

TABLE OF CONTENTS

	Page
A. TABLE OF AUTHORITIES	iv
B. ASSIGNMENT OF ERROR	
1. Assignment of Error	1
2. Issue Pertaining to Assignment of Error	2
C. STATEMENT OF THE CASE	
1. Factual History	3
2. Procedural History	4
D. ARGUMENT	
I. THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNDER UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, WHEN IT FOUND HIM GUILTY OF POSSESSION OF METHAMPHETAMINE BECAUSE SUBSTANTIAL EVIDENCE DID NOT SUPPORT THIS VERDICT	12
II. THE TRIAL COURT ERRED WHEN IT ENTERED FINDING OF FACT 6 BECAUSE IT IS UNSUPPORTED BY SUBSTANTIAL EVIDENCE	16
III. THE BENCH TRIAL VIOLATED THE DEFENDANT'S RIGHT TO A JURY TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 21, AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT, BECAUSE THE DEFENDANT DID NOT KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY WAIVE THIS RIGHT	17
E. CONCLUSION	22

F. APPENDIX

1. Washington Constitution, Article 1, § 3	23
2. Washington Constitution, Article 1, § 21	23
3. United States Constitution, Sixth Amendment	23
4. United States Constitution, Fourteenth Amendment	23

TABLE OF AUTHORITIES

Page

Federal Cases

<i>Blakely v. Washington</i> , 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004)	19, 20
<i>Cheff v. Schnackenberg</i> , 384 U.S. 373, 86 S.Ct. 1523, 16 L.Ed.2d 629 (1966)	17
<i>In re Winship</i> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)	12
<i>Jackson v. Virginia</i> , 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)	13

State Cases

<i>Pasco v. Mace</i> , 98 Wn.2d 87, 653 P.2d 618 (1982)	18
<i>State v. Agee</i> , 89 Wn.2d 416, 573 P.2d 355 (1977)	16
<i>State v. Aten</i> , 130 Wn.2d 640, 927 P.2d 210 (1996)	13
<i>State v. Baeza</i> , 100 Wn.2d 487, 670 P.2d 646 (1983)	12
<i>State v. Borboa</i> , 124 Wn.App. 779, 102 P.3d 183 (2004)	19, 20
<i>State v. Bugai</i> , 30 Wn.App. 156, 632 P.2d 917 (1981)	18
<i>State v. Colquitt</i> , 133 Wn.App. 789, 137 P.3d 892 (2006)	13
<i>State v. Donahue</i> , 76 Wn.App. 695, 887 P.2d 485 (1995)	18
<i>State v. Ford</i> , 110 Wn.2d 827, 755 P.2d 806 (1988)	16
<i>State v. Hill</i> , 123 Wn.2d 641, 870 P.2d 313 (1994)	15, 16
<i>State v. Johnson</i> , 12 Wn.App. 40, 527 P.2d 1324 (1974)	13

<i>State v. Moore</i> , 7 Wn.App. 1, 499 P.2d 16 (1972)	12
<i>State v. Nelson</i> , 89 Wn.App. 179, 948 P.2d 1314 (1997)	16
<i>State v. Taplin</i> , 9 Wn.App. 545, 513 P.2d 549 (1973)	13
<i>State v. Vasquez</i> , 109 Wn.App. 310, 34 P.3d 1255 (2001)	18
<i>State v. Wicke</i> , 91 Wn.2d 638, 591 P.2d 452 (1979)	18
<i>State v. Williams</i> , 23 Wn.App. 694, 598 P.2d 731 (1979)	18, 19

Constitutional Provisions

Washington Constitution, Article 1, § 3	12
Washington Constitution, Article 1, § 21	17
United States Constitution, Sixth Amendment	17
United States Constitution, Fourteenth Amendment	12

ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court violated the defendant's right to due process under Washington Constitution, Article 1, § 3, and under United States Constitution, Fourteenth Amendment, when it found him guilty of possession of methamphetamine because substantial evidence did not support this verdict. RP 1-74.

2. The trial court erred when it entered finding of fact 6 because it is unsupported by substantial evidence.

3. The bench trial violated the defendant's right to a jury trial under Washington Constitution, Article 1, § 21, and United States Constitution, Sixth Amendment, because the defendant did not knowingly, intelligently, and voluntarily waive this right. RP 8-17-08 1-3.

Issues Pertaining to Assignment of Error

1. Does a trial court violate a defendant's right to due process under Washington Constitution, Article 1, § 3, and under United States Constitution, Fourteenth Amendment, if it finds him guilty of possession of methamphetamine when substantial evidence does not support the conclusions that the defendant possessed the methamphetamine the state tested and had admitted into evidence?

2. Does a trial court err when it enters a finding of fact unsupported by substantial evidence?

3. Does a bench trial violate a defendant's right to a jury trial under Washington Constitution, Article 1, § 21, and United States Constitution, Sixth Amendment, when the defendant did not sign a written jury waiver and when the court's colloquy with the defendant does not demonstrate that the defendant knowingly, intelligently, and voluntarily waived this right?

STATEMENT OF THE CASE

Factual History

At about 4:53 in the afternoon of February 27, 2008, Centralia Police Officer Timothy Warren went with his police dog to help execute a search warrant at 421 Cherry Street in Centralia. RP 11-12.¹ As Officer Warren went to station himself outside the residence to perform containment, he heard another officer over the radio state that someone was running from the back of the house. RP 12-14. Officer Warren then saw the defendant jump over a wall and run down the street, dropping a back pack as he did. *Id.* Officer Warren, who was about 50 to 75 feet away when he saw this, immediately got out of his vehicle and gave chase. *Id.* Once his police dog got out of the car and caught up with him, he gave the command for the dog to apprehend the defendant, who was the only person on the street. *id.*

About one city block down the street, the police dog caught up with the defendant, bit him on the buttocks knocking him down, and then rolled past the defendant because of its forward momentum. RP 15-16. The defendant then attempted to get up and flee, but the police dog turned around, bit the defendant on the shoulder and the arm, effectively pulling the

¹The record in this case includes three volumes of verbatim reports of the pretrial hearing held in 4/17/08, the bench trial held on 4/24/08, and the sentencing held on 5/20/08. The trial is referred to herein as "RP [page #]." The other two volumes are referred to as "RP [hearing date] [page #]."

defendant to the ground. *id.* As the dog pulled the defendant to the ground, Officer Warren caught up with them, ordered the defendant to remain face down on the ground, and called off the dog. RP 16-17. At this point, Officer Warren handcuffed the defendant and took him back toward the house where the other officers were executing the warrant. RP 18. About half way back, Officer Warren gave custody of the defendant to another officer. *Id.*

Once Officer Warren handed the defendant off, he and Officer Patrick Fitzgerald went back with flashlights and retraced the defendant's path from the house to the point the dog apprehended him. RP 19-21, 27-28. Somewhere between 5 to 10 feet beyond the latter point, Officer Fitzgerald found a baggie with what he suspected to be methamphetamine in it lying on the grass. RP 29-31. Upon seeing this, he pointed it out to Officer Warren. RP 19-21.

Procedural History

By Information filed February 28, 2008, the Lewis County Prosecutor charged the defendant Andrew Craig Skyberg with one count of possession of methamphetamine. CP 1-2. The case later came on for review on August 17, 2008, at which time the defendant, his attorney, and the judge signed a document originally entitled "ORDER" with that word crossed out and the phrase "Waiver of Jury Trial" substituted. The body of this document states:

On motion of the defendant

IT IS HEREBY ORDERED: That the Defendant has knowingly and voluntarily waived his right to a jury trial. The matter shall proceed to trial to a Judge sitting without a jury.

CP 6.

At no point during the hearing on April 17, 2008, at which the court accepted the waiver, did the defendant or his attorney state that they had discussed his right to a jury trial, what that right entailed, and what it meant to waive that right. RP 8-17-08 1-3. None the less, the court accepted the waiver and the case proceeded to trial before the bench. RP 1. During this trial, the state called four witnesses, including Officers Warren and Fitzgerald. RP 2. The defendant then took the stand as the sole witness for the defense. *Id.* During their testimony, Officers Warren and Fitzgerald testified to the facts contained in the preceding factual history. *See* Factual History. However, when the two officers got to the point where they described seeing the baggie with suspected methamphetamine in it, their testimony varied dramatically concerning what exactly happened to that baggie from that point. RP 20-21, 29-31. According to Officer Warren, Officer Fitzgerald picked up the baggie and later gave it to Officer Lowrey or some other officer in the street crimes unit. RP 20-21. His testimony at trial went as follows on this point.

Q. Okay. Were you aware or did Sergeant Fitzgerald locate anything of interest at that location?

A. Yes, he did. Approximately, I would say 5 feet from where I took Mr. Skyberg into custody there was a white – clear baggy of crystal substance.

Q. Did Sergeant Fitzgerald show this to you?

A. Yes. He picked it off the ground and showed me.

Q. Did you see what Sergeant Fitzgerald did with this item?

A. I believe he handed it off to Detective Lowery or one of the – one of the street crimes investigators.

RP 20-21.

For his part, Officer Fitzgerald admitted finding the baggie, but he denied ever touching it or giving it to anyone. RP 29-31. His testimony at trial on this point went as follows:

Q. Okay. And did you find anything at that stop or at the location approximately one block away?

A. Right. I found a – I got down on the – I kind of squatted down on the ground to get a better idea of - get a better look at the grass. And about 6 – well, between 8 to 10 feet from where I was standing I found a baggy, like half of a lunch bag, a ziploc baggy, with a white crystalline powder inside it.

A. That was the termination of the foot pursuit. That's where Mr. Skyberg was eventually caught.

Q. And you said that 8 to 10 feet from where you were standing you located the ziploc baggy with a – what would you - what would you describe or how would you describe the material inside of it?

A. It was white crystalline powder or white sugary – it looked like sugar, very typical of methamphetamine.

Q. Okay. And what did you do at that point?

A. Pointed it out to Officer Warren.

Q. Okay. And after you pointed it out, what did you do next, sir?

A. We picked it up –

Q. Okay.

A. – noted where we were and left.

Q. Did you go back to the search address and where you initially started out –

A. Yes.

Q. – at 421? Did you hand over or do anything with this ziploc baggy?

A. I'd already handed it over – or actually, I never picked it up. I pointed it out to Officer Warren who then picked it up.

Q. Okay.

A. That way we had a continuity of evidence.

Q. Sure.

RP 29-31.

Neither officer testified as to the amount of crystalline substance they believed to be in the baggie. RP 11-26, 33-44. At trial, the state did have a baggie of methamphetamine marked into evidence as Exhibit No. 1. RP 35. However, they did this through Officer Mike Lowrey. *Id.* Officer Lowrey testified that on that day, he was the evidence officer for the purposes of the

execution of the search warrant. RP 33-34. According to Officer Lowrey, at some point during the execution of the warrant, he took possession of an "item" "that had been located." RP 34. After making this statement, Officer Warren identified Exhibit No. 1 as a baggie of suspected methamphetamine that he sent to the crime lab for analysis. RP 33-34. The crime lab returned a report that the baggie had methamphetamine in it. RP 35-36. However, Officer Lowrey did not even testify that the item that Officer Warren supposedly gave him was the baggie marked as Exhibit No. 1. RP 34-35. His testimony on this issue went as follows:

Q. Did you take inventory or process any – any evidence or items that were secured of as a result of that search warrant?

A. Yes, I did.

Q. Did you obtain any items from Officer Warren?

A. I obtained some that he – that had been located, yes.

Q. Okay. I'm handing you what's been marked as identification number 1. Can you take a look at that, sir?

A. Yes, sir.

Q. And what is identification 1 or what is that item?

A. It's marked as item number 4 for our logging. It states methamphetamine, slash, amphetamine in a clear plastic baggy, crystalline material. And it's evidence taped with my initials on the evidence tape on the back.

RP 34-35.

In addition, at no point during the trial did the state ever hand Exhibit No. 1 to either Officer Warren or Officer Fitzgerald and ask either one of them whether or not Exhibit No. 1 was, in fact, the baggie that they testified they saw in the area of the defendant's arrest. RP 11-26, 27-33. However, as Officer Lowrey testified, Exhibit No. 1 was the fourth item of evidence he logged in as evidence officer during the execution of the warrant. RP 35.

Following the reception of evidence in this case, the parties presented closing argument. RP 73-84. The court then rendered its verdict, finding the defendant guilty of possession of methamphetamine. RP 84-85. The court later entered the following findings of fact and conclusions of law on the trial:

FINDINGS OF FACT

1. On 02-27-2008, members of the street crimes unit served a search warrant at 421 W. Cherry, Centralia Wa.
2. Law enforcement arrived and Defendant ran from the 421 W. Cherry location.
3. As Defendant ran he discarded a backpack. The backpack would later be searched and discovered to contain several clean baggies.
4. Defendant was apprehended by K-9 Kayo after his handler, Officer Warren, instructed Kayo to apprehend. Kayo struck Defendant from the rear (back) as he ran.
5. Defendant was detained and placed in restraints. Within 5 feet of the arrest location, Sgt Fitzgerald found a baggie containing a crystal substance. The baggie was found 5 feet away in the direction

Defendant had been running prior to being struck by Kayo.

6. The crystal substance weighed 5.6 grams. The crystal substance was tested by the Washington State Patrol (WSP) Crime Lab and identified as methamphetamine. The State and Defendant stipulated to the identification by WSP and admissibility of the results.

7. Sgt. Fitzgerald and Officer Lowery both testified that 5.6 grams of methamphetamine is inconsistent with an amount typical for personal use. 5.6 grams is consistent with an amount that would suggest or signify distribution.

8. At the time Defendant was apprehended he told officers “you didn’t find that stuff on me.”

9. Defendant chose to testify at trial. The defendant testified that he was unaware that officers were pursuing him or wanting him to stop. Defendant also testified that he was aware the dog was pursuing him and decided he would stop, got to the ground, and wait for the dog to arrive.

10. At the time defendant was apprehended by the K-9 dog, Kayo, Defendant struggled with the dog until the Defendant complied with Officer Warren’s directions and Kayo was removed.

11. The defendant was in possession of the methamphetamine.

12. The acts described herein occurred in Lewis County, Washington State.

CONCLUSIONS OF LAW

1. The court has jurisdiction over the defendant and the subject matter of this case.

2. The defendant is guilty of possession of a controlled substance, to wit: methamphetamine.

3. A judgment and sentence consistent with these findings shall enter.

CP 15-16.

At a later hearing, the court sentenced the defendant to 24 months in prison, which was at the high end of the standard range. CP 17-28. The defendant thereafter filed timely notice of appeal. CP 29.

ARGUMENT

I. THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNDER UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, WHEN IT FOUND HIM GUILTY OF POSSESSION OF METHAMPHETAMINE BECAUSE SUBSTANTIAL EVIDENCE DID NOT SUPPORT THIS VERDICT.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: “[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* In addition, evidence that is equally consistent with innocence as it is with guilt is not sufficient to support a conviction; it is not substantial evidence.

State v. Aten, 130 Wn.2d 640, 927 P.2d 210 (1996).

“Substantial evidence” in the context of a criminal case means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). This includes the requirement that the state present substantial evidence “that the defendant was the one who perpetrated the crime.” *State v. Johnson*, 12 Wn.App. 40, 527 P.2d 1324 (1974). The test for determining the sufficiency of the evidence is 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, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979).

In the case at bar, the state charged the defendant with possession of methamphetamine under RCW 69.50.4013(1). In order to sustain a conviction under this statute, the state had the burden of proving the following beyond a reasonable doubt that the defendant possessed methamphetamine. Although the state does not have the burden of proving a mental state, the state does have the burden of providing (1) that the defendant either actually or constructively possessed a substance, and (2) that an expert tested the substance and found that it was methamphetamine. *State*

v. Colquitt, 133 Wn.App. 789, 137 P.3d 892 (2006).

In the case at bar, the state met this latter burden by providing a lab test that stated that the substance found in Exhibit No. 1 contained methamphetamine. However, the state failed completely in its burden of proving that the defendant ever actually or constructively possessed Exhibit No. 1. It is true that Officer Warren and Fitzgerald both saw a baggie of what they suspected to be methamphetamine on the ground about five to ten feet from where the defendant was apprehended. However, neither officer identified Exhibit No. 1 as that baggie. Indeed, both officers denied ever picking up the baggie and giving it to anyone.

It is true in this case that Officer Lowrey testified that Officer Warren found something during the execution of the search warrant. However, Officer Lowrey did not even claim that Officer Warren gave him whatever it was that he found. Much less did Officer Lowrey claim that Officer Warren gave him Exhibit No. 1. Indeed, even if he had so testified, there was no evidence that Exhibit No. 1 was the baggie that Officer Warren said that he saw but did not pick up. It is interesting to note on this point that Officer Lowrey testified that Exhibit No. 1 was the fourth item that he logged into evidence during the execution of the search warrant. In any event, there is no evidence that the only baggie of methamphetamine admitted into evidence was the baggie that Officers Warren and Fitzgerald saw near the area in

which the defendant was apprehended. Thus, in the case at bar, the state failed to present substantial evidence to support the crime charged against the defendant.

It is true in this case that (1) the lab report also mentions a second baggie containing less than .1 grams of methamphetamine, and (2) the officers found some empty baggies in the backpack that the defendant discarded. However, there is no evidence in this case that the baggie tested came from the defendant's backpack. First, no witness identified the baggie tested as one coming from the defendant's backpack. Second, as finding of fact No. 3 states, all of the baggies the officer found in the defendant's backpack were clean. This finding states:

3. As Defendant ran he discarded a backpack. The backpack would later be searched and discovered to contain several clean baggies.

CP 14.

The state did not assign error to this finding of fact. As a result, it is a verity on appeal. *State v. Hill*, 123 Wn.2d 641, 870 P.2d 313 (1994). Consequently, the state failed to present substantial evidence that the defendant possessed either items identified in Exhibit 2 as items containing methamphetamine.

II. THE TRIAL COURT ERRED WHEN IT ENTERED FINDING OF FACT 6 BECAUSE IT IS UNSUPPORTED BY SUBSTANTIAL EVIDENCE.

The purpose of findings of fact and conclusions of law is to aid an appellate court on review. *State v. Agee*, 89 Wn.2d 416, 573 P.2d 355 (1977). The Court of Appeals reviews these findings under the substantial evidence rule. *State v. Nelson*, 89 Wn.App. 179, 948 P.2d 1314 (1997). Under the substantial evidence rule, the reviewing court will sustain the trier of facts' findings "if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise." *State v. Ford*, 110 Wn.2d 827, 755 P.2d 806 (1988). In making this determination, the reviewing court will not revisit issues of credibility, which lie within the unique province of the trier of fact. *Id.* Finally, findings of fact are considered verities on appeal absent a specific assignment of error. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

In the case at bar, the defendant has specifically assigned error to finding of fact 6. This finding states as follows:

6. The crystal substance weighed 5.6 grams. The crystal substance was tested by the Washington State Patrol (WSP) Crime Lab and identified as methamphetamine. The State and Defendant stipulated to the identification by WSP and admissibility of the results.

CP 15.

Although the first sentence in this finding is somewhat vague as to

which crystal substance the court was referring, appellant herein interprets it to mean that the court was referring to Exhibit No. 1 from the trial. If this is the case, then the defense does not assign error to this sentence because the crime lab report on Exhibit No. 1 identified the baggie as containing 5.6 grams of crystalline material and that this substance contained methamphetamine. However, to the extent that this finding of fact tries to state that the 5.6 grams of crystalline material came from the baggie that Officers Warren and Fitzgerald both said they saw, and both denied ever picking up and giving to anyone, then the defendant does assign error to this finding. As was set out in Argument I, substantial evidence does not support the conclusion that Exhibit No. 1 was the baggie the officers saw since neither officer identified Exhibit No. 1 as the baggie they saw, and both officers denied ever picking up the baggie and giving it to anyone.

III. THE BENCH TRIAL VIOLATED THE DEFENDANT'S RIGHT TO A JURY TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 21, AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT, BECAUSE THE DEFENDANT DID NOT KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY WAIVE THIS RIGHT.

Under the United States Constitution, Sixth Amendment every person charged with an offense that could result in over six months imprisonment is entitled to a trial by jury. *Cheff v. Schnackenberg*, 384 U.S. 373, 86 S.Ct. 1523, 16 L.Ed.2d 629 (1966). By contrast, Washington Constitution, Article

1, § 21, affords the citizens of this state the right to trial by jury for any offense that is defined as a “crime,” conviction of which could result in any imprisonment. *Pasco v. Mace*, 98 Wn.2d 87, 653 P.2d 618 (1982). Since all persons charged with a crime have a fundamental right to trial by jury, the waiver of this right may only be sustained if “knowingly, intelligently and voluntarily made.” *State v. Bugai*, 30 Wn.App. 156, 157, 632 P.2d 917 (1981).

The waiver of the right to jury trial must either be made in writing or made orally on the record. *State v. Wicke*, 91 Wn.2d 638, 591 P.2d 452 (1979). If the defendant challenges the validity of the jury waiver on appeal, the State bears the burden of proving that the waiver was knowingly, intelligently and voluntarily made. *State v. Donahue*, 76 Wn.App. 695, 697, 887 P.2d 485 (1995). Because it implicates the waiver of an important constitutional right, the appellate court reviews the waiver de novo. *State v. Vasquez*, 109 Wn.App. 310, 34 P.3d 1255 (2001). Finally, in examining an oral waiver of the right to jury made in violation of the requirement under CrR 6.1, “every reasonable presumption should be indulged against the waiver of such a right, absent an adequate record to the contrary.” *State v. Wicke, supra*.

For example, in *State v. Williams*, 23 Wn.App. 694, 598 P.2d 731 (1979) the defendant’s were convicted in a superior court bench trial de novo

of illegally taking shellfish. The record contained no written waiver of jury trial and no colloquy between the defendant and the court. The defendants thereafter appealed, arguing that the state had failed to meet its burden of showing that they had knowingly, intelligently, and voluntarily waived their rights to a jury trial. The Court of Appeals agreed, holding as follows:

State v. Jones, 17 Wn.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 Wn.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. The absence of such a colloquy in the record of the present case dictates reversal of the convictions.

State v. Williams, 23 Wn.App. at 697-698.

In a recent case, *State v. Borboa*, 124 Wn.App. 779, 102 P.3d 183 (2004), the defendant appealed his exceptional sentence, arguing that under the decision in *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), the trial court had denied him his right to jury trial when it imposed a sentence in excess of the standard range based upon judicially determined aggravating facts. In this case, a jury convicted the defendant of first degree kidnaping, second degree assault of a child, and first degree rape of a child. The jury had also returned a special finding that the defendant had

committed the kidnaping with sexual motivation. Under RCW 9.94A.712, the court imposed sentences of life in prison, and then declared a minimum mandatory term in excess of the applicable range based upon deliberate cruelty and particular vulnerability because of age.

While the defendant's case was on appeal, the Supreme Court issued the decision in *Blakely* and the defendant then argued that the minimum mandatory sentence in excess of the applicable range violated his right to jury trial. The state responded by arguing that even if *Blakely* applied, the defendant had waived his right to a jury determination on the aggravating factors when he admitted one of the factors in his initial brief. However, the Court of Appeals rejected this argument, holding as follows:

Although a defendant can waive his Sixth Amendment right to jury trial, he or she must do so knowingly, voluntarily, and intelligently. Borboa was tried by a jury and sentenced before *Blakely* was decided. He did not know of or agree to forgo his right to have a jury find the facts needed to support a sentence above the standard range. Thus, he did not knowingly, voluntarily, or intelligently waive his Sixth Amendment right to have a jury find such facts.

State v. Borboa, 124 Wn.App. at 792 (footnotes omitted).

In the case at bar, the defendant was at least aware of his right to trial by jury, as the court informed him of that right during its brief colloquy with him. However, there was no written waiver of jury trial filed, and there is no evidence in the record to support the conclusion that the defendant's attorney

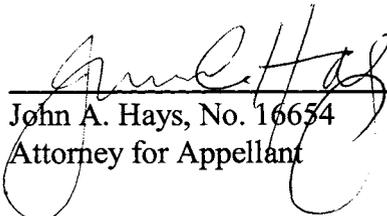
ever explained to him either what that right was, or what the consequences of waiving it were. Thus, this court should grant the defendant a new trial before a jury.

CONCLUSION

This court should vacate the defendant's conviction and remand with instructions to dismiss because substantial evidence does not support this conviction. In the alternative, this court should grant the defendant a new trial to a jury because the defendant did not knowingly, voluntarily, and intelligently waive this right.

DATED this 24th day of November, 2008.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**WASHINGTON CONSTITUTION
ARTICLE 1, § 21**

The right to trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases where the consent of the parties interested is given thereto.

**UNITED STATES CONSTITUTION,
SIXTH AMENDMENT**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

**UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

