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STATE OF WASHINGTON
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Supreme Court No. 99597-4

SUPREME COURT
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,
Respondent,

v.

MARTINIANO ELUTERIO CAMACHO,
Petitioner.

ANSWER TO PETITION FOR REVIEW

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I. ISSUES PRESENTED FOR REVIEW

If a defendant is permitted to represent himself, and if he tells the Superior Court two different times that he wants to waive a jury trial, but does not file a written waiver, should this Court accept review under RAP 13.4 (b) where the Court of Appeals has affirmed his conviction under the invited error doctrine?

II. STATEMENT OF THE CASE

The defendant waives his right to a jury trial:

The defendant was advised on his right to a jury trial at his arraignment. RP 08/01/19 at 6. On September 18, 2019, the defendant requested permission to proceed pro se. RP 08/01/19 at 15. The trial court granted that request. RP 08/01/19 at 23. The defendant also stated, “I want to waive my jury.” RP 08/01/19 at 27. The court reset the hearing one week to allow the defendant to submit a written waiver of a jury trial. RP 08/01/19 at 30.

One week later, on September 25, 2019, the defendant stated he did not bring the waiver with him, but said, “Yes, your Honor. I want a bench trial. I have the paper with waiver of jury trial in my room. I’m sorry I didn’t bring it here today, but, yes, I want a bench trial. I do not want a jury trial.” RP 08/28/19 at 9.

Substantive facts regarding the crime:

Although the substantive facts may not be too relevant for the purposes of this Petition, the defendant's version of facts is not complete. Anthony Matthews and his friend Jamell Goree travelled to the Tri-City area on July 27, 2019 to watch the annual hydroplane races. RP¹ at 10. In the early morning hours of July 27, 2019, they went to a convenience store for a snack. RP at 11.

In the convenience store parking lot, they heard a man, the defendant, yelling loudly, and talking to himself. RP at 12, 52. The defendant walked quickly toward Mr. Matthews who told him to back off. RP at 14. The defendant responded, "Don't touch me. I'm gonna kill you." *Id.* He then pulled out a knife and started chasing Matthews with it. RP at 14-15. The defendant swung the knife at Matthews, but Matthews was able to avoid it. RP at 15. Mr. Goree confirmed Matthews's account, saying that the defendant was swinging the knife wildly and took several swipes at Matthews. RP at 53-54. The blade on the knife was 3.5 inches. RP at 79.

The defendant admitted that he was under the influence of methamphetamine that day. RP at 104. He admitted pulling out his knife and waving it at Matthews. RP at 98. He stated that he confronted

¹ "RP" refers to the verbatim report of proceedings from bench trial on 09/30/2019.

Matthews and Goree because they cursed at him while he was walking.
RP at 97.

The encounter was caught on the convenience store's video system. See Exhibit 5. It showed Matthews and Goree had their backs to the defendant as he walked across the convenience store parking lot. RP at 104. He turned around and approached them. *Id.* The video shows the defendant swinging the knife in a downward motion. RP at 23.

The Court found the defendant guilty of Assault in the Second Degree with a Deadly Weapon enhancement.

III. ARGUMENT

A. The considerations governing acceptance of review in RAP 13.4 (b) do not support granting the Petition.

The decision by the Court of Appeals is not in conflict with a decision of this Court or another published decision of the Court of Appeals and does not implicate any significant question of law under the State or Federal Constitutions.

1. The decision by the Court of Appeals is not in conflict with another decision by the Court of Appeals or this Court in applying the invited error doctrine or declining to review the issue under RAP 2.5 (a).

a. The cases cited by the defendant are distinguishable.

This case is distinguished from the others cited by the defendant by the fact that the defendant represented himself in trial. *State v. Wicke*, 91 Wn.2d 638, 591 P.2d 452 (1979), where the defendant remained silent while his attorney waived a jury, is not on point. Likewise, *State v. Hos*, 154 Wn. App. 238, 250, 225 P.3d 389 (2010), where the defendant apparently acquiesced in her attorney's representation that she agreed with a bench trial, is also not on point.

The defendant also cites *State v. Griffith*, 11 Wn. App. 2d 661, 455 P.3d 152 (2019), but the defense attorney did the talking in that case while the defendant remained silent.

Finally, the defendant cites *State v. Williams*, 23 Wn. App. 694, 598 P.2d 731 (1979). However, the same situation occurred: the defense attorney spoke for the defendant in waiving a jury trial who was not questioned by the trial court.

All of the cases cited by the defendant deal with a jury waiver done by the defense attorney while the defendant is silent. Here, the defendant acted as his own attorney and told the trial court, two different times, that he wanted a bench trial. The cases cited by the defendant are consistent with the Court of Appeals decision.

- b. The Court of Appeals use of the invited error doctrine and RAP 2.5 is consistent with other cases.**

As the Court of Appeals stated, the “invited error doctrine” precludes a criminal defendant from appealing an error that he helped create. *State v. Mercado*, 181 Wn. App. 624, 629-30, 326 P.3d 154 (2014). Courts consider whether the defendant affirmatively assented to the error, materially contributed to it, or benefited from it. *Id.* Here, the defendant would have had a jury trial if he was silent about his desire to have a bench trial. If he had not affirmatively said he wanted to waive a jury, one would have been impaneled.

Furthermore, it may have been a good decision, even in hindsight, for the defendant to waive a jury. A jury would have viewed Mr. Matthews and Mr. Goree with sympathy. After all, they were completely innocent individuals who happened to cross paths with the defendant, who was high on methamphetamine, and started trying to stab Mr. Matthews for no reason. A judge would be better able to separate the sympathy for the victim and only look at the facts of the case.

The defendant’s claim in his Petition for Review that “there is no evidence Mr. Camacho knowingly and voluntarily set up the error” is not correct. The defendant told the Superior Court not to impanel a jury and that he preferred a bench trial. That is the only reason he did not have a

jury trial. The Court of Appeals was correct that the invited error doctrine should exclude an appeal on the defendant's waiver of a jury.

The Court of Appeals was also correct that this issue should not be reviewed under RAP 2.5 (a). As the Court of Appeals stated:

There is no obvious error because the record strongly suggests that Camacho made a knowing, intelligent, and voluntary waiver of his jury trial right. With respect to knowing, Camacho purposefully waived his jury trial right twice in open court. With respect to intelligent, Camacho was previously advised of his jury trial right at arraignment, expressed no misunderstanding of that right, and had extensive experience as a felony defendant in superior court. With respect to voluntary, Camacho *himself* waived his jury trial right. Given his record, the purported error is not so obvious to warrant appellate review.

Opinion at 6.

The defendant cites *Griffith*, *Williams*, and *Hos* as cases where the challenge to a waiver of a jury trial was raised for the first time on appeal. However, as stated above those cases are not on point. In each of those cases, only the defense attorney spoke, and the trial court did not ask the defendant any questions. An error would be manifest in this situation because the trial court did not ensure the defendant knew that his or her attorney waived a jury or agreed with that decision. In this case, the defendant himself, acting as his own attorney, stated he wanted a bench trial and did not want a jury.

Further there is language in both *Griffith* and *Williams* indicating that the colloquy between the Court and the defendant herein may be sufficient to satisfy constitutional muster.

The court in *Griffith* stated: “A record showing that the defendant orally waived the right may be sufficient to prove a valid waiver for constitutional purposes, notwithstanding CrR 6.1’s requirement of a written waiver. A statement by defense counsel that the defendant waived the right is insufficient.” *Griffith*, 11 Wn. App. 2d at 687 (emphasis added).

The court in *Williams* stated:

State v. Jones, 17 Wash. App. 261, 562 P.2d 283 (1977), held that a criminal defendant's right to trial by jury is not waived unless a written waiver is filed by defendant himself. *In re Reese*, 20 Wash.App. 441, 580 P.2d 272 (1978), softened the rule in holding that an express and open waiver of jury trial in open court and appearing in the record constitutes substantial compliance with CrR 6.1(a). This interpretation was upheld by our Supreme Court following a consolidated appeal in *State v. Wicke*, supra. Under the present state of the law, where there is no written waiver of a jury trial, substantial compliance with CrR 6.1(a) requires some colloquy between the court and the defendant personally.

Williams, 23 Wn. App. at 697 (emphasis added).

The Court of Appeals decision is consistent with other decisions regarding the invited error doctrine or not reviewing an issue raised for the first time on appeal under RAP 2.5 (a).

2. There is no significant question of law under either the US or Washington State constitutions.

The defendant included this issue in the last paragraph of the Argument in Support of Review of the Petition without explanation or citing any authority. The requirement of a written jury waiver in CrR 6.1 (a) is not a constitutional requirement. The procedure for waiving a jury is not as stringent as for waiving an attorney. The Court of Appeals correctly quoted *State v. Castillo-Murcia*, 188 Wn. App. 539, 547, 354 P.3d 932 (2015), “Because Washington only requires a personal expression of waiver from the defendant, the right to a jury trial is easier to waive than other constitutional rights.”

There is no constitutional question when a pro se defendant states, directly and on more than one occasion, that he wants to waive a jury trial.

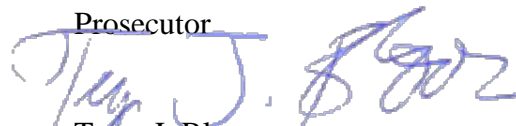
IV. CONCLUSION

Accordingly, the petition for review should be denied.

RESPECTFULLY SUBMITTED this April 26, 2021.

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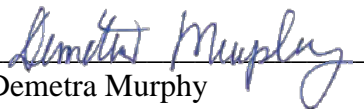
CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

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Signed at Kennewick, Washington on April 26, 2021.


Demetra Murphy
Appellate Secretary

BENTON COUNTY PROSECUTOR'S OFFICE

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