UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1901

September Term, 2015

MAJOR LENELL RICHARDSON

v.

STATE OF MARYLAND

Krauser, C.J.,
Woodward,
Salmon, James, P.
(Retired, Specially Assigned),

JJ.

Opinion by Woodward, J.

Filed: August 4, 2016

Appellant, Major Lenell Richardson, was convicted of possession with intent to distribute a controlled dangerous substance (cocaine) after a bench trial on an agreed statement of facts in the Circuit Court for Wicomico County. He was thereafter sentenced as a third time offender to a term of twenty-five years' imprisonment without the possibility of parole under the subsequent offender penalty provisions found in Maryland Code (2002, 2012 Repl. Vol.), § 5-609(c) of the Criminal Law Article.

Before this Court, appellant presents one question for our review: Did the trial court commit reversible error by conducting a belated jury trial waiver and providing inaccurate advice about appellant's trial options?

For the reasons that follow, we affirm the judgment of the circuit court.

BACKGROUND

As indicated, appellant pleaded not guilty and proceeded on an agreed statement of facts. At the outset of that proceeding, the trial court conducted *voir dire* of appellant and explained the many trial rights that he would be giving up by not contesting the facts of his case. Then, the State recited the agreed statement of facts.[1] Immediately after the recitation

[1] The statement of facts established that appellant, with the assistance of others, was seen distributing what the police believed to be controlled dangerous substances in the parking lot of a shopping center. Once appellant left the shopping center parking lot as a passenger in a black Jeep Cherokee, the police stopped the vehicle and conducted a K-9 scan, which resulted in a positive alert for the presence of an odor of narcotics. When the driver, Lateasha Whitehead, exited the vehicle, a police officer noticed that her pants were unbuttoned. When the officer asked Whitehead about her pants, "[s]he immediately told detectives that her pants were unbuttoned because she had just concealed narcotics in her vagina at the request of [appellant]." At the police station, the police recovered a capsule from Whitehead's vagina containing "53 individually wrapped pieces of crack cocaine."

(continued…)

of the statement of facts, the court addressed appellant's waiver of his right to a jury trial, as follows:

THE COURT:	Stand up a minute, Mr. Richardson. Mr. Richardson, I have not yet advised you of your rights to a jury. You understand you have the absolute right to be tried by a jury on these charges? Do you understand that?
[APPELLANT]:	Yes.
THE COURT:	In a jury trial, 12 people selected at random from the community would hear the evidence. After hearing the evidence, they would all have to agree upon their verdict. They would all have to be convinced beyond a reasonable doubt of your guilt before a jury would find you guilty, and you and [defense counsel] would have the right to participate in the selection of that jury? Do you understand that?
[APPELLANT]:	Yes.
THE COURT:	**And you could be tried by a jury or you can waive your right to a jury trial and be tried by the Court without a jury, in which event, I would hear the evidence, and I would decide your guilt or innocence based on that statement of facts that was just presented. Do you understand that?**

After waiving their *Miranda* rights, both appellant and Whitehead admitted that appellant gave the capsule to Whitehead to hide after they were stopped by police.

[APPELLANT]:	Yes.
THE COURT:	And if you elected a jury trial, I would also give you the right to elect to be tried by a different judge if you so desired. Do you understand that?
[APPELLANT]:	Yes.
THE COURT:	Understanding all of that, do you want to be tried by a jury or do you want to waive your right to a jury trial and be tried by this Court?
[APPELLANT]:	Yes.
THE COURT:	What? Do you want to waive your right to a jury trial—
[APPELLANT]:	Yes.
THE COURT:	—and be tried by the Court?
[APPELLANT]:	Yes.
THE COURT:	Okay. I find the defendant has knowingly and voluntarily waived his right to a trial by jury. All right. You may be seated. Now, do you wish to be heard on guilt or innocence based on the facts as submitted?
[DEFENSE COUNSEL]:	I don't. I submit on the facts, Your Honor.

(Emphasis added).

DISCUSSION

The Contentions

Appellant contends that the trial court erred in two discrete ways when conducting the jury trial waiver colloquy. He first argues that the trial court erred by conducting the colloquy after the agreed upon statement of facts was recited, in violation of Maryland Rule 4-246, which states that a "defendant may waive the right to a trial by jury at any time before the commencement of trial." *See* Md. Rule 4-246(b). Second, he contends that the trial court erred by not explaining that appellant could have had a "traditional bench trial," in which he could both contest the State's evidence and present his own evidence.

The State responds that appellant's claims are waived, because no objection was made at trial to the court's allegedly defective jury trial waiver colloquy. In the alternative, the State argues that the trial court made no error.

Timing of Jury Trial Waiver Colloquy

Pursuant to Maryland Rule 8-131(a), our scope of appellate review is "ordinarily" limited to an issue that was "raised in or decided by the trial court." Rule 8-131(a) has two purposes: to ensure fairness to all parties and to promote the orderly administration of the law. *Boulden v. State*, 414 Md. 284, 297 (2010). Appellant's argument that the jury trial waiver colloquy was untimely in violation of Rule 4-246 was unquestionably waived when no objection was raised at trial.

In *Boulden*, the Court of Appeals considered the application of the preservation requirement to an error almost identical to appellant's claim of error regarding the timing

of the jury trial waiver colloquy. *See id.* at 296. There, Boulden argued "that a criminal defendant may not waive effectively his or her right to a jury trial" where the waiver colloquy took place at the close of the State's case. *Id.* The Court of Appeals held that, because of the failure to interpose a timely objection, "Boulden waived her right to complain about the timing and effectiveness of the jury trial waiver colloquy." *Id*. at 296-97. We believe that *Boulden* is controlling and hold that appellant has failed to preserve for appeal his argument that the trial court erred by conducting the jury trial waiver colloquy after the State had recited the agreed upon statement of facts.

Furthermore, even if appellant's argument regarding the trial court's alleged violation of Rule 4-246 was preserved, *Boulden* forecloses it. *See Boulden*, 414 Md. at 313 (holding, after exercising its discretion under Rule 8-131(a) to decide the unpreserved issue, that the trial court's violation of Rule 4-246 was harmless error and did not prejudice Boulden, because she "stated unambiguously in open court that she understood the right and that she wished to waive it," and "it is not unreasonable to surmise that the failure to object was a matter of strategic choice").

The Omission of Advice About a "Traditional Bench Trial"

Again, because he failed to object to the jury trial waiver colloquy, appellant has not preserved his second argument for appellate review. *See* Md. Rule 8-131(a); *Nalls v. State*, 437 Md. 674, 693 (2014) ("[T]he 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.").

Appellant would fare no better on his second argument even if it was preserved. Appellant contends that the trial court did not adequately ensure that his jury trial waiver was knowing and voluntary. Appellant's argument rests entirely on the court's explanation to appellant during the jury trial waiver colloquy that, if appellant waived his right to a jury trial, the trial court "would hear the evidence, and [ ] would decide [appellant's] guilt or innocence based on that statement of facts that was just presented." Appellant claims that the court erred when it did not also explain that, if appellant wanted to waive his right to a jury trial, that he had the option of a "traditional bench trial," in which "the State would have been compelled to present evidence against him, the defense would have had the opportunity to cross examine the State's witnesses, and [appellant] would have been able to present his own evidence."

Appellant's contention overlooks the fact that appellant had, by the point where the jury trial waiver occurred, already validly waived his right to contest the evidence. The following examination of appellant occurred on the record before the agreed upon statement of facts was recited:

THE COURT:	We are going to go ahead with a not guilty statement of facts.
[DEFENSE COUNSEL]:	A not guilty statement of facts, Judge, yes.
THE COURT:	All right. You are [appellant]?
[APPELLANT]:	Yes, sir.
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THE COURT:	All right. Your attorney indicates you want to plead not guilty but proceed on a statement of facts to the charge of possession with the intent to distribute a controlled dangerous substance, not marijuana. The maximum penalty if you are found guilty of that charge is 20 years in jail or a $25,000 fine.
[PROSECUTOR]:	Actually, Your Honor, we served notice on the defendant. He is now facing 25 years mandatory minimum without the possibility of parole.
THE COURT:	That's because of the subsequent offender?
[PROSECUTOR]:	Yes, because of the subsequent offender.
THE COURT:	25-year mandatory minimum with no parole. Do you understand that?
[APPELLANT]:	Yes.
THE COURT:	If I accept the plea—or if I find you guilty of those statement of facts, then the maximum sentence would be 25 years mandatory minimum sentence. So that means it would be imposed, the 25 years without the possibility of parole. Do you understand that?
[APPELLANT]:	Yes.
THE COURT:	And do you understand what that charge means, possession with the intent to distribute a controlled dangerous substance not marijuana, and what the State would have to prove in order to prove you guilty?

[APPELLANT]:	Yes.
THE COURT:	Have you discussed that with [defense counsel], and you understand it?
[APPELLANT]:	Yes.
THE COURT:	Is that correct, [defense counsel]?
[DEFENSE COUNSEL]:	Judge, we have, many times. Thank you.
THE COURT:	Okay. And you understand **when you proceed on a statement of facts, there aren't any witnesses being called.** The State will just give me a statement of facts, and I will decide your guilt or innocence based on that statement of fact. **Under our Constitution, you have the right to confront and cross-examine the witnesses against you**. When you proceed on a statement of facts, there are no witnesses, **so you will be waiving that right.** Do you understand that?
[APPELLANT]:	Yes.
THE COURT:	And you also understand that under our Constitution, **you could testify if you wanted to**? You wouldn't have to because **you have the absolute Constitutional right to remain silent**. And if you remain silent, neither a Judge nor a jury could infer in any way that you were guilty just because you didn't testify. **But when you proceed on a statement of facts, you wouldn't have the opportunity to testify if you wanted to.** Do you understand that?

[APPELLANT]:	Yes.
THE COURT:	And you also understand if I find you guilty, you would have 30 days to file an appeal to the Court of Special Appeals. Do you understand that?
[APPELLANT]:	Yes.
THE COURT:	How old are you, sir?
[APPELLANT]:	43.
THE COURT:	How far did you go in school?
[APPELLANT]:	I got my GED.
THE COURT:	You can read and write then, I assume?
[APPELLANT]:	Yes.
THE COURT:	Okay. Has anybody threatened you with anything or promised you anything to get you to proceed on a statement of facts?
[APPELLANT]:	No.
THE COURT:	Are you under the influence of any alcohol, drugs or medications this morning?
[APPELLANT]:	No.
THE COURT:	[Defense counsel], are you satisfied that your client understands the rights he is waiving by proceeding on a statement of facts?
[DEFENSE COUNSEL]:	I do, Judge.

Appellant cites to no authority, and we are otherwise not aware of any, standing for the proposition that a knowing jury trial waiver must contain specific advice about a "traditional bench trial." The Committee Note for Rule 4-246, which sets forth areas of inquiry for determining whether a waiver is knowing, makes no mention of bench trials at all.[2] Moreover, the jury trial waiver was otherwise valid. When asked, appellant said that

[2] The Committee Note reads:

> 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
>
> (continued…)

he understood that he had an "absolute right to be tried by a jury on these charges," and that

> [i]n a jury trial, 12 people selected at random from the community would hear the evidence. After hearing the evidence, they would all have to agree upon their verdict. They would all have to be convinced beyond a reasonable doubt of your guilt before a jury would find you guilty, and you and [defense counsel] would have the right to participate in the selection of that jury[.]

Under the circumstances of this case, we find no error and affirm the judgment of the circuit court.

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

> 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?

Md. Rule 4-246 Committee note (emphasis in original). *See also Nalls*, 437 Md. at 689 & n.4.