

No. 35763-1-II  
COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

RICHARD D. HARTMAN,

Appellant.

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APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR MASON COUNTY

The Honorable, Judge Toni A. Sheldon  
Cause No. 06-1-00246-6

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BRIEF OF RESPONDENT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to order a competency examination when the court became concerned with Hartman's ability to proceed with trial.
2. The trial court erred in denying Hartman his constitutional right to proceed pro se.
3. The trial court erred in giving the intent to commit a crime inference instruction (Instruction No. 10A) over Hartman's objection.
4. The trial court erred in not taking the case from the jury for lack of sufficient evidence.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err by not ordering a competency examination when: (a) it had the discretion to make that decision; (b) was in a position to evaluate Hartman's demeanor and behavior; (c) was told by Hartman that he was ill with Hepatitis C; and (d) retained counsel for Hartman stated that his client was competent and was assisting with his own defense?
2. Did the trial court err by not allowing Hartman to proceed pro se when he made that request: (a) after first retaining and then attempting to fire counsel, (b) the trial was in its third day and (c) substantial testimony had already been given?
3. Did the trial court err in giving the intent to commit a crime inference instruction when it merely supported and was not the sole and sufficient proof that Hartman committed any element of burglary in the second degree?
4. Should the trial court have taken the case from the jury for lack of sufficient evidence when: (a) on a Saturday evening, two witnesses saw a man on top of a tank that was used to fuel school buses; (b)

law enforcement stopped Hartman in close proximity to that fuel tank in a truck that contained; (c) a mechanical pump with a nozzle that smelled of diesel fuel and (d) the cap to the school fuel tank had been unscrewed and was sitting on top of it?

#### C. EVIDENCE RELIED UPON

The official Report of Proceedings shall be referred to as “RP.”

The Clerk’s Papers shall be referred to as “CP.”

#### D. STATEMENT OF THE CASE

##### 1. Procedural History

The defendant, Richard D. Hartman, was charged by information with one count of burglary in the second degree in Mason County Superior Court on June 28, 2006. CP 5: 42. At an omnibus and pretrial hearing on August 7, 2006, Hartman moved the court to allow him to represent himself pro se and have his court-appointed counsel “resigned as [his] counsel.” RP 4: 14-15. Upon questioning Hartman as to his ability to proceed pro se, Hartman informed the court that although he had an “[e]ighth grade” education, he earned his GED in 1990. RP 5: 3-4; 9-12. The court at this hearing “relieved” court-appointed counsel of representing Hartman, and allowed him to proceed pro se. RP 7: 7-8.

On September 11, 2006, Hartman appeared in court and requested a continuance so that he could continue to prepare his case. RP 11: 6-14.

The trial court denied that request because his case had already been continued “on a number of occasions.” RP 14: 18-19; 21-23. At his readiness hearing on September 15, 2006, Hartman informed the trial court that although he was having “a little bit of difficulty getting a hold of [his] private investigator” and wanted a “30-day continuance,” he was unable to remember that investigator’s name. RP 16: 15-23. As Hartman’s case had, at that time, a final start date of October 2, 2006, the trial court reasoned that it “most probably [wouldn’t] be called in next Tuesday”; September 19, 2006. RP 17: 1-3.

At a hearing on October 20, 2006, Hartman signed a promise to appear for a readiness hearing on November 6, 2006, and for the trial week beginning November 14, 2006, with a last day to start trial of November 27, 2006. CP 47. On October 23, 2006, a notice of appearance and discovery request was filed by a private attorney for Hartman. CP 49. At a readiness hearing on November 6, 2006, retained counsel for Hartman informed the trial court that his client, “didn’t have discovery to give to [him].” RP 19: 5-6. The trial court, however, stated that it would “try” to give him “a reasonable opportunity” to obtain discovery. RP 20: 11-13. The trial court also noted that “if, in going through the discovery, you come up with something that is a more appropriate request for a continuance, we’ll come back and readdress at that time.” RP 20: 13-15.

Hartman's case went to trial on November 17, 2006. RP 24: 1-10. Retained counsel for Hartman noted on that day that he had "had discovery for over a week." RP 25: 6-7. During jury selection, the trial court noted that it:

[H]as some concerns about whether Mr. Hartman is physically able to go forward with the trial today. As I was looking at him a couple of times during the course of our voir dire here in chambers-and he's only perhaps seven feet away from me-his eyes tend to narrow to the point that I'm not sure they're fully open, and I'm just concerned---that he doesn't look like he may be fully able to comprehend what's going on. RP 29: 9-15; 18-21.

By way of explanation, Hartman stated that at that time he felt, "kind of light headed" and "sick." RP 29: 16-17. The trial court allowed counsel for Hartman time "to address" this issue with his client. RP 29: 19-21. Later in the proceedings, counsel for Hartman explained that his client had informed him that he had "had hepatitis C for 30 years" and that this condition "does cause fatigue." RP 34: 5-8. Defense counsel also noted that if Hartman's eyes "start falling to half-mast," that "he may need a break to get some fresh air and to...snap out of that fatigue." RP 34: 10-12.

Prior to the start of testimony, the trial court made a record outside the presence of the jury that it was concerned because Hartman had "stood up" during voir dire and "walked right in front of all...the jurors and

actually left the courtroom.” RP 40: 9-13. The trial court stated that Hartman “didn’t ask permission to do so or for a brief recess,” and that Hartman’s actions were “tremendously inappropriate.” RP 40: 16-17. Defense counsel later stated, “I think that [Hartman] is competent” because “[h]e’s providing me with assistance in his own defense.” RP 45: 12-13. Counsel for Hartman also stated that his client’s “competence is an issue at least to raise and then dismiss.” RP 45: 22-23. Testimony began on November 17, 2006, and ended on November 22, 2006. RP 54: 4-8; 179: 10-12.

In-between testimony and out of the presence of the jury on November 22, 2006, Hartman informed the trial court through his attorney that he (defense attorney) “was no longer acting as his attorney” and that he (Hartman) was now “proceeding pro se.” RP 133: 16-17. In explaining this statement, Hartman told the trial court:

Your Honor, my attorney has informed me that until he is paid his full fee, he will not defend me one hundred per cent. I’ve paid half; I’m getting half. RP 133: 22-23.

Hartman asserted that he and his retained counsel had differing opinions regarding the evidence, as well as his attorney’s method of preparing his case for trial. RP 134: 4-19. Retained counsel for Hartman briefly explained to the trial court how he had prepared the case and concluded by stating that:

[I]f it comes down to me violating my oath as an officer of the court or me doing what he tells me to do, I'll gladly step-down, and I'll be quit of this case and have no regrets. I think that I'm doing a fine job here and...this case is not over yet. RP 137: 4-8.

The court denied Hartman's motion to represent himself pro se because it "is a request that simply comes too late in terms of the third day of trial" and because retained counsel "is an able and capable attorney." RP 137: 13-17.

Hartman renewed his request "to go pro se" later that day, and the trial court reiterated its position that "as far as strategy goes" that defense counsel "is captain of the ship." RP 161: 12-15. The trial court again denied Hartman's request, reasoning that "it simply comes too late in the proceedings. We're in the third day of trial." RP 162: 15-17. Defense counsel noted that the trial court was "acting in its discretion under certain well-defined parameters that are...clear in case law." RP 163: 4-6.

During discussion on the proposed jury instructions, the trial court agreed with the State that it was appropriate to give "the inference of intent instruction that accompanies the burglary charge." RP 183: 4-6. The trial court reasoned that the State "does have the opportunity to argue the law, as opposed to just the facts." RP 183: 8-9. On November 22, 2006, the jury found Hartman guilty of having committed burglary in the second degree, and he was sentenced for that offense on December 7,

2006. Hartman's sentencing on this conviction for burglary in the second degree was based on his offender score of "9," and he received a sentence at the "the top end" of the standard range; 68 months. RP 258: 8-9.

## 2. Statement of Facts

On [Saturday], June 24, [2006], Jacqueline Phipps and her husband, Ron Phipps, drove past the North Mason [County] School District "bus barn" at approximately "6:00 o'clock" in the "evening." RP 91: 22-25; 69: 15; 92: 11-13; 93: 5. At the time, Jacqueline Phipps had been employed as a school bus driver with North Mason Transportation for five years. RP 91: 8-10; 20-21. Jacqueline Phipps was a passenger in this vehicle, and she was driving with her husband "to the Bremerton area for a ballet" recital in which their daughter was a participant. RP 92: 6-10.

When driving past the bus barn, Jacqueline Phipps looked at it because "the week previous to that, somebody had stolen gas—fuel out of the fuel tank that was behind the garage." RP 92: 14-19. In looking at the bus barn, Jacqueline and Ron Phipps both saw "a man on top of the fuel tank" but neither could positively identify who that person was. RP 93: 9; 12-15; 72: 10-17; 85: 10-11. The tank could hold "550-gallon[s]" of fuel and was used "for surplus." RP 55: 17.

After driving past the fuel tank, Jacqueline Phipps asked her husband to turn around so they could “go back and see what was going on.” RP 93: 20-21. In driving by the fuel tank a second time, Jacqueline Phipps saw that the man “was still on the fuel tank” and that “a truck” was “parked right along the fence...on the other side of the fuel tank.” RP 93: 20-25; 94: 7-14. Despite the presence of “brushes and stuff” growing in that area, Jacqueline Phipps could see that the truck was “white...had barrels in it,” and was parked with its back “facing the highway.” RP 94: 17-24.

Although Jacqueline Phipps had a difficult time getting cell phone reception, she successfully contacted 911 and talked with the dispatcher. RP 95: 4-5; 8-9. While talking with dispatch, she “saw the white truck pulling out of the dirt road.” RP 95: 10-11. The driver of the white truck then “took a left...proceeded to leave,” and then “went down to Highway 3 and took a right.” RP 95: 18-19. Up to this point in the incident, Jacqueline Smith did not see any “second person associated with this [white] truck,” but noted that because “[t]here were barrels in the back” it was “hard to see into [it].” RP 95: 20-23; 96: 1-2. When her husband followed the white truck, she tried to “see the license plate number.” RP 96: 4-5. The Phipps’ followed the white truck “[a]bout halfway down the

hill, down to 106,” when the “police came up to the hill and the vehicle turned to the right up a driveway.” RP 96: 6-13.

Deputy Ledford of the Mason County Sheriff’s Department was “on Highway 3” in “the Belfair [WA] area” when both he and Deputy Ward responded to this incident. RP 113: 13-22. As Deputy Ledford “close[ed] in behind” Richard D. Hartman, the defendant, Deputy Ward “took up the position at Highway 3 and 106, [and] wait[ed] for [Hartman] to come down the hill towards [him].” RP 166: 19-22. Deputy Ward noted that at the time,

[there] was real good radio traffic from the initial reporting person-Ms. Phipps I believe-through our Shelton communication and then back to us deputies, so we knew exactly where [Hartman’s] vehicle was at that time. RP 166: 16-19.

Once Deputy Ward saw Hartman’s vehicle “heading down the hill with Deputy Ledford behind him,” he “took off to try and close the road, at which time [Hartman] turned up into a driveway in the 22,000 block.” RP 166: 23-25; 167: 1. At that time, both Deputy Ward and Deputy Ledford came “up behind” Hartman’s white truck, where they then “made contact” with him. RP 167: 1-2.

Hartman was positively identified by Deputy Ledford “as the individual [whom] he contacted and took into custody that day.” RP 112: 19-23. Deputy Ledford also positively identified Hartman as the person

who drove the truck. RP 142: 25; 143: 1. When he stopped Hartman, Deputy Ledford “recognized [Hartman’s] vehicle from previous contacts,” and noted that among other items there were “55-gallon style drums in the back of the truck.” RP 115: 5-8.

In describing the drums, Deputy Ledford stated that “one’s like a fuel cell” and “one’s a plastic or metal drum.” RP 116: 24-25; 117: 1. In viewing photograph “No. 9,” Deputy Ledford also noted that in the bed of Hartman’s truck was a “lot of hose” and “the shaft of a pump assembly.” RP 117: 2-5. In photographs “11, 12 and 13,” Deputy Ledford described that he took them “just to show that there [were] weeds under the undercarriage from [Hartman] obviously driving through an unimproved road or trail.” RP 118: 8-10.

After opening the hood of Hartman’s truck, Deputy Ledford “immediately noticed a pair of extremely large bolt cutters,” as well as “some cables with clamps hooked up to the battery.” RP 118: 18-20. “On top of the battery” was “a shirt or some type of clothing material,” and Deputy Ledford was unsure whether it “was [there] to keep [a] spark from arcing or...what the idea was behind it.” RP 119: 11-19. When Deputy Ledford removed the shirt, he “discovered...battery clamps with a heavy gauge wire.” RP 119: 20-25. These clamps “were hooked up...to a positive and negative...The one end was grounded and one end was

hooked-up to the battery.” RP 120: 3-5. When following the “line out” from these clamps, Deputy Ledford found that it ran “outside of the engine compartment...underneath the cab, then up in between the cab and bed,” where it attached to “the pump assembly.” RP 120: 6-23.

To Deputy Ledford, although it “didn’t appear [as] if any fuel was taken,” both deputies noted that the “pump assembly,” however, was “wet with...diesel fuel.” RP 123: 15-16; 168: 9-19. Having operated “diesel equipment in the past,” Deputy Ledford recognized by scent that the fuel on the assembly pump was diesel. RP 144: 1-6. The deputy also had diesel fuel from the pump assembly in Hartman’s truck both “on [his] hands” and had “clean[ed] [diesel] fuel out of the back of [his] patrol car so that [he] didn’t have to smell it for the rest of [that] week.” RP 123: 21-25. Deputy Ward stated that he could “differentiate” between the smell of gasoline and diesel fuel, and that the fuel on the pump assembly “wasn’t gasoline” but “more of a diesel...fuel.” RP 171: 17-22.

Whether the diesel fuel that “was wet” on the “metal tube of the pump” in Hartman’s truck was a certain color could not be “ascertain[ed]” by Deputy Ward because it “was on [the] pipe.” RP 171: 13-16. Deputy Ledford noted that while “[o]ff-road diesel is typically pink-colored” and that “diesel fuel for road-going vehicles” has “a brownish tint,” he either did not or could not determine the color of the diesel fuel in either the

containers or on the pump assembly in Hartman's truck. RP 144: 10-25; 145: 1-3. Deputy Ledford was unable to check the fuel in the tank at the bus barn because he "never made it over the fence." RP 145: 4-9. Because the fuel tank was inside a "secure facility" and the incident occurred "after school hours," Deputy Ledford "had no way to get in there" to examine it, absent "climbing the fence and barbed wire." RP 155: 10-15.

Ethel Gunderson, Hartman's mother, stated that the transfer pump in the back of the white truck that Hartman drove was used to fuel a "955H Cat bulldozer" that she owns. RP 173: 6-7; 12; 176: 9-13. In June of 2006, that transfer pump was functional. RP 176: 20-23. Gunderson had used the pump "a few days before this incident to fuel" the Cat bulldozer and that "it has red fuel in it." RP 176: 25; 177: 1; 9-11.

During his investigation, Deputy Ledford noticed that while the "barrels" or "tanks" in the back of Hartman's truck "were essentially empty," but that "[t]here was diesel fuel in the bottom of them" in "minimal amounts." RP 124: 2-9. Continuing his investigation, Deputy Ledford drove back to the school grounds to where the "trail essentially comes out" that "leads back to the [bus barn] fuel tank." RP 124: 11-23; 126: 3-5.

Deputy Ledford noted that there was “an overgrown access [road]” that was “actually too overgrown to really take a patrol car back...without scratching it up pretty bad.” RP 125: 9-18; 126: 3-5. Instead, Deputy Ledford parked his patrol car and “walked in” with his camera.” RP 125: 17-18. The deputy noted that aside from “Scotch broom,” there were no businesses or residences back in that area.” RP 125: 19-24. While Deputy Ledford observed although the Scotch broom appeared to have “been growing for years,” it was “beat[en] down” on the road leading to the fuel tank, with “obvious tire marks on the grass,” including the Scotch broom itself. RP 127: 9-16.

When Deputy Ledford reached the fuel tank, he saw that “the barbed wire directly above [it]” was “somewhat damaged,” in that it appeared “that somebody ha[d] either crawled over...or laid something over it.” RP 128: 11-13. The wire itself was “bent and somewhat damaged.” RP 128: 13-14. The deputy also observed that “some type of cap” or “plug” had been removed from” the fuel tank itself at the bus barn.” RP 128: 21-22. Deputy Ledford did not attempt to start the fuel pump in Hartman’s truck however, and “could not tell whether it worked or not.” RP 150: 10-15. In describing the area around the fuel tank, Deputy Ledford stated that there was “one set of tire marks where you

could tell somebody drove through [the brush], basically right to the back of that fuel tank.” RP 152: 17-25.

### 3. Summary of Argument

The trial court did not err by not halting the trial and ordering Hartman to undergo a competency examination because: (a) it had the discretion to make that decision; (b) was in a position to evaluate Hartman’s demeanor and behavior; (c) was told by Hartman that he was ill with Hepatitis C; and (d) retained counsel stated that his client was both competent and was assisting with his own defense. Hartman’s statements to the trial court also show that not only did he understand the issues in his case, but that he could rationally and coherently analyze them both independently and with his attorney to assist in his defense.

No error also occurred when the trial court denied Hartman’s request to proceed pro se because he made it after retaining counsel, when the trial was in its third day, after substantial testimony had already been given. Had the trial court granted Hartman’s request, an obstruction of justice would have occurred.

The trial court did not err by giving the intent to commit a crime inference instruction because it merely supported and was not the sole and sufficient proof that Hartman committed any element of burglary in the

second degree. This instruction simply allowed the jury to consider whether something may or may not have occurred, and was only one of a set of instructions the jury considered.

Lastly, the trial court did not err by not taking the case from the jury for lack of sufficient evidence because there was ample evidence that the jury could consider in determining Hartman's guilt or innocence. Primarily, the jury could consider whether Hartman either did or did not commit burglary in the second degree when: (a) on a Saturday evening, two witnesses saw a man on top of a tank that used to fuel buses; (b) law enforcement stopped Hartman in close proximity to that tank in a truck that contained; (c) a mechanical pump with a nozzle that smelled of diesel fuel; and (d) the cap to the school fuel tank had been unscrewed and was sitting on top of it.

The trial court did not err, and the State respectfully requests that the Court affirm.

E. ARGUMENT

1. THE TRIAL COURT DID NOT ERR BY NOT ORDERING HARTMAN TO UNDERGO A COMPETENCY EXAMINATION BECAUSE:
  - (A) IT HAD THE DISCRETION TO MAKE THAT DECISION;
  - (B) WAS IN A POSITION TO EVALUATE HARTMAN'S DEMEANOR AND BEHAVIOR;
  - (C) WAS TOLD BY HARTMAN THAT HE WAS ILL WITH HEPATITIS C; AND
  - (D) RETAINED COUNSEL FOR HARTMAN STATED THAT HIS CLIENT WAS BOTH COMPETENT AND WAS ASSISTING WITH HIS OWN DEFENSE.

The trial court did not err by not ordering Hartman to undergo a competency examination because: (a) it had the discretion to make that decision; (b) was in a position to evaluate Hartman's demeanor and behavior; (c) was told by Hartman that he was ill with Hepatitis C; and (d) retained counsel for Hartman stated that his client was both competent and was assisting with his own defense.

Whenever a defendant has pleaded not guilty by reason of insanity, or there is reason to doubt his or her competency, the court on its own motion or on the motion of any party shall either appoint or request the secretary to designate at least two qualified experts or professional persons, one of whom shall be approved by the prosecuting attorney, to examine and report upon the mental condition of the defendant. RCW 10.77.060(1)(a).

The constitutional standard for competency to stand trial is whether the accused has ‘sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding’ and to assist in his defense with ‘a rational as well as factual understanding of the proceedings against him[her].’ *In re Pers. Restraint of Fleming*, 142 Wash.2d 853, 861-862, 16 P.3d 610 (2001). Washington law affords greater protection by providing that ‘no incompetent person may be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues.’ *Fleming* at 862. ‘Requiring that a criminal defendant be competent has a modest aim: It seeks to ensure that he has the capacity to understand the proceedings and to assist counsel.’ The two-part test for legal competency for a criminal defendant in Washington is: (1) whether the defendant understands the nature of the charges; and (2) whether he is capable of assisting in his defense. *Fleming* at 862; *see State v. Hahn*, 106 Wash.2d 885, 894, 726 P.2d 25 (1986).

The determination of whether a competency examination should be ordered rests generally within the discretion of the trial court. *Fleming* at 863; *see State v. Thomas*, 75 Wash.2d 516, 518, 452 P.2d 256 (1969). The factors a trial judge may consider in determining whether or not to order a formal inquiry into the competence of an accused include the ‘defendant’s appearance, demeanor, conduct, personal and psychiatric reports and the

statements of counsel.’ *Fleming* at 863; *see State v. Dodd*, 70 Wash.2d 513, 514, 424 P.2d 302 (1967). A defendant need not be able to choose among alternative trial strategies to be competent. *State v. Lord*, 117 Wn.2d 829, 900-901, 822 P.2d 177 (1991). A disagreement between the defendant and counsel as to the manner in which to proceed, without more, does not raise the issue of competency. *Lord* at 901.

Procedures of the competency statute (RCW 10.77) are mandatory and not merely directory. *Fleming* at 863; *see State v. Wicklund*, 96 Wash.2d 798, 805, 638 P.2d 1241 (1982). “[O]nce there is a reason to doubt a defendant’s competency, the court must follow the statute to determine his or her competency to stand trial.’ *Fleming* at 863; *see City of Seattle v. Gordon*, 39 Wash.App. 437, 441, 693 P.2d 741 (1985). Failure to observe procedures adequate to protect an accused's right not to be tried while incompetent to stand trial is a denial of due process. *Fleming* at 863; *see State v. O’Neal*, 23 Wash.App. 899, 901, 600 P.2d 570 (1979). Washington cases have taken the position that a trial court does not abuse its discretion if competency issues are raised. *Fleming* at 864; *see State v. Lord* at 902-904 (statements by [the] defendant concerning his conversations with the devil and conflicts with his counsel do not create a doubt of defendant’s competency).

The facts in *State v. Lord* are analogous to Hartman’s case because they involve a defendant whose competency was questioned, and why the trial court did not order a competency hearing. In *Lord*, the defendant was convicted of committing aggravated first degree murder. *Lord* at 881. At the beginning of the penalty phase of Lord’s trial, defense counsel moved for a hearing to determine if Lord was competent to proceed. *Lord* at 900. The motion was based in part upon statements that Lord had made to jail staff.

Specifically, Lord told jail staff that he had “had a conversation with the Lord and the devil, and the devil asked him to drink a cup of his own blood to prove his innocence.” *Lord* at 901. Lord had also asked a jailer “to handcuff him when he [Lord] appeared in court, because [Lord] was afraid of what he would do” to his attorney. In response to questions from the [trial] court, Lord stated that he believed he was competent to assist either Ness or Mandel in his defense. *Lord* at 902. The trial court ruled that because counsel for Lord had not made any assertion that Lord was unable to recall or relate facts sufficient for defense counsel to proceed in the sentencing phase, defense counsel’s motion regarding Lord’s competency was without merit. *Lord* at 902-904.

In Hartman’s case, the court initially voiced a concern regarding whether Hartman was “physically able to go forward” with his trial. RP

29: 9-15. Although the trial court also expressed a concern whether Hartman was “fully able to comprehend” the proceedings, it was explained that he had “had Hepatitis C for 30 years,” and that he simply might need to take “a break to get some fresh air” so that he could “snap out of that fatigue.” RP 34: 10-12. Later in the trial, retained counsel for Hartman stated, “I think that [Hartman] is competent” because “[h]e’s providing me with assistance in his own defense.” RP 45: 12-13. In a statement to the trial court on why it should grant his mid-trial motion to represent himself, Hartman analyzed the evidence as follows:

In the photograph, the aerial photograph, there has now been a bunch of Scotch bloom taken out. That photograph doesn’t even show the way that it was at the time of the alleged crime.

There’s other evidence of more accesses than just one into that area, and that hasn’t been brought forth. And it needs to be brought to the jury’s attention that there is more than one way in and out of this [area]. There could have been 40 people back there that they didn’t see. They don’t know this if they don’t know there is more than one way in and out of there. RP 134: 11-19.

Unlike defendant Lord who asserted that he had engaged in “a conversation with the Lord and the devil, and the devil asked him to drink a cup of his own blood to prove his innocence,” Hartman demonstrated to the trial court that he was able to analyze the evidence in a logical fashion and assist in his own defense. *Lord* at 901. If Hartman did suffer from a

medical condition, it may have been a purely physical one that did not affect his mental competency. Recognizing this, the trial court properly acted within its discretion to not halt the trial until a competency evaluation could be completed because this would have been both unnecessary and unduly delayed the completion of Hartman's trial.

2. THE TRIAL COURT DID NOT ERR BY ALLOWING HARTMAN TO PROCEED PRO SE BECAUSE HE MADE HIS REQUEST:
  - (A) AFTER FIRST RETAINING AND THEN ATTEMPTING TO FIRE COUNSEL;
  - (B) WHEN HIS TRIAL WAS IN ITS THIRD DAY; AFTER
  - (C) SUBSTANTIAL TESTIMONY HAD ALREADY BEEN GIVEN.

The trial court did not err by allowing Hartman to proceed pro se because he made his request: (a) after first retaining and then attempting to fire counsel; (b) when his trial was in its third day; after (c) substantial testimony had already been given.

The United States Supreme Court recognizes a constitutional right of criminal defendants to waive assistance of counsel and to represent themselves at trial. *State v. DeWeese*, 117 Wn.2d 369, 375, 816 P.2d 1 (1991). A court cannot force a defendant to accept counsel if the defendant wants to conduct his or her own defense, as the Sixth Amendment grants defendants the right to make a personal defense with

or without the assistance of an attorney. *DeWeese* at 375; *see Faretta v. California*, 422 U.S. 806, 45 L. Ed. 2d 562, 95 S. Ct. 2525 (1975). The right to representation by counsel of choice is, however, limited in the interest of both fairness and efficient judicial administration. *DeWeese* at 375; *see U.S. v. Wheat*, 486 U.S. 153, 159, 100 L. Ed. 2d 140, 108 S. Ct. 1692 (1988).

A defendant may not manipulate the right to counsel for the purpose of delaying and disrupting trial. *DeWeese* at 379; *see State v. Johnson*, 33 Wn.App. 15, 22, 651 P.2d 247 (1982). Self-representation is a grave undertaking, one not to be encouraged. *DeWeese* at 379. Its consequences, which often work to the defendant's detriment, must nevertheless be borne by the defendant. When a criminal defendant chooses to represent himself and waive the assistance of counsel, the defendant is not entitled to special consideration[,] and the inadequacy of the defense cannot provide a basis for a new trial or an appeal.

When a midtrial request for self-representation is presented the trial court shall inquire Sua Sponte into the specific factors underlying the request. *State v. Fritz*, 21 Wn.App.354, 363, 585 P.2d 173 (1978).

Among other factors to be considered by the court in assessing such requests made after the commencement of trial are the quality of counsel's representation of the defendant, the defendant's prior proclivity to

substitute counsel, the reasons for the request, the length and stage of the proceedings, and the disruption or delay which might reasonably be expected to follow the granting of such a motion. Having established a record based on such relevant considerations, the court should then exercise its discretion and rule on a defendant's request.

The request or demand to defend pro se must be knowingly and intelligently made. *State v. Breedlove*, 79 Wn.App. 101, 106, 900 P.2d 586 (1995). The request must be unequivocal and it must be timely, i.e., it may not be used to delay one's trial or obstruct justice. The [Washington] cases which have considered the timeliness of a proper demand for self-representation have generally held that...if made during trial, the right to proceed pro se rests largely in the informed discretion of the trial court. *Breedlove* at 107.

The facts of *Fritz* are analogous to Hartman's case, because they involve a defendant who demanded to proceed pro se. On the day set for trial, defendant Fritz "unequivocally demanded to represent himself pro se." *Fritz* at 364. The trial court denied that request and later made findings that although Fritz was competent to stand trial, "he was not competent to intelligently waive counsel or to act as his own counsel." Due to defendant Fritz's having previously "fled the state" prior to his first trial date, obtained "a substitution of counsel and continuance on the eve"

of his second one, and “on the morning of the third date...sought to discharge his new attorney, represent himself and obtain yet another continuance,” the Court of Appeals reasoned that the trial court had the discretion to deny the defendant’s motion. *Fritz* at 365.

The facts of Hartman’s case are similar to those in *Fritz* in that Hartman’s request to proceed pro se in the third day of trial was untimely. While Hartman had been granted the opportunity to proceed pro se on August 7, 2006, retained counsel for him filed a notice of appearance in his case on October 23, 2006. RP 7: 7-8; CP 49. On the third day of trial Hartman moved to proceed pro se citing an alleged disagreement over his fee agreement with retained counsel, and also their differing opinions over trial strategy. RP 133: 16-17; 22-23; 134: 4-19. The trial court, as did the one in *Fritz*, correctly found that Hartman’s request came “too late.” RP 137: 13-17.

After hearing from both Hartman and his retained counsel on these issues, the trial court also made a specific finding that Hartman’s attorney was “able and capable,” and that he was “captain of the ship” as far as strategy was concerned. RP 137: 13-17; 161: 12-15. The trial court properly exercised its discretion and did not err by denying Hartman’s request to proceed pro se not only after the trial had begun, but when it was in its third day. Had the trial court granted Hartman’s request midway

through the trial, it would have resulted in obstruction of justice. Hartman was afforded ample opportunity to either prepare his case and proceed to trial pro se, or to retain counsel and allow that attorney to do the same. Although Hartman may not have agreed with the attorney he retained on trial strategy, there is nothing to suggest that Hartman could not have retained counsel whom he considered to be more skilled before trial commenced. The trial court did not err in its decision denying Hartman's request to proceed pro se after he did so during the third day of his trial.

3. THE TRIAL COURT DID NOT ERR IN GIVING THE INTENT TO COMMIT A CRIME INFERENCE INSTRUCTION BECAUSE IT MERELY SUPPORTED AND WAS NOT THE SOLE AND SUFFICIENT PROOF THAT HARTMAN COMMITTED ANY ELEMENT OF BURGLARY IN THE SECOND DEGREE.

The trial court did not err in giving the intent to commit a crime inference instruction because it merely supported and was not the sole and sufficient proof that Hartman committed any element of burglary in the second degree.

The threshold inquiry in ascertaining the constitutional analysis applicable to a [mandatory or permissive inference] jury instruction is to determine the nature of the presumption it describes. *State v. Brunson*, 128 Wn.2d 98, 105, 905 P.2d 346 (1995); see *Ulster County Court v. Allen*, 442 U.S. 140, 157-160, 99 S. Ct. 2213, 60 L. Ed. 2d 777 (1979).

Presumptions and inferences must generally divide into two categories: mandatory (the jury must find a presumed fact from a proven fact) and permissive (the jury may find a presumed fact from a proven one, but may decide otherwise). Mandatory presumptions create problems of constitutional scope because of their potential for circumventing the State's burden to prove all elements beyond a reasonable doubt. The United State Supreme Court has established more likely than not as the standard of proof for permissive inferences. *Brunson* at 108.

The State may use evidentiary devices, such as presumptions and inferences, to assist it in meeting its burden of proof. *State v. Deal*, 128 Wn.2d 693, 699, 911 P. 2d 996 (1996). Permissive inferences do not necessarily relieve the State of its burden of persuasion because the State is still required to persuade the jury that the proposed inference should follow from the proven facts. *Deal* at 699. When permissive inferences are only part of the State's proof supporting an element and not the 'sole and sufficient' proof of such element, due process is not offended if the prosecution shows that the inference more likely than not flows from the proven fact. *Deal* at 700; *see Brunson* at 107. The court assumes juries follow all the instructions given, not solely the instruction on an inference. *Brunson* at 109; *see Lord* at 861.

The facts of the cases consolidated in *Brunson* are comparable to Hartman's because although they involve acts that are not particularly egregious, they are nonetheless sufficient for the case to go to a jury. In the case of Eric West, the victim, Karen Bowman, was alone in her living room when she heard the sound of dishes clanking in the kitchen. *Brunson* at 101. She walked to the kitchen and screamed, because a man had climbed halfway through her kitchen window and was leaning on the countertop with his hands straddling the kitchen sink. *Brunson* at 102. While Bowman screamed, the man pushed back out of the window. Bowman continued to scream as West picked-up a walkman tape recorder in the yard. West turned to her and said, '[q]uiet lady, I just wanted to use the phone.' Bowman saw West a total of forty-five seconds to a minute while he was approximately seven feet below her and three to four feet away.

Bowman shut the window and called 911. She described the burglar to police, and within minutes, they found West waiting at a nearby bus stop dressed as Bowman had described and working on a walkman. Bowman immediately identified West, and by her house the police found several glasses and part of a mortar and pestle from her kitchen in the yard. The police also saw that a tree stump which had been used as a planter had been pushed-up against Bowman's house under the window.

Like Bowman, Jacqueline and Ron Phipps saw someone who was out of place; namely a person on top of a school district's fuel tank on a Saturday evening in late June. RP 93: 9; 12-15; 72: 10-17; 85: 10-11. While the Phipps' were unable to positively identify Hartman as the person whom they saw on the tank, Jacqueline Phipps followed the person as he drove away in a truck, and gave the 911 operator its location. RP 95: 4-5; 8-9.

When law enforcement stopped the truck, they not only found Hartman to be both the driver and its sole occupant, but that a pump nozzle in the truck bed was wet with diesel fuel .RP 112: 19-23; 123: 15-16; 168: 9-19. This is similar to Bowman's seeing West with a walkman, and then the police finding him immediately after the incident with one in his possession in that it is consistent with the inference that a crime had been committed. Additionally, in Hartman's case, a further examination of the fuel tank at the school showed that its cap had been removed and was sitting on top of it. RP 128: 21-22. This is also similar to the police finding the glasses and part of the mortar and pestle from inside Bowman's house outside in her yard, after she saw West climbing through her kitchen window.

As the court in *Brunson* correctly reasoned, “[u]nder the facts of these cases, criminal intent flows more likely than not from the

Defendant's unlawful entries." *Brunson* at 111. Just because the jury in Hartman's case was provided with the permissive inference instruction did not mean that they would (a) use that instruction alone to determine Hartman's guilt or innocence; and/or (b) that the instruction required them to make any finding of guilt at all. As occurred in *Brunson*, all the permissive inference instruction did was to allow the jury to consider whether based on the facts presented, something may or may not have occurred. The jury in Hartman's case had ample evidence to determine whether Hartman was the one who was on the school fuel tank and either took or tried to take fuel. The trial court did not err by giving the jury the permissive inference instruction in Hartman's case.

4. THE TRIAL COURT DID NOT ERR BY NOT TAKING THE CASE FROM THE JURY FOR LACK OF SUFFICIENT EVIDENCE WHEN:
  - (A) ON A SATURDAY EVENING, TWO WITNESSES SAW A MAN ON TOP OF A TANK THAT WAS USED TO FUEL SCHOOL BUSES;
  - (B) LAW ENFORCEMENT STOPPED HARTMAN IN CLOSE PROXIMITY TO THAT FUEL TANK IN A TRUCK THAT CONTAINED;
  - (C) A MECHANICAL PUMP WITH A NOZZLE THAT SMELLED OF DIESEL FUEL; AND
  - (D) THE CAP TO THE SCHOOL FUEL TANK HAD BEEN UNSCREWED AND WAS SITTING ON TOP OF IT.

The trial court did not err by not taking the case from the jury for lack of sufficient evidence when: (a) on a Saturday evening, two witnesses saw a man on top of a tank that was used to fuel school buses; (b) law enforcement stopped Hartman in close proximity to that fuel tank in a truck that contained; (c) a mechanical pump with a nozzle that smelled of diesel fuel; and (d) the cap to the school fuel tank had been unscrewed and was sitting on top of it.

Evidence is sufficient if, viewed in the light most favorable to the State, it permits any rational trier of fact to find all of the essential elements of the crime beyond a reasonable doubt. *State v. Holt*, 119 Wash.App. 712, 720, 82 P.3d 688 (2004); *see State v. Joy*, 121 Wash. 2d 333, 338, 851 P.2d 654 (1993). In a criminal case, the State must prove each element of the alleged offense beyond a reasonable doubt. *State v. Ware*, 111 Wash.App. 738, 741, 46 P. 3d.280 (2002); *cited by State v. Alvarez*, 128 Wash.2d 1, 13, 904 P.2d 754 (1995). A claim of insufficiency admits the truth of the State's evidence and requires that all reasonable inferences be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wash.2d 192, 201, 829 P.2d 1068 (1992).

Direct evidence is not required to uphold a jury's verdict; circumstantial evidence can be sufficient. *State v. O'Neal*, 159 Wash.2d

500, 506, 150 P.3d 1121 (2007). Circumstantial evidence is accorded equal weight with direct evidence. *State v. Delmarter*, 94 Wash.2d 634, 638, 618 P.2d 99 (1980). In reviewing the evidence, deference is given to the trier of fact, who resolves conflicting testimony, evaluates the credibility of witnesses, and generally weighs the persuasiveness of the evidence. *State v. Walton*, 64 Wash.App. 410, 415-16, 824 P.2d 533 (1992) *review denied*, 119 Wash.2d 1011, 833 P.2d 386 (1992); *State v. Rooth*, 129 Wash.App. 761, 773, 121 P.3d 755 (2005).

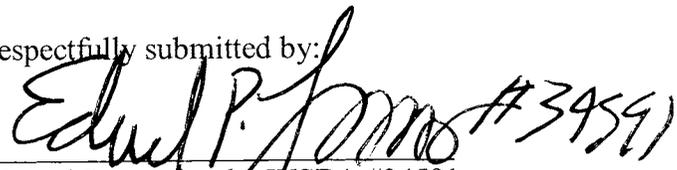
In Hartman's case, the jury had ample facts to consider in deliberating Hartman's guilt or innocence. Had nobody been able to positively identify Hartman, if Hartman's truck been a different color than the one the police stopped, or if the pump assembly in Hartman's truck smelled of gasoline rather than diesel, then Hartman's argument regarding sufficiency of the evidence might be more persuasive. As it was, the jury had sufficient facts to determine whether Hartman was the one on the tank, and whether he either stole or tried to steal fuel from it. The trial court did not err in not taking Hartman's case from the jury for lack of sufficient evidence.

F. CONCLUSION

The State respectfully requests that the judgment and sentence of the trial court be affirmed.

Dated this 31<sup>st</sup> day of August, 2007.

Respectfully submitted by:



Edward P. Lombardo, WSBA #34591  
Deputy Prosecuting Attorney for  
Gary P. Burlison, Prosecuting Attorney  
Mason County, WA

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

STATE OF WASHINGTON, )  
 )  
 Respondent, ) No. 35763-1-II  
 )  
 vs. ) DECLARATION OF  
 ) FILING/MAILING  
 ) PROOF OF SERVICE  
 RICHARD D. HARTMAN, )  
 )  
 Appellant, )  
 \_\_\_\_\_ )

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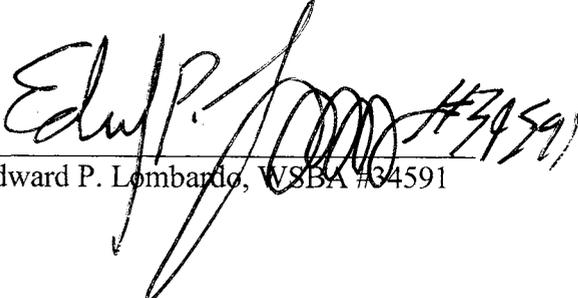
I, EDWARD P. LOMBARDO, declare and state as follows:

On FRIDAY, AUGUST 31, 2007, I deposited in the U.S. Mail,  
postage properly prepaid, the documents related to the above cause number  
and to which this declaration is attached, BRIEF OF RESPONDENT, to:

Patricia A. Pethick  
PO Box 7269  
Tacoma, WA 98417

I, EDWARD P. LOMBARDO, declare under penalty of perjury of  
the laws of the State of Washington that the foregoing information is true  
and correct.

Dated this 31<sup>ST</sup> day of AUGUST, 2007, at Shelton, Washington.

  
Edward P. Lombardo, WSBA #64591

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