.

BACKGROUND

In March 2015, appellant moved in with his girlfriend, Jacquelyn Loys, who was living in Westminster, Maryland with the couple's two children. The couple had dated "off and on" for approximately six years.

On November 13, 2015, around 4:00 P.M., Loys asked appellant if he would rather cook dinner or look after the children in the family room. Appellant chose to cook, and Loys remained in the family room to watch television with the children. In the family room was "an old wood burning stove" with a loud fan. With the stove and the fan on, Loys

[1] Appellant presented the following issues in his brief:

> 1. In light of the inaccurate and misleading advice that he received, was Mr. Breen's waiver of his right to a jury trial neither knowing nor voluntary?
>
> 2. Was the evidence insufficient to support Mr. Breen's conviction for first-degree assault?
>
> 3. Was the evidence insufficient to support Mr. Breen's conviction for reckless endangerment?

could not "really hear too much what was going on in the kitchen[.]" At some point Loys heard the front door open, and assumed that appellant had stepped outside to smoke a cigarette.

When appellant re-entered the home, he appeared upset and yelled, "You didn't hear that?" Loys stated that she did not hear anything, and went to the kitchen to see what appellant had been referring to. There, she discovered that a pot of tomato soup on the stove had "popped and there was tomato soup everywhere." Too frustrated with the situation, appellant refused to clean up the tomato soup by himself. Loys told appellant to watch the children while she cleaned.

While cleaning up the soup, Loys became frustrated and asked appellant why he went outside to smoke. Appellant responded by "barging" into the kitchen and stood in front of the kitchen stove in "almost like a football player's defensive stance." Appellant then shoved Loys toward the sink and threw the sponge that Loys had been using at her head. Loys asked appellant to calm down and to "please leave." Appellant began "angrily" cleaning up and Loys, in a louder voice, again asked him to leave the house.

Appellant then "got in" Loys's face, and the couple argued. Appellant yelled that he would not leave, while Loys continued to urge him to leave the house. The argument did not last very long, and Loys went to check on her children in the family room. Appellant remained in the kitchen, and the couple continued to yell at each other between rooms.

As the argument continued, appellant came into the family room and, with one hand, grabbed Loys by the throat and lifted her off the ground. Appellant eventually placed Loys

down on the floor, but kept his hand around her throat and pinned her against the wall. Appellant let go after approximately fifteen seconds, but continued to yell at Loys. She fell to the floor crying. Appellant then dragged Loys into the kitchen. With Loys lying on the floor, appellant pressed his foot down on her face, causing her jaw to hurt "really bad." The couple's daughter followed appellant into the kitchen and screamed at appellant to "get off my mommy." After what "felt like a lifetime" to Loys, Loys started swinging wildly in an effort to force appellant off of her. When appellant released her, Loys rushed to her daughter and took her back to the family room where her son remained.

Appellant followed Loys, screaming at everyone to "shut up." Loys and appellant again stood face-to-face, yelling and screaming at one another, with Loys begging appellant to leave. Appellant picked up their daughter in a "threatening" manner. The daughter screamed at appellant to put her down and asked Loys for help. Loys responded by picking up the couple's infant son. Appellant asked: "What, are you going to hurt my son?" In response, Loys went into the front yard and screamed for help.[2]

Appellant followed Loys and picked her up from behind in a "bear hug" before carrying her back into the kitchen. Still holding their son, Loys began to turn around to face appellant when she noticed something coming toward her. Loys received a blow to her left temple, and she immediately fell to the ground, unconscious.

[2] According to Loys, during the altercation, appellant took her cell phone and the house phone and put them in his pockets.

Loys awoke sometime later feeling disoriented and "seeing triple." Her son was crying underneath her, and her daughter was sitting beside her, crying. Loys crawled to a cell phone she had managed to take from appellant during the struggle and called 911.[3] At the time, Loys was "in a lot of pain," and her head, jaw, hip, and shoulder hurt.

In response to the 911 calls, Sergeant Richard Lambert and Lieutenant Douglas Johnston arrived approximately 6:20 P.M. and found Loys lying on her back, unconscious.[4] Sergeant Lambert observed the couple's daughter sitting next to Loys. She asked him to "help my mom, I think she's dead." Lieutenant Johnston observed Loys drift in and out of consciousness. When conscious, Loys appeared groggy and slurred her speech.

Westminster Fire Department EMT Guy Garheart III treated Loys at her home. He observed and tested Loys to determine whether she was suffering from a "decreased mental status." He assessed Loys as scoring a 12 on the Glasgow coma score, indicating "that she ha[d] some form of decreased mental status[.]"[5] Following protocol, Garheart summoned a helicopter to transfer Loys to the shock trauma center at the University of Maryland. By the time the helicopter arrived, Loys had improved to a 14 on the Glasgow coma assessment.

[3] The couple's daughter had also called 911. The 911 calls were played at trial.

[4] All law enforcement personnel in this case are members of the Westminster Police Department, unless otherwise noted.

[5] Garheart testified at appellant's trial that the Glasgow coma score is used to assess a patient's mental status. The test is a composite of three assessments of a patient's eye movement, verbal ability, and motor movements. Garheart stated that a 15 is a "normal" score. We also note that Glasgow is spelled "Glascow" in the record.

Sometime after the attack, appellant called Frank Loys ("Frank"), Loys's father. Appellant asked Frank to check on Loys because appellant believed he had hurt her. Appellant never told Frank what had happened, but did state that "he thought he hurt her real bad[.]" Frank called Loys's house, but no one answered. By the time Frank arrived at Loys's house, paramedics were treating her, and a neighbor was looking after her children. Appellant called Frank again to ask about Loys's condition. When Frank said she was "not well," appellant responded, "I guess I'm going back to jail." Police later found appellant lying on the ground next to his car. Appellant told police that he had gotten into a fight at a bar and needed medical help.

Doctors diagnosed Loys with a concussion and released her from the hospital. Loys remained in "a lot of pain." Frank stayed with his daughter to help care for her and her children for a couple of days because she appeared "[g]roggy, tired, kind of spacey." At one point, Loys suffered from double vision and went to an emergency clinic. The medical staff advised her she was experiencing "normal" symptoms following a concussion.

The State charged appellant with first-degree assault, second-degree assault, and reckless endangerment. Appellant waived his right to a jury trial, and the circuit court convicted appellant of all charges. For the first-degree assault, the court imposed a prison sentence of twenty-five years, with five years suspended; the conviction for second-degree assault was merged for sentencing. The court imposed a consecutive suspended sentence of five years for reckless endangerment, to be followed by a five-year period of probation. We will provide additional facts as necessary.

DISCUSSION

I. Jury Trial Waiver

Appellant first contends that the trial court erred by accepting his jury trial waiver. We disagree.

At the outset of trial, defense counsel stated that appellant wished to waive his right to a jury trial. The following colloquy ensued:

> [APPELLANT'S COUNSEL]: Mr. Breen, you have the right to be tried by a jury. A jury consists of 12 people selected from a list which are [sic] compiled at random from the voter rolls and driver registry of Carroll County. In order to be convicted, all 12 must unanimously agree that you are guilty beyond a reasonable doubt if after a certain amount of time -- let me also back up a little bit.
>
> **In order to be acquitted all 12 would have to agree that you are not guilty beyond a reasonable doubt.** If after a certain amount of time the jury cannot come to a conclusion as to guilt [sic] or not guilty, a mistrial could be declared and then the State would have to decide where to go from there, how to continue with the charges from there.
>
> You also have the right to be tried by the Court. The Court would consist of one judge, Judge Hughes. Judge Hughes is the only person that would make that decision as to whether or not you are guilty. **It is the same burden whether it is a jury trial or a court trial, it is the same burden, that is the State still must prove each and every element of the crimes charged beyond a reasonable doubt.**
>
> **So in order to convict you, the Judge has to be convinced beyond a reasonable doubt. In order to acquit you he has to [sic] convinced that the State has not met their burden beyond a reasonable doubt.**
>
> The Judge will not discuss with anyone else -- in other words, the jury discusses the evidence in the case among themselves. The Judge makes -- and the Judge alone -- the Judge and Judge alone

makes the decision as to whether or not you are guilty. So do you understand that?

[APPELLANT]: Yes.

[APPELLANT'S COUNSEL]: Knowing -- do you understand what a jury trial is?

[APPELLANT]: Yes.

[APPELLANT'S COUNSEL]: You understand what a court trial is?

[APPELLANT]: Yes.

(Emphasis added).

Appellant's counsel then confirmed that appellant was thirty years old, had graduated high school with a GED, and was not currently taking any medications. The colloquy continued:

[APPELLANT'S COUNSEL]: And you and I have had ample time to discuss[] your options here, is that correct?

[APPELLANT]: Absolutely.

[APPELLANT'S COUNSEL]: **And do you wish to be tried by the jury or by the Court?**

[APPELLANT]: **By the Court.**

THE COURT: All right. [Appellant's counsel], perhaps it is just my early morning mindset **but let me reiterate to Mr. Breen what the State's burden in this case.**

Sir, in order to be convicted of any charge in this case the State must be able to prove beyond a reasonable doubt and to a moral certainty that you committed the acts here. **To be acquitted you do not have to prove anything. Okay? If there is a reasonable doubt after the Court considers all the evidence in the case, then you are entitled -- in fact I am required to acquit you. But you bear no burden in this case of any type.** Do you understand that?

> [APPELLANT]: Yes, Your Honor.
>
> THE COURT: Okay. All right. I am satisfied that Mr. Breen has made a knowing, voluntary and intelligent waiver of his rights to trial by jury. Is there anything preliminary?

(Emphasis added).

Appellant contends that the court erred in accepting his jury trial waiver because his counsel provided erroneous legal advice concerning his burden of proof for an acquittal. Specifically, trial counsel stated that in order to be acquitted, either the jury or the judge would have to be convinced beyond a reasonable doubt that he was not guilty. Appellant concedes that the court attempted to clarify the burden of proof after his counsel spoke, but argues that the court complicated the error by correctly explaining the burden in a court trial, not a jury trial. As such, appellant maintains that "[t]he erroneous advice . . . made a jury trial seem less attractive than a bench trial." Appellant therefore contends that his convictions must be vacated.

In response, the State concedes that appellant's counsel provided erroneous advice, but contends that a review of the entirety of the colloquy demonstrates that the court properly explained the burdens of proof and rectified trial counsel's error.

Maryland Rule 4-246 permits a defendant to waive a trial by jury. Subsection (b) of the Rule provides, in part:

> 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.

The Court of Appeals has noted that Rule 4-246 provides the procedures for a waiver of a jury trial, but "the ultimate inquiry regarding the validity of a waiver is whether there has been an intentional relinquishment or abandonment of a known right or privilege." *Winters v. State*, 434 Md. 527, 537 (2013) (quoting *Boulden v. State*, 414 Md. 284, 295 (2010)) (internal quotation marks omitted).

The committee note to Rule 4-246(b) suggests that in the examination of the defendant, "the court should seek to ensure that the defendant understands" various aspects of a jury trial, including: 1) the right to a trial by jury; 2) that the case will be tried by a jury unless the defendant waives the right; 3) the composition of a jury; 4) the burdens of proof; 5) the possibility of a mistrial; and 6) if the defendant waives a jury trial, the court may not permit the defendant to change his or her mind. Committee Note to Md. Rule 4-246(b). "While courts need not engage in a 'fixed litany,' the record must show that the defendant has some information regarding the nature of a jury trial." *Valonis & Tyler v. State*, 431 Md. 551, 567 (2013) (internal citations omitted).

In his brief, appellant primarily relies on *Winters* to support the proposition that his waiver colloquy was defective. In *Winters*, the defendant entered pleas of not guilty and not criminally responsible for the murder of his father and requested a bench trial. 434 Md. at 530-31. During the jury trial waiver colloquy, the trial court incorrectly informed Winters that "when proving that he was not criminally responsible, he would have to do so beyond a reasonable doubt[,]" instead of the correct burden of proof – a preponderance of evidence. *Id.* at 538. The Court of Appeals held that "[b]y giving Winters erroneous information that made exercising Winters's constitutional right to a jury trial less attractive,

the trial judge may have misled Petitioner and, thereby, influenced his decision to waive his right to a jury trial." *Id.* at 539. The Court also noted that "[a]lthough Winters was represented, there is no indication on the record that the trial judge, defense counsel, or anyone else corrected the misleading advice." *Id*. The Court reversed Winters's conviction.

Here, as in *Winters*, appellant's counsel incorrectly stated the burden of proof in a criminal trial. Unlike in *Winters*, however, the trial court rectified this error and provided the correct burden of proof:

> [The Court]: Sir, in order to be convicted of any charge in this case the State must be able to prove beyond a reasonable doubt and to a moral certainty that you committed the acts here. To be acquitted you do not have to prove anything.

Appellant argues that the court's clarification failed to remedy defense counsel's error because the court's language pertained only to a bench trial rather than to both a bench and a jury trial. The court's language, however, does not confine the burden of proof only to bench trials. In short, the trial judge recognized defense counsel's error and intervened to correct it.

We hold that the trial court complied with the requirements for a valid waiver colloquy as articulated in *Morgan v. State*, 438 Md. 11, 21-22 (2014). First, the court examined appellant on the record and ensured that appellant had "some information" regarding the nature of a jury trial. *Id*. at 21 (citation omitted). Second, the court made "a determination after an examination of the defendant, taking into consideration the judge's personal observations of the defendant and the defendant's responses to questions posed."

Id. (citations and quotations omitted). Finally, the court announced that determination on the record. *Id*. at 21-22. In finding that appellant knowingly and voluntarily waived his right to a jury trial, the trial court strictly complied with the requirements of Rule 4-246(b). Accordingly, the trial court properly accepted appellant's jury trial waiver.

II. Sufficiency of the Evidence

Appellant next argues that the evidence presented at trial was insufficient to sustain his convictions for first-degree assault and reckless endangerment. We disagree.

We review this case pursuant to Maryland Rule 8-131(c), which states:

> When an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses.

In reviewing the sufficiency of the evidence, we ask "'whether any rational trier of fact could have found the essential elements of the crimes beyond a reasonable doubt.'" *Spencer v. State*, 450 Md. 530, 549 (2016) (quoting *Harrison v. State*, 382 Md. 477, 487 (2004)). Stated another way, "[i]n considering the legal sufficiency of the evidence following a non-jury trial, the appellate court must determine 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.'" *Stephens v. State*, 198 Md. App. 551, 558 (2011) (quoting *State v. Albrecht*, 336 Md. 475, 479 (1994)).

First-Degree Assault

Appellant contends that the evidence was insufficient to sustain his conviction for first-degree assault. Pursuant to Md. Code (2002, 2012 Repl. Vol.), § 3-202(a)(1) of the

Criminal Law Article ("CL"), "A person may not intentionally cause or attempt to cause serious physical injury to another." Section 3-201(d) defines "serious physical injury" as injury that "(1) creates a substantial risk of death; or (2) causes permanent or protracted serious: (i) disfigurement; (ii) loss of the function of any bodily member or organ; or (iii) impairment of the function of any bodily member or organ." Appellant argues that Loys did not suffer a "serious physical injury" because Loys suffered only minor injuries in comparison to other first-degree assault cases. Specifically, appellant contends that a concussion does not create a substantial risk of death. Furthermore, appellant argues that there was insufficient evidence to demonstrate his intent to cause serious physical injury to Loys because he only punched her once.

The State responds that there was ample evidence from which a factfinder could conclude that appellant caused and/or intended to cause serious physical injury to Loys. Specifically, the State notes that Loys testified that appellant – who was significantly larger than her[6] – picked her up by her throat, stepped on her face, and punched her in the head with sufficient force to knock her unconscious.

Appellant relies primarily upon *Cathcart v. State*, 169 Md. App. 379 (2006), *vacated on other grounds*, 397 Md. 320 (2007), and *Chilcoat v. State*, 155 Md. App. 394 (2004), for the proposition that Loys did not suffer serious physical injury. In *Cathcart*, Cathcart forced the victim to complete various sex acts and choked and knocked her unconscious.

[6] At trial, Loys testified that she is approximately five feet and four inches tall and weighs approximately 115 pounds. She testified that appellant stands approximately six feet and one inch tall, and weighs over 200 pounds.

169 Md. App. at 382-83. The victim suffered various injuries, including two fractures to her jaw, a broken nose, a dislocated chin, multiple hematomas to the face, and a swollen hand. *Id.* at 383. We determined that the evidence was sufficient to sustain Cathcart's conviction for first-degree assault because CL § 3-202(a)(1) prohibits not only causing serious physical injury, but also *attempting* to cause serious physical injury, and "a jury may infer the necessary intent from an individual's conduct and the surrounding circumstances, whether or not the victim suffers such an injury." *Id.* at 393 (internal quotation marks omitted) (quoting *Chilcoat*, 155 Md. App. at 403). In *Cathcart*, the jury heard testimony from witnesses who saw the victim after the beating, one of whom described the victim as looking like "death." *Id.* at 393-94 n.10. We concluded that there was sufficient evidence from which the jury could infer that Cathcart intended to cause serious physical injury; accordingly, the evidence was sufficient to support his conviction for first-degree assault.

In *Chilcoat*, Chilcoat hit a man over the back of the head multiple times with a beer stein. 155 Md. App. at 398. Chilcoat remarked afterward that the victim looked dead. *Id.* The victim lost consciousness and suffered two skull fractures, which necessitated that doctors replace part of his skull with mesh. *Id.* at 400-01. The neurosurgeon who treated the victim testified that although "it would be unusual for someone to die from an injury such as [the victim's]," it was likely that the injury could lead to an abscess which could result in blindness, paralysis, or death. *Id.* at 401. On appeal, we determined that the evidence was sufficient to show that the victim had suffered serious physical injury within the meaning of CL § 3-202. *Id.* at 402-04. We also noted that the jury "may 'infer that one

intends the natural and probable consequences of his act.'" *Id.* at 403 (quoting *Ford v. State*, 330 Md. 682, 704 (1993)). Therefore, we concluded that the jury could have inferred that Chilcoat intended to cause serious physical injury to the victim. *Id.* at 404.

In this case, the prosecution did not produce any testimony that Loys's concussion could have led to death if untreated. Loys did testify, however, that she was in pain for weeks following the attack and that she experienced double vision and other concussion symptoms for a period of time. Her father stayed with her for a couple of days after the attack to take care of her. Taking the evidence in the light most favorable to the State, we are persuaded that a rational fact-finder could have concluded that Loys suffered a serious physical injury because she suffered protracted impairment of the function of her brain and eyesight.

Moreover, CL § 3-202(a)(1) prohibits not only causing serious physical injury, but also attempting to cause serious physical injury. Because a fact-finder "may 'infer that one intends the natural and probable consequences of his act[,]'" *Chilcoat*, 155 Md. App. at 403 (quoting *Ford*, 330 Md. at 704), we are persuaded that there was sufficient evidence from which a rational fact-finder could find that appellant intended to cause Loys serious physical injury. Loys testified that she and appellant engaged in a drawn-out verbal argument, that in the course of that dispute appellant held her off the ground by her throat, dragged her by her hair or arm, pressed his foot to her face, grabbed her in a "bear hug," and punched her in the head when she was not looking. Appellant's conduct caused Loys to be "in and out [of] consciousness" for nearly two hours. Furthermore, Loys testified about the significant size disparity between her and appellant. Finally, in his phone call to

Frank, appellant urged Frank to check on Loys because he believed he had "hurt her real bad[.]" Appellant did more than land "a single punch." Indeed, the trial court found that Loys "suffered a protracted injury," which took several days to fully resolve. While the facts here are not as egregious as those in *Cathcart* and *Chilcoat*, a rational fact-finder could (and did) reasonably conclude that appellant intended to inflict serious physical injury to Loys.

Reckless Endangerment

Finally, appellant maintains that there was insufficient evidence to support his conviction for reckless endangerment. Criminal Law § 3-204(a)(1) provides that a person may not recklessly engage in conduct that creates a substantial risk of death or serious physical injury to another. "'[T]he elements of a *prima facie* case of reckless endangerment are: 1) that the defendant engaged in conduct that created a substantial risk of death or serious physical injury to another; 2) that a reasonable person would not have engaged in that conduct; and 3) that the defendant acted recklessly.'" *Thompson v. State*, 229 Md. App. 385, 414 (2016) (quoting *Holbrook v. State*, 364 Md. 354, 366-67 (2001)). Importantly, "'[g]uilt under the statute does not depend upon whether the accused intended that his reckless conduct create a substantial risk of death or serious injury to another. The test is whether the appellant's misconduct, viewed objectively, was so reckless as to constitute a gross departure from the standard of conduct that a law-abiding person would observe[.]'" *Id.* at 415 (quoting *Holbrook*, 364 Md. at 367).

At trial, the court concluded that the State had proven that appellant committed reckless endangerment because he had both failed to summon help for Loys, and also left

her unconscious and lying on the floor. Appellant acknowledges that a conviction for reckless endangerment may be based on a failure to act, but argues that there was insufficient evidence that he was aware of a substantial risk that Loys had suffered a serious physical injury.

The State responds that appellant was fully aware of the risk of injury to Loys when he left after knocking her unconscious. The State maintains that appellant demonstrated this awareness by calling Loys's father after he left the house, pleading with him to check on Loys because "he thought he hurt her real bad." Moreover, the State argues that appellant had a duty to aid Loys because his conduct put her in a position of peril. The State therefore asserts that there was sufficient evidence to sustain appellant's conviction for reckless endangerment based on his failure to act.

In *State v. Kanavy*, 416 Md. 1, 11 (2010), the Court of Appeals determined that the reckless endangerment statute "includes the wil[l]ful failure to perform a legal duty." To prove reckless endangerment based on a failure to act, the State must establish: 1) that the accused owed the victim a duty to obtain emergency medical aid; 2) the accused was aware of this duty; 3) the accused knew that failure to comply with this duty would "create a substantial risk of death or serious physical injury" to the victim; 4) a reasonable person would not have disregarded the duty to obtain emergency medical aid; and 5) the accused consciously disregarded the duty. *Id.* at 12-13.

We are persuaded that there was sufficient evidence to conclude that appellant owed a duty to Loys because he placed her in peril. *See id.* at 10 (noting that there is a duty owed

"to a person placed in a position of danger by the person creating such danger" (quoting Charles E. Moylan Jr., *Criminal Homicide Law*, § 12.9 at 235 (2002))).

Furthermore, we are convinced that appellant knew of this duty and that failure to summon medical personnel for Loys would result in a "substantial risk of death or serious physical injury" because appellant called Loys's father shortly after the attack. In the call, appellant pleaded with Frank to check on Loys. There was testimony that appellant was insistent and that appellant told Frank that "he thought he hurt her real bad[.]" Moreover, there was evidence that appellant was aware that he abandoned an unconscious woman and two young children without summoning medical assistance to resolve the damage that he, himself, had caused. Accordingly, we conclude that there was sufficient evidence from which a rational factfinder could convict appellant of reckless endangerment based on his failure to obtain medical assistance for Loys.

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