UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2483

September Term, 2014

MARIA CARMEAN BYRD

v.

STATE OF MARYLAND

Krauser, C.J.
Berger,
Reed,

JJ.

Opinion by Krauser, C.J.

Filed: November 24, 2015

Following a bench trial in the Circuit Court for Wicomico County, Maria Carmean Byrd, appellant, was convicted of two counts of first-degree assault, second-degree assault, and reckless endangerment. She was thereafter sentenced to a term of 10 years' imprisonment with all but two years suspended on one of the two counts of first-degree assault; a sentence of 10 years' imprisonment with all but two years suspended on the second count of first-degree assault, which was to run consecutive to the foregoing sentence, and three years of supervised probation upon release.

Byrd presents one question for our review and that is: Did the trial court err by accepting her waiver of her right to a jury trial? Because we find that the matter was not preserved for appellate review, we shall affirm the judgments of the circuit court.

Background

Appellant was convicted of charges stemming from an altercation she had with two guests of her neighbors, the details of which are not relevant to the issue before us. When the case was called for trial, defense counsel asked whether the court wanted appellant's waiver of a jury trial on the record. This exchange ensued:

> THE COURT: Thank you for reminding me. Would you tell her about her right to a jury trial and make sure she understands?
>
> [DEFENSE COUNSEL]: Thank you, Your Honor. Ms. Byrd, you have a right to a jury trial in this case. Do you understand that?
>
> [APPELLANT]: Yes.

> [DEFENSE COUNSEL]: Have I explained to you previously what a jury trial is? It would be 12 people chosen at random that would decide whether you are guilty or not as opposed to a single judge?
>
> [APPELLANT]: Yes.
>
> [DEFENSE COUNSEL]: Do you understand?
>
> [APPELLANT]: Yes.
>
> THE COURT: All 12 would have to vote guilty to find you [guilty] and all 12 not guilty to finding you not guilty. Do you understand?
>
> [APPELLANT]: Uh-huh.
>
> THE COURT: Any other vote would be a hung jury. Do you understand?
>
> [APPELLANT]: Yes.
>
> THE COURT: Knowing all that and having to explain to you before, is it your desire to waive your right to a jury trial and to be tried by Judge Jackson this morning?[1]
>
> [APPELLANT]: Yes.
>
> [DEFENSE COUNSEL]: Yes. Is there anything else judge?
>
> THE COURT: She knowingly and voluntarily waives her right to a jury trial.

Appellant did not object to the court's ruling and proceeded to trial before the court.

[1] As appellant points out, there appears to be an error in the transcript. This question, and possibly the two questions that preceded it, which are attributed, by the transcript, to the court, were more likely to have been posed by defense counsel.

Discussion

A criminal defendant's right to a jury trial is a fundamental right guaranteed under both the federal and Maryland State Constitutions. *See* U.S. CONST. amend. VI, XIV, § 1; Md. Declaration of Rights, Art. 5, 21, 24. But a defendant may elect to waive this right, pursuant to Maryland Rule 4-246(b). That rule provides:

> 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.

"The waiver of a jury trial is a two-step process. The trial judge must determine that the waiver is knowing and voluntary. And the trial judge must make that finding on the record." *Meredith v. State*, 217 Md. App. 669, 673-74, *cert. denied*, 440 Md. 26 (2014).

As for the nature and extent of the inquiry that a court should pursue in determining whether the waiver by a jury is knowing and voluntary, the Committee Note to Rule 4-246(b) states:

> 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?

Committee Note to Md. Rule 4-246(b) (emphasis in original). While the Committee Notes to the Rules are not part of the Rules themselves, *see* Md. Rule 1-201(e), we may "read the Rules in light of the Committee [N]otes.'" *Aguilera v. State,* 193 Md. App. 426, 442 (2010) (quoting *Bijou v. Young-Battle*, 185 Md. App. 268, 288 (2009)).

Appellant contends that the colloquy preceding her jury trial waiver was "fatally deficient," first, because she was misinformed about the jury selection process, given that she was told that the jury would be picked at random, and, second, because she was not provided with sufficient information about the nature of a jury trial. That is to say, she was not advised that she would be presumed innocent if tried by a jury or that a jury would have to find her guilty beyond a reasonable doubt. Thus, appellant claims that the judgments entered against her should be reversed, and the case should be remanded for a new trial. Unfortunately for appellant, her claims were intentionally, or inadvertently, not preserved for our review.

To preserve the issue of whether a trial judge has complied with Rule 4-246(b) for appellate review, a contemporaneous objection must be made, as the Court of Appeals observed in *Nalls & Melvin v. State*, 437 Md. 674, 693 (2014). *See also*, *Meredith*, 217 Md. App. at 674-75. When a defendant does not object to either the waiver procedure, its content, or the trial court's announcement that the jury trial waiver was made knowingly and voluntarily, the effectiveness of that waiver is not preserved for appellate review. Because appellant did not object to the court's acceptance of her jury trial waiver, her claim as to the voluntariness of that waiver was not preserved for our consideration.

In any event, even if the issue had been preserved, there is no merit in appellant's contention that her jury trial waiver was invalid. "In determining whether the defendant has knowingly and voluntarily waived his right to a jury trial, the questioner need not recite any fixed incantation." *Martinez v. State*, 309 Md. 124, 134 (1987) (citation omitted). *See also Boulden v. State*, 414 Md. 284, 295 (2010) ("there is no fixed dialog that must take place with a defendant to affect a valid outcome.") "The court must, however, 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. Hall*, 321 Md. 178, 182-83 (1990) (citing *Martinez*, 304 Md. at 134). "[W]hether there has been an intelligent waiver of the jury trial right depends on the facts and circumstances of each case." *Id*. at 182 (citations omitted).

Under the facts and circumstances of the present case, it is clear that appellant had "some knowledge" of her right to a jury trial. She was advised that a jury was comprised of 12 people that would have to find her guilty unanimously, but that, if she waived her right to a jury trial, the court alone would make that finding. Moreover, the record reflects that appellant's attorney had discussed the right to a jury trial with her prior to trial and that, based on that discussion, appellant had made the decision to waive her right to a jury. *See Walker v. State*, 406 Md. 369, 382-83 (2008) (fact that defendant is represented by counsel is a factor supporting a determination that she had "some knowledge" of her jury trial rights).

Furthermore, in making a determination that a defendant has made a knowing waiver of their right to a jury trial, the "ultimate inquiry" is "whether there has been an *intentional relinquishment or abandonment of a known right or privilege*." *Winters v. State*, 434 Md. 527, 537 (2013) (citing *Boulden*, 414 Md. at 295) (emphasis added). Appellant, in electing a bench trial, did not waive either the requirement that the State establish her guilt beyond a reasonable doubt or that she be presumed innocent. These legal precepts applied to appellant's case regardless of whether she was tried by a jury or by a judge. *See Commonwealth of Pennsylvania v. Quarles*, 456 A.2d 188, 191 (1983) ("By definition, a waiver is a relinquishment of a right or remedy. . . . The [defendant] never relinquished his

right to have a factfinder determine his guilt beyond a reasonable doubt . . . [but] merely relinquished his right to have a jury as a factfinder as opposed to a judge.").

While acknowledging that there is no requirement that trial courts must provide the defendant with details of the jury selection process,[2] appellant also claims that her waiver was not made knowingly because, according to appellant, she was misinformed about the jury selection process when she was told that a jury was "12 people chosen at random" but was not also advised that she and her attorney would have had an opportunity to participate in the selection process. Even if this argument had been preserved, we are not convinced that appellant would be entitled to relief because there is no indication in the record that appellant was or was likely to have been affirmatively misled.

In *Winters, supra,* upon which appellant relies, the Court of Appeals held that the trial judge erred in accepting a defendant's waiver of his right to a jury trial where the court provided erroneous information about the standard of proof and the procedure for determining whether a defendant was criminally responsible. 434 Md. at 535. Specifically, the judge incorrectly informed Winters during the colloquy that if he wished to prove that he was not criminally responsible for the offense with which he was charged, he would have to prove it beyond a reasonable doubt, when, in fact, the standard of proof is the less stringent "preponderance of the evidence." *Id*. at 538. Citing the significant difference

[2] *See Hall v. State*, 321 Md. 178, 183 (1990) (trial court not required to advise defendant as to the details of the jury selection process).

between proving a fact beyond a reasonable doubt and proving a fact by a preponderance of the evidence, the Court held that:

> [m]ost critical to the waiver of Winters's right to a jury trial is that the instruction incorrectly indicated to Winters that when proving that he was not criminally responsible, he would have to do so beyond a reasonable doubt. . . . The trial judge's misstatement may have misled Winters to believe that the task of proving that he was not criminally responsible in a jury trial would be a more difficult task than it actually is under Maryland law. This makes a jury trial appear less attractive and would reasonably influence Winters's decision to waive his right.

Id. Moreover, in *Morales v. State*, 325 Md. 330, 339 (1992), the Court of Appeals held that defendant's decision to waive his constitutional right to testify in his own defense was not knowingly and intelligently made where defendant apparently changed his mind about testifying after the trial court incorrectly advised him that all of his prior convictions could be used to impeach his credibility.

Here, the court's information that the jury was composed of "12 people selected at random" was certainly a misstatement. The court was obviously referring to the fact that the jury pool, not the jury itself, was randomly selected. In any event, the failure of the court to further state that appellant and her attorney would participate in the selection process, was not the type of erroneous information that undermined the judicial advisements in *Winters* or *Morales* and was not likely to have misled appellant into waiving her right to a jury trial. Although the better practice would be for the trial court to adhere to the protocol set forth

in the Committee Notes to Rule 4-246(b), the facts and circumstances of this case establish no error in the trial court's acceptance of appellant's jury trial waiver.

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