

No. 41438-4-II

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THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON
BY [Signature]
DEPUTY

STATE OF WASHINGTON,

Respondent,

vs.

CANDI LEE BANGE,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

JONATHAN L. MEYER
Lewis County Prosecuting Attorney

By:



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I. ISSUES

- A. Can Bange challenge the jury trial waiver when she did not preserve the issue in the trial court?
- B. Did Bange knowingly, intelligently and voluntarily waive jury trial?

II. STATEMENT OF THE CASE

Bange's statement of the case is adequate for purposes of this response except as otherwise cited in the argument below.

ARGUMENT

A. **BANGE IS PROCEDURALLY BARRED FROM CHALLENGING THE JURY TRIAL WAIVER.**

Bange is barred from raising issue with her jury trial waiver under RAP 2.5(a). An appellate court generally will not consider an issue that a party raises for the first time on appeal. RAP 2.5(a); *State v. O'Hara*, 167 Wn.2d 91, 97-98, 217 P.3d 756 (2009); *State v. McFarland*, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995). The origins of this rule come from the principle that it is the obligation of trial counsel to seek a remedy for errors as they arise. *State v. O'Hara*, 167 Wn.2d at 98. The exception to this rule is "when the claimed error is a manifest error affecting a constitutional right." *Id.*, citing RAP 2.5(a). There is a two part test in determining whether the assigned error may be raised for the first time on appeal, "an

appellant must demonstrate (1) the error is manifest, and (2) the error is truly of constitutional dimension.” *Id.* (*citations omitted*).

The reviewing court analyzes the alleged error and does not assume it is of constitutional magnitude. *Id.* The alleged error must be assessed to make a determination of whether a constitutional interest is implicated. *Id.* If an alleged error is found to be of constitutional magnitude the reviewing court must then determine whether the alleged error is manifest. *Id.* at 99; *State v. McFarland*, 127 Wn.2d at 333. An error is manifest if the appellant can show actual prejudice. *State v. O’Hara*, 167 Wn.2d at 99. The appellant must show that the alleged error had an identifiable and practical consequence in the trial. *Id.*

Bange is claiming that she did not waive her right to a jury trial and therefore the bench trial that was conducted on November 1, 2010 was a violation of her constitutional right to a jury trial. Brief of Appellant 6, RP 1. Bange did not raise the issue of her jury trial waiver in the trial court, either at the time of trial or a motion after the conclusion of trial. See, RP. While the alleged error does affect a constitutional right, no error occurred and therefore Bange has not suffered any prejudice from the bench trial that was held.

Bange signed a written jury trial waiver on January 15, 2009.

CP 20. The waiver stated:

I, Candi Bange, am the defendant in this case. I understand that I have a constitutional right to a jury trial. I do not want a jury trial. I want my case decided by a judge sitting without a jury.

CP 20. The waiver is signed by Bange and dated January 15, 2009. CP 20. The trial did not occur until November 1, 2010 because the case was dismissed, appealed and remanded for trial. RP 3, CP 21-22, 31-38. There was no other trial held in this case in the interim. RP 3, CP 21-22, 31-38. Bange did not assert her right to a jury trial at any time during the bench trial, nor did her trial counsel. See, RP. Bange's conduct and her written waiver of jury trial evidence her desire for a bench trial in this matter and is an effective waiver of her right to a jury trial. Bange cannot show any prejudice, therefore no manifest error occurred. Bange is barred from raising the issue of her jury trial waiver and her conviction should be affirmed.

B. BANGE DID KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY WAIVE HER RIGHT TO A JURY TRIAL.

A criminal defendant has a constitutional right to a trial by jury. U.S. Const. amend. VI; Const. art. 1, § 21. The State has the burden of establishing that a defendant validly waived his or her

right to a jury trial. *State v. Hos*, 154 Wn. App. 238, 249, 225 P.3d 389 (2010). The reviewing court “will indulge every reasonable presumption against such waiver, absent a sufficient record. *Id* at 249-50. Validity of a jury trial waiver is reviewed de novo. *State v. Vasquez*, 109 Wn. App. 310, 319, 34 P.3d 1255 (2001); *affirmed* 148 Wn.2d 303, 59 P.3d 648 (2002).

A defendant may waive jury trial orally or by filing a written waiver. *State v. Wicke*, 91 Wn.2d 638, 645-46, 591 P.2d 452 (1979); CrR 6.1(a). Compliance with CrR 6.1(a) constitutes strong evidence of a validly waived right. *State v. Choi*, 55 Wn. App. 895, 903, 781 P.3d 505 (1989). A waiver is a voluntary or intentional relinquishment of a known right. *State v. Horsley*, 137 Wn.2d 500, 510, 974 P.2d 316 (1999). A right to a jury trial can be revived under certain circumstances after a party properly waives that right. *Id.* 509-11.

Bange argues that the holding of the Supreme Court in *Horsely* applies to her case. Brief of Appellant 7-10. The facts and circumstances that occurred in *Horsely* are distinct from what occurred in Bange’s case. *Horsely* was a civil matter for damages resulting from an assault *Horsely* committed against Diana Wilson. *Horsely* agreed to a bench trial after a jury trial demand was

withdrawn and a bench trial was held which resulted in a mistrial. Shortly after the mistrial was declared Horsley submitted a written request for a jury trial and his request was denied. The Supreme Court held, “the right to a jury trial is revived upon the declaration of a mistrial.” *State v. Horsley*, 137 Wn.2d at 511. The reasoning given by the Court was, when a party waives his or her right in one trial that party does not give up the right in subsequent trials in the same case because a party could not waive a prospective right they do not know exists. *Id.*

Bange also argues her case is similar to *Hos* because her attorney’s statement that this was a bench trial is not evidence of Bange executing a knowing, intelligent and voluntary waiver. Brief of Appellant 13. In *Hos* the trial counsel stated it was Hos’s intent to ask the court for a bench trial. Hos did not file a written waiver of jury trial. It was held that, “[t]o be sufficient, the record must contain the defendant’s personal expression of waiver; counsel’s waiver on the defendant’s behalf is not sufficient.” *State v. Hos*, 154 Wn. App. at 395-96. Bange states, “[s]imilar to that case, [*Hos*], Ms. Bange did not file a written waiver and the court did not discuss the jury trial waiver option with her.” Brief of Appellant 13. This is simply not true. Bange did file a written waiver of jury trial back on

January 15, 2009, and the waiver stated Bange knew she had a constitutional right to a jury trial and she was giving up that right and wanted her case heard before a judge sitting without a jury. CP 20. The facts in Bange's case are not similar to those in *Hos*, where the record was void of any personal expression of a waiver of the right to a jury trial by Hos. Bange made a personal expression of her desire to waive jury trial. CP 20.

Bange signed a written waiver of jury trial on January 15, 2009, specifically requesting a bench trial. CP 20. Bange's case was dismissed, prior to a trial being held on February 4, 2009. CP 21-22. The judge who dismissed the case was the Honorable Judge James Lawler, the deputy prosecutor was J. Bradley Meagher and Ms. Bange's attorney at the time was David Arcuri. CP 21-22. The State appealed the dismissal and the Court of Appeals reversed and remanded the case back to the Superior Court for trial. CP 31-38. Bange was reappointed David Arcuri to represent her. CP 40. The case went to trial on November 1, 2010, with the Honorable Judge James Lawler presiding, deputy prosecuting attorney J. Bradley Meagher and David Arcuri representing Bange. RP 1. The case was tried on the amended information filed on January 22, 2009. RP 5-6; CP 3. Nothing had

changed from the original date of trial, which never occurred, to the date the case was finally tried to the bench. Further, the trial that occurred on November 1, 2010 was not a subsequent trial like what occurred in *Horsely*. Bange had never been tried in this case, this was the first trial, and while there were intervening events, those events do not revive her right to a jury trial that she waived, in writing, back in January 2009. Horsley made a specific and clear demand to the trial court for a jury trial after his initial trial ended in a mistrial. No such thing happened in Bange's case. Bange did not request a jury trial, her trial counsel and the State both commented they were present for a bench trial, and the waiver Bange signed in January 2009 was still in effect. RP 3, 6; CP 20. Bange's conviction should be affirmed.

CONCLUSION

For the foregoing reasons, this court should affirm Bange's conviction for delivery of a controlled substance.

RESPECTFULLY submitted this 17th day of May, 2011.

JONATHAN L. MEYER
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by: 
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Attorney for Plaintiff

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

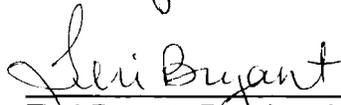
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STATE OF WASHINGTON
BY _____
DEPUTY

STATE OF WASHINGTON,) NO. 41438-4-II
Respondent,)
vs.) DECLARATION OF
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CANDI LEE BANGE,)
Appellant.)
)
)
_____)

Ms. Teri Bryant, paralegal for Sara I. Beigh, Deputy
Prosecuting Attorney, declares under penalty of perjury under the
laws of the State of Washington that the following is true and
correct: On May 18, 2011, the appellant was served with a copy of
the **Respondent's Brief** by depositing same in the United States
Mail, postage pre-paid, to the attorney for Appellant at the name
and address indicated below:

Carol A. Elewski
Attorney for Appellant
PO Box 4459
Tumwater, WA 98501

DATED this 17 day of May, 2011, at Chehalis, Washington.



Teri Bryant, Paralegal
Lewis County Prosecuting Attorney Office