

STATE OF WASHINGTON
DIVISION II

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STATE OF WASHINGTON
BY  DEPUTY

Court of Appeals No. 37507-9-II

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

State of Washington,
Respondent,

v.

Doug Merino,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Christine Pomeroy

REPLY BRIEF OF APPELLANT

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III. STATEMENT OF THE CASE

The Appellant’s statement of the case appears in the Brief of Appellant.

For purposes of addressing the defective charging documents, the Appellant points out that the Appellant objected to the deficient language in the charging documents in two separate motions to dismiss. CP. 14-19. CP. 55-57.

For purposes of addressing the trial court error in refusing the Appellant’s effort to contradict his complicity or conspirator relationship through hearsay statements of the co-conspirators, appellate counsel again points out that the Respondent State introduced allegedly sworn hearsay testimony of co-conspirators in the form of a sworn “proof of loss” and alleged “deposition” like oral statements which were taken under oath (See, for example, CP. 27 (objection) and CP. 31-33 (“proof of loss”

document, RP. 37 (records custodian unavailable - line 24-25), and at trial – RP. 63 and 75)). The trial court admitted the Respondent’s co-conspirator hearsay, finding that there was “slight” evidence of a conspiracy, and that was all the State was required to establish in order to introduce the hearsay. RP. 56. At trial, the Respondent also presented double hearsay testimony concerning alleged sworn statements of the absent co-conspirators which were given to an absent attorney the insurance company hired. RP. 75. The court considered the “proof of loss” as an essential part of the State’s case. RP. 232. The State considered the hearsay “deposition” testimony of the co-conspirators to be such a crucial point that it repeated it (inaccurately at one point, RP. 309) multiple times during closing argument.

ARGUMENT

1. DEFECT IN CHARGING DOCUMENT

The Respondent argues that the State does not have to “include every fact” in the information, concedes that it did not include any facts and merely included words “taken directly from the statute.” (Br. Of Respondent at 11). Excluding any facts, such as the alleged victim of an attempt crime, or the alleged conduct of the Appellant in attempting a theft creates a defective information. Merely accusing someone of

conspiracy to commit attempted theft is clearly unconstitutionally vague. The Respondent seems to concede the point, and instead complains that the Appellant did not argue to this court that the Appellant challenged the sufficiency of the charging document prior to the verdict. In fact, the Appellant filed two motions to dismiss, challenging the sufficiency of the charging document, which the State then failed to amend with any particulars. Since the challenge to the defective information came before this appeal, reversal is warranted so the Appellant can properly identify and defend himself from the essential facts contained in the information on retrial. See State v. Kjorsvik, 117 Wn.2d 93, 812 P.2d 86 (1991).

Even if this court finds that the motions to dismiss did not sufficiently alert the State to the defective information, this court should reject the State's contention on appeal, that which is that the Appellant was not prejudiced. To the contrary, the Appellant was confronted with a mostly hearsay account by an absent witness who allegedly tried to obtain insurance proceeds under false pretenses. The trial court pointed out that the evidence that the Appellant participated in that scheme was "slight" at best. The Respondent controlled this case from the outset, having charged and entered into a plea bargain with the absent witness, and returning the passport to that witness so he could leave the country before the State

charged the Appellant. Clearly, the State prejudiced the Appellant by not providing any facts in the information.

2. Insufficient Evidence of Attempted Theft “Conspiracy” or “Complicity”

The State points out that the conspiracy charge cannot rest upon the alleged plot discussed by the other co-conspirators (RP. 145-158), because there is no evidence that the Appellant was involved in that conversation. The State then claims that the Appellant could be convicted on the sole basis that he had completed an appraisal and bill of sale for the vehicle, and lied when called by someone claiming to be an insurance investigator. As noted previously, the State did not charge these facts as the ones that established the elements of the crime in the information. Moreover, except for lying to the investigator, the amended charges involving the use of the Appellant’s documents in support of an attempt to obtain a “loan” from a Pierce County credit union were dismissed.

3. Admission of Co-conspirator Hearsay

The State claims that no Confrontation Clause issues arises in this case because “[s]tatements in furtherance of a conspiracy are not testimonial” (Brief of Respondent, at 21). The statements in this case

were clearly testimonial and should not have been admitted. In addition, the trial court erred in then barring the Appellant's efforts to challenge those statements with other inconsistent statements of the alleged co-conspirator .

The Respondents' argument that the statements were not testimonial and the Respondent's references to legal authorities are off point, at best. The testimonial statements in this case were not even subject to cross examination when they were given. This clearly misleads a jury and violates a Defendants' right to challenge the statements. If the State wants to plea bargain away the co-conspirator by giving him a passport to leave the country, as it did here, then present that absent co-conspirator's testimony under oath in a subsequent proceeding, without presenting the witness who gave that testimony, or any of the witnesses' inconsistent statements that the Defendant obtained, or even the notary or lawyer who took the testimonial evidence, the Constitution's confrontation clause in Washington becomes a joke to the rest of the country and some appellate court needs to step in and fix things. See Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 1374 (2004)(court must bar the admission of out-of-court testimonial statements against a criminal defendant "absent opportunity for cross-

examination.”). Here, the Appellant was denied any opportunity for cross-examination of the statement.

4. Withdrawal From Conspiracy and Complicity to Attempted Theft

The State primarily argues that the Appellant cannot legally abandon a conspiracy or an attempted theft because both crimes were completed before the Appellant abandoned them. The State concedes that the only viable evidence that the Appellant was part of the alleged conspiracy and attempted theft involved the bill of sale and appraisal the with the Appellant’s name on them, which the Varners later used to obtain insurance and claim their car was stolen. Clearly, the crime was not completed when the Appellant allowed his name to appear on a bill of sale and appraisal. The State concedes that there is no evidence that the Appellant knew anything about any insurance fraud or attempted theft issue until he was called by the insurance investigator. The Appellant pointed out at trial and sought to get the jury to consider, that the Appellant’s statements to the insurance investigator were sufficient to constitute abandonment at the first point he found out that a crime was in progress. Although the State wants to belittle that

effort to abandon, it was properly an issue that should have been presented to the jury for determination. In addition to the authorities cited by Appellant, there are substantial policy reasons for allowing a defendant to abandon a conspiracy or attempted crime by preventing its successful conclusion – which would be the completion of the crime. As explained in “Criminal Attempts” by Anthony Duff, in the chapter on “Does It Matter When the Attempt is Abandoned?, page 69” voluntary abandonment at some time before the attempted crime becomes a completed crime makes sense in supporting an acquittal, because policy would favor allowing such a defense in order to encourage stopping the underlying crimes before completion. Obviously, if a conspiracy or attempt is “complete” at the point someone signs a document, not knowing what it is being used for, the defense of abandonment should still be allowed, since a co-conspirator who finds out about the crime in progress should be allowed to stop it.

5. Jurors Discussing Extrinsic Evidence Before Deliberations

Juror discussions of outside evidence should not be condoned. The State argues that the evidence of the discussions in this case is not enough to establish juror misconduct. The Appellant in this

case argues that there was sufficient evidence for the court to at least question the jurors who discussed the extrinsic evidence, and that the refusal to do so merits reversal.

6. Prosecutor Withholding Exculpatory Evidence, Counseling a Witness to Avoid Such Testimony at Trial, and Presenting Inculpatory Theory at Trial Despite Knowledge of the Undisclosed Exculpatory Evidence

The State obtained exculpatory statements concerning a photograph it wanted to use as an exhibit. The State did not disclose those exculpatory statements to Defense counsel, despite a promise to do so in the Omnibus order. Moreover, the State developed a contradictory theory and presented it trial that Merino was possibly the principal or a conspirator at the time the photograph was taken. That theory would be blown out of the water if the State disclosed the exculpatory evidence it had collected that Merino was not the photographer, and that the photographs were different from the ones that Janell Varner printed for Ken and Jim Varner. Instead of alerting the Defense or the trial court to these bits of evidence, the State gave the Defense a black and white photo, and misrepresented the facts to counsel and the trial court, sandbagging the Defendant at trial.

The State argues that it did not present any evidence about its inculpatory theory, and therefore it is not a foul to have withheld the exculpatory evidence. To the contrary, the State introduced the photograph, containing a reflection of three people in the bumper, and repeatedly hammered on the theme that there were three people involved in photographing the car. The prosecutor was clearly telling the jury to look closely at the photo, and the prosecutor even performed the theatrics of posting it to the jury, for an extended period of the trial. Obviously, the prosecutor allowed the jury to see the three men in the bumper of the car, but conveniently left out the evidence that the three men were not Doug Merino. Moreover, by waiting until trial, the Defendant had no opportunity to establish the contradictory evidence that he was not one of the three men in the color photograph that the State had in its possession.

Respectfully submitted,



Christopher W. Bawn, Counsel for Appellant

CERTIFICATE OF SERVICE - I certify that I submitted a copy of this document in the US Mailbox on Sunday, August 23, 2009, addressed and with sufficient postage for delivery to the Respondent's counsel. I also submitted this document electronically to the Respondent's counsel and the Court of Appeals on August, 23, 2009.

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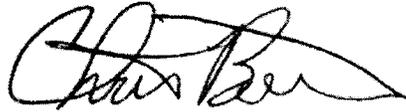
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Court Copy 1

Attached to this pleading is a copy of the relevant pages in
the section of the authority cited in the Appellant's Reply Brief.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Chris Bawn". The signature is fluid and cursive, with a long horizontal stroke at the end.

Christopher W. Bawn, #13417, Attorney for Appellant

CERTIFICATE OF SERVICE

This item was sent via U.S. Mail to the Court of Appeals and
to the Attorney for the Respondent on August 24, 2009.

OXFORD MONOGRAPHS IN CRIMINAL LAW
AND JUSTICE

CRIMINAL ATTEMPTS



R. A. DUFF



CLARENDON PRESS OXFORD

question. They help us to connect one thing with another and another. But at the bar of reason, always the final appeal is to cases.²³⁴

Both moral and legal reasoning are *essentially* a matter of case-by-case reasoning, whose rational foundation consists in the comparison of one case with others. We begin with a set of cases about which we agree (or whose disposition is authoritatively specified for us). We can then decide new cases on the basis of their resemblances to, or differences from, members of that paradigm set. We might, of course, hope to formulate some principle, like those 'defining' the conduct element in attempts, which will connect these variegated cases. The point of such a principle, however, is not to specify descriptive criteria for its quasi-mechanical application to new cases. Rather, it is to remind us of the relevant features of the particular cases, and thus to point us towards what will be relevant features in future cases; and the rational grounds for any judgement on a new case will still be based, not on its derivation from such a principle, but on the direct comparison between this case and other particular cases.

From this perspective, the fact that the law can provide no determinate general specification of the conduct element in attempts is neither surprising nor dismaying; and the provision of a list of authoritative illustrations (by a legislature or a supreme court) can be seen not as a counsel of despair, but as an appropriate statutory instantiation of practical reasoning.²³⁵

2.8 'VOLUNTARY ABANDONMENT' AS A DEFENCE

Finally, we must attend to the issue of 'voluntary abandonment'. Someone embarks on a criminal enterprise, and pursues it far enough for her conduct to constitute an attempt, but then abandons it 'voluntarily'. How, if at all, should that voluntary desistance affect her criminal liability?

THE RELEVANCE OF VOLUNTARY ABANDONMENT

It could do this in one of three ways. First, it could figure simply as a mitigating factor in sentencing—as it does in English law, which allows no formal defence of abandonment.²³⁶ This is made explicit in Stephen's

²³⁴ 'A Feature of Wittgenstein's Technique', 102. See also 'Gods', 157–8; 'Philosophy, Metaphysics and Psycho-Analysis', 248–54.

²³⁵ But see further below, ch. 13, at nn. 207–10.

²³⁶ See *Haughton v Smith* [1975] AC 476, 493–4 (Lord Hailsham); Wasik, 'Abandoning Criminal Intent', 793–5. Courts have sometimes acquitted in part because the defendant could still have abandoned the enterprise (*Hope v Brown* [1954] 1 WLR 250, 252; *Conner v Bloomfield* [1970] 55 Cr. App. R. 305, 305) or even because he might actually have abandoned it voluntarily (*Ilyas* [1983] 78 Cr. App. R. 17). In *Lankford* the Court of Appeal implied (*pace* Wasik, 786–7) that 'a voluntary change of heart at some point in the proceedings' could negate what would otherwise have been an attempt ([1959] Crim. LR 209, 210). See also Lord Diplock's comment on acts indicating 'a fixed irrevocable intention to go on

definition: an attempt is an act forming part of a series that would constitute the crime's commission 'if it were not interrupted, either by the voluntary determination of the offender not to complete the offence or by some other cause'.²³⁷

Secondly, voluntary abandonment could secure an acquittal by negating an essential element of an attempt. If an attempt requires acts which 'demonstrate unequivocally that . . . he . . . would commit the crime except for the intervention of another person or some other extraneous factor',²³⁸ a voluntary abandonment would negate that essential element, by demonstrating that the agent would *not* have 'committ[ed] the crime except for' extraneous intervention. Likewise, if the law convicts only those who 'fail' in, or are 'prevented from', committing the crime, it should acquit someone who voluntarily abandons her criminal enterprise:²³⁹ voluntary abandonment does not, from her perspective, constitute failure in or prevention of her endeavours.

Thirdly, voluntary abandonment could be an 'affirmative defense'. Although the defendant's acts in pursuit of his criminal enterprise satisfy the normal conditions for an attempt, for instance by constituting a 'substantial step', he can still secure an acquittal by offering evidence, which the prosecution fails to disprove, that 'he abandoned his effort to commit the crime or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose'.²⁴⁰

The difference between the last two possibilities is partly procedural, concerning the evidential or probative burdens to be borne by prosecution and defence. However, the two possibilities reflect different conceptions of the significance of voluntary abandonment. To allow it only to mitigate sentence implies that one who abandons her attempt is still *guilty* of an attempt, although her abandonment qualifies her guilt. To treat it as an affirmative defence implies that she was engaged in a genuine criminal attempt, but her abandonment wipes out what would otherwise have been her guilt. To treat it as negating an essential element of an attempt implies that it is incompatible with the very concept of 'attempt': attempts are enterprises which the agent would not abandon voluntarily.

to commit the complete offence unless involuntarily prevented from doing so' (*Stonehouse* [1978] AC 55, 68; see Sullivan, 'Crossing the Rubicon in Miami' at nn. 32, 80 above). But the defence does not formally exist in English law; *Smith & Hogan*, 317.

²³⁷ *Digest*, art. 29; see at nn. 61, 81, above.

²³⁸ Wisconsin Code, s. 939.32(2); see at n. 78, above, *Manual* 285 NW 2d 639 (1979); also *West* 437 So 2d 1212 (1983, Mississippi), and at nn. 78-89 on the 'probable desistance' test.

²³⁹ See e.g. Mississippi's Code, *Miss. Code Ann.*, s. 97-3-95 (Supp. 1982), as applied in *West* 437 So 2d 1212 (1983); but contrast the application of California Penal Code, s. 664 in *Staples* 85 Cal. Rptr. 589 (1970); see *LaFare & Scott*, 518-21.

²⁴⁰ *Model Penal Code*, s. 5.01(4); see s. 1.12 on 'affirmative defenses'. In some jurisdictions the defence has the greater burden of establishing an 'affirmative defense' 'by a preponderance of the evidence': see *Larson* 443 A 2d 890 (1982, Rhode Island), 896; *LaFare & Scott*, 51-6.

WHAT MAKES ABANDONMENT 'VOLUNTARY'?

If voluntary abandonment is to entitle the agent to an acquittal (whether as negating an element of the crime, or as an affirmative defence) we must of course determine what counts as 'voluntary'. It is clearly not enough that the abandonment is not *involuntary*: that the defendant positively chose to desist, rather than being rendered unable to complete the crime by external intervention or other 'extraneous factors'. If he decides to desist only because he becomes aware that he is likely to be caught or to fail, for example, his desistance is not 'voluntary'.²⁴¹ On the other hand, abandonment *is* 'voluntary' if it is due to the agent's own realization that what she is trying to do is wrong. There are, however, puzzling cases between these two extremes of clearly 'non-voluntary' and clearly 'voluntary' abandonment.²⁴²

Suppose that a would-be rapist's victim persuades him to desist. If she does so by persuading (or reminding) him that rape is wrong, his abandonment is 'voluntary': although induced by this 'extraneous factor',²⁴³ it is motivated by and reflects his own recognition that he is acting wrongfully. If she dissuades him only by persuading him that he will be caught if he continues, or by threatening him with a gun, his abandonment is not 'voluntary': his whole course of conduct (including his desistance) is still guided by the intention 'to rape her if I can get away with it'; and that intention, put so far into effect, should surely convict him of attempted rape. However, suppose she dissuades him by informing him that she is pregnant;²⁴⁴ or that she recently had a miscarriage, or is menstruating?²⁴⁵

The *Model Penal Code* would still convict him if his decision is merely 'to postpone the criminal conduct until a more advantageous time or to transfer the criminal effort to another but similar objective or victim';²⁴⁶ he is then still taking 'a substantial step' towards actualizing his intention to commit rape, although this particular step proved a dead end.²⁴⁷ Suppose, though, that he just abandons this rape, without manifesting any intention to postpone or transfer the enterprise? Should we say that his abandonment

²⁴¹ See *Model Penal Code*, s. 5.01(4); *LaFare & Scott*, 520; *Staples* (n. 239, above) 591.

²⁴² See *Fletcher*, 190-5 for further examples.

²⁴³ So too if he hears 'the voice' of God, or of conscience: see *Weaver* 42 SE 745 (1902, Georgia); *Graham* 162 NYS 334 (1916, New York).

²⁴⁴ See *Le Barron* 145 NW 2d 79 (1966, Wisconsin): conviction upheld; her pregnancy was an 'extraneous factor'.

²⁴⁵ See *Oakley* 125 NW 2d 657 (1964, Wisconsin): conviction quashed; his conduct did not manifest the requisite intent to 'rape' her, i.e. to overcome her 'utmost resistance' by physical force (Wisconsin Stats., s. 944.01). Hallows J dissented: he displayed the requisite intent; her success in dissuading him was 'not to his credit but to hers' (663).

²⁴⁶ S. 5.01(4).

²⁴⁷ Cf. Lord Diplock's comments on the pickpocket who first tries an empty pocket, but whose conduct is (he thought) still suitably proximate to the complete offence of picking other pockets: *Noak* [1978] 3 WLR 57, 64-5; see below, ch. 3, at nn. 92-3.

is 'voluntary', justifying an acquittal, only if it is motivated by his recognition of the *wrongness* of what he was trying to do, rather than by a purely egoistical recognition that he would not enjoy raping this woman? If so, should that recognition be a recognition or remembrance of the wrongness of rape as such; or should it be enough that he believes it to be wrong to rape a pregnant woman, for instance?

Or suppose he desists, not for any moral reason, nor because he suddenly realizes that he might well be caught, but because he has a prudential change of mind about whether it is worth risking punishment to commit this crime?²⁴⁸ The *Model Penal Code* would count such an abandonment as 'voluntary', since it is not motivated by 'circumstances, not present or apparent at the inception of [his] course of conduct, that increase the probability of detection':²⁴⁹ but should such a prudential abandonment entitle him to an acquittal?

DOES IT MATTER WHEN AN ATTEMPT IS ABANDONED?

We must also ask whether it matters at what stage the attempt is abandoned. Someone who has not yet progressed far enough to satisfy the normal conditions for an attempt (who has not yet taken a 'substantial step', or 'embarked on' the commission of the crime) is obviously not guilty of an attempt, whether she abandons it 'voluntarily' or not.²⁵⁰ Someone who completes his attempt by doing what is (for all he knows) the last act necessary to complete the offence is equally clearly guilty of an attempt, even if that attempt fails and he voluntarily refrains from trying again.²⁵¹ However, if voluntary abandonment at some time before that point can justify an acquittal, does it matter how late in the attempt it comes?

According to the *Model Penal Code* it does not: the defendant can secure an acquittal if 'he abandoned his effort to commit the crime or otherwise prevented its commission'.²⁵² Thus an intending rapist who voluntarily abandoned the rape after he had undressed his victim and lain on top of her would be guilty of sexual assault,²⁵³ but not of attempted rape.²⁵⁴ Even an effective intervention to prevent completion of the crime, after doing the last positive act that needed to be done, secures an acquittal under the *Code*: a repentant would-be murderer who took back the poisoned

²⁴⁸ Cf. *Staples* 85 Cal. Rptr. 589, 590-1.

²⁴⁹ S. 5.01(4); see Wechsler, Jones and Korn, 'The Treatment of Inchoate Offences in the Model Penal Code', 618.

²⁵⁰ See *Haughton v Smith*, [1975] AC 476, 493 (Lord Hailsham); *Joyce* 693 F 2d 838 (1982), 841-3.

²⁵¹ See *Pyle* 476 NE 2d 124 (1985, Indiana).

²⁵² S. 5.01(4). ²⁵³ See s. 213.4.

²⁵⁴ Contrast *Glover* 10 SE 420 (1889, Virginia): 'if a man resolves on a criminal enterprise, and proceeds so far in it that his act amounts to an indictable attempt, it does not cease to be such, although he voluntarily abandoned the evil purpose' (421).

food she had given her victim before he ate it would be acquitted of attempted murder.²³⁵ Indeed, if the defendant need only have 'prevented' the crime's commission, then a would-be murderer who, after shooting his victim, completely and voluntarily renounced his criminal purpose²³⁶ and secured life-saving treatment for her, would be acquitted of attempted murder.

Of course, if his repentant intervention fails and the crime is actually completed, he is guilty of that complete crime: he is then in the same position as any criminal who repents his crime after the event. Suppose, though, that his intervention is pre-empted? Mr Grant checked a suitcase containing a bomb onto a plane, intending that it should explode in mid-air and kill those on the plane; he then repented his plan and went to retrieve the suitcase; but it had already exploded prematurely without causing injury. What prevented the completion of the crime of murder was not his intervention but the bomb's premature explosion:²³⁷ but he *would have* prevented its completion, had it not already been prevented. This would also be true if the bomb had been detected before he could retrieve it: should he in such a case be acquitted on grounds of 'voluntary abandonment'?

We cannot answer these questions, about the meaning of 'voluntary', and about whether it matters when the attempt is 'abandoned', without clarifying *why* 'voluntary abandonment' should be a defence—if indeed it should be one.

THE MODEL PENAL CODE'S RATIONALE FOR THE DEFENCE

The *Model Penal Code* provisions rest on two arguments: first, voluntary abandonment can negate the inference to 'dangerousness of character' which the defendant's conduct would otherwise warrant, and which is a central foundation of attempt liability; and secondly, this defence gives intending criminals an incentive to desist.²³⁸

The strength of the second argument depends on some speculative empirical predictions about the likely benefits of such an incentive (and its likely costs in allowing more criminals to escape liability by spurious pleas of voluntary abandonment). Nor does it, by itself, justify recognizing only *voluntary* abandonment as a defence: indeed, the incentive (at least to desist from the present attempt) would be even stronger if abandonment

²³⁵ See Lumpkin J's *obiter* comment in *Griffin* 26 Ga.493 (1858, Georgia); and see at nn. 39-44, above on 'possible intervention'.

²³⁶ See at n. 240, above.

²³⁷ *Grant* 233 P 2d 660 (1951, California); this seemed to be one of the court's reasons for upholding his conviction for attempted murder.

²³⁸ See Commentary, 359-60; Wechsler et al., *op. cit.* n. 249, above, 617-18. For comment, see Stuart, 'The Actus Reus in Attempt', 520-1; *Fletcher*, 186-7; Wasik, 'Abandoning Criminal Intent', 791-5.

induced by the prospect of imminent detection also constituted a defence. An intending criminal who desisted only for that reason, however, might well have decided only to postpone the enterprise until some better occasion;²⁵⁹ and although he would thereby render his current attempt no longer dangerous, he would not undermine the inference to dangerousness of character that his conduct warranted.

The first argument, that voluntary abandonment negates the inference to 'dangerousness of character', carries more weight. The 'dangerousness' which grounds attempt liability consists in the disposition to form a criminal intention firm enough to lead to the actual commission of the crime:²⁶⁰ but one who voluntarily abandons her attempt does not manifest such a disposition. Wasik thinks that this rationale for the defence is sound only if the agent's abandonment grounds a 'necessary inference' to her *lack* of dangerousness of character:²⁶¹ but this is too strict. What justifies attempt liability is the dangerousness inferrable from the agent's conduct; so, to escape liability, all that should be required is the undermining or negation of that inference, not the positive grounding of a contrary inference.²⁶²

Such a rationale for the defence explains the Code's specific definition of 'voluntary' abandonment.²⁶³ Someone whose abandonment is motivated only by sudden fear of detection or failure does not thereby undermine the inference to dangerousness of character which his conduct otherwise warrants. If it is motivated instead by a prudent re-evaluation of law's deterrent threats, however, that inference is undermined: for someone with such a prudential view of the law is likely to continue obeying it. On the other hand, if what dissuades the intending criminal is some particular feature of this present victim, rather than the wrongfulness (or imprudence) of this kind of crime, he should still be convicted: desistance for that kind of reason does not undermine the inference to a dangerous disposition to commit that type of crime.

(However, intervention after the 'last act', to prevent completion of the crime, is more problematic from this perspective.²⁶⁴ One problem is that it is unclear why it should matter whether the intervention is *successful*: if such intervention undermines the inference to dangerousness of character, it surely does so whether or not the intervention is successful. Another problem is that it is not clear how significantly a post-last-act intervener differs from one who repents a crime she has successfully completed, and now seeks some way to repair the harm she has done: each agent has displayed a disposition to form a criminal intention firm enough to lead

²⁵⁹ See at n. 246, above.

²⁶⁰ See at nn. 146-9, above.

²⁶¹ 'Abandoning Criminal Intent', 792.

²⁶² On this reading the main rationale for the Code's provisions is thus not markedly different from that which Fletcher finds in German law, and distinguishes from what he thinks is the Code's rationale (Fletcher, 184-97).

²⁶³ See at nn. 241-9, above.

²⁶⁴ See at nn. 255-7, above.

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