Circuit Court for Washington County
Case No. C-21-CR-24-000153

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1996

September Term, 2024

KEHINDE OLUWATOBI OSOSANYA

v.

STATE OF MARYLAND

Graeff,
Tang,
Raker, Irma S.
(Senior Judge, Specially Assigned),

Opinion by Raker, J.

Filed: April 7, 2026

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

Appellant, Kehinde Ososanya, was convicted in a bench trial in the Circuit Court for Washington County of second-degree assault and abuse of a vulnerable adult. Appellant presents the following questions for our review:

> "1. Did the absence of a valid jury waiver violate Mr. Ososanya's constitutional rights to a jury trial?
>
> 2. Whether the evidence was insufficient to sustain the convictions?"

Finding error, we shall reverse and remand.

I.

On March 26, 2024, appellant was charged with abuse of a vulnerable adult, Mr. Alex Koloian, in the second degree and second-degree assault. After a bench trial on August 28, 2024, appellant was convicted of both charges and sentenced to 5 years of incarceration, all but 1 year suspended, on count 1, and 10 years of incarceration, all suspended, on count 2, followed by 5 years supervised probation.

Prior to the commencement of trial, the court engaged in the following colloquy regarding appellant's right to a jury trial:

> "THE COURT: Alright. In that case, [DEFENSE COUNSEL], does your client plead guilty or not guilty?
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> [DEFENSE COUNSEL]: Not guilty, Your Honor.
>
> THE COURT: Alright. Does he wish to be tried by a jury of his peers or by the bench?
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> [DEFENSE COUNSEL]: He wishes to try by the bench, Your Honor.
>
> THE COURT: And does your client waive the reading of the charges?

[DEFENSE COUNSEL]: He does waive the reading of the charges, Your Honor.

THE COURT: I'm sorry, he does?

[DEFENSE COUNSEL]: He does.

THE COURT: He does waive the reading of them?

[DEFENSE COUNSEL]: Yes.

THE COURT: Thank you. Alright."

The case proceeded to trial as a bench trial.

We glean the following facts from the trial record. Appellant worked at The Arc of Washington as a Direct Support Professional for people with intellectual and developmental disabilities, starting on December 18, 2022. Along with Raymond Landsdowne, another Direct Support Professional, appellant managed the care of Alex Koloian, the victim in this case, who lived in an Arc facility called Dam4B. At trial, the State's theory of the case was that appellant became frustrated with Mr. Koloian and used inappropriate physical force to subdue him while at an urgent care. Appellant testified in his defense, and maintained that he did not strike, hit or abuse Mr. Koloian.[1]

On behalf of the State, Meghan Janeuk, the senior director of quality assurance at The Arc, testified that she helps support individuals who have "problematic behaviors" within the organization. She creates behavior plans, which are tools for staff to know how to work with an individual "in the most effective and efficient manner while maintaining

[1] In his brief before this Court, appellant's defense has changed. He no longer maintains that he did not strike Mr. Koloian, but instead, for the first time, he argues that his conduct relative to Mr. Koloian was based on duress and justification.

their health and safety." She also provides training for staff. Ms. Janeuk testified that she provided training for appellant in September of 2022 when appellant completed a two-day course. One of the skills which employees are trained in is avoidance and deflection: "[i]f somebody comes at you, you know, with a punch or a kick, step out of the way. Avoid it. And then deflection is the use of your arm or hands to stop something from hitting you."

Ms. Janeuk testified that Mr. Koloian had a behavior plan in place, though appellant was not trained on his plan, which Ms. Janeuk said was not the "best-case scenario." Moreover, Ms. Janeuk testified while staff members all have access to behavior plans, they are not self-explanatory: "But it's not a self-train document so nobody can just go and just read it and go, 'Okay, I'm trained on this now,' you have to be trained by either me or a program manager or director." Mr. Koloian's plan did not include the use of restraints. Mr. Koloian is diagnosed with Autism, and when Ms. Janeuk first wrote his behavior plan, he "was engaged in aggression, fecal smearing, and AWOL multiple times per month." She testified that his behaviors have "decreased astronomically from when I first wrote his behavior plan. . . . All of those at this point take place on average less than one time a month, so he has been really doing really really well in the program." Mr. Koloian was housed in a home with the highest level of intervention because he is "more behavior-intensive."

According to Mr. Koloian's behavior plan, he has two staff members with him from 9 a.m. to 8:30 p.m. From 8:30 p.m. until the morning, he has one staff member who is not allowed to sleep. Ms. Januek described the behavior plan in more depth:

> "So, communication strategies are exactly what they sound like. It's how to communicate with Alex. It gives you some information about his abilities to communicate so that you know what to expect.
>
> Preventative strategies are strategies to utilize to prevent the target behaviors from happening. And again, his target behaviors being the aggression, elopement, and fecal smearing. The preventative strategies are based on interviews with the staff and learning, kind of, the history and what the function of the behavior is. So, we create the preventative strategies.
>
> Following that are the skill-building strategies. So Alex's behavior plan right now, his skill-building strategies are related to helping him learn to wait because he does not wait very well.
>
> And then he has reinforcement strategies. His reinforcement strategies are very kind of global: high fives, pats on the back. It's nothing like a reward calendar or anything like that. And then management strategies, your management strategies tell you what to do if he starts smearing feces, what to do if he becomes aggressive. Which, again, I only have avoidance and deflection in there. And what to do if he attempts to elope. So that's kind of the breakdown of a behavior plan."

Ms. Janeuk testified that Mr. Koloian's behavior is worse when he is not feeling well, but his addressed behaviors in his behavior plan do not include very intensive forms of aggression. He was not known to engage in "full-blown attack on some type of person."

Mr. Landsdowne testified that during his interview with The Arc, he was told that Mr. Koloian was "behaviorally non-verbal, that he would smear his feces. Stuff like that nature, that he would vomit, projectile vomit at you. Stuff like that, that he would sometimes occasionally spit at you and things of that nature." He further described Mr. Koloian as follows:

> MR. LANDSDOWNE: "I would say besides the spitting and the vomiting—or the vomiting and the—I never personally witnessed the fecal smearing. So, I can't say. I've never personally experienced that, so I can't even say that's something that I can even put in there. But sometimes if he got too close to you and you didn't acknowledge him, he would get a little violent at

> that time. Cause like, if he's that close to you, obviously he wants you to say something to him. Like if you don't say something to him, he's probably gonna try to punch you. But he's not gonna really—you'll feel it cause it's slow. It's real slow. But yeah.
>
> THE STATE: Now when you mentioned punching, could you demonstrate how Alex would punch?
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> MR. LANDSDOWNE: Oh, it's like, so he would put his hand like this, and he would slowly like—it wouldn't be like this slow but it's like [MR. LANDSDOWNE imitates punch]. Like that, just a little, yeah.
>
> THE STATE: And what did you mean by violent?
>
> MR. LANDSDOWNE: He would just not be himself. Like he would just get to a point where the only way you could really calm him down is if you really sit down and talk to him. If he allows you to. Or if he'll go on a ride. So, he'll just be—he'll just have little outbursts. It'd be constant outbursts until you could figure out why he's having those outbursts, or if you could, like I said, calm him down."

Mr. Landsdowne explained that one method of calming Mr. Koloian down was to take him for a ride in a car provided by The Arc, which had a plastic partition between the front and back seats so Mr. Koloian would not be aggressive toward the driver:

> ". . . we had a plastic shield. Just in case he would get, you know, upset, and start spitting. And like I said, he would projectile throw up. . . . So, we had a plastic thing on the back of our seats where—so he wouldn't spit or like if he undid his seatbelt, he couldn't hit us. And then in his van, he didn't have the two front seats, he just had that third-row seat. And that's how it was in his van."

Mr. Koloian had various "triggers," which Mr. Landsdowne described as follows:

> ". . . in the house, if you played anything besides classical music, that was a trigger. If you sat too long, that was a trigger. If you didn't interact with him as much, that was a trigger. Not speaking to him, that was a trigger. I wanna say that's most of them."

Ms. Landsdowne explained how he would deflect Mr. Koloian's aggression:

> "Oh, like he would, like I said, sometimes would just swing at you. And if he'd swing at you, just, sometimes, just, you gotta take your time. I would back up like, 'Alright, come on, Alex. Reel it back in. Reel it back in. Alright, we gonna start over.' But if he swung at you, that means we gotta figure out what's wrong, cause he doesn't always just switch. So, yeah."

Mr. Landsdowne emphasized the importance of de-escalation and explained, "Like he was just really big on verbal communication, really big on verbal communication. And if that didn't work, you grab those keys and go for a ride." He elaborated "There's never a time where somethings not—his aggressions gonna come out and you're going to have to adjust to that aggression no matter what. It's gonna come out regardless. He's gonna try anybody that walks through his doors . . ."

On January 23, 2023, Mr. Landsdowne arrived at Dam4B around 2 p.m., where he was informed that "Oh, man. Alex is not doing too good." Mr. Koloian had "pale, rosy cheeks, he's been throwing up." Once appellant arrived, Mr. Landsdowne and appellant took Mr. Koloian to urgent care. Mr. Landsdowne drove, and appellant sat in the passenger seat. Mr. Koloian sat in the back behind the partition. Upon arrival, Mr. Landsdowne filled out forms while appellant tried to get Mr. Koloian to put on a mask because of the ongoing pandemic. During the ensuing struggle, Mr. Landsdowne testified that appellant restrained Mr. Koloian's hands and "karate chopped" him:

> "So, I'm filling out the paperwork. As I'm filling out the paperwork, I hear a commotion—no, I wanna say it was still like the COVID, so it was still with the masks. So, we get a mask. [APPELLANT] comes to give Alex a mask. Alex he—he goes to Alex; I'm filling out the paperwork.
>
> All I hear is a commotion, I turn around. [APPELLANT'S] like, 'He's refusing to put on the mask.' I said, 'Well, he has to put the mask on. Like this is mandatory.' Then it goes from him to [APPELLANT] holding his hands like hey like woah. And then I turn, and I see an initial karate chop,

> and I'm like woah. So, I'm like, '[APPELLANT], you go ahead and we gonna switch. You go ahead and go fill out the—finish the paperwork at the front desk, I'm a go, I'll handle Alex.'
>
> ***
>
> I said—so, I see that. I'm like alright let's switch, let's switch. So, I—he comes over, he goes to the front desk, and I come over next to Alex. I'm like, 'Alex, like calm down. Calm down. Calm down. Calm down,' he then goes like this and tries to headbutt me. And he's shaking, shaking, shaking, shaking. I'm like, 'You gotta calm down. You gotta calm down.' I then go back to the front desk and was like, 'Can we just get a room? Like y'all are not busy, there—it's getting out of hand. I don't want anybody to come in and he start acting that way towards them. Can we please just get a room?"

The group was placed in a room, and Mr. Koloian lay on the bed. Mr. Landsdowne continued to work on the paperwork, continuing as follows:

> "So, Alex lays on the bed. I don't think [APPELLANT] sat down; I think he was standing at the door. I'm finishing up paperwork, I hear another commotion. (indiscernible). So, I know he's gonna act out. That's something you're taught, you training is your ability to be able to how to tell you how he's gonna act out. (indiscernible). It went from, 'Calm down,' to like a more forceful tone. So, I turn around. I turn around, I see [APPELLANT] hit (indiscernible).
>
> ***
>
> I'm hearing more, I turn, I see [APPELLANT] took his right elbow and he elbowed him right here in his left hip. Elbow, and I'm like okay wait wait—get your paperwork. So, I'm trying to finish the paperwork, and after I did finish the paperwork, I was like, 'Alright [APPELLANT], let's switch.' Cause [APPELLANT] then did a forearm chop and then had his knee up kind of in his stomach torso area.
>
> So, I was like, 'Okay, we're gonna switch.' So, he put up, finished the rest of the paperwork. Signed the paperwork. He then was like, 'Okay, I'm gonna go find a doctor.'"

Mr. Landsdowne and Ms. Janeuk testified that none of the restraints which appellant allegedly used on Mr. Koloian were approved restraints.

While appellant searched for a doctor, Mr. Landsdowne remained with Mr. Koloian, who was "freaking out. He's just freaking out." Mr. Landsdowne testified that appellant's behavior at the urgent care went from "calm to aggressive."

When no doctor would treat Mr. Koloian, Mr. Landsdowne decided to return to Dam4B and call 911. Mr. Landsdowne called The Arc and explained that he said: "Call it in, cause [MR. KOLOIAN] needs to be seen. Cause I know if it happens, they'll sedate him or just control the situation better than we can. And after that, they control the situation." Mr. Landsdowne testified that during the drive, appellant complained that the prior shift had not taken Mr. Koloian to urgent care.

At Dam4B, Mr. Koloian tried to eat. Mr. Landsdowne described the situation as follows:

> "So, when he tried to eat, he didn't eat. He destroyed all his food cause he couldn't eat. He was upset that he couldn't eat, so he just threw his stuff all over the floor. He threw his lunchbox on the floor. The juice was spilled all over. The fruit cup was thrown on the floor. Like everything was just—it was a mess."

Mr. Landsdowne called 911:

> "So, then I call 9-1-1. And they asked us, 'Hey like do you need us to bring like an officer over just in case he gets aggressive?' At this point, I said yes to them. Like Alex is aggressive. I said yes, the cops never showed up. But the ambulance did show up. They showed up in like five minutes. We went from—when they came in, I told them like, 'Hey he's kind of aggressive.' so I'm gonna try to—I'm gonna prepare them first before y'all just come in, cause he's probably gonna see y'all, get spooked.
>
> We don't know how Alex is gonna react this time, cause he hasn't reacted like himself the whole time. So, they come in. I come in the room like, 'Hey Alex, you know, some people wanna see you. They trying to make you feel better. They trying to get you better.' I said, 'You wanna get better?', he says, 'Yes.' So, then he gets up. When he sees them, he's not aggressive at all. Just

> goes straight to the ambulance. I couldn't get in with him, so I took my personal vehicle."

Mr. Landsdowne testified that, before the ambulance arrived, appellant left his shift, which prompted Mr. Lansdowne to notify Tasha, an Arc employee, but then appellant returned:

> "Before the ambulance came, [APPELLANT] was like, 'I wasn't trained enough for this. I don't understand why we're dealing with this.' Then he leaves. He was driving his white Challenger. He leaves, so I call Tasha and I'm like, '[APPELLANT] can not come back because he left the whole situation. Like you can't just leave in the middle of a shift.' After he left, I'm on the phone with Tasha. I'm sitting on the back of my car where Alex is laying down, and he comes walking down the hill with a banana in his hand. And I'm like, 'Where's your car?', I'm like where did he just come from? And I'm like, 'Oh, Tasha, he's back.', so I hang up the phone. And I'm like alright then, I didn't even ask him those questions. My first instinct is if the ambulance is coming, wait for them, and then we gonna go to the hospital."

Defense counsel responded to this testimony by arguing that appellant had left to move his car to make space for the ambulance.

Mr. Landsdowne and appellant joined Mr. Koloian at the hospital, where they remained until Mr. Koloian was released around 12:30 a.m. Mr. Landsdowne testified that one of the nurses remarked, "Hey, I see bruising on him." Mr. Landsdowne filled out a report regarding Mr. Koloian's health in the Arc system but did not include the alleged abuse. He said he reported the abuse to Tasha the day of the incident: "I didn't give her like exact details, but I was like, 'Yeah, he hit Alex, and this is just not, like this doesn't work like that. Like it doesn't work like that.', and that's when I said he came down with the banana and I said, 'Oh, actually he just came back so Imma yeah let him know what's

going on.'" Once Mr. Koloian was released from the hospital, appellant drove him home because Mr. Landsdowne had to pick up his kids.

Mr. Landsdowne described Mr. Koloian's typical punching as follows:

> "It was not strong at all. I mean it's slow, it's real slow. And then what he'll do is, if it does connect, it's more of like a mush. It's not really a punch, it's a mush. So, he'll connect and be like—just extend his arm. Yeah."

In response to a question asking if Mr. Landsdowne had ever witnessed a similar interaction between appellant and Mr. Koloian, Mr. Landsdowne testified:

> "Most of the time I would say [APPELLANT] was really good with Alex. There did came an incident where Alex did try to attack him while [APPELLANT] was getting his clothes out in his room. Alex swung on [APPELLANT], [APPELLANT] was like, "I was a CO [Correctional Officer]." So, he kind of got Alex on the ground, was like, 'Hey, don't do that. I was a CO; you can't assault me like that.'"

During cross examination, Mr. Landsdowne answered the question "What triggers [Mr. Koloian's] aggression" as follows:

> "I mean, you can't say. He's autistic. You can't really say that—anything can trigger him. I mean, you can just snap your finger the wrong way; he can get triggered. I mean, his mind is not regulated like our minds. So, he—it's not gonna operate like our mind."

Mr. Landsdowne described the expressive nature of Mr. Koloian's eyes:

> "Like cause Alex doesn't really change his face. He either has a smile on his face or it's like this, but it's you still know what Alex is feeling. But when he's—something's going on, his eyes tell you all. It's like a switch in his eyes. If he's about to do something, his eyes switch. If he's angry, his eyes switch. If he's happy, his eyes switch. Like he doesn't have to be smiling to be happy. You can just tell through his eyes. You look through his eyes, he—his eyes will tell you his whole story. Like how he's feeling."

At the conclusion of Mr. Landsdowne's testimony, the court asked a few questions:

"THE COURT: I just have a brief question. So, I watched the demonstration; how hard was what you described as the karate chop?

MR. LANDSDOWNE: I can't really say how hard it was, it was just a visual. Like I can't really.

THE COURT: Okay.

MR. LANDSDOWNE: Like I—yeah.

THE COURT: So, again everything's being recorded.

MR. LANDSDOWNE: Yes, ma'am.

THE COURT: So, what you demonstrated on [PROSECUTOR] was sort of open-hand sort of from the elbow.

MR. LANDSDOWNE: Mhm. Coming down. Yeah, coming down.

THE COURT: The elbow to the fingers coming down to the base of the neck.

MR. LANDSDOWNE: Yes, ma'am.

THE COURT: Kind of where the neck goes out to the shoulder.

MR. LANDSDOWNE: Yes, ma'am.

THE COURT: To that spot. Okay. Were you able to see Alex?

MR. LANDSDOWNE: Yes, ma'am. I could absolutely see Alex from that angle.

THE COURT: So, you testified that his eyes tell you—are expressive.

MR. LANDSDOWNE: Yes, ma'am.

THE COURT: What did his eyes do at that—when the karate chop—

MR. LANDSDOWNE: So, if you ever look at Alex, you see his eyes are kind of low. Eyes are always kind of low. At that moment his eyes were no longer low. So, that is—you know something is going on cause his eyes went from his normal, typical low eyes to wide-eyed. So, yeah."

Heather Rice, a nurse, testified that she examined Mr. Koloian on January 24, 2023, the day after the incident. She conducted a head-to-toe assessment and noted "no bruising or breaches." She asked Mr. Koloian about pain: "I asked him if he had any pain. He did say, 'Yes.' When I asked him where the pain was, he couldn't tell me. He just kept saying he had pain." Ms. Rice testified that it was unusual for Mr. Koloian to complain of pain. Mr. Koloian was "pretty much acting himself" during the assessment, as he had been diagnosed with and already treated for sepsis at that point.

Appellant testified in his defense at trial. He denied ever hitting Mr. Koloian. He testified that he was asked to work with Mr. Koloian after prior staff traveled to Africa with the disclaimer that if appellant did not like the work, he could go back to his previous duties. On the third day of working with Mr. Koloian, appellant indicated he would like to stay with him, though he noted that there was no staff to take his place: "But even if I wanted to go back to my previous house and division, there's no staff that picked up my shift, so basically, I was left in a limbo. I just had to continue working there."

Appellant confirmed that he received no training specific to Mr. Koloian. He testified that, upon being informed that Mr. Koloian was sick on January 23, 2024, he questioned why the prior shift had not taken him to urgent care. Appellant testified that when they arrived at the urgent care, Mr. Koloian began swinging at appellant's head:

> "When I got there, after like two minutes I believe, he started swinging towards my head. So, and then, like I said, I don't restrain on him. What we're taught to do is this: tell him hands to your side. Hands to your side. You kind of pull him and say hands to your side. That's what I did. So, he didn't really listen."

When they were in the exam room, appellant testified that Mr. Koloian again swung at his head. Appellant again told him to keep his hands to his side, but Mr. Koloian became increasingly aggressive. Appellant testified that Mr. Koloian was not treated at the urgent care because of his aggression.

Appellant described Mr. Koloian hitting his head and denied using any karate chop on him:

> ". . . I've never been hit that much. It was a bit too much. Eleven, ten times? I don't know. But it was just—was more concerned about my head than I was about him. So it was plain—it was just—I remember trauma I had, and then comes again, so.
>
> [DEFENSE COUNSEL]: Did you ever strike Alex?
>
> APPELLANT: No, not at all.
>
> [DEFENSE COUNSEL]: Did you use karate on him?
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> APPELLANT: I don't know where that came from. I never did that. I was just more concerned about my head because his hands was going towards my head. And like I said, we were changing. If he stays a while, then I will tell him—maybe he lied to my face. Let me go back. Let me—I was trying to see maybe he would calm down with one person; maybe he preferred one person or the other. (indiscernible) went for like five—five minutes."

The court found appellant guilty of both charges, assault and physical abuse of a vulnerable adult, explaining as follows:

> "[The] Court finds the defendant guilty of both counts. The assault being count 2, assault. This strike to the base of the neck, what was described by Mr. Landsdowne as a karate-chop, the knee to the stomach, which I also note knee to the stomach, to the abdomen on a person who's vomiting, who's seeking medical attention because there's clearly something in his digestive system that's not going well and he's not eating, so. And then the elbow to the upper part of the body on a person who's laying down. The two of those, the elbow and the knee, were to a person laying down. Again, the opportunity to just step back, step away from. Court finds the harmful offense of

> unwanted contact and that he intended for that contact to happen, and that's an assault under Maryland law.
>
> And as to the physical abuse of a vulnerable adult by a custodian. Did he cause physical pain or injury to the victim? I find yes, and I was the one that asked Mr. Landsowne "Did you see a reaction from Alex when he was struck?", and he says, "Yes, but Alex keeps his eyes sort of partially closed, that there's generally no affect, but that Alex is very expressive through his eyes and that he had his eyes partially closed until he was struck, and then his eyes got big. So, he experienced it. It doesn't need to leave a mark to cause physical pain or injury, and it doesn't have to last a long time. There's nothing in the law that says how long that pain or that injury needs to be in place. But I believe that there was physical pain or injury to Alex by the defendant."

Appellant was convicted and sentenced as described. This timely appeal followed.

II.

Before this Court, appellant first argues that the trial court failed to ensure a valid jury waiver, thereby violating appellant's constitutional right to a jury. Appellant asserts that the court failed to inform him properly of his right to trial by jury, did not follow the Rule with respect to jury trial waiver, and thus his waiver was not made knowingly. Nor did appellant personally waive his right to a jury trial. Appellant argues that he did not voluntarily waive his right to a jury trial, and that the court failed to announce on the record that appellant's waiver was knowingly and voluntary.

Appellant next argues that the evidence is insufficient to convict him of the charges. His defense, before this Court, as to the assault charge, is that the assault was legally justified because it was committed out of necessity or duress, essentially that the duress of the circumstances compelled the commission of the crime, thus making the offense

excusable. *See Crawford v. State*, 61 Md. App. 620, 622 (1985). As to the abuse of a vulnerable adult, he argues that the evidence was insufficient to convict because the trial court did not find that if there was pain, it was inflicted on Alex as a result of cruel or inhumane treatment or of a malicious act under the circumstances that indicate that the vulnerable adult's health or welfare is harmed or threatened. He maintains that there was nothing cruel, inhumane, or malicious in appellant's trying to prevent Alex from repeatedly pummeling him in the head, that his conduct was not malicious because it was justified by necessity and duress, nor was appellant's attempt to restrain Alex barbarous, savage or cruel. The harm done to Mr. Koloian was minimal and appellant avoided the harm of Mr. Koloian punching him in the head. Appellant argues he could not have stepped away from Mr. Koloian's punches because Mr. Koloian required two staff members to control him and it would have been irresponsible for appellant to leave. Appellant asserts that he had apprehension of serious bodily injury if he did not prevent Mr. Koloian from punching him.

The jury waiver argument is really a non-issue here as the State recognizes and concedes error—that the court's inquiry as to waiver of the right to a jury trial was insufficient in law, did not satisfy the Rule, that appellant was deprived of his right to a jury trial and his waiver was not knowing or voluntary. The State recognizes that the trial court did not satisfy the constitutional standard for a knowing and voluntary waiver. The State agrees with appellant that the record here is "absolutely devoid of any information concerning a jury trial . . . and any statements demonstrating that Mr. Ososanya was knowingly and voluntarily waiving his right to a jury trial." He was not examined in open court about his right to a jury trial and therefore, there is nothing to support the trial court's

conclusion that he knowingly and voluntarily waived this right. The State agrees that appellant's convictions must be reversed.

The real issue, according to the State, is whether this Court remands this case for a new trial, or, on the other hand, finds that the evidence was insufficient, and therefore, the State may not retry appellant. The State argues that the evidence was sufficient to convict appellant of second-degree assault and abuse of a vulnerable adult and that the State is entitled to retry appellant. The State asks us to reverse appellant's convictions and remand the case for a new trial. The State argues the case was plainly about credibility and, as the fact finder, the trial judge did not believe appellant. Appellant denied striking Mr. Koloian; the judge did not believe him. He was free to disbelieve appellant's version of events.

Now, before this Court, appellant changes horses and argues not that he did not strike Mr. Koloian, but instead that he struck him because of duress, and it was justified. The State maintains that appellant's actions were not conducted out of necessity and that his treatment of Mr. Koloian amounted to cruel and inhumane treatment.

III.

Because the State concedes the trial court erred and failed to inform appellant properly of his right to a jury trial, and we agree, we shall reverse. We recognize that trial courts have heavy dockets, are very busy, and time is important. However, the waiver of the constitutional right to a jury trial is fundamental, and trial judges must ensure that the inquiry of waiver of jury trials is full and complete, and in accord with Rule 4-246.

IV.

We turn to the sufficiency of the evidence. We hold that there was sufficient evidence to convict appellant.

We review the sufficiency of the evidence to determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia,* 443 U.S. 307, 319 (1979); *Scriber v. State,* 236 Md. App. 332, 344 (2018). As a reviewing court, we do not judge the credibility of witnesses or resolve conflicts in the evidence. *Id*. at 344. The question before us is "not whether the evidence *should have or probably would have* persuaded the majority of fact finders but only whether it *possibly could have* persuaded *any* rational fact finder." *Id.* (emphasis in original). We give "deference to all reasonable inferences the fact-finder draws, regardless of whether we would have chosen a different reasonable inference." *State v. Suddith*, 379 Md. 425, 430 (2004) (citation omitted).

The *Scriber* court clarified the standard of review for bench trials:

> "Where, as here, a case is tried before the court rather than a jury, the judgment of the circuit court will not be set aside on the evidence unless clearly erroneous and due regard will be given to the opportunity of the lower court to judge the credibility of the witnesses. The findings of fact of the trial judge must be accepted unless there was no legally sufficient evidence or proper inferences therefrom, from which the court could find the accused guilty beyond a reasonable doubt.
>
> Accordingly, when reviewing bench trials, we review findings of fact under the clearly erroneous standard, meaning that a finding of a trial court is not clearly erroneous if there is competent or material

> evidence in the record to support the court's conclusion. Issues of law are reviewed *de novo*."

Scriber, 236 Md. App. at 344-45 (internal citations omitted).

The Maryland statute, Md. Code (2002, Volume), § 3-605(b)(1) of the Criminal Law Article ("Crim. Law") protecting vulnerable adults provides as follows:

> "A caregiver, a parent, or other person who has permanent or temporary care or responsibility for the supervision of a vulnerable adult may not:
>
> (i) cause abuse or neglect of the vulnerable adult; or
>
> (ii) intentionally and maliciously inflict severe emotional distress on the vulnerable adult."

The statute defines abuse as "the sustaining of physical pain or injury by a vulnerable adult as a result of cruel or inhumane treatment or as a result of a malicious act under circumstances that indicate that the vulnerable adult's health or welfare is harmed or threatened." Crim. Law § 3-604(a)(2)(i). "[T]he standard 'cruel or inhumane' has a settled and commonly understood meaning." *Bowers v. State*, 283 Md. 115, 126 (1978).

We hold that the evidence presented supported the judgments beyond a reasonable doubt. The trial judge found that appellant inflicted a karate-chop to Mr. Koloian's neck, a knee to his stomach while Mr. Koloian was vomiting, and then his elbow to Mr. Koloian's upper body while Mr. Koloian was lying down. This conduct amounted to an assault. As to physical abuse of a vulnerable adult, the judge found appellant inflicted physical pain upon Mr. Koloian. The trial judge did not err in finding that this conduct also amounted to abuse. Appellant denied striking Mr. Koloian. In this case where credibility was primary, the court did not believe appellant.

As the State points out, now, on appeal before this Court, appellant argues that he acted out of necessity or duress. He essentially admits striking Mr. Koloian. The trial judge found that appellant struck "the vulnerable adult." We note that appellant never raised below that he acted out of necessity or duress. We assume that the State is not raising non-preservation here because, even though this defense was not raised below, the trial judge did acknowledge that appellant had "the opportunity to just step back, step away from" the situation, thereby, in the State's view, disposing of any claim that his actions were otherwise justified. Because the State addresses this argument on the merits, and does not argue lack of preservation, we will address it.

We begin with noting that necessity is an affirmative defense.[2] *See Dixon v. United States*, 548 U.S. 1, 8-9 (2006). Thus, the State is not required to rebut the defense until the defendant presents evidence that, if credited, would make the defense applicable. The common law defense of necessity is a defense that is applicable in rare situations. The Supreme Court of Maryland stated, "[t]he case does not become one of necessity unless all other alternatives have been exhausted." *Sigma Reprod. Health Ctr. v. State*, 297 Md. 660, 679 (1983).

"To invoke the necessity defense, a defendant must 1) have been in present and imminent risk of death or bodily harm, 2) not have placed himself in the situation intentionally or recklessly, 3) *not have a reasonable or legal alternative to the criminal*

[2] If, as appellant implies in his brief, duress or necessity is not an affirmative defense, but negating the defense is an element of the charge of abuse of a vulnerable adult, appellant could have stepped back and ceased striking Mr. Koloian.

action, and 4) stop the criminal activity when the necessity ends." *McMillan v. State*, 428 Md. 333, 361 (2012) (emphasis added).

The duress defense is related but distinct. The Supreme Court of Maryland explained duress as follows:

> "To constitute a defense, the *duress by another person on the defendant must be present, imminent, and impending*, and of such a nature as to induce *well grounded apprehension of death or serious bodily injury* if the act is not done. It must be of such a character as to leave *no opportunity to the accused for escape.* Mere fear or threat by another is not sufficient nor is a threat of violence at some prior time. The defense cannot be raised if the apprehended harm is only that of property damage or future but not present personal injury. The defense cannot be claimed if the compulsion arose by the defendant's own fault, negligence or misconduct. To generate this defense, a defendant must meet the relatively low threshold of showing some evidence of duress.
>
> The duress defense serves the public policy that the law ought to promote the achievement of higher values at the expense of lesser values, and sometimes the greater good for society will be accomplished by violating the literal language of the criminal law. Duress is not premised on a person lacking the mental element which the crime in question requires. Rather, when a person faces a choice of evils, the law prefers that he avoid the greater evil by bringing about the lesser evil."

Howell v. State, 465 Md. 548, 551-53 (2019) (internal citations removed) (emphasis in original).

The trial judge here found that appellant could have walked away or stepped back, suggesting that he could have "escaped" or refrained from continuing to strike Mr. Koloian. The trial judge was not clearly erroneous in his findings. As such, even assuming arguendo that appellant raised the defense of necessity or duress, he failed to satisfy the requirements of the defense, and the trial judge rejected the defense properly.

The evidence was sufficient to convict appellant of abuse of a vulnerable adult and assault. A reasonable fact-finder could have found that testimony that appellant struck Mr. Koloian several times while he was seeking medical care for a stomach issue was sufficient to satisfy the statutory elements of cruel or inhumane treatment and assault.

JUDGMENTS OF THE CIRCUIT COURT FOR WASHINGTON COUNTY VACATED. CASE REMANDED TO THAT COURT FOR A NEW TRIAL. COSTS TO BE PAID BY APPELLANT.