NO. 96287-1

THE SUPREME COURT OF

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

EDUARDO PEREZ,
Appellant/Petitioner.

ANSWER TO PETITION FOR REVIEW BY YAKIMA COUNTY

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A. **INTRODUCTION.**

This case was affirmed by the Court of Appeals, Division III. The court heard oral argument on May 1, 2018. The decision was filed on August 9, 2018. The Court of Appeals opinion dismissed all three of Perez's allegations.

The court found the evidence presented by the State was sufficient to support the jury's determination that Perez had committed attempted burglary when he tried at least twice to kick in the front door and smashed out almost all of the windows of a rural home while taunting the two elderly women within, hollering and cursing that he could see them and hear them.

The court's opinion cited well settled case law regarding sufficiency claims. If further, determined that Perez's reliance on State v. Jackson, 112 Wn.2d 867, 774 P.2d 1211 (1989) when addressing a sufficiency of the evidence was incorrect. The court stated that Jackson addressed an issue involving jury instructions not sufficiency of the evidence.

The court also opined that Perez's reliance on Jackson regarding proof of intent was not well founded and in fact stated Jackson actually undercut Perez's argument because if the case had been about sufficiency

this court would have reversed the Jackson with prejudice not remanded it without prejudice. The court stated "[t]he evidence here was sufficient to permit a jury finding that Mr. Perez intended to burglarize Ms. Porter's home. "Unmistakably," the State's evidence showed Mr. Perez "intended more than a social call." *State v. Bergeron,* 105 Wn.2d 1, 11, 711 P.2d 1000 (1985). (Slip at 7)

The court dismissed Perez's allegation that the trail court had not complied with RCW 9.94A.777 which dictates what actions a trial court can take regarding the imposition of cost and assessments if the party before it has been determined to have a mental health condition.

The court distinguished Tedder, infra, referencing that the facts in Tedder justified the use of that statute and that there were no facts in Perez's case which would indicate that Perez had a condition which would require the trial court to address RCW 9.94A.777. And, further pointed out that this issue was unpreserved and did not qualify for review under RAP 2.5.

The Court of Appeals ruled there was no basis to reverse the underlying conviction.

ISSUES PRESENTED BY PETITION

1. This Court should grant review because the Court of Appeals opinion as that opinion is in conflict with other decisions of the Court of Appeals.

d. The State presented insufficient evidence.
e. The Court of Appeals decision inn in conflict with previous decisions.
f. Review should be granted because the trial court failed to inquire into the defendant's ability to pay LFO's considering his known mental health history.

ANSWER TO ISSUES PRESENTED BY PETITION

1. The Court of Appeals opinion does not merit review. Perez has not met the standards set forth in the Rules of Appellate Procedure, 13.4, which determine whether a matter is should be reviewed.
   a. The Court of Appeals correctly determined that there was sufficient evidence presented.
   b. The opinion in this case does not conflict with other opinion of this court or any division of the Court of Appeals.
   c. There is no record to support defendant's allegation that he has a mental health issue which should have been reviewed by the trial court.
   The Court of Appeals opinion does not merit review under any circumstance and specifically not under RAP 13.4

B. **STATEMENT OF THE CASE**

Set forth below is the Statement of the Case directly from the State's opinion brief in the Court of Appeals.

On September 30, 2015, seventy-nine-year-old Mrs. Ethel Porter was in her rural home in Outlook, Washington where she had lived for 53 years, visiting with her eighty-one-year-old sister, Mary Lou Ribail. There was no other person in the home at that time. RP 56 They "…were just laughing and talking and visiting and trying on some shirts and stuff…" When they heard a loud bang which at first they thought might have been a gunshot. RP 56, 89. The sisters soon determined that the

noise was someone kicking the front door of this rural home. The kicks were hard enough that Mrs. Porter was concerned the door might be forced open. RP 56, 90.

The two women were scared by the kicks and the male who was "hollering and cussing", "ranting and raving and swearing" after the door was kicked. RP 57, 90. The two women "…were afraid, and so (they) were just kind of trying to hide in the house." They were very fearful that Perez would break into the house. They attempted to take shelter in the bathroom but Perez had already broken out the window in that room. RP 57-8.

Both Mrs. Porter and Mrs. Ribail heard the defendant yell "I know you're in there" and Mrs. Ribail heard him yell "I can see you" and "I can hear you." RP 57, 89-90. Mrs. Ribail testified that this was "scary" and that after she heard these statements that "I was afraid then." She was concerned that the door might fly open and the kick to the door shook the house. RP 91.

The women called 911 and reported that they believed there had been shots fired at the home. RP 60, 100.

Mrs. Porter had known Perez from past contacts. During this assault on her home she looked out through the shades that were covering the windows that were being broken. She observed a person whom she

identified as the defendant Eduardo Perez. RP 58-9. She saw that he was wearing a red shirt. She was also able to testify that she recognized Perez's voice. RP 60.

Soon after the kicks to the front door these two elderly women began to hear and see the windows in the home being broken out. They actually observed rocks come through the windows. By the time this rampage was over Perez had broken out almost every window in the home. There were rocks found inside the home and Officer Aguilar testified that he found a garden ornament physically inside the home that had been thrown or smashed through one of the windows. RP 57-60, 92, 98, 188. When asked about the noise of the rocks coming through the windows Mrs. Ribail's response was "Loud enough to scare you." RP 99

Mrs. Porter, Mrs. Ribail, Deputy Aguilar and Chantile Hutchinson all testified that they observed that there were two footprints on the front door of the Porter residence. RP 67,69, 165,187, 191-2.

When officers arrived at the Porter residence they observed the defendant pacing back and forth on the porch at his mother's home which is adjacent to the Porter property. Perez was wearing a red shirt. RP 142, 150, 192. Officer Orth testified that Perez appeared "agitated, and he was just kind of all over the place." When asked by Officer Orth "…what's going on." Perez stated "it's the neighbor, it's the neighbor." RP 146.

Perez then began to walk towards the Porter residence. Officers told him to stop but Perez continued to walk across the field towards the victim's home. Perez continued to fail to comply with the orders of the officers and so the officers took hold of his arms to stop him. Perez resisted and fought with the officers who then arrested him. RP 147.

Dep. Aguilar testified without objection that "…the victims told me that he tried entering the residence by kicking the door first. Then they heard the loud sounds of something breaking. They thought maybe they were being shot into the home, shots were being fired. That's what their assumption was." RP 189. He also testified that he observed the lawn ornament that was used to smash out the final window that was smashed. He observed the ornament inside the home sitting on the window sill. RP 188.

The granddaughter of Mrs. Porter, Chantile Hutchinson testified that there had been three "game cameras" which were placed around the Porter property prior to the commission of this crime. RP 155-73, 175-81. Numerous pictures were taken by the cameras and Ms. Hutchinson testified that she could positively identify the defendant, Eduardo Perez as the person in some of those pictures. RP 172. The pictures admitted as evidence depict and captured what occurred on the date of this criminal act.

The defendant Eduardo Perez, chose to exercise his right to remain silent and did not testify. RP 121-22.

At sentencing the court addressed Perez's future ability to pay LFO's. Perez indicated on the record that he had been working part-time. He also informed the court of the fact that "he is considered to be totally disabled, physically disabled." RP 311. The court inquired about the nature of the disability and trial counsel stated again "It's physical" followed by Perez himself stating "[p]hysical." RP 311. According to the unsupported statement Perez has been granted total disability. PR 312.

After the discussion regarding defendant's disability the trial court waived all discretionary LFO's including court appointed (attorney) fee, jury fee, costs for incarceration and medical costs. The remaining LFO's are the crime penalty assessment, criminal filing fee and the DNA fee, these are all mandatory fees. RP 312, CP 51. The court also imposed restitution which was not disputed in the trial court or challenged in this appeal. RP 312. (Appellants brief at 15).

ARGUMENT

This petition is governed by RAP 13.4(b), which sets forth the standard an appellant must meet before their case will be accepted for review. Perez claims that his petition meets the criterion of RAP 13.4(b) (1) and (2), this is patently incorrect.

The court of appeals opinion does not meet any of the criterion set forth in RAP 13.4(b). The opinion does not **1**) Conflict with any decision by this court or (2) any opinion by any division of the Court of Appeals.

1a-b. Insufficiency of the evidence – conflict.

Perez claims that the Court of Appeals decision regarding the sufficiency of the State's evidence is in conflict with is that the State had to present additional evidence regarding the actions of this defendant which would prove he intended to enter the residence after he kicked the door and smashed out the windows.

The case law does not support that interpretation as was clearly set forth in the opinion of the Court of Appeals This was an ATTEMPT. Therefore, the State did not need to prove an actual entry just the attempt to enter. There is literally few things on this planet which are a more clear indication that a party is attempting to enter a location than "kicking in the door."

Perez interprets the evidence in a manner that does not comport with the reality of the facts given at trial. His argument appears to be that the State had to demonstrate actual entry, once again this was an attempt.

The law in this area is decades old and the evidence presented at trial was more than sufficient to prove beyond a reasonable doubt that what Perez intended to do was get into this house and commit a crime.

The State was required, and did prove Perez took a substantial step towards committing the crime of residential burglary. A person commits the crime of burglary when he enters a building with the intent to commit a crime therein. RCW 9A.52.030(1). A person "attempts" an offense when, with the intent to commit a specific crime, he takes a substantial step toward committing the crime. RCW 9A.28.020(1).

In order to constitute a "substantial step," the conduct must strongly corroborate the actor's criminal purpose. State v. Townsend, 147 Wn.2d 666, 57 P.3d 255 (2002); State v. Aumick, 126 Wn.2d 422, 894 P.2d 1325 (1995). A 'substantial step' is conduct strongly corroborative of the actor's criminal purpose." In re Pers. Restraint of Borrero, 161 Wn.2d 532, 539, 167 P.3d 1106 (2007) State v. Wilson, 158 Wn.App. 305, 242 P.3d 19 (2010) ""Mere preparation to commit a crime is not a substantial step." Townsend, 147 Wn.2d at 679, 57 P.3d 255. In order for conduct to comprise a substantial step, it must be strongly corroborative of the defendant's criminal purpose. State v. Workman, 90 Wn.2d 443, 452, 584 P.2d 382 (1978). Whether conduct constitutes a substantial step is a question of fact. State v. Billups, 62 Wn.App. 122, 126, 813 P.2d 149 (1991).

As Judge Pennell stated in the opinion authored by her:

Mr. Perez first asserts there is insufficient evidence to

> show he took a substantial step toward entering Ms. Porter's home. We conclude there was. The evidence shows Mr. Perez kicked the door multiple times, and with enough force to make the whole house shake. He then systematically broke almost every window in the house and taunted Ms. Porter and Ms. Ribail as he did so. The fact that Mr. Perez was unsuccessful in breaking through the door and never actually climbed in any of the windows is what causes his offense to fall under the auspice of an attempt, instead of a completed crime. The incomplete nature of his conduct does not render the State's evidence insufficient. Viewing these facts in a light most favorable to the State, a rational trier of fact could find beyond a reasonable doubt Mr. Perez's actions were part of an unsuccessful effort to unlawfully force entry into Ms. Porter's home, and thus constitute a substantial step toward residential burglary. Slip 4-5

Not one single word of the opinion issued in this case conflicts with any of the law cited by Perez, there is no basis pursuant to RAP 13.4 for review to be granted.

Here, as was done in the briefing in the Court of Appeals, Perez claims he knows the "intent" of why the windows were broken and yet there is not a single word on the record to supporting that claim.

There is nothing in the record other than the testimony of the State's witnesses, therefore this theory that Perez's "intent" when he smashed out almost all of the windows in the house was purely to damage this home is speculation and without merit.

Perez did not testify at trial standing on his right to remain silent.

The jury was allowed to infer what the intent of Perez was from the evidence presented. Issues of witness credibility are to be determined by the trier of fact and cannot be reconsidered by an appellate court. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). A reviewing court will consider the evidence in a light most favorable to the prosecution. Id. It also must defer to the finder of fact in resolving conflicting evidence and credibility determinations. Camarillo, 115 Wn.2d at 71. A challenge to the sufficiency of the evidence requires that the defendant address the evidence and all reasonable inferences drawn in favor of the State, with circumstantial evidence and direct evidence considered equally reliable. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The elements of a crime can be established by both direct and circumstantial evidence. State v. Brooks, 45 Wn. App. 824, 826, 727 P.2d 988 (1986). One is no less valuable than the other. There is sufficient evidence to support the conviction if a rational trier of fact could find each element of the crime proven beyond a reasonable doubt.

Perez's claim is the State did not prove his intent was to commit a burglary when he was kicking the door and smashing windows out most of the windows in this house. He states "First, there was no evidence the alleged kicking was done in effort to enter, as **opposed to with intent (sic) to cause damage, as with the windows.** There was no other evidence

presented that Mr. Perez attempted to enter the home, such as actually trying to open the door with the doorknob or using tools to pry open the door. RP 57-60, 9 1-92." Petition at 6. (Emphasis added.)

This is not supported by the record and again, Perez did not testify at his trial, so the statements of the State's witnesses are unrefuted in the record.

Perez claimed in the Court of Appeals and again before this court that State v. Jackson, 112 Wn.2d 867, 774 P.2d 1211 (1989) is the case which is controlling and that the ruling in this case is in conflict with Jackson. "The problem with Mr. Perez's reliance on *Jackson* is that *Jackson* only addressed instructional error. The court did not engage in a sufficiency analysis. Because Mr. Perez does not allege instructional error, *Jackson's* analysis is largely irrelevant to Mr. Perez's case.(5)" Footnote 5 continues: "If anything, *Jackson* undercuts Mr. Perez's sufficiency challenge. *Jackson* reversed the defendant's conviction without prejudice. Had the evidence been insufficient to support an inference of intent, the reversal should have been with prejudice. (Slip at 6)"

Judge Pennell cites to State v. Bergeron, 105 Wn.2d 1, 11, 711 P.2d 1000 (1985) stating ""Unmistakably," the State's evidence showed Mr. Perez "intended more than a social call.""

The direct testimony of the nearly 80-year-old resident was that the

door had recently been replaced:

> A. My son, Darren, had came over from the coast, and he put a brand new door on it.
> Q. Why was that done?
> A. I think it was because this had been happening.
> Q. With Mr. Perez?
> A. Mm-hmm.
> Q. Yes or no?
> A. Yes. RP 01.10.2017. page 55

Deputy Jose Aguila testified as follows regarding the footprints on the door:

> Q. What does it show us?
> A. It's a photograph of foot impressions on the door being kicked.
> Q. Does it accurately portray the way the door looked when you investigated?
> A. Yes, sir.
> Q. On that photograph, does there appear to be some tread in that footprint?
> A. There's a specific pattern. You can see there's a lighter impression and then a heavier impression. At least two separate impressions, one over the other. RP 01.10.2017. page 191

Bergeron also states the court's reasoning why there is no need to charge and prove what crime a defendant intended to commit in the location he was attempting to burgle:

> Another consequence is that despite the fact that 5,755 attempted burglaries occurred in this state last year (1984), the crime of attempted burglary would have to be virtually written off the books as a crime. Except in the case where a burglary defendant or an accomplice confesses, how can the State be reasonably expected to prove beyond a reasonable doubt what specific crime or crimes were intended to be committed inside a building

when entry is attempted but not gained?

…

Knowledge of criminal intent usually resides exclusively in the mind of the defendant. He may unlawfully enter a building with the intent to commit a certain crime, and ultimately commit a different crime, or no crime at all. He is nonetheless guilty of burglary.

In either case, the State would be hard pressed to prove entry with intent to commit a crime if it were required to specify exactly which of several crimes available to the defendant he intended to commit. Such a requirement would seriously weaken the enforcement of burglary laws.

Id at 9-10 (Footnotes omitted)

State v. Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832 (1999) addresses an attempted burglary. The Supreme Court stated "The jury is permitted to infer from one fact the existence of another essential to guilt, if reason and experience support the inference,'"

Judge Pennell stated the following in the court's opinion:

Rather than *Jackson*, Mr. Perez's case is controlled by *State v. Bencivenga*, 137 Wn.2d 703, 974 P.2d 832 (1999). Bencivenga held that the analysis in Jackson applies only to the propriety of a permissive inference instruction. *Bencivenga*, 137 Wn.2d at 708. *Jackson* does not apply to the question of whether sufficient evidence supports a jury's verdict. Unlike what is true in the instructional context, where judges are restricted from guiding jurors' assessments of the facts, "[n]othing forbids a jury . . .from logically inferring intent from proven facts, so long as it is satisfied the state has proved that intent beyond a reasonable doubt." Id. at 709. Although a jury should not reach an inference of guilt when there are equally reasonable conclusions that can follow from a set of circumstances, the reasonable

> doubt standard (not the sufficiency test) protects a defendant from conviction in such circumstances. In the end, "it is the province of the finder of fact to determine what conclusions reasonably follow from the particular evidence in a case." Id. at 711.

Turning once again to this court's opinion in Bergeron at 19-20 "Intent may be inferred from all the facts and circumstances surrounding the commission of an act or acts. This rule is applicable in cases of attempted crimes as well as in cases where the crime has been consummated. Although intent may not be inferred from conduct that is patently equivocal, it may be inferred from conduct that plainly indicates such intent as a matter of logical probability. (Citations omitted.)

In the case before this court there is no other conclusion a reasonable jury could infer from the facts other than Perez was trying to get into this rural home to "commit a crime against a person or property therein."

Perez claims that the two kicks to a replaced and secured door and the smashing out of almost all of the windows are facts that are "even stronger than in Jackson because his criminal conduct was conducted in the daylight hours.

The object of Perez's actions was clearly that he wanted to get at the two women in the home as evidenced by his taunts and threats as he assaulted this home. There is no time frame in the world as it presently

exists which is indicative a criminal attempting to burglarize a home or business. This is not the 1800's when the acts such as this were done in the close of the night.

1c. - LFO's – mental health inquiry.

Perez cites to State v. Tedder, 194 Wn. App. 753, 754-55, 378 P.3d 246 (2016) as dispositive of this allegation. He alleges the Court of Appeals decision is in conflict with Tedder. Once again, the Court of Appeals decision:

> The record contains no such evidence that Mr. Perez suffers from a mental health condition. There was a competency evaluation, but Mr. Perez was found competent. Nothing in the record shows Mr. Perez suffers from a diagnosed mental health condition. This record stands in stark contrast to the extensive evidence of mental health issues affecting the defendant in *State v. Tedder*, 194 Wn. App. 753, 754-55, 378 P.3d 246 (2016). Moreover, the trial court specifically inquired into Mr. Perez's ability to pay and asked him about employment limitations. The only limitation he disclosed was a physical disability. The trial court struck all discretionary LFOs due to this physical disability.

The Petitioner has wholly and totally failed to set forth anything from the trial court record which would support this allegation. The court did not need to make inquiry as to a defendant's mental health status before costs and assessments were imposed because there is nothing in the record which would indicate that Mr. Perez meets the definition in RCW 9.94A.777(1) or (2). There can be no basis under RAP 13.4 for review if

there are not facts which support the allegation.

In this petition Perez says that because he was sent to Eastern State Hospital for a competency evaluation he therefore meets the definition in RCW 9.94A.777, this is clearly incorrect. Even if there were more facts in the record pertaining to the evaluation a competency evaluation is not in and of itself a diagnosis of a "mental health condition" a person could be sent to Eastern for innumerable reasons for an evaluation for competency that have nothing to do with a "mental health condition" which meets the standard of RCW 9.94A.777, these two situations are not synonymous.

And to make this argument even less plausible he was found to be competent and returned to Yakima County for trial.

In his opening Court of Appeals brief Petitioner misrepresented the record stating the court abused its discretion when it failed to consider Perez's "known" mental health issues…Mr. Perez appeared before the sentencing court with a significant mental health history…despite the clear mental health history, Mr. Perez's mental illness was not discussed..." (Appellant's brief 14-15.) (Emphasis added).

Perez cites to 2RP 2-11 and CP 52 as supportive of these statements. However, the record at 2RP 2-11 literally does not address anything regarding the reason for the request for a competency evaluation, it is purely a discussion between the parties and the court as to which

institution Perez should be sent to. CP 5-6 is a boilerplate order that was presented to the court so that an evaluation could be done, it too does not address a single thing about any alleged "mental health" issue or issues let alone that these issues are "significant." (See Appendix A for 2RP 2-11 and Appendix B for CP 5-6)

Perez conveniently ignores the following which is the colloquy between trial counsel and the court regarding this alleged issue at 2RP 12-13:

> MR. BRUNS: Good morning, Your Honor. No. 3 on criminal motions, Eduardo Perez, 15-1-01523-6. We're on for competency status. We received the competency report from Eastern State Hospital late last week. They have found him competent to proceed with matters, so we are handing forward an order setting the schedule on the case for omnibus on 2/24, trial on 3/7. We will present the formal competency order this afternoon.
>
> …
>
> MR. KNITTLE:…You may recall from this morning, Your Honor, State of Washington versus Eduardo Perez, Cause 15-1-01523-6. This morning we advised you that pursuant to an order from Eastern State Hospital dated, I think, May [sic] 12, '16— 7
> THE COURT: Uh-huh.
> MR. KNITTLE: —in which the psychologist opined that he was, in fact, competent to stand trial, that we—we entered, as scheduled, an order with the trial date and an omnibus date, and—but I didn't yet have the order for the Court to sign that actually finds him competent. I have that order prepared. Mr. Bruns has reviewed and signed it, and present it now to the Court for signature.
> THE COURT: Mr. Bruns, it appears you signed off on this?
> MR. BRUNS: Yeah, that's correct, Your Honor, we approve as to form and content.

(This order may be found at CP 7 and Appendix C.)
2RP 12-13

Eastern Washington State Hospital would not have reported to the trial court that Perez was competent to stand trial if he in fact had these alleged "significant" mental health issues.

There is literally nothing in the record before the trial court that would indicate that Mr. Perez has anything but the physical disability that was addressed by the trial court prior to the imposition if the LFO's which were imposed.

This case is factually distinguishable from Tedder they do not conflict with each other they are just factually distinguishable and therefore once again the facts in Perez's case do not comport with that case law he has cited. Reading from Tedder clearly sets forth this distinction:

> Tedder has an extensive history of mental illness, including diagnoses for schizoaffective disorder, antisocial personality disorder, and bipolar I disorder, and more than two dozen past hospitalizations for mental health treatment
>
> On one or two prior occasions, Tedder appeared in mental health court.
>
> …
>
> At sentencing, Tedder's counsel disclosed to the trial court that he had represented Tedder a number of times in the past when Tedder had " breaks," and that after Tedder's admission into mental health court, Tedder became homeless when living with his father did not work out and was then hospitalized at Western

> State Hospital. 3 Verbatim Report of Proceedings at 500-01. The trial court recognized Tedder's difficulties when he was not medicated and acknowledged that Tedder had appeared before the mental health court. (Tedder at 754-55)

Perez did not raise this issue in the trial court, it was therefore, waived the issue on appeal. The Court of Appeals briefly addressed this issue then dismissed it; "Unpreserved LFO errors do not command review as a matter of right." State v. Blazina, 182 Wn.2d 827, 833, 344 P.3d 680 (2015), citing RAP 2.5(a), the court declined to further address this allegation, this court should do the same.

D. CONCLUSION

The Court of Appeals opinion does not merit review by this court under RAP 13.4 and therefore this court should deny review.

Respectfully submitted this 4th day of October 2018,

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APPENDIX A

MR. BRUNS: Next, Your Honor, Eduardo Perez.

THE COURT: It's No. 30?

MR. BRUNS: Yes. And it's—

THE COURT: 15-1-01523-6. Mr. Knittle and Mr. Bruns.

MR. BRUNS: That's correct, Your Honor. Your Honor, I'm going to submit to the Court an order for a 15-day evaluation.

THE COURT: Okay.

MR. BRUNS: I'll wait for Mr. Knittle to get here.

UNIDENTIFIED: I can stand in for Mr. Knittle.

MR. BRUNS: No, he needed to stand in, I'm sorry, on this one. It's odd in the sense that I'm going to request the 15-day evaluation at Western State Hospital, not Eastern State Hospital.

THE COURT: Have we run that by anybody?

MR. BRUNS: I was at a CLE last Friday, and what I was informed is that because the backlog is so severe at Eastern State Hospital, that Western State Hospital is looking at taking over at least Yakima County and maybe some of the others along the Cascade front range.

THE COURT: But, is that going to get done administratively within that particular entity rather than us jamming them, because I don't know how comfortable I'd be saying "Western State Hospital" unless I've got some

authority from them.

MR. BRUNS: Well, that's just it, Your Honor. I don't know that you don't have any authority—

THE COURT: Hmm.

MR. BRUNS: —to do that. And their timeframe on scheduling these kinds of evaluations is much shorter than Eastern's.

THE COURT: Well, my understanding is they were bringing resources over here.

MR. BRUNS: They were. That's one of the things they're doing. They're looking to—when I was asking about the problems, I asked the question at the CLE about this, because they were talking about Eastern Washington, which, of course they all focus on Spokane. I said, well, I'm from Yakima. What—what's happening down there? And they told me they're looking at taking over Yakima altogether for sending our people over to Western State Hospital, which makes sense since geographically we are closer to them, and it takes less time to transport to Western.

THE COURT: I guess that we're looking at and we are going to be use—what's got me—so, Mr. Knittle, here's my—I—I really can't even call it an issue. But, if I sign an order that this gentleman goes to Western State Hospital, I—do I have the authority—I think I do. I would feel a lot more comfortable if the agencies were involved before

signing that particular document or have some input from them. But, I—you know, and I guess that's where I'm looking at the State to have made some phone calls, verifying whether this is, in fact, acceptable or not.

MR. KNITTLE: I—

MR. BRUNS: Well, Your Honor, if it doesn't work, what I would suggest is we go ahead and do it and try it. And I will fax all the material over to Western State Hospital. And if they put up a fuss—

THE COURT: Well—

MR. BRUNS: —I'll bring it back before you.

THE COURT: Yeah. And I'm not sure I want to set that precedent, Mr. Bruns, without some of the information from the Hospital. So, that—I guess that's where I'm at. I—I'm not willing to do that without, I guess, at least giving them the courtesy of, you know, what their position is on it, pro or con or—or anything, because I don't know any of us that have been sending anybody to Western State from here. And I—I'm not sure without additional information, unless the State has that, that I'm willing to jump out on that limb without additional information.

MR. BRUNS: Well—

MR. KNITTLE: Your—Your Honor, I learned about this from Mr. Bruns about an hour ago. And I told him, I would object for precisely the reasons the Court is articulating now,

because we don't know what Western's response will be. We don't even know if the Yakima County Jail will take—

THE COURT: Right.

MR. KNITTLE: —him to Steilacoom.

THE COURT: It—it's got a lot of moving parts, I guess, because it does impact our transport officers.

MR. BRUNS: I'm informed the Jail doesn't care where they're taken, Your Honor.

THE COURT: Okay.

MR. BRUNS: I could—my position on this is that under the *Trueblood* decision, the courts are the authority on where these people go because the courts are governing how much time is being taken. We know from the statistics that Western is getting these done much more rapidly than Eastern is. And it is—makes geographical sense to send them over to Steilacoom instead of up to Medical Lake 'cause it's a shorter drive. So, that means we're going to have less man hours from Yakima County, DOC personnel wasted to transport, and there's no reason that I can see that you don't have the authority.

THE COURT: I—

MR. BRUNS: And I'd rather defer to your authority than some administrator from DSHS saying, you can't do this.

THE COURT: Well, I would rather talk to an AAG who represents the—the hospitals. I'm not willing to sign the

order today to Western State Hospital. I'm not saying that if I have some additional information that I won't be willing. The best I can do today is sign paperwork in the normal course that does indicate Eastern State Hospital with 14 days' status, allow Counsel to do some digging on this because I would like some more information, and—and, in fact, maybe even having an Assistant Attorney General on the phone on these matters as to what's being discussed, because if this is being represented in CLEs, then obviously we need to have some—the courts need to have some additional information because I—do not misunderstand my position. I want this done as quickly and as expediently—

MR. BRUNS: I understand, Your Honor.

THE COURT: —as possible. That—that's not my problem with it today. If Western State is it and, you know, we can put all the mechanisms in place that that's going to happen, I—I'm great with that. But, I guess right now I just don't feel that I have enough information to be comfortable making that decision today.

MR. BRUNS: I was going to set the competency status out to Tuesday, January 12th. That's normally what we do. Do you want it sooner?

THE COURT: That would be my question to you. I mean, I would be happy to set it in two weeks if you want to bring some additional information, because then if—I mean, and

Mr. Knittle can bring some additional information.

MR. BRUNS: I will—I'll look into it, Your Honor.

THE COURT: Okay.

MR. BRUNS: And I'll informally report back to you on what I learn.

THE COURT: Okay. Because I would be happy to sign an amended order if, you know, everybody's saying, yeah, that'd be great if you guys can do that.

MR. BRUNS: Okay.

MR. KNITTLE: I hadn't planned on researching the issue. I believe that he should be sent to Eastern. If Counsel comes up with some things, I'll be happy to jump in if he—and I think it need be. But, I believe the burden is on Counsel if he wants him to go to Western.

THE COURT: You know, and Mr. Knittle, I'm going to say, Eastern State has not been meeting any of these obligations in 14 days as required. You know, there's a federal lawsuit going on. So, I would hope the State would want to become as informed on this as possible for those reasons because we're not meeting the standards over here.

MR. KNITTLE: Is there—

THE COURT: And it is a problem, so.

MR. KNITTLE: Is—is Western meeting the standards?

MR. BRUNS: Yes, they're much closer.

THE COURT: I think they're closer. I—I don't disagree

with the information that's been provided. It's just now if we're going to—I know that Western was sending resources over here to help Eastern. Again, I—I will indicate on anybody who's doing criminal cases right now, I would think it would behoove them to understand really what the inner workings are on this to go forward, because I don't know what the outcome—you know, we've had some rulings from different judges, and I can't—I can't speak to what Judge Bartheld did. I know Judge McCarthy said, well, it's a civil issue, and so if—if the defendant sues and wins, that's not my problem; I'm still making decisions based upon normal bail considerations. I don't know what Judge Bartheld did.

Again, I think parties need to become very informed in this area because this is huge right now, quite frankly. So, for today I'm going to sign the order for the 15-day evaluation indicating Eastern State Hospital. I will set a status hearing on Tuesday, January 12th, at nine a.m. to revisit—and—and would be happy to revisit it with additional information from the hospitals to do amended orders if that becomes prudent and necessary. This is obviously with Mr. Perez's agreement. It is setting this out beyond the 14 days. A lot of counsel aren't being so accommodating, and that's where the issues are being—the records are being made, but I think we'll be very probing

in the future. I'm trying to be careful with my wording.

Thank you.

[Session ends at 10:46 a.m.]

APPENDIX B

FILED
COUNTY CLERK

'15 NOV 12 P1 :50

SUPERIOR COURT
YAKIMA CO. WA

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON, Plaintiff, vs. Eduardo Perez, Defendant.	NO. 15-1-01523-6 ORDER FOR FIFTEEN DAY EVALUATION

THIS MATTER having come on before the above-entitled court upon the oral motion of defendant, pursuant to RCW Chapter 10.77; plaintiff appearing by and through the undersigned Deputy Prosecuting Attorney for Yakima County, Washington; defendant appearing personally and with his attorney, Scott Bruns; the court having considered the motion herein and arguments of counsel, and being fully advised in the premises; now, therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the defendant shall be committed to ~~Western~~ Eastern State Hospital, Mentally Ill Offender Program, for a period of time not to exceed fifteen (15) days for purposes of evaluation as to competency and sanity, and at the end of said time period, authorities at ~~Western~~ Eastern State Hospital shall provide the court and counsel with a report of their examination, including, but not limited to, the following: (a) a description of the nature of the

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examination; (b) a diagnosis of the mental condition, if any, of the defendant; (c) if the defendant suffers from a mental disease or defect, an opinion as to his competency; (d) an opinion as to the defendant's sanity at the time of the acts alleged herein; (e) an opinion as to whether or not the defendant has the capacity to act intentionally and/or with knowledge; (f) an opinion as to whether or not the defendant is a substantial danger to other persons, or presents a substantial likelihood of committing felonious acts, jeopardizing public safety or security, unless kept under further control by the court or other persons or institutions; (g) all previous health care providers for defendant shall provide to the above hospital and/or staff any and all records, reports and history as may be requested.

IT IS FURTHER ORDERED that speedy trial requirements under CrR 3.3 shall be, and the same are hereby suspended and all proceedings herein are hereby stayed until further order of the court.

IT IS FURTHER ORDERED that defendant shall be transported to said hospital by the Yakima County Sheriff and kept in said hospital for the duration of his treatment as per this order and released only back into the custody of the Yakima County Sheriff who shall return defendant to Yakima County upon completion of the examination.

Done in open court this 12th day of November, 201.5

JUDGE

Hon. RUTH E. REUKAUF

Presented by:

Scott A. Bruns, WSBA# 15060
Attorney for Defendant

Deputy Prosecuting Attorney
Washington State Bar # 16538

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APPENDIX C

FILED
JANELLE BIRDLE, CLERK

'16 FEB 16 P5:13

SUPERIOR COURT
YAKIMA CO. WA

SUPERIOR COURT OF WASHINGTON FOR YAKIMA COUNTY

STATE OF WASHINGTON, Plaintiff, vs. EDUARDO PEREZ DOB: 2/18/1965 Defendant.	NO. 15-1-01523-6 ORDER OF COMPETENCY AND SETTING TRIAL DATE

THIS MATTER having come on before the above-entitled Court for hearing under the provisions of RCW 10.77 to determine the competency of the defendant; the undersigned Deputy Prosecuting attorney appearing for the State, the defendant appearing personally and with his attorney Scott A. Bruns; an Order for Competency Evaluation having been entered on November 15, 2015, the Court having reviewed the records and files herein including the report of Eastern State Hospital dated February 12, 2016; now therefore

THE COURT FINDS that the defendant has the capacity to understand the nature of the proceedings against him and is able to assist in his defense and therefore is competent to stand trial.

The defendant's speedy trial period shall recommence as of the date of this order and a new trial date shall be set for 3-7-16 with a Triage Hearing on 3-4-16.

DATED: February 16, 2016.

Richard H Bartheld
JUDGE

RICHARD H. BARTHELD
JUDGE

Presented by:

Duane R. Knittle
DUANE R. KNITTLE
Deputy Prosecuting Attorney
Washington State Bar No. 16538

Approved for entry, copy received

SCOTT A. BRUNS
Defense Attorney
Washington State Bar No. 15060

JOSEPH A. BRUSIC
Yakima County Prosecuting Attorney
128 N. 2nd Street, Room 329
Yakima, WA 98901
(509) 574-1210 Fax (509) 574-1211

DECLARATION OF SERVICE

I, David B. Trefry, state that on October 4, 2018, I emailed a copy of the State's Answer to: Jan Trasen at wapofficemail@washapp.org

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 4th day of October, 2018 at Spokane, Washington.

s/ David B. Trefry
DAVID B. TREFRY, WSBA #16050
Senior Deputy Prosecuting Attorney
Yakima County, Washington
P.O. Box 4846, Spokane WA 99220
David.Trefry@co.yakima.wa.us

YAKIMA COUNTY PROSECUTORS OFFICE

October 04, 2018 - 1:35 PM

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Appellate Court Case Title:	State of Washington v. Eduardo Perez
Superior Court Case Number:	15-1-01523-6

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