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Division III  
State of Washington  
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No. 37143-3-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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THE STATE OF WASHINGTON,

Respondent

v.

MARTINIANO ELUTERIO CAMACHO,

Appellant

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR BENTON COUNTY

NO. 19-1-00938-03

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BRIEF OF RESPONDENT

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## **I. RESPONSE TO ASSIGNMENTS OF ERROR**

- A. The trial court did not err in allowing the defendant to waive a jury.
- B. The trial court did not err in imposing a standard range sentence

## **II. STATEMENT OF FACTS**

### **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 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:**

Anthony Matthews and his friend Jamell Goree travelled to the Tri-City area on July 27, 2019 to watch the annual hydroplane races. RP<sup>1</sup> 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 Matthews and Goree because they cursed at him while he was walking. RP at 97.

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<sup>1</sup> “RP” refers to the verbatim report of proceedings from bench trial on 09/30/2019.

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.

**Sentencing:**

The defendant was 41 years old at the time of the offense. CP 32. He had 16 prior felony convictions, 10 of which were as an adult. CP 33. His criminal history spanned three decades and involves a wide variety of crimes including car theft, burglary, assault, harassment, escape, drug possession, and malicious mischief. The prosecutor asked for a sentence of 96 months, on a range of 75-96 months. RP 08/01/19 at 36.

The defendant did not ask for any specific sentence, but said, "I'm ready to get treatment if you can give me treatment, you know. I don't think that locking me up and throwing away the key would solve this problem. . . . And I ask you, if you could, sentence me under diminished capacity . . . I wouldn't mind getting treatment . . . ." RP 08/01/19 at 39.

The trial court sentenced the defendant to the top of the standard range, 96 months.

### III. ARGUMENT

- A. The defendant knowingly and voluntarily waived a jury trial.**
- 1. The court need not consider this issue under RAP 2.5 or the invited error doctrine.**

Discussing the invited error doctrine, the court in *State v. Lewis*, 15

Wn. App. 172, 177, 548 P.2d 587 (1976) stated:

We hold, therefore, that when a defendant in the procedural setting of a criminal trial makes a tactical choice in pursuit of some real or hoped for advantage, he may not later urge his own action as a ground for reversing his conviction even though he may have acted to deprive himself of some constitutional right.

That reasoning should apply here also. The court approved the defendant to act as his own attorney. He thereafter requested to waive a jury. He should not now be allowed to claim error.

RAP 2.5(a)(3) could also bar consideration of the issue because it was never raised in the trial court. This rule allows consideration of “manifest error affecting a constitutional right.” “Manifest” in RAP 2.5(a)(3) requires a showing of actual prejudice. *State v. O'Hara*, 167 Wn.2d 91, 99–100, 217 P.3d 756 (2009).

To demonstrate actual prejudice, there must be a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case. *Id.* The focus of the actual prejudice analysis is on whether the error is so obvious on the record that the error

warrants appellate review. It is not the role of an appellate court on direct appeal to address claims where the trial court could not have foreseen the potential error or where the prosecutor or trial counsel could have been justified in their actions or failure to object. Thus, to determine whether an error is practical and identifiable, the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error. *Id.*

The defendant cites *State v. Hos*, 154 Wn. App. 238, 250, 225 P.3d 389 (2010) as holding that a waiver of a jury is reviewable under RAP 2.5. However, *Hos* did not directly address the issue. In *Hos*, the defendant apparently acquiesced in her attorney's representation that she agreed with a bench trial. *Id.* That is in contrast to this situation where the defendant initiated the request to waive a jury. There is nothing so obvious in this record that the error warrants review. The defendant twice stated he wanted to go forward without a jury and there was nothing the trial court could have done to correct granting the request.

Under either the invited error doctrine or RAP 2.5 the issue should not be reviewed.

**2. Standard on review (if the court reviews the issue):**

CrR 6.1(a) states: “Cases required to be tried by jury shall be so tried unless the defendant files a written waiver of a jury trial, and has consent of the court.” But CrR 6.1(a) is an evidentiary procedural requirement, not a constitutional requirement. Thus, failure to comply with CrR 6.1(a)'s writing requirements does not warrant reversal where the record is otherwise sufficient to show a valid waiver under the rule. *Hos*, 154 Wn. App. at 250.

Oral jury trial waivers on the record are sufficient if made knowingly, intelligently, voluntarily, and free from improper influences. *State v. Stegall*, 124 Wn.2d 719, 724–25, 881 P.2d 979 (1994). A jury trial waiver is reviewed de novo. *State v. Ramirez–Dominguez*, 140 Wn. App. 233, 239, 165 P.3d 391 (2007). The record must adequately establish that the defendant waived his right knowingly, intelligently, and voluntarily. *State v. Pierce*, 134 Wn. App. 763, 771, 142 P.3d 610 (2006). Washington law does not require an extensive colloquy on the record; instead “only a personal expression of waiver from the defendant” is required. *Id.* As a result, the right to a jury trial is easier to waive than other constitutional rights, such as the waiver of rights by guilty plea and the right to an attorney. *Id.* at 771-72. When examining the record, one factor a court on review considers is whether the defendant was informed

of his constitutional right to a jury trial. *City of Seattle v. Williams*, 101 Wn.2d 445, 451, 680 P.2d 1051 (1984).

**3. The defendant's affirmative statements that he wanted to waive a jury trial meets this standard.**

The defendant was allowed to waive his right to an attorney on September 18, 2019. RP at 23. He thereafter stated without prompting, "I want to waive my jury." RP 08/01/19 at 27. The following week he again stated, "I want a bench trial. . . . I want a bench trial. I do not want a jury trial." RP 08/28/19 at 9.

Compare this with *State v. Rangel*, 33 Wn. App 774, 776, 657 P.2d 809 (1983) where the defendant nodded affirmatively when the trial court advised him of the right to a jury trial, what that meant, if he understood the right and if he wished to waive a jury. This was held sufficient for a jury waiver.

Most of the reported cases are where the defense attorney speaks completely for the defendant, with the court never asking the defendant anything. *State v. Hos*, 154 Wn. App. 238, 225 P.3d 389 (2010); *State v. Stegall*, 124 Wn.2d 719, 881 P.2d 979 (1994). Both held that there has to be some personal expression of approval from the defendant, but there is no requirement for a colloquy or advice of the consequences of a jury waiver. *Stegall*, 124 Wn.2d at 724, 730.

There may have been tactical purposes for the defendant to request a bench trial. For example, he may not have felt he had sufficient experience to select a jury. He may have believed that his prior crimes of dishonesty would unduly prejudice a jury. But the trial court was under no obligation to discuss this with him. The defendant in a timely fashion made two requests to waive a jury trial. It could have been error to deny those requests.

**B. There was no error in sentencing to the standard range.**

**1. Standard on review:**

*State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104, 1109 (1997) discussed the general principles concerning appealing a standard range sentence.

The same principles apply where a defendant has requested an exceptional sentence below the standard range: review is limited to circumstances where the court has refused to exercise discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range. A court refuses to exercise its discretion if it refuses categorically to impose an exceptional sentence below the standard range under any circumstances; i.e., it takes the position that it will never impose a sentence below the standard range. A court relies on an impermissible basis for declining to impose an

exceptional sentence below the standard range if it takes the position, for example, that no drug dealer should get an exceptional sentence down or it refuses to consider the request because of the defendant's race, sex, or religion. Even in those instances, however, it is the refusal to exercise discretion or the impermissible basis for the refusal that is appealable, not the substance of the decision about the length of the sentence. Conversely, a trial court that has considered the facts and has concluded that there is no basis for an exceptional sentence has exercised its discretion, and the defendant may not appeal that ruling. So long as the trial court has considered whether there is a basis to impose a sentence outside the standard range, decided that it is either factually or legally insupportable and imposed a standard range sentence, it has not violated the defendant's right to equal protection.

**2. The trial court considered and rejected mitigating factors.**

The trial judge stated that there were no mitigating factors. RP 08/01/19 at 43. The judge did not refuse to consider any possible mitigating factors or that he would never impose an exceptional sentence below the standard range for such a crime.

The defendant argues that there were grounds for an exceptional sentence because the court found that the defendant dropped the knife in

the middle of the assault, which means that the defendant abandoned the assault, which means there must have been something to his claim of self-defense, which means the trial court did not properly consider the “failed defense” mitigating factor in RCW 9.94A.535 (1)(c). See Br. of Appellant at 13-15.

The trial court did not find that the defendant dropped the knife. The court only recounted the testimony: “The only portion of the defendant’s testimony which is supported by evidence is the defendant’s claim that he dropped the knife in the parking lot during the middle of the assault. Ezekiel Mentell testified that he found the knife in the parking lot not where the defendant was tackled.” See Findings of Fact (e), CP 43. The defendant misunderstood this Finding to mean that the trial court accepted his testimony.

Also, RCW 9.94A.535(1)(c) applies where, “The defendant committed the crime under duress, coercion, threat, or compulsion insufficient to constitute a complete defense but which significantly affected his or her conduct.” It does not apply to failed self-defense claims. The claim itself that the defendant was acting in self-defense is nonsense. The defendant said he heard two people curse at him and in response he approached them, pulled out a knife, and swung it at one.

The defendant also argues that RCW 9.94A.535(1)(e) applies. That provision states, “The court may impose an exceptional sentence below the standard range if . . . (e) the defendant’s capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired. Voluntary use of drugs or alcohol is excluded.”

Here, the trial court *did* consider mitigating factors, specifically this one, and rejected it. RP 08/01/19 at 43. But, the only evidence in the record affecting the defendant’s mental abilities was his own use of methamphetamine that night. Voluntary drug use is not a mitigating factor under the terms of the above provision.

#### **IV. CONCLUSION**

The defendant voluntarily chose to waive a jury trial. His sentence was appropriate considering he has 16 prior felonies, spanning three decades and the crime—for no reason, other than perhaps being high on methamphetamine, the defendant tried to stab a total stranger.

The conviction and sentence should be affirmed.

**RESPECTFULLY SUBMITTED** on July 9, 2020.

**ANDY MILLER**

Prosecutor

A handwritten signature in cursive script that reads "Andy Miller". The signature is written in black ink and is positioned above a solid horizontal line.

Prosecuting Attorney

Bar No. 10817

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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:

Marie Trombley  
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Signed at Kennewick, Washington on July 9, 2020.

  
Demetra Murphy  
Appellate Secretary

**BENTON COUNTY PROSECUTOR'S OFFICE**

**July 09, 2020 - 3:49 PM**

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