Circuit Court for Allegany County
Case No. C-01-CR-18-000067

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 957

September Term, 2018

JOHN NICHOLAS

v.

STATE OF MARYLAND

Berger,
Arthur,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: June 5, 2019

*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 Allegany County, John Marvin Nicholas, appellant, was convicted of second-degree assault. He now appeals, claiming that his conviction must be reversed because he did not validly waive his right to a jury trial. The State concedes as much, and we agree that reversal is required. Mr. Nicholas also challenges the sufficiency of the evidence to convict him, which we address even though we reverse his conviction. *See Benton v. State*, 224 Md. App. 612, 629 (2015) (under double jeopardy principles, "a retrial may not occur if the evidence was insufficient to sustain the conviction in the first place"). Because the evidence was sufficient to sustain Mr. Nicholas's conviction, we shall remand for further proceedings.

I.

Mr. Nicholas first contends that the trial court erred when it accepted his jury trial waiver without ensuring that he "knowingly" and "voluntarily" relinquished his right to a jury trial, as required by Maryland Rule 4-246(b), the Sixth Amendment to the United States Constitution, and Articles 5, 21, and 23 of the Maryland Declaration of Rights. The State concedes that "the waiver colloquy and the circuit court's finding that [Mr.] Nicholas waived his right to a jury trial knowingly were deficient." We agree that the record does not demonstrate that Mr. Nicholas knowingly waived his right to a jury trial and shall reverse for that reason.[1]

[1] We note that, absent a contemporaneous objection, a violation of Rule 4-246(b) may not be raised, as of right, on appeal. *See Nalls v. State*, 437 Md. 674, 693-94 (2014). Therefore, we do not address Mr. Nicholas's claim that the court violated that Rule. However, we are persuaded that no objection was required to preserve his claim that the

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When Mr. Nicholas's case was called for trial, defense counsel indicated that he intended to waive his right to a jury trial and proceed by way of a bench trial. With the trial court's permission, defense counsel then engaged in the following colloquy:

> [DEFENSE COUNSEL]: Ok. Mr. Nicholas, you understand that whenever this case came through in the Circuit Court, we had that confusion about your initial appearance, but eventually we got it sent in for a jury trial. You do recall that, right?
>
> MR. NICHOLAS: Yes, sir.
>
> [DEFENSE COUNSEL]: All right, and after discussions with you and I, I think we reached an agreement strategically that we are going to proceed with a bench trial today, but you understand that you are absolutely under no obligation. Even if I think it is a good idea, if you wanted to have a jury trial, you are the final arbitrator of what kind of trial we are going to have. You understand that?
>
> MR. NICHOLAS: Yes, sir.
>
> [DEFENSE COUNSEL]: And you understand that if you wanted to have a jury trial, even over my objection, you could, we could have a trial before a jury, instead of just a Judge. Do you understand that?
>
> MR. NICHOLAS: Yes, sir.
>
> [DEFENSE COUNSEL]: And do you give up your right to a jury trial and elect to proceed to a bench trial?
>
> MR. NICHOLAS: Yes, sir.

(continued)
jury trial waiver was constitutionally deficient because the right to a jury trial may not be waived by a mere procedural default. *See Curtis v. State*, 284 Md. 132, 143 (1978) (observing that "[t]his high standard [of an intentional relinquishment or abandonment of a known right or privilege] has been applied regarding the waiver of the right to trial by jury" (citation omitted)).

> [DEFENSE COUNSEL]: Do you have any questions about what that means?
>
> MR. NICHOLAS: No, sir.

Based on this colloquy, the court found that Mr. Nicholas had "been advised of his rights to have a jury trial and he's knowingly waived those rights and is requesting a bench trial, which is also his right to do."

To pass constitutional muster, the waiver of the right to a jury trial must be "knowledgeable and voluntary," that is, that there has been an intentional relinquishment or abandonment of a known right or privilege. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Although courts need not engage in any "specific litany," the record must show that the defendant has some information regarding the nature of a jury trial. *Abeokuto v. State*, 391 Md. 289, 320 (2006) (quotation marks and citation omitted). "Whether there is an intelligent, competent waiver must depend on the unique facts and circumstances of each case." *Valiton v. State*, 119 Md. App. 139, 148 (1998) (quotation marks and citation omitted). "If the record in a given case does not disclose a knowledgeable and voluntary waiver of a jury trial, a new trial is required." *Smith v. State*, 375 Md. 365, 381 (2003) (citations omitted).

Here, the waiver colloquy is almost identical to the colloquy that occurred in *Tibbs v. State*, 323 Md. 28 (1991). In that case, defense counsel asked Mr. Tibbs whether he understood that he "[had] a right to have a trial by jury"; whether he understood "what a jury trial is"; whether he remembered speaking with counsel at the jail and expressing his desire to have the case tried before the court; whether he waived his right to "have the

matter tried before a jury"; and whether he was giving up his right to a jury trial "freely and voluntarily." After Mr. Tibbs responded "Yes" to each of defense counsel's questions, the court accepted his jury trial waiver and Mr. Tibbs proceeded with a bench trial.

On appeal, the Court of Appeals held that "the record [was] woefully deficient to establish that Tibbs knowingly and voluntarily relinquished his right to a jury trial" because it "fail[ed] to disclose that [the appellant] received any information at all concerning the nature of a jury trial[.]" *Id*. at 31. The Court further noted that it was "not sufficient that an accused respond affirmatively to a naked inquiry, either from his lawyer or the court, that he understood that he has a right to a jury trial [and] that he knows 'what a jury trial is[.]'" *Id*. at 32. Therefore, it reversed Mr. Tibbs's conviction, finding that "constitutional due process requirements" had not been met. *Id*. In the instant case, the record is equally deficient to establish that Mr. Nicholas knowingly waived his right to a jury trial. In fact, unlike *Tibbs*, defense counsel in this case did not even ask Mr. Nicholas if he understood what a jury trial was. Consequently, his conviction must be reversed, and the case remanded for a new trial.

II.

Mr. Nicholas also claims that the evidence was insufficient to sustain his conviction because he testified that he was acting in self-defense and the "trial judge failed to address whether his conduct was legally justified." However, the court was not required to explain all its reasons in arriving at the verdict. *See Chisum v. State*, 227 Md. App. 118, 139 (2016). Moreover, "the issue of legal sufficiency of the evidence is not

concerned with the findings of fact based on the evidence or the adequacy of the fact-findings to support a verdict." *Id*. at 129. Rather, "[i]t is concerned only, at an earlier pre-deliberative stage, with the objective sufficiency of the evidence itself to permit the factfinding even to take place." *Id*. at 129-30. Here, the victim testified that Mr. Nicholas pushed her multiple times. And that testimony, standing alone, was sufficient to establish all the elements of second-degree assault beyond a reasonable doubt. To the extent that Mr. Nicholas claimed that he was acting in self-defense, the trial court, as the fact-finder, was free to believe all, some, or none of his testimony.

JUDGMENT OF THE CIRCUIT COURT FOR ALLEGANY COUNTY REVERSED. CASE REMANDED TO THE CIRCUIT COURT FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY ALLEGANY COUNTY.