

NO. 42783-4-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

MICHAEL DAVID MARTIN,

Appellant.

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

Assignment of Error

1. Trial counsel's failure to move to exclude an irrelevant, unfairly prejudicial witness denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment.

2. The defendant's conviction should be reversed and the case remanded for a new trial because the record below fails to show that the defendant knowingly and voluntarily waived his right under Washington Constitution, Article 4, § 5, to have his case tried before an elected superior court judge.

Issues Pertaining to Assignment of Error

1. Does a trial counsel's failure to move to exclude an irrelevant, unfairly prejudicial witness deny a defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, when the jury would have acquitted but for the admission of that evidence?

2. Should a defendant's conviction be reversed and the case remanded for a new trial when the record below fails to show that the defendant knowingly and voluntarily waived the right under Washington Constitution, Article 4, § 5, to have an elected judge preside at trial?

STATEMENT OF THE CASE

Factual History

Early in the morning of July 30, 2011, Byron Brown drove his pickup to his gravel pit in rural Cowlitz County near the Cowlitz River. RP 34-35.¹ Upon opening the gate and entering the work area, he saw a person standing under his rock crusher. RP 35-38. Mr. Brown then looked for a possible second person, saw no one, and slowly backed out of the gravel pit to go back home and call 911. *Id.* As he did this, the person under the rock crusher dumped something out of a backpack and fled on foot. RP 38-39. Mr. Brown then drove home and had his wife call the sheriff's office. RP 38. As Mr. Brown was returning to the gravel pit, he saw a vehicle parked by a Weyerhaeuser gate on a road near the area of his house and gravel pit. RP 40-42. Thinking that the vehicle might belong to the person he had seen in his gravel pit, he stopped and took pictures of the vehicle and license plate. *Id.* As he was doing this, he saw the defendant coming down a trail from the gravel pit carrying a bicycle. *Id.*

As the defendant got near the vehicle, which belonged to the defendant's mother, Mr. Brown accused him of being the intruder. RP 40-42. Mr. Brown told the defendant that he had called the sheriff's office. *Id.*

¹The record on appeal includes one volume of verbatim reports, referred to herein as "RP [page #]."

He also pointed a pellet gun at him to force him to talk. *Id.* The defendant denied the accusation and stated that he had been on a hike down to the river. *Id.* After a brief conversation, the defendant loaded his bicycle into the vehicle and drove off. *Id.* However, he gave Mr. Brown his correct address on Storm Road before leaving. *Id.*

Two sheriff's deputies eventually responded to the area where they took statements from Mr. Brown and an employee. RP 5-6, 15-16. Both Mr. Brown and his employee told the deputies that someone had been cutting wires under the rock crusher and had fled, leaving a pair of wire cutters in the area, along with footprints in the dust. *Id.* The deputies took the wire cutters but never tried to get fingerprints from this item. RP 31-32. Mr. Brown's employee also told them that he had driven to the end of Storm Road and had a conversation with the defendant as he drove up with his mother. RP 71-72. The defendant told the employee that he wanted to go speak with Mr. Brown and the sheriff's deputies. *Id.* However, the defendant returned home when the employee told the defendant that the deputies would come to speak with him. *Id.*

Eventually, the deputies went to the defendant's house and spoke with him. RP 7-13, 25-31. The defendant told them that he had driven his mother's vehicle to the Weyerhaeuser gate, and then rode his bicycle down the path by the rock quarry. *Id.* He then walked the rest of the way to the river, as he

had done many times over the past few years. *Id.* Although he admitted walking through the quarry, he denied ever seeing anyone, or ever getting more than 40 yards from the rock crusher. *Id.* However, he did admit that he had entered the rock quarry without permission and that he had driven his mother's vehicle without a license. RP 11-13.

Procedural History

By information filed August 3, 2011, the Cowlitz County Prosecutor charged the defendant Michael D. Martin with attempted first degree theft, first degree malicious mischief, driving while suspended in the third degree, and second degree criminal trespass. CP 1-2. The case later came on for trial with the state calling the two deputies who had responded to the scene, Mr. Brown, and his employee. RP 4, 15, 34, 63. These witnesses testified to the facts set out in the preceding factual history. *See* Factual History.

In addition, as its last witness, the state called a person by the name of Deann Nelson. RP 82. Ms. Nelson told the jury that she was the "buy back" manager from Waste Control in Longview. RP 83. She then explained the prices for scrap copper, scrap copper wire, and other scrap metals. RP 83-86. She further testified that the defendant had sold scrap metal to her business on a number of occasions, although she couldn't say what types of metal. *Id.* The state never did explain the relevance of this evidence and the defense did not challenge it as irrelevant. RP 82-93.

Following the close of the state's case, the defendant took the stand as the only defense witness. RP 96. While in the witness box he explained his long time habit of hiking to the river near the gravel pit, and his habit of walking through the gravel pit as the easiest way to get from where he parked his car to the river. RP 96-109. While he admitted walking through the area and admitted driving without a license, he denied having even come close to the defendant's rock crusher, let alone damaging it. *Id.*

After the defendant's testimony, the defense rested its case and the court instructed the jury without objection from either party. RP 119, 130-145; CP 23-53. The jury then listened to closing arguments and retired for deliberation, eventually returned verdicts of guilty on all counts. RP 145-164, 165-168; CP 54-57. Following sentencing within the standard range, the defendant filed timely notice of appeal. CP 74.

ARGUMENT

I. TRIAL COUNSEL’S FAILURE TO MOVE TO EXCLUDE AN IRRELEVANT, UNFAIRLY PREJUDICIAL WITNESS DENIED THE DEFENDANT EFFECTIVE ASSISTANCE OF COUNSEL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22, AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT.

Under both United States Constitution, Sixth Amendment, and Washington Constitution, Article 1, § 22, the defendant in any criminal prosecution is entitled to effective assistance of counsel. The standard for judging claims of ineffective assistance of counsel under the Sixth Amendment is “whether counsel’s conduct so undermined the proper functioning of the adversary process that the trial cannot be relied on as having produced a just result.” *Strickland v. Washington*, 466 U.S. 668, 686, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). In determining whether counsel’s assistance has met this standard, the Supreme Court has set a two part test.

First, a convicted defendant must show that trial counsel’s performance fell below that required of a reasonably competent defense attorney. Second, the convicted defendant must then go on to show that counsel’s conduct caused prejudice. *Strickland*, 466 U.S. at 687, 80 L.Ed.2d at 693, 104 S.Ct. at 2064-65. The test for prejudice is “whether there is a reasonable probability that, but for counsel’s professional errors, the result in the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Church v.*

Kinchelse, 767 F.2d 639, 643 (9th Cir. 1985) (citing *Strickland*, 466 U.S. at 694, 80 L.Ed.2d at 698, 104 S.Ct. at 2068)). In essence, the standard under the Washington Constitution is identical. *State v. Cobb*, 22 Wn.App. 221, 589 P.2d 297 (1978) (counsel must have failed to act as a reasonably prudent attorney); *State v. Johnson*, 29 Wn.App. 807, 631 P.2d 413 (1981) (counsel's ineffective assistance must have caused prejudice to client).

In the case at bar, the defendant claims ineffective assistance based upon trial counsel's failure to object when the state called a witness whose testimony was completely irrelevant and unfairly prejudicial. This witness was Deann Nelson, the "buy back" manager from Waste Control in Longview. She testified to the price of scrap copper, scrap copper wire, and other scrap metals. She further testified that the defendant had sold scrap metal to her business on a number of occasions, although she couldn't say what types of metal. The state never did explain the relevance of this evidence because the defense did not challenge it as irrelevant. However, as the following explains, it was both irrelevant and prejudicial.

Under ER 401, "relevance" is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." In other words, for evidence to be relevant, there must be a "logical nexus" between the evidence and the fact to be

established. *State v. Whalon*, 1 Wn.App. 785, 791, 464 P.2d 730 (1970). It must have a “tendency” to prove, qualify, or disprove an issue for it to be relevant. *State v. Demos*, 94 Wn.2d 733, 619 P.2d 968 (1980).

Under ER 402, irrelevant evidence is not admissible. This court rule states:

All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible.

ER 402.

In the case at bar, there was no “logical nexus” between the fact at issue (whether or not the defendant had attempted to steal wiring from Mr. Brown’s rock crusher) and the facts presented by Deann Nelson (that copper wire sold for a certain price and the defendant had sold other scrap metals at her place of employment). Rather, the inference that the state was attempting to have the jury draw was (1) that people who sell scrap metal are thieves, (2) the defendant sold scrap metal, and therefore (3) the defendant was a thief who tried to steal metal from Mr. Brown. As such, the state did not seek to introduce this evidence because it was relevant. Rather, the state sought to introduce this evidence because of its unfair prejudicial effect.

Given both the lack of relevance on the one hand, and the unfair prejudice on the other hand, there was no possible tactical basis for the

defendant's attorney to refrain from objecting to the entirety of Ms Nelson's testimony. Thus, the failure to object fell below the standard of a reasonably prudent attorney. In addition, given the facts that (1) Mr. Brown only saw the actual thief from a distance, (2) that the defendant did not attempt to flee from Mr. Brown and gave his correct name and address, and (3) that the defendant sought out the police and spoke freely with them, there is a high likelihood that absent the admission of Ms Nelson's irrelevant and prejudicial evidence, the jury would have acquitted the defendant. As a result, trial counsel's failure to object to this evidence denied the defendant effective assistance of counsel under both Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment and he is entitled to a new trial.

II. THE DEFENDANT'S CONVICTION SHOULD BE REVERSED AND THE CASE REMANDED FOR A NEW TRIAL BECAUSE THE RECORD BELOW FAILS TO SHOW THAT THE DEFENDANT KNOWINGLY AND VOLUNTARILY WAIVED HIS RIGHT UNDER WASHINGTON CONSTITUTION, ARTICLE 4, § 5, TO HAVE HIS CASE TRIED BEFORE AN ELECTED SUPERIOR COURT JUDGE.

Under Washington Constitution, Article 4, § 5, every person charged with a felony, and every civil litigant appearing in a superior court has the right to have an elected superior court judge preside over his or her trial. *State v. Sain*, 34 Wn.App. 553, 663 P.2d 493 (1983). This constitutional provision states as follows:

There shall be in each of the organized counties of this state a superior court for which at least one judge shall be elected by the qualified electors of the county at the general state election If a vacancy occurs in the office of judge of the superior court, the governor shall appoint a person to hold the office until the election and qualification of a judge to fill the vacancy, which election shall be at the next succeeding general election, and the judge so elected shall hold office for the remainder of the unexpired term.

Washington Constitution, Article 4, § 5 (in part).

While the litigants in a felony criminal proceeding each have the right to have the case tried by an elected superior court judge, our constitution and statutory law do allow judges *pro tempore* to preside over individual cases if both parties consent. Washington Constitution, Article 4, § 7; RCW 2.08.180. Washington Constitution, Article 4, § 7, states as follows concerning the appointment of judges *pro tempore*:

The judge of any superior court may hold a superior court in any county at the request of the judge of the superior court thereof, and upon the request of the governor it shall be his or her duty to do so. A case in the superior court may be tried by a judge *pro tempore* either with the agreement of the parties if the judge *pro tempore* is a member of the bar, is agreed upon in writing by the parties litigant or their attorneys of record, and is approved by the court and sworn to try the case; or without the agreement of the parties if the judge *pro tempore* is a sitting elected judge and is acting as a judge *pro tempore* pursuant to supreme court rule. The supreme court rule must require assignments of judges *pro tempore* based on the judges' experience and must provide for the right, exercisable once during a case, to a change of judge *pro tempore*. Such right shall be in addition to any other right provided by law. However, if a previously elected judge of the superior court retires leaving a pending case in which the judge has made discretionary rulings, the judge is entitled to hear the pending case as a judge *pro tempore* without any written agreement.

Washington Constitution, Article 4, § 7.

This constitutional provision authorizes four types of judges *pro tempore*: (1) out-of-county superior court judges hearing a case at the request of either an in-county superior court judge or the governor, (2) members of the bar if agreed upon by the parties, (3) an elected judge of that county appointed pursuant to supreme court rule, and (4) a retired superior court judge who had previously made a discretionary decision in the case prior to retirement. The case at bar deals with the second alternative only, since the judge *pro tempore* hearing the case had not then nor previously been elected as either a superior court judge or a judge of a court of limited jurisdiction. Rather, he was a member of the bar. The appointment of members of the bar to sit as judges *pro tempore*, found in Washington Constitution, Article 4, § 7, is also found in RCW 2.08.180, the first portion of which provides as follows:

A case in the superior court of any county may be tried by a judge *pro tempore*, who must be either: (1) A member of the bar, agreed upon in writing by the parties litigant, or their attorneys of record, approved by the court, and sworn to try the case; or (2) pursuant to supreme court rule, any sitting elected judge.

RCW 2.08.180 (in part).

In *National Bank of Washington, Coffman-Dobson Branch v. McCrillis*, 15 Wn.2d 345, 130 P.2d 901 (1942), the Washington Supreme Court explained that under both the constitution and the statute, the authority

of a member of the bar to preside over a case in the superior court derives solely from the consent of the litigants. The court notes as follows on this point:

A judge *pro tem.*, under our statute, is appointed to hear one particular case. He does not derive his authority from a general election, nor from an appointment by an executive officer, but his power to act is based upon the consent of the parties litigant to his appointment. A judge *pro tem.*, under our statute, is not a superior court judge, and could make no claim to the office of superior court judge. We are of the opinion that it clearly appears from the constitutional and statutory provisions that the essential element to the valid appointment of a judge *pro tem.* which must exist is the consent of the parties.

McCrillis, 15 wn.2d at 357.

In *McCrillis*, the court went on to note that the parties may consent to the appointment of a judge *pro tempore* either orally in open court or by written stipulation. *McCrillis*, 15 Wn.2d at 356. However, without the consent of both parties, the judge *pro tempore* lacks jurisdiction. *McCrillis*, 15 Wn.2d at 359.

The language in both Washington Constitution, Article 4, § 7 and RCW 2.08.180 makes it appear that consent for the appointment of a judge *pro tempore* can be given solely by the attorneys of record, regardless of the desires of the litigants. However, as the decision in *State v. Sain, supra*, explains, the right to have an elected superior court judge preside over a felony trial is a substantial constitutional right that can only be waived by the

defendant, not by his or her attorney. The following examines this case.

In *State v. Sain, supra*, the state charged three defendant's with first degree robbery. The court appointed a single attorney to represent all three. When the elected superior court judge became ill, the defendants' attorney twice orally consented to the appointment of a judge *pro tempore* to hear the case. That judge *pro tempore* presided over the remainder of the proceedings. Two days before trial, the court allowed the defense attorney to withdraw from representing two of the three defendants based upon a conflict of interest. The court then appointed a new attorney for the two defendants the original attorney could no longer represent.

The next day, the new attorney appeared before the court and moved to continue the case. The court denied the motion, but only after both of the attorneys signed a stipulation acknowledging their willingness to proceed before the judge, who was still presiding *pro tempore*. On the morning of trial, the court requested that the three defendants state on the record that they agreed to have their case tried before a judge *pro tempore*. The defendant represented by the original attorney refused. The other two defendants consented. However, after the court again denied a motion to continue, those two defendants stated on the record that they were withdrawing their consent to have a judge *pro tempore* preside over their cases. None the less, the case went to trial and all three defendants were convicted.

Following conviction, all three defendants appealed, arguing in part that since they had not consented to having a *pro tempore* judge preside over their cases, the judge had acted without jurisdiction. Thus, they claimed the right to a new trial. The state responded by arguing that the consent by both defense counsel, which was eventually reduced to writing and acknowledged in open court, was sufficient to satisfy the requirements of both the constitution and the statute. The Court of Appeals first reviewed the case of the defendant who was represented by the original attorney at trial and who had refused consent to a judge *pro tempore* at the beginning of the trial. In addressing this defendant's arguments, the court first noted a distinction between "procedural issues" and "substantial rights." As the court noted, an attorney has the authority to waive procedural issues. However, only a defendant can waive "substantial rights." The court then went on to hold that the right to be tried by an elected judge derived directly from the constitution and constituted a substantial right that only the defendant could waive. The court held as follows on this issue:

We find the right under Const. art. 4, § 5, to be tried in a court presided over by an elected superior court judge accountable to the electorate is a substantial right. Thus, the requirement of Mr. Sain's written consent could not be waived by Mr. Burchard's unauthorized statements.

State v. Sain, 34 Wn.App. at 557.

The court then noted that the judge *pro tempore* should have obtained

the defendant's written consent prior to trial and the failure to do so robbed the judge of jurisdiction and required reversal of the conviction. The court's specific holding was as follows:

The record before us leaves substantial doubt as to what happened prior to the morning of trial. In fact, there is no record of exactly what was said during the telephonic presentations to Judge Ennis or what precisely occurred the evening before trial. One thing is clear; Larry Sain refused to give his written consent to Judge Ennis sitting as judge pro tempore at his trial. While it is understandable how these events came about, hindsight indicates the defendants' written consent should have been obtained before Judge Ennis undertook any action in the case. Consequently, we are constrained to hold the judge *pro tempore* did not have jurisdiction to preside over the trial of Larry Sain and his conviction must be reversed and remanded for retrial.

State v. Sain, 34 Wn.App. at 557.

The court's requirement that the judge *pro tempore* first obtain the defendant's written consent to preside over the case follows a line of cases which require the court to enter into a direct colloquy with any defendant who states the intent to waive a right secured under the constitution. For example, our case law requires the court to engage in a colloquy with a defendant indicating a desire to waive the right to jury trial under Washington Constitution, Article 1, § 21, and United States Constitution, Sixth Amendment. *State v. Bugai*, 30 Wn.App. 156, 157, 632 P.2d 917 (1981) ("Because of the constitutional guarantee of trial by jury, the record must show that the waiver of a jury by the accused was knowingly,

intelligently and voluntarily made.”)

Similarly, the court must enter into a detailed colloquy with any defendant indicating a desire to waive the right to counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment. As with jury waivers, the waiver of the right to counsel must also be knowingly, voluntarily, and intelligently made. *State v. Harell*, 80 Wn.App. 802, 805, 911 P.2d 1034 (1996). Thus, if the court fails to hold a detailed colloquy with the defendant to assure that the waiver is knowingly, voluntarily and intelligently made, the record must clearly reflect that the defendant at least understood the seriousness of the charge, the possible maximum penalty involved, and the existence of technical procedural rules governing the presentation of a defense. *State v. DeWeese*, 117 Wn.2d 369, 377-378, 816 P.2d 1 (1991).

Our case law requires an even more detailed colloquy with a defendant indicating the desire to plead guilty. Under the due process clauses found in Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, all guilty pleas must be knowingly, voluntarily, and intelligently entered. *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); *In re Pers. Restraint of Stoudmire*, 145 Wn.2d 258, 36 P.3d 1005 (2001). Guilty pleas that are entered without a statement of the consequences of the sentence are not “knowingly” made.

State v. Miller, 110 Wn.2d 528, 756 P.2d 122 (1988). While the trial court need not inform a defendant of all possible collateral consequences of his or her guilty plea, the court must inform the defendant of all direct consequences. *State v. Ross*, 129 Wn.2d 279, 916 P.2d 405 (1996).

These cases stand for the proposition that, absent a sufficient record, the courts must indulge every reasonable presumption against finding the waiver of a constitutional right. *State v. Wicke*, 91 Wn.2d 638, 645, 591 P.2d 452 (1979). For example, in *State v. Hos*, 154 Wn.App. 238, 225 P.3d 389 (2010), a defendant appealed her conviction for possession of methamphetamine following a bench trial, arguing that she had not knowingly, voluntarily, and intelligently waived her right to a jury trial. In this case, the defendant's attorney had brought an unsuccessful suppression motion, and then stated that the defendant wished to submit to a bench trial on stipulated facts in order to reserve the right to appeal the denial of the motion to suppress. The court then accepted the defense attorney's statement and found the defendant guilty upon a stipulation to facts presented by the parties. At no point did the defendant object. However, neither did the court enter into a colloquy with the defendant concerning her right to trial by jury, and the defendant did not sign a written jury waiver.

On appeal, the state responded by arguing that (1) the defendant ratified her attorney's oral waiver of her right to jury trial by failing to object

and (2) the error was not preserved for appeal because the defendant had not called the error to the trial court's attention. In addressing these arguments, the court first reviewed the decision in *State v. Wicke, supra*, noting as follows:

To be sufficient, the record must contain the defendant's personal expression of waiver; counsel's waiver on the defendant's behalf is not sufficient. Our Supreme Court upheld the Court of Appeals' reversal of Wicke's conviction following a bench trial because, although Wicke's trial counsel had stated on the record that Wicke waived his right to a jury trial, the record did not contain Wicke's personal expression of such jury trial waiver. Wicke had stood beside his counsel, without objection, as counsel orally waived a jury trial. But the trial court did not question Wicke about whether he had discussed a jury waiver with defense counsel and whether he had agreed to the waiver; nor did Wicke file a written jury trial waiver under CrR 6.1(a).

State v. Hos, 154 Wn.App. at 250-251 (citations and footnote omitted).

Based upon the holding in *Wicke*, the court then went on to reject the state's arguments, in spite of the fact that the defendant had stood by counsel and failed to object when her case was tried to the bench. The court stated:

But here, as in *Wicke*, the record does not contain Hos's personal expression waiving her right to a jury trial. Hos did not sign a written jury trial waiver. Nor did the trial court question Hos on the record to determine whether she knowingly, intelligently, and voluntarily waived her right to a jury trial, or even whether she had discussed the issue with her defense counsel or understood what rights she was waiving. Because the record lacks Hos's personal expression of waiver of her constitutional right to a jury trial, *Wicke* requires that we reverse her conviction and remand for a new trial.

State v. Hos, 154 Wn.App. at 251-252.

In both *Hos* and *Wicke*, the court refused to find a waiver of the right to jury trial in spite of the fact that (1) the defendants stood by their attorneys in open court and said nothing when their attorneys informed the court that each defendant was waiving the right to jury trial, and (2) each defendant continued to say nothing when their cases were tried to the bench.

In the case at bar, the Judge *Pro Tempore*, Dennis Maher, presided over the defendant's trial. It is true that the defendant signed a document consenting to this action, however the document and the colloquy were inadequate and did not inform the defendant that he was waiving a right under the state constitution. Rather, the waiver simply states as follows:

IT IS AGREED that DENNIS MAHER may hear the above-entitled matter as Judge Pro Tempore.

CP 14.

The colloquy between the court and the defendant was similarly inadequate in that it also failed to inform the defendant that he was waiving a right guaranteed him under the state constitution. The colloquy went as follows:

COMMISSIONER MAHER: This is the matter of State of Washington v. Michael David Martin, 11-1-00786-1. It is a matter that we actually began yesterday and we declared a mistrial. So this is day one of the trial. So I have indicated to the attorneys that we probably needed to put on the record many of the issues that we had discussed yesterday in our pretrial yesterday. So, Mr. Martin, as I indicated to you yesterday, I'm hearing this matter as a judge pro tem. To do that you need to agree to my appointment to hear this matter in that

capacity. Have you had an opportunity to discuss that with your attorney?

DEFENDANT: Yes, sir.

COMMISSIONER MAHER: And on the record are you agreeing for me to hear this matter as a judge pro tem?

DEFENDANT: Yes, sir.

COMMISSIONER MAHER: And I have a document that purports to have the signature of both attorneys and you. Is that your signature on this document?

DEFENDANT: Yes, it is.

COMMISSIONER MAHER: And you gave that of your own free will? Nobody forced you to do that?

DEFENDANT: Yes.

RP 1-2.

Once again, both the written waiver and the colloquy completely fail to inform the defendant that his right to have an elected judge preside over his trial is based in Washington Constitution, Article 4, § 5, or that this even is a right guaranteed under the constitution. Thus, the written waiver and the colloquy were inadequate and the defendant's case should be remanded for a new trial in front of an elected judge.

CONCLUSION

The defendant is entitled to a new trial based upon his unknowing waiver of his constitutional right to have his case heard in front of an elected judge under Washington Constitution, Article 4, § 5, and based upon the denial of his right to effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment.

DATED this 29th day of May, 2012.

Respectfully submitted,



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APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 22**

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

**WASHINGTON CONSTITUTION,
ARTICLE 4, § 5
(in part)**

There shall be in each of the organized counties of this state a superior court for which at least one judge shall be elected by the qualified electors of the county at the general state election . . . If a vacancy occurs in the office of judge of the superior court, the governor shall appoint a person to hold the office until the election and qualification of a judge to fill the vacancy, which election shall be at the next succeeding general election, and the judge so elected shall hold office for the remainder of the unexpired term.

**WASHINGTON CONSTITUTION
ARTICLE 4, § 7**

The judge of any superior court may hold a superior court in any county at the request of the judge of the superior court thereof, and upon the request of the governor it shall be his or her duty to do so. A case in the superior court may be tried by a judge pro tempore either with the agreement of the parties if the judge pro tempore is a member of the bar, is agreed upon in writing by the parties litigant or their attorneys of record, and is approved by the court and sworn to try the case; or without the agreement of the parties if the judge pro tempore is a sitting elected judge and is acting as a judge pro tempore pursuant to supreme court rule. The supreme court rule must require assignments of judges pro tempore based on the judges' experience and must provide for the right, exercisable once during a case, to a change of judge pro tempore. Such right shall be in addition to any other right provided by law. However, if a previously elected judge of the superior court retires leaving a pending case in which the judge has made discretionary rulings, the judge is entitled to hear the pending case as a judge pro tempore without any written agreement.

**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.

EVIDENCE RULE 401
DEFINITION OF “RELEVANT EVIDENCE”

“Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

RULE 402
RELEVANT EVIDENCE GENERALLY ADMISSIBLE;
IRRELEVANT EVIDENCE INADMISSIBLE

All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible.

**COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II**

STATE OF WASHINGTON,
Respondent,

vs.

MICHAEL DAVID MARTIN,
Appellant.

NO. 42783-4-II

AFFIRMATION OF
OF SERVICE

CATHY RUSSELL, states the following under penalty of perjury under the laws of Washington State. On May 29th, 2012, I personally placed the United States Mail and/or electronically filed the following documents with postage paid to the indicated parties:

1. BRIEF OF APPELLANT
2. AFFIRMATION OF SERVICE

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Dated this 29TH day of May, 2012, at Longview, Washington.

/s/

Cathy Russell, Legal Assistant to
John A. Hays, Attorney at Law

NO. 42783-4-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

MICHAEL DAVID MARTIN,

Appellant.

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

Assignment of Error

1. Trial counsel's failure to move to exclude an irrelevant, unfairly prejudicial witness denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment.

2. The defendant's conviction should be reversed and the case remanded for a new trial because the record below fails to show that the defendant knowingly and voluntarily waived his right under Washington Constitution, Article 4, § 5, to have his case tried before an elected superior court judge.

Issues Pertaining to Assignment of Error

1. Does a trial counsel's failure to move to exclude an irrelevant, unfairly prejudicial witness deny a defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, when the jury would have acquitted but for the admission of that evidence?

2. Should a defendant's conviction be reversed and the case remanded for a new trial when the record below fails to show that the defendant knowingly and voluntarily waived the right under Washington Constitution, Article 4, § 5, to have an elected judge preside at trial?

STATEMENT OF THE CASE

Factual History

Early in the morning of July 30, 2011, Byron Brown drove his pickup to his gravel pit in rural Cowlitz County near the Cowlitz River. RP 34-35.¹ Upon opening the gate and entering the work area, he saw a person standing under his rock crusher. RP 35-38. Mr. Brown then looked for a possible second person, saw no one, and slowly backed out of the gravel pit to go back home and call 911. *Id.* As he did this, the person under the rock crusher dumped something out of a backpack and fled on foot. RP 38-39. Mr. Brown then drove home and had his wife call the sheriff's office. RP 38. As Mr. Brown was returning to the gravel pit, he saw a vehicle parked by a Weyerhaeuser gate on a road near the area of his house and gravel pit. RP 40-42. Thinking that the vehicle might belong to the person he had seen in his gravel pit, he stopped and took pictures of the vehicle and license plate. *Id.* As he was doing this, he saw the defendant coming down a trail from the gravel pit carrying a bicycle. *Id.*

As the defendant got near the vehicle, which belonged to the defendant's mother, Mr. Brown accused him of being the intruder. RP 40-42. Mr. Brown told the defendant that he had called the sheriff's office. *Id.*

¹The record on appeal includes one volume of verbatim reports, referred to herein as "RP [page #]."

He also pointed a pellet gun at him to force him to talk. *Id.* The defendant denied the accusation and stated that he had been on a hike down to the river. *Id.* After a brief conversation, the defendant loaded his bicycle into the vehicle and drove off. *Id.* However, he gave Mr. Brown his correct address on Storm Road before leaving. *Id.*

Two sheriff's deputies eventually responded to the area where they took statements from Mr. Brown and an employee. RP 5-6, 15-16. Both Mr. Brown and his employee told the deputies that someone had been cutting wires under the rock crusher and had fled, leaving a pair of wire cutters in the area, along with footprints in the dust. *Id.* The deputies took the wire cutters but never tried to get fingerprints from this item. RP 31-32. Mr. Brown's employee also told them that he had driven to the end of Storm Road and had a conversation with the defendant as he drove up with his mother. RP 71-72. The defendant told the employee that he wanted to go speak with Mr. Brown and the sheriff's deputies. *Id.* However, the defendant returned home when the employee told the defendant that the deputies would come to speak with him. *Id.*

Eventually, the deputies went to the defendant's house and spoke with him. RP 7-13, 25-31. The defendant told them that he had driven his mother's vehicle to the Weyerhaeuser gate, and then rode his bicycle down the path by the rock quarry. *Id.* He then walked the rest of the way to the river, as he

had done many times over the past few years. *Id.* Although he admitted walking through the quarry, he denied ever seeing anyone, or ever getting more than 40 yards from the rock crusher. *Id.* However, he did admit that he had entered the rock quarry without permission and that he had driven his mother's vehicle without a license. RP 11-13.

Procedural History

By information filed August 3, 2011, the Cowlitz County Prosecutor charged the defendant Michael D. Martin with attempted first degree theft, first degree malicious mischief, driving while suspended in the third degree, and second degree criminal trespass. CP 1-2. The case later came on for trial with the state calling the two deputies who had responded to the scene, Mr. Brown, and his employee. RP 4, 15, 34, 63. These witnesses testified to the facts set out in the preceding factual history. *See* Factual History.

In addition, as its last witness, the state called a person by the name of Deann Nelson. RP 82. Ms. Nelson told the jury that she was the "buy back" manager from Waste Control in Longview. RP 83. She then explained the prices for scrap copper, scrap copper wire, and other scrap metals. RP 83-86. She further testified that the defendant had sold scrap metal to her business on a number of occasions, although she couldn't say what types of metal. *Id.* The state never did explain the relevance of this evidence and the defense did not challenge it as irrelevant. RP 82-93.

Following the close of the state's case, the defendant took the stand as the only defense witness. RP 96. While in the witness box he explained his long time habit of hiking to the river near the gravel pit, and his habit of walking through the gravel pit as the easiest way to get from where he parked his car to the river. RP 96-109. While he admitted walking through the area and admitted driving without a license, he denied having even come close to the defendant's rock crusher, let alone damaging it. *Id.*

After the defendant's testimony, the defense rested its case and the court instructed the jury without objection from either party. RP 119, 130-145; CP 23-53. The jury then listened to closing arguments and retired for deliberation, eventually returned verdicts of guilty on all counts. RP 145-164, 165-168; CP 54-57. Following sentencing within the standard range, the defendant filed timely notice of appeal. CP 74.

ARGUMENT

I. TRIAL COUNSEL’S FAILURE TO MOVE TO EXCLUDE AN IRRELEVANT, UNFAIRLY PREJUDICIAL WITNESS DENIED THE DEFENDANT EFFECTIVE ASSISTANCE OF COUNSEL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22, AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT.

Under both United States Constitution, Sixth Amendment, and Washington Constitution, Article 1, § 22, the defendant in any criminal prosecution is entitled to effective assistance of counsel. The standard for judging claims of ineffective assistance of counsel under the Sixth Amendment is “whether counsel’s conduct so undermined the proper functioning of the adversary process that the trial cannot be relied on as having produced a just result.” *Strickland v. Washington*, 466 U.S. 668, 686, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). In determining whether counsel’s assistance has met this standard, the Supreme Court has set a two part test.

First, a convicted defendant must show that trial counsel’s performance fell below that required of a reasonably competent defense attorney. Second, the convicted defendant must then go on to show that counsel’s conduct caused prejudice. *Strickland*, 466 U.S. at 687, 80 L.Ed.2d at 693, 104 S.Ct. at 2064-65. The test for prejudice is “whether there is a reasonable probability that, but for counsel’s professional errors, the result in the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Church v.*

Kinchelse, 767 F.2d 639, 643 (9th Cir. 1985) (citing *Strickland*, 466 U.S. at 694, 80 L.Ed.2d at 698, 104 S.Ct. at 2068)). In essence, the standard under the Washington Constitution is identical. *State v. Cobb*, 22 Wn.App. 221, 589 P.2d 297 (1978) (counsel must have failed to act as a reasonably prudent attorney); *State v. Johnson*, 29 Wn.App. 807, 631 P.2d 413 (1981) (counsel's ineffective assistance must have caused prejudice to client).

In the case at bar, the defendant claims ineffective assistance based upon trial counsel's failure to object when the state called a witness whose testimony was completely irrelevant and unfairly prejudicial. This witness was Deann Nelson, the "buy back" manager from Waste Control in Longview. She testified to the price of scrap copper, scrap copper wire, and other scrap metals. She further testified that the defendant had sold scrap metal to her business on a number of occasions, although she couldn't say what types of metal. The state never did explain the relevance of this evidence because the defense did not challenge it as irrelevant. However, as the following explains, it was both irrelevant and prejudicial.

Under ER 401, "relevance" is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." In other words, for evidence to be relevant, there must be a "logical nexus" between the evidence and the fact to be

established. *State v. Whalon*, 1 Wn.App. 785, 791, 464 P.2d 730 (1970). It must have a “tendency” to prove, qualify, or disprove an issue for it to be relevant. *State v. Demos*, 94 Wn.2d 733, 619 P.2d 968 (1980).

Under ER 402, irrelevant evidence is not admissible. This court rule states:

All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible.

ER 402.

In the case at bar, there was no “logical nexus” between the fact at issue (whether or not the defendant had attempted to steal wiring from Mr. Brown’s rock crusher) and the facts presented by Deann Nelson (that copper wire sold for a certain price and the defendant had sold other scrap metals at her place of employment). Rather, the inference that the state was attempting to have the jury draw was (1) that people who sell scrap metal are thieves, (2) the defendant sold scrap metal, and therefore (3) the defendant was a thief who tried to steal metal from Mr. Brown. As such, the state did not seek to introduce this evidence because it was relevant. Rather, the state sought to introduce this evidence because of its unfair prejudicial effect.

Given both the lack of relevance on the one hand, and the unfair prejudice on the other hand, there was no possible tactical basis for the

defendant's attorney to refrain from objecting to the entirety of Ms Nelson's testimony. Thus, the failure to object fell below the standard of a reasonably prudent attorney. In addition, given the facts that (1) Mr. Brown only saw the actual thief from a distance, (2) that the defendant did not attempt to flee from Mr. Brown and gave his correct name and address, and (3) that the defendant sought out the police and spoke freely with them, there is a high likelihood that absent the admission of Ms Nelson's irrelevant and prejudicial evidence, the jury would have acquitted the defendant. As a result, trial counsel's failure to object to this evidence denied the defendant effective assistance of counsel under both Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment and he is entitled to a new trial.

II. THE DEFENDANT'S CONVICTION SHOULD BE REVERSED AND THE CASE REMANDED FOR A NEW TRIAL BECAUSE THE RECORD BELOW FAILS TO SHOW THAT THE DEFENDANT KNOWINGLY AND VOLUNTARILY WAIVED HIS RIGHT UNDER WASHINGTON CONSTITUTION, ARTICLE 4, § 5, TO HAVE HIS CASE TRIED BEFORE AN ELECTED SUPERIOR COURT JUDGE.

Under Washington Constitution, Article 4, § 5, every person charged with a felony, and every civil litigant appearing in a superior court has the right to have an elected superior court judge preside over his or her trial. *State v. Sain*, 34 Wn.App. 553, 663 P.2d 493 (1983). This constitutional provision states as follows:

There shall be in each of the organized counties of this state a superior court for which at least one judge shall be elected by the qualified electors of the county at the general state election If a vacancy occurs in the office of judge of the superior court, the governor shall appoint a person to hold the office until the election and qualification of a judge to fill the vacancy, which election shall be at the next succeeding general election, and the judge so elected shall hold office for the remainder of the unexpired term.

Washington Constitution, Article 4, § 5 (in part).

While the litigants in a felony criminal proceeding each have the right to have the case tried by an elected superior court judge, our constitution and statutory law do allow judges *pro tempore* to preside over individual cases if both parties consent. Washington Constitution, Article 4, § 7; RCW 2.08.180. Washington Constitution, Article 4, § 7, states as follows concerning the appointment of judges *pro tempore*:

The judge of any superior court may hold a superior court in any county at the request of the judge of the superior court thereof, and upon the request of the governor it shall be his or her duty to do so. A case in the superior court may be tried by a judge pro tempore either with the agreement of the parties if the judge pro tempore is a member of the bar, is agreed upon in writing by the parties litigant or their attorneys of record, and is approved by the court and sworn to try the case; or without the agreement of the parties if the judge pro tempore is a sitting elected judge and is acting as a judge pro tempore pursuant to supreme court rule. The supreme court rule must require assignments of judges pro tempore based on the judges' experience and must provide for the right, exercisable once during a case, to a change of judge pro tempore. Such right shall be in addition to any other right provided by law. However, if a previously elected judge of the superior court retires leaving a pending case in which the judge has made discretionary rulings, the judge is entitled to hear the pending case as a judge pro tempore without any written agreement.

Washington Constitution, Article 4, § 7.

This constitutional provision authorizes four types of judges *pro tempore*: (1) out-of-county superior court judges hearing a case at the request of either an in-county superior court judge or the governor, (2) members of the bar if agreed upon by the parties, (3) an elected judge of that county appointed pursuant to supreme court rule, and (4) a retired superior court judge who had previously made a discretionary decision in the case prior to retirement. The case at bar deals with the second alternative only, since the judge *pro tempore* hearing the case had not then nor previously been elected as either a superior court judge or a judge of a court of limited jurisdiction. Rather, he was a member of the bar. The appointment of members of the bar to sit as judges *pro tempore*, found in Washington Constitution, Article 4, § 7, is also found in RCW 2.08.180, the first portion of which provides as follows:

A case in the superior court of any county may be tried by a judge *pro tempore*, who must be either: (1) A member of the bar, agreed upon in writing by the parties litigant, or their attorneys of record, approved by the court, and sworn to try the case; or (2) pursuant to supreme court rule, any sitting elected judge.

RCW 2.08.180 (in part).

In *National Bank of Washington, Coffman-Dobson Branch v. McCrillis*, 15 Wn.2d 345, 130 P.2d 901 (1942), the Washington Supreme Court explained that under both the constitution and the statute, the authority

of a member of the bar to preside over a case in the superior court derives solely from the consent of the litigants. The court notes as follows on this point:

A judge *pro tem.*, under our statute, is appointed to hear one particular case. He does not derive his authority from a general election, nor from an appointment by an executive officer, but his power to act is based upon the consent of the parties litigant to his appointment. A judge *pro tem.*, under our statute, is not a superior court judge, and could make no claim to the office of superior court judge. We are of the opinion that it clearly appears from the constitutional and statutory provisions that the essential element to the valid appointment of a judge *pro tem.* which must exist is the consent of the parties.

McCrillis, 15 wn.2d at 357.

In *McCrillis*, the court went on to note that the parties may consent to the appointment of a judge *pro tempore* either orally in open court or by written stipulation. *McCrillis*, 15 Wn.2d at 356. However, without the consent of both parties, the judge *pro tempore* lacks jurisdiction. *McCrillis*, 15 Wn.2d at 359.

The language in both Washington Constitution, Article 4, § 7 and RCW 2.08.180 makes it appear that consent for the appointment of a judge *pro tempore* can be given solely by the attorneys of record, regardless of the desires of the litigants. However, as the decision in *State v. Sain, supra*, explains, the right to have an elected superior court judge preside over a felony trial is a substantial constitutional right that can only be waived by the

defendant, not by his or her attorney. The following examines this case.

In *State v. Sain, supra*, the state charged three defendant's with first degree robbery. The court appointed a single attorney to represent all three. When the elected superior court judge became ill, the defendants' attorney twice orally consented to the appointment of a judge *pro tempore* to hear the case. That judge *pro tempore* presided over the remainder of the proceedings. Two days before trial, the court allowed the defense attorney to withdraw from representing two of the three defendants based upon a conflict of interest. The court then appointed a new attorney for the two defendants the original attorney could no longer represent.

The next day, the new attorney appeared before the court and moved to continue the case. The court denied the motion, but only after both of the attorneys signed a stipulation acknowledging their willingness to proceed before the judge, who was still presiding *pro tempore*. On the morning of trial, the court requested that the three defendants state on the record that they agreed to have their case tried before a judge *pro tempore*. The defendant represented by the original attorney refused. The other two defendants consented. However, after the court again denied a motion to continue, those two defendants stated on the record that they were withdrawing their consent to have a judge *pro tempore* preside over their cases. None the less, the case went to trial and all three defendants were convicted.

Following conviction, all three defendants appealed, arguing in part that since they had not consented to having a *pro tempore* judge preside over their cases, the judge had acted without jurisdiction. Thus, they claimed the right to a new trial. The state responded by arguing that the consent by both defense counsel, which was eventually reduced to writing and acknowledged in open court, was sufficient to satisfy the requirements of both the constitution and the statute. The Court of Appeals first reviewed the case of the defendant who was represented by the original attorney at trial and who had refused consent to a judge *pro tempore* at the beginning of the trial. In addressing this defendant's arguments, the court first noted a distinction between "procedural issues" and "substantial rights." As the court noted, an attorney has the authority to waive procedural issues. However, only a defendant can waive "substantial rights." The court then went on to hold that the right to be tried by an elected judge derived directly from the constitution and constituted a substantial right that only the defendant could waive. The court held as follows on this issue:

We find the right under Const. art. 4, § 5, to be tried in a court presided over by an elected superior court judge accountable to the electorate is a substantial right. Thus, the requirement of Mr. Sain's written consent could not be waived by Mr. Burchard's unauthorized statements.

State v. Sain, 34 Wn.App. at 557.

The court then noted that the judge *pro tempore* should have obtained

the defendant's written consent prior to trial and the failure to do so robbed the judge of jurisdiction and required reversal of the conviction. The court's specific holding was as follows:

The record before us leaves substantial doubt as to what happened prior to the morning of trial. In fact, there is no record of exactly what was said during the telephonic presentations to Judge Ennis or what precisely occurred the evening before trial. One thing is clear; Larry Sain refused to give his written consent to Judge Ennis sitting as judge pro tempore at his trial. While it is understandable how these events came about, hindsight indicates the defendants' written consent should have been obtained before Judge Ennis undertook any action in the case. Consequently, we are constrained to hold the judge *pro tempore* did not have jurisdiction to preside over the trial of Larry Sain and his conviction must be reversed and remanded for retrial.

State v. Sain, 34 Wn.App. at 557.

The court's requirement that the judge *pro tempore* first obtain the defendant's written consent to preside over the case follows a line of cases which require the court to enter into a direct colloquy with any defendant who states the intent to waive a right secured under the constitution. For example, our case law requires the court to engage in a colloquy with a defendant indicating a desire to waive the right to jury trial under Washington Constitution, Article 1, § 21, and United States Constitution, Sixth Amendment. *State v. Bugai*, 30 Wn.App. 156, 157, 632 P.2d 917 (1981) ("Because of the constitutional guarantee of trial by jury, the record must show that the waiver of a jury by the accused was knowingly,

intelligently and voluntarily made.”)

Similarly, the court must enter into a detailed colloquy with any defendant indicating a desire to waive the right to counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment. As with jury waivers, the waiver of the right to counsel must also be knowingly, voluntarily, and intelligently made. *State v. Harell*, 80 Wn.App. 802, 805, 911 P.2d 1034 (1996). Thus, if the court fails to hold a detailed colloquy with the defendant to assure that the waiver is knowingly, voluntarily and intelligently made, the record must clearly reflect that the defendant at least understood the seriousness of the charge, the possible maximum penalty involved, and the existence of technical procedural rules governing the presentation of a defense. *State v. DeWeese*, 117 Wn.2d 369, 377-378, 816 P.2d 1 (1991).

Our case law requires an even more detailed colloquy with a defendant indicating the desire to plead guilty. Under the due process clauses found in Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, all guilty pleas must be knowingly, voluntarily, and intelligently entered. *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); *In re Pers. Restraint of Stoudmire*, 145 Wn.2d 258, 36 P.3d 1005 (2001). Guilty pleas that are entered without a statement of the consequences of the sentence are not “knowingly” made.

State v. Miller, 110 Wn.2d 528, 756 P.2d 122 (1988). While the trial court need not inform a defendant of all possible collateral consequences of his or her guilty plea, the court must inform the defendant of all direct consequences. *State v. Ross*, 129 Wn.2d 279, 916 P.2d 405 (1996).

These cases stand for the proposition that, absent a sufficient record, the courts must indulge every reasonable presumption against finding the waiver of a constitutional right. *State v. Wicke*, 91 Wn.2d 638, 645, 591 P.2d 452 (1979). For example, in *State v. Hos*, 154 Wn.App. 238, 225 P.3d 389 (2010), a defendant appealed her conviction for possession of methamphetamine following a bench trial, arguing that she had not knowingly, voluntarily, and intelligently waived her right to a jury trial. In this case, the defendant's attorney had brought an unsuccessful suppression motion, and then stated that the defendant wished to submit to a bench trial on stipulated facts in order to reserve the right to appeal the denial of the motion to suppress. The court then accepted the defense attorney's statement and found the defendant guilty upon a stipulation to facts presented by the parties. At no point did the defendant object. However, neither did the court enter into a colloquy with the defendant concerning her right to trial by jury, and the defendant did not sign a written jury waiver.

On appeal, the state responded by arguing that (1) the defendant ratified her attorney's oral waiver of her right to jury trial by failing to object

and (2) the error was not preserved for appeal because the defendant had not called the error to the trial court's attention. In addressing these arguments, the court first reviewed the decision in *State v. Wicke, supra*, noting as follows:

To be sufficient, the record must contain the defendant's personal expression of waiver; counsel's waiver on the defendant's behalf is not sufficient. Our Supreme Court upheld the Court of Appeals' reversal of Wicke's conviction following a bench trial because, although Wicke's trial counsel had stated on the record that Wicke waived his right to a jury trial, the record did not contain Wicke's personal expression of such jury trial waiver. Wicke had stood beside his counsel, without objection, as counsel orally waived a jury trial. But the trial court did not question Wicke about whether he had discussed a jury waiver with defense counsel and whether he had agreed to the waiver; nor did Wicke file a written jury trial waiver under CrR 6.1(a).

State v. Hos, 154 Wn.App. at 250-251 (citations and footnote omitted).

Based upon the holding in *Wicke*, the court then went on to reject the state's arguments, in spite of the fact that the defendant had stood by counsel and failed to object when her case was tried to the bench. The court stated:

But here, as in *Wicke*, the record does not contain Hos's personal expression waiving her right to a jury trial. Hos did not sign a written jury trial waiver. Nor did the trial court question Hos on the record to determine whether she knowingly, intelligently, and voluntarily waived her right to a jury trial, or even whether she had discussed the issue with her defense counsel or understood what rights she was waiving. Because the record lacks Hos's personal expression of waiver of her constitutional right to a jury trial, *Wicke* requires that we reverse her conviction and remand for a new trial.

State v. Hos, 154 Wn.App. at 251-252.

In both *Hos* and *Wicke*, the court refused to find a waiver of the right to jury trial in spite of the fact that (1) the defendants stood by their attorneys in open court and said nothing when their attorneys informed the court that each defendant was waiving the right to jury trial, and (2) each defendant continued to say nothing when their cases were tried to the bench.

In the case at bar, the Judge *Pro Tempore*, Dennis Maher, presided over the defendant's trial. It is true that the defendant signed a document consenting to this action, however the document and the colloquy were inadequate and did not inform the defendant that he was waiving a right under the state constitution. Rather, the waiver simply states as follows:

IT IS AGREED that DENNIS MAHER may hear the above-entitled matter as Judge Pro Tempore.

CP 14.

The colloquy between the court and the defendant was similarly inadequate in that it also failed to inform the defendant that he was waiving a right guaranteed him under the state constitution. The colloquy went as follows:

COMMISSIONER MAHER: This is the matter of State of Washington v. Michael David Martin, 11-1-00786-1. It is a matter that we actually began yesterday and we declared a mistrial. So this is day one of the trial. So I have indicated to the attorneys that we probably needed to put on the record many of the issues that we had discussed yesterday in our pretrial yesterday. So, Mr. Martin, as I indicated to you yesterday, I'm hearing this matter as a judge pro tem. To do that you need to agree to my appointment to hear this matter in that

capacity. Have you had an opportunity to discuss that with your attorney?

DEFENDANT: Yes, sir.

COMMISSIONER MAHER: And on the record are you agreeing for me to hear this matter as a judge pro tem?

DEFENDANT: Yes, sir.

COMMISSIONER MAHER: And I have a document that purports to have the signature of both attorneys and you. Is that your signature on this document?

DEFENDANT: Yes, it is.

COMMISSIONER MAHER: And you gave that of your own free will? Nobody forced you to do that?

DEFENDANT: Yes.

RP 1-2.

Once again, both the written waiver and the colloquy completely fail to inform the defendant that his right to have an elected judge preside over his trial is based in Washington Constitution, Article 4, § 5, or that this even is a right guaranteed under the constitution. Thus, the written waiver and the colloquy were inadequate and the defendant's case should be remanded for a new trial in front of an elected judge.

CONCLUSION

The defendant is entitled to a new trial based upon his unknowing waiver of his constitutional right to have his case heard in front of an elected judge under Washington Constitution, Article 4, § 5, and based upon the denial of his right to effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment.

DATED this 29th day of May, 2012.

Respectfully submitted,

A handwritten signature in black ink that reads "John A. Hays". The signature is written in a cursive style with a large, stylized initial "J".

John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 22**

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

**WASHINGTON CONSTITUTION,
ARTICLE 4, § 5
(in part)**

There shall be in each of the organized counties of this state a superior court for which at least one judge shall be elected by the qualified electors of the county at the general state election . . . If a vacancy occurs in the office of judge of the superior court, the governor shall appoint a person to hold the office until the election and qualification of a judge to fill the vacancy, which election shall be at the next succeeding general election, and the judge so elected shall hold office for the remainder of the unexpired term.

**WASHINGTON CONSTITUTION
ARTICLE 4, § 7**

The judge of any superior court may hold a superior court in any county at the request of the judge of the superior court thereof, and upon the request of the governor it shall be his or her duty to do so. A case in the superior court may be tried by a judge pro tempore either with the agreement of the parties if the judge pro tempore is a member of the bar, is agreed upon in writing by the parties litigant or their attorneys of record, and is approved by the court and sworn to try the case; or without the agreement of the parties if the judge pro tempore is a sitting elected judge and is acting as a judge pro tempore pursuant to supreme court rule. The supreme court rule must require assignments of judges pro tempore based on the judges' experience and must provide for the right, exercisable once during a case, to a change of judge pro tempore. Such right shall be in addition to any other right provided by law. However, if a previously elected judge of the superior court retires leaving a pending case in which the judge has made discretionary rulings, the judge is entitled to hear the pending case as a judge pro tempore without any written agreement.

**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.

EVIDENCE RULE 401
DEFINITION OF “RELEVANT EVIDENCE”

“Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

RULE 402
RELEVANT EVIDENCE GENERALLY ADMISSIBLE;
IRRELEVANT EVIDENCE INADMISSIBLE

All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible.

**COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II**

STATE OF WASHINGTON,
Respondent,

vs.

MICHAEL DAVID MARTIN,
Appellant.

NO. 42783-4-II

AFFIRMATION OF
OF SERVICE

CATHY RUSSELL, states the following under penalty of perjury under the laws of Washington State. On May 29th, 2012, I personally placed the United States Mail and/or electronically filed the following documents with postage paid to the indicated parties:

1. BRIEF OF APPELLANT
2. AFFIRMATION OF SERVICE

SUSAN I. BAUR
COWLITZ COUNTY PROS ATTY
312 S.W. 1ST STREET
KELSO, WA 98626

MICHAEL D. MARTIN
395 STORM RD.
CASTLE ROCK, WA 98611

Dated this 29TH day of May, 2012, at Longview, Washington.

/s/

Cathy Russell, Legal Assistant to
John A. Hays, Attorney at Law

HAYS LAW OFFICE

May 29, 2012 - 2:05 PM

Transmittal Letter

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