Circuit Court for Cecil County
Case No. C07-CR-17-016

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2286

September Term, 2017

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ROBERT F. FLEEGER, JR.

v.

STATE OF MARYLAND

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

JJ.

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PER CURIAM

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Filed: March 4, 2019

Following a bench trial in the Circuit Court for Cecil County, Robert F. Fleeger, Jr., the appellant, was convicted of two counts of possession of child pornography in violation of Md. Code Ann. (2002, 2012 Repl. Vol.), Crim. Law § 11-208.[1] He appeals, arguing that his convictions 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. Fleeger also challenges the sufficiency of the evidence to convict him, which we address even though we reverse his convictions. *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"). We hold that the evidence was sufficient to sustain Mr. Fleeger's convictions and, thus, remand for further proceedings.

**I.**

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

> 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

[1] The court granted Mr. Fleeger's motion for judgment of acquittal as to five counts of distribution of child pornography and/or possession with intent to distribute child pornography pursuant to Md. Code Ann. (2002, 2012 Repl. Vol.), Crim. Law § 11-207.

> 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 (2014).

When this case was called for trial, defense counsel introduced himself and the court said, "I have had a chance to review the file, and I take it this is a bench trial." Defense counsel replied, "Yes, your Honor, please." After resolving preliminary motions, the court directed the State to call its first witness. A waiver in accordance with Rule 4-246(b) did not occur on the record. Accordingly, we agree with the parties that the convictions must be reversed, and the case remanded for a new trial.[2] *See Smith v. State*, 375 Md. 365, 381 (2003) ("If the record in a given case does not disclose a knowledgeable and voluntary waiver of a jury trial, a new trial is required") (citations omitted).

**II.**

Mr. Fleeger was convicted of two counts of possession of child pornography relative to two videos found on a laptop and a USB drive recovered during a search of his house. Each video depicted two girls (possibly the same two girls) mostly nude, engaged

[2] Ordinarily, to challenge the validity of a jury trial waiver, a defendant must make a contemporaneous objection in the trial court. *See Spence v. State*, 444 Md. 1, 14-15 (2015). Although there was no objection here, we shall, in this case, considering the complete lack of any on-the-record examination of Mr. Fleeger, exercise our discretion to review the unpreserved claim pursuant to Maryland Rule 8-131(a).

in sexual contact with each other. When the videos were played at trial, the court described them for the record as depicting "young girls" who were "obviously prepubescent[.]"

Defense counsel moved for judgment of acquittal at the close of the State's case, arguing that the State had failed to prove that the girls were under age 16, as required by the possession of child pornography statute.[3] The court rejected that argument, opining:

> I don't have any question about that. I don't think anybody could look at that –
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> ***
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> – film and think that the girl was – and the statute specifically allows the trier of fact to determine that,[4] and I mean, I'm determining that she was under sixteen. If I had to guess I would say she was, you know, under ten or thereabouts[.]

[3] Crim. Law § 11-208 provides, in pertinent part:

> (a) A person may not knowingly possess and intentionally retain a film, videotape, photograph, or other visual representation showing an actual child *under the age of 16 years*:
> (1) engaged as a subject of sadomasochistic abuse;
> (2) engaged in sexual conduct;
> (3) in a state of sexual excitement.

(Emphasis added.)

[4] The trial court is mistakenly referring to a provision of the distribution of child pornography statute, codified at Crim. Law § 11-207.

Defense counsel reiterated this argument in his renewed motion for judgment of acquittal at the close of all the evidence. The court denied the motion, noting again that it was "convinced they're under sixteen" and that "anybody would draw that conclusion."

On review of the sufficiency of the evidence, our only task is to determine whether the evidence, viewed in the light most favorable to the State, "was supported by either direct or circumstantial evidence by which any rational trier of fact could find [the defendant] guilty beyond a reasonable doubt [of possession of child pornography]." *Moye v. State*, 369 Md. 2, 12-13 (2002). Mr. Fleeger contends the State was required to adduce expert medical testimony that the appearance of the subjects in the videos was consistent with a child under age 16.[5] "Expert testimony is not required 'on matters of which the [fact finder] would be aware by virtue of common knowledge.'" *Sewell v. State*, 239 Md. App. 571, 635 (2018) (quoting *Hartford Acc. & Indem. Co. v. Scarlett Harbor Assocs. Ltd. P'ship*, 109 Md. App. 217, 257 (1996)). There might be cases in

[5] Mr. Fleeger's argument rests, in part, upon the inclusion of a provision in the statute criminalizing the creation and/or distribution of child pornography that permits the fact finder to determine if the subjects of the visual depiction are minors by relying upon: "its own observation." Crim. Law § 11-207(c)(2). He relies upon the "negative implication" rule of statutory interpretation for the proposition that the legislature, by excluding this provision from Crim. Law § 11-208, intended to prohibit the fact finder from deciding based upon its own observation that the subject of a visual depiction was under age 16. The negative implication rule only applies to guide statutory interpretation within the same statute, not to separate statutes enacted at different times. *See Miller v. Miller*, 142 Md. App. 239, 251 (2002) ("negative implication" rule of statutory interpretation applies when the legislature "included particular language in one section of a statute, but omitted it in another section *of the same act*") (citing *Lindh v. Murphy*, 521 U.S. 320 (1997)) (emphasis added).

which the age of a subject in a video or photograph was ambiguous, necessitating expert testimony to aid the trier of fact in assessing their developmental stage, but this is not that case. The court found, based upon circumstantial evidence within its common knowledge of human development, that the two girls depicted in the videos were "prepubescent" and much younger than age 16. Thus, we are satisfied that the evidence was legally sufficient to convict Mr. Fleeger.

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