NO. 45129-8-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

TROY ALLEN FISHER,

Appellant.

BRIEF OF APPELLANT

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Assignment of Error

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2. The trial court's failure to order stand-by counsel to take over the defense during trial upon the defendant's request denied the defendant his state and federal constitutional rights to counsel.

3. The trial court's failure to order a competency evaluation after stand-by counsel filed an affidavit putting defendant's competency in question denied the defendant his state and federal constitutional rights to due process.

4. The trial court denied the defendant his state and federal constitutional rights to due process when it found him guilty of first degree murder because substantial evidence does not support the conclusion that the defendant killed with premeditation or the intent to commit robbery.

5. Substantial evidence does not support the trial court's finding that the defendant acted with an egregious lack of remorse.

Issues Pertaining to Assignment of Error

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5. Substantial evidence does not support the trial court's finding that the defendant acted with an egregious lack of remorse.

STATEMENT OF THE CASE

Factual History

On August 7, 2011, at 7:32 pm Edward Fisher, a self-employed forklift mechanic, made a purchase of paint and another item the Home Depot in Vancouver, Washington. RP 869-874[1]. The transaction was caught on the store's security video. *Id.* This was the last time anyone saw him. RP 355-357, 370-373, 424-427, 437, 483-485, 508-510, 560-593. During the next few weeks a number of family members attempted to contact him, including his sister, a daughter, a number of friends, and an acquaintance from whom he rented shop space. *Id.* No one was able to find him at home and he did not answer repeated messages left on his cell phone, which was highly unusual. *Id.* Neither did he pay his rent for his shop space, which had never happened before. RP 441-442. According to his bank someone had extensively accessed his accounts after that date. RP 885-910. This person was his son Troy Fisher, who withdrew money and made charges even though he was not a signatory on the accounts and had no permission to do so. RP 683-694, 697, 888-889.

In fact, Mr. Fisher was not in good health. RP , 374-375, 440-441, 443, 511. He had diabetes, high blood pressure, had suffered from prostate

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[1]The record on appeal includes nine volumes of continuously numbered verbatim reports referred to herein as "RP [page #]."

cancer and four months earlier he had suffered a severe broken leg in a work accident that left him with a metal rod in his leg and partially immobile for a number of months. RP 374-375, 443-445, 511, 513-514. He had originally used a wheel chair, then used a walker, and eventually walked with a cane. RP 367-370, 381-383, 432, 470-473, 503-504. During this time he also suffered from depression. RP 374-375, 440-441. He lived in a double wide mobile home in rural Clark County as a bachelor for many years, and his house was very dirty and cluttered, as was his surrounding acreage. RP 546-548, 566-567. Upon inspection none of his personal items were found missing such as his toothbrush. RP 764-765, 1006.

Bud Fisher's adult son defendant Troy Fisher moved into Bud's home after Troy's very acrimonious divorce. RP 376, 452, 803, 839. During this period of time the defendant worked with his father in his business, although there was a great deal of friction between them about work. RP 485-486, 491, 804. The defendant also worked around the house at his father's request and there were bad feelings between the two of them about this also. RP 804, 839-841. On a number of occasions the defendant's three minor children would stay with him and his father as was allowed under his parenting plan. RP 809-811, 852, 922. Although none of the children remember their grandfather indicating that he was going anywhere or that he had a girlfriend, they all remembered him talking about previously living in Germany while

enlisted in the Air Force. 856, 864.

Perhaps most unusual of all about Ed Fisher's disappearance was the fact that he routinely visited his mother in a local assisted living center, took her to her various medical and dental appointments, and was responsible for taking care of her finances. RP 374-375, 437, 525-527. Prior to August 7th he had not indicated to his mother or her care providers at the assisted living center that he would be gone and he made no provisions for someone else to take care of her finances. *Id.* Neither had he told any of his family members, his friends, his business acquaintances, or the employees at his bank that he would be leaving either temporarily or permanently. RP 359-361, 370-373, 470-473. Indeed, he rarely if ever took vacations. RP 370-373. Rather, he spent all of his time involved in his business. *Id.*

Within a few weeks family members and friends called the police, who began a missing person investigation. RP 508-510, 780. This investigation included interviews with family members, friends, and business acquaintances, as wells as visits to Mr. Fisher's home and shop. RP 525-528, 564-579, 590-596. Eventually the police obtained a number of search warrants, including one for Mr. Fisher's home. RP 556, 590-593, 1154. On the day they executed that warrant they found that the carpet from the interior of the home had been ripped out and drug outside, with some of it in one of Mr. Fisher's trucks, which had been backed up to the front door of the

residence. RP 568-569, 597-599. The defendant's children later told the officer that they had helped their father pull out the carpet. RP 812-813, 854. The deputies also found a couple of holes in the sub-floor in the front room. RP 603-604. Suspecting foul play, the detectives search the house for the presence of blood, and they searched the adjoining property for any sign of Mr. Fisher. RP 981-987, 1097-1098, 1109-1110. They found no blood nor any evidence of Mr. Fisher, either alive or dead. *Id.*

The deputies did note that a number of missing pieces had been cut out of the carpet. RP 973. Although they could not find the pieces on Mr. Fisher's property, they eventually found them hidden in blackberry bushes on property owned by a friend of the defendant. 1183-184. A couple of those pieces had blood on them. 1022-1026. Later analysis on the blood matched the DNA with DNA obtained from a toothbrush taken from Mr. Fisher's bathroom. RP 764-769. This DNA did not match DNA obtained from a fluid sample taken from the defendant. *Id.*

In fact, Mr. Fisher's property had two burn piles on it that had been recently used. RP 483-485. One still had trash on it waiting to be burned. RP 556-558, 588-589. Believing that the defendant might have killed his father and disposed of his body by burning it in one of these burn piles, they obtained the assistance of a forensic anthropologist who worked for the King County Medical Examiner's Office. RP 570, 660-671. She minutely

examined the burn piles and ground and came to the conclusion that no body had been burned at either location. RP 660-671. Her conclusions were based upon her examination of the burn locations and her knowledge of what it takes to completely burn a human body. *Id.* In essence, she found no evidence that either burn pile had been hot enough to destroy a body. *Id.* Neither did she find any telltale evidence that a body had been burned on the property. *Id.* At her suggestion the deputies called for a cadaver dog and searched the entire property. RP 667-668. This search also did not uncover any evidence of a dead body. *Id.*

While the deputies were executing the warrant the defendant drove to the bottom of the driveway with one of his son, where he stopped at the request of one of the deputies. RP 551. He then agreed to go with the deputies to give a two hour long recorded statement about what he knew about his father's disappearance. RP 603-606. Initially the defendant told the officers that his father had connected up with a female acquaintance from Germany and he left with her on a yacht bound for Germany. RP 612-690. In fact he had previously told his family members this same story. *Id.* He also told the deputies, as he did family and friends, that his father had left him in charge of his business. *Id.*

Eventually the defendant admitted to the deputies that his father had not left for Germany. RP 720-731, 739-741. Rather, the defendant confessed

that that when he returned home during the evening of August 7th his father confronted him about work around the house that he claimed the defendant had performed incorrectly. *Id.* According to the defendant, during the confrontation his father pulled out a .22 pistol and pointed it at him. *Id.* The defendant then grabbed the pistol and it went off, hitting his father in the head. *Id.* As his father fell to the floor the defendant stated that he shot his father for a second time although he did not know why he did this. *Id.* Realizing his father was dead he just sat and waited for the police to come. *Id.* When they didn't, he drug his father outside, put him on one of the burn piles, and then burned his body. RP 733-735. According to the defendant he did not know whether the first or second shot killed his father. RP 720-721.

Procedural History

By information filed September 30, 2011, and later twice amended, the Clark County Prosecutor charged the defendant Troy Allen Fisher with First Degree Murder under an allegation that he either acted with premeditated intent to kill his father or he killed him during the course or furtherance of the crime of First Degree Robbery. CP 2, 5-6, 637-638. The amended information also alleged four aggravating factors: (1) that the defendant committed the offense while armed with a firearm, (2) that the defendant knew or should have know that the victim was particularly vulnerable, (3) that the defendant abused a position of trust or confidence to

commit the offense, and (4) that the defendant demonstrated or displayed an egregious lack of remorse in the commission of the offense. CP 637-638. The state also charged the defendant with second degree murder in the alternative, alleging that he had intentionally killed his father. *Id.* The alternative charge included the four aggravators alleged in the primary charge. *Id.*

The court initially appointed attorney Gregg Schile to represent the defendant. CP 1. Mr. Schile thereafter filed extensive written pleadings (1) moving to suppress all of the defendant's statements on the basis that he had been illegally detained and that he had invoked his right to counsel prior to making any statements, (2) moving to suppress all of the evidence the officers had obtained during the execution of the many search warrants they had served in the case on the basis that the affidavits given in support of the warrants did not establish probable cause, and (3) moving to dismiss on the basis that the state's evidence did not establish the *corpus delecti* of the crime charged. CP 8-75, 76-223, 231, 235-249, 256, 257-263, 264-286, 291-297.

On April 22, 2012, the parties appeared before the court on the defendant's CrR 3.5 and CrR 3.6 motions. CP 232-234. During the hearing the state called two witnesses: Deputy Todd Barsness and Deputy Kevin Schmidt. RP 2-34, 48-52. These two deputies took the defendant from his father residence to the sheriff's office and performed the interrogation. *Id.*

The defendant then took the stand on his own behalf. RP 34-48. Following this testimony and argument by counsel the court denied each of the motions ruling as follows: (1) that the defendant was not in custody when he gave his statements, that he waived his right to silence and an attorney, and that he never did invoke either right, and (2) that probable cause supported each warrant that was issued. RP 98-107; CP 253-255. At the end of the hearing the defense stated that it would later note the *corpus delecti* motion for hearing. CP 111.

About six months after the original CrR 3.5/3.6 motions the parties appeared in court and the defendant requested the appointment of a different attorney to represent him. CP 303, 304, 305-306. The court granted the motion and appointed Mr. Chuck Buckley to represent the defendant. CP 307. A couple of months later on January 3, 2013, the defendant appeared before the court and demanded the right to represent himself. CP 312; RP 116-129. At the same time Mr. Buckley moved to withdraw as defendant's attorney. CP 314. During the hearing on the defendant's motion the court engaged in a colloquy with the defendant during which it outlined the maximum penalties the defendant was facing along with the difficulties the defendant would face if he appeared *pro se*. CP 116-129. The defendant none the less repeatedly insisted that he be allow to represent himself and the court eventually granted his request. CP 123-146. Once week later the court

ordered Mr. Buckley to continue as standby counsel. CP 150-154.

About six weeks later on February 27, 2013, the parties appeared before the court and both the defendant and Mr. Buckley moved that the court allow Mr. Buckley to withdraw as standby counsel. CP 332-334, 511-517; RP 155-163. The court granted the motion and, at the defendant's request, appointed a third attorney by the name of Bob Yoseph to appear with the defendant as standby counsel. CP 332-334, 504-505, 520-521, 522; RP 155-163. The written order appointing Mr. Yoseph is on a pre-printed form for the appointment of attorneys in Clark County and has "as Stand-by Counsel" written in by the judge. CP 522.

At a subsequent omnibus hearing the defendant orally and in writing moved for permission to reopen the CrR 3.5 and CrR 3.6 motions and call further witnesses, and the state moved for permission to amend the information. RP 176-193. The court granted the request over the state's objection and the second over the defendant's objection. RP 194-211, 212-236. As a result, on April 22, 2013, the day before trial, the parties again appeared before the court on the defendant's CrR 3.5 and CrR. 3.6 hearing. RP 231-340. At that time the defendant called four witnesses. RP 245-280. The parties then presented argument, after which the court reaffirmed its prior rulings denying all requests by the defense. RP 282-299.

The next day, prior to the beginning of trial, the defendant filed a jury

waiver, which the court accepted. CP 672; RP 341-348. The court then called the case for trial. RP 351. Over the next five days the state called 34 witnesses. RP 354-1210. These witnesses testified to the facts contained in the preceding factual history. *See* Factual History, *supra*. During the state's case the defendant consulted with his standby counsel on a number of occasions but at all times acted as his own attorney. *Id.* At 11:26 on the morning of the fourth day of trial the state rested its case. RP 1,211; CP 731. This was on Friday, April 26. *Id.* After the state rested its case the defendant moved for a mistrial, which the court denied. RP 1212-1213. The court then pressed the defendant on whether or not he was going to present an opening statement, which he had reserved at the beginning of the trial. RP 1213. At this point the defendant told the court that he was not capable of going on as his own attorney. RP 1212. As a result the defendant asked the court to have his standby counsel take over his representation. *Id.* The court first engaged in a colloquy with the defendant's standby counsel, after which it denied the defendant's request. RP 1214. The following quotes this exchange between the court and defendant, and between the court and standby counsel:

> JUDGE JOHNSON: Thank you. Please be seated. And I was told we were ready to go ahead, Mr. Fisher?
>
> DEFENDANT: Your Honor, I believe there's a Brady violation here and I believe there's some other issues here and this is – I – I don't think – I don't think I can do this anymore. Uh, I don't think – I can't figure out how to get it all worked out with my attorney and

myself.

JUDGE JOHNSON: Uh-huh.

DEFENDANT: To do the proper procedures and what not and I just –

JUDGE JOHNSON: Well as you know, Mr. Fisher, I tried to advise you that it was not a good decision to go ahead and want to represent yourself in court. I went through a lengthy explanation with you and you decided that you wanted to represent yourself in this proceeding. You had another attorney as standby counsel to start with and I have now had Mr. Yoseph as standby counsel. The State has rested its case and you need to decide whether you want to present any evidence. The first thing I asked was whether you wanted to give an opening statement explaining what – anything that you wish to present on behalf of your Defense and then may testify and may call witnesses on your own behalf. So, I'm not sure what you're saying, are you saying you don't wish to present anything further at this time or what is it that you're – you're saying?

DEFENDANT: I – I would like Mr. Yoseph to take over if that's possible please?

JUDGE JOHNSON: Well, I don't know that Mr. Yoseph is prepared to do that or that the Court could ask him to do that at this point, he's not been serving as your attorney and has not prepared the case as if he were serving as your attorney. Mr. Yoseph did you wish to respond?

MR. YOSEPH: Well, I – your last statement is the most accurate one, Your Honor. I'm – I'm not prepared to go forward at this time, obviously because I've just been standby counsel, advising on technical matters and this is the first time that Mr. Fisher has expressed to me that he wants me to take over the case, so, I'm in a difficult spot here obviously and I know Ms. Banfield is upset, we can tell just by looking at her, so – (General laughter.)

JUDGE JOHNSON: Uh-huh. Well, I'm afraid, Mr. Fisher, that we're not able to accomplish that. You've made the decision to go ahead, you've continued with that decision throughout the trial. The

> witnesses have been called, have presented their testimony, Mr. Yoseph is able to continue to assist you as standby counsel but is not adequately prepared and would not be ethically prepared to represent you at this point. That's quite a different task than assisting here as he has as standby counsel, so, I think you have to decide how you want to go ahead with your case. You made that decision.

RP 1212-1214.

At this point the defendant moved to continue the trial date so he could consult with Mr. Yoseph over the weekend. RP 1214. Although the court granted the motion it only did so after giving a six page statement as to why it refused the defendant's request to have his standby counsel take over his case. RP 1217-1222, 1226-1228. In essence the court stated that it was refusing the defendant's request for two reasons: (1) it was untimely, and (2) Mr. Yoseph was not prepared. *Id.* The court did not find that the defendant was acting in bad faith in requesting that standby counsel take over his representation. *Id.*

The next Monday the trial resumed with the defendant filing a motion for a mistrial, which the court denied. RP 1230-1239, 1243-1247. At this point stand by counsel Mr. Yoseph orally moved for a mistrial on the basis that his interactions with the defendant over the weekend led him to the belief that the defendant was not competent. RP 1248-1253. In so moving he noted that he was specifically going against the defendant's wishes. *Id.* Mr. Yoseph supported his oral motion with a written affirmation setting out his

reasons for coming to the conclusion that the defendant was not competent. CP 680-683. The court denied the request and required the defendant to proceed. RP 1253. The defendant then called six witnesses for brief testimony, after which the defense rested its case. RP 1253-1289.[2]

At this point the state presented its closing and rebuttal argument that ran for 21 pages and six pages respectively. RP 1292-1313, 1318-1323. The defendant's closing argument ran for four pages. RP 1314-1317. The court then adjourned for the day to consider its verdict. RP 1323. The next morning the court declared its verdict, finding the defendant guilty of first degree murder under both charged alternative methods, as well as guilty of second degree murder under the alternative charge. RP 1324-1342. The court also found that the state had proven the firearm enhancement as well as the claim that the defendant acted with an egregious lack of remorse in the commission of the offense. *Id.* However, the court did not find that the state had proven that the defendant committed the offenses by breaching a position of trust and authority. *Id.* Neither did the court find a nexus between the victim's particular vulnerability and the defendant's commission of the offense. *Id.* The court later entered written findings in support of its verdicts.

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[2]In fact the defendant had already called two witnesses during the midst of the state's case for the convenience of the parties. RP 409-417, 927-933.

RP 817-826.

The court later sentenced the defendant to an exceptional sentence of 480 months in prison. RP 829-841. The court arrived at this sentence by imposing 380 months on a standard range of 300 to 380 months (actual standard rage of 240 to 320 with 60 months added for the firearm enhancement), and then adding 100 months on the one aggravator it found proven (egregious lack of remorse). *Id.* The defendant thereafter filed timely notice of appeal. RP 842.

ARGUMENT

I. THE TRIAL COURT VIOLATED THE DEFENDANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS WHEN IT FOUND HIM GUILTY OF FIRST AND SECOND DEGREE MURDER BECAUSE NO EVIDENCE INDEPENDENT OF THE DEFENDANT'S STATEMENTS ESTABLISHES THE EXISTENCE OF THE ELEMENTS OF THOSE OFFENSES.

As a part of the due process rights guaranteed under both Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: "[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law." *In re Winship*, 397 U.S. at 364. If substantial evidence does not support a finding that each and every element of the crime charged is proved beyond a reasonable doubt, then any remedy other than dismissal with prejudice violates a defendant's right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment. *Id.*

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16

(1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* "Substantial evidence" in the context of a criminal case, means evidence sufficient to persuade "an unprejudiced thinking mind of the truth of the fact to which the evidence is directed." *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). The test for determining the sufficiency of the evidence is whether, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980).

In addition, under the traditional *corpus delicti* rule, a defendant's extrajudicial statements may not be admitted into evidence absent independent proof of the existence of every element of the crime charged. *State v. Ashurst*, 45 Wn.App. 48, 723 P.2d 1189 (1986). The "*corpus delicti*" usually involves two elements: "(1) an injury or loss (*e.g.*, death or missing property) and (2) someone's criminal act as the cause thereof." *Bremerton v. Corbett*, 106 Wn.2d 569, 573-74, 723 P.2d 1135 (1986). Although the independent proof of the crime charged need not be sufficient to support a conviction, the state must present "evidence of sufficient circumstances

which would support a logical and reasonable inference" that the charged crime occurred. *Id.* at 578-79; *State v. Hamrick*, 19 Wn.App. 417, 576 P.2d 912 (1978).

Washington courts have followed this rule of evidence since statehood. *See e.g. State v. Munson*, 7 Wash. 239, 34 P. 932 (1893). Over the years, the Washington Supreme Court has repeatedly refused the state's requests to replace it with the "trustworthiness" standard applied in federal courts. *See State v. Ray*, 130 Wn.2d 673, 679, 926 P.2d 904 (1996) ("[T]his Court has previously considered the arguments for adopting the "trustworthiness" standard, and it has consistently declined to abandon the *corpus delicti* rule").

In *Bremerton v. Corbett*, *supra*, the court gave the following history behind this common law rule of evidence.

> The *corpus delicti* rule was established by the courts to protect a defendant from the possibility of an unjust conviction based upon a false confession alone. The requirement of independent proof of the corpus delicti before a confession is admissible was influenced somewhat by those widely reported cases in which the "victim" returned alive after his supposed murderer had been tried and convicted, and in some instances executed. It arose from judicial distrust of confessions generally, coupled with recognition that juries are likely to accept confessions uncritically. This distrust stems from the possibility that the confession may have been misreported or misconstrued, elicited by force or coercion, based upon mistaken perception of the facts or law, or falsely given by a mentally disturbed individual. Thus, it is clear that the corpus delicti rule was established to prevent not only the possibility that a false confession was secured by means of police coercion or abuse but also the

possibility that a confession, though voluntarily given, is false.

City of Bremerton v. Corbett, 106 Wn.2d at 576-577 (citations omitted).

In 2003, the Washington Legislature passed RCW 10.58.035 in order to eliminate the traditional *corpus delicti* rule and replace it with a "trustworthiness" doctrine. The first section of this statute states:

> (1) In criminal and juvenile offense proceedings where independent proof of the corpus delicti is absent, and the alleged victim of the crime is dead or incompetent to testify, a lawfully obtained and otherwise admissible confession, admission, or other statement of the defendant shall be admissible into evidence if there is substantial independent evidence that would tend to establish the trustworthiness of the confession, admission, or other statement of the defendant.

RCW 10.58.035(1).

The second paragraph of this rule creates four non-exclusive factors the court "shall" consider in determining whether or not a defendant's statement will be admissible under the statute. This second section states:

> (2) In determining whether there is substantial independent evidence that the confession, admission, or other statement of the defendant is trustworthy, the court shall consider, but is not limited to:
>
> (a) Whether there is any evidence corroborating or contradicting the facts set out in the statement, including the elements of the offense;
>
> (b) The character of the witness reporting the statement and the number of witnesses to the statement;
>
> (c) Whether a record of the statement was made and the timing of the making of the record in relation to the making of the statement;

and/or

(d) The relationship between the witness and the defendant.

RCW 10.58.035(2).

While an initial review of RCW 10.58.035 might indicate that it has replaced the *corpus delicti* rule in its entirety, any such conclusion would be inaccurate. The reason is that the *corpus delicti* rule has always addressed two issues. The first is the admissibility of evidence. The second is the sufficiency of evidence to sustain a conviction. As the Washington State Supreme Court explained in *State v. Dow*, 168 Wn.2d 243, 227 P.3d 1278 (2010), the new statute addresses only the former issue of the admissibility of a defendant's statement. Thus, while a defendant's statements would not have been admissible under the *corpus delicti* rule, they might now be admissible if the requirements of RCW 10.58.035 are met. However, absent independent proof of the existence of the crime charged, under the *corpus delicti* rule, those statements would still be insufficient to sustain a conviction. The court stated the following on this issue in *Dow*:

> Subsection (4) provides that "[n]othing in this section may be construed to prevent the defendant from arguing to the jury or judge in a bench trial that the statement is not trustworthy or that the evidence is otherwise insufficient to convict." RCW 10.58.035 (emphasis added). This subsection establishes that the legislature has left intact the requirement that a defendant cannot be convicted without sufficient evidence to establish every element of the crime, which is consistent with the *corpus delicti* doctrine and our cases. Considering RCW 10.58.035's plain language, we hold that any

> departure from the traditional corpus delicti rule under RCW 10.58.035 pertains only to admissibility and not to the sufficiency of evidence required to support a conviction. The corpus delicti doctrine still exists to review other evidence for sufficiency, i.e., corroboration of a confession. That is, the State must still prove every element of the crime charged by evidence independent of the defendant's statement.

State v. Dow, 168 Wn.2d at 253-254 (citation omitted).

In the case at bar, the state charged the defendant with first degree murder under RCW 9A.32.030(1)(a) and (1)(c). This statute provides:

> (1) A person is guilty of murder in the first degree when:
>
> (a) With a premeditated intent to cause the death of another person, he or she causes the death of such person or of a third person; or
>
> (b) Under circumstances manifesting an extreme indifference to human life, he or she engages in conduct which creates a grave risk of death to any person, and thereby causes the death of a person; or
>
> (c) He or she commits or attempts to commit the crime of either (1) robbery in the first or second degree, (2) rape in the first or second degree, (3) burglary in the first degree, (4) arson in the first or second degree, or (5) kidnapping in the first or second degree, and in the course of or in furtherance of such crime or in immediate flight therefrom, he or she, or another participant, causes the death of a person other than one of the participants . . .

RCW 9A.32.030(1).

In this case the state alleged both that the defendant killed his father with premeditated intent under the (1)(a) alternative, or that he caused the death of his father during the course or furtherance of either a first degree robbery or an attempted first degree robbery under the (1)(c) alternative. The

term "robbery" as it is used under the second alternative is defined as follows:

> A person commits robbery when he or she unlawfully takes personal property from the person of another or in his or her presence against his or her will by the use or threatened use of immediate force, violence, or fear of injury to that person or his or her property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

RCW 9A.56.190.

The problem with both of these charges is that absent the defendant's statements there is no evidence at all from which a reasonable person could conclude that the defendant acted with premeditation or intent as is required under the first alternative and there is no evidence at all from which a reasonable person could conclude that the defendant attempted to take property from his father as is required under the second alternative. The following examines these issues.

A careful review of the evidence in this case taken in the light most favorable to the state, absent the defendant's statement, reveals the following facts: (1) that the defendant's father disappeared under very unusual circumstances indicating that he would not have left the area at all, let alone without giving many people notice, (2) that immediately after his disappearance the defendant, who lived in the same home as his father, began

to actively steal money from his father's bank accounts, (3) that the defendant was distressed financially, (4) that the defendant and his father had a very acrimonious relationship, (5) that the defendant took the carpet out of the residence he shared with his father and cut two holes in the subfloor, (6) that the defendant cut out and hid relatively small pieces of the carpet, (7) that two of those pieces had the defendant's father's blood on them, (8) that the defendant had attempted to clean the residence, and (9) that the defendant had access to firearms. From this evidence is would be reasonable to infer that the defendant's father was dead and that the defendant had been involved in causing his father's death. However, it does not provide any evidence as to how the defendant's father died or what the defendant's mental state was. There is literally no evidence at all that the defendant killed his father either with "premeditated intent," with the intent to take property, or with any intent at all.

Since the facts absent the defendant's statements does not constitute any evidence at all of the necessary intent required under either first or second degree murder, under the *corpus delecti* rule this court should not consider any of the defendant's many statements when evaluating the presence or absence of substantial evidence to support the defendant's conviction. As was just explained, this evidence only supports a conclusion that the defendant was somehow involved in the death of his father and the attempt

to cover up the facts of that death. Thus, even taken in the light most favorable to the state, there is no evidence substantial or otherwise to prove a premeditated intentional killing, an intentional killing, or an intent to take property. Thus, the trial court denied the defendant due process under both Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when it found him guilty of first degree murder and second degree murder in the alternative.

II. THE TRIAL COURT'S FAILURE TO ORDER STAND-BY COUNSEL TO TAKE OVER THE DEFENSE DURING TRIAL UPON THE DEFENDANT'S REQUEST DENIED THE DEFENDANT HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO COUNSEL.

Any person charged with a criminal offense has the state and federal constitutional right to waive assistance of counsel and represent herself or himself. *State v. DeWeese*, 117 Wn.2d 369, 375, 816 P.2d 1 (1991). Although not required under either the state or federal constitutions, a trial court may appoint standby counsel to aid a *pro se* defendant at that defendant's request or even over the defendant's objection. *State v. McDonald*, 143 Wn.2d 506, 511, 22 P.3d 791 (2001). Once appointed, standby counsel assumes two basic function for a *pro se* defendant. *Id.* The first is to "provide technical information," and the second is "to be available to represent the accused in the event that termination of the defendant's self-representation is necessary." *State v. Bebb*, 108 Wn.2d 515, 525, 740

P.2d 829 (1987) (quoting *Faretta v. California*, 422 U.S. 806, 834 n. 46, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975)). Standby counsel's failure to meet these requirements prejudices a defendant's case and requires reversal. *State v. McDonald*, 143 Wn.2d at 512–13.

In the case at bar the trial court appointed Mr. Yoseph at the defendant's request to represent the defendant as standby counsel. Upon appointment Mr. Yoseph assumed the two duties mentioned above: to provide technical information" to the defendant and to be prepared to represent the defendant if such action became necessary. The lengthy trial record in this case reveals that Mr. Yoseph performed the first function quite well. There are numerous references in the record to the defendant availing himself of the opportunity to consult with Mr. Yoseph. Neither did the defendant complain that Mr. Yoseph was not meeting his first requirement as standby counsel.

By contrast, the record demonstrates that Mr. Yoseph was not prepared to fulfill the second requirement of standby counsel. In fact, it is apparent from his statements and the court's statements that neither he nor the court even understood his second role as standby counsel. He quite frankly admitted that he had not prepared himself to take over as counsel for the defendant and the trial court's response to his admission indicates that the court did not believe he had any duty to so prepare himself to take over for

the defendant. Given the defendant's inability to proceed as his own attorney, as was demonstrated by his statements and request that Mr. Yoseph take over, the conclusion follows that "that termination of the defendant's self-representation" had become necessary. Thus, Mr. Yoseph's failure to prepare himself denied the defendant effective assistance of counsel under both Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment.

III. THE TRIAL COURT'S FAILURE TO ORDER A COMPETENCY EVALUATION AFTER STAND-BY COUNSEL FILED AN AFFIDAVIT PUTTING DEFENDANT'S COMPETENCY IN QUESTION DENIED THE DEFENDANT HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS.

At common law, a person whose mental condition was such that he lacked the capacity to understand the nature and object of the proceedings against him, to consult with counsel, or to assist in preparing his defense, could not be subjected to trial. *Drope v. Missouri*, 420 U.S. 162, 171, 95 S.Ct. 896, 903, 43 L.Ed.2d 103 (1975). As noted by Blackstone, one who became "mad" after the commission of an offense should not be arraigned "because he is not able to plead to it with that advice and caution that he ought." 4 W. Blackstone, *Commentaries*, 24; *see Youtsey v. United States*, 97 F. 937, 940-946 (CA6 1899). Similarly, Blackstone also noted that if the defendant "became mad after pleading, he should not be tried, for how can he make his defense?" Some commentators have viewed this common-law

prohibition against proceeding against incompetent defendants "as a by-product of the ban against trials *in absentia*; the mentally incompetent defendant, though physically present in the courtroom, is in reality afforded no opportunity to defend himself." Foote, *A Comment on Pre-Trial Commitment of Criminal Defendants*, 108 U.Pa.L.Rev. 832, 834, 904 (1960). *See Thomas v. Cunningham*, 313 F.2d 934, 938 (4th Cir. 1963).

However, regardless of its historical basis, for the purposes of criminal trials in the United States, "it suffices to note that the prohibition is fundamental to an adversary system of justice." *Drope v. Missouri*, 420 U.S. 162, 171-172, 95 S.Ct. 896, 903, 43 L.Ed.2d 103 (1975) (citing Note, *Incompetency to Stand Trial*, 81 Harv.L.Rev. 455, 457-459 (1967)). Thus, consistent with the due process clauses under the Fifth and Fourteenth Amendments, a criminal defendant may not be tried unless he is competent. *Pate v. Robinson*, 383 U.S. 375, 378, 86 S.Ct. 836, 838, 15 L.Ed.2d 815 (1966). Neither may a criminal defendant waive the right to counsel or plead guilty unless he does so "competently and intelligently." *Johnson v. Zerbst*, 304 U.S. 458, 468, 58 S.Ct. 1019, 1025, 82 L.Ed. 1461 (1938). Finally, the competency standard for pleading guilty or waiving the right to counsel is the same as the competency standard for standing trial. *Godinez v. Moran*, 509 U.S. 389, 390, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993) (citation omitted).

As the court noted in *Godinez*, the standard for competency, whether

to go to trial, plead guilty, or waive counsel, presents two questions: (1) Does the defendant have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding," and (2) Does the defendant have a "rational as well as factual understanding of the proceedings against him." *Godinez v. Moran*, 422 U.S at 390 (quoting *Dusky v. United States*, *supra*.) The requirement that a defendant be competent during trial is also statutorily recognized in RCW 10.77.084(1)(a), which states:

> (1)(a) If at any time during the pendency of an action and prior to judgment the court finds, following a report as provided in RCW 10.77.060, a defendant is incompetent, the court shall order the proceedings against the defendant be stayed except as provided in subsection (4) of this section.

RCW 10.77.084(1)(a).

To place his competency in issue, there must be evidence supporting his claim of incompetency. *State v. Marshall*, 144 Wn.2d 266, 281, 27 P.3d 192 (2001). A thorough review of the trial record in this case reveals that there was sufficient evidence at the end of the state's case to put the defendant competency in question. The following examines this evidence.

In this case the defendant represented himself through five days of trial during which he asked relatively few questions on cross-examination and repeatedly made references and motions demonstrating a fixation on his belief that his first attorney had provided ineffective assistance, even to the point of attempting to strike his first counsel's extensive pleadings. In spite

of his prior repeated protestations that he wanted to represent himself, by the fifth day of trial he told the court that he could not go on and he asked that standby counsel be allowed to take over his case. When the trial court refused, the defendant asked for a continuance over the weekend during which he could consult with standby counsel. The court granted the motion and by Monday standby counsel himself, over defendant's objections, made a motion for a competency evaluation supported by a written affirmation in which he stated that he did not believe the defendant was competent. In spite of the fact that (1) the case was being tried to the court, and (2) the state had already closed its case, the trial court did not take the necessary time to even review the competency issue or address it, much less order an evaluation. By failing to address the issue of competency after both the defendant's conduct and his standby counsel's affirmation clearly placed competency in question the trial court erred and denied the defendant his right to a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment. As a result this court should reverse the defendant's conviction and remand for a new trial.

IV. THE TRIAL COURT DENIED THE DEFENDANT HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS WHEN IT FOUND HIM GUILTY OF FIRST DEGREE MURDER BECAUSE SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THE CONCLUSION THAT THE DEFENDANT KILLED WITH PREMEDITATION OR THE INTENT TO COMMIT ROBBERY.

As was mentioned in Argument I, (1) as part of the due process rights guaranteed under both Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt, and (2) under the *corpus delecti* rule a defendant's statements cannot be used in determining the existence of substantial evidence unless there is some evidence independent of the defendant's statement to establish the elements of the offense charged. *State v. Baeza, supra*; *In re Winship, supra*; *State v. Dow, supra.* Thus, appellant claimed that his convictions for first and second degree murder should be vacated and the charges dismissed because there was no independent evidence absent his statements on either "premeditated intent to kill," "intent to kill" or the intent to take property by means of force. As the following explains, even were there sufficient evidence to admit the defendant statements, there is still no substantial evidence to support a first degree murder conviction. The following sets out this related argument.

As was set out previously, the evidence absent the defendant's statements includes the following facts: (1) that the defendant's father

disappeared under very unusual circumstances indicating that he would not have left the area at all, let alone without giving many people notice, (2) that immediately after his disappearance the defendant, who lived in the same home as his father, began to actively steal money from his father's bank accounts, (3) that the defendant was distressed financially, (4) that the defendant and his father had a very acrimonious relationship, (5) that the defendant took the carpet out of the residence he shared with his father and cut two holes in the subfloor, (6) that the defendant cut out and hid relatively small pieces of the carpet, (7) that two of those pieces had the defendant's father's blood on them, (8) that the defendant had attempted to clean the residence, and (9) that the defendant had access to firearms. The consideration of the defendant's statements adds the following facts: (1) that when the defendant's father came home on the evening of August 7th he became angry with the defendant, (2) that the defendant's father pulled out a .22 pistol during the argument and pointed it at the defendant, (3) that the defendant grabbed the pistol and it then "went off" hitting the defendant's father in the head, (4) that the defendant's father then fell to the floor, (5) that the defendant then shot his father, (6) that the defendant's father dies as a result of one or both of the gunshots, (7) that the defendant then burned his father body, and (8) that the defendant then began actively attempting to coverup what had happened.

The problem with this evidence is that even seen in the light most favorable to the state it does not support a conclusion that the defendant acted either with premeditation or that he acted with the intent to take property. The former is an element under the first alternative charge of first degree murder while the latter is an element under the second alternative charge of first degree murder. Certainly intent can be inferred from the defendant's admitting action of purposely shooting his father (the second bullet). However, this evidence does not constitute substantial evidence of either premeditation or an intent to take property by force. Thus, even with the admission of the defendant's statements substantial evidence does not support a conviction for first degree murder and the trial court's decision to convict the defendant on that charge violated his right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment.

V. SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THE TRIAL COURT'S FINDING THAT THE DEFENDANT ACTED WITH AN EGREGIOUS LACK OF REMORSE.

In order to obtain reversal of a sentence in excess of the standard range, Defendant has the burden of proving either "that the reasons supplied by the sentencing judge are not supported by the record which was before the judge, or that these reasons do not justify a sentence outside the standard range for that offense . . ." RCW 9.94A.585(4)(a). The former is a question

of fact reviewed under a clearly erroneous standard. *State v. Fisher*, 108 Wn.2d 419, 423, 739 P.2d 1117 (1987) (citing *State v. Nordby*, 106 Wn.2d 514, 517-18, 723 P.2d 1117 (1980)). The latter is a question of law and should be independently reviewed by this Court. *Id.* In addition, Defendant may also obtain reversal of an exceptional sentence that is "clearly excessive or clearly too lenient." RCW 9.94A.585(4)(b). In the case at bar the defendant makes the first and second arguments. Specifically, the defendant argues that the trial court's finding that he burned his father's body is not supported by substantial evidence and that even if proven it does not support a conclusion that he acted with "an egregious lack of remorse" as defined in RCW 9.94A.535(3)(q). The following sets out these arguments.

A defendant's lack of remorse may be used to justify imposition of a sentence in excess of the standard range if that lack of remorse is "of an aggravated or egregious nature." *State v. Ross*, 71 Wn.App. 556, 861 P.2d 473 (1993), 883 P.2d 329 (1994). In *Ross*, the court found this fact proven by the state evidence demonstrating that the defendant's protestations of remorse were not credible and that he continued to blame the justice system for his offenses. *State v. Ross*, 71 Wn.App. at 563–64. In *State v. Erickson*, 108 Wn.App. 732, 739, 33 P.3d 85 (2001), the court found the lack of remorse sufficiently egregious to justify an exceptional sentence because the defendant had bragged and laughed about the murder, mimicked the victim's

reaction to being shot, asked the victim if it hurt to get shot, thought the killing was funny, joked about being on television for the murder, and told police he felt no remorse. *State v. Erickson*, 108 Wn.App. 732, 739–40, 33 P.3d 85 (2002). Similarly in *State v. Wood*, 57 Wn.App. 792, 795, 790 P.2d 220 (1990), the court found a lack of remorse sufficiently egregious upon its finding that the defendant joked with her husband's killer about sounds her husband made after the killer shot him and went to meet a boyfriend's family ten days after her husband's death.

In this case the only fact upon which the court relied in finding an egregious lack of remorse was its belief that the defendant had burned his father's body shortly after he killed him. The court held as follows on this issue:

> 4.3 The third factor was that the defendant demonstrated or displayed an egregious lack of remorse. This under RCW 9.94A.535(3)(q) is not a named statutory factor. There are a number of factors that are considered in this regard, and the court must find substantial and compelling factor in order to find this aggravating factor. The court did find that this aggravated factor had been shown. The defendant, in his statement, indicated that he dragged his father outside, put him on a trash pile, and disposed of his body. He was observed on surveillance video purchasing charcoal and fire logs, concealing his crime to exploit his father's financial resources. The court found that these circumstances constituted an egregious lack of remorse.

CP 824-825.

The problem with this finding is that the state presented its own

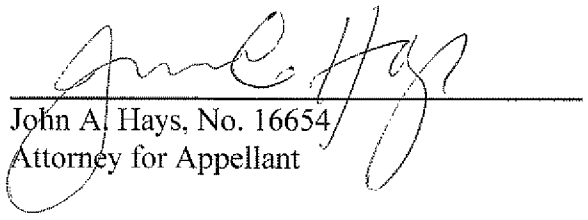
forensic expert who gave a detailed explanation as to why she was completely certain that no body had been burned on the property in question. This evidence, which included her minute inspection of the burn pile sites and her extensive experience led her to conclusively state that no body had been burned at that location. However, even were the court to completely disregard her evidence, the problem with the court's finding in that an immediate attempt to burn a body in order to conceal the commission of a murder might show some immediate lack of remorse, but it is far from and "egregious lack or remorse" as is required under the statute. Thus, the trial court erred when it imposed an exceptional sentence in this case.

CONCLUSION

The defendant's convictions for first and second degree murder should be vacated and dismissed because they are not supported by substantial evidence. In the alternative, the defendant's convictions should be vacated and a new trial ordered based upon standby counsel's failure to represent the defendant when the defendant was unable to continue representing himself and when the trial court did not determine the defendant's competency once it was placed into question. Also in the alternative this court should vacate the defendant's exceptional sentence and remand with instructions to sentence within the standard range.

DATED this 18th day of April, 2014.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

WASHINGTON CONSTITUTION
ARTICLE 1, § 3

No person shall be deprived of life, liberty, or property, without due process of law.

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 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.

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.

WASHINGTON CONSTITUTION ARTICLE 1, § 14

Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted.

RCW 9.94A.535
Departures from the Guidelines

The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence. Facts supporting aggravated sentences, other than the fact of a prior conviction, shall be determined pursuant to the provisions of RCW 9.94A.537.

Whenever a sentence outside the standard sentence range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law. A sentence outside the standard sentence range shall be a determinate sentence.

If the sentencing court finds that an exceptional sentence outside the standard sentence range should be imposed, the sentence is subject to review only as provided for in RCW 9.94A.585(4).

A departure from the standards in RCW 9.94A.589 (1) and (2) governing whether sentences are to be served consecutively or concurrently is an exceptional sentence subject to the limitations in this section, and may be appealed by the offender or the state as set forth in RCW 9.94A.585 (2) through (6).

. . .

(3) Aggravating Circumstances – Considered by a Jury – Imposed by the Court

Except for circumstances listed in subsection (2) of this section, the following circumstances are an exclusive list of factors that can support a sentence above the standard range. Such facts should be determined by procedures specified in RCW 9.94A.537.

. . .

(q) The defendant demonstrated or displayed an egregious lack of remorse.

. . .

COURT OF APPEALS OF WASHINGTON, DIVISION II

STATE OF WASHINGTON, **Respondent,** **vs.** **TROY ALLEN FISHER,** **Appellant.**	**NO. 45129-8-II** **AFFIRMATION OF OF SERVICE**

The under signed states the following under penalty of perjury under the laws of Washington State. On this, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

1. Mr. Tony Golik
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2. Troy Allen Fisher, No. 367621
   Washington State Penitentiary
   1313 13th Avenue.
   Walla Walla, Washington 98362

Dated this 18th day of April, 2014, at Longview, Washington.

Diane C. Hays

HAYS LAW OFFICE

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