UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1519

September Term, 2015

RICKY EMMANUEL EBERHART-EL

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Nazarian,
Harrell, Glenn T., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed: June 7, 2017

Ricky Eberhart-El appeals his convictions for theft over $1,000 and related offenses. He contends that the Circuit Court for Baltimore County erred in finding that he waived his right to counsel through inaction and validly waived his right to a jury trial. We disagree and affirm.

I. BACKGROUND

The charges underlying this appeal arose from allegations that Mr. Eberhart-El paid counterfeit money for a dirt bike that had been advertised for sale on Craigslist. On March 31, 2015, Mr. Eberhart-El appeared in the District Court of Maryland, sitting in Baltimore County. He was represented by counsel from the Office of the Public Defender, was arraigned, and discharged his Public Defender so that he could seek private counsel. At that appearance, the judge advised Mr. Eberhart-El that he had a right to counsel, that counsel was important, and that making his next appearance without counsel may result in a finding that he had waived his right to counsel. Mr. Eberhart-El also prayed a jury trial, so the case was transferred to circuit court.

On June 10, 2015, Mr. Eberhart-El appeared in the circuit court, without counsel, and requested a postponement in order to obtain counsel. He was sent to the administrative judge, where his request for a postponement was denied and the court found that he had waived his right to counsel through inaction. He then was directed back to the circuit court, where the State presented him with a plea offer. He rejected the plea offer and requested a court trial.

That same afternoon, he appeared again in circuit court. The State informed the court that Mr. Eberhart-El had prayed a jury trial in the district court, that his request for postponement had been denied, and that the administrative judge had found that he had waived his right to counsel through inaction. The court asked Mr. Eberhart-El how he wished to proceed, with a jury trial or a bench trial. After a waiver colloquy, the court found that Mr. Eberhart-El knowingly and voluntarily waived his right to a jury trial. He then had a bench trial, and was convicted of theft over $1,000, and with possession and issuance of counterfeit United States currency with unlawful intent; the court acquitted him of counterfeiting United States currency with intent to defraud and simple counterfeiting. This timely appeal followed.

II. DISCUSSION

Mr. Eberhart-El raises two contentions on appeal.[1] *First*, he contends that because he was unrepresented, confused, pressured, and overwhelmed, the trial court erred in finding that he knowingly and voluntarily waived his right to a jury trial. *Second*, he contends that he was "cut off" when explaining why he appeared without counsel and that the trial court erred in finding that he had waived his right to counsel through inaction.

[1] Mr. Eberhart-El phrased the Questions Presented in his brief as follows:

> 1. Did the trial court err in denying Appellant's motion for postponement to obtain counsel and did the trial court abuse its discretion in finding that Appellant had waived his right to counsel by inaction?
> 2. Did the trial court err in finding that Appellant knowingly and voluntarily waived his right to a jury trial?

A. The Court Did Not Abuse Its Discretion In Finding That Mr. Eberhart-El Waived His Right To Counsel Through Inaction.

Mr. Eberhart-El argues *first* that the trial court abused its discretion in finding that he waived his right to counsel through inaction. We review a trial court's finding of waiver under Rule 4-215(d) for abuse of discretion. *Broadwater v. State*, 401 Md. 175, 203–04 (2007). A trial court abuses its discretion when a discretionary decision "either does not logically follow from the findings upon which it supposedly rests or has no reasonable relationship to its announced objective." *Dehn v. Edgecombe*, 384 Md. 606, 628 (2005) (quoting *North v. North*, 102 Md. App. 1, 14, (1994)).

Md. Rule 4-215 governs the waiver of counsel in the circuit court, and subsection (d) provides that a court may find that a defendant has waived his right to counsel by inaction if he appears for trial without counsel and has no meritorious reason:

> (d) **Waiver by inaction – Circuit court.** If a defendant appears in circuit court without counsel on the date set for hearing or trial, [and] indicates a desire to have counsel, . . . the court shall permit the defendant to explain the appearance without counsel. If the court finds that there is a meritorious reason for the defendant's appearance without counsel, the court shall continue the action to a later time and advise the defendant that if counsel does not enter an appearance by that time, the action will proceed to trial with the defendant unrepresented by counsel. If the court finds that there is no meritorious reason for the defendant's appearance without counsel, the court may determine that the defendant has waived counsel by failing or refusing to obtain counsel and may proceed with the hearing or trial.

This court has explained that "rule 4-215(d) requires the court to first permit a defendant to explain why he or she appeared without counsel and, second, to determine

whether, considering that explanation, the defendant has a meritorious reason for appearing without counsel." *McCracken v. State*, 150 Md. App. 330, 356 (2003) (quoting *Moore v. State*, 331 Md. 179, 185 (1993)). The rule is mandatory, but need not follow a particular script. *Id.*

After discharging the Public Defender's Office in district court, Mr. Eberhart-El appeared over two months later in the circuit court without counsel and requested a postponement. He was sent to the administrative court where the following colloquy occurred:

> THE COURT: You want a postponement of this case?
>
> MR. EBERHART-EL: Yes.
>
> THE COURT: For what reason, sir?
>
> MR. EBERHART-EL: To obtain counsel.
>
> THE COURT: So why haven't you gotten counsel since you've prayed a jury trial in the case?
>
> MR. EBERHART-EL: I still haven't gathered all of the money together.
>
> THE STATE: Your Honor, if I could add something briefly. It's my understanding that Mr. Eberhart-El did have a Public Defender down below, however, he fired them [sic] in the District Court because he wanted to seek private counsel.
>
> THE COURT: Yeah, (the district court judge's) notes are pretty clear on that, along with the fact that the defendant was fully arraigned on March 31st, told of the importance of counsel and his right to counsel. Advised that making his next appearance in the Circuit Court without counsel could be a waiver.
>
> The Court, in the District Court made sure that he was notified of the charges lodged against him, the nature of the charges and

> allowable penalties. [The district court judge] wrote that he – he struck the Public Defender's appearance at the defendant's request at that time.
>
> I am going to deny the request for a postponement and find that the defendant has waived his right [to] counsel by his inaction.

Mr. Eberhart-El doesn't dispute the sequence of events, but points us to *Moore v. State*, in which the Court of Appeals held that a failure of the court to permit a full explanation of the reasons for appearing without counsel deprives the court of the information necessary to properly exercise its discretion. 331 Md. 179, 18–7 (1993). But *Moore* is not altogether helpful to him: as the State points out, the Court noted as well that "[t]he fact that a defendant has not finished paying his or her lawyer, *without more*, may not be a meritorious reason for appearing without counsel." *Id.* at 186 (emphasis added). In contrast to *Moore*, where the defendant offered a change in employment and pay statements to support his reason for appearing without counsel, Mr. Eberhart-El provided no response other than "I still haven't gathered all the money together" when asked why he appeared without counsel.

Mr. Eberhart-El also contends that he was cut off by the State during his exchange with the administrative judge. The transcript doesn't reflect that, however. What it does show is that he offered an explanation to which the State responded, and that the administrative judge exercised his discretion to deny Mr. Eberhart-El's request for a postponement and to find that he had effectively waived his right to counsel through

inaction.[2] The court considered Mr. Eberhart's reason for appearing without counsel, coupled with the notes from the district court and the information provided by the State, in rejecting his request for postponement and finding that he waived counsel through inaction. In light of the information available at the time, the court was well within its discretion to find that Mr. Eberhart-El had waived his right to counsel through inaction.

B. The Court Did Not Err In Finding That Mr. Eberhart-El Had Waived His Right To A Jury Trial.

Second, Mr. Eberhart-El argues that the trial court erred in finding that he had knowingly and voluntarily waived his right to a jury trial. *See* Md. Rule 4-246(b). He contends that he should not have been given the option of a court trial since he had already elected a jury trial when the case was in District Court and that, as a result of being unrepresented in the circuit court, he was "confused, pressured, and overwhelmed" when he decided to waive a jury. The State responds that because Mr. Eberhart-El failed to object to the waiver at trial, this issue is unpreserved on appeal. On the merits, the State argues that, even if his arguments are preserved, the court's examination of Mr. Eberhart-El was sufficient and when asked if his decision to waive his right to a jury trial was made knowingly and voluntarily, Mr. Eberhart-El answered in the affirmative.

After Mr. Eberhart-El had been found to have waived his right to counsel through inaction, the prosecutor presented a plea offer that he declined, and he then requested a

[2] There is no dispute, nor any issue in this appeal, about the prerequisite step, *i.e.*, that Mr. Eberhart-El had been represented by the Office of the Public Defender and discharged them while the case was still in the district court. This left him the option either to proceed *pro se* or to obtain private counsel.

court trial. Mr. Eberhart-El was then sent back to the circuit court, where the following exchange occurred:

> THE COURT: Okay. All right. Um, so Mr. Eberhart, you have – you have a choice to make. You have a right to a jury trial and a – or a right to – and a right to a bench trial, that is a trial without a jury, a judge like myself, it would be me.
>
> Um, if you wanted a jury trial 12 citizens of the U.S., all residents of Baltimore County would be selected. They would sit right over here in the jury box. In order to convict you all 12 would have to be convinced of your guilt[] beyond a reasonable doubt. It has to be unanimous. It can't be 11 to one or 10 to two, it's got to be 12 to zero.
>
> Alternatively, if all 12 are of the opinion that the State did not prove each and every element of the crime with which you've been charged, you would be acquitted. It has to be 12, nothing. It can't be 11 to one or whatever.
>
> If a jury was unable to reach a unanimous decision either for guilt or for not guilty, the State would have the option to retry you again and again until a jury was able to reach a verdict, either for guilt or not guilty; do you understand all that?
>
> MR. EBERHART-EL: Yes.
>
> THE COURT: Okay. The other option you have, as I said before, is a trial before a judge without a jury. Um, in that case the judge would be the one finder of fact, and I would have to be convinced beyond a reasonable doubt of your guilt.
>
> So how do you wish to proceed, with a jury or with a judge?
>
> MR. EBERHART-EL: With a judge.
>
> THE COURT: Okay. All right. Has anyone – well, let me ask you a few questions.
>
> Have you – are you under the influence of any drugs or alcohol?
>
> MR. EBERHART-EL: No.

> THE COURT: Have you taken any drugs or alcohol in the last 24 hours?
>
> MR. EBERHART-EL: No.
>
> THE COURT: Um, how far have you gone in school?
>
> MR. EBERHART-EL: Some college.
>
> THE COURT: Some college. So you graduated high school?
>
> MR. EBERHART-EL: Yes.
>
> THE COURT: And you can, obviously, read and write English, right?
>
> MR. EBERHART-EL: Yes.
>
> THE COURT: Okay. All right. Has anyone coerced you or forced you in any way in order to, induced you to waive your right to a jury trial?
>
> MR. EBERHART-EL: No.
>
> THE COURT: You're doing it freely and voluntarily?
>
> MR. EBERHART-EL: Yes.
>
> THE COURT: Okay. All right. Then I find that Mr. Eberhart is freely, voluntarily and knowingly, intelligently waiving his right to trial by jury.

1. Mr. Eberhart-El's jury waiver challenge is not preserved.

The State argues that because Mr. Eberhart-El did not object at any time to the finding that he voluntarily waived his right to a jury trial, this issue is unpreserved on appeal. We agree.

An accused's right to a trial by jury is guaranteed by the Sixth Amendment to the United States Constitution, as applied to the States by the Fourteenth Amendment. *Duncan*

v. Louisiana, 391 U.S. 145, 149 (1968). The procedure for protecting that constitutional right is set forth in Md. Rule 4-246:

> (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.

But a contemporaneous objection in the trial court is necessary to preserve appellate review on a claim of noncompliance with Rule 4-246. *Nalls v. State*, 437 Md. 674, 693 (2014). And Mr. Eberhart-El did not object to the trial court's finding that he knowingly and voluntarily waived his right to a jury trial. To the contrary, when asked by the court if his decision was being made freely and voluntarily, he answered in the affirmative. *See Meredith v. State*, 217 Md. App. 669, 674–75 (2014) (holding that where a defendant makes "no objection below to the waiver procedure, to its content, or to the trial court's announcement as to the 'knowingly and intelligently' made waiver of his right to a jury trial[, h]is challenge to the effectiveness of his waiver is not preserved for our review and is not properly before this Court"). For that reason alone, Mr. Eberhart-El's contention that his waiver was not knowing and voluntary is not properly before us.

2. Regardless, Mr. Eberhart-El waived his right to a jury trial.

Even if we were to reach the merits, however, the outcome would be the same. Mr. Eberhart-El contends that he should not have been given the option of a court trial because he had already requested a jury trial in the district court and was unrepresented, and "confused, pressured, and overwhelmed" at the time he waived a jury. But the fact that he had previously requested a jury trial in the district court did not alter his right or ability to waive a jury at any time before trial began. And although we do not doubt that he may have felt some measure of confusion, pressure, and anxiety from the prospect of representing himself at trial, the record supports the court's finding that he made the waiver knowingly and voluntarily. 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 in original) (citation omitted). And it did: his answers to the court's questions revealed that he understood the difference between a court trial and jury trial, that he was educated, not under the influence of drugs or alcohol, not forced or coerced in any way to make his decision, and most importantly, that he freely and voluntarily waived his right to a jury trial.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED. APPELLANT TO PAY COSTS.