NO. 46696-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

JEREMY PUTNAM BAKKE, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.13-1-02265-6

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

A. RESPONSE TO ASSIGNMENTS OF ERROR

I. BAKKE KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY WAIVED HIS RIGHT TO A TRIAL BY JURY.

II. BAKKE WAS NOT DENIED A FAIR TRIAL.

B. STATEMENT OF THE CASE

Bakke was charged by Information with assault in the third degree, unlawful possession of a controlled substance, and possession of stolen property in the third degree. CP 1-2. He waived his right to have his case tried by a jury and elected to have a bench trial. CP 74-75. He was convicted by the trial court of all three counts. CP 19. This timely appeal followed. CP 67.

C. ARGUMENT

I. BAKKE KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY WAIVED HIS RIGHT TO A TRIAL BY JURY.

Bakke argues that he did not knowingly, intelligently, and voluntarily waive his right to a jury trial. This is so, he says, because he used the "wrong form" and because his waiver did not include an explicit explanation of his right to a jury by "12 fair and impartial jurors, that they must be unanimous to return a verdict, that he had the right to participate

in jury selection, or that a judge would decide the case alone if he waived that right." (Brief of Appellant at 7.) Bakke's claims are baseless.

As an initial matter, there is no one "form" for waiver of a jury trial. The Washington Pattern Forms Committee has no published form for waiver of jury trial. Bakke did not use the "wrong form." Second, Bakke's claim that the form he signed "did not address waiver of a jury" is nonsense. (See Brief of Appellant at 6.) The form's title was "Waiver of Jury Trial." CP 74. At paragraph 3, the form said "I freely and voluntarily waive my right to a jury trial. No one has threatened harm of any kind to me or to any person and no one has made promises of any kind to cause me to make this waiver." CP 74-75. The form Bakke signed and submitted was clearly a waiver of the right to a jury trial and could not have been confused for anything else.

Bakke contends that the form he proffered was inadequate to effectuate a waiver of his right to a jury trial because it did not include a specific waiver of his right to a jury by "12 fair and impartial jurors," a specific waiver of his right to a unanimous verdict, and a specific waiver of his right to participate in jury selection. He also claims the form did not advise him that the judge would decide the case alone as a result of his waiver. Bakke is incorrect.

A defendant may waive his constitutional right to a jury trial. *State v. Forza*, 70 Wn.2d 69, 71, 422 P.2d 475 (1966); *State v. Benitez*, 175 Wn.App. 116, 127, 302 P.3d 877 (2013). CrR 6.1(a) requires such a waiver to be made in writing; however waiver may also be found when made orally on the record. *State v. Treat*, 109 Wn.App. 419, 427, 35 P.3d 1192 (2001); *State v. Pierce*, 134 Wn.App. 763, 771, 142 P.3d 610 (2006). On review, the court considers whether the defendant is informed of his constitutional right to a jury trial and whether the facts and circumstances generally show the waiver was done knowingly, intelligently and voluntarily. *State v. Ramirez-Dominguez*, 140 Wn.App. 233, 240, 165 P.3d 391 (2007) (citing *City of Seattle v. Williams*, 101 Wn.2d 445, 451, 680 P.2d 1051 (1984) and *State v. Downs*, 36 Wn.App. 143, 145, 672 P.2d 416 (1983)). The appellate court's review of a jury trial waiver is de novo. *Ramirez-Dominguez* at 239. Oral waivers on the record are sufficient if made knowingly, intelligently and voluntarily. *State v. Stegall*, 124 Wn.2d 719, 724-25, 881 P.2d 979 (1994); *State v. Donahue*, 76 Wn.App. 695, 697, 887 P.2d 485, *rev. denied*, 126 Wn.2d 1023 (1995).

> A written waiver "is strong evidence that the defendant validly waived the jury trial right." *Pierce*, 134 Wn.App. at 771, 142 P.3d 610. An attorney's representation that the defendant's waiver is knowing, intelligent, and voluntary is also relevant. Washington law does not require an extensive colloquy on the record; instead "only a personal expression of waiver from the defendant" is required.

> *Pierce*, 134 Wn.App. at 771, 142 P.3d 610. As a result, the right to a jury trial is easier to waive than other constitutional rights.

State v. Benitez, supra, at 128-29 (some internal citations omitted).

Here, Bakke filed a written waiver of his right to a jury trial. The written waiver informed him that he had the right to remain silent before and during trial, and the right to refuse to testify against himself; the right at trial to hear and question the witnesses who testify against him, and the right to compel the appearance of witnesses at no expense to him; and the right to appeal the jury's verdict. CP 74-75. Orally, he was advised by the trial court that he had the constitutional right to have a jury trial composed of 12 persons who would be selected at random from the community and examined by the attorneys to determine whether they can be fair and impartial. RP 5. He was further advised that his case would be decided solely by the judge in the event he waived his right to a jury trial. RP 5. Bakke signed the waiver confirming his intent to waive his right to a jury trial, and he orally confirmed that he understood his right to a jury trial and wished to waive that right. RP 5-6. He waived his right to a jury trial with the assistance and advice of counsel. CP 75, RP 5-6. His waiver was knowingly, intelligently, and voluntarily made.

Bakke's claim that his waiver cannot be valid where he was not advised that he had a right to a jury of 12 people who would try the case

fairly and impartially fails because not only is such an explicit advisement not required, but because the trial court did, in fact, advise him of that fact. Similarly, Bakke was advised, both in writing and orally, that the judge alone would decide the case. CP 74, RP 6. The only rights that Bakke identifies, that he was not specifically advised of, are the right to a unanimous jury verdict and the right to participate in jury selection. "But [this Court] has not required that a defendant be apprised of every aspect of the jury trial right in order for the defendant's waiver to be valid." *Benitez* at 129. Moreover, this Court has twice rejected the claim that a defendant must be advised of his right to participate in jury selection in order for his jury trial waiver to be valid. *Pierce* at 773; *Benitez* at 130. Bakke's claim fails.

II. BAKKE WAS NOT DENIED A FAIR TRIAL.

Bakke claims that the trial court erred in trying his case while he was shackled. Relying on cases that involved trials before a jury, and none which involved cases tried solely to the bench, Bakke argues that the trial court erred in not ordering the removal of his handcuffs without finding impelling necessity.

As an initial matter, Bakke *agreed* to have his legs shackled during the trial. Bakke told the court: "Well, Your Honor, I'm just asking that he be unhandcuffed. *He doesn't have any objection to being shackled.*" RP

77. To the extent that Bakke complains in this appeal about shackling in general, he may not complain about the shackling of his legs because he invited that error. Under the invited error doctrine, a criminal defendant is precluded from "seeking appellate review of an error she helped create, even when the alleged error involves constitutional rights." *State v. Mercado*, 181 Wn.App. 624, 629-30, 326 P.3d 154 (2014), citing *State v. Studd*, 137 Wn.2d 533, 546–47, 973 P.2d 1049 (1999); *State v. Henderson*, 114 Wn.2d 867, 870–71, 792 P.2d 514 (1990). "To determine whether the invited error doctrine is applicable to a case, we may consider whether the petitioner affirmatively assented to the error, materially contributed to it, or benefited from it." *Mercado* at 630, citing *State v. Momah*, 167 Wn.2d 140, 154, 217 P.3d 321 (2009); *In re Pers. Restraint of Copland*, 176 Wn.App. 432, 442, 309 P.3d 626 (2013). The defendant must have engaged in an affirmative, knowing, and voluntary act which materially contributed to the error. *Mercado* at 630. The State bears the burden of proving that an error was invited. *State v. Thomas*, 150 Wn.2d 821, 844, 83 P.3d 970 (2004).

Here, Bakke told the court that he was agreeable to having his legs shackled and induced the court not to consider the matter further. The error was invited. But even if it was not invited, it was certainly waived.

And Bakke has not argued that review is appropriate under RAP 2.5(a) with respect to the leg shackling.

With respect to the handcuffs on his wrist, Bakke did not object to the handcuffs on the ground that it might undermine the presumption of innocence, the claim he now makes. Rather, he merely objected because he felt it would be difficult to take notes. RP 76. Bakke has waived any claim of error that the handcuffing undermined his presumption of innocence where he did not object to the handcuffing on that basis. A party may not raise an objection that it did not properly preserve at trial without a showing of manifest constitutional error. *State v. Kronich*, 160 Wn.2d 893, 899, 161 P.3d 982 (2007). "We adopt a strict approach because trial counsel's failure to object to the error robs the court of the opportunity to correct the error and avoid a retrial." *State v. Powell*, 166 Wn. 2d 73, 82, 206 P.3d 321, 327 (2009); *State v. Kirkman*, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). An appellate court will not reverse the trial court where the specific ground for objection raised on appeal is different than the ground on which the objection was based below. *Powell* at 82-83, citing *State v. Korum*, 157 Wn.2d 614, 648, 141 P.3d 13 (2006); *State v. Ferguson*, 100 Wn.2d 131, 138, 667 P.2d 68 (1983); *State v. Koepke*, 47 Wn.App. 897, 911, 738 P.2d 295 (1987). In *Koepke*, the defendant objected at trial to the admission of a 911 tape on the ground that the tape

lacked foundation. On appeal, he assigned error to the admission of the tape on the ground that admission of the tape violated his Fifth and Fourteenth Amendment rights and his right to confront witnesses. *Koepke* at 911. The Court of Appeals, relying on *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (2001), reiterated that "a party may only assign in the appellate court on the specific ground of the evidentiary objection made at trial." *Koepke* at 911.

Because Bakke now seeks reversal on an issue he did not specifically raise at trial, he must demonstrate that review is warranted under RAP 2.5(a). Although he identifies this error as constitutional error (see Brief of Appellant at 14), he does not demonstrate that the constitutional error, assuming without conceding there was error, was manifest.

"The general rule in Washington is that a party's failure to raise an issue at trial waives the issue on appeal unless the party can show the presence of a 'manifest error affecting a constitutional right.'" *State v. Robinson*, 171 Wn.2d 292, 304, 253 P.3d 292 (2011), quoting *State v. Kirwin*, 165 Wn.2d 818, 823, 203 P.3d 1044 (2009) and *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). The rule requiring issue preservation at trial encourages the efficient use of judicial resources and ensures that the trial court has the opportunity to correct any

errors, thereby avoiding an unnecessary appeal a "consequent new trial," and the appellate court should not "sanction a party's failure to raise error at trial" that could have been repaired. *State v. Grimes*, 165 Wn.App. 172, 179, 267 P.3d 454 (2011); see also *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). "[P]ermitting appeal of all unraised constitutional issues undermines the trial process and results in unnecessary appeals, undesirable retrials, and wasteful use of resources." *Robinson*, supra, at 305.

As explained in *McFarland*, supra, RAP 2.5(a)(3) is "not intended to afford criminal defendants a means for obtaining new trials whenever they can identify some constitutional issue not raised before the trial court." *McFarland* at 333. In order to obtain review under RAP 2.5, the error must be "'manifest,'—i.e. it must be 'truly of constitutional magnitude.'" *Id.*; *State v. Scott* at 688. To be deemed manifest constitutional error, a defendant must identify the error and show how, in the context of the trial, the alleged error actually affected the defendant's rights. *McFarland* at 333. "It is not enough that the Defendant allege prejudice—actual prejudice must appear in the record." *Id.* at 334.

> Generally, an appellate court may refuse to entertain a claim of error not raised before the trial court. [RAP 2.5(a).] In order to benefit from this exception, "the defendant must identify a constitutional error and show how the alleged error actually affected the [defendant]'s

> rights at trial." A constitutional error is manifest if the appellant can show actual prejudice, i.e., there must be a "plausible showing by the [defendant] that the asserted error had practical and identifiable consequences in the trial of the case." If an error of constitutional magnitude is manifest, it may nevertheless be harmless.

Grimes at 180, quoting *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011); *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009).

Two salient cases decided by this Court have discussed the question of manifest error affecting a constitutional right. In *State v. Grimes*, supra, this Court held that the appellant could not complain about the special verdict form used in her case, which failed to explain to the jury that they need not be unanimous in order to answer "no," for the first time on appeal. This Court reiterated that a reviewing court must first determine whether the error is of constitutional dimension and, second, whether the error was manifest. If both conditions are satisfied, the Court reviews the merits of the claim. Because the Court must necessarily have found manifest constitutional error in order to review the merits of the claim, the Court applies the harmless error test for constitutional error, namely whether the error was harmless beyond a reasonable doubt. The State bears the burden of making this showing. *Grimes* at 185-86.

In order to find that constitutional error is "manifest," the reviewing court must determine that it had practical and identifiable

consequences at trial. *Grimes* at 180. In *Grimes*, this Court lamented in footnotes 16 and 20 the unfortunate conflation of the actual prejudice analysis (in other words, practical and identifiable consequences) of RAP 2.5(a) and harmless error analysis.

> We acknowledge that it is somewhat counterintuitive that an error might cause "actual prejudice" yet ultimately be declared "harmless." It is our hope that having accepted *Ryan* and *Nunez* for review, the Supreme Court will resolve this somewhat circular reasoning and provide a more straightforward definition of "manifest" error in the context of RAP 2.5(a)'s exception to the preservation of error rule. In the meantime, however, we have removed "actual prejudice" from our manifest error analysis and substituted "practical and identifiable" consequences in its place.

Grimes at 187, n. 16. Shortly after issuing its opinion in *Grimes,* this Court issued its opinion in *State v. Bertrand*, 165 Wn.App. 393, 267 P.3d 511 (2011), holding again that the appellant could not complain about a special verdict form for the first time on appeal that failed to advise the jury that it need not be unanimous to answer "no." In a lengthy and illuminating footnote, the majority again discussed the term "actual prejudice" in the context of RAP 2.5(a)(3):

> This "actual prejudice" language has frustrated and confused lawyers, clerks, and judges for years because the term of art, "actual prejudice," involves a different balance than does a harmless error analysis, which determines whether reversal is warranted.
> ...

> We also note that the reasoning *Powell* and *Kirkpatrick* appears to conflict with the reasoning in *O'Hara*, a case in which our Supreme Court admonished, "The determination of whether there is actual prejudice," and, therefore, whether an error is "manifest,"
>
> > is a different question and involves a different analysis as compared to the determination of whether the error warrants reversal. In order to ensure the actual prejudice and harmless error analyses are separate, the focus of the actual prejudice must be on whether the error is so obvious on the record that the error warrants appellate review.
>
> *O'Hara*, 167 Wn.2d at 99-100.
> ...

Bertrand at 419, n.8.

Here, Bakke cannot show that the presence of his handcuffs had a practical and identifiable consequence to the trial. This case was tried solely to the judge, not to a jury. In *State v. Read*, 147 Wn.2d 238, 53 P.3d 26 (2002), the Supreme Court, relying on *State v. Miles*, 77 Wn.2d 593, 602, 464 P.2d 723 (1970), as well as numerous federal and other state authorities, held that a trial judge is presumed not to consider inadmissible facts or evidence in a bench trial. *Read* at 244-45, citing *Hawkins v. Marion Corr. Inst.*, 62 Ohio App.3d 863, 869, 577 N.E.2d 720, *overruled on other grounds by*, 55 Ohio St.3d 705, 562 N.E.2d 898 (1990); *Harris v. Rivera*, 454 U.S. 339, 346, 102 S.Ct. 460, 70 L.Ed.2d 530 (1981); *Builders*

Steel Co. v. Comm'r of Internal Revenue, 179 F.2d 377, 379 (8th Cir.1950). The *Read* Court said:

> Bench trials place unique demands on judges, requiring them to sit as both arbiters of law and as finders of fact. For example, judges in bench trials may be asked to exclude probative evidence on the ground it is unfairly prejudicial. No judge could rule on such a request without considering the challenged evidence. And yet, in a bench trial, it is the consideration of such evidence by the judge that the objecting party seeks to prevent. The same is true of all challenged evidence in a bench trial.

Read at 245. The Court went on to cite with approval from *Hawkins v. Marion Corr. Inst.*, supra, which observed that a trial judge's duties "often require him to have knowledge of inadmissible evidence." *Hawkins* at 869. Such evidence might obviously include a defendant's criminal history, any prior behaviors suggesting dangerousness, prior drug use, suppressed confessions or physical evidence, etc. Additionally, the trial judge deciding the case may very well have been the judge who determined the bail amount, and most likely has seen the defendant shackled during pre-trial hearings.

The *Miles/Read* presumption that a trial judge ignores inadmissible facts and evidence is rebuttable. *Read* at 245. "A defendant can rebut the presumption by showing the verdict is not supported by otherwise admissible evidence, or the trial court relied on the inadmissible evidence to make essential findings that it otherwise would not have made."

Read 245-46. In *State v. Gower*, 179 Wn.2d 851, 856, 321 P.3d 1178 (2014), the defendant rebutted the presumption where the trial court relied on evidence that was "actually admissible under the law in place at the time [of the trial]", but was later held inadmissible as a matter of law by the Supreme Court.[1]

Here, Bakke cannot rebut the presumption that the trial court did not consider his handcuffing during trial as evidence of his guilt. The prosecutor noted that the trial court was aware the defendant was in custody, and the trial court identified officer safety as the basis for retaining the handcuffs (the defendant was charged with assaulting an officer—a reckless and irrational act in almost every instance). The trial court further noted: "...[W]ith respect to the fact that I know he's in custody, it doesn't affect me one way or the other. I'm as impartial as they come, so it's not an issue with me." RP 77. It is obvious from this remark that the trial court was aware of his primary obligation to presume the defendant innocent until such time as that presumption may be overcome by the evidence, and had no concern about his ability to fulfill that obligation.

Bakke has not shown, or even attempted to show, that this alleged error had practical and identifiable consequences at trial, nor has he

[1] The evidence in question in *Gower* was a prior sex conviction admitted under the subsequently invalidated RCW 10.58.090.

rebutted, or even attempted to rebut, the presumption that the trial judge would not be affected by knowing that the defendant was handcuffed during the trial. Bakke's claim fails.

D. CONCLUSION

Bakke's judgment and sentence should be affirmed.

DATED this 2nd day of June, 2015.

Respectfully submitted:

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