

.1 . 63937-4

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NO. 63937-4-I

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

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STATE OF WASHINGTON,

Respondent,

v.

BAILEY C. WITT,

Appellant.

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BRIEF OF RESPONDENT

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## **I. ISSUE**

Was there circumstantial evidence that defendant took a substantial step towards unlawfully entering a building with the intent to commit a crime therein?

## **II. STATEMENT OF THE CASE**

On April 4, 2009, at about 4:45 AM, an officer saw a car “kind of secreted” in a parking area on the northwest side of the Viking Village commercial complex. 6/29 RP 28, 33. The officer approached in his marked patrol car. The driver of the parked car got out and stood beside the car. As the officer began to speak with the driver, he heard a sound “like a large metal object hitting the ground.” The sound came from the other side of the building. The officer called for another unit, since he believed there was a burglary in progress. 6/29 RP 31-33.

The second responding officer saw a male – later identified as defendant -- in dark clothing with a dark backpack running from the entrance of the laundromat in Viking Village towards a box van. The officer went to the front of the box van and saw defendant looking at her. He was no longer carrying the backpack. The officer told defendant to stop, but defendant ran away. The officer gave chase. 6/29 RP 76-78.

Defendant ran into some bushes. The officer told him to come out because she had requested a police dog. Defendant approached the officer, and she arrested him. Since defendant no longer had the backpack, the officer went back to the box van. She saw the backpack lying on the ground near the rear wheel. She also saw a large crowbar on top of the wheel. 6/29 RP 79-81.

When the police dog arrived, he went into the area of bushes where defendant had hidden. He found two work gloves in the bushes. 6/29 RP 87.

After both suspects were secured, the first responding officer requested a fire truck so he could go onto the roof of Viking Village. Using the fire truck's ladder, the officer and two other officers went on to the roof. The officers saw one set of footprints in the frost. The footprints went around a vent then off towards the front of the building. 6/29 RP 40. The officers left the roof and secured the building while waiting for a detective to arrive. 6/29 RP 42.

A detective arrived and was briefed by the first responding officer. 6/29 RP 116. The detective went up on the roof to photograph the footprints. He took photos of the prints around the vent hood. 6/29 RP 118-19. One of the photos showed a piece of tread was missing from the heel area of the left shoe. The left shoe

defendant was wearing was missing a similar part of its tread. 6/30 RP 140-14142, 145.

The detective took custody of the backpack that had been found behind the box van and the crowbar. Inside the backpack were a reciprocating saw, several screwdrivers, a coping saw, a flat pry bar, tin snips, a claw hammer, latex gloves, and assorted wires and electrical connectors. The detective testified that some of these tools could be used in burglaries. He described specifically how pry bars, the crowbar, and tin snips could be used. 6/30 RP 149-51.

A few days after the attempted burglary, the detective went back to Viking Village. He saw a garbage dumpster that could have been used to gain entry onto the roof. He also saw a vertical scratch in the fascia board directly above the dumpster. 6/30 RP 153-56. The scratch appeared to be relatively fresh. 6/30 RP 157. The dumpster was about four feet from where the car was parked when it was first observed. 6/30 RP 160.

The owner of the laundromat did not know defendant. No one had permission to be on the roof of the laundromat on April 4, 2009. 6/30 RP 132, 134.

### **III. ARGUMENT**

#### **A. STANDARD OF REVIEW.**

We review . . . sufficiency of evidence challenges in a light most favorable to the State. We accept the State's evidence as true and view all reasonable inferences in favor of the State. Circumstantial evidence is as reliable as direct evidence. "Circumstantial evidence is evidence of facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common experience." A trier of fact may rely exclusively upon circumstantial evidence to support its decision. We defer to the trier of fact in matters of witness credibility and weight of evidence. We will affirm if the trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

State v. Jackson, 145 Wn. App. 814, 818, 187 P.3d 321 (2008) (footnotes omitted) (quoting Washington Practice: Washington Pattern Jury Instructions: Criminal 5.01, at 124 (2d ed.1994).

#### **B. THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE ATTEMPTED BURGLARY CONVICTION.**

In this case, the State was required to prove the following elements:

- (1) That on or about the 4th day of April, 2009, the defendant did an act that was a substantial step toward the commission of Second Degree Burglary;
- (2) That the act was done with the intent to commit Second Degree Burglary; and
- (3) That the act occurred in the State of Washington.

CP 26, see RCW 9A.28.020(1).

“A person commits the crime of Second degree burglary when he or she enters or remains unlawfully in a building with intent to commit a crime against a person or property therein.” CP 28, see RCW 9A.52.030(1).

Defendant claims “without any evidence [he] attempted to gain entry into the building, there was insufficient evidence to show [he] took a substantial step towards the commission of burglary.” Brief of Appellant 5. Defendant is wrong.

There is no requirement that the substantial step towards second degree burglary is the attempted entry of a building. See State v. Pittman, 134 Wn. App. 376, 385, 166 P.3d 720 (2006) (criminal trespass is not a lesser included crime of attempted residential burglary “because a substantial step toward committing burglary does not necessarily involve a criminal trespass”). “What constitutes a substantial step is also a factual question.” State v. Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832 (1999).

An example of a substantial step towards commission of burglary that was not an attempted entry is set out in State v. Vermillion, 66 An. App. 332, 832 P.2d 95 (1992), review denied,

120 Wn.2d 1030 (1993). There, the defendant was charged with attempted burglary. His substantial step was:

[E]nticing Ms. Downey to show him houses in which to commit the crime, reconnoitering the houses in advance, selecting one for the commission of the crime the next day, and possession of two neckties which could be used in the commission of the crime.

Vermillion, 120 Wn. App. at 338-39.

The Court of Appeals found this evidence was sufficient for the jury to find the defendant committed attempted burglary. Id. at 343. See also State v. Belieu, 50 Wn. App. 834, 848, 751 P.2d 321 (1988) (Green, J. dissenting) (ringing the doorbell to see if anyone was home was the substantial step that supported a conviction for attempted burglary), reversed, convictions reinstated, 112 Wn.2d 587 (1989).

As the California Court of Appeals said in People v. Gibson, 94 Cal. App.2d 468, 210 P.2d 747 (1949):

In view of the midnight appearance of appellant carrying a 14-foot ladder in an alley of a business section, his placing it beside a department store 20 feet high, his possession of a burlap bag containing divers tools adapted to the burglar's art, and wearing gloves to avoid leaving traces of his identity, it required no strain upon the conscience or the logic of the court to deduce that the purpose of this midnight tour was to enter an enclosure for the purpose of theft.

Gibson, 94 Cal.App.2d at 471, cited with approval, State v. West, 18 Wn. App. 686, 691, 571 P.2d 237 (1977).

Here, a person wearing a shoe that matched the tread on defendant's shoe was on the roof of the Viking Village building at 4:30 AM. That person walked around the vent on the roof. This vent would have allowed access to the interior of the building.

When defendant was first seen by a police officer, he was dressed in dark clothing. Gloves were found by the police dog that tracked defendant. Defendant was wearing a backpack containing tools that could have been used to enter the building and move between the businesses in that building. A crowbar was found on top of a wheel of the box van, near where defendant abandoned his backpack. The crowbar also could have been used to gain access to the building.

Moreover, when defendant saw an officer, he abandoned his backpack and crowbar and fled. Flight is evidence of consciousness of guilt. State v. Freeburg, 105 Wn. App. 492, 497, 20 P.3d 984 (2001).

There was circumstantial evidence from which a jury could find beyond a reasonable doubt that defendant intended to unlawfully enter the Viking Village building and commit a crime

therein, and that defendant took a substantial step towards committing second degree burglary.

**IV. CONCLUSION**

The judgment and sentence should be affirmed.

Respectfully submitted on April 5, 2010.

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