UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0468

September Term, 2013

GREGG MARTI

v.

STATE OF MARYLAND

Meredith,
Kehoe,
Thieme, Raymond G., Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Thieme, J.
Dissenting Opinion by Kehoe, J.

Filed: October 5, 2015

Convicted, following a bench trial in the Circuit Court for Prince George's County, of fourth-degree burglary and malicious destruction of property with a value of less than $500, Gregg Marti,[1] appellant, noted this appeal, contending that the circuit court erred in accepting his waiver of jury trial. Specifically, appellant claims that, prior to accepting that waiver, the circuit court neither adequately examined him nor "determine[d] and announce[d] on the record" that his waiver was made "knowingly and voluntarily," thereby violating Maryland Rule 4-246(b).

At the time the initial briefs in this appeal were filed, the prevailing law was set forth in *Valonis and Tyler v. State*, 431 Md. 551 (2013), which appeared to hold that no contemporaneous objection was required to preserve for appellate review a claim that the trial court, in accepting a defendant's waiver of jury trial, had failed to comply with the "determine and announce" requirement of Rule 4-246(b). During the pendency of this appeal, however, the Court of Appeals, in three contemporaneously filed decisions, *Nalls and Melvin v. State*, 437 Md. 674 (2014), *Szwed v. State*, 438 Md. 1 (2014), and *Morgan v. State*, 438 Md. 11 (2014), clarified its holdings in *Valonis and Tyler*. Most relevant to this appeal, the Court of Appeals explained that *Valonis and Tyler* had not jettisoned the contemporaneous objection rule, in the context of "determine and announce" violations, but had merely been an appellate exercise of discretion, under Maryland Rule 8-131(a), to consider an unpreserved issue. *Nalls and Melvin*, 437 Md. at 693-94 (opinion of Greene, J.);

[1] At some parts of the record, Marti's name is spelled "Gregg Marti," and at other parts it is spelled "Greg Marti." We adopt the version stated in his initial brief.

id. at 699 (McDonald, J., concurring and dissenting); *id.* at 699-701 (Watts, J., concurring and dissenting).

In light of those intervening decisions, appellant moved to submit a supplemental brief, requesting that we reach the merits of his appeal, notwithstanding the intervening clarification in the law. We granted that motion and ordered that the State file a response to appellant's supplemental brief, which it has.

We now hold that, under the preservation rule as stated in *Nalls and Melvin*, neither of appellant's claims, alleging violations of Rule 4-246(b), was preserved because appellant failed to object below at any time. We shall nonetheless take the unusual step of exercising our discretion, under Maryland Rule 8-131(a), to notice plain error and address one of these unpreserved claims, regarding the adequacy of the examination, and, in light of the patently inadequate examination which preceded appellant's purported waiver of jury trial, we reverse appellant's convictions and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND[2]

On March 8, 2012, appellant and his sister, Stephanie Marti, broke into the Laurel home of his ex-girlfriend, Tonika Watkins,[3] and proceeded to destroy much of what was inside.[4] Thereafter, both appellant and his sister were charged, in separate eight-count indictments, with first-degree burglary, theft, and malicious destruction of property, as well as lesser included offenses. Several weeks later, the State moved to consolidate the two cases, since they arose "out of the same time and incident"; at both trials, the State "intend[ed] to offer the testimony of the same witnesses"; a single trial would "avoid unnecessary time, expense and inconvenience to the parties, witnesses and the Court"; and

[2]Since appellant does not challenge the sufficiency of the evidence to sustain his convictions, nor does he challenge any aspect of the bench trial which followed his waiver of jury trial, we recite only an abbreviated version of the facts. *See Teixeira v. State*, 213 Md. App. 664, 666 (2013).

[3]The home, located in Laurel, belonged to Ms. Watkins's mother, Delphien Watkins, and she lived there with her mother; her daughter, Jayde Martinez; and her sister, Tiara Watkins.

[4]Tonika Watkins testified that, when she left the home earlier that evening, her residence "was in the normal condition" but that, upon returning later that evening, "it looked like a tornado had hit. There was glass all over. Everything was broken. Everything glass was broken."

Tiara Watkins, who remained home that evening, actually witnessed appellant and Stephanie Marti, shortly after they had broken into her home. Thereafter, she observed them as they rampaged through her home. When they finally fled the scene, Tiara Watkins called 911, and a recording of that emergency call was broadcast to the court. Moreover, a series of photographs, chronicling the destruction that appellant and Stephanie Marti had left in their wake, was admitted into evidence.

both cases were scheduled for trial on the same day. Noting that no opposition had been filed, the circuit court granted that motion, and a trial date was set for the consolidated cases.

On the morning of trial, both defendants elected a bench trial. The ensuing colloquy, during which, among other things, appellant purportedly waived his right to a jury trial, is the subject matter of this appeal:

> THE COURT: Good morning. There is a rumor that the Defendants will be electing a Bench Trial.
>
> [APPELLANT'S COUNSEL]: That rumor is correct, Your Honor.
>
> [STEPHANIE MARTI'S COUNSEL]: That is correct.
>
> THE COURT: We're all set? Do you have enough chairs there? We will be breaking for a long lunch around 10:25. I've got a dedication ceremony I have to go to and make some short remarks. So, we'll take a little early lunch. Having said that, I guess we're ready for opening statements.
>
> [APPELLANT'S COUNSEL]: Shall we put the waiver on the record?
>
> THE COURT: Lets put the waiver on, yes.
>
> [STEPHANIE MARTI'S COUNSEL]: You wish us to voir dire our clients?
>
> THE COURT: Yes.
>
> [STEPHANIE MARTI'S COUNSEL]: Please state your full name for the record.
>
> STEPHANIE MARTI: Stephanie Marti.

[STEPHANIE MARTI'S COUNSEL]: How old are you?

STEPHANIE MARTI: Thirty-one.

[STEPHANIE MARTI'S COUNSEL]: How far did you go in school?

STEPHANIE MARTI: College.

[STEPHANIE MARTI'S COUNSEL]: So you read, write, and understand the English language?

STEPHANIE MARTI: Yes.

[STEPHANIE MARTI'S COUNSEL]: Today are you under the influence of any drugs, alcohol, medication or anything else that would affect your decision-making?

STEPHANIE MARTI: No.

[STEPHANIE MARTI'S COUNSEL]: Have you and I had the opportunity to discuss whether you wished to have a trial by a Judge or trial by jury in this case?

STEPHANIE MARTI: We had a conversation.

[STEPHANIE MARTI'S COUNSEL]: And is it your decision to waive your right to a trial by jury and elect a trial by Judge?

STEPHANIE MARTI: Yes.

[STEPHANIE MARTI'S COUNSEL]: Do you understand that if you wanted to, we could have a jury trial. Twelve people would be impaneled from the voter and motor registration list of Prince George's County to sit in this case, and that before you could be convicted, all 12, each one of them, would have to be convinced of your guilt beyond a reasonable doubt before you could be convicted. Do you understand that?

STEPHANIE MARTI: Yes.

[STEPHANIE MARTI'S COUNSEL]: If any one of them wasn't so convinced, they couldn't convict you. All 12 would have to have a reasonable doubt as to your guilt before you could be found not guilty. At the jury trial, you would have a right to testify. If you elected not to testify, the Judge would instruct the jury that your decision not to testify could not be held as evidence of your guilt and they would have to decide your guilt or innocence based strictly upon their review of the other evidence. Do you understand that?

STEPHANIE MARTI: Yes.

[STEPHANIE MARTI'S COUNSEL]: When you elect a court trial, the Judge will be the sole person deciding your guilt or innocence, and [the judge] would have to be convinced of your guilt beyond a reasonable doubt before you could be convicted. Do you understand that?

STEPHANIE MARTI: Yes.

[STEPHANIE MARTI'S COUNSEL]: Do you have any question about what it means to have a jury trial or about your decision to give up a jury trial?

STEPHANIE MARTI: No.

[STEPHANIE MARTI'S COUNSEL]: Is that a decision that you made freely and voluntarily?

STEPHANIE MARTI: Yes.

[STEPHANIE MARTI'S COUNSEL]: Thank you, Your Honor.

THE COURT: Thank you. **Let's do it this way. Mr. Marti, did you listen to all of that?**

GREGG MARTI: **Yes, Your Honor, I did.**

THE COURT: **Did you discuss this with [your counsel] as well?**

GREGG MARTI: **Yes, I have.**

THE COURT: **And do you have any questions about that?**

GREGG MARTI: **Not at all, Your Honor.**

THE COURT: **Is it your desire to freely and voluntarily give up your right to a trial by jury in this case and have me try the case?**

GREGG MARTI: **Yes, Your Honor.**

THE COURT: **Okay. Thank you both.**

(Emphasis added.)

Immediately after accepting both defendants' waivers of jury trial, the court conducted a one-day bench trial. At the conclusion of that trial, the court found appellant guilty of burglary in the fourth degree, in violation of Criminal Law Article, § 6-205, and malicious destruction of property with a value of less than $500, in violation of Criminal Law Article, § 6-301, and it acquitted him of all other charges.[5] The court thereafter sentenced appellant to consecutive terms of three years' imprisonment for fourth-degree burglary and sixty days'

[5]Stephanie Marti, who is not a party to this appeal, was found guilty of a single count of burglary in the fourth degree.

imprisonment for malicious destruction of property, as well as $500 restitution,[6] with credit for two days' time served. Appellant then noted this timely appeal.

DISCUSSION

The Parties' Contentions

Appellant complains that, in accepting his purported waiver of jury trial, the circuit court committed two distinct violations of Maryland Rule 4-246(b), each of which requires that his convictions be reversed. First, he contends, the court's "perfunctory exchange" with him failed to satisfy the requirement, in Maryland Rule 4-246(b), that a trial court "may not accept" a jury trial waiver without first ensuring that there be "an examination of the defendant on the record in open court." Therefore, he maintains, the court had no factual basis for determining whether appellant's purported jury trial waiver was knowing and voluntary. Second, according to appellant, the circuit court failed to comply with the "determine and announce" requirement of that same rule, a failure which, according to *Valonis and Tyler v. State*, 431 Md. 551 (2013), mandates reversal and a new trial.

The State counters with three arguments, two of which are pertinent here: First, according to the State, appellant waived his claims of Rule 4-246(b) error because he failed to object at the conclusion of the waiver colloquy. Second, maintains the State, the trial

[6] As to the restitution order, appellant and his sister were held jointly and severally liable.

court's examination of appellant was sufficient to ensure that his waiver of jury trial was knowing and voluntary.[7]

In his supplemental brief, filed after the decisions of the Court of Appeals in *Nalls and Melvin v. State*, 437 Md. 674 (2014), *Szwed v. State*, 438 Md. 1 (2014), and *Morgan v. State*, 438 Md. 11 (2014), appellant, focusing strictly on his "determine and announce" claim, requests that we excuse his failure to object to the waiver colloquy below and nonetheless address the merits of that claim. He asserts, citing *Walker v. State*, 343 Md. 629, 637 (1996), that when a decision of the Court of Appeals "with regard to a constitutional provision, a statute, or a common law principle" is overruled on the ground that that decision "represented an erroneous interpretation or application of the constitutional provision, statute, or common law principle," the question of whether the new ruling "should be applied prospectively only is governed by the principles set forth" in *Owens-Illinois v. Zenobia*, 325 Md. 420, 470-472 (1992); and that, applying those principles, retroactive application of *Nalls and Melvin* to defendants who, like he, were tried before *Valonis and Tyler*, is unjustified.

The State counters that *Nalls and Melvin* did not announce a new rule and that, therefore, no question of its prospective versus retroactive application is presented here.

[7]The State further contends that a limited remand, not a reversal, is "the appropriate remedy" for a trial court's violation of the "determine and announce" requirement. After briefs in the instant case had already been filed, however, the Court of Appeals rejected the identical argument. *Nalls and Melvin v. State*, 437 Md. 674, 694-95 (2014) (opinion of Greene, J.) (citing *Valonis and Tyler*, 431 Md. at 569); *id.* at 697-99 (Battaglia, J., concurring).

Analysis

Preservation

We begin our analysis by observing that appellant's counsel did not object at any time, either to the examination or to the trial court's failure to announce its findings on the record that his waiver was, indeed, knowing and voluntary. The State maintains that that absence of a contemporaneous objection precludes us from considering the merits of appellant's claims.

During the pendency of this appeal, the Court of Appeals re-visited the question it had seemingly already answered in *Valonis and Tyler*. In *Nalls and Melvin v. State*, 437 Md. 674 (2014), a plurality of the Court, comprising Chief Judge Barbera and Judges Harrell and Greene and speaking through Judge Greene, acknowledged that there was "continued confusion" in the lower courts regarding the preservation issue because it had based its holding in *Valonis and Tyler* upon "dual bases": to address "perceived problems with compliance among the trial courts" with Rule 4-246(b), a rule intended to protect the "fundamental right to a jury trial," which is a matter of "constitutional significance"; and as an exercise of discretion, under Rule 8-131(a), which permits an appellate court to consider an unpreserved issue "'if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal[.]'" *Nalls and Melvin*, 437 Md. at 692-93 (quoting Md. Rule 8-131(a)) (opinion of Greene, J.). The plurality then pronounced:

> Going forward, however, the 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. Accordingly, **to the extent that *Valonis* could be read to hold that a trial judge's alleged noncompliance with Rule 4-246(b) is reviewable by the appellate courts despite the failure to object at trial, that interpretation is disavowed.**

Id. at 693-94 (emphasis added).

In a concurring and dissenting opinion, Judge McDonald, joined by Judge Adkins, agreed with the plurality's "holding that the contemporaneous objection rule applies" to claims that a trial court has failed to comply with Rule 4-246(b). *Id.* at 699 (McDonald, J., concurring and dissenting). And, in a separate concurring and dissenting opinion, Judge Watts observed that, in the aftermath of *Valonis and Tyler*, "questions arose" as to whether that decision "had eliminated the requirement of a contemporaneous objection to preserve for appellate review the issue of the waiver of the right to a jury trial" but that, "[i]n a salutary development, . . . the Court eliminates any doubt and conclusively determines that a contemporaneous objection is required to preserve for appellate review the waiver of the right to a jury trial pursuant to Rule 4-246(b)." *Id.* at 699 (Watts, J., concurring and dissenting).

In sum, six judges of the Court of Appeals agreed that a contemporaneous objection is required to preserve for appellate review a claim of noncompliance with Rule 4-246(b),

at least a claim of the specific variety addressed in *Valonis and Tyler* and in *Nalls and Melvin*, that is, the failure to comply with the "determine and announce" requirement. Moreover, those same six judges agreed that the *Valonis and Tyler* Court had merely exercised its appellate discretion, under Rule 8-131(a), to decide an unpreserved issue and that the contemporaneous objection rule had never actually been held not to apply to a claim of "determine and announce" error. *See id.* at 693 (observing that Court had "elected to exercise" its "discretion to review the merits in" *Valonis and Tyler*) (opinion of Greene, J.); *id.* at 699 (agreeing with holding that "the contemporaneous objection rule applies" to claims of "determine and announce" error) (McDonald, J., concurring and dissenting); *id.* at 700 (asserting that, in *Valonis and Tyler*, the Court had "exercised its discretion pursuant to Rule 8-131(a) to address the issue") (Watts, J., concurring and dissenting).

Two conclusions follow: First, as *Nalls and Melvin* did not announce a new rule, no issue arises as to its prospective or retrospective application; and second, as appellant did not make a contemporaneous objection below to the circuit court's failure to "determine and announce" on the record that his jury trial waiver was entered knowingly and voluntarily, *Nalls and Melvin* instructs that his claim of "determine and announce" error is not preserved.

If this case presented only a claim that the trial court had failed to "determine and announce on the record" its finding that appellant's waiver of jury trial had been made knowingly and voluntarily, we would affirm on the basis of *Nalls and Melvin*. And, in any event, we shall not further address that unpreserved issue, thereby mooting one of the State's

contentions, that a violation of the "determine and announce" requirement should be remedied by a limited remand, not a reversal, although we cannot help but observe that, in *Nalls and Melvin*, the Court of Appeals rejected the State's identical limited remand argument, holding that it could "see no reason to deviate from" the holdings in *Valonis and Tyler* that such an error is "'not subject to harmless error analysis'" and that the "only appropriate sanction is a reversal." *Nalls and Melvin*, 437 Md. at 694-95 (opinion of Greene, J.) (quoting *Valonis and Tyler*, 431 Md. at 569); *id.* at 697-99 (Battaglia, J., concurring). But because the case at bar presents the additional error claim of an inadequate colloquy, a claim which, under the circumstances of this case, is of a serious character, implicating as it does the validity of the waiver of jury trial, we shall turn next to consider whether the rule stated in *Nalls and Melvin* was intended to foreclose a claim of this type and, if so, whether we should nonetheless exercise our discretion, under Rule 8-131(a), to notice plain error and consider the merits of that claim.

In attempting to clarify the preservation requirement as it applies to "determine and announce" error, the Court of Appeals appears to have stated, broadly, that a contemporaneous objection is required to preserve **any** claim of non-compliance with Rule 4-246(b). *See Nalls and Melvin*, 437 Md. at 693 (opinion of Greene, J.) ("Going forward, however, the 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."); *id.* at 699 (McDonald, J., concurring and

dissenting) ("I disagree with the plurality's application of Rule 4-246(b) in these cases, although I agree with its holding that the contemporaneous objection rule applies."); *id.* at 699 (Watts, J., concurring and dissenting) ("In a salutary development, with the instant opinion, the Court eliminates any doubt and conclusively determines that a contemporaneous objection is required to preserve for appellate review the waiver of the right to a jury trial pursuant to Rule 4-246(b)[.]").

It is, perhaps, debatable whether the preservation rule announced in *Nalls and Melvin* was intended to sweep so broadly as to also apply to a claim based upon an inadequate waiver colloquy, an inadequacy that may go, not only to the core of a fundamental constitutional right, but a right subject to the "knowing and voluntary" waiver standard. *See Martinez v. State*, 309 Md. 124, 133-34 & n.10 (1987) (observing 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). As the Court of Appeals has made clear, such a right (and, specifically, the right to a jury trial) may not be waived by a mere procedural default. *See Curtis v. State*, 284 Md. 132, 143, 147-48 (1978).[8] Indeed, in expressing

[8]Although the Court of Appeals, in *Curtis v. State*, 284 Md. 132 (1978), was interpreting the waiver provision of the Maryland Uniform Post Conviction Procedure Act, then codified at former Article 27, § 645A(c) and now codified, without substantive change, at Criminal Procedure Article, § 7-106(b), the Court's analysis of waiver and procedural default is, in our view, relevant here. Indeed, *Curtis* expressly recognized the right to trial by jury as an example of a fundamental right that could not be waived by a procedural default. *Curtis*, 284 Md. at 143 ("This high standard [of an intentional relinquishment or (continued...)

disagreement with the majority's decision to reach the merits of unpreserved claims of "determine and announce" error, the dissenting judges in *Szwed v. State*, *supra*, one of the companion cases to *Nalls and Melvin*, 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.**

Szwed, 438 Md. at 8 (McDonald, J., dissenting) (footnote omitted) (emphasis added). At the same time, however, the dissent observed: "It is notable that **the oral colloquy** and finding required by Maryland Rule 4-246(b), while useful to ensure that a defendant's waiver of a jury trial is in fact knowing and voluntary, **is not itself constitutionally required**; it is simply in aid of the constitutional requirement that, to be effective, a waiver of a constitutional right must be knowing and voluntary." *Id.* at 8-9 n.3 (McDonald, J., dissenting) (emphasis added).

In a line of cases, many of which long pre-dated *Valonis and Tyler*, the Court of Appeals has addressed the merits of claims of inadequate waiver colloquies despite the lack

[8](...continued)
abandonment of a known right or privilege] has been applied regarding the waiver of the right to trial by jury.") (citing *Adams v. United States ex rel. McCann*, 317 U.S. 269, 275 (1942)).

of objections below, although we hasten to add that the issue of preservation was never raised in those cases.[9] *Winters v. State*, 434 Md. 527 (2013); *Walker v. State*, 406 Md. 369 (2008), *abrogated on other grounds as stated in Valonis and Tyler 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*, *supra*, 309 Md. 124; *Countess v. State*, 286 Md. 444 (1979), *abrogated on other grounds as stated in Walker v. State*, 406 Md. 369, 379 (2008). Although, as the Court of Appeals has observed, "most rights, whether constitutional, statutory or common-law, may be waived by inaction or failure to adhere to legitimate procedural requirements," *State v. Rose*, 345 Md. 238, 248 (1997) (interpreting waiver provision of Uniform Post Conviction Procedure Act), the Court of Appeals in that case was addressing a constitutional right, the right to a proper reasonable doubt jury instruction, that it deemed waivable by a mere procedural default, *id.* at 250, not by "an intentional relinquishment or abandonment of a known right or privilege," *Johnson v. Zerbst*, 304 U.S. at 464, which is the waiver standard applicable to the right to trial by jury. *Curtis*, 284 Md. at 143.

Based upon the broad, unqualified language used in *Nalls and Melvin*, as well as the teachings we deduce from *Curtis* and *Rose*, we conclude that, in the absence of a

[9] In each instance, it is nonetheless clear that no objection was raised below, as may be determined by examining the detailed recitations, in each decision, of the pertinent waiver colloquies.

contemporaneous objection below, the only Rule 4-246(b) claims that may be raised on appeal are those expressly alleging a violation of the constitutional right to a trial by jury. Because appellant failed to object below, and because his appellate claim does not expressly allege a constitutionally infirm waiver, his claim of an inadequate waiver colloquy is not preserved.[10]

Nonetheless, as we have misgivings about the extremely abbreviated waiver colloquy in this case, and in light of both the closeness of the preservation issue as well as the dearth of caselaw addressing the specific circumstance of a jury trial waiver colloquy involving multiple defendants, we shall exercise our discretion to notice plain error and address the merits of appellant's claim. *See* Md. Rule 8-131(a); *Savoy v. State*, 218 Md. App. 130, 142 (2014) (observing that Rule 8-131(a) "allows for the possibility of plain error review"); *James v. State*, 191 Md. App. 233, 246 (2010) (noting that "an appellate court possesses plenary discretion to notice plain error material to the rights of a defendant, even if the matter was not raised in the trial court") (citation and quotation omitted).

[10]We further note that merely reciting that the right to a jury trial is guaranteed by the United States and Maryland Constitutions, as appellant does in his brief, is insufficient to expressly state a claim of a constitutionally infirm waiver colloquy. Appellant expends most of his argument in asserting that "the trial court violated Maryland Rule 4-246," and he never claims, so far as we can tell, that the waiver was constitutionally deficient because of the defective colloquy. Md. Rule 8-504(a)(6); *Moosavi v. State*, 355 Md. 651, 660 (1999) (observing that "if a point germane to the appeal is not adequately raised in a party's brief, the [appellate] court may, and ordinarily should, decline to address it") (citation and quotation omitted).

In *James*, we said that, at a minimum, an error is "plain" and, therefore, subject to plain error review only if it is "wrong under current law." *Id.* at 247. Even then, it is "only the extraordinary error and not the routine error that will cause us to exercise the extraordinary prerogative" of plain error review, and we should reserve "our discretion to exercise plain error review for instances when the unobjected to error is compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial." *Id.* at 246-47 (citations and quotations omitted). And we "may address an unpreserved issue to communicate a desired message to the bench and bar that might otherwise go unsent." *Id.* at 247 (citation and quotation omitted).

In the case at bar, we think that it is beyond dispute that the error here was (and still is) "plain" under current law, and furthermore, we think that at least two additional conditions are satisfied. First, the error in this case implicates not only a fundamental right of the defendant, but it comes uncomfortably close to a core right, the right to a jury trial, which may only be waived under the "knowing and voluntary" standard. Error correction is therefore "fundamental to assure the defendant a fair trial." *James*, 191 Md. App. at 247.

Second, if we were to affirm the judgments in this case because of non-preservation, we would be giving a tacit, albeit unintentional, message to trial courts that the waiver colloquy is not terribly important, since any error must be illuminated by a defense objection (and, presumably, cured), or else, in the absence of an objection, the colloquy will be largely immune from appellate review.

We hasten to add, however, that defense counsel, in the future, may not rely upon such an act of appellate grace. Appellant's trial counsel should have, but did not, object when the trial court cut short the waiver colloquy by essentially pressing the "fast-forward" button.

Examination of the Defendant on the Record

The examination of appellant, conducted by the circuit court, was, as appellant aptly describes it, "perfunctory." Although the examination of Stephanie Marti, conducted by her counsel, arguably, may have been sufficient to comply with Maryland Rule 4-246(b), as to her,[11] we conclude that the court's attempt to incorporate the examination of her and to deem it adequate as to appellant was error. We reach that conclusion because of the text of the rule and because the right to a jury trial is a personal right of the defendant, *Smith v. State*, 375 Md. 365, 379 n.11 (2003), which he "alone may waive." *Winters v. State*, *supra*, 434 Md.

[11]We note, however, that when Stephanie Marti was asked whether she understood that she was waiving the right to be tried and convicted only by a unanimous jury, her counsel informed her: "All 12 would have to have a reasonable doubt as to your guilt before you could be found not guilty." This is plainly an incorrect statement of the requirement of jury unanimity. Just moments before, however, she had been correctly informed "that before you could be convicted, all 12, each one of them, would have to be convinced of your guilt beyond a reasonable doubt before you could be convicted" and that "[i]f any one of them wasn't so convinced, they couldn't convict you." In *Winters v. State*, 434 Md. 527 (2013), the Court of Appeals held that a trial court's legally erroneous advisement as to a defendant's burden of proof in showing that he was not criminally responsible rendered his waiver of jury trial unknowing. Whether a similar outcome would follow here, as to the advisements given to Stephanie Marti, is a matter we need not decide. We shall assume, without deciding, that the examination was adequate to ensure that she knowingly and voluntarily waived her right to jury trial.

at 536; *accord Valonis and Tyler v. State*, *supra*, 431 Md. at 560 ("In Maryland, a defendant's right to waive a trial by jury may be exercised only by the defendant.").

We begin with the text of Rule 4-246(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.**

(Emphasis added.)

The rule provides that a court "may not accept" a jury trial waiver unless there is "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." That is the first step of "a two-step procedure," "very clearly" set forth in the rule, *Nalls and Melvin*, 437 Md. at 687 (opinion of Greene, J.), and provides the trial court with the necessary factual basis for completing the second step, in which it "determines and announces on the record that the waiver is made knowingly and voluntarily." Md. Rule 4-246(b). "[W]ith regard to the examination, the trial judge is required to do more than merely 'go through the motions.'" *Valonis and Tyler*, 431 Md. at 567; *accord Morgan*, *supra*, 438 Md. at 21. Although "the trial judge 'need not recite any fixed incantation,'" *Winters*, 434 Md. at 537 (quoting *Walker*, 406 Md. at 378), the rule "requires that the trial judge engage in the waiver process." *Nalls and Melvin*, 437 Md. at 685 (opinion of Greene, J.); *accord Szwed*, *supra*, 438 Md. at 6

(opinion of Greene, J.) (observing, in the related context of a violation of the "determine and announce" requirement, that "addressing one half of the required announcement neither suffices as a valid announcement that the criminal defendant's jury trial waiver was both knowing and voluntary, **nor confirms for the appellate courts that the trial judge was fully engaged in the process**) (emphasis added); *id.* at 7 (Battaglia, J., concurring).

Neither party cites any appellate decision specifically involving a jury trial waiver colloquy of multiple defendants, but our own research discloses two Maryland decisions, as well as a Florida decision that is most factually analogous to the instant case. Those are: *Countess v. State*, *supra*, 286 Md. 444; *Salzman v. State*, 49 Md. App. 25, *cert. denied*, 291 Md. 781 (1981), *cert. denied sub nom. Blinken v. State*, 291 Md. 771 (1981), *cert. denied sub nom. Blinken v. State*, 291 Md. 772 (1981); and *Sinkfield v. State*, 681 So. 2d 838 (Fla. Dist. Ct. App. 1996). We shall address them in turn, beginning with the Maryland decisions, both of which interpreted the predecessor to Rule 4-246, that is, former Rule 735. Although similar to the present rule, Rule 735 differed in several respects, perhaps most notably in that it required the court to determine that the defendant "has made his election for a court trial with full knowledge of his right to a jury trial and that he has knowingly and voluntarily

waived the right,"[12] rather than that he merely "knowingly and voluntarily" waives, as Rule 4-246(b) now requires.

Countess v. State, 286 Md. 444, comprised four consolidated appeals, one of which involved a joint bench trial of three defendants, McCoy, Robinson, and Gault. At the outset of that joint trial, counsel for each defendant, in succession, informed the court that his client had been advised of his right to a jury trial as well as what that right entailed, and that his client nonetheless wished to waive that right. After all three defense counsel had so informed the court, it responded, "Very well then," and it proceeded to conduct the bench trial. *Id.* at 458-59. At the conclusion of that trial, the court found each defendant guilty of grand larceny and imposed sentences accordingly. *Id.* at 459.

McCoy, Robinson, and Gault noted appeals, contending, among other things, that "the lower court [had] failed to follow the proper procedures relating to the waiver of a jury trial."

[12]The pertinent part of former Rule 735 was as follows:

> If the defendant elects to be tried by the court, the trial of the case on its merits before the court may not proceed until the court determines, after inquiry of the defendant on the record, that the defendant has made his election for a court trial with full knowledge of his right to a jury trial and that he has knowingly and voluntarily waived the right. If the court determines otherwise, it shall give the defendant another election pursuant to this Rule.

Md. Rule 735 d (1979). The "full knowledge" requirement was deleted in 1982 by a Rule amendment. *See Walker v. State*, 406 Md. 369, 378 (2008) (discussing history of former Rule 735).

McCoy v. State, 41 Md. App. 667, 669, *rev'd sub nom. Countess v. State*, 286 Md. 444 (1979); *see also Countess*, 286 Md. at 453 (observing that question raised was not "effectiveness in the constitutional sense of the waiver by each defendant of those rights" but only whether lower courts had properly interpreted and applied Rule 735). This Court affirmed their convictions. As to the specific issue regarding waiver of jury trial, we observed that "counsel for each [defendant] announced the waiver of a jury trial and explained his client's understanding of his right"; that "[a]t no time" did any of them "voice any objection"; and that, "prior to the commencement of the State's case," each defendant "indicated that he was satisfied with the services of his attorney." *Id.* at 674. We therefore concluded that each defendant had "made his election of a court trial with full knowledge of his right to a jury trial and each knowingly and voluntarily [had] waived the right," as required by former Rule 735 d. *McCoy*, 41 Md. App. at 674-75.

But the Court of Appeals reversed. The Court observed that there had been "no inquiry of any *of the defendants on the record* as required by § d [of the Rule]" and that, consequently, "[a]ll the court had before it on which to determine whether each defendant made the election of a court trial with full knowledge of his right to a jury trial and knowingly and voluntarily waived the right came from the defendant's counsel." *Countess*, 286 Md. at 459. Reasoning that "the responses to the inquiry must come from the defendant himself," the Court of Appeals concluded that Rule 735 d had been violated, and it

accordingly reversed the judgments against McCoy, Robinson, and Gault and remanded for new trials. *Id.*

In the instant case, perhaps unlike in *Countess*, there was, as we have noted, an inquiry made of appellant, although it was an extremely abbreviated one. Consequently, there were responses from him, but only to the following queries: whether appellant had "listen[ed] to all of that," that is, the lengthy colloquy of his co-defendant; whether he had "discuss[ed] this with" his trial counsel "as well"; whether he had "any questions about that"; and whether it was his "desire to freely and voluntarily give up [his] right to a trial by jury in this case." Nonetheless, it is hardly an exaggeration to say that, as in *Countess*, where "[a]ll the court had before it" from which it could determine whether each defendant was knowingly and voluntarily waiving his right to a jury trial "came from the defendant's counsel," not from each defendant personally, 286 Md. at 459, so too in the instant case, nearly all the court had before it from which it could determine whether appellant was knowingly and voluntarily waiving his right to a jury trial came from questioning directed at his co-defendant, not at him personally. Moreover, it is highly doubtful whether the trial court here had an adequate factual basis, from the skeletal questions actually posed to appellant and the responses thereto, for determining whether appellant was knowingly and voluntarily waiving his right to jury trial.

Salzman v. State, *supra*, 49 Md. App. 25, was an appeal following a joint bench trial of three co-defendants: Paul Blinken; his wife, Marcia Blinken; and Bruce Salzman.

Immediately prior to that trial, each defendant was examined, one at a time, beginning with Bruce Salzman, followed by Paul Blinken, and concluding with Marcia Blinken. *Id.* at 57-58. During those examinations, each defendant was "extensively advised as to the nature of a jury trial." *Id.* at 57. We rejected Paul Blinken's claim of an invalid waiver, on the alleged ground that, while he was being examined, he had not been asked whether he "understood that a jury's verdict would have to be unanimous." *Id.* at 58.[13] We reasoned that Paul Blinken had observed the examinations of both Bruce Salzman and Marcia Blinken and that both of them had been advised that a jury's verdict must be unanimous, and we concluded that Paul Blinken therefore "understood the nature of a jury trial," which was "all that *Countess* require[d]." *Id.*

In contrast, in the case at bar, appellant was barely examined at all and was certainly not "extensively advised as to the nature of a jury trial." *Salzman*, 49 Md. App. at 57. Merely observing his sister being examined, and not even being alerted, until after the

[13]It must be borne in mind that, under the then-extant version of Rule 735 d, a jury trial waiver was valid only if the defendant had "full knowledge of his right to a jury trial" and "knowingly and voluntarily waived the right." To satisfy this "full knowledge" requirement, it was "normally" sufficient that " the defendant entitled to a jury trial knows that he has the right to be tried by a jury of 12 persons or by the court without a jury; that whether trial is by a jury or by the court, his guilt must be found to be beyond a reasonable doubt; that in a jury trial all 12 jurors must agree that he is so guilty but in a court trial the judge may so find." *Countess v. State*, 286 Md. 444, 455 (1979). Today, in contrast, under Rule 4-246(b), "the trial judge need not recite any fixed incantation," *Winters*, *supra*, 434 Md. at 537 (citation and quotation omitted), and a defendant need only be provided with "some knowledge of the jury trial right before being allowed to waive it." *State v. Hall*, 321 Md. 178, 183 (1990).

conclusion of that examination, that he should have been paying attention, is simply not enough to ensure that his subsequent waiver was knowing and voluntary.

In *Sinkfield v. State*, *supra*, 681 So. 2d 838, Sinkfield and a co-defendant, Bennett, appeared before a circuit court[14] judge "to discuss a plea," and the court set a trial date for the following day. *Id.* at 838. The following day, Sinkfield and Bennett appeared for trial, with their respective counsel, before a different circuit court judge. *Id.* Prior to commencement of trial, Bennett's counsel addressed the court and requested that they "'go on the record about our clients agreeing to go non-jury[.]'" *Id.* In response, the court commented that the matter had been discussed earlier that morning, and it told Bennett's counsel to "say it again." *Id.* Bennett's counsel balked, explaining that he did not think his client had been present during that discussion. *Id.* This prompted the court to ask Bennett whether he agreed to a bench trial, and he responded, "Yes." *Id.* at 839. Immediately thereafter, Bennett's counsel "outlined to his client . . . the consequences of waiving trial by jury and again obtained his consent to proceed with a non[-]jury trial." *Id.*

Turning to Sinkfield's counsel, the court then asked, "Your guy the same way, Jack?" *Id.* Sinkfield's counsel replied, "Yes. We've been through this yesterday with [the other circuit court judge]." *Id.* The court responded, "Oh, you did? Okay." *Id.* It then proceeded to conduct a bench trial, at the conclusion of which Sinkfield was convicted.

[14]In Florida, as in Maryland, the trial courts of general jurisdiction are known as circuit courts.

On appeal, the District Court of Appeal of Florida, Fourth District, reversed and remanded for a new trial. The Florida intermediate appellate court reasoned that, "[n]otwithstanding the court's comment" alluding to a discussion that had taken place earlier that morning, there was "no record of such having occurred" and that, moreover, the transcript of the prior day's proceedings, before the other judge, contained "no discussion" of Sinkfield having waived his right to a jury trial. *Id.* Because the statement by Bennett's counsel, that Sinkfield "agree[d] to go non-jury," was, "in the absence of the court's requisite inquiry" of Sinkfield and its "findings on the record that [he] voluntarily, knowingly and intelligently agreed with the waiver," not a "valid oral waiver" of Sinkfield's right to a jury trial, nor was Sinkfield's silence "during his [own] counsel's apparent waiver" of Sinkfield's right to jury trial "a valid waiver of that right," the Florida court concluded that Sinkfield's conviction could not stand. *Id.*

Similarly, in the case at bar, upon the conclusion of the examination of the co-defendant, the trial court attempted to shortcut the process. But, "in the absence of the court's requisite inquiry" of appellant, as well as the absence of any other part of the record indicating that appellant (and not his co-defendant) had waived a jury trial, *Sinkfield*, 681 So. 2d at 839, there could not have been a valid waiver, just as there was not in *Sinkfield*.

The procedure followed here stands in stark contrast with that followed in *Smith v. State*, *supra*, 375 Md. 365, a procedure which the Court of Appeals deemed sufficient to comply with the examination requirement. In that case, trial counsel asked Smith "numerous

poignant questions to assure he understood his right to a jury trial, his ability to waive that right, the ramifications of waiving such a right and that he was doing so 'freely and voluntarily,'" questioning which "elicited answers from [Smith] that conformed with the requirements of Md. Rule 4-246(b)." *Smith*, 375 Md. at 380 n.12.

Indeed, the waiver colloquy in the instant case is reminiscent of what occurred in *Tibbs v. State*, *supra*, 323 Md. 28. In that case, just prior to trial, Tibbs's counsel asked him whether he understood that he "[had] a right to have a trial by jury"; whether he understood "what a jury trial is"; whether he recalled a jailhouse conversation, held several days earlier, during which he had expressed to counsel a desire "to have the case tried before" the court; whether he "specifically waive[d]" his right to "have the matter tried before a jury"; whether anyone had "forced" him or "threatened" him into giving up his right to a jury trial; and whether he was giving up his jury trial right "freely and voluntarily." After each of these questions, Tibbs provided the appropriate responses, "Yes" in all instances except the penultimate query, to which he responded, "No, they haven't [forced or threatened me]." *Id.* at 30. At the conclusion of that brief examination, Tibbs's counsel addressed the court: "Your Honor, I would proffer to the Court that a waiver of a jury trial is freely and voluntarily tendered," to which the trial court replied, "All right." *Id.*

Following his convictions of four drug charges, *id.* at 30-31, Tibbs appealed, contending that his jury trial waiver "could not have been 'knowing' because the record was devoid of any information about the nature of a jury trial." *Id.* at 31. Although we affirmed

his convictions in an unreported opinion, the Court of Appeals reversed, holding that "the record [was] woefully deficient to establish that Tibbs knowingly and voluntarily relinquished his right to a jury trial," as that "record fail[ed] to disclose that Tibbs received any information at all concerning the nature of a jury trial." *Id.* If anything, the record in the instant case is even more "woefully deficient" to establish that appellant knowingly and voluntarily waived his right to a jury trial than the one in *Tibbs*.

In the case at bar, the court's exceedingly brief examination, in which it asked whether appellant had "listen[ed] to all of that," whether appellant had "discuss[ed] this with" his trial counsel "as well," whether appellant had "any questions about that," and whether it was appellant's "desire to freely and voluntarily give up [his] right to a trial by jury in this case," was tantamount to "go[ing] through the motions," *Valonis and Tyler*, 431 Md. at 567, and it did not "confirm[] for the appellate court[] that the trial judge was fully engaged in the process." *Szwed*, 438 Md. at 6 (opinion of Greene, J.). It is therefore clear that the waiver colloquy in the case at bar did not satisfy Rule 4-246(b), which "contemplates full compliance with both steps of the waiver procedure." *Nalls and Melvin*, 437 Md. at 687 (opinion of Greene, J.).

Our conclusion is further reinforced by the Committee Note which accompanies Rule 4-246(b). Although a committee note is not a part of the rule it accompanies, *see* Md. Rule 1-201(e), we nonetheless "read the Rules in light of the Committee notes." *Bijou v.*

Young-Battle, 185 Md. App. 268, 288 (2009). The Committee Note which immediately follows Rule 4-246(b) states:

> Although the law does not require the court to use a specific form of inquiry in determining whether a defendant's waiver of a jury trial is knowing and voluntary, the record must demonstrate an intentional relinquishment of a known right. What questions must be asked will depend upon the facts and circumstances of the particular case.
>
> In determining whether a waiver is knowing, the court should seek to ensure that the defendant understands that: (1) the defendant has the right to a trial by jury; (2) unless the defendant waives a trial by jury, the case will be tried by a jury; (3) a jury consists of 12 individuals who reside in the county where the court is sitting, selected at random from a list that includes registered voters, licensed drivers, and holders of identification cards issued by the Motor Vehicle Administration, seated as jurors at the conclusion of a selection process in which the defendant, the defendant's attorney, and the State participate; (4) all 12 jurors must agree on whether the defendant is guilty or not guilty and may only convict upon proof beyond a reasonable doubt; (5) if the jury is unable to reach a unanimous decision, a mistrial will be declared and the State will then have the option of retrying the defendant; and (6) if the defendant waives a jury trial, the court will not permit the defendant to change the election unless the court finds good cause to permit the change.
>
> In determining whether a waiver is voluntary, the court should consider the defendant's responses to questions such as: (1) Are you making this decision of your own free will?; (2) Has anyone offered or promised you anything in exchange for giving up your right to a jury trial?; (3) Has anyone threatened or coerced you in any way regarding your decision?; and (4) Are you presently under the influence of any medications, drugs, or alcohol?.

It is obvious that the minimal examination ("did you listen to all of that?") that took place here did not even begin to address any of the questions suggested in the Committee Note. Even if we were to assume that appellant actually followed, in detail, the lengthy questioning directed at his sister, understood what rights he was waiving, and communicated that understanding to the court through his answers, a dubious assumption at best, as he was not even warned to pay attention beforehand to the inquiry directed at her,[15] we note that several of the questions in the Committee Note, pertaining to voluntariness, are personal to the defendant. Specifically, whether anyone had "offered or promised" appellant anything in exchange for giving up his right to a jury trial; whether anyone had "threatened or coerced" him "in any way" regarding his decision; and whether appellant was, at that time, "under the influence of any medications, drugs, or alcohol," are questions that were never posed to appellant, and we may not merely infer what his answers to those questions would have been.

Although it is true, as the State insists, that no specific questions as to voluntariness must be posed unless there is a "trigger," *Aguilera v. State*, 193 Md. App. 426, 442-43 (2010) (citing *Abeokuto v. State*, 391 Md. 289, 321 (2006)), the total absence of such questions does

[15] *See Valonis and Tyler*, *supra*, 431 Md. at 567 (trial court "not permitted to presume as a matter of fact a knowing and voluntary waiver"); *Butler v. State*, 214 Md. App. 635, 647 (2013) ("appellate courts are not free to infer or interpolate a finding by the trial court that the waiver was knowing and voluntary"), *overruled on other grounds by Nalls and Melvin*, 437 Md. 674.

further confirm that the examination here was superficial at best. Moreover, in cases where Maryland appellate courts have upheld jury trial waivers in the absence of any questioning as to voluntariness, it has invariably been the case that questions addressed to the knowledge prong were directed to the defendant and answered by him. *See, e.g.*, *Kang v. State*, 393 Md. 97, 109-110 (2006); *Abeokuto*, 391 Md. at 320-21; *Hall, supra*, 321 Md. at 179-81; *Aguilera*, 193 Md. App. at 430-31. Here, in contrast, not only were there no questions addressed to appellant regarding voluntariness, there were also no questions addressed to him regarding knowledge of the rights he was waiving. *See Aguilera*, 193 Md. App. at 444 (observing that, in *Tibbs v. State, supra*, where the jury trial waiver was held invalid, not only was there "no explicit inquiry about voluntariness, . . . the court made no inquiry about the defendant's knowledge about jury trials").

Because Rule 4-246(b) governs "the waiver of a fundamental constitutional right," its provision "specifying that the defendant be examined on the record regarding his or her waiver of the right to a jury trial" is "subject to strict compliance." *Valonis and Tyler*, 431 Md. at 568. Clearly, that provision was not satisfied here, because appellant was not, in fact, "examined on the record." *Id.* Moreover, since the right at issue is personal to appellant, the mere fact that his co-defendant may have been adequately examined on the record in open court is not sufficient to strictly comply with Rule 4-246(b), as to appellant. Indeed, as the Court observed in *Valonis and Tyler*,

> **Strict compliance with the requirements of Rule 4-246(b) will ensure that there is an adequate examination of the defendant**, such that the judge may determine and announce on the record that the defendant's waiver was knowing and voluntary.

Id. at 570 (emphasis added). In the case at bar, the trial court's woefully inadequate examination of appellant fell far short of strict compliance with Rule 4-246(b).

We wish to emphasize that our holding should not be construed as precluding the appropriate exercise of a trial court's discretion in conducting its proceedings, specifically as applicable to its conduct of joint trials. If the trial court, in this instance, had notified appellant, prior to the examination of his co-defendant, that the ensuing inquiry also pertained to his own waiver of jury trial, this would be a far different case. Should a trial court wish to combine the examination of multiple defendants, we think the better practice is to require each co-defendant to answer the questions, as they are presented, but even if appellant had simply been alerted, prior to questioning of his sister, we would be more sympathetic to the State's argument that he should be deemed to have absorbed the contents of those questions.

Remedy

In *Nalls and Melvin*, the Court of Appeals, in addressing "the appropriate remedy in situations involving noncompliance with Rule 4-246(b)," reaffirmed its holdings in *Valonis and Tyler* that the failure to comply with the "determine and announce" requirement of Rule 4-246(b) is "'not a mere technicality and is not subject to harmless error analysis'"; and that

"the only appropriate sanction is a reversal." *Nalls and Melvin*, 437 Md. at 694-95 (opinion of Greene, J.) (quoting *Valonis and Tyler*, 431 Md. at 569); *id.* at 697-99 (Battaglia, concurring). In our view, an inadequate waiver colloquy is, if anything, an even more significant violation of Rule 4-246(b) than is a "determine and announce" violation, and therefore, the appropriate sanction can be no less. Indeed, the Court of Appeals long ago rejected the idea that anything short of a reversal could suffice when there is an inadequate waiver colloquy. *See Countess*, *supra*, 286 Md. at 462-63 (rejecting State's argument that there had been merely a "technical failure to comply with Rule 735 d" and that appropriate remedy should be obtained through post conviction proceeding). Accordingly, we reverse and remand for further proceedings.

JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY REVERSED. CASE REMANDED FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY PRINCE GEORGE'S COUNTY.

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0468

September Term, 2013

GREGG MARTI

v.

STATE OF MARYLAND

Meredith,
Kehoe,
Thieme, Raymond G., Jr.
(Retired, Specially Assigned),

JJ.

Dissenting Opinion by Kehoe, J.

Filed: October 5, 2015

I respectfully dissent. Plain error review is a discretionary exercise and, from my perspective, considerations of fairness and judicial economy weigh against its use in this case.

Mr. Marti was present in the court room for trial with his co-defendant. At the beginning of the proceeding, the lawyers for both defendants indicated to the court that their respective clients wished to waive their rights to a trial by jury. Mr. Marti was present while co-defendant's counsel explained the consequences of waiving a jury trial to her. Then, in response to questions from the trial court, Mr. Marti affirmed that: (1) he had listened to the explanation; (2) he had discussed the issue with his own counsel; and (3) he had no questions. In all likelihood, a different response to any of the court's inquiries would have triggered a more detailed examination from the trial court.

I believe that the principal problem with the trial court's examination of Mr. Marti was that the court failed to make specific inquiries as to Mr. Marti's level of education and whether he was under the influence of drugs or alcohol. Had counsel objected, it is almost certain that the court would have promptly corrected its oversight. But no objection was made and, as the Majority explained, *Nalls* and *Melvin* make it clear that a timely objection is necessary to preserve contentions of this sort for appellate review.

In *Chaney v. State*, 397 Md. 460, 468 (2007), the Court of Appeals explained that plain error review:

> is a discretion that appellate courts should rarely exercise, as considerations of both fairness and judicial efficiency ordinarily require that all challenges that a party desires to make to a trial court's ruling, action, or conduct be presented

> in the first instance to the trial court so that (1) a proper record can be made with respect to the challenge, and (2) the other parties and the trial judge are given an opportunity to consider and respond to the challenge.

I believe that Mr. Marti's case is an example of the second concern articulated by the *Chaney* Court. I would affirm the convictions.