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Division II
State of Washington
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NO. 51262-9-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

MICHAEL G. MANSFIELD,

Appellant.

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

Assignment of Error

The trial court violated the defendant's right to a jury trial under Washington Constitution, Article 1, § 21, and United States Constitution, Sixth Amendment, when it accepted a jury waiver that the defendant did not knowingly, intelligently, and voluntarily enter.

Issues Pertaining to Assignment of Error

Does a trial court violate a defendant's right to a jury trial under Washington Constitution, Article 1, § 21, and United States Constitution, Sixth Amendment, if it accepts a jury waiver that the defendant did not knowingly, intelligently, and voluntarily enter?

STATEMENT OF THE CASE

Factual History

On the evening of May 18, 2017, Defendant Michael Mansfield spent the night at his mother's house at 13241 Zeller Road SE outside of Yelm. RP 13, 24-27.¹ The prior year he had lived at that address and worked for a business his mother Margaret Mansfield and his aunt Donna Stemme ran. RP 32-33, 86-92. While working for them he often drove an old Ford Explorer that his aunt let his mother use. *Id.* In April of 2017, the defendant had asked his mother for permission to use the Explorer but she refused. RP 104, In fact, the defendant's aunt had told his mother to not let the defendant drive the Explorer any more. RP 16-17, 27-32.

On the morning of May 19th, the defendant's mother got up to go to work and found both the defendant and the Explorer gone. RP 27. Believing that the defendant had taken the Explorer without permission, she obtained a temporary restraining order to prevent the defendant from having contact with her or coming to her house. RP 30-32. By that evening,

¹The record on appeal includes verbatim reports of the two hearings held on November 8, 2017, and November 13, 2017, as well as the bench trial held on November 17, 2017, and the sentencing hearing held on December 13, 2017. The two pretrial hearings and the sentencing hearing are referred to herein as "RP [date] [page #]." The bench trial is referred to herein as "RP [page #]."

her daughter was at her house and got the defendant on the phone to ask about the Explorer. RP 58-62. The defendant then got a ride to his mother's house and ended up in the driveway in a confrontation with his sister. RP 58-62, 96-98. Both the defendant and his sister called the police. RP 58-59, 97-98.

Once the police arrived they served the defendant with the no contact order and told him to leave. RP 64-65, 77. During his conversation with the police the defendant told them that he had taken the Explorer early that morning to help a friend who was out of gas. RP 62-65, 77. He told them that after helping that friend put gas in her car, he parked the van and left with her for a nearby casino. *Id.* He also told the police that he had driven the Explorer on many occasions and thought there would be no problem with using it for a few minutes to help a friend. RP 62-66. Although there was some confusion as to where the defendant left the Explorer, after a short while another officer found it in the parking lot of the local Eagles lodge about a mile from the defendant's mother's house. RP 78-81. At this point the defendant's ride showed up and he left his mother's house. RP 71-72. The police later tracked the defendant down and arrested him for theft of the Explorer. RP 118.

Procedural History

By information filed May 24, 2017, the Thurston County Prosecutor charged the defendant Michael Mansfield with one count of Theft of a Motor Vehicle against a family or household member. CP 8. On July 27, 2017, the court signed an agreed order resetting the trial to October 9, 2017. CP 9. One month later the court signed a second agreed order resetting the trial to November 13, 2017. CP 10. That agreed order noted that the last day for trial was November 14th. *Id.* On November 8, 2017, five days before trial, the parties appeared before the court for a scheduled statute hearing. CP 10. At that time the defendant signed a jury waiver in court, and his attorney gave it to the court. RP 11/8/17 1-5. The waiver stated as follows:

COMES NOW the Defendant Michael Mansfield and informs the court that he hereby freely and voluntarily waives his right to a jury trial pursuant to CrR 6.1(a) and wishes to proceed with a bench trial.

CP 18.

The trial court accepted this jury waiver without any colloquy at all with the defendant. RP 11/8/17/1-5.

The parties later appeared on the day for trial. CP 25. At that time they entered a third agreed order of continuance. *Id.* At that hearing the court noted that only one courtroom was available and another case had

precedence. RP 11/13/17 1-4. The court reset trial for November 27, 2017.

CP 25.

The case finally came on for bench trial on November 27, 2017. RP 1-159; CP 10. At the beginning of the trial the court noted that it had not engaged the defendant in a colloquy when it had accepted his jury waiver. RP 4-5. The court then entered into a short conversation with the defendant about his prior entry of his right to jury trial. RP 4-5. After that colloquy and short opening statements by the parties, the state called four witnesses: the defendant's aunt, his mother, and the two police officers who investigated the case. RP 11, 23, 56, 73. They testified to the facts in the preceding factual history. *See Factual History, supra*. The defendant then took the stand, admitted that he had driven his aunt's Explorer about one mile from his mother's house to the Eagles lodge, stated that he believed he had permission to use the vehicle for that short period, and denied any intent to deprive his aunt or mother of the Explorer. RP 86-118.

Following the defendant's testimony the parties presented oral argument, after which the court found the defendant guilty. RP 120-146, 146-155. On December 13, 2017, the parties again appeared in this case, at which time the court entered the findings of fact and conclusions of law in support of its verdict, sentenced the defendant within the standard range

and only imposed mandatory legal-financial obligations. CP 40-43, 50-60;
RP 12/13/17 1-11. The defendant thereafter filed timely notice of appeal.
CP 77-79.

ARGUMENT

I. THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT TO A JURY TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 21, AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT, WHEN IT ACCEPTED A JURY WAIVER THAT THE DEFENDANT DID NOT KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY ENTER.

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 defendants 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 2004 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 that he had the right to trial by jury, since the written waiver so states. However, the inadequacy of the written waiver and the lack of any colloquy between the court and the defendant at the time it accepted the waiver shows that the waiver in this case was no more effective than the waiver in *Borboa*. Although the court engaged in a subsequent colloquy almost three weeks later at the beginning of the bench trial, by this time the defendant was faced with the fact that the trial had repeatedly been continued and the fact that were he to ask for a jury his case would again be continued. This subsequent colloquy cannot substitute for the deficiencies in both the written waiver and the absence of any colloquy when the court accepted

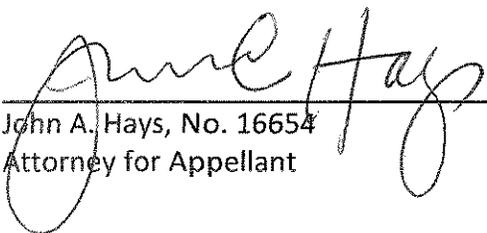
the waiver. Thus, in this case the state cannot meet it's burden of proving that the jury waiver was knowingly, intelligently, and voluntarily made. As a result, this court should reverse the conviction and remand for a new trial before a jury.

CONCLUSION

For the reasons set out herein this court should reverse the defendant's conviction and remand for a new trial.

DATED this 13th day of April, 2018.

Respectfully submitted,



John A. Hays, No. 16654
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APPENDIX

**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.

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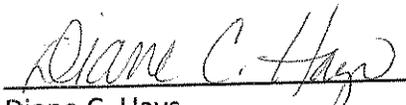
AFFIRMATION
OF SERVICE

MICHAEL G. MANSFIELD,
Appellant.

The under signed states the following under penalty of perjury under the laws of Washington State. On the date below, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

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