

63937-4

639-37-4

NO. 63937-4-I

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

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STATE OF WASHINGTON,

Respondent,

v.

BAILEY WITT,

Appellant.

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

The Honorable Gerald Knight, Judge

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BRIEF OF APPELLANT

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Attorney for Appellant

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A. ASSIGNMENT OF ERROR

There was insufficient evidence to support appellant's conviction.

Issue Pertaining to Assignment of Error

Appellant was charged with attempted second degree burglary.

Was there sufficient evidence to support appellant's conviction where there was no evidence of an attempt to gain entry into the building?

B. STATEMENT OF THE CASE

1. Procedural Facts

Bailey Witt was charged in Snohomish County Superior Court with attempted second-degree burglary. CP 70-71. A jury found Witt guilty as charged. CP 16-17. Witt was sentenced to a standard range sentence of 20 months. CP 3-15.

2. Substantive Facts<sup>1</sup>

At about 4:45 a.m., Snohomish County Deputy Christopher Veentjer saw a car parked in an alcove at the Viking Village, a commercial complex housing six to eight businesses. RP 28, 33, 133. When Veentjer turned his spot light on the car a man got out. RP 31. Veentjer asked the man what he was doing but before the man could answer Veentjer heard a metal object hit the ground. RP 32. Veentjer drew his gun and called for backup. RP 33.

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<sup>1</sup> RP refers to the trial verbatim report of proceeding held on June 29<sup>th</sup> and 30<sup>th</sup> 2009.

Deputy Tracy Peckham arrived seconds later. When she drove into the complex she saw Witt, who was wearing dark clothes and carrying a backpack, jog from the entrance of one of the businesses located in the complex. RP 75, 90. Witt ran to the rear of a box van parked nearby. RP 77. When Peckham went to the van and identified herself, Witt ran into some bushes but he eventually came out and Peckham arrested him. RP 78-80. Peckham found the backpack near the rear wheel of the van and a crow bar on top of the van's rear wheel. RP 80. Peckham did not see Witt carrying a crow bar. RP 93.

Inside the backpack police found a reciprocating saw, pry bar, tin snips, screwdrivers, wood scribing tools, claw hammer, wires, electrical connection and latex gloves. RP 149-151. A detective testified some of the items in the backpack appeared to be tools that would be used in a burglary while others did not. RP 137, 150-151.

Police used a fire truck ladder to access the roof of the complex. On the roof there were some shoeprints in the frost. RP 38. The shoeprints went around a vent on the roof then off towards the front of the building. RP 40. The tread pattern of one of the shoeprints was similar to the tread pattern on the shoes Witt was wearing. RP 136, 140-144. Police also saw scratches on the fascia board of the building near a dumpster and

hypothesized someone could have accessed the roof by standing on the dumpster. RP 155.

Police did not see any signs anyone tried to gain entry into the building through the roof. RP 101, 182. Police also checked the entire building and did not find any evidence that anyone attempted to gain entry through any of the windows or doors. RP 99-100, 180.

C. ARGUMENT

THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE CONVICTION.

In all criminal prosecutions, due process requires that the State prove every fact necessary to constitute the charged crime beyond a reasonable doubt. U.S. Const. amend. 14; Const. art. 1. § 3: In re Winship, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970); State v. Crediford, 130 Wn.2d 747, 749, 927 P.2d 1129 (1996). A reviewing court should reverse a conviction for insufficient evidence where no rational trier of fact, when viewing the evidence in a light most favorable to the State, could have found the elements of the crime charged beyond a reasonable doubt. State v. Hundley, 126 Wn.2d 418, 421-22, 895 P.2d 403 (1995); State v. Wade, 98 Wn. App. 328, 338, 989 P.2d 576 (1999).

The elements of second-degree burglary require proof of entering or remaining unlawfully in a building with the intent to commit a crime against a person or property therein. RCW 9A.52.030. To prove an attempt the evidence must show a person committed an act constituting a substantial step toward the commission of the 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) (citing State v. Aumick, 126 Wn.2d 422, 429-30, 894 P.2d 1325 (1995)).

Generally, where courts have found sufficient evidence to support an attempted burglary conviction the evidence has shown some attempt to gain entry into the building. In Bencivenga, for example, the evidence showed Bencivenga tried to pry open the door. Bencivenga, 137 Wn.2d at 705. In State v. Chacky, 177 Wn. 694, 33 P.2d 111 (1934), Chacky pried the padlock off the door of the building. Id. at 695. In State v. Bergeron, 105 Wn.2d 1, 711 P.2d 1000 (1985), Bergeron broke a basement window and pushed it off its track. Id. at 11.

Here, there were no broken windows, pried locks, broken doors, or any indication someone attempted to get into the building. While some of the tools found in the backpack were the types of tools used to commit a burglary, others were not. They were, however, all common tools. The

shoeprints and the fact Witt ran from police may be circumstantial evidence Witt was on the roof but there was no evidence he was on the roof with any of the tools in the backpack or that he tried to gain access to the building from the roof. In sum, without any evidence Witt attempted to gain entry into the building, there was insufficient evidence to show Witt took a substantial step towards the commission of burglary. Thus, the State failed to prove the attempt element of the crime.

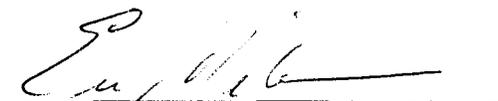
D. CONCLUSION

There was insufficient evidence to support attempted second-degree burglary. Therefore, it is requested this Court reverse Witt's conviction.

DATED this 8<sup>th</sup> day of February, 2010.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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Attorney for Appellant

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v.	)	COA NO. 63937-4-I
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BAILEY WITT,	)	
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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 8<sup>TH</sup> DAY OF FEBRUARY 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] SNOHOMISH COUNTY PROSECUTOR'S OFFICE  
3000 ROCKEFELLER AVENUE  
EVERETT, WA 98201
  
- [X] BAILLEY WITT  
DOC NO. 836572  
MONROE CORRECTIONAL COMPLEX  
P.O. BOX 7001  
MONROE, WA 98272

**SIGNED** IN SEATTLE WASHINGTON, THIS 8<sup>TH</sup> DAY OF FEBRUARY 2010.

x *Patrick Mayovsky*

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