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No. 35867-4-III

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

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State of Washington

v.

Robert Lloyd Ayerst

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**Brief of Appellant**

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Appeal from Asotin County Superior Court No. 16-1-00150-7

The Honorable Scott D. Gallina

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## INTRODUCTION

Robert Ayerst was convicted of attempted burglary second degree, malicious mischief second degree, and bail jumping. He now appeals his conviction for attempted burglary as insufficient evidence was adduced at trial to support that conviction.

## ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR 1: Insufficient evidence supports Mr. Ayerst's conviction for attempted burglary because no evidence of trespass was adduced, and intent may not be inferred from equivocal conduct.

## ISSUES

- 1. Whether sufficient evidence supports Mr. Ayerst's conviction for attempted second degree burglary where the jury made plain that equivocal inferences could be drawn from the evidence?**

## MATERIAL FACTS

On September 6, 2016 at approximately 2:30 a.m., Robert Ayerst was washing his white GMC pickup at Mr. Suds Car Wash in Clarkston, Washington. With him was an individual whom he did not know but had represented that he needed a ride because of a car breakdown. Verbatim Report of Proceedings (VRP) at 153. During that time, the individual with Mr. Ayerst left the truck and came back a short time later. VRP at 74-89;

Exhibit P2. Mr. Ayerst then finished washing his truck, and then left the car wash. *Id.* He then backed his truck into the facility's parking lot, and then left a moment later. All of this was captured on security footage. *See* Exhibit P2.

The next morning, Bruce Meacham, the owner of the car wash facility was notified that the property's storage shed doors had been ripped open. VRP at 64. Upon arriving, he found them to be sprung, but the internal contents of the building appeared untouched. VRP at 64-65. He then called police. VRP at 65. A security system had been installed the previous day, and the footage was turned over to police. The footage showed Mr. Ayerst's presence as well as the individual with him. VRP at 74-89. Mr. Ayerst was identified by his license plate, and ultimately arrested by police on a resulting warrant. VRP at 89. He ultimately charged by information with attempted burglary in the second degree, second degree malicious mischief, and, by amended information, bail jumping. Clerk's Papers (CP) at 1-2, 25-27.

At trial, the state introduced testimony from the car wash owner, his security footage, and the testimony of law enforcement officers – none of whom were present at the time the incident took place. *See generally*, VRP at 49-128. Accordingly, the focus of the State's attempted burglary and malicious mischief cases centered around the security footage, and the

inferences that could be drawn therefrom. *Id.* The video itself did not show the building being vandalized, but rather, Mr. Ayerst's companion with something resembling a tow strap beneath his hoodie, Mr. Ayerst's vehicle backing up to the location where the building was located, and then his headlights bounce as he then pulled away and left the premises. VRP at 74-89; Exhibit P2. The video did not show any evidence of entry into the building by either man. *Id.*

Mr. Ayerst took the stand in his own defense, and adamantly denied any wrongdoing. VRP at 151-193. Nevertheless, he was convicted by jury of all three offenses, and sentenced within the standard range. CP at 93, 103-110. This appeal timely followed. CP at 112-120.

## ARGUMENT

1. Insufficient evidence supports Mr. Ayerst's attempted burglary conviction because his alleged actions were equivocal, and no evidence was introduced by the State to demonstrate his intent.

It is axiomatic that, in order to determine whether sufficient evidence was adduced at trial to support a conviction, this Court looks to whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Salinas*, 119 Wn. 2d 192, 201 P.2d 1068 (1992). As such, the State's evidence is taken as true, and all reasonable inferences therefore

drawn in its favor. *Id.* The State may prove its case through either direct or circumstantial evidence, which are weighed equally. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997). Here, as discussed below, insufficient evidence was presented to demonstrate the crime of attempted second degree burglary beyond a reasonable doubt and so Mr. Ayerst's conviction must not stand.

“A person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building other than a vehicle or a dwelling.” RCW 9A.52.030. A person is guilty of attempt if, “with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime.” RCW 9A.28.020(1).

While intent may be generally inferred by the jury from all the facts and circumstances surrounding the commission of an act, intent may not be inferred from conduct that is patently equivocal. Stated differently, “an inference should not arise where there exist other reasonable conclusions that would follow from the circumstances.” *State v. Jackson*, 112 Wn.2d 867, 876, 774 P.2d 1211 (1989).

In *Jackson*, a law enforcement officer observed the defendant repeatedly kick a door window, and then walk away once he spotted the officer. *Id.* at 870. Upon inspection, it was discovered that the window had

been damaged, and that footprints matching the defendant's shoes were to be seen all about the window. *Id.* The defendant was charged with second degree burglary and denied the same. *Id.* at 870-71. He was ultimately convicted after the trial court instructed the jury that intent to commit burglary may be inferred from the defendant's actions. The Court of Appeals affirmed the conviction. *Id.* at 873.

Upon review, our Supreme Court reversed and dismissed, holding that intent to commit a crime may not be inferred by equivocal behavior, to wit: that the substantial step of breaking the window could mean either that the defendant was intending to commit a burglary, or that he intended only malicious mischief. Where such equivocal behavior is shown, intent may not be inferred and therefore the jury may not be instructed as such. *Id.* at 876.

Subsequently, in *State v. Bencivenga*, the Supreme Court overturned a Division One dismissal of a second-degree attempted burglary conviction owing to insufficient evidence. 137 Wn.2d 703, 974 P.2d 832 (1999). The *Bencivenga* court distinguished *Jackson* because *Jackson* had at issue a jury instruction creating an inference, whereas the case before it did not. *Id.* at 708-09. The court explained that the holding in *Jackson* did not restrict the fact finder from determining what is "reasonable;" rather, the intent was to free the fact-finder from any constraint arising from a instructed inference.

*Id.* at 708. As such, the court determined that absent such an instruction it was an invasion of the fact-finding province to dismiss the conviction on the grounds found in *Jackson*, and that the fact-finder was free to infer intent to commit a crime, even where no evidence of entry existed. *Id.* at 709-711.

Notably, in both *Jackson* and *Bencivenga*, the crime of malicious mischief was not at issue, and so the issue was not whether the fact finder *could* have found a reasonable alternative, but rather, whether the inference relied upon by the fact-finder to ascertain intent was sufficient to convict on its own accord. In *Jackson*, it was insufficient owing to the jury instruction, and in *Bencivenga*, it was sufficient owing to the *lack* of an interfering instruction.

Here however, even taking all evidence in a light most favorable to the State, there was insufficient evidence adduced to demonstrate that Mr. Ayerst or his purported accomplice committed attempted burglary. Rather, all that was adduced was that he and the other man were present at the scene, and that by inference from reflection of the truck's lights, the truck pulled the tow rope that damaged the building's doors. *See* VRP; Exhibit P2. Mr. Ayerst's truck is then seen driving away. *Id.* No testimony or video supported any form of trespass or entry into the building. *Id.*

It was from this evidence alone that the jury determined that Mr. Ayerst was guilty of both attempted burglary *and* malicious mischief.<sup>1</sup> This resulting equivalence, absent any other information, is insufficient to meet the state's burden regarding second degree attempted burglary simply because the jury itself confirmed the existence of a reasonable alternative to the intent to commit another crime when it determined that Mr. Ayerst was guilty of malicious mischief. After all, "if the finder of fact concludes an alternative *reasonable* explanation exists for the defendant's actions, then the State has failed to meet its burden of establishing guilt beyond a reasonable doubt." *Bencivenga*, 137 Wn.2d at 708. Accordingly, Mr. Ayerst's conviction for attempted second degree burglary must be dismissed with prejudice.

## CONCLUSION

For reasons discussed above, Mr. Ayerst's conviction for attempted burglary must be dismissed.

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<sup>1</sup> After all, the burden lies with the State to charge in the alternative, and here it apparently failed to do so. Notably, neither the charging document nor the jury instructions provide for a finding of malicious mischief as an alternative offense, and so the jury was free to create an equivalency that does not stand up as a matter of law under *Jackson*.

Respectfully submitted this 1<sup>st</sup> day of October, 2018 by:

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