

No. 41438-4-II

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

STATE OF WASHINGTON,
Respondent,

v.

CANDI LEE BANGE,
Appellant.

FILED
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COURT OF APPEALS
DIVISION II
SEATTLE, WA

APPELLANT'S REPLY BRIEF

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ARGUMENT

Trying Ms. Bange's Case without a Jury was Manifest Constitutional Error Requiring Remand

Ms. Bange's constitutional rights to a jury trial were violated when the superior court tried her without a jury and without a valid waiver of such right. Although Ms. Bange filed a jury waiver prior to dismissal, appeal and remand of her case, that waiver did not waive her right to a jury trial in the proceedings that followed remand: "Parties who waive the right to a jury in one proceeding cannot be deemed to have given up the right for all subsequent proceedings." Wilson v. Horsley, 137 Wn.2d 500, 511, 974 P.2d 316 (1999) (en banc).

Horsley held that agreeing to a bench trial that ended in a mistrial did not operate as a waiver of the right to a jury at a subsequent trial. Despite arising in a different procedural context, Horsley applies with full force here. Horsley held that the contexts of mistrial and appeal and remand were analytically indistinguishable for purposes of this issue. Id. at 511 n.5. Accordingly, the rule of Horsley, that a

waiver of the right to a jury trial made in one proceeding does not waive the right in subsequent proceedings, unequivocally applies to this case.

In addition, a case the Horsley Court cited with approval, Spring v. Department of Labor & Indus., 39 Wn. App. 751, 695 P.2d 612 (1985), is directly on point. Spring involved a party's request for a jury trial after appeal and remand. Division Three held the party was entitled to a jury trial after remand, even though he had waived his right to a jury trial before remand. The court determined that the rule in Washington is, "following reversal of judgment 'the case stands exactly as it stood before the trial.'" 39 Wn. App. 751, 756. That tenet was quoted approvingly in Horsley. 137 Wn.2d 500, 511 n.5; see 137 Wn.2d. at 509-511.

The only difference between Horsley and Spring and this case is that no trial occurred before appeal and remand here. But that situation does not alter the analysis. The Supreme Court's decision in Horsley was based on considerations that apply with equal force

whether or not a trial was held in the initial proceedings.

First, the Court held that “[a]ny waiver of a right guaranteed by a state’s constitution should be narrowly construed in favor of preserving the right.” 137 Wn.2d at 509. The required narrow construction requires that a jury trial waiver does not survive appeal and remand, whether or not a trial was initially held. Next, the Court cited the well-settled law that a party cannot waive a prospective right she does not know exists. 137 Wn.2d at 510. Ms. Bange waived her right to a jury in the initial proceeding without contemplating the possibility of a subsequent trial. Accordingly, she could not knowingly have waived the right to trial by jury following remand. Finally, the Court opined that the potential for different conditions at the time of the subsequent proceeding made it unfair to allow an initial waiver to apply to all subsequent proceeding. 137 Wn.2d at 510. Here, the circumstances were necessarily different following

remand at a trial that occurred 22 months after the initial waiver was filed.

For all these reasons, Ms. Bange's January 2009 waiver of her right to jury trial did not survive the dismissal, appeal and remand of her case. See Appellant's Brief at 7-10. Appeal and remand returned to Ms. Bange all the rights with which she began her case, including her right to a trial by jury.

Thus, after remand, it was as though the written jury waiver had never been filed. Ms. Bange was, in effect, in the same position as the defendant in Hos, who had also not waived her right to a jury trial. State v. Hos, 154 Wn. App. 238, 249, 225 P.3d 389 (2010); see Appellant's Brief at 11-14. As in Hos, Ms. Bange was required knowingly and voluntarily to waive her right to a jury trial before a bench trial could occur. When that did not happen, her constitutional rights to a jury trial were violated and she was prejudiced by having her case decided at a bench trial.

The State acknowledges this issue is one of constitutional magnitude. However, it maintains the

issue may not be heard for the first time on appeal because it is not manifest as neither error nor prejudice occurred. Respondent's Brief at 2-3. The State is mistaken. The only way no error occurred here is if Horsley does not apply to this case and the January 2009 waiver survived appeal and remand of Ms. Bange's case. But the State offers no colorable grounds for distinguishing Horsley. Respondent's Brief at 4-5. Indeed, as explained in Appellant's Brief and above, Horsley's reasoning and holding apply with full force here and the January 2009 waiver had no effect at the November 2010 trial.

In addition, the error was manifest. Manifest error requires a showing of actual prejudice. Actual prejudice requires evidence that the asserted error "had practical and identifiable consequences in the trial of the case." State v. O'Hara, 167 Wn.2d 91, 99, 217 P.3d 756 (2009) (quotations and internal quotation marks omitted). Denying a defendant her right to a jury trial is clearly a practical and identifiable consequence. In fact, the error is so

manifest that this Court did not deem it necessary to subject it to analysis in Hos. Hos, 154 Wn. App. 238, 249-52 (reversing without discussion of manifest error despite State's argument that issue should not be heard on appeal because not raised below).

The State argues that since Ms. Bange filed a waiver in January 2009 and then proceeded with the November 2010 bench trial without objection, she must have wanted the bench trial and so was not prejudiced by it. Respondent's Brief at 3. The idea that failure to object to an error signifies acceptance of the error is specious. The entire concept of manifest error is based on the fact that significant constitutional error may happen at trial without objection. See RAP 2.5(a); Hos, 154 Wn. App. 238, 249-52 (holding defendant did not accede to bench trial when she went along with bench trial without objection). Moreover, as already discussed, the January 2009 waiver had no effect at the November 2010 trial. Further, as Horsley explained, circumstances change from one proceeding to the next,

making the January 2009 waiver uninformative of Ms. Bange's wishes in November 2010.

CONCLUSION

For all these reasons and the reasons set forth in Appellant's Brief, Candi Lee Bange respectfully requests this Court to reverse her conviction.

Dated this 26th day of May 2011.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on this 26th day of May, 2011, I caused a true and correct copy of Appellant's Brief to be served by U.S. mail on:

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