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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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NO. 35763-1-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent

vs.

RICHARD D. HARTMAN,

Appellant.

BRIEF OF APPELLANT

APPEAL FROM THE SUPERIOR COURT FOR
MASON COUNTY

The Honorable Toni A. Sheldon, Judge

Cause No. 06-1-00246-6

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A. ASSIGNMENTS OF ERROR

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

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred in failing to order a competency examination when the court became concerned with Hartman's ability to proceed with trial? [Assignment of Error No. 1].
2. Whether the trial court erred in denying Hartman his constitutional right to proceed pro se? [Assignment of Error No. 2].
3. Whether the trial court erred in giving the intent to commit a crime inference instruction (Instruction No. 10A) over Hartman's objection? [Assignment of Error No. 3].
4. Whether there was sufficient evidence to uphold Hartman's conviction for burglary in the second degree? [Assignment of Error No. 4].

C. STATEMENT OF THE CASE

1. Procedure

Richard D. Hartman (Hartman) was charged by information filed in Mason County Superior Court with one count of burglary in the second degree. [CP 42].

No pretrial motions regarding CrR 3.5 or 3.6 were made or heard. Prior to trial Hartman was allowed to proceed pro se by the time trial commenced he was represented by retained counsel. [RP 4-7, 18-24]. Hartman was tried by a jury, the Honorable Toni A. Sheldon presiding. Hartman objected to the court giving the burglary permissive inference instruction (Instruction No. 10A) [CP 59; RP 180-184, 191-192]. The jury found Hartman guilty as charged. [CP 45; RP 237-238].

The court sentenced Hartman to a standard range sentence of 68-months based on an offender score of 9. [CP 8-20, 44; RP 257-258].

Timely notice of appeal was filed on December 7, 2006. [CP 7]. This appeal follows.

2. Facts

On June 24, 2006, Ron and Jackie Phipps were driving to Bremerton to take their daughter to a ballet recital. [RP 70, 83, 92]. Jackie Phipps works as a bus driver for the North Mason School District. [RP 70, 91]. As the Phippses drove past the school district's bus barn,

they noticed a man apparently standing on a fuel tank in the fenced yard of the building. [RP 72, 93]. They also saw a truck with fuel tanks in its bed parked right next to the fence. [RP 73, 94, 97-98]. Jackie at first thought it was a co-worker, but made her husband, Ron, turn their car around to check. [RP 93]. They saw the man still there and Jackie realized it wasn't her co-worker and that something wasn't right and called 911. [RP 73, 93-95]. The Phippses then saw a white truck leaving the area and followed it until the police arrived and stopped the truck. [RP 74, 95-96]. Neither Jackie nor Ron could identify Hartman at trial as the man they saw apparently standing on the fuel tank. [RP 85]. Both admitted on cross-examination that given the short time for making her observations and the angle/distance from which they were being made that the man could have been standing in the truck's bed. [RP 79-82, 101-105].

Mason County Sheriffs Deputies Matthew Ledford and James Ward stopped the truck reported by the Phippses and contacted the driver, Hartman. [RP 110-115, 164-167]. After inspecting the truck noting that there was grass and shrubs hanging from the undercarriage and that there were fuel tanks in the bed of the truck along with a portable fuel pump, arrested Hartman. [RP 116-118]. The fuel pump was never inspected to see if it worked and the fuel tanks contained barely any fuel—the police never inspected the fuel to determine whether it was “off” or “on” road

diesel. [RP 123-124, 143-145, 150]. It could not be determined whether any fuel had been taken from the fuel tanks in the bus yard. [RP 66-67].

Ethel Gunderson, Hartman's mother, testified that the truck Hartman had been driving was hers and that the fuel tanks in the back were for a Cat she used in the family business. [RP 173-177]. The Cat uses "off road" diesel fuel. [RP 173].

Hartman did not testify at trial.

D. ARGUMENT

- (1) HARTMAN'S CONVICTION SHOULD BE REVERSED BECAUSE THE TRIAL COURT FAILED TO ORDER A COMPETENCY EXAMINATION WHEN THE COURT BECAME CONCERNED WITH HARTMAN'S ABILITY TO PROCEED WITH TRIAL.

Requiring that a criminal defendant be competent has a modest aim: It seeks to ensure that he has the capacity to understand the proceedings and to assist counsel. State v. Marshall, 144 Wn.2d 266, 277, 27 P.3d 266 (2001). The determination of whether a competency examination should be ordered rests generally within the discretion of the trial court. State v. Thomas, 75 Wn.2d 516, 518, 452 P.2d 256 (1969). The factors a trial judge may consider in determining whether or not to order a formal inquiry into the competence of an accused include the "defendant's appearance, demeanor, conduct, personal and family history,

past behavior, medical and psychiatric reports and the statements of counsel.” State v. Dodd, 70 Wn.2d 513, 514, 424 P.2d 302 (1967).

Procedures of the competency statute, RCW 10.77, are mandatory and not merely directory. State v. Wicklund, 96 Wn.2d 798, 805, 638 P.2d 1241 (1982). Thus once there is a reason to doubt a defendant’s competency, the court must follow the statute to determine his or her competency to stand trial. City of Seattle v. Gordon, 39 Wn. App. 437, 441, 693 P.2d 741 (1985). Failure to observe procedures adequate to protect an accused’s right not to be tried while incompetent to stand trial is a denial of due process and reversible error. State v. O’Neal, 23 Wn. App. 899, 901, 600 P.2d 570 (1979); *see also* In re Fleming, 142 Wn.2d 853, 16 P.3d 610 (2001).

Here, during jury selection the court stopped the proceeding stating the following:

And the Court just has some concerns about whether Mr. Hartman is physically able to go forward with the trial today. As I was looking at him a couple of times during the course of our voir dire in chambers—and he’s only perhaps seven feet away from me—his eyes tend to narrow to the point that I’m not sure they’re fully open, and I’m just concerned....

Mr. Hartman: I feel kind of light-headed and I’m sick, Your Honor.

...that he doesn’t look like he may be fully able to comprehend what’s going on. So I’ll give you time while the court is taking up the other matter to address that with Mr. Hartman.

[RP 29].

The court adjourned the matter, but the next day revisited the issue again noting its concern, “that Mr. Hartman did not look particularly well physically, or perhaps mentally as well, to be able to continue the trial...” [RP 30]. Instead of halting the proceedings and ordering a competency examination as required by law, the court continued with jury selection and ultimately the trial. Given the court’s own statements, the court was required to order a competency examination and its failure to do so requires the reversal of Hartman’s conviction.

(2) HARTMAN WAS DENIED HIS CONSTITUTIONAL RIGHT TO REPRESENT HIMSELF.

A criminal defendant has a constitutional right to waive assistance of counsel and proceed pro se at trial. Sixth Amendment to the United States Constitution; Art. 1, section 22 of the Washington Constitution; State v. Fritz, 21 Wn. App. 354, 358, 585 P.2d 173 (1978). In order to exercise the right, a defendant’s request must be unequivocal, knowingly and intelligently made, and it must be timely. State v. Vermillion, 112 Wn. App. 844, 851, 51 P.3d 188 (2002). To determine the validity of a defendant’s self-representation request, the trial court examines the facts and circumstances and the entire record. State v. DeWeese, 117 Wn.2d 369, 378, 816 P.2d 1 (1991). The court should also engage in a colloquy

with the defendant to ensure that he or she understands the risks and consequences of self-representation. State v. Vermillion, 112 Wn. App. at 851.

An appellate court reviews a trial court's denial of a defendant's self-representation request for an abuse of discretion that lies along a continuum, corresponding to the timeliness of the request: (a) if made well before the trial...unaccompanied by a motion for continuance, the right of self-representation exists as a matter of law; (b) if made as the trial is about to commence or shortly before, the existence of the right depends on the facts of the particular case with a measure of discretion reposing in the trial court in the matter; and (c) if made during trial the right to proceed pro se rests largely in the informed discretion of the trial court. State v. Vermillion, 112 Wn. App. at 855, *citing* State v. Fritz, 21 Wn. App. at 361. However, a defendant cannot seek self-representation in order to delay or obstruct the administration of justice, and a defendant can waive self-representation by disruptive words or misconduct. State v. Vermillion, 112 Wn. App. at 851. The erroneous denial of a defendant's motion to proceed pro se requires reversal without any showing of prejudice. State v. Breedlove, 79 Wn. App. 101, 110, 900 P.2d 586 (1995).

Here, prior to trial Hartman was afforded his right to self-representation, but when trial commenced his was represented by retained

counsel. [RP 4-7, 18-24]. After trial had commenced, Hartman unequivocally reasserted his right to self-representation because his retained counsel had informed him “that until he is paid his full fee, he will not defend me one hundred percent.” [RP 133]. Hartman further explained his reasons for wanting to represent himself as his belief that his attorney was not providing effective assistance of counsel by failing to investigate the case including the failure to seek a continuance pretrial in order to prepare and failing to adequately cross-examine the witnesses.¹ [RP 133-137]. Hartman made no request to delay the trial. He simply asked to represent himself and take control of his trial defense.

While the court expressed concern regarding Hartman’s assertion of the lack of representation for failure to pay counsel’s fee, the court accepted Hartman’s counsel’s statement denying this and denied Hartman’s request to proceed pro se holding, “It is a request that simply comes too late in terms of the third day of trial.” [RP 137]. The court’s rationale for doing so makes no sense in that trial would have continued

¹ The day following Hartman’s request to proceed pro se, Hartman’s counsel requested an in camera hearing at which instead of asking to be removed from the case, he outlined his trial strategy as to why he would not be calling a witness Hartman wanted to call—counsel’s belief that the testimony would be false. [11-22-06 RP 1-5]. The witness at issue was not present, and provided no sworn declaration indicating the content of what his testimony would be. Based on this hearing, it merely seems the possible testimony would have been for the jury to weigh and determine its worth along with all the other testimony provided at trial. This hearing demonstrates a breakdown in the attorney client relationship, and further supports the error in the trial court’s denial of Hartman’s request to proceed pro se.

without interruption only it would have continued with Hartman conducting his defense instead of his retained counsel. The trial court's reasoning that it was made "too late" does not constitute a proper exercise of discretion in light of the record. The trial court should have granted Hartman's constitutional right to proceed pro se as it was not made for any improper reason. This court should reverse Hartman's conviction and remand for a new trial in order to afford him his right to represent himself on the charge.

(3) THE TRIAL COURT ERRED IN GIVING INSTRUCTION NO. 10A, THE INTENT TO COMMIT A CRIME INFERENCE INSTRUCTION, OVER HARTMAN'S OBJECTION.

Over Hartman's objection, [RP 180-184, 191-192], the court instructed the jury in Instruction No. 10A as follows:

A person who enters or remains unlawfully in a building may be inferred to have acted with intent to commit a crime against a person or property therein. This inference is not binding upon you and it is for you to determine what weight, if any, such inference is to be given.

[CP 59].

The State may use evidentiary devices, such as presumptions and inferences, to assist it in meeting its burden of proof, though they are not favored in criminal law. State v. Hanna, 123 Wn.2d 704, 710, 871 P.2d 135 (1994). The State Supreme Court has approved the permissive inference of

intent to commit a crime “whenever the evidence shows a person enters or remains unlawfully in a building.” State v. Grimes, 92 Wn. App. 973, 980 n.2, 966 P.2d 394 (1998), *citing* State v. Brunson, 128 Wn.2d 98, 107, 905 P.2d 346 (1995). The permissible inference of criminal intent is found in RCW 9A.52.040, which provides:

In any prosecution for burglary, any person who enters or remains unlawfully in a building may be inferred to have acted with intent to commit a crime against a person or property therein, unless such entering or remaining shall be explained by evidence satisfactory to the trier of fact to have been made without such criminal intent.

When permissive inferences are only part of the State’s burden of proof supporting an element and not the “sole and sufficient” proof of such element, due process is not offended if the prosecution shows that the inference more likely than not flows from the proven fact. State v. Brunson, 128 Wn.2d at 107; *see also* State v. Cantu, 156 Wn.2d 819, 826, 132 P.3d 725 (2006). In every case where the jury has been instructed on the burglary permissive inference of criminal intent there has been some evidence corroborating the criminal intent, i.e. something was taken or in the process of being taken. *See e.g.* State v. Brunson, *supra*; State v. Cantu, *supra*; State v. Deal, 128 Wn.2d 693, 701, 911 P.2d 996 (1996). It is because of this corroboration the giving of the inference instruction was not found to be error since the instruction was not the “sole” evidence of criminal intent.

Unlike the cases cited above, the evidence presented by the State does not provide the requisite corroboration that would have supported the giving of the inference instruction. The State's evidence consisted of two witnesses seeing a man apparently standing on the fuel tank inside the fenced yard of the North Mason School District bus barn, the police stopping a truck seen leaving the area of the bus barn that had nearly empty fuel tanks and a fuel pump that may or may not have worked in its bed, and a cap being loose on the fuel tank in the bus barn yard. What this evidence amounts to is evidence of a possible criminal trespass not a burglary. The "sole" evidence establishing the additional element the State bore the burden of proving beyond a reasonable doubt of the intent to commit a crime was the inference instruction—Instruction No. 10A. The trial court erred in giving Instruction No. 10A over Hartman's objection where it was not supported by the record. This court should reverse Hartman's conviction.

(4) THERE WAS INSUFFICIENT EVIDENCE ELICITED AT TRIAL TO PROVE BEYOND A REASONABLE DOUBT THAT HARTMAN WAS GUILTY OF BURGLARY IN THE SECOND DEGREE.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact would have found the essential elements of a crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d

1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928.

Here, Hartman was charged and convicted of burglary in the second degree. In order to sustain this charge and conviction, the State bore the burden of proving beyond a reasonable doubt that Hartman was in fact inside the bus barn’s fenced yard and was there with the intent to commit a crime. Based on the evidence elicited at trial, the sum of the State’s evidence to establish burglary beyond a reasonable doubt consisted of two witnesses seeing a man apparently standing on the fuel tank inside the fenced yard of the North Mason School District bus barn, the police stopping a truck seen leaving the area of the bus barn that had nearly empty fuel tanks and a fuel pump that may or may not have worked in its bed, and a cap being loose on the fuel tank in the bus barn yard. What this evidence amounts to is

evidence of a possible criminal trespass not a burglary. This court should reverse and dismiss Hartman's conviction.

E. CONCLUSION

Based on the above, Hartman respectfully requests this court to reverse and dismiss his conviction for burglary in the second degree.

DATED this 6th day of July 2007.

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CERTIFICATE OF SERVICE

Patricia A. Pethick hereby certifies under penalty of perjury under the laws of the State of Washington that on the 6th day of July 2007, I delivered a true and correct copy of the Brief of Appellant to which this certificate is attached by United States Mail, to the following:

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Signed at Tacoma, Washington this 6th day of July 2007.

Patricia A. Pethick
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