

NO. 34440-8-II
Cowlitz Co. Cause NO. 05-1-00437-9

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

PONCIANO RAMIREZ-DOMINGUEZ,

Appellant.

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY DEPUTY

BRIEF OF RESPONDENT

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I. IDENTITY OF THE RESPONDENT

The State of Washington, by and through the Cowlitz County Prosecuting Attorney's Office (hereinafter "Respondent") is the Respondent in this matter.

II. ISSUES PRESENTED ON APPEAL

A. DID THE TRIAL COURT PROPERLY ACCEPT THE APPELLANT'S WAIVER OF RIGHT TO A JURY TRIAL?

B. WAS THE BENCH TRIAL PROPER?

C. WAS THE ENTRY OF A GUILTY FINDING APPROPRIATE BY THE TRIAL COURT?

III. STATEMENT OF THE CASE

A. Procedural History

The Respondent agrees in large part with the procedural history as presented by the Appellant with the following clarifications and additions.

The Appellant, Ponciano Ramirez-Dominguez was charged by Cowlitz County prosecutor with one count of rape of a child in the first degree on April 11, 2005. CP 1-2. The Appellant's first appearance occurred on August 3, 2005. RPI 4.¹ Marta Rutherford, a certified Spanish interpreter, was present and translated the proceedings for the

¹ "RPI" refers to the verbatim transcripts of the proceedings. These reports include every court appearance of the Appellant prior to the bench trial.

Appellant. RPI 4. Ms. Rutherford explained to the court the Appellant spoke Mixteco, but she was able to understand his Spanish. RPI 4. At the Appellant's next court appearance on August 4, 2005, the Appellant told the court he would be better served with a Mixteco interpreter, which was agreed to by all parties. RPI 7-10. By the next court appearance on August 9, 2005, the first appearance the Appellant had with his attorney, John Hays, a certified Mixteco interpreter was not available. RPI 11-13. The court and the State agreed to set the matter over in order to obtain a certified Mixteco interpreter for the Appellant. RPI 11-13. It should be noted that up and through this court date, the Appellant had been provided a Spanish interpreter for every proceeding, and was able to successfully communicate with the court. RPI 4-13.

The Appellant was arraigned on August 18, 2005 with the aid of Santiago Ventura, a certified Mixteco interpreter. RPI 14-15. Mr. Ventura expressed to the court on this date that he had no problems communicating with the Appellant. RPI 15. In addition, the Appellant's trial attorney expressed his satisfaction with the level of interpretation provided by Mr. Ventura. RPI 15-16. At pre-trial, Mr. Ventura was not in attendance, but Mr. Hays reported to the court he and Mr. Ventura had met with the Appellant more than once, and did not express any difficulties in communication. RPI 19.

Pre-trial was continued to September 27, 2005, and Mr. Ventura was present to interpret for the Appellant. RPI 20-27. Mr. Hays expressed some concern over interpretation issues and stated to the court most of their interviews had been in Spanish. RPI 26. Mr. Hays relayed to the court there are three different types of Mixteco, Mixteco Alta, Mixteco Barro and Mixteco de la Costa. RPI 20-22, 40. The Appellant was again before the court on October 11, 2005 with Mr. Ventura for a CrR 3.5 hearing. RPI 28-36. At this time Mr. Hays relayed to the court that Mr. Ventura was not the proper type of Mixteco interpreter needed to continue in this matter. RPI 28-36. The court granted a continuance in order to try and obtain an interpreter better suited for the needs of the Appellant. RPI 33.

On October 25, 2005, a date scheduled for the CrR 3.5 hearing, Mr. Hays again raised the language issue before the court. RPI 37-57. The court inquired of a court administrator, Alice Millard, if a proper Mixteco interpreter was obtained. RPI 44-49. Ms. Millard explained to the court the repeated attempts made by the court administration to obtain an appropriate interpreter for the Appellant. RPI 44-47. The court administrator was able to connect the Appellant with many different Mixteco interpreters who were unable to communicate with the Appellant. RPI 44. Ultimately, the court was unable to provide the Appellant with an

interpreter of his exact Mixteco dialect. RPI 47. A hearing was set to address language issues before the court on November 8, 2005. RPI 54.

On November 8, 2005, Mr. Hays decided to proceed with Mr. Ventura translating in Spanish for the Appellant because the court was unable to find an interpreter “that speaks a Mizteco that is closer to the defendant’s native language...” RPI 61-62. The court inquired of the Appellant, in Mixteco, which language he would like to proceed in and the Appellant stated, “I would like to proceed with Spanish because that’s the language I can understand better.” RPI 65. The court then inquired of the Appellant, in Spanish, which language he would like to proceed in and the Appellant stated, “ Forgive me, but from the beginning I have been wanting Spanish. I don’t know why Mr. Ventura was called as an interpreter. From the beginning I have not accepted him as my interpreter.” RPI 65-66.

THE COURT: Mr. Ramirez-Dominguez, do you think you have an understanding of what is going on here, in Spanish?

DEFENDANT RAMIREZ-DOMINGUEZ: There would be one, two or threes words that I would not be able to understand, and what I will ask from you is to repeat those few words that I would not be able to understand.

THE COURT: All right, I think we will proceed in Spanish.
RPI 66.

The hearing continued and the State made an offer of proof that Spanish was the proper language for the trial court to proceed in. RPI 66-76. The trial court accepted that the Appellant conducted his daily routine and friendships in Spanish, the interview conducted by the detectives in this case was done in Spanish with no showing of any miscommunication and the Appellant's wish to proceed with the hearings and trial in Spanish. RPI 75-76. This was done in full agreement by Appellant's trial counsel, Mr. Hays, and with the full offer of proof from the State and certified court interpreter Marta Rutherford. RPI 71-75.

The Appellant gave an oral waiver of his right to a jury trial on December 9, 2005. RPI 209-213. As a part of the oral waiver, the trial court went through each of the rights to a jury trial individually to ensure the Appellant understood what was taking place. RPI 209-213.

THE COURT: Do you want to have this case tried by a judge and not by a jury?

DEFENDANT RAMIREZ-DOMINGUEZ: By the judge. As soon as possible.

RPI 211.

Again the trial court asked the Appellant what his intention was.

THE COURT: All right. Sir, you need to listen to me, and you need to answer my question. I need you to answer one question: Do you want to have this case tried by a judge or by a jury?

DEFENDANT RAMIREZ-DOMINGUEZ: By the judge.

RPI 212.

The trial court ultimately accepted the Appellants oral waiver of his right to a jury trial. RPI 212.

A bench trial was held on December 12-December 13, 2005. RPII-RPIII.² The trial court found the Appellant guilty of first degree child molestation and first degree kidnapping. RPIII 544-545. Ultimately, under RCW 9.94A.712, the trial court sentenced the Appellant to a minimum term of 68 months and a maximum term of life. RPV 598.³ The Appellant filed a timely appeal. CP 40.

B. Factual History

The State agrees in most part with the Appellant's factual history and would adopt it as provided. Additionally, the State would submit it is the procedural history that is the basis for the appeal.

IV. ARGUMENT

A. THE APPELLANT KNOWINGLY, VOLUNTARILY AND INTELLIGENTLY WAIVED HIS RIGHT TO A JURY TRIAL; THEREFORE THE BENCH TRIAL AND VERDICT AS A RESULT OF THAT BENCH TRIAL WERE PROPER.

² RPII refers to the second volume of verbatim transcripts of the proceedings, the first day of trial. RPIII refers to the third volume of verbatim transcripts of the proceedings, the second day of trial.

³ RPV refers to the fifth volume of verbatim transcripts of the proceedings.

The State will address all three issues raised on appeal in one section. The root of this appeal lies within the belief the Appellant was not proficient enough in the Spanish language to knowingly, voluntarily and intelligently waive his right to a jury trial.

The oral waiver of his right to a jury trial made by the Appellant satisfies the purpose of CrR 6.1 if the waiver is done knowingly, voluntarily and intelligently. *See State v. Donahue*, 76 Wash.App. 695, 887 P.2d 485 (1995), *State v. Rangel*, 33 Wash.App. 774, 657 P.2d 809 (1983), *State v. Bray*, 23 Wash.App. 117, 594 P.2d 1363 (1979). In *Donahue*, the requirement for knowingly, voluntarily and intelligently does not require the trial court to engage in a particular type of colloquy for a waiver to be valid. *Donahue at 487*. In *State v. Stegall*, it was found that all that was required was a personal expression made by the defendant of a waiver of right. 124 Wash.2d 719, 725, 881 P.2d 979 (1994). In the case at hand, the trial court went through a lengthy colloquy with the Appellant, in which, on more than one occasion, the Appellant expressed his desire to have his case heard by a judge. RPI 208, 211, 212. In addition, as in *Donahue*, the Appellant addressed the trial court directly, stated he wanted his trial to be heard by a judge and stated he went over the waiver and its meaning with his attorney. *Donahue at 487*, RPI 210, 211, 212.

The State would submit the challenge in this case was not one of language, but one of education level. The Appellant is, admittedly, an uneducated farm worker from Mexico. There are many aspects of the legal process which may be difficult to grasp, regardless of your primary language. The trial court in this matter took every conceivable opportunity to ensure they were providing the Appellant with the proper interpreter and every chance to guarantee his rights were not being violated during any of the court proceedings. The Appellant argues the record is replete with ineffective communications, yet the State would argue these are merely statements anyone in this type of situation would make. This is not the first, nor the last time a defendant has made apologies to the court, or made statements on the record of their feelings on what was going on in their case.

The Appellant points the court to *State v. Woo Won Choi*, 55 Wn.App. 895, 781 P.2d 505 (1989). This case is distinguishable from the case at hand because the trial court in *Woo Won Choi* did not directly address the defendant on whether an interpreter was needed, but relied solely on defense counsel's representation to the court. *Id* at 508-509. In the present case, the trial court went through a detailed colloquy with the Appellant about his rights to a jury trial. RPI 208-212. *Woo Won Choi* is similar in the sense that the trial court accepted the defense counsel's

representation of the level of understanding the defendant had, and relayed to the court that understanding. *Id.*, RPI 208-212. No other cases were provided by the Appellant.

The State would submit the Appellant is really arguing the lack of education is the barrier in these proceedings. An uneducated English speaker could misunderstand the same things as the Appellant in this case. For instance, the Appellant understood what it meant to “work”, but not what it meant to be “employed.” The concept is there, the verbiage is not. The trial court made it very clear the language was understood by the Appellant, and very clear the concepts were understood by the Appellant. The State would also point out there were no issues with ineffective assistance of counsel raised in this appeal. The defense counsel had no issues with the Appellant’s wish to waive his right to a jury trial. RPI 208-209. The record in this case is clear, and the record does not reflect any violation of the Appellant’s right to a jury trial. The waiver was done after having consulted his attorney and it was done knowingly, intelligently and voluntarily. The record shows the burden was met and any barriers the Appellant had were not of language.

V. CONCLUSION

For all of the above reasons, this Court should affirm the trial court’s verdict of guilt for one count of child molestation in the first

degree and one count of kidnapping in the first degree. The waiver of right to a jury trial was entered knowingly, intelligently and voluntarily by the Appellant, and therefore the bench trial was proper and the finding of guilty should be affirmed.

Respectfully submitted this 26th day of December, 2006.

SUSAN I. BAUR
Prosecuting Attorney

By Pat Anderson 36410
PATRICIA ANDERSON/WSBA #36410
Deputy Prosecuting Attorney
Representing Respondent

COURT OF APPEALS, STATE OF WASHINGTON
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CERTIFICATE OF
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I, Audrey J. Gilliam, certify and declare:

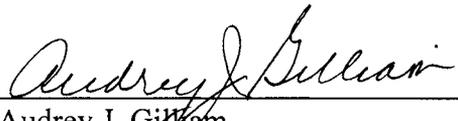
That on the 26 day of December, 2006, I deposited in the mails of the United States Postal Service, first class mail, a properly stamped and address envelope, containing Brief of Respondent addressed to the following parties:

Court of Appeals
950 Broadway, Suite 300
Tacoma, WA 98402

Lisa E. Tabbut
Attorney at Law
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Longview, WA 98632

I certify under penalty of perjury pursuant to the laws of the State of Washington that the foregoing is true and correct.

Dated this 26 day of December, 2006.



Audrey J. Gilliam