

Circuit Court for Somerset County
Case No. C-19-CR-19-000150

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 0338

September Term, 2020

MARK W. RUSSELL

v.

STATE OF MARYLAND

Graeff,
Zic,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Zic, J.

Filed: June 22, 2021

*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 Somerset County, Mark Russell, appellant, was convicted of sexual solicitation of a minor. Appellant was sentenced to a term of seven years imprisonment. In this appeal, he presents a single question, which we have rephrased:¹

Did the trial court err in failing to conduct an on-the-record examination of appellant regarding his decision to waive his right to a jury trial as required by Maryland Rule 4-246(b)?

For the reasons that follow, we hold that the question presented regarding Rule 4-246(b) is not preserved for our review and thus affirm the judgment of the circuit court. We note that appellant did not raise a constitutional due process claim in his initial or reply brief and confirmed at oral argument that he is not making such a claim.

BACKGROUND²

At the start of trial, the following colloquy occurred:

[THE COURT]: We're here, State of Maryland versus Mark W. Russell, C-19-CR-19-000150. [Defense Counsel], you represent Mr. Russell; is that correct?

[DEFENSE]: I do, Your Honor.

[THE COURT]: Mr. Russell had previously waived his right to a jury trial; correct?

[DEFENSE]: Yes, Your Honor.

¹ Appellant presents the issue as follows: “Must this Court reverse Mr. Russell’s conviction where the trial court failed to examine Mr. Russell on the record in open court about his jury trial waiver and where Mr. Russell’s waiver was not made on the record in open court?”

² In light of the very narrow question presented, a detailed recitation of the facts proven at trial is unnecessary. *Elliot v. State*, 185 Md. App. 692, 699 n.3 (2009).

A bench trial ensued, after which appellant was convicted. At no point did the trial court examine him regarding his jury trial waiver. Neither appellant nor defense counsel objected to the trial court’s failure to conduct an on-the-record inquiry of appellant regarding his decision to waive his right to a jury trial.

Following trial, the trial court entered into the record a document titled “Trial Minutes,” which indicated, among other things, that appellant had waived his right to a jury trial and had elected a bench trial. Attached to that document was a second document titled “Election of Court Trial or Jury Trial.” That document, which was dated the same day as the trial, reads as follows:

I know that I have a right to be tried by a jury of 12 persons or by the court without a jury. I am aware that before a finding of guilty in a jury trial all 12 jurors must find that I am guilty beyond a reasonable doubt. I am aware that before a finding of guilty in a court trial the judge must find that I am guilty beyond a reasonable doubt.

I hereby elect to be tried by: **The Court**

I make this election knowingly and voluntarily and with full knowledge that I may not be permitted to change this election.

The document was signed by appellant and his counsel.³ Aside from those documents, the record does not reflect any discussion of appellant’s right to a jury trial or his waiver of that right.

³ Appellant does not dispute that he signed the document.

DISCUSSION

Appellant contends that the trial court failed to comply with Rule 4-246(b), and thus committed reversible error, in failing to conduct any inquiry into his jury trial waiver and in failing to “determine and announce” that the waiver was made knowingly and voluntarily. The State counters that appellant’s claim is unpreserved because neither he nor defense counsel objected to the court’s failure to comply with the requirements of Rule 4-246(b). We agree with the State.

Rule 4-246 states, in pertinent part:

(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.

As the Court of Appeals has explained, Rule 4-246(b) “very clearly sets out a two-step procedure: (1) ‘an examination of the defendant on the record in open court,’ commonly referred to as the ‘waiver colloquy,’ and (2) ‘the court[’s] determin[ation] and announce[ment] on the record that the waiver is made knowingly and voluntarily,’ which we refer to as the ‘determination and announcement requirement.’” *Nalls v. State*, 437 Md. 674, 687 (2014) (citing Md. Rule 4-246(b)) (alteration in original). “The Rule

contemplates full compliance with both steps of the waiver procedure.” *Id.* Failure to comply fully with the Rule is a reversible error. *Szwed v. State*, 438 Md. 1, 5 (2014).

That said, the Court has made clear “that a claimed failure of the court to adhere strictly with the requirements of Rule 4-246(b) requires a contemporaneous objection in order to be challenged on appeal.” *Spence v. State*, 444 Md. 1, 14-15 (2015) (citing *Nalls*, 437 Md. at 693); accord *Szwed*, 438 Md. at 5 (citing *Nalls*, 437 Md. at 693); *Meredith v. State*, 217 Md. App. 669, 674 (2014) (citing *Nalls*, 437 Md. at 693). Absent such an objection, the issue is unpreserved but may be reviewed at the appellate court’s discretion pursuant to Maryland Rule 8-131(a).⁴ *E.g.*, *Spence*, 444 Md. at 15.

Appellant argues that the contemporaneous objection requirement set forth in *Spence v. State*, 444 Md. 1 (2015), *Szwed v. State*, 438 Md. 1 (2014), *Nalls v. State*, 437 Md. 674 (2014), and *Meredith v. State*, 217 Md. App. 669 (2014) does not apply to his case because, in each of those cases, the reviewing court “considered waiver inquiries and announcements that were merely deficient insofar as they fell short of the precise procedures set forth in Rule 4-246(b).” Appellant argues that those cases are distinguishable from his case because, in his case, the trial court “did not merely fail to meet the precise requirements of the Rule, the Rule was ignored altogether.” Appellant contends that the Court, in establishing the requirement of a contemporaneous objection, could not have intended for a trial court’s failure “to conduct any jury waiver

⁴ Rule 8-131(a) states, in pertinent part, that an appellate court will not decide any non-jurisdictional issue “unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.”

examination, determination, or announcement to go un-reviewed and un-remedied merely because defense counsel failed to object.”

We are not persuaded. To be sure, in each of the above cases, the trial court engaged in some form of “waiver colloquy,” such that the primary issue on appeal was the court’s compliance with the “determination and announcement” portion of Rule 4-246(b). *See Spence*, 444 Md. at 13-15; *Szwed*, 438 Md. at 3-5; *Nalls*, 437 Md. at 680-84; *Meredith*, 217 Md. App. at 670-73. Thus, those cases are distinguishable, as the trial court in the instant case failed to conduct a waiver colloquy.

That said, there is nothing in the language of those cases to suggest that the requirement of a contemporaneous objection was meant to apply only to appellate challenges of a trial court’s compliance with the “determination and announcement” portion of the Rule. In other words, there is nothing to suggest that a defendant is relieved of the contemporaneous objection requirement in cases where the trial court failed to comply with the “waiver colloquy” portion as well. To the contrary, the holding in *Nalls*, on which the other three cases relied, established that the lack of a contemporaneous objection forfeits *any* challenge to a trial court’s failure to comply with the Rule. *See* 437 Md. at 693 (“Going forward, . . . appellate courts will continue to review the issue of a trial judge’s compliance with Rule 4-246(b) provided a contemporaneous objection is raised in the trial court to preserve the issue for appellate review.”); *see also Spence*, 444 Md. at 14-15 (“We made it perfectly clear in *Nalls* that a claimed failure of the court to adhere strictly with the requirements of Rule 4-246(b) requires a contemporaneous objection in order to be challenged on appeal.”). Appellant’s

claim that the contemporaneous objection requirement does not apply in his case is therefore without merit.

Here, appellant made no objection, contemporaneous or otherwise, after the trial court confirmed, on the record, that he had waived his right to a jury trial and wished to proceed by way of a bench trial. Appellant’s claim that the court failed to comply with Rule 4-246(b) is therefore not preserved for our review. He does not ask that we exercise our discretion to review the issue pursuant to Rule 8-131(a). In any event, we decline to do so.

In sum, there was no objection made at the time the court accepted the written waiver or at any other time prior to the start of trial that it failed to comply with Rule 4-246(b). Thus, the issue is not preserved for our review.

**JUDGMENT OF THE CIRCUIT COURT
FOR SOMERSET COUNTY AFFIRMED;
COSTS TO BE PAID BY APPELLANT.**