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Court of Appeals
Division III
State of Washington
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No. 35867-4-III

IN THE COURT OF THE APPEALS
OF THE STATE OF WASHINGTON

DIVISION III

THE STATE OF WASHINGTON, Respondent

v.

ROBERT LLOYD AYERST, Appellant.

BRIEF OF RESPONDENT

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I. SUMMARY OF THE ISSUE

1. WAS THERE SUFFICIENT EVIDENCE PRODUCED AT TRIAL TO SUPPORT THE JURY'S VERDICT OF GUILTY ON THE CHARGE OF BURGLARY IN THE SECOND DEGREE?

II. SUMMARY OF ARGUMENT

1. THE JURY'S VERICT OF GUILTY ON THE CHARGE OF BURGLARY IN THE SECOND DEGREE WAS SUPPORTED BY AMPLE EVIDENCE.

III. STATEMENT OF THE CASE

On September 6, 2016, in the early morning hours, the Appellant, Robert L. Ayerst, and an unidentified adult male used a tow strap and a pickup truck to attempt to break open the doors on the Mr. Suds Carwash on Bridge Street in Clarkston, Asotin, County Washington. Report of Proceedings (hereinafter RP) p. 64 - 65, 76, 79-80, 82, 84. The owner, Bruce Meacham arrived at the business early the next morning and observed the doors to the shop area to be damaged and a yellow tow strap hanging from the handles. RP 64. The doors were damaged and sprung on their hinges. RP 64. Security footage was provided to police that depicted the Appellant arrive at the car wash at around 2:23 a.m. in his White GMC pickup truck. RP 66, 74-75, 85.

Upon arrival, the Appellant drove his pickup through the car wash lot, passed the doors to the shop, and then circled around, pulling into one of the wash bays. RP 74, 84 - 85. The Appellant exited his truck and began washing it. RP 74. His unidentified passenger exited the pickup with a yellow tow strap with a metal hook under his grey sweatshirt. RP 74-75. The passenger then walked off camera to the area where the doors to the shop area are located. RP 75. A pedestrian walking on Bridge Street interrupted the effort and the passenger returned briefly to the pickup. RP 75. After the pedestrian passed by, the passenger again exited the pickup and

went back to the area where the shop doors are located. RP 75. Upon his return, the Appellant completed washing his pickup. RP 75. The Appellant got into his pickup and backed out of the carwash.¹ RP 75. The Appellant then pulled back through the car wash lot on the south side and around in front of the shop doors. RP 75. He continued to the vacuums for a short time. RP 75. The Appellant then backed his pickup back around to a position directly in front of the doors to the shop area. RP 75. They then attached the tow strap to the truck and pulled on them with the pickup.² RP 75-76. This occurred at approximately 2:40 a.m. RP 177. During the State's case, Detective Denny testified that Appellant's headlights could be seen against the hotel wall across from the carwash and there was a noticeable dip, indicating that the level of the lights lowered. RP 75. Detective Denny posited that this was consistent with the vehicle pulling against something solid like the doors to the carwash shop. RP 75-76. The Appellant then pulled away, from the doors, leaving the tow strap behind, and exiting the car wash property. RP 89. Exhibit P-1.

¹This was a very circuitous route taken by the Appellant both in entering and exiting the car wash, a fact that State's counsel pointed out in closing argument. RP 222.

²The jury found that the Appellant did in fact damage the doors in the manner described and the Appellant does not assail the jury's verdict on this point.

The Appellant and his pickup were then observed by Officer Brian Odenborg at approximately 2:55 a.m. at the Zip Trip convenience store across the street from the Mr. Suds carwash. RP 82, 86, 112 - 114. Officer Odenborg had stopped at the Zip Trip for a midshift refreshment and observed a white GMC pickup. RO 111-112. The officer entered the store and noticed that there were no other patrons. RP 113. The officer observed that there were two male occupants who were simply sitting in the truck. RP 113. Neither made eye contact or otherwise acknowledged the officer's presence, which Officer Odenborg found unusual. RP 112. Due to not recognizing the pickup, the hour of the night and the lack of apparent purpose to their presence at the store, Officer Odenborg ran the plate on the pickup through dispatch and it returned to the Appellant. RP 114-115.

The State charged the Appellant with Attempted Burglary in the Second Degree, Malicious Mischief in the Second Degree³ and a warrant was issued for his arrest. Clerk's Papers (hereinafter CP) 1-2, 3. The Appellant, who resided in Dayton, Washington, was subsequently arrested and denied that he was even in Clarkston, Washington on September 6, 2016. RP 90. When shown a still

³The Appellant was later charged with Bail Jumping (Felony) as well, due to his failure to appear at a hearing in this matter. CP 25-27. The Appellant's actions of forcing entry on the shop doors caused damages in excess of one thousand nine hundred dollars (\$1,900.00). RP 68. The Appellant challenges neither the Malicious Mischief conviction nor the Bail Jumping conviction.

frame from the surveillance video, he denied that the person depicted washing his pickup, claiming that he often loaned out his pickup. RP 91-92.

The case proceeded to trial on November 16, 2017. RP 34-253. The jury instructions were submitted by agreement of the parties and did not include WPIC 60.05. RP 142-146, CP 74-92. The jury unanimously found the Appellant guilty as charged of Attempted Burglary in the Second Degree, Malicious Mischief in the Second Degree, and Bail Jumping (C Felony). CP 93. The Trial Court accepted the verdicts and subsequently sentenced the Appellant to a standard range sentence of fifty-five and a half (55.5) months on an offender score of twenty-two (22), rejecting the State's request for an exceptional sentence based upon "free crimes" under RCW 9.94A.535(2)(c). CP 71, 103-110.

The Appellant now challenges the sufficiency of the trial evidence as it relates to the charge of Attempted Burglary in the Second Degree.

IV. DISCUSSION

The Appellant sole challenge relates to the sufficiency of the evidence to support his conviction for Attempted Burglary in the Second Degree. The Appellant claims that evidence of his intent to

commit a crime inside the Mr. Suds car wash shop is lacking. Because his lone authority does not support his position and well settled law rejects the very argument upon which he relies, this Court should reject his appeal. The evidence produced at trial was more than sufficient to support the jury's verdict and his conviction should therefore be affirmed.

1. THE JURY'S VERICT OF GUILTY ON THE CHARGE OF BURGLARY IN THE SECOND DEGREE WAS SUPPORTED BY AMPLE EVIDENCE.

The Appellant claims that there was insufficient evidence produced at trial to support the jury's verdict. Specifically, the Appellant claims that there was insufficient evidence that he intended to commit a crime against persons or property once inside the carwash shop. The Appellant only substantive citation is to State v. Jackson, 112 Wn.2d 867, 774 P.2d 1211 (1989). The Appellant's reliance on this case is misplaced. More significantly, the Appellant grossly overstates the ruling and the result therein.

In Jackson, the defendant was charged with Attempted Burglary in the Second Degree based upon an officer's observation of him kicking the door to a business and damaging it. *Id.* at 870. At trial, the court instructed the jury pursuant to a slightly modified version WPIC 60.05, which allows a jury to infer intent to commit a crime from the act of unlawfully entering or remaining. *Id.* at 872. In

reversing the conviction, the Supreme Court held that WPIC 60.05 was not applicable to attempted burglary where no entry occurs. *Id.* at 876.

As a starting point, the State takes umbrage, as should this court, at the intentionally misleading description of the Supreme Court's ruling supplied by the Appellant. In his brief, the Appellant states, "Upon review, our Supreme Court reversed **and dismissed**, holding that the intent to commit a crime may not be inferred by equivocal behavior, . . ." Brief of Appellant, p. 5 (*emphasis added*). This is a blatant misstatement of the results of the decision in Jackson. The Court did not reverse and dismiss, but rather, reversed and "remanded for a new trial." Jackson, p. 879. This distinction is procedurally significant and important. That the Supreme Court remanded for a new trial necessarily means that, even *sub silentio*, the Court found that there was sufficient evidence in Jackson to support the verdict. The appropriate remedy for insufficiency of the evidence is dismissal with prejudice. See State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). Retrial following reversal for insufficient evidence is "unequivocally prohibited" and dismissal is the remedy. See *id.* The Appellant's mischaracterization does not therefore appear to be inadvertent and is, at best, reckless with regard to appropriate levels of candor.

The Appellant's argument intimates that the Supreme Court decided the case based upon insufficient quantum of evidence. This is simply not true. The Court decided the case based upon an instructional error. Jackson at 876. The Had there been insufficient evidence, they would have reversed and dismissed. That the Court reversed and remanded for a new trial makes clear that there was sufficient evidence for the jury to have found the defendant guilty, but the court erred in nudging the jury in that direction. This is supported by the Court's subsequent decision in State v. Bencivenga, 137 Wn.2d 703, 974 P.2d 832 (1999). Therein, the Court expressly stated:

The issue we there decided was whether it was error "to instruct the jury that it may infer the defendant acted with intent to commit a crime within the building from the fact that the defendant may have attempted entrance into the building," concluding it was.

137 Wn.2d at 708. The Court continued in clarifying its ruling in Jackson:

But we did not hold in Jackson that the fact finder would be precluded from determining what is "reasonable." To the contrary, we sought to free the fact finder from any direction toward guilt.

Id. In the case at bar, the jury was not instructed regarding the permissive presumption that unlawful entry (or the attempted at the same) allows the jury to infer intent to commit a crime once inside. As such, Jackson is inapplicable. If any confusion remained, the Court eliminated any possibility therefore in stating:

The reason Jackson does not apply to this situation, which does not involve a jury instruction, is that such would invade the province of the fact finder by appropriating to the appellate court the role of factually determining the reasonableness of an inference. Just because there are hypothetically rational alternative conclusions to be drawn from the proven facts, the fact finder is not lawfully barred against discarding one possible inference when it concludes such inference unreasonable under the circumstances. Nothing forbids a jury, or a judge, from logically inferring intent from proven facts, so long as it is satisfied the state has proved that intent beyond a reasonable doubt.

Bencivenga, 137 Wn.2d at 708–09. To the extent that the Appellant herein hold Jackson up as authority for his proposition that equivocal behavior is insufficient to support conviction for Attempted Burglary in the Second Degree, he is sorely mistaken. While the jury may not be so instructed, it certainly may reject alternative explanations. The Appellant’s argument was similarly rejected by this Court recently in State v. Perez, 35043-6-III, 2018 WL 3801846, (*Unpub.*)(Div. III, Aug. 9, 2018).⁴ Therein, this Court stated, “Jackson does not apply to the question of whether sufficient evidence supports a jury’s verdict.” *Id.* at 3. This Court continued:

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

⁴ GR 14.1(a) governs the citation to unpublished opinions and states in pertinent part, “Unpublished opinions of the Court of Appeals have no precedential value and are not binding on any court. However, unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate.”

inferring intent from proven facts, so long as it is satisfied the state has proved that intent beyond a reasonable doubt." 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. (Citing Bencivenga, 137 Wn.2d at 708, 711.

The Appellant has dressed up his argument for the dance, but ultimately, it boils down to a simple issue of sufficiency of the evidence to support the jury's guilty verdict on the charge of Attempted Burglary in the Second Degree. In order to secure a conviction, Due Process requires that the State prove all elements of the crime beyond a reasonable doubt. State v. Washington, 135 Wn. App. 42, 48, 143 P.3d 606 (Div. I, 2006).

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 could have found guilt beyond a reasonable doubt. When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.

State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)(*internal citations omitted*). To prove Attempted Burglary in the Second Degree, the State was required to show that the Appellant, with the

intent to commit a Burglary in the Second Degree, committed any act constituting a substantial step toward commission of a Burglary in the Second Degree. RCW 9A.28.020(1). A "substantial step" is conduct which is "strongly corroborative of the actor's criminal purpose." See State v. Townsend, 147 Wn.2d 666, 679, 57 P.3d 255 (2002). Burglary in the Second Degree is committed when the person, "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.

Here, the Appellant drove to the carwash, performed reconnaissance by circling the lot and the shop doors. He then washed his truck while his unidentified accomplice⁵ attached the tow strap to the doors of the shop. He then backed his truck up to the doors and the strap was attached. Using his pickup, he pulled on the doors to force them open. He then retreated to the convenience store across the street to see whether anyone notice the commotion or called the police before returning to take property inside. When Officer Odenborg arrived at the Zip Trip a few minutes later, the Appellant decided against completing his plan and left the tow strap still attached to the doors.

⁵The jury was instructed on accomplice liability. CP 79.

The Appellant argues that the State's evidence was insufficient on proof that the Appellant intended to make entry once he forced open the doors. It should be noted that the Appellant never disputed that someone tried to burglarize the Mr. Suds carwash shop that night. In his trial testimony on cross examination the Appellant conceded this point.

Q You don't dispute that someone tried to break into the Mr. Suds Car Wash?

A No, I don't dispute that. I don't dispute that at all.

Q Someone tried to burglarize it, correct?

A Yes, I totally agree with that.

RP 186-187. The Appellant simply denied that he was the one that committed the crimes. RP158-159. There was never any dispute in this case that someone tried to burglarize the Mr. Suds carwash. The only issue in the case was identity of the Appellant as the perpetrator.

Intent to attempt a crime also may be inferred from all the facts and circumstances. State v. Nicholson, 77 Wn.2d 415, 420, 463 P.2d 633 (1969). The evidence was compelling that more was intended by the Appellant than just a vandalism prank. If he had only intended to damage the doors, as the Appellant now intimates, then the tow strap would have been unnecessary. He and his cohort could simply have kicked on them like the defendant in Jackson, or rammed them with

his pickup. Instead, he had his compatriot tie a strap to them and pulled them open. Where a vandal would flee the scene for fear of being caught, the Appellant remained in close proximity where he could observe whether his efforts had drawn unwanted attention. This is further evidence of his intent to return and enter the premises for the purpose of stealing shop contents. The hour of night is also strongly suggestive of his intentions. It is also telling that denied that he was in Clarkston that night when questioned by police.

The Appellant hangs his argument on a claim that there is more than one explanation for his behavior. Perhaps he simply wanted to cause damage. This contrary to his trial testimony and is otherwise legally irrelevant. RP 159.

Just because there are hypothetically rational alternative conclusions to be drawn from the proven facts, the fact finder is not lawfully barred against discarding one possible inference when it concludes such inference unreasonable under the circumstances. Nothing forbids a jury, or a judge, from logically inferring intent from proven facts, so long as it is satisfied the state has proved that intent beyond a reasonable doubt.

Bencivenga, 137 Wn.2d 703, 708–09. (*Internal citation omitted*).

An essential function of the fact finder is to discount theories which it determines unreasonable because the finder of fact is the sole and exclusive judge of the evidence, the weight to be given thereto, and the credibility of witnesses. ***That the crime here charged is attempted burglary does not change the analysis.***

Id. (*Internal citation omitted*)(*emphasis added*). The jury here

weighted the evidence, separate the grain from the chaff and determined that the Appellant had tried to burglarize the carwash that night.

Less evidence has been held to be sufficient to sustain attempted burglary charges. In State v. Chacky, 177 Wn. 694, 695, 33 P.2d 111 (1934) held that sufficient evidence supported conviction where a police officer and a companion saw two men drive up to a Piggly Wiggly store and pry the padlock off the door of the building. *Id.* at 695. The police officer immediately moved toward the building and thwarted the efforts. *Id.* Affirming Chacky's conviction, the Court stated, "This evidence was enough to take the case to the jury on the questions of criminal intent and overt act." *Id.*

In State v. Bergeron, 105 Wn.2d 1, 3, 711 P.2d 1000 (1985) the offender broke a window to a residence and slid it open before fleeing prior to entry. The Supreme Court again determined that the evidence was sufficient to support the charge of attempted burglary. Therein the Court stated: "Mr. Bergeron's conduct was not patently equivocal; it plainly indicated his criminal intent as a matter of logical probability." *Id.* at 20.

In State v. Brooks, the defendant therein attempted to enter a an apartment by use of a screwdriver. 107 Wn. App. 925, 927-928, 29 P.3d 45 (Div. I, 2001). He first attempted to upon the gate to the

complex with the screwdriver and, failing to do so, climbed the fence and attempted to use the screwdriver to open an apartment door. *See id.* This was determined to be sufficient evidence of his intent to commit a crime once inside, and the court affirmed his conviction for Attempted Residential Burglary. *See id.* at 930. Therein, the court stated:

The use of the screwdriver rather than conventional methods to seek entry further illustrates that Brooks sought to enter the apartment for illegal reasons.

Id. Here, instead of a screwdriver, the Appellant used a tow strap and his pickup. This evidence is at least as strong as that in Brooks.

In Perez, *supra*, this Court determined that there was sufficient evidence to support conviction for attempted burglary where the defendant kicked several doors, threw rocks through the windows, and yelled at the occupants. Perez, at 1. Perez is much closer to the scenario propounded by the Appellant, yet this Court determined the defendant's efforts therein were sufficiently indicative of his criminal intent. Here, the efforts of the Appellant were much more strongly indicative of trying to break in to a building than someone merely wishing to commit vandalism. While there were many targets for sheer vandalism present, like the coin acceptors, carwash wands and vacuum machines, the Appellant applied force to the only doors in the facility. Further, this force was calculated at making entry, not

maximizing damage. The evidence herein was clearly sufficient to sustain the jury's verdict.

2. ISSUES RAISED IN THE APPELLANT'S STATEMENT OF ADDITIONAL GROUNDS ARE MERITLESS.

The Appellant raises two issues in his Statement of Additional Grounds. Neither issues has any legal or factual merit and should therefore be rejected by this Court.

First, the Appellant argues that his trial counsel should have argued concerning the timing of a call to the police concerning noise coming from the Mr. Suds Car Wash approximately one hour after the Appellant had broken open the doors to the maintenance shop. First, there is insufficient factual basis in the record to support his claim. "Courts engage in a strong presumption counsel's representation was effective." *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995)(*internal citations omitted*). Where the claim is brought on direct appeal, "the reviewing court will not consider matters outside the trial record." *Id.* Here, there is nothing in the record to support that anyone called 911 to report a loud bang at the carwash. The only reference to anyone hearing anything around that time is a single statement in Officer Lorz report which states, "A neighbor stated that he may have heard a noise around 0330 hours that morning." CP 43. Without sufficient factual record, this Court should decline to review the issue.

Even if this Court assumes the facts are as claimed by the Appellant, he cannot demonstrate that trial counsel was ineffective.

To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. Competency of counsel is determined based upon the entire record below.

McFarland, 127 Wn.2d at 334–35 (*internal citations omitted*).

“When counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient.” State v. Kylo, 166 Wn.2d 856, 863, 215 P.3d 177 (2009). Counsel's decision not to pursue this issue was sound strategy. Counsel sought to assail the investigation based upon the video itself, arguing that there wasn't sufficient time to attach the tow strap to the truck. RP 93-98, 239-240. Counsel intimated that the police identified the Appellant and ceased investigating further. RP 100.

Additionally, the Appellant cannot show prejudice in light of the overwhelming evidence of his complicity in the case. The jury had the benefit of the video establishing that the Defendant and his vehicle were present at the carwash and can be seen backing into a position in front of the carwash shop doors. Prior to that, the jury could see his

passenger emerge from the pickup with the yellow tow strap dangling out of his hooded sweatshirt and walk to the area of the shop doors. Police later found this strap still hanging from the shop door handles. The fact that the Appellant denied being in Clarkston or that he was the person on the video demonstrated his consciousness of guilt.

Finally, the Appellant's incredible account of his evening's events was more than the jury could reasonably believe. He claimed that he drove from Dayton, Washington that night for the purpose of visiting his sister in Weippe, Idaho.⁶ He claimed that, at that late hour, he was struck by the need to speak with his sister about the recent death of their mother. PR 192. He claimed that he had picked up a stranded motorist who needed a jump and, decided to wash his truck in Clarkston at 2:00 a.m. before driving on to Weippe. RP 191-2. Rather than part ways, he and this stranger drove to the carwash. RP 191. He further He testified that He then went to the convenience store and hung out with his new "friend"⁷ for a fifteen minutes to a half hour. RP 191-192. Having driven to Clarkston and washed his

⁶The travel time from Dayton, Washington to Clarkston, Washington is approximately one hour twenty-nine minutes. See <https://www.distance-cities.com/distance-dayton-wa-to-clarkston-wa>. The travel time from Clarkston, Washington to Weippe, Idaho is one hour forty-seven minutes. See <https://www.distance-cities.com/distance-clarkston-wa-to-weippe-id>.

⁷The Appellant couldn't give the name of his passenger and thought perhaps it was "Timmy." RP 153.

pickup, he then decided not to proceed to Weippe. RP 192. In addition to this incredible tale of events, the Appellant attempted to explain the “dip” in his headlights observed by Detective Denny on the video. RP 156-157. He testified that when he was backing up toward the shop doors he suddenly noticed someone sleeping in the parking lot and braked hard to avoid backing over him. RP 156-157, 177. There was no credible reason for the Appellant to have backed up into the area of the shop doors. The route he took through the car wash lot led him unnecessarily past the car wash shop doors on three different occasions. RP 170-179. The Appellant's attempts to explain away all the events captured on the video and the other compelling evidence was simply not credible and the jury so found. That someone may have heard a noise coming from the carwash area at 3:30 a.m. was simply of no consequence. The video evidence conclusively proved that the Appellant used his truck to force upon the doors with the yellow strap that his passenger attached minutes earlier. The Appellant has failed to show that the outcome of the trial would have been different. See Kyllo, 166 Wn.2d at 862.

Next, the Appellant, in effect, argues that the trial court should have granted his motion to dismiss pursuant to State v. Knapstad, 107 Wn.2d 346, 729 P.2d 48 (1986). In State v. Knapstad, the Supreme Court held that a trial court has inherent power to dismiss

a criminal prosecution for insufficiency of the charge. *Id.* In recognition of that power, the Knapstad court held that a trial court may entertain a pretrial motion to dismiss only if there are no material disputed facts and the undisputed facts do not establish a prima facie case of guilt. See State v. Dunn, 82 Wn.App. 122, 125, 916 P.2d 952 (Div. III, 1996). The trial court considers the evidence and the reasonable inferences in the light most favorable to the State when determining whether to grant a motion for dismissal under Knapstad. See State v. Jackson, 82 Wn.App. 594, 608, 918 P.2d 945 (Div. II, 1996). A motion for dismissal under Knapstad cannot be sustained if a rational fact finder could find the essential elements of the crime beyond a reasonable doubt. See State v. Bradford, 60 Wn.App. 857, 862, 808 P.2d 174 (Div. I, 1991). A motion under Knapstad also requires an affidavit from the defendant or defense counsel that states that no facts are in dispute. Knapstad, 107 Wn.2d at 356.

Here, the affidavit of counsel was hardly a stipulation to undisputed facts. CP 33-37. Rather, it was a summary of the Appellant's theory of the case and argued the inferences in a light most favorable to the Appellant. In response thereto, the State filed a declaration disputing the facts asserted by the Appellant. "If the State specifically denies the material facts alleged in the affidavit, the

motion is defeated.” Dunn, at 126. Here, the trial court properly denied the Appellant’s motion.

Finally, and more significantly, a trial court’s denial of a Knapstad motion is not reviewable on appeal. See State v. Jackson, 82 Wn. App. at 608. (“[A] defendant who goes to trial may not appeal the denial of a Knapstad motion.”). The Appellant cannot appeal the denial of his motion to dismiss. The issues raised by the Appellant in his Statement of Additional Grounds are without merit. His convictions should therefore be affirmed.

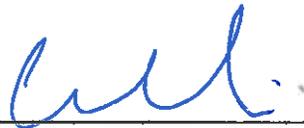
V. CONCLUSION

The Appellant’s attempt to mischaracterize precedent to support his arguments must necessarily fail. The evidence was sufficient to support the jury’s guilty verdict. The jury properly concluded, based upon the evidence, that the Appellant took a substantial step toward entering the Mr. Suds carwash, with the intent to commit a crime against persons or property therein. Trial counsel was not ineffective. Finally, the trial court properly denied the Appellant’s motion to dismiss, which decision is, in any event, not appealable. The Appellant’s conviction should therefore be affirmed and his appeal rejected and denied. The State respectfully requests

this Court affirm the Appellant's conviction for Attempted Burglary in the Second Degree.

Dated this 13th day of November, 2018.

Respectfully submitted,



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

THE STATE OF WASHINGTON,

Respondent,

v.

ROBERT L. AYERST,

Appellant.

Court of Appeals No: 35867-4-III

DECLARATION OF SERVICE

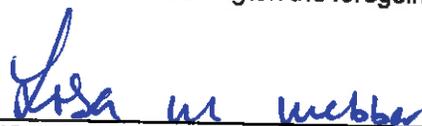
DECLARATION

On November 14, 2018 I electronically mailed, through the portal, a copy of the BRIEF OF RESPONDENT in this matter to:

JOHN C. JULIAN
john@jcjulian.com

I declare under penalty of perjury under the laws of the State of Washington the foregoing statement is true and correct.

Signed at Asotin, Washington on November 14, 2018.



LISA M. WEBBER
Office Manager

**DECLARATION
OF SERVICE**

ASOTIN COUNTY PROSECUTOR'S OFFICE

November 14, 2018 - 11:42 AM

Transmittal Information

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