

NO. 45129-8-II

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

STATE OF WASHINGTON, Respondent

v.

TROY ALLEN FISHER, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.11-1-01616-1

BRIEF OF RESPONDENT

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A. RESPONSE TO ASSIGNMENTS OF ERROR

- I. THERE WAS INDEPENDENT EVIDENCE, APART FROM THE DEFENDANT’S CONFESSION, SHOWING THAT BUD FISHER DIED OF HOMICIDAL MEANS.
- II. FISHER HAD NO CONSTITUTIONAL RIGHT TO THE REAPPOINTMENT OF COUNSEL ON DEMAND AFTER HE UNEQUIVOCALLY WAIVED HIS RIGHT TO COUNSEL.
- III. FISHER’S COMPETENCY TO STAND TRIAL WAS NOT CALLED INTO QUESTION NOR RAISED BY STAND-BY COUNSEL.
- IV. SUFFICIENT EVIDENCE SUPPORTS THE TRIAL COURT’S FINDING THAT THE DEFENDANT ACTED WITH PREMEDITATION IN THE INTENTIONAL MURDER OF BUD FISHER, AND THAT HE COMMITTED THE MURDER DURING THE COMMISSION OR IN FURTHERANCE OF ROBBERY OR ATTEMPTED ROBBERY.
- V. THE EVIDENCE IS SUFFICIENT TO SUPPORT THE TRIAL COURT’S FINDING THAT THE DEFENDANT DISPLAYED AN EGREGIOUS LACK OF REMORSE.

B. STATEMENT OF THE CASE¹

Edward “Bud” Fisher was Troy Fisher’s father. He owned his own forklift repair business in Battle Ground. RP 372-73, Ex. 91 at p. 5. The last time anyone saw Edward “Bud” Fisher alive was on August 7, 2011. CP 817. That weekend, his friend Jason Cook came to Bud’s house to put

¹ Fisher does not assign error to any finding of fact by the trial court on the non-jury trial, nor does he complain that some findings of fact are couched as conclusions of law. The State has taken some of the facts used in the Statement of the Case from the facts outlined in the trial court’s findings of fact and conclusions of law.

siding on the house. RP 936. Bud's son, Troy,² was supposed to help him. RP 941. However, Mr. Cook described the scene between Bud and Troy as intense. RP 943. It was clear to Mr. Cook that Bud and Troy had issues they needed to air. RP 943. Troy asked Mr. Cook "[h]ow did you enjoy the trip with the asshole?" RP 944. Troy called his father stupid and an idiot. RP 944. This was upsetting to Mr. Cook, as he felt Bud was a good friend. RP 944. Troy continued to speak badly about Bud that entire day and into the next morning, when Mr. Cook asked Bud to take him home because he could not endure anymore. RP 945. That night, August 7, 2011, Bud was seen on a security video at a Home Depot at 7:32 p.m. CP 818. A receipt showed that he used a Visa card to purchase paint and another item. CP 818. Bud returned home and has not been seen or spoken to by anyone but Troy Fisher since that time. CP 819.

Bud had limited mobility, having suffered a severe leg injury in his work as a forklift mechanic four months prior to his murder. CP 819. He was hospitalized for his injury and eventually moved from a wheelchair to a walker and, finally, to a cane. CP 819. In the store surveillance videos viewed at trial, Bud was seen in a mobility cart. CP 819. Bud's injury rendered it unlikely that he wandered away from his home or was lost. CP 819.

² In the Statement of the Case, the State refers to the victim, Mr. Edward Fisher, as "Bud," and the defendant, Troy Fisher, as "Troy."

Bud had a very close relationship with his elderly mother who lived in an assisted living care facility in Battle Ground. CP 819. Bud visited his mother several times a week and was her caretaker. CP 819. He delivered her medications and supported her financially along with his sister, Mary Jane Newman. CP 819, RP 355. Mary Jane would send checks to Bud for her part of their mother's financial support, but the final check she sent was not cashed. RP 356. Mary Jane went on vacation at the end of July, 2011, and returned in the first part of September. RP 356. She began calling him and got no response. RP 356. It was unusual for Bud not to call her back. RP 357. Bud complained to Mary Jane about his relationship with Troy. RP 358.

Mary Jane called Troy and Troy told her that Bud had gone on a cruise. RP 360. She did not believe him. RP 360. He added to the story, telling her that Bud had run off with an old girlfriend to Germany and told him to put the house up for sale. RP 360. He also claimed that Bud turned his business over to him, which she also did not believe. RP 360-61. Mary Jane had never heard of this girlfriend in Germany. RP 361. Mary Jane knew that Bud would not just leave without telling her because of their joint responsibility for their mother. RP 363. Bud was not happy with the work Troy did for him in his business. RP 449.

Bud's daughter (Troy's sister) Terrie Hasan also spoke with Troy after the disappearance of her father. Troy told her that Bud "ran into" an old girlfriend from Germany and that they sailed off on a yacht back to Germany. RP 371. Ms. Hasan could not think of a single occasion when Bud went on vacation. RP 371. Ms. Hasan had never known Bud to have a passport and had never known him to leave the country. RP 372. Another daughter, Tina Hoffman-Emerson, made these same observations. RP 438.

Bud was a diabetic and had other medical problems. CP 819. He received medical care at the Veterans' Administration in Portland, Oregon. CP 819. He had not been to the VA to receive care since before August 7, 2011. CP 819. After his disappearance, his prescriptions and VA identification card were left behind. CP 819. They were eventually discovered, along with his wallet, in a truck that used to belong to Bud, but was sold by his family after his death. RP 974.

Bud rented space in a shop and always paid his rent on time by check. CP 819. The rent was not paid in September, 2011. CP 819. Eventually, Troy paid the rent with cash. CP 819. Bud always answered or returned phone calls promptly, but no one has been able to reach him since August 7, 2011. CP 820. Bud managed his own financial accounts as sole signator. CP 820. Bud was never personally observed accessing his bank accounts after August 7, 2011. CP 820.

Inside Bud's home, the police found carpet that had been cut out of the hallway and living room. RP 986-88. Two holes had been cut into the subfloor. RP 990. There was a replacement piece of subfloor leaning against the wall. RP 990. A receipt for the new subfloor from Lowe's dated September 17, 2011, was found. RP 996. The carpet from the home was found in the woods some distance away from the home. CP 820. Large bloodstains were found on the carpet in the woods. CP 820. The bloodstains likely necessitated the removal of the carpet and subflooring. CP 820.

Troy told friends, family, and his children that Bud met up with an old girlfriend from Germany, that she was very wealthy, and that he had suddenly left for Germany with her. CP 821. Yet Troy never explained how this connection occurred. CP 821. Bud Fisher did not know how to use a computer, he was not normally mobile, and he needed medications. CP 821. If Bud left for Germany, he did not take his debit cards or other identification that an ordinary person would take if traveling. CP 821.

Troy told one of his neighbor's, in a manner that was considered joking at the time, that he was so frustrated with his father that he might "cap him." CP 821.

Troy met with the police and agreed to a recorded interview. Detective Barsness of the Clark County Sheriff's office asked him about

the circumstances surrounding his father's disappearance. Ex. 91. Exhibit 92 is the recording of the interview which was played in full for the trial court. Exhibit 91, which was also admitted, is the transcript of the interview.

Troy told Detective Barsness that Bud came home one night and said that "his ship came in." RP 635, Ex. 91 at p. 4. Troy claimed he asked Bud what he meant and Bud said he met up with a woman he knew while stationed in Germany. Ex. 91 at p. 4. Then Bud changed subjects and began accusing Troy of ruining his business, and telling Troy that he (Troy) may as well take it over and said he (Bud) was leaving. Id. Troy claimed they talked some more and the next morning, Bud gave him all of his PIN numbers, including the PINs for his cell phone and his bank accounts. Id. Troy claimed that Bud asked him to fix up the house so Bud could sell it. Id. Troy went on to claim that he and Bud set up his bank accounts for online access and then Troy left. Ex. 91 at p. 5. Troy claimed that when he returned that afternoon, his dad was gone. Id. Two weeks prior to this, Bud had been telling Troy and his grandkids about his time being stationed in Germany in the 60's. Ex. 91 at 10-11.

Troy initially claimed that he ripped the carpet out of the house because mice had ruined it. Ex. 91 at p. 16, 66. When pressed again about why Bud had left, Troy again said that Bud just walked in one day and

said his “ship had come in.” Ex. 91 at p. 19. When asked what Troy thought of that, Troy went on a rant about how his father tried to control him. Ex. 91 at p. 19-20. Troy then said that his father’s plan was to go to Seattle to meet the woman from Germany, and they would sail on her boat from Seattle to Germany. Ex. 91 at 21. Troy could not explain how Bud connected with this woman since he did not have a computer and was not a “computer guy.” Ex. 91 at p. 22. Troy said this all occurred on the first Sunday in August. Ex. 91 at 23. Troy claimed that Bud asked Troy to get rid of all of his clothes because he had lost weight. *Id.* Troy conceded that Bud had not signed anything over to him before leaving, and claimed that all Bud did was give Troy all the PIN numbers so he could pay Bud’s bills and deposit his checks. Ex. 91 at 24. Troy said that Bud wanted him to use his (Bud’s) money to fix up the house. Ex. 91 at 25. Troy said that Bud “dictated” all the numbers and information Troy would need to access Bud’s money. Ex. 91 at 26. When Bud left, Troy estimated there was \$2,000 in his personal account and \$6,000 in his business account. Ex. 91 at 33-34.

Troy was not worried about his dad at all, despite the bizarre nature of his alleged departure. Ex. 91 at 37. Troy told Barsness that his dad had many guns. Ex. 91 at 38. Troy claimed that Bud said, before he left, that Troy could have the business and told him he would have to sign

paperwork with the IRS. Ex. 91 at 45. However, Bud did not sign over the business, or anything else, to Troy. Id. Troy did not think any of this was unusual, and said he felt the family had “jumped the gun” by filing a missing persons report. Ex. 91 at 55. Troy then went on a rant about how one night he overheard Bud complaining about him (Troy) to Aunt Mary, talking about how Troy was not carrying his weight and “could care less if I left or stayed.” Ex. 91 at 56. Troy continued, complaining that his dad never paid him a decent wage. Ex. 91 at 57. Bud was preventing Troy from making a living, according to Troy, and Troy was behind on his child support and was trying to keep the State from taking away his driver’s license. Ex. 91 at 57. Troy was “thousands behind” on his child support payments. Id. Barsness asked Troy if any of the money he had taken from Bud’s accounts went to child support and Troy said no, but added that he “did steal some money for kids’ school clothes and stuff like that.” Ex. 91 at 58. Troy estimated he had spent \$1,000 of Bud’s money on his kids. Id. Troy said that if he uses his dad, he can keep his head above water. Ex. 91 at 59-60.

Detective Barsness began to press Troy. Troy again said that the mice had ruined the carpet, and claimed he had to cut out the subfloor because the garbage in the house soaked through to the subfloor. Ex. 91 at 66. When Barsness tells Troy that the story he’s given does not make

sense, and that Bud did not have a passport, Troy asked “Am I going to jail now, or--?” Ex. 91 at 68. Barsness asked, “Do you need to go to jail?” Troy replied, “I don’t know.” Ex. 91 at 69. Barsness then offers a theory to Troy that Bud died of his health problems and Troy merely capitalized on his death. Ex. 91 at 70. Troy again asked if he was going to jail? Id. Barsness then told Troy that this was his opportunity to say what happened, and Troy claimed that his dad pulled a gun on him. Ex. 91 at 71-72. Troy then raised his voice, in an apparent sob, and repeated “he pulled a gun on me!” Ex. 91 at 72. Troy then said he “cracked,” and “I’m going to jail now,” again appearing to get emotional. Ex. 91 at 73. Troy then said:

(unintelligible). He pulled a gun on me. (unintelligible) I just (unintelligible). He pulled a gun on me! He was pissed about the siding. He pulled a fucking gun on me! The gun went off. (sobbing). He fell to the ground and I pulled the trigger again. And I don’t know if the first shot killed him. It went in his head, okay?

...

And I don’t know why I did the second shot.

...

I don’t know why I did the second shot. He pulled a gun on me because of the siding.

Ex. 91 at 73.

Troy went on with his confession, stating that he dragged Bud outside to “his fucking trash pile, and I burned him. I just burned him. I didn’t know what to do...I was pissed. It...it just happened in two seconds...I don’t know why I did the second shot.” Ex. 91 at 74.

Troy admitted that the holes in the floor were because Bud’s blood soaked through. Ex. 91 at 75. That was also the reason for tearing out the carpet. Id. Troy said he threw the carpet in the woods. Ex. 91 at 76.

Troy said that when Bud pulled a gun on him, he grabbed it and pushed it back against Bud. Troy said he then grabbed Bud by the shoulder and shot him in the back of the head. When Bud fell to the ground, Troy shot him again. Ex. 91 at 76.

When confronted with the fact that the police would test the gun Troy used to kill Bud for Bud’s DNA, to show if he actually touched the gun, Troy said that Bud was wearing his work gloves when he pulled the gun. Ex. 91 at 78-79. Troy also said he wiped the gun down. Id.

Troy said that he took Bud out to the burn pile and started a fire right on top of him. Ex. 91 at 83. He also said that he did not use an accelerant. Id. Troy claimed he stayed out there for hours while Bud burned, saying goodbye to him. Id. Troy said there are no remains of Bud, as they all burned. Ex. 91 at 84.

In fact, Troy lied. He did not burn his father in the burn pile. Dr. Katherine Taylor, a forensic anthropologist, found absolutely no evidence of a human body on Bud's property. RP 662-668. She opined, unequivocally, that no body had been burned on the property. RP 666. She ordered cadaver dogs brought in to search for a body and they no evidence of a body on the property. RP 667. There was no body hidden on the property. RP 668.

Troy has never revealed the location of Bud's body. Bud's body has never been found. RP 1032.

Detective Barsness testified that although Troy appeared to be crying or sobbing on the video of his interview, Barsness observed that he was hunched over with his hand to his forehead, engaging in heavy breathing and sighing, but that no tears ever came from him and there was no indication of genuine sadness or remorse. RP 970-71.

Stephenie Winters-Sermeno is a DNA analyst. RP 761-62. She tested the carpet that was recovered in the woods and found Bud's DNA on the carpet. RP 765. The DNA came from blood. RP 767.

After murdering his father, Troy bought new bikes for his kids. RP 786, 844. He also bought hand-held gaming devices, video games, cellphones, cleats, a new gym bag, jerseys, and an "abundance of new things" for his kids, according to his former wife. RP 844-845.

Troy obtained cash from one of Bud's accounts less than two hours after Bud had made his final purchase. CP 823. It was at 9:28 p.m. RP 900. Troy attempted to take out \$260, but that exceeded the daily limit from that account (because Bud had used it earlier), so he only took out \$100. RP 900. Later that same night, Troy was seen on surveillance video at a Walmart, purchasing fire logs and charcoal. CP 823. The next day, Troy again withdrew funds from Bud's account at 11:51 a.m. CP 823. Over the ensuing weeks, up until his arrest, Troy continued to make withdrawals and purchases from Bud's accounts. CP 823. The business account for Cascade Forklift had a balance of \$12,000 when Bud died, and at the time of Troy's arrest it had less than \$2,000. CP 823.

The trial court entered extensive findings of fact and conclusions of law, finding the defendant guilty of premeditated murder in the first degree and felony murder in the first degree, by committing or attempting to commit the crime of robbery in the first degree, and committing the murder in the course of or in furtherance of the crime or in immediate flight therefrom. CP 817-826. The court also found that Troy committed the crime while armed with a firearm and that he displayed an egregious lack of remorse. CP 824-826. With regard to egregious lack of remorse, the court found that the defendant dragged his father outside and discarded him on a trash pile. CP 825. He was seen purchasing logs and charcoal

with the intent of burning his father to conceal his crime. CP 825. He wanted to exploit his father's financial resources. CP 825. These circumstances constituted an egregious lack of remorse. CP 825.

This timely appeal followed.

C. ARGUMENT

I. THERE WAS INDEPENDENT EVIDENCE, APART FROM THE DEFENDANT'S CONFESSION, SHOWING THAT BUD FISHER DIED OF HOMICIDAL MEANS.

Fisher claims that the State did not establish the corpus delicti of each element of premeditated murder in the first degree and felony murder in the first degree by robbery in the first degree or attempted robbery in the first degree. Fisher misunderstands the State's burden of production.

Different types of crimes have different showings the State must make in order to establish the corpus delicti of the crime.³ The State agrees with Fisher that the corpus delicti rule is both a rule of sufficiency of the evidence and a rule about the admissibility of evidence (specifically, the statements of the defendant). The State disagrees with Fisher's assumption, which he fails to support with citation to authority, that it must produce corpus delicti for *each element* of the homicide crime. The

³ The showing the State must make in the crimes of possession of a controlled substance with intent to manufacture or driving under the influence, for example, is different than the showing it must make in a homicide. See generally *State v. Whalen*, 131 Wn.App. 58, 126 P.3d 55 (2005); *State v. Hamrick*, 19 Wn.App. 417, 576 P.2d 912 (1978).

Court of Appeals recently reiterated, in *State v. Hummel*, 165 Wn.2d 749, 758-59, 266 P.3d 269 (2012), *review denied*, 176 Wash. 2d 1023, 297 P.3d 708 (2013), the State’s burden of production in a homicide case:

It is also well settled that only two elements are necessary to establish the *corpus delicti* in a homicide case: the fact of death and a causal connection between the death and a criminal act. *State v. Aten*, 130 Wn.2d 640, 927 P.2d 210 (1996); *State v. Lung*, 70 Wn.2d 365, 371, 423 P.2d 72; (1967); *State v. Little*, 57 Wn.2d 516, 521, 358 P.2d 120 (1961); *State v. Richardson*, 197 Wash. 157, 163, 84 P.2d 699 (1938); *State v. Gates*, 28 Wash. 689, 69 P. 385 (1902); *State v. Rooks*, 130 Wn.App. 787, 125 P.3d 192 (2005); *State v. Sellers*, 39 Wn.App. 799, 695 P.2d 1014 (1985).

The independent evidence may be either direct or circumstantial and need not be of such character as would establish the *corpus delicti* beyond a reasonable doubt or even by a preponderance of the evidence. *Aten*, 130 Wash.2d at 656, 927 P.2d 210. It is sufficient if it *prima facie* establishes the *corpus delicti*. *Id.* “*Prima facie*” in the context of the *corpus delicti* rule means “‘evidence of sufficient circumstances which would support a logical and reasonable inference’ of the facts sought to be proved.” *Aten*, 130 Wash.2d at 656, 927 P.2d 210 (quoting *State v. Vangerpen*, 125 Wash.2d 782, 796, 888 P.2d 1177 (1995)). There is no requirement that the evidence establish the identity of the perpetrator. *Lung*, 70 Wn.2d at 371, 423 P.2d 72.

Contrary to Fisher’s argument under this assignment of error, the State is not required to demonstrate *corpus* as to each element of the crime. The State need only show the fact of death and a causal connection between the death and a criminal act. The State made these showings.

There is overwhelming evidence, absent the defendant's confession, that Bud Fisher is dead. Witnesses testified that he owned a business and regularly kept in touch with his family and his mother. He was the primary caregiver for his mother. He provided her with money and obtained her medications. Bud was a man who either answered phone calls or returned them promptly. Bud had no passport. His family members never knew him to go on vacation or leave the country. He was never late on his rent for his shop. He was in ill health. He had diabetes and other medical conditions. He needed medication. He had limited mobility due to a recent severe injury to his leg. He has not been seen or heard from since August 7, 2011. There is no evidence that Bud Fisher has accessed his financial accounts since August 7, 2011. CP 819-820. There is no question that Bud Fisher is dead.

There is also no question that there is a causal connection between Bud's death and a criminal act. Bud's blood was found in large stains on a carpet found in the woods that came from his home. Wooden sub-flooring had also been removed from the home, leading to an inference that blood soaked through the carpet and into the sub-floor. The disposal of the carpet in the woods demonstrated an effort by the perpetrator to conceal the crime. Following his disappearance, Bud's financial accounts were accessed by his son. The first transaction by Troy Fisher, which is

provable absent his confession, occurred less than two hours after the final transaction made by Bud. The police found Bud's identification and financial cards in his home (CP 821), leading to the conclusion that he did not leave his home voluntarily.

The State established the corpus delicti for the crimes of premeditated murder in the first degree and felony murder in the first degree.

II. FISHER HAD NO CONSTITUTIONAL RIGHT TO THE REAPPOINTMENT OF COUNSEL ON DEMAND AFTER HE UNEQUIVOCALLY WAIVED HIS RIGHT TO COUNSEL.

Fisher claims he was denied his right to counsel when the trial court did not order Mr. Yoseph to take over the case when Fisher changed his mind about self-representation. As Fisher's claim is premised on the idea that he had a constitutional right to force the trial court to reappoint counsel after the State rested its case, it fails.

A review of the facts is warranted here. Fisher was provided with counsel on September 20, 2011. RP 1217. His lawyer was Gregg Schile. Id. Mr. Schile represented Fisher for over a year and made motions to suppress which were accompanied by extensive briefing. Id. Several hearings were held on the motions. Id. Nevertheless, Fisher was unsatisfied and asked for new counsel. Id. The trial court allowed Mr.

Schile to withdraw and appointed Charles Buckley, a criminal defense attorney with thirty-four years of experience. RP 1218, 126. Mr. Fisher, convinced he was smarter than Mr. Buckley, asked to have him removed as counsel and demanded to represent himself. RP 118-20. After an exhaustive colloquy, in which the trial court informed Fisher that he was a fool to want to represent himself and that he would be held to the standard of an attorney, Fisher unequivocally insisted on self-representation. RP 122-150. The court granted the motion. RP 150. Fisher agrees the *Faretta* colloquy was adequate because he does not challenge it in this appeal. After his request to represent himself was granted, Fisher asked that Mr. Buckley be appointed as stand-by counsel. RP 147. The court made it clear to Fisher that stand-by counsel would be available to merely assist him, not represent him. 151-52. On the fifth day of trial, after the State had called 29 witnesses, many of whom were flown in from outside the state, Fisher decided that being a lawyer is difficult and asked to have Mr. Yoseph “take over.” RP 1213. The trial court rejected the motion as untimely. RP 1217. Specifically, the court noted the history outlined above and observed that Fisher would be unhappy no matter who was representing him. RP 1217-1221. This observation was well supported by the record. Indeed, the record supports the inference that Fisher made the

motion for the purposes of delay, obstruction, and injecting error for appeal.

A defendant has a Sixth Amendment right to represent himself. *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525 (1975); *State v. DeWeese*, 117 Wn.2d 369, 375, 816 P.2d 1 (1991). “Once an unequivocal waiver of counsel has been made, the defendant may not later demand the assistance of counsel as a matter of right since reappointment is wholly within the discretion of the trial court.” *DeWeese*, supra, at 376-77; see also *State v. Silva*, 107 Wn.App. 605, 626-27, 27 P.3d 663 (2001). A defendant does not have a constitutional right to stand-by counsel, and has no constitutional right to hybrid representation “wherein a defendant serves as co-counsel with his attorney.” *Silva* at 626.

Fisher complains that he was denied his right to counsel, but this claim fails at the outset because following his unequivocal and proper waiver of counsel, he cannot demand the assistance of stand-by counsel as a matter of right. Re-appointment of counsel is within the sole discretion of the trial court, and the trial court found the request untimely and disingenuous. Fisher does not argue that Judge Johnson was incorrect in her assessment or in her finding that the request was untimely.

Instead, Fisher claims that a defendant actually *does* have the constitutional right to reappointment of counsel on demand following an

unequivocal waiver of counsel. He bases this claim exclusively on *State v. McDonald*, 143 Wn.2d 506, 22 P.3d 791 (2001). But *McDonald* is inapposite. In *McDonald*, the issue before the Court was whether, in the event the trial court appoints stand-by counsel, stand-by counsel must not have a conflict of interest. *McDonald* at 510. The Supreme Court held that stand-by counsel must be conflict-free, because a conflict burdened attorney would not be available to resume representation, in the event representation became *necessary*. *McDonald* at 514 (“The representation of Gaer by the prosecutor’s office undermines the duties Gaer owed to McDonald, including the attorney-client privilege.”) The issue before the Court was not whether there is now, in Washington, a state-based constitutional right to have counsel reappointed on demand. There is not.

The *McDonald* Court attempted to clarify the role to be played by stand-by counsel and remarked:

A defendant possesses a right to have conflict-free standby counsel because standby counsel must be (1) candid and forthcoming in providing technical information/advice, (2) able to fully represent the accused on a moment's notice, in the event termination of the defendant's self-representation is necessary, and (3) able to maintain attorney-client privilege.

McDonald at 512-13.

Notably, the language “fully represent the accused on a moment’s notice” appears for the first time in *McDonald* and no citation to authority

is given for the remark. Prior to *McDonald*, the Supreme Court said this about stand-by counsel:

Standby counsel's role is not to represent the defendant, however, but to provide technical information, and “to be *available* to represent the accused in the event that termination of the defendant's self-representation is necessary.” *Faretta*, 422 U.S. at 834 n. 46, 95 S.Ct. at 2541 n. 46.

State v. Bebb, 108 Wn. 2d 515, 525, 740 P.2d 829 (1987) (emphasis added). The Court of Appeals repeated the “available to represent the accused in the event that termination of the defendant’s self-representation is necessary” language in *State v. Silva*, *supra*, at 676-77.

The language from *McDonald* relied on by Fisher is contrary to earlier pronouncements of the duties of stand-by counsel and is *gratis dictum*. Not only does *McDonald* not hold that a defendant has the constitutional right to demand the reappointment of counsel at any time (which would have required *McDonald* to overrule *State v. DeWeese*, *supra*), it does not hold that the trial court cannot limit the duties of stand-by counsel. In both *State v. Silva*, *supra*, and *State v. Pugh*, the Court of Appeals recognized that the trial court may limit the tasks which stand-by counsel is required to provide. *Silva* at 630, *State v. Pugh*, 153 Wn.App. 569, 581, 222 P.3d 821 (2009).

Even if *McDonald* stands for the proposition that Mr. Yoseph needed to be ready to take over the defense in a murder trial on a moment's notice, that duty was only triggered if it was *necessary* to abandon self-representation. But as the trial court noted, it was not necessary. Mr. Fisher was not incompetent to continue representing himself. He was playing games. He had been both aggressive and successful in lodging objections, and had a clear idea of who he wanted to call as witnesses and the information he sought to glean from them. Assuming that Fisher was not merely playing games and seeking delay, then he had merely decided he was not a very good lawyer. But as *Faretta* makes clear, considerations of the defendant's "skill and judgment" as an advocate are not permissible. *State v. Hahn*, 106 Wn.2d 885, 890, n.2, 726 P.2d 25 (1986).

The trial court in this case did not err in rejecting Fisher's request to withdraw his waiver of counsel and have counsel appointed. As noted above, Fisher was clearly trying to inject irregularity into the proceedings. This is evident by the following statement made by Fisher when, after the trial court rejected his untimely attempt to have counsel appointed, he asked for a recess until the following Monday to confer with Mr. Yoseph:

To allow Mr. Yoseph to spend some more time with me so we can finalize our decision on what would be the best way to proceed at this moment. And whether he take over or I

declare incompetent, as in to continue on today. (Addresses Mr. Yoseph.) Is that right?

RP 1223.

Fisher had obviously been told by the very experienced Mr. Yoseph to inject incompetency into the proceedings, despite there being no evidence that Fisher was incompetent in any respect.

The trial court did not err, Fisher did not have a constitutional right to reappointment of counsel, and this claim fails.

III. FISHER'S COMPETENCY TO STAND TRIAL WAS NOT CALLED INTO QUESTION NOR RAISED BY STAND-BY COUNSEL.

Fisher claims that stand-by counsel raised a claim that he was incompetent to stand trial. Fisher misunderstands the record. Stand-by counsel, without the permission of Fisher, asked the trial court to declare a mistrial, claiming that he was not competent to represent himself--not that he was incompetent to stand trial. See CP 680-83 (Mr. Yoseph's motion for mistrial). As the discussion below clarifies, competence to represent oneself in a criminal proceedings is a different question than competence to stand trial. Because Fisher's entire argument in this assignment of error, and the cases on which he relies, is premised on the mistaken idea that Fisher's competence to stand trial was questioned, his claim fails.

“Trial judges have permissive authority to deny self- representation to those suffering from mental illness.” *State v. Lawrence*, 166 Wn.App. 378, 389, 271 P.3d 280, *review denied*, 174 Wn.2d 1009, 281 P.3d 686 (2012); *In re Rhome*, 172 Wn.2d 654, 667, 260 P.3d 874 (2011). The “inquiry into a defendant’s mental health status is different from an inquiry into his skill and judgment to act as his own lawyer.” *Rhome* at 669. The presumption against waiver of the right to counsel “does not give the court carte blanche to deny a motion to proceed pro se.” *State v. Madsen*, 168 Wn.2d 496, 504-05, 229 P.3d 714 (2010).

The grounds that allow a court to deny a defendant the right to self-representation are limited to a finding that the defendant's request is equivocal, untimely, involuntary, or made without a general understanding of the consequences. Such a finding must be based on some identifiable fact; the presumption in [*In re Det. of*] *Turay* does not go so far as to eliminate the need for any basis for denying a motion for pro se status. Were it otherwise, the presumption could make the right itself illusory.

Lawrence at 390.

In *Indiana v. Edwards*, 554 U.S. 164, 174, 178, 128 S.Ct. 2379 (2008), the United States Supreme Court ruled that state judges were permitted to deny a defendant self-representation if it concluded that a defendant who was competent to stand trial was nevertheless not capable of representing himself. The opinion did not, however, mandate an inquiry

into a defendant's mental health status each time a waiver of counsel is sought.

As noted above, Mr. Yoseph's suggestion that Fisher was incompetent was limited to claiming that he was incompetent *to represent himself*. Yoseph stated in his declaration he questioned "whether or not [Fisher] is competent to represent himself in this case *pro se*." CP 681. Yoseph goes on to question whether the *Faretta* colloquy was adequate (a point not raised in this appeal) even though he was not present for it, and complains that Fisher had not consulted him on strategy or on the decision whether to waive his right to a jury trial. CP 681-82. Yoseph goes on to complain that Fisher was only using him for technical assistance. *Id.* Notably, Fisher objected to Yoseph's motion and stated his desire to proceed. RP 1249. At that point, the trial court should have declined to even consider the motion or allow Yoseph to argue it, because it was not Mr. Yoseph's role to interfere with a significant tactical decision such as this. *McKaskle v. Wiggins*, 465 U.S. 168, 178, 104 S.Ct. 944 (1984). As explained in *State v. Silva*, *supra*:

The American Bar Association has defined the role of standby counsel as follows:

(a) Defense counsel whose duty is to actively assist a pro se accused should permit the accused to make the final decisions on all matters, including strategic and tactical matters relating to the conduct of the case.

(b) Defense counsel whose duty is to assist a pro se accused only when the accused requests assistance may bring to the attention of the accused matters beneficial to him or her, but should not actively participate in the conduct of the defense unless requested by the accused or insofar as directed to do so by the court.

Silva at 627.

The Court of Appeals went on to note that “standby counsel must be judicious in working within delineated boundaries so as not to infringe on the defendant’s right of self-representation.” *Silva* at 628.

But Mr. Yoseph’s complaints do not even speak to incompetence to represent oneself. In fact, Mr. Yoseph revealed a misunderstanding of the purpose of stand-by counsel. Stand-by counsel is supposed to give technical advice, as occurred here. The role of stand-by counsel is not to be hybrid co-counsel, although Mr. Yoseph apparently felt that it was. Mr. Yoseph was not *supposed* to be involved in strategy decisions, as noted above, unless sought by Fisher. Again, it was wholly improper for Mr. Yoseph to make a motion for a mistrial without Fisher’s consent. Mr. Yoseph’s motion amounted to him memorializing his astonishment at the rank stupidity of self-representation, particularly in a murder case. But the Supreme Court has said the Sixth Amendment protects one right to exercise this particular brand of stupidity.

A careful review of Mr. Yoseph's motion shows that he did not present any facts that would suggest Fisher was suffering from mental illness presently. The entire motion was directed at getting the trial court to ignore Fisher's competent waiver of counsel and force appointed counsel on him because self-representation, as a rule, is foolish. The trial court was under no obligation to assume that Fisher was either incompetent to stand trial, or incompetent to continue with the potentially foolish venture of self-representation. This assignment of error lacks merit.

IV. SUFFICIENT EVIDENCE SUPPORTS THE TRIAL COURT'S FINDING THAT THE DEFENDANT ACTED WITH PREMEDITATION IN THE INTENTIONAL MURDER OF BUD FISHER, AND THAT HE COMMITTED THE MURDER DURING THE COMMISSION OR IN FURTHERANCE OF ROBBERY OR ATTEMPTED ROBBERY.

Fisher claims that insufficient evidence supports his convictions. Fisher is incorrect. The State is required under the Due Process Clause to prove all the necessary elements of the crime charged beyond a reasonable doubt. U.S. Const. amend. XIV, § 1; *In re Winship*, 397 U.S. 358, 362-65, 90 S. Ct 1068, 25 L.Ed.2d 368 (1970); *State v. Colquitt*, 133 Wn.App. 789, 796, 137 P.3d 893 (2006). When determining whether there is sufficient evidence to support a conviction, the evidence must be viewed in the light most favorable to the State. *State v. Salinas*, 119 Wn.2d 192,

201, 829 P.2d 1068 (1992). If “any rational jury could find the essential elements of the crime beyond a reasonable doubt”, the evidence is deemed sufficient. *Id.* An appellant challenging the sufficiency of evidence presented at a trial “admits the truth of the State’s evidence” and all reasonable inferences therefrom are drawn in favor of the State. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.2d 410 (2004). When examining the sufficiency of the evidence, circumstantial evidence is just as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

“Criminal intent may be inferred from circumstantial evidence or from conduct, where the intent is plainly indicated as a matter of logical probability.” *State v. Billups*, 62 Wn.App. 122, 126, 813 P.2d 149 (1991), citing *State v. Caliguri*, 99 Wn.2d 501, 506, 664 P.2d 466 (1983) and *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The appellate court’s role does not include substituting its judgment for the jury’s by reweighing the credibility of witnesses or importance of the evidence. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). “It is not necessary that [we] could find the defendant guilty. Rather, it is sufficient if a reasonable jury could come to this conclusion.” *United States v. Enriquez-Estrada*, 999 F.2d 1358 (9th Cir. 1993), (quoting *United States v. Nicholson*, 677 F.2d 706, 708 (9th Cir. 1982)).

The determination of the credibility of a witness or evidence is solely within the scope of the jury and not subject to review. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), citing *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). “The fact finder...is in the best position to evaluate conflicting evidence, witness credibility, and the weight to be assigned to the evidence.” *State v. Olinger*, 130 Wn. App. 22, 26, 121 P.3d 724 (2005) (citations omitted).

A careful review of Fisher’s brief reveals that he bases his insufficiency claim on the premise that the evidence is insufficient of both alternative means of committing murder in the first degree because the evidence would be insufficient without Troy Fisher’s confession. As noted above, however, Troy Fisher’s confession was admissible and properly considered by the trial court.

There is sufficient evidence that Troy Fisher committed robbery in the first degree. He confessed to obtaining Bud Fisher’s PIN numbers and was seen accessing Bud Fisher’s account less than two hours after the final time Bud accessed his account. In the ensuing days, Troy Fisher accessed more of Bud’s money and in the weeks between the murder and his arrest, Troy went on a spending spree.

The Supreme Court explained, in *State v. Craig*, 82 Wn.2d 777, 781, 514 P.2d 151 (1973), that the State need not show that the defendant

had the intent to commit robbery at the precise moment the fatal attack began. In *Craig*, the defendant was charged with felony murder and robbery for the murder of a cab driver in which the property of the cab driver was taken after the murder was completed. *Craig* at 778-79. The court said:

The burden was on the state to show the killing by the defendant and that it was done in connection with the robbery, as a part of the same transaction. It was not incumbent upon it to prove the state of mind of the defendant at the time of the killing. The appellant and Davis, being the only living witnesses to the crime, know precisely what happened. The state could prove that there was a robbery and a murder. It could not prove what the defendants were thinking when they committed the murder, except by inference from the circumstances. Having killed and robbed the victim, the appellant cannot now be heard to say [that] his intentions were pure when he administered the blows which resulted in the death of the victim. Nor does the fact that the homicide occurred before the robbery was consummated change the character of the latter offense.

Craig at 782-83.

As in *Craig*, the evidence here is sufficient to prove that the defendant murdered Bud Fisher in connection to robbing him. The defendant's claim fails.

Likewise, there was sufficient evidence to show that the defendant acted with premeditation. Fisher makes brief mention of his confession to police that he shot Bud Fisher in the back of the head, and then shot him

again when he was on the floor, but says that notwithstanding his confession, the evidence is insufficient to sustain the trial court's finding of premeditation. Again, Fisher is incorrect.

Premeditation is “the deliberate formation of and reflection upon the intent to take a human life” and involves “thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short.” *State v. Finch*, 137 Wn.2d 792, 831, 975 P.2d 967 (1999) (quoting *State v. Pirtle*, 127 Wn.2d 628, 644, 904 P.2d 245 (1995) (quoting *State v. Gentry*, 125 Wn.2d 570, 597-98, 888 P.2d 1105 (1995); *State v. Ortiz*, 119 Wn.2d 294, 312, 831 P.2d 1060 (1992))). It must span more than a moment in time. RCW 9A.32.020(1).

State v. Allen, 159 Wn.2d 1, 147 P.3d 581 (2006).

Sufficient evidence of premeditation may be found where the weapon used was not readily available or where multiple wounds are inflicted. *Gentry* at 599. “An attack on a victim from behind may indicate premeditation.” *State v. Hoffman*, 116 Wn.2d 51, 84, 804 P.2d 577 (1991); see also *Gentry* at 599. “Evidence of multiple acts of violence also supports an inference of premeditation.” *Hoffman* at 84; *State v. Hughes*, 106 Wn.2d 176, 200, 721 P.2d 902 (1986).

In this case, the defendant procured a gun and shot Bud Fisher once in the back of the head, and once again when Bud was down on the floor. He offered no explanation for the second, gratuitous shot. He did not claim to have acted in self-defense. Significantly, Troy Fisher lied about

burning his father in the burn pile. To be sure, he tried. He was seen purchasing the tools he thought he would need to burn his father. But as the forensic anthropologist testified, there is simply no way a body would have burned to ashes in the way, particularly without an accelerant. Why would the defendant not reveal the location of his father's body, after confessing to his murder? Likely because the body would reveal evidence discounting Troy's story about his father coming at him with a gun. Likely because it will reveal two gunshots, or more, to the head. It might reveal an execution style killing. The defendant knows that whatever evidence will be revealed when his father's body is found, it will be even more damning than the evidence already used to find him guilty of murder in the first degree.

Taken in the light most favorable to the State, the evidence is sufficient to support the trial court's finding that the defendant acted with premeditation.

V. THE EVIDENCE IS SUFFICIENT TO SUPPORT THE TRIAL COURT'S FINDING THAT THE DEFENDANT DISPLAYED AN EGREGIOUS LACK OF REMORSE.

Egregious lack of remorse is a statutory aggravating factor. RCW 9.94A.535(3)(q). The lack of remorse must be beyond "the mundane lack of remorse found in run-of-the-mil criminals..." *State v. Wood*, 57 Wn.App. 792, 790 P.2d 220 (1990), In *Wood*, the defendant was convicted

of murdering her husband and the Court of Appeals upheld the aggravating factor that she acted with an egregious lack of remorse. In *Wood*, the evidence showed that the defendant called 911 to report “proowler noise.” When deputies arrived, they found the victim, Richard Wood, lying face up on the floor of the bedroom, naked, with several bullet holes in his neck and chest. *Wood* at 794. The evidence showed it took the victim 30 minutes to an hour to bleed to death. *Id.* No physical evidence such as a weapon or evidence showing the defendant had fired a gun was recovered. The defendant was the beneficiary of two life insurance policies on the victim. The defendant had once commented, in an apparent joking fashion, that she wished her husband would fall off the roof so she could collect life insurance. *Wood* at 794.

The defendant in *Wood* had been having an affair and enlisted her lover’s help in committing the murder. Three weeks following the murder, she moved in with him. Another man with whom the defendant cheated on her husband testified that she showed no remorse at the death of her husband. In fact, she and this second man took a vacation together ten days after her husband’s murder. *Wood* at 795-96.

The Court of Appeals found sufficient evidence to support the egregious lack of remorse aggravator based on Wood’s total indifference to her husband’s death and her traveling to Missouri with one man a week

following her husband's murder and moving in with another man three weeks after the murder.

Similarly, Mr. Fisher showed total indifference to his father's death. His police interview is chilling. He tried to fake tears during his confession. He spent the victim's money with reckless abandon for weeks after the murder, right up to the time of his arrest. He repeatedly expressed no concern about where his father had gone. He tried to conceal evidence. He tried to burn his father's body in a trash pile. Sufficient evidence supports this aggravating factor.


D. CONCLUSION

The judgment and sentence should be affirmed in all respects.

DATED this 13th day of August, 2014.

Respectfully submitted:

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