

No. 70428-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

J.H.,

Appellant.

ON APPEAL FROM THE JUVENILE DIVISION OF THE SUPERIOR
COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

APPELLANT'S OPENING BRIEF

RICHARD W. LECHICH
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

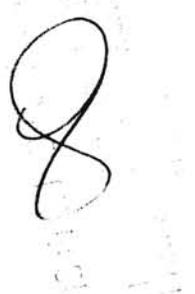
A handwritten signature in black ink is located on the right side of the page, overlapping the horizontal line above the appeal information. Below the signature, there is a faint, circular stamp that is partially obscured and difficult to read.

TABLE OF CONTENTS

A. INTRODUCTION 1

B. ASSIGNMENTS OF ERROR 1

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 2

D. STATEMENT OF THE CASE..... 4

E. ARGUMENT 7

1. The evidence was insufficient to find J.H. guilty of attempted residential burglary. 7

 a. Standard of Review 7

 b. The evidence was insufficient to conclude that J.H. took a substantial step toward committing residential burglary. 8

 c. The evidence was insufficient to infer that J.H. intended to commit burglary..... 11

 d. Remand for entry of judgment on the lesser offense of attempted first degree criminal trespass would be improper because this crime was not necessarily proven at trial and the record does not disclose that the trier of fact expressly found all the necessary elements. 14

2. The court improperly inferred criminal intent based on RCW 9A.52.040, which does not apply in attempted burglary cases..... 16

F. CONCLUSION..... 20

TABLE OF AUTHORITIES

Washington Supreme Court Cases

In re Heidari, 174 Wn.2d 288, 274 P.3d 366 (2012) 14

In re Welfare of Wilson, 91 Wn.2d 487, 588 P.2d 1161 (1979)..... 10

State v. Bencivenga, 137 Wn.2d 703, 974 P.2d 832 (1999)..... passim

State v. Bergeron, 105 Wn.2d 1, 711 P.2d 1000 (1985)..... 12, 13

State v. Carothers, 84 Wn.2d 256, 525 P.2d 731 (1974) 10

State v. Chacky, 177 Wash. 694, 33 P.2d 111 (1934) 13

State v. Deal, 128 Wn.2d 693, 911 P.2d 996 (1996) 17

State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980)..... 14

State v. Hill, 123 Wn.2d 641, 870 P.2d 313 (1994)..... 8

State v. Jackson, 112 Wn.2d 867, 774 P.2d 1211 (1989) 17, 20

State v. J-R Distributors, Inc., 82 Wn.2d 584, 512 P.2d 1049 (1973) 10

State v. Miles, 77 Wn.2d 593, 464 P.2d 723 (1970)..... 18

State v. Read, 147 Wn.2d 238, 53 P.3d 26 (2002)..... 18

State v. Salinas, 119 Wn.2d 192, 829 P.2d 1068 (1992) 7

State v. Workman, 90 Wn.2d 443, 584 P.2d 382 (1978)..... 8

Washington Court of Appeals Cases

Douglas Northwest, Inc., v. Bill O'Brien & Sons Constr., Inc., 64 Wn. App.
661, 828 P.2d 565 (1992)..... 18

State v. A.M., 163 Wn. App. 414, 260 P.3d 229 (2011)..... 7, 14, 16

<u>State v. Alvarez</u> , 105 Wn. App. 215, 19 P.3d 485 (2001)	8
<u>State v. B.J.S.</u> , 140 Wn. App. 91, 169 P.3d 34 (2007).....	7
<u>State v. Ogen</u> , 21 Wn. App. 44, 584 P.2d 957 (1978)	17
<u>State v. Pittman</u> , 134 Wn. App. 376, 166 P.3d 720 (2006)	15
<u>State v. Sandoval</u> , 123 Wn. App. 1, 94 P.3d 323 (2004)	20

Statutes

RCW 9A.28.020(1).....	8
RCW 9A.52.025(1).....	8
RCW 9A.52.040.....	17
RCW 9A.52.070.....	15

Other Authorities

11A Wash. Prac., Pattern Jury Instr. Crim. WPIC 60.05 (3d Ed).....	17
--	----

A. INTRODUCTION

Around noon on Halloween 2012, a resident heard his house alarm “chirp.” Shortly thereafter, the resident heard noise coming from outside near a window by his backyard. The resident yelled for whoever was outside to leave and pulled back the blinds of the window. He saw three young men. They left. J.H. was later identified as one of the three, charged with attempted residential burglary, and found guilty in juvenile court.

No evidence established that J.H. himself set off the alarm or that he made the noises by the window. Besides his proximity to the two other young men, no evidence tended to show that he was acting in concert with either of them. Because the evidence was insufficient to conclude that J.H. took a substantial step toward burglary or that he intended to commit burglary, this Court should reverse and order the charge dismissed with prejudice. Alternatively, this Court should reverse and remand for a new trial because the court misapplied the law by inferring criminal intent based on an inapplicable statute.

B. ASSIGNMENTS OF ERROR

1. The evidence was insufficient to find J.H. guilty of attempted residential burglary. Conclusions of Law (CL) II, III, & IV.

2. Substantial evidence does not support the findings that J.H. tried to break into the resident's home. Finding of Fact (FF) 1 & 4.

3. Substantial evidence does not support the court's finding that, after the resident looked at the alarm control panel, he then "determined that someone had opened his back sliding glass door." FF 11.

4. Substantial evidence did not establish that a nearby house, observed by witness James Beard, was owned by a person named Dao Vo. FF 4, 5, 6, 7, 24, 25.

5. The court erred in concluding that J.H. took a substantial step toward the commission of residential burglary. CL II.

6. The court erred in concluding that J.H. intended to commit residential burglary. CL II.

7. The court improperly accepted the State's erroneous argument that it could infer criminal intent based on RCW 9A.52.040, a statute that applies to burglaries, not attempted burglaries. See CL II; CP 49 (court's incorporation of its oral findings and conclusions).

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was there sufficient evidence for the court to find that J.H. tried to break into Kent Wright's home?

2. Was there sufficient evidence to conclude that J.H. took an act that was a substantial step toward the commission of residential burglary?

2. Was there sufficient evidence to conclude that J.H. intended to commit residential burglary?

3. After determining that there is insufficient evidence, the court may remand for entry of judgment on a lesser included offense if the trier of fact expressly found all the elements of the lesser offense. Attempted criminal trespass in the first degree is a lesser included offense of attempted residential burglary and requires a finding that a person intended to knowingly enter or remain in a building unlawfully. No finding expressly states this requirement was met. Should this Court decline to remand for entry of judgment on attempted criminal trespass in the first degree?

4. During closing argument, the State argued that the court could infer criminal intent based on RCW 9A.52.040. This statute provides that, in prosecutions for burglary, the trier of fact may infer criminal intent when a person enters or remains unlawfully in a building. This statute does not apply to prosecutions for attempted burglary. In its oral ruling, the court stated that it was inferring criminal intent because J.H. had no reason to be the resident's backyard. Further, the court did not correct the prosecutor on the applicability of RCW 9A.52.040. Did the court err by inferring criminal intent for attempted residential burglary based on an inapplicable statute?

D. STATEMENT OF THE CASE

Shortly before noon on Halloween, October 31, 2012, Kent Wright returned home from work to change out of a Halloween costume and prepare for an afternoon doctor's appointment. CP 46 (FF 9)¹; RP 28-29. After getting out of the shower upstairs, he heard his home alarm system "chirp." CP 11 (FF 11); RP 29. The chirp meant that a door or window could have been opened. RP 29. He checked the alarm control panel. CP 46 (FF 11). The panel indicated that the "zone" for the rear sliding door along the patio had been activated. RP 32.² This rear sliding door had caused two false alarms earlier in the summer. RP 44. From upstairs, Wright looked outside into his backyard, but did not see anyone. CP 46 (FF 11); RP 29. As he was leaving the room, he heard loud noises by one of his downstairs windows. CP 46 (FF 12); RP 29, 33.

Wright ran downstairs and yelled, "Get the fuck out of here," as he approached the window. CP 46 (FF 12). He pulled back the blinds on the window and saw three young men in his backyard. CP 46 (FF 12). Two of the young men immediately ran away while the third briefly stared back

¹ The Findings of Fact and Conclusions of Law are attached as "Appendix A."

² The findings of fact erroneously state that Wright "determined that someone had opened his back sliding glass door." CP 46 (FF 11). Wright only determined that the alarm system reported that the "zone" for the rear sliding door had been activated. RP 32. The door was not actually opened that day. RP 43.

at Wright before also leaving. CP 46 (FF 12)³; RP 33. Wright called 911 and gave a description of the person who had stared back at him to the police, who arrived about ten minutes later. CP 46-47 (FF 13-14).

Around that time, James Beard was working on remodeling a nearby home. See CP 4 (FF 4-5); RP 9, 12. Beard saw a young man knock at the door of a house⁴ across the street, which was about 85 to 100 feet from Beard. RP 12, 22. This was not Wright's house. Beard went to check the tools in his van. RP 13. When he was done, the young man across the street was no longer there. RP 14. About five minutes later, an officer arrived. RP 14. Officer Paul Peter had been dispatched to respond to a residential alarm that had gone off at 12:01 p.m. at the home. RP 47, 50. Officer Peter noticed that a pane on one of the windows had been broken and that it appeared someone had tried to pry off a screen at the back of the house. RP 48, 50. Officer Peter talked to Beard, who gave him a description of what he had seen. RP 14; 51-52.

³ This finding says that Wright "saw the respondent, who stared back at him for a moment . . ." CP 46 (12). Wright did not know J.H. and later identified J.H. as this person. CP 47 (FF 21, 22); RP 38-39.

⁴ The findings of fact identify the owner of this house as Dao Vo. CP 46, 48 (FF 4, 5, 6, 7, 24, 25). No testimony established that Vo was the owner of the house. The parties had identified Vo as the owner of the house and the State had planned on calling Vo as a witness, but the court granted J.H.'s motion to exclude Vo's testimony. RP 65.

Based on the descriptions given by Beard and Wright, Officer Scott Rankin later detained J.H. and two other male teenagers as they were walking near Kent Meridian High School. RP 80, 82. Beard and Wright were taken separately to the school for a show-up. CP 47 (FF 20). Wright identified J.H. as one of three young men in his backyard. CP 47 (FF 21). Beard identified J.H. as the person he saw knocking at the door of the house across the street from where he had been working. CP 47 (FF 24).

J.H. was arrested and spoke with Detective Craig Lamp. RP 93, 98. J.H. told Lamp that he had taken a bus from his home to Kent Station. CP 48 (FF 27). He then caught a different bus to Kent Meridian High School. CP 48 (FF 27). J.H. said he wanted to enroll there. CP 48 (FF 27). J.H. stated he had been alone since leaving his house. CP 48 (FF 27).

The State charged J.H. with attempted residential burglary, RCW 9A.28.020 & 9A.52.025, accusing him of trying to enter, together with others, Wright's home. CP 1.

Trial was held on April 2 and 8, 2013. CP 45. The court admitted J.H.'s statement to Detective Lamp. CP 50-52. The court found J.H. guilty of attempted residential burglary. CP 5. The court imposed a

manifest injustice disposition,⁵ sentencing J.H. to commitment to Juvenile Rehabilitation Administration for 31 weeks with credit for 219 days of pre-disposition detention. CP 7-8; 58. J.H. appeals. CP 12.

E. ARGUMENT

1. The evidence was insufficient to find J.H. guilty of attempted residential burglary.

a. Standard of Review

“Due process requires the State to prove beyond a reasonable doubt every essential element of a crime.” State v. A.M., 163 Wn. App. 414, 419, 260 P.3d 229 (2011). In a sufficiency of the evidence challenge, the test is whether after viewing the evidence in the light most favorable to the State, a rational trier of fact could have found all the elements of the offense beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). In reviewing a juvenile court adjudication, the appellate court decides whether substantial evidence supports the trial court's findings of fact and whether the findings support the conclusions of law. State v. B.J.S., 140 Wn. App. 91, 97, 169 P.3d 34 (2007).

“Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the

⁵ The court also imposed consecutive standard range sentences of 52-65 weeks in two different cases. CP 58. These two cases, along with an earlier disposition, are linked on appeal (# 70429-0; # 70427-3; and # 70426-5).

truth of the finding.” State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Unchallenged findings of fact are verities on appeal. A.M., 163 Wn. App. at 419. “The findings of fact must support the elements of the crime beyond a reasonable doubt.” State v. Alvarez, 105 Wn. App. 215, 220, 19 P.3d 485 (2001). Conclusions of law are reviewed de novo. A.M., 163 Wn. App. at 419.

J.H. was charged and found guilty of attempted residential burglary. “A person is guilty of residential burglary if, with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling other than a vehicle.” RCW 9A.52.025(1). “A person is guilty of an attempt to commit a crime 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). “Both the substantial step and the intent must be established beyond a reasonable doubt for a conviction to lawfully follow.” State v. Bencivenga, 137 Wn.2d 703, 707, 974 P.2d 832 (1999).

b. The evidence was insufficient to conclude that J.H. took a substantial step toward committing residential burglary.

A substantial step is strongly corroborative of the actor's criminal purpose. State v. Workman, 90 Wn.2d 443, 451, 584 P.2d 382 (1978).

Mere preparation to commit a crime is not a substantial step. Workman, 90 Wn.2d at 449–50.

The court found that J.H., together with others, tried to break into Wright’s home. CP 45 (FF1); CP 46 (FF4).⁶ Based on this finding, the court concluded that J.H. took a substantial step toward committing residential burglary. RP 124⁷; CP 48 (CL II).⁸ The court’s finding that J.H. tried to break into Wright’s home is not supported by substantial evidence.

Shortly after Wright’s alarm went off and hearing noise near a downstairs window, Wright went downstairs. CP 46 (FF 12). Believing there was someone outside, Wright yelled, “Get the fuck out of here,” and pulled down the blinds of the window. CP 46 (FF 12). He saw three young men outside, who fled. CP 46 (FF 12). Wright later identified J.H. as one of these men. CP 47 (FF 21).

⁶ The court found that “three young men attempted to break into Kent Wright’s home. One of the young men was later identified as the respondent.” CP 45 (FF 1). The court also found that “[b]efore the respondent tried to break into Wright’s home, James Beard saw the respondent approach Dao Vo’s house, knock on her door, and ring her doorbell.” CP 46 (FF 4).

⁷ In its oral ruling, the court stated that it found that “[J.H.], together with others, took a substantial step toward committing residential burglary when he attempted to breach the sliding glass door and/or with window at Mr. Wright’s home.” RP 124.

⁸ The conclusion of law states that “the respondent did an act that was a substantial step toward the commission of residential burglary.”

J.H. was charged and found guilty as a principal of attempted residential burglary. CP 1, 49. “[A]nyone who participates in the commission of a crime is guilty of the crime and should be charged as a principal, regardless of the degree or nature of his participation.” State v. Carothers, 84 Wn.2d 256, 264, 525 P.2d 731 (1974). However, “[m]ere knowledge or physical presence at the scene of a crime neither constitutes a crime nor will it support a charge of aiding and abetting a crime.” In re Welfare of Wilson, 91 Wn.2d 487, 491-92, 588 P.2d 1161 (1979), quoting State v. J-R Distributors, Inc., 82 Wn.2d 584, 593, 512 P.2d 1049 (1973).

The evidence was insufficient to find that J.H. tried to break into Wright’s home. While it is reasonable to infer that someone caused his alarm to “chirp” (by presumably trying to open the sliding door) and made the noise by his window (by presumably trying to open it), it does not follow that J.H. was the person responsible. There was also no evidence that J.H. was acting in concert with the other two young men at Wright’s home. The evidence only showed that J.H. was present in Wright’s backyard.⁹ That J.H. ran after being told to, “Get the fuck out of here,” does not indicate that he had earlier been trying to enter unlawfully into the house.

⁹ For purposes of this appeal, J.H. does not challenge the identifications of him. J.H. denied being in Wright’s backyard. See CP 48 (FF 27).

Given this evidence, a fair-minded and rational person would not be persuaded that J.H. tried to break into Wright's home. Accordingly, the court's finding that J.H. tried to break into Wright's home is unsupported by substantial evidence and should be overturned. Without this finding, the court's conclusion that the J.H. took a substantial step toward committing residential burglary is unsupported and must also be overturned. Accordingly, the judgment should be reversed.

c. The evidence was insufficient to infer that J.H. intended to commit burglary.

The evidence was also insufficient to support the trial court's conclusion that J.H. intended to commit residential burglary.

In the court's oral ruling, the court reasoned that intent could be inferred because J.H.'s was in Wright's backyard and he ran when confronted by Wright:

I do infer intent to commit a crime against a person or property therein. There was no other reason to be there. The circumstances of this particular offense, including his running when confronted by Mr. Wright, I find all lead me to the conclusion that [J.H.] is guilty as charged of attempted residential burglary.

RP 124. The evidence did not justify the court's inference of intent to commit burglary.

Intent to attempt a crime may be inferred from all the facts and circumstances. Bencivenga, 137 Wn.2d at 709. Facts and circumstances

tending to support a finding of intent to commit burglary include a person's breaking a window,¹⁰ opening an entryway,¹¹ trying to pry or actually breaking off a lock on a door,¹² admission of intent to enter,¹³ possession or use of burglary tools,¹⁴ wearing of dark clothing,¹⁵ and fleeing from the police.¹⁶ The lack of daylight¹⁷ and the presence of inclement weather¹⁸ may also support an inference of intent to commit burglary.

Thus, in Bencivenga, there was sufficient evidence of intent to commit burglary where the defendant, "dressed in dark clothing, attempted to pry open the door of [a restaurant] at about 3:30 a.m. in the midst of a snowstorm." Bencivenga, 137 Wn.2d at 709. Similarly, the evidence was sufficient in Bergeron, where the defendant, at 3:15 a.m.,

¹⁰ See State v. Bergeron, 105 Wn.2d 1, 11, 19-20, 711 P.2d 1000 (1985).

¹¹ See Bergeron, 105 Wn. at 11, 19-20.

¹² State v. Bencivenga, 137 Wn.2d 703, 711, 974 P.2d 832 (1999); State v. Chacky, 177 Wash. 694, 695-96, 33 P.2d 111 (1934).

¹³ See Bergeron, 105 Wn. at 11, 19-20.

¹⁴ See Chacky, 177 Wash. at 695-96.

¹⁵ See Bencivenga, 137 Wn.2d at 709.

¹⁶ See Bergeron, 105 Wn. at 11, 19-20; Chacky, 177 Wash. at 695-96.

¹⁷ See Bencivenga, 137 Wn.2d at 709; Bergeron, 105 Wn. at 11, 19-20; Chacky, 177 Wash. at 695-96.

¹⁸ See Bencivenga, 137 Wn.2d at 709.

broke a window of a residence, slid the window open, and ran when the police arrived. State v. Bergeron, 105 Wn.2d 1, 10–11, 711 P.2d 1000 (1985). Likewise, the evidence was sufficient in Chacky, where the defendant, around midnight, broke off a lock on a door of a store with a crowbar, fled from the police, and was found to have other burglary tools in his car. State v. Chacky, 177 Wash. 694, 695-96, 33 P.2d 111 (1934).

Here, the type of evidence present in Bencivenga, Bergeron, and Chacky is lacking. Wright’s window and sliding door were not broken. J.H. was not seen trying to open the window or door. J.H. was not found to be in possession of burglary tools. J.H. was described as wearing jeans and a furry hat with earflaps, not burglary-like apparel. CP 47 (FF 14, 21). It was daytime and there was no evidence of inclement weather. When J.H. was later confronted by the police, he did not flee. See CP 47 (FF 18); RP 82.

Here, the prosecution’s case rested on mere inferences. Compare Bencivenga, 137 Wn.2d at 711 (“the evidence against Bencivenga included not just ‘inferences’ . . .”). The State may argue that criminal intent can be inferred from the evidence that J.H. was identified as knocking at the door of different house that had an alarm go off. However, that was at a different place and it was not shown that J.H. was responsible for anything that happened there. The State may also argue

that J.H. fleeing when confronted by the resident shows criminal intent. That J.H. left when told by the resident to, “Get the fuck out of here,” only shows compliance with the resident’s wishes to leave, not that he intended to commit a crime. Even if criminal intent could be inferred, the criminal intent could be malicious mischief or criminal trespass, not burglary.

Because there was insufficient evidence to prove beyond a reasonable doubt that J.H. intended to commit residential burglary, this Court should reverse.

- d. Remand for entry of judgment on the lesser offense of attempted first degree criminal trespass would be improper because this crime was not necessarily proven at trial and the record does not disclose that the trier of fact expressly found all the necessary elements.**

“[W]hen an appellate court finds the evidence insufficient to support a conviction for a charged offense, it may remand the case and direct the trial court to enter judgment on a lesser included offense or lesser degree of the offense charged when the lesser offense was necessarily proven at trial.” *A.M.*, 163 Wn. App. at 421. The record must disclose that the trier of fact expressly found each of the elements of the lesser offense. *In re Heidari*, 174 Wn.2d 288, 294, 274 P.3d 366 (2012); *State v. Green*, 94 Wn.2d 216, 235, 616 P.2d 628 (1980).

Attempted first degree criminal trespass is a lesser included offense to attempted residential burglary. State v. Pittman, 134 Wn. App. 376, 384, 166 P.3d 720 (2006), abrogated on other grounds by State v. Grier, 171 Wn.2d 17, 246 P.3d 1260 (2011). “A person is guilty of criminal trespass in the first degree if he or she knowingly enters or remains unlawfully in a building.” RCW 9A.52.070. Attempted first degree criminal trespass is a lesser included offense of attempted residential burglary because it is not possible to take a substantial step toward committing residential burglary without taking a substantial step toward committing first degree criminal trespass. Pittman, 134 Wn. App. at 384-85.

If this Court agrees that the finding that J.H. tried to break into Wright’s home is not supported by substantial evidence, then there is no remaining finding showing that the court expressly found that J.H. intended to enter Wright’s home or that he took a substantial step toward doing so. Accordingly, the Court should not remand with instruction to enter judgment on attempted criminal trespass.

If the Court upholds the finding, but determines that there was insufficient evidence to support the conclusion of intent to commit burglary, remand for entry of judgment for attempted criminal trespass would still be improper. There is no express finding that J.H. intended to

knowingly enter or remain unlawfully in Wright's home. Because there is no such express finding, the Court should deny a request by the State to remand for a guilty disposition on attempted criminal trespass in the first degree. See A.M., 163 Wn. App. at 423 (rejecting request by State to remand for entry of conviction for attempted first degree rape of child because court did not make an express finding of intent).

The Court should reverse and order the charge dismissed with prejudice. See A.M., 163 Wn. App. at 423 (reversing and ordering charges dismissed).

2. The court improperly inferred criminal intent based on RCW 9A.52.040, which does not apply in attempted burglary cases.

Alternatively, the Court should reverse and remand for a new trial because the trial court improperly inferred criminal intent based on a statute that did not apply.

The State began its closing argument by drawing the court's attention to RCW 9A.52.040. RP 105. This statute provides that in prosecutions for burglary, the trier of fact may infer criminal intent when a person enters or remains unlawfully in a building unless there is evidence of a satisfactory alternative explanation:

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.

RCW 9A.52.040.¹⁹ The State argued that this statute was “there for the court if it wants to make that inference.” RP 105.

The prosecutor’s argument was a misstatement of the law. RCW 9A.52.040 applies in cases of burglary, not in cases of attempted burglary. State v. Jackson, 112 Wn.2d 867, 876, 774 P.2d 1211 (1989) (holding that instruction based on RCW 9A.52.040 was improper in attempted burglary case); State v. Ogen, 21 Wn. App. 44, 49, 584 P.2d 957 (1978). In Ogen, this Court reasoned that the statute did not apply to the attempted burglary prosecution because the defendants there were not charged with burglary and there was no evidence that they either entered or remained unlawfully in a building. Ogen, 21 Wn. App. at 49. In Jackson, our Supreme Court approved of Ogen. Jackson, 112 Wn.2d at 876. Jackson further held it is

¹⁹ The related Washington Pattern Jury Instruction reads:

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.

11A Wash. Prac., Pattern Jury Instr. Crim. WPIC 60.05 (3d Ed). This instruction does not include the statutory language “unless such entering or remaining shall be explained by evidence satisfactory to the trier of fact.” This is to avoid an unconstitutional shifting of the burden of persuasion. See State v. Deal, 128 Wn.2d 693, 703, 911 P.2d 996 (1996) (holding that language in an instruction based on this statute improperly shifted burden of persuasion).

erroneous to instruct the jury in attempted burglary cases “that it may infer the defendant acted with intent to commit a crime within a building, where the evidence is that the defendant may have attempted entrance into a building, but there exist other equally reasonable conclusions which follow from the circumstances.” Jackson, 112 Wn.2d 867, 870, 774 P.2d 1211 (1989). This holding does not, however, preclude the trier of fact from inferring criminal intent from all the facts and circumstances. Bencivenga, 137 Wn.2d at 708-09.

In bench trials, the trial court is presumed to know the law and apply it correctly. Douglas Northwest, Inc., v. Bill O'Brien & Sons Constr., Inc., 64 Wn. App. 661, 681, 828 P.2d 565 (1992); see State v. Miles, 77 Wn.2d 593, 601, 464 P.2d 723 (1970). Thus, the appellate court presumes that the trial judge did not consider inadmissible evidence in rendering the verdict. State v. Read, 147 Wn.2d 238, 244, 53 P.3d 26 (2002). This presumption can be rebutted “by showing the verdict is not supported by sufficient admissible evidence, or the trial court relied on the inadmissible evidence to make essential findings that it otherwise would not have made.” Read, 147 Wn.2d at 245-46.

Here, the issue is not whether the trial court considered inadmissible evidence, but whether the court applied an inapplicable statute. While there is a presumption that the trial court knows the law,

the record rebuts the presumption that the trial court knew RCW 9A.52.040 did not apply.

The record shows that the court relied on the statute in making its ruling. During the court's oral ruling, the court stated it was inferring criminal intent because there was "no other reason" explaining why J.H. was there:

I do infer intent to commit a crime against a person or property therein. There was no other reason to be there.

RP 124.²⁰ This is the type of analysis one would logically use if applying RCW 9A.52.040, which indicates intent can be inferred based on one's mere presence.

The trial court did not correct the prosecutor when arguing that RCW 9A.52.040 applied. But the court did correct the prosecutor on a different erroneous argument. After the prosecutor stated that J.H. lied to the police about his whereabouts, the court interceded and informed the prosecutor that it was improper to call the defendant a liar. RP 110. Thus, the record shows the court was disposed to correct erroneous legal arguments, but did not do so as to RCW 9A.52.040. This indicates that the court did not know RCW 9A.52.040 was inapplicable.

²⁰ The court incorporated "its oral finding and conclusions as reflected in the record" into its written Findings of Fact and Conclusions of Law. CP 49.

The record indicates that the court erroneously applied RCW 9A.52.040. This was prejudicial error. The court inferred intent to commit burglary under RCW 9A.52.040 based on J.H.'s presence in Wright's backyard. This was prejudicial because J.H.'s presence in Wright's backyard did not necessarily establish intent to commit burglary. See Jackson, 112 Wn.2d at 876 (stating that an "inference should not arise where there exist other reasonable conclusions that would follow from the circumstances."); State v. Sandoval, 123 Wn. App. 1, 6, 94 P.3d 323 (2004) (holding that instruction based on RCW 9A.52.040 in burglary case was improper because the inference of intent to commit burglary did not "flow more probably than not from the breaking and entering" given the evidence in the case). If the court had not applied RCW 9A.52.040, then the court likely would not have inferred intent to commit burglary. Accordingly, this Court should reverse and remand for a new trial. See Sandoval, 123 Wn. App. at 6.

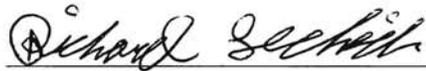
F. CONCLUSION

Because the evidence was insufficient to prove beyond a reasonable doubt that J.H. attempted to commit residential burglary, the judgment should be reversed with instruction that the charge be dismissed with prejudice. Alternatively, the judgment should be reversed and

remanded for a new trial because the court improperly applied RCW
9A.52.040 in concluding there was criminal intent.

DATED this 5th day of December, 2013.

Respectfully submitted,



Richard W. Lechich – WSBA #43296
Washington Appellate Project
Attorneys for Appellant

Appendix A

FILED
KING COUNTY WASHINGTON

The Honorable Judge Barbara Mack
Hearing Date April 24, 2013 at 1 30 pm
Hearing Location Courtroom 2

JUN 24 2013

SUPERIOR COURT CLERK
BY JOVELITA V AVILA
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY
JUVENILE DIVISION

STATE OF WASHINGTON,

Plaintiff,

vs

JAHAD V D HILL,
B D 04/18/95

Respondent

No 12-8-02861-5

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
PURSUANT TO CrR 6 1(d)

THE ABOVE-ENTITLED CAUSE having come on for fact finding on April 2, 2013, and April 8, 2013, before the Honorable Judge Barbara Mack in the above-entitled court, the State of Washington having been represented by Eric Shelton, the respondent appearing in person and having been represented by Dennis McGuire, the court having heard sworn testimony and arguments of counsel, and having received exhibits, now makes and enters the following findings of fact and conclusions of law

FINDINGS OF FACT

- 1 On October 31, 2012, three young men attempted to break into Kent Wright's home One of the young men was later identified as the respondent
- 2 Wright's home is in King County, Washington
- 3 Wright does not know the respondent and has never given him permission to enter his home

FINDINGS OF FACT AND CONCLUSIONS OF LAW
PURSUANT TO CrR 6 1(d) - 1

ORIGINAL

Daniel T Satterberg, Prosecuting Attorney
Juvenile Court
1211 E Alder
Seattle Washington 98122
(206) 296 9025 FAX (206) 296 8869

- 1 4 Before the respondent tried to break into Wright's home, James Beard saw the respondent
2 approach Dao Vo's house, knock on her door, and ring her doorbell. The respondent walked
3 away after ringing Vo's doorbell several times. Vo's house is just blocks away from
4 Wright's
- 5 Beard was working at a house across the street from Vo's house when he saw the
6 respondent. Beard thought that the respondent's presence was unusual because he had been
7 working across the street for months and had never seen the respondent before. He also
8 thought that the respondent was acting suspiciously, as he refused to look in his direction
9 even though he could tell that Beard was watching him
- 10 Beard looked away for a moment and, when turned back to look at the respondent, the
11 respondent was gone. Beard went back to work. About five minutes later Officer Peter
12 with the Kent Police Department, pulled up to Vo's house
- 13 Officer Peter was dispatched to Vo's house because Vo's alarm was sounding. Vo's alarm
14 went off at 12:01 pm. Officer Peter arrived 8 minutes later at 12:09. He discovered that
15 someone had attempted to pry a screen off one of Vo's back windows. A pane on one of
16 Vo's windows had also broken. However, it did not appear that entry had been made into
17 Vo's home
- 18 Soon after Officer Peter's arrival, Beard told Officer Peter what he had seen. Beard told
19 Officer Peter what he saw the respondent do, that he saw the side of the respondent's face,
20 and that the respondent was wearing a fur hat with ear flaps and jeans that had a tiger or a
21 dragon on the back pockets. He also stated that the respondent was dressed nicely and was
22 wearing a red shirt and possibly a black jacket
- 23 Mr. Wright arrived home just before noon on October 31, 2012
- 24 Wright has an alarm system that "chirps" whenever one of his windows or doors open. He
also had a control panel upstairs that indicates the location of the open window or door
- Wright heard his alarm chirp as he stepped out of his shower upstairs. He looked at the
alarm control panel and determined that someone had opened his back sliding glass door.
He looked outside into his backyard and could not see anyone
- Wright then heard a loud noise by one of his downstairs windows, so he put a towel on, ran
downstairs, and yelled "Get the fuck out of here" as he approached the window. He pulled
back the blinds on the window that he heard the noise coming from and saw three young
men in his backyard. Wright saw two of the three males running away from him, he also
saw the respondent, who stared back at him for a moment and then jumped his fence into his
neighbor's yard
- Wright called 911, and police arrived ten minutes later

- 1 14 Wright described the male that stared back at him as wearing an odd, furry hat and jeans that
2 had a distinctive pattern on the back pockets This description was broadcast over radio
- 3 15 Timothy Kovich manages security operations for the Kent School District He can view live
4 footage from his office of the schools he monitors—one of which is Kent Meridian High
5 School
- 6 16 Kovich got a call from the Security Resource Officer at Kent Meridian, Officer Rankin, that
7 several attempted burglaries had been reported just north of the school Officer Rankin gave
8 Kovich Beard's and Wright's descriptions, and asked Kovich to monitor the school's
9 security cameras
- 10 17 Within minutes of Officer Rankin's call, Kovich saw a male wearing a furry hat with
11 earflaps and jeans with a dragon on the back pockets The male was walking onto the
12 school's property from the north with two other males Kovich watched the males walk
13 through the north parking lot, by the school's cafeteria, and out toward a main access road
14 Kovich radioed his observations to Officer Rankin
- 15 18 Officer Rankin was near the high school when he got Kovich's report He pulled into the
16 high school's parking lot and saw three males walking away from the school and towards
17 the road Officer Rankin noticed that one of the males matched Beard's and Wright's
18 descriptions, as he was wearing a lumberjack style hat with floppy earflaps and jeans with
19 dragons on the back pockets
- 20 19 Officer Rankin identified the respondent in court as the male that he stopped on October 31,
21 2012 Officer Rankin also told the court that the respondent was the male that was wearing
22 a lumberjack hat and dragon jeans when he stopped him Officer Rankin immediately
23 reported this information to dispatch
- 24 20 When officers heard that a person had been detained that matched both Beard's and
Wright's descriptions of a suspect, Beard and Wright were taken separately to the high
school for an in-field show up
- 21 21 Wright saw the respondent and told officers that he was 100% sure that he was one of the
22 males that he saw in his backyard He identified the respondent by his floppy hat, his
23 dragon covered pants, and his physical build Another male was standing next to the
24 respondent that Wright recognized because of his red shoes, but Wright was only 70% sure
he was one of the males he saw in his backyard
- 22 22 Wright identified the respondent in court as the same person he saw outside his window on
October 31, 2012
- 23 23 Officer Peter informed Beard of the department's standard in-field show up instructions,
including the fact that just because these people were there, didn't mean they had anything
to do with the crime, and that he had no obligation to ID anyone

1 24 Beard initially told Officer Peter that he was 70% sure that the male he saw was the
2 respondent, and asked if they could turn him sideways so he could see how he looked when
3 he was at Vo's door The respondent turned to his side and Beard said he was now 100%
4 sure that the respondent was the person he saw at Vo's

5 25 Beard also identified the respondent in court, stating that he was the male he saw at Vo's on
6 October 31, 2012

7 26 Detective Lamp also responded to the high school He advised the respondent of his
8 Miranda rights using his department issued code book

9 27 After having been advised of his rights, the respondent told Lamp that he had taken a bus
10 from his home to Kent Station He said that he then caught another bus to Kent Meridian
11 High School because he wanted to enroll there Lamp asked the respondent the times and
12 numbers of the buses he took, but the respondent could not provide him with specifics
13 Lamp also asked the respondent if he had been with anyone and he said "No"—stating that
14 he had been alone since he left his house Lamp told the respondent that a video showed that
15 he was clearly with two other males, but the respondent insisted that he had been alone the
16 entire time

17 28 Lamp also noted that the respondent's demeanor that day was "very low key and calm "
18 Lamp thought that this was very unusual for someone being accused of a crime

19 29 The State's witnesses were credible

20 30 The court has not based any of its credibility determinations on argument made by counsel

21 CONCLUSIONS OF LAW

22 I

23 The above-entitled Court has *jurisdiction* of the subject matter and of the respondent in
24 the above-entitled cause

25 II

26 The following elements of Attempted Residential Burglary, contrary to RCW 9A 28 020
27 and 9A 52 025, have been proven by the State beyond a reasonable doubt

28 (1) On or about October 31, 2012, the respondent did an act that was a substantial step
29 toward the commission of residential burglary,

30 (2) The act was done with the intent to commit residential burglary, and

31 (3) That the act occurred in the State of Washington

1 III

2 The respondent is guilty of the crime of Attempted Residential Burglary as charged in the
3 Information

4 IV

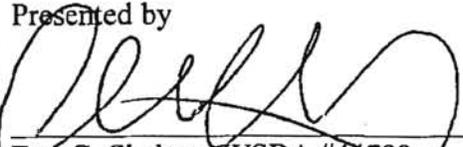
5 Judgment should be entered in accordance with Conclusion of Law III

6 In addition to these written findings and conclusions, the Court hereby incorporates its
7 oral findings and conclusions as reflected in the record

8 DONE IN OPEN COURT this 24 day of June, 2013

9 
10 JUDGE BARBARA A MACK

11 Presented by

12 
13 Eric G Shelton, WSBA #44788
14 Deputy Prosecuting Assistant Attorney

15 
16 Dennis McGuire, WSBA #18114
17 Attorney for Respondent

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 70428-1-I
v.)	
)	
J. H.,)	
)	
Juvenile Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 5TH DAY OF DECEMBER, 2013, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
<input checked="" type="checkbox"/> J. H. 24513 27 TH AVE S APT 2 DES MOINES, WA 98198	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 5TH DAY OF DECEMBER, 2013.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
☎ (206) 587-2711