

COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
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**NO. 37533-8-II**

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

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**STATE OF WASHINGTON,**

**Respondent,**

**v.**

**HARRY FLEMING III**

**Appellant.**

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**ON APPEAL FROM THE SUPERIOR COURT OF  
KITSAP COUNTY, STATE OF WASHINGTON  
Superior Court No. 07-1-01096-1**

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**BRIEF OF APPELLANT**

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ROGER A. HUNKO, WSBA# 9295  
Attorney for Appellant  
The Law Office of Wecker-Hunko  
569 Division Street, Suite E  
Port Orchard, WA 98366  
(360) 876-1001

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**HARRY FLEMING, III**

**Appellant.**

**NO. 37533-8-II**

**OPENING BRIEF OF APPELLANT**

### **I. ASSIGNMENT OF ERROR**

- A. The trial court erred when it admitted hearsay evidence, which was not proven to be reliable.**
- B. The conviction should be reversed because there was insufficient evidence to support an element of the crime.**
- C. The trial court erred when it gave Jury Instruction Number 11.**

### **II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR**

- A. Did the trial court err when it admitted several documents under the Business Record Exception, when the reliability of the documents was seriously questionable?**
- B. Should the conviction be reversed when there was not sufficient evidence that Fleming intended to deprive Quality Rentals of the property?**
- C. Did the trial court err when it gave Jury Instruction Number 11, when the evidence did not support that proper notice had been received?**

### III. STATEMENT OF THE CASE

On July 31, 2007, Harry Fleming, III was charged by information filed in the Superior Court for Kitsap County with one count of Theft of Rental, Leased or Lease-Purchased Property in violation of RCW 9A.56.096(1)(a) and (5)(b). CP 1. Fleming was arraigned in Superior Court on September 11, 2007. CP 6. The case proceeded to trial by jury on February 19, 2008. The State filed a Second Amended Information which charged Fleming with the original charge filed on July 31, 2007. CP 31.

Defense filed a Motion to Suppress which also encompassed its pre-trial motions. CP 42. The defense objected to several documents it anticipated the State would admit under the Business Exception Rule, including computer printouts of customer contact notes, and an envelope purportedly containing a demand letter. CP 42. Oral argument was presented to the court concerning those objections. RP February 19, 2008. Fleming objected to those documents being admitted under the business record exception to the hearsay rule because the documents did not meet foundational requirements of RCW 5.54.020. RP 23. The State argued those requirements went to weight not admissibility. RP 24. The court decided an ER 104 hearing was necessary and testimony concerning the documents was presented prior to trial on February 20, 2008. Supplement to RP February 20, 2008 9-34.

Todd Caspary testified that he was the manager of Quality Rentals. RP 12. Caspary testified that Exhibit No. 5 was a history of every point of contact with a customer. RP 13. Any person employed at the time makes entries into the system, and the computer time stamps the entry upon completion of the entry. RP 13. Caspary testified

that employees are trained to make the entry at the time they make the contact. RP 13. Caspary also admitted that Exhibit No. 5 was not complete because the computer can only print out so many characters. RP 21. Caspary admitted that several of the entries were made by Tammie Hale who had recently been fired by Caspary. RP 21. Hale was terminated due to anomalies in the business records completed by Ms. Hale. RP 22.

Exhibits Nos. 6 and 7 were copies of demand letters that were printed and mailed to Fleming. RP 13. Caspary testified that these demand letters were prepared in the regular course of business. RP 15,17. Both letters were processed on June 8, 2006. RP 13. Caspary identified Exhibit No. 8 as an envelope with a return receipt, stating that while it was mailed on June 8, 2006 it did not appear to be processed by the post office until June 13, 2006. RP 18. Caspary stated, “the general process is the day I print the letter, I seal it in the envelope, put the certified, take it to the post office and send it certified.” RP 23. However, Caspary did not process this demand letter or mail it. He believed that most likely Tammie Hale did. RP 23. Upon noting the post mark on the envelope as June 12, 2006, Caspary testified that even though the demand letter is printed on a particular day, and the computer would show that as the day it was sent, the letter may not go into the mail that day. RP 25. There might not be enough petty cash or there might be another reason that it didn’t get in the mail that day. RP 25. Caspary admitted that the system was only as accurate as the operators, in that an employee could enter a contact stating that it had happened, when it actually had not happened. RP 26.

The court admitted the documents finding that they were “clearly routine business records, clerical in nature documenting events that happened in the business.” RP 33.

The court held that arguments that the documents were not complete or accurate went to weight rather than admissibility. RP 33. The court did not address the issue of reliability.

The State proposed and the court admitted Jury Instruction No. 11 over defense objection. February 21, 2008 RP 70, 158. Jury Instruction No. 11 states:

The finder of fact may presume intent to deprive if the finder of fact finds that the person who rented or leased the property failed to return or make arrangements acceptable to the owner of the property or the owner's agent to return the property to the owner or the owner's agent within seventy-two hours after receipt of the proper notice following the due date of the rental, lease, lease-purchase, or loan agreement.

Proper notice consists of a written demand by the owner of the owner's agent made after the due date of the rental, lease, lease-purchase, or loan period, mailed by certified or registered mail to the renter, lessee, or borrower at the address the renter, lessee or borrower gave when the contract was made.

CP 36

The certified letter was returned to Quality Rentals, and the envelope, which was sealed, was opened by Caspary, Wilkinson (DPA) and Adams (defense counsel) on the morning of February 21, 2008 and therefore the letter was not received. RP 70. Defense argued that the statute defines proper notice, but requires "receipt" of proper notice. RP 70. The court held it was a factual argument and the only thing the statute required was that it was mailed to the right address. RP 70. Defense again argued that the statute says "upon receipt" of proper notice, you can presume intent. RP 70. The court again found it was an issue of fact defense could argue to the jury. Defense argued that the statute was "pretty clear", it says "receipt" not "mailed". RP 70.

The case proceeded to trial and the jury found Fleming guilty. Verdict RP 2.

#### IV. SUBSTANTIVE FACTS

At trial, Todd Caspary, Manager for Quality Rentals, Inc. testified for the State. His testimony consisted of identifying documents presented to the jury to support the State's case. RP 48-131. The first document Caspary identified was an undated initial order form. RP 50. On the form, the renter was identified first as Clarice Palmeira and second as Harry Fleming, spouse to be. RP 51. Although not dated, Caspary agreed that it would be "safe to say the initial order form was prepared before May 17, 2006. RP 51. There was no information on the form stating who prepared the form or what was rented.<sup>1</sup>

##### Exhibit 1

The following exhibits were admitted over defense objection. The court admitted all of the documents under the Business Record Exception.

##### Exhibit 2

Caspary identified this document as an "updated version of the first form". RP 54. The updated version had a different address than the first form. RP 54. The form was dated 5-16-06 and was taken by Tammie Hale. EX 2.

##### Exhibit 3

On May 17, 2006, a lease purchase agreement was created in the name of Harry Fleming. RP 55. Caspary stated that only one signature is obtained when a couple is married. RP 104. The agreement was for a three-piece wall unit and the first payment was due on May 26, 2006. RP 56, EX 3. On the first page of the document the name Clarice Palmeira was crossed through. Caspary could not say why because he did not

<sup>1</sup> All exhibits are attached as an addendum

cross it out. RP 106. In addition, handwritten on the document was “7200 sectional”.

Caspary did not know if it was the same couch because he didn’t write it. RP 107.

Caspary testified that it was not office policy to make handwritten changes to documents.

RP 107. He also testified that the person who signs the document is not necessarily the same person who wrote up the agreement. RP 107.

#### Exhibit 4

On May 30, 2006, another lease purchase agreement was completed in the name of Harry Fleming for a three-piece sectional. The first payment was due May 31, 2006. RP 59, EX 4. Signatures purporting to be that of Harry Fleming and Tammie Hale were on the form. RP 60. Exhibit 3 indicates the first payment is due May 26, 2006, yet Exhibit 4 is for a new lease on May 30, 2006. Caspary testified that it is not the usual policy to rent another piece of property to someone who is behind in his or her payments. RP 108. Caspary could not testify to the specifics of how these transactions transpired because he had nothing to do with the generation of the agreements or any involvement with Mr. Fleming. RP 109

#### Exhibit 5

A computer printout was presented to Caspary to identify. RP 78. Caspary identified the document as a customer contact notes print out. RP 78. Caspary testified concerning how entries were made and what those entries meant. RP 78-84. Caspary indicated there were notations indicating phone contacts were attempted but there was a hang-up, several times the answering machine picked up, but no messages were left (LNMOM), and “said he will make”. RP 80, EX 5. Caspary testified that the entry “said

he will make” did not represent the full content of the entry because the print out only included so many characters and it would be necessary to print out the individual entry to get the full content. RP 80. There was no testimony concerning the remainder of the entry. Caspary went on to identify other entries as indicating the voicemail was full when a contact was attempted. RP 81. An entry of “Offsite CAM-TFN” indicated that an employee went to the residence and hung a tag final notice on the door. RP 82. There is no indication on the entry who placed the TFN or who made the entry and there was no testimony concerning the computer entry process. EX 5. The customer contact notes indicated that two demand letters had been sent out on June 8, 2006. RP 83, EX 5. Furthermore, Caspary stated that according to the notes, two different types of letter were sent out on June 6<sup>th</sup> and June 7<sup>th</sup>. He stated it was not usual policy to send them out that close. RP 113. Many of the contact notes were from Tammie Hale who had recently been terminated because of her honesty. RP 113-14.

#### Exhibits 6 and 7

Two letters were presented to Caspary to identify. RP 84,88, EX 6, 7. The letters were dated June 8, 2006 and were mailed to the address listed on the updated order form. Caspary identified the letters as collection letters. RP 84. Caspary testified that the letters are sent out when they feel they have exhausted all other attempts. RP 85. Caspary stated the letters were used in the regular course of business at Quality Rentals. RP 86. The letter informs the customer that if they do not return the property within 72 hours they will be prosecuted. RP 86. When defense counsel pointed out that Exhibit 6 said the payment was due May 31<sup>st</sup> when it was actually due May 26<sup>th</sup>, Caspary could not explain

why they were different. RP 115. Caspary stated that he could not explain why or how the due date was forwarded by five days and that it was possible someone changed that in the system. RP 115.

#### Exhibit 8

An envelope was presented to Caspary and he identified it as a certified letter addressed to Fleming. RP 88, EX 8. The letter was post-marked June 12, 2006 and was returned to Quality Rentals, unclaimed on June 29, 2006. RP 89, EX 8. Caspary explained that although the contact notes state the letter was generated, and in fact was generated, on June 8, 2006, it is not cost-effective to “keep sending them back and forth to the post office.” A lot of the time he waits for one to build up or if he has something else that needs to be mailed. Therefore, the item may not go out in the mail until several days later. RP 124. Caspary testified that the letter was sealed and opened “this morning” with the prosecutor. RP 90. Caspary testified that Fleming never received – never opened that envelope. RP 90.

#### Exhibits 9 and 10

The State also admitted two documents described as payment history for the two items rented. RP 91-93, EX 9, 10. The documents indicated that \$10.00, the promotion price, had been paid on each item and that no other payment had been made through July 5, 2006. RP 91-93. Caspary testified that it is possible an employee could receive cash and not create a computer record. RP 131. He also testified he suspected Tammie Hale of theft because she had backed money out of the computer and said she gave it a customer – one whom he believed to be “one of the most honest customers I have.” RP 131.

## Exhibit 11

The State admitted a handwritten document with "Quote Sheet" in the right hand corner. Caspary testified that this document is generated because a couple years ago the prosecutor's office requested it be generated to indicate the replacement value. RP 94. Caspary testified that he recognized the handwriting as Tammie Hale's. RP 94. The document was dated June 16, 2006, after the demand letter had been sent. RP 94. The quote sheet listed a value of \$454 for the wall unit and \$992 for the three-piece sectional. RP 95. Outside of the presence of the jury, the court asked Caspary, "if Mr. Wilkinson was to ask you where these came from, the MIBK and the ENBR, what would your answer be?" Caspary stated they came from "our inventory price list" which is part of their business records, which are available to him. The court held that was sufficient to admit under the business record exception. RP 99-100.

After the state rested, Mr. Fleming testified in his own defense. RP 136-52. Fleming testified that he and Clarice were married on January 7, 2006. RP 136. Fleming testified that he lived at the address listed on the updated form between May 17, 2006 and July 5, 2006, with his wife, her son, and his 10 year old disabled daughter. RP 138. He admitted that he rented the items in dispute. RP 138. Fleming admitted that his signature and initials were on the forms presented by the State. RP 142-48. Fleming and his wife, Clarice, went to Quality Rentals together to rent the furniture. RP 138. Fleming stated that Clarice was with him every time he went to Quality Rentals. RP 146. Fleming did not recall that anyone ever asked Clarice to sign the documents in May. RP 151. Fleming agreed that the address listed on the certified mail was his address at the time. RP 150.

During the period in question, Fleming was suffering from depression and sleeplessness, and was placed on medication. RP 140-41. Once on the medication he seemed to sleep all of the time. RP 141. Fleming's wife took care of the bills. He gave her money and trusted she was taking care of paying what needed to be paid. RP 139. Fleming does not recall receiving any phone calls from Quality Rental. He did not have Caller ID. He never saw any tags left on the door. Nor did he see any notices from the post office. RP 141. Fleming had rented from Quality Rentals in the past and had not had any issues. RP 142. Fleming did not agree that only \$20.00 had been paid, because he gave the money to his wife and believed his wife was making the payments. RP 148. He had no proof that payments had been made. RP 148-39. However, he did not generally keep receipts. RP 151. Fleming did not contact Quality Rentals to come pick up the property because he was not aware there was a problem or that Quality Rentals was trying to contact him. RP 151-52. Fleming believed his wife was paying the bills. RP 151.

## V. ARGUMENT

### **A. THE TRIAL COURT ERRED WHEN IT ADMITTED UNRELIABLE HEARSAY EVIDENCE UNDER THE BUSINESS RECORD EXCEPTION WHEN THE DOCUMENTS WERE INCOMPLETE AND THE PERSON POSTING THE STATEMENTS WAS TERMINATED FOR IMPROPER DOCUMENTATION ON THE COMPUTER, AND WAS UNAVAILABLE TO TESTIFY.**

While due process does not guarantee every person a perfect trial, Bruton v. United States, 391 U.S. 123, 20 L. Ed.2d 476, 88 S. Ct. 1620 (1968), both our state and federal constitutions do guarantee all defendants a fair trial untainted from inadmissible, prejudicial evidence. State v. Swenson, 62 Wn.2d 259, 382

P.2d 614, (1963). It also guarantees a fair trial untainted by unreliable evidence. State v. Ford, 137 Wn.2d 472, 973 P.2d 472 (1999).

For example, in State v. Dahl, 139 Wn.2d 678, 990 P.2d 396 (1999), the prosecutor filed a motion to revoke a defendant's SOSSA sentence, based in large part on a claim that he had exposed himself to a 13-year old and 14-year old girl. During the revocation hearing, the state relied upon hearsay to establish the facts of the alleged exposure, and the state did not present any evidence as to why it failed to call the two girls themselves. After the court granted the motion and revoked the sentence, the defendant appealed arguing in part that the trial court denied him due process when it admitted the hearsay account of the incident without presenting any evidence on the reliability of the hearsay. The Washington Supreme Court agreed, holding that the trial court had violated the defendant's due process rights when it based its decision at least in part upon unreliable evidence.

As the following explains, this evidence was inadmissible hearsay and its use denied the defendant his right to a fair trial under Washington Constitution, Article 1, section 3 and United States Constitution Fourteenth Amendment.

Under ER 802, hearsay "is not admissible except as provided by these rules, by other court rules, or by statute." Under ER 801(c) hearsay is defined as follows:

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

ER 801(c).

The phrase “other than one made by the declarant while testifying at the trial or hearing” includes an out of court statement made by an in court witness. State v. Sua, 115 Wn.App. 29, 60 P.3d 1234 (2003). This restriction arises from the “unwillingness to countenance the general use of prior prepared statements” as substantive evidence. See Advisory Committee’s Note to Federal Rules of Evidence 801(d)(1).

In the case at bar, the court admitted Exhibits two through eleven over defense objection. Each exhibit was admitted under the Business Exception Rule to hearsay. This hearsay exception states:

A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

RCW 5.45.020

The Court held an ER 104 hearing concerning only exhibits five through eight. Testimony was presented by the manager of Quality Rentals concerning all of the exhibits. Caspary did not complete the documents and had very little knowledge concerning Mr. Fleming or his case. Caspary testified to the normal process in the business and that he trained his employees to do certain things. Concerning exhibit five, Caspary testified that employees are trained to make entries into the system, and the computer time stamps the entry upon completion of the entry. He admitted that exhibit five was not complete because the computer could only print out so many characters.

Many of the entries were made by an employee, Tammie Hale who had recently been fired due to anomalies in the business record. Caspary admitted that the computer system was only as accurate as the operators, and that an employee could enter a contact stating that it happened, when it actually had not happened. Exhibits six through eight involved demand letters and an envelope which was postmarked several days after the letter was supposedly sent. Caspary testified to the “general process” of sending those letters stating, “the general process is the day I print the letter, I seal it in the envelope, put the certified, take it to the post office and send it certified.” RP 23. He then testified he had not processed that letter, but Tammie Hale did. After it was pointed out that the postmark was several days after the demand letter was printed, Caspary stated that the demand letter might not go into the mail the day it is printed for various reasons. Based on this testimony the court held that the records were clearly business records and that any argument concerning accuracy or completeness went to weight not admissibility without addressing the reliability of exhibits.

While the testimony may have supported parts of the Business Record Exception, it did not satisfy all of them. To be admissible under the business record exception, the business record must (1) be in record form; (2) be of an act, condition or event; (3) be made in the regular course of business; (4) be made at or near the time of the fact, condition or event; and (5) the court must be satisfied that the source of information, method and time of preparation justify admitting the evidence. State v. Hopkins, 134 Wn. App 780, 789, 142 P.3d 1104 (2006). While the testimony may arguably support the first three requirements, the last two requirements were not met. The testimony presented

made it questionable as to whether the record was made at or near the time of the fact, condition or event. Statements in the computer printout, exhibit 5, purported to state that contacts were made at a specific time to contact Fleming. However, the testimony showed that the information was only as good as its operators, and that one of the main persons entering that information, including sending out the demand letters, was Tammie Hale, an employee who had been terminated for anomalies in her business records. Furthermore, entries concerning the TFNs did not include an operator's name or identify who may have made that contact.

A trial court's decision to admit or refuse evidence is within its discretion and will not be reversed absent a manifest abuse of discretion. State v. Kreck, 86 Wn.2d 112, 120, 542 P.2d 782 (1975). Here, the Court was required to find not only that the documents were done in the regular course of business, but that documents were reliable. The Court instead of determining the reliability, as required by the rule, passed that on to the jury. That was error. There was sufficient testimony presented to seriously question the reliability of exhibits five through eight.

Exhibits two through four and nine through eleven were also admitted over defense objection. The court admitted each of those documents under the business record exception with nothing more than testimony from Caspary that the documents were created in the regular course of business. Each of those documents was apparently created by Tammie Hale. There were irregularities in them that Caspary could not explain. There, again, are serious concerns regarding the reliability of these documents. Moreover, exhibit eleven was a document created for the purpose of prosecution, as per

Caspary's testimony and should not have been admitted at all. Crawford v. Washington, 541 U.S. 36, 51-52, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

The Sixth Amendment prohibits the admission of testimonial hearsay statements in a criminal case without an opportunity for cross-examination. Hopkins, 134 Wn. App. at 790, citing Crawford, 541 U.S. at 50-51. There are three prerequisites before Crawford applies. First, the statements must be offered for the truth of the matter asserted, i.e. for a hearsay purpose. Second, the statements must be testimonial, and third, the defendant must not have had an opportunity to cross-examine the declarant. Hopkins, 134 Wn.App. at 790.

Because Exhibit 11 was created by Hale, and Hale did not testify, the issue turns on whether the statement was testimonial. Id. One example of testimonial statements is a "statement made under circumstances that would lead an objective witness reasonably to believe that the statements would be available for use at a later trial". Id. Here, Hale created the Quote Sheet after attempts had allegedly been made to contact Fleming. Caspary testified that this sheet is completed at the request of the prosecutor's office. Therefore, the quote sheet was clearly testimonial, and should not have been admitted.

Therefore, for all of the reasons stated above, the court abused its discretion by admitting all of these exhibits, and the conviction should be reversed and remanded for a new trial.

**B. THERE WAS INSUFFICIENT EVIDENCE THAT FLEMING INTENDED TO DEPRIVE QUALITY RENTALS OF THE PROPERTY, AND THEREFORE THE CONVICTION SHOULD BE REVERSED.**

Evidence is sufficient to support a conviction if, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). When a defendant challenges the sufficiency of evidence in a criminal case, the Court will draw all reasonable inferences from the evidence in favor of the State and interpret all reasonable inferences from the evidence strongly against the defendant. State v. Partin, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). Circumstantial evidence is no less reliable than direct evidence. State v. Delmater, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of sufficiency admits the truth of the State's evidence and all inferences that can be reasonably drawn there from. State v. Theroff, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980).

Credibility determinations are for the trier of fact and are not subject to review. State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004). The Court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. Id. at 874-75.

In this case, all of the evidence presented was unreliable hearsay evidence. Even so, that evidence was not sufficient to establish that Fleming intended to deprive Quality Rentals of the property he had rented. The evidence presented was that a payment had not been made in just over thirty days. There was evidence presented that many attempts had been made to contact Fleming concerning the past due payment. However, there was no evidence presented that he was contacted. In fact, the evidence only shows failed attempts to contact. Had the evidence shown that Quality Rentals had actually left a

message on the voice mail, in over twenty attempts, then the evidence might arguably support the inference. However, according to the hearsay evidence, Quality Rentals did not leave any messages. Allegedly, there were TFNs left at the address. However, the evidence supporting that is only on the computerized customer contact notes, which don't even indicate who the employee was that allegedly left those TFNs.

While a certified letter was mailed to Fleming, the evidence clearly showed that the letter was not received. Because there is no evidence to support even an inference that Fleming had been contacted concerning the past due payment, and the payment was only overdue by one month, there is not sufficient evidence to support an important element of the crime - that Fleming intended to deprive Quality Rentals of the property.

When the evidence does not support the conviction, the proper remedy is to reverse the conviction, and dismiss with prejudice. State v. Devries, 149 Wn.2d 842, 853, 72 P.3d 748 (2003). Therefore, the conviction should be reversed, and the case should be dismissed with prejudice.

**C. THE TRIAL COURT ERRED WHEN IT GAVE JURY INSTRUCTION NO. 11 WHEN THE EVIDENCE DID NOT SUPPORT SUCH AN INFERENCE.**

The State may use evidentiary devices, such as presumptions and inferences, to assist it in meeting its burden of proof, though they are not favored in criminal law. State v. Hanna, 123 Wn.2d 704, 710, 871 P.2d 135 (1994). The State Supreme Court has approved of the permissive inference of intent to commit a crime, on a burglary charge "whenever the evidence shows a person enters or remains unlawfully in a building." State v. Grimes, 92 Wn. App. 973, 980 n.2, 966 P.2d 394 (1998), *citing* State v. Brunson, 128

Wn. 2d 98, 107, 905 P.2d 346 (1995). The permissible inference of criminal intent for Theft of Rental Property is found in RCW 9A.56.096, which provides in relevant part:

(2) The finder of fact may presume intent to deprive if the finder of fact finds either of the following:

(a) That the person who rented or leased the property failed to return or make arrangements acceptable to the owner of the property, or the owner's agent to return the property to the owner or the owner's agent within seventy-two hours after **receipt** of proper notice following the due date of the rental, lease, lease-purchase or loan agreement; ... (emphasis added)

(3) As used in subsection (2) of this section, "proper notice" consists of a written demand by the owner or the owner's agent made after the due date of the rental, lease, lease-purchase or loan period, mailed by certified mail to the renter, lessee, or borrower at: (a) the address the renter, lessee or borrower gave when the contract was made; or (b) the renter, lessees or borrowers last known address if later furnished in writing by renter, lessee, borrower or the agent of the renter, lessee or borrower.

When permissive inferences are only part of the State's burden of 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. State v. Brunson, 128 Wn.2d at 107; *see also* State v. Cantu, 157 Wn.2d 819, 826, 132 P.3d 725 (2006). In burglary cases where the jury has been instructed on the burglary permissive inference of criminal intent there has been some evidence corroborating the criminal intent, i.e. something was taken or was in the process of being taken. *See e.g.* State v. Brunson, *supra*; State v. Cantu, *supra*; State v. Deal, 128 Wn.2d 693, 701, 911 P.2d 996 (1996). It is because of this corroboration the giving of the inference

instruction has not been found to be error since the instruction was not the “sole” evidence of criminal intent.

Here, although the unreliable hearsay evidence presented shows that attempts were made to notify Fleming that his payment was past due, and although the evidence presented seems to support that the payment was past due a little over thirty days, that evidence cannot support the evidence of intent to deprive. Therefore, the inference instruction serves as the sole evidence of the intent element of the crime.

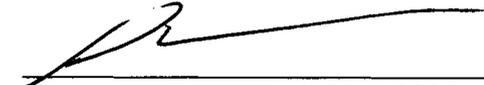
Moreover, unlike the burglary cases, the Theft of Rental Property statute is clear as to when the inference may be made. The inference may be made only when the evidence shows that “proper noticed” has been received. Property notice is specifically defined in the statute. Proper notice is not leaving a message on the voice mail. Proper notice is not leaving a tag final notice on the door. Proper notice is a written demand letter sent by certified mail. In this case, the court held that in order to give the inference instruction all that was required is that the proper notice be mailed. However, the statute clearly states inference can be presumed upon “receipt” of proper notice. The statute does not state that the inference may be presumed upon the mailing of proper notice. Proper notice is the certified mail, but the statute requires that the proper notice be received. The statute is clear and not ambiguous. The evidence in this case clearly showed that proper notice was sent. The evidence also clearly showed that proper notice was not received. Therefore, it was clearly error to give the inference instruction.

## VI. CONCLUSION

Because there was insufficient evidence to support the conviction, the conviction should be reversed and the case dismissed with prejudice. If the court does not agree, because of the evidentiary and instructional errors, the conviction should be reversed and the case remanded for a new trial.

Respectfully Submitted this 1 day of <sup>December</sup>~~November~~, 2008

  
\_\_\_\_\_  
Tina R. Robinson, WSBA# 37965  
Associate Attorney

  
\_\_\_\_\_  
Roger A. Hunko, WSBA# 9295  
Attorney for Appellant

ADDENDUM  
INCLUDING  
EXHIBITS

DATE \_\_\_\_\_ TAKEN BY \_\_\_\_\_  
 ITEM RENTED \_\_\_\_\_

RENTER Clarice Palmara D.O.B. 2-7-69 Phone 782-1087  
 Spouse, Relative or Roommate Harry Fleming D.O.B. 9-17-71 Relation Spouse to be  
 Address 5237 Pine Rd NE. A11D Zip 98310 Apt. A11D How Long 2 Months  
 Landlord Wesley Apt. Address \_\_\_\_\_ Phone 379-3832  
 Previous Address 1901 B Russell Rd City Bremerton State WA Zip 98312 How Long 3 years

EMPLOYMENT  
 Place of Employment Detiler Address 1st Ave Phone 405-1621  
 Occupation Wet B How Long 3 Months Dept. \_\_\_\_\_ Supervisor Rick  
 Working Hours: From: 8:00 AM To: 5:00 PM Pay Day 3-18  
 Previous Job Fire Watch Occupation \_\_\_\_\_

EMPLOYMENT  
 Place of Employment \_\_\_\_\_ Address \_\_\_\_\_ Phone \_\_\_\_\_  
 Occupation \_\_\_\_\_ How Long \_\_\_\_\_ Dept. \_\_\_\_\_ Supervisor \_\_\_\_\_  
 Working Hours: From: \_\_\_\_\_ To: \_\_\_\_\_ Pay Day \_\_\_\_\_  
 Previous Job \_\_\_\_\_ Occupation \_\_\_\_\_

IF ASSISTANCE Type D.S.H.S. Case # 20671673 Caseworker Geri  
 How Long Years Co-signer \_\_\_\_\_

IF MILITARY RANK \_\_\_\_\_ SERIAL # \_\_\_\_\_ Base \_\_\_\_\_ Unit \_\_\_\_\_  
 Phone \_\_\_\_\_ Ext. \_\_\_\_\_ ETS \_\_\_\_\_ Commanding Officer \_\_\_\_\_ First Sergeant \_\_\_\_\_  
 Home of Record \_\_\_\_\_ City \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_

Name Rose Marie Chun Fook Address 8106 82nd Ave Relation MOM Phone 360-620-2119  
 Emp. \_\_\_\_\_ City Lakewood State WA Zip 98498  
 Name Brenda Chun Fook Address 412 E. Bismark Relation Sister in Law Phone 360-471-0893  
 Emp. Amoud Rora City Tacoma State WA Zip 98408  
 Name Renee Ohelo Address 8106 82nd Ave Relation Sister Phone 360-503-0426  
 Emp. Monril Corrections City Lakewood State WA Zip 98498  
 Name Earlean Burnam Address Victory Dr. Relation Grandma Phone 360-674-3723  
 Emp. \_\_\_\_\_ City Port Orchard State WA Zip \_\_\_\_\_  
 Name James Fleming Address Victory Dr. Relation Cousin Phone 360-674-3723  
 Emp. \_\_\_\_\_ City \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_

His Dr. License PLMTH 2970P Yr. & Make of Car 1995 CHEV CAMARO License # \_\_\_\_\_ Exp. Date 11  
 His Soc. Sec. # 538744363 Color: Top SILVER Bottom \_\_\_\_\_ State Licensed \_\_\_\_\_  
 Her Dr. License PLMECR318CG  
 Her Soc. Sec. # 575-31-9205 Registered Owner \_\_\_\_\_ Legal Owner \_\_\_\_\_

Bank N/A Branch \_\_\_\_\_ Checking # \_\_\_\_\_ Savings # \_\_\_\_\_  
 Credit \_\_\_\_\_ Acct. # \_\_\_\_\_

How Did You Hear of Us?  
 TV  Radio  
 Newspaper \_\_\_\_\_  
 Referral \_\_\_\_\_  
 Yellow Pages \_\_\_\_\_

Comments: Mac. McCherron. (253) 589-0588.  
14601 Portland Ave S.W.  
Lake Wood, WA. 98312

**WASHINGTON DRIVER LICENSE**

LIC # **FLEMIH\*297QP** EXP **09-17-2009**

**FLEMING, HARRY III**  
1908 RUSSELL RD  
BREMERTON WA 98312

|     |      |     |      |
|-----|------|-----|------|
| CDL | END  | RES |      |
| SEX | HT   | WT  | EYES |
| M   | 6-02 | 190 | BRN  |

ISSUE DATE **10-05-2004**  
DOB **09-17-1971**

*Harry Fleming*



**WASHINGTON IDENTIFICATION CARD**

LIC # **PALMECR318CG** - EXP **02-07-2006** ♥

**PALMEIRA, CLARICE R**  
3392 SHADDEN LN NW 101  
BREMERTON WA 98312

|     |      |     |      |
|-----|------|-----|------|
| SEX | HT   | WT  | EYES |
| F   | 5-00 | 150 | BRN  |

ISSUE DATE **02-01-2003**  
DOB **02-07-1969**

*Clarice Palmeira*





ORDER FORM

#2

DATE 5-16-06 TAKEN BY Tammie  
ITEM RENTED Sectional 4 3pc wall

RENTER Harry Fleming Orchard D.O.B. Phone 674  
 Spouse, Relative or Roommate Part time D.O.B. Relation  
 Address 4320 Victory DR Zip 98367 How Long  
 Landlord Robert Samuels Address Phone (360) 674-2476  
 Previous Address 3232 Pine Rd City Bremerton State WA Zip 98312 How Long

EMPLOYMENT  
 Place of Employment Address Phone  
 Occupation How Long Dept. Supervisor  
 Working Hours: From: To: Pay Day  
 Previous Job Occupation

EMPLOYMENT  
 Place of Employment Address Phone  
 Occupation How Long Dept. Supervisor  
 Working Hours: From: To: Pay Day  
 Previous Job Occupation

IF ASSISTANCE Type Case # Caseworker  
 How Long Co-signer

IF MILITARY RANK SERIAL # Base Unit  
 Phone Ext. ETS Commanding Officer First Sergeant  
 Home of Record City State Zip

Name Address Relation Phone ( ) A.C.  
 Emp. City State Zip  
 Name Address Relation Phone ( ) A.C.  
 Emp. City State Zip  
 Name Address Relation Phone ( ) A.C.  
 Emp. City State Zip  
 Name Address Relation Phone ( ) A.C.  
 Emp. City State Zip  
 Name Address Relation Phone ( ) A.C.  
 Emp. City State Zip

His Dr. License Yr. & Make of Car License # Exp. Date / /  
 His Soc. Sec. # Color: Top Bottom State Licensed  
 Her Dr. License  
 Her Soc. Sec. # Registered Owner Legal Owner

Bank Branch Checking # Savings #  
 Credit Acct. #

How Did You Hear of Us?  
 TV  Radio  
 Newspaper  
 Referral  
 Yellow Pages  
 Tele-Track

Comments:

May 17, 2006

LEASE PURCHASE AGREEMENT

925261



Leasor: Quality Rentals

Leasee: Initial HF

KLQ Enterprises, Inc
DBA: Quality Rentals
3627 Wheaton Way
Bremerton, WA 98310
Tel: (360) 377-3445

Clarice Palmeira & Harry Fleming
4320 Victory Dr
Port Orchard, WA 98367
(360) 674-2476

DEFINITIONS:

As used in this agreement "you" and "your" mean the person(s) signing this lease as leasee; "we" and "our" mean the lessor/owner (the lease company); "property" means the items described in the disclosures; and "lease" means this Lease Purchase Agreement including the disclosures.

LEASE PURCHASE DISCLOSURES

1. INITIAL LEASE PAYMENT

The initial lease period is for a 9 day term. Your initial lease payment is due on May 17, 2006. Your first renewal payment is due on May 26, 2006

2. TERM OF THIS LEASE

This lease is for a Monthly term. Lease payments are due at the beginning of each term that you choose to keep the property. You are NOT obligated in any way to renew this agreement after the initial lease period. You may renew this agreement, if you have complied with its terms, by sending or delivering an additional payment before the end of the lease period. You understand that we do NOT have a grace period for late payments and you must make payment in advance to continue using the property. You understand this lease terminates automatically if you do not renew it. There are NO refunds if you choose to return the property before the end of the term. HF (Initial)

3. DESCRIPTION OF PROPERTY AND LEASE RATES.

LEASE SCHEDULE PAYMENTS

Table with 7 columns: ITEM No, SERIAL No, DESCRIPTION, CONDITION, WEEKLY, SEMIMONTHLY, MONTHLY. Row 1: 5130, 00178499, MIBK 8000 3pc Offset Wall Silver Cloud / 7200 Sectional, New, 22.25, 44.50, 89.00. Row 2: Guaranteed Replacement Program, 2.25, 4.50, 9.00. Row 3: State Sales Tax, 2.11, 4.21, 8.43. Row 4: Total Lease Payment, 26.61, 53.21, 106.43.

4. INITIAL LEASE PAYMENT

Your initial lease payment will include the following charges:

Table with 5 columns: AMOUNT, ONE-TIME PROCESS FEE, GRP, STATE SALES TAX, TOTAL. Row 1: \$0.00, \$9.21, \$0.00, \$0.79, \$10.00

OTHER CHARGES (Subject to Change)

Table with 3 columns: COLLECTION/TRIP FEE, NSF CHECK FEE, LATE PAYMENT PENALTY. Row 1: \$10.00, \$25.00, \$8.00

5. TOTAL COST

You do not acquire any ownership rights in this property unless you renew this lease for the weeks or months shown here, or choose to purchase it for cash sooner. (Total cost does not include sales tax and other fees.)

18 Monthly payments at \$89.00 for a total of \$1,602.00

6. OUR CASH PRICE FOR THIS PROPERTY IS \$801.00

Initial HF































