

**Appeal No. 14-24-00580-CR**

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**In The Fourteenth Court Of Appeals**

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14th COURT OF APPEALS  
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DEBORAH M. YOUNG  
Clerk of The Court

**GERALD WADE, Appellant**

**Vs.**

**THE STATE OF TEXAS, Appellee.**

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**On Appeal from the 412th Judicial District Court  
of Brazoria County, Texas  
Cause Number 99812-CR.**

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**BRIEF FOR APPELLANT  
GERALD WADE**

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Oral Argument Not Requested

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## IDENTITY OF PARTIES AND COUNSEL

Pursuant to Tex. R. App. P., Rule 38.1(a), appellant certifies that the following is a complete list of the parties to the final judgment and the names and addresses of counsel in the trial and on appeal:

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### Trial Judge:

W. Edwin Denman

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**Appeal No. 14-24-00580-CR**

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**In The Fourteenth Court Of Appeals**

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**GERALD WADE, Appellant**

**Vs.**

**THE STATE OF TEXAS, Appellee.**

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**On Appeal from the 412th Judicial District Court  
of Brazoria County, Texas  
Cause Number 99812-CR.**

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**BRIEF FOR APPELLANT**  
**GERALD WADE**

To The Honorable Justices of the Fourteenth Court of Appeals:

Comes now appellant, Gerald Wade, by and through his attorney of record, Cary M. Faden, and files this his brief to set aside the July 24, 2024, judgment of the 412th Judicial District Court of Brazoria County, Texas in Cause Number 99812-CR, and would respectfully show the Court:

## STATEMENT OF THE CASE

On December 7, 2023, Appellant, was indicted for the state jail felony degree-enhanced to a second degree felony of burglary of a building; (1 CR at 6). The offense was alleged to have occurred on or about October 25, 2023. (1 CR at 6). On July 23, 2023, Appellant pleaded not guilty to the indictment. (3 RR at 23). After a jury trial, the jury assessed Appellant's punishment at confinement in the Texas Department of Criminal Justice-Institutional Division for a period of six (6) years, with a \$10,000.00 fine. (1 CR at 64). On July 30, 2024, Appellant timely filed his notice of appeal. (1 CR at 71).



**ISSUES PRESENTED**

**POINT OF ERROR ONE**

**THE EVIDENCE ADDUCED AT TRIAL WAS LEGALLY  
INSUFFICIENT TO SUPPORT A FINDING OF GUILT AS TO  
THE INDICTMENT.**

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## STATEMENT OF FACTS

On December 7, 2023, Appellant was indicted in the 412th Judicial District Court in cause number 99812-CR. That indictment alleged that, on or about October 25, 2023, in Brazoria County, Appellant did:

did then and there intentionally or knowingly enter a building not then open to the public, owned by Leslie Bryson, Bryson Memorial, without the effective consent of said owner, with intent to commit theft;

## ENHANCEMENT PARAGRAPHS

AND THE GRAND JURORS AFORESAID do further present that before the commission of the offense alleged above, on or about the 19th day of March, 2007, in Cause Number 1107788, in the 337th District Court of Harris County, Texas, the defendant was convicted of the felony of Possession of a Controlled Substance;

AND THE GRAND JURORS AFORESAID do further present that before the commission of the offense alleged above, on or about the 9th day of September, 2008, in Cause Number 1157884, in the 178th District Court of Harris County, Texas, the defendant was convicted of the felony of Possession of a Controlled Substance;

AND THE GRAND JURORS AFORESAID do further present that before the commission of the offense alleged above, on or about the 21st day of March, 2011, in Cause Number 1291889, in the 337th District Court of Harris County, Texas, the defendant was convicted of the felony of Evading Arrest w/Vehicle.

(1 CR at 6).

A venire of approximately one hundred (100) persons, was subjected to voir dire examination. (2 RR at 12-113). The jury of twelve (12) was selected and seated,

with no further objection. (2 RR at 113). The jury was sworn. (2 RR at 113). Appellant was arraigned on the indictment and entered a plea of not guilty. (3 RR at 23).

Rachel Whittington was called, I am employed at Martus Stone as an office manager. And was Martus Stone known by another name last year? Yes, sir. It was known as Bryson Memorials. How long have you worked at Martus Stone or Bryson Memorials? Almost nine years. Okay. And what you said you were an office manager. What all does that entail? I take care of everything in the office. I sell the headstones. I talk to the families, the cemeteries, I coordinate everything between everyone. Okay. And so Bryson Memorials you were talking about headstones. Is that generally what y'all sell? That is the main part of the business, yes, sir. Okay. What other parts of the business are there? We do commercial signs every so often, the tiles that goes on the courthouses or the Masonic emblems and stuff. So let's go to October 23rd of 2023. How did, you know why we're here. Right? Yes, sir. Okay. So how did this start for you? It started with a gentleman walking in, introducing himself, and looking into purchasing a memorial. I started off by asking-Okay. So a person walked in and asked about purchasing a memorial? Yes, sir. What did you tell them? I told them that I can help him and I needed to know what cemetery the memorial would be going into. And what did he say? He would not answer me. Okay. Why is that

important? Because every cemetery has different rules and regulations so I have to know what's going what cemetery it's going in in order to help the family the best. So he answered his phone and wouldn't answer your questions. What happened next? He asked to go outside and look at a memorial. Okay. And what did you do? I went with him. Okay. To show him the memorial. And so you went outside. Where exactly did you go to show him the memorial? So when he came into your office, you're talking about this building here? Yes, sir. I just stayed a distance from him. Before that while we were walking out of the office I texted Mr. Bryson to check the cameras because I had a bad feeling because he wouldn't answer any questions. Okay. And why did you -- you said a little bit. But why did you have that bad feeling? Because he wouldn't answer any questions and we had a previous attempt -- not attempt. It was an actual robbery at that time. And it gave off the same vibes. And they answered questions. This gentleman did not. Okay. And so you texted Mr. Bryson to check the security cameras? Yes, sir. What did you do after that? That was it. I just walked with him. I stayed behind him so I was within a safe distance if anything was happening. He still wouldn't answer any questions. I was trying to help, and I just stayed a safe distance. Ms. Whittington, do you recognize the contents of those photos? Yes, sir. And what are generally the contents of those photos? That is generally my office. It has a cash box in there behind my desk. Okay. And is that all the interior of that

building you pointed out and identified as your office on that map? Yes, sir. Generally, when y'all are open do you allow customers to go behind your desk? Never. Is that area behind your desk, is that open to the public? No, sir. Okay. What all is contained back there that the public wouldn't or shouldn't have access to? That has files of our orders, that has our cash box, that's where we keep all of the confidential more stuff. Okay. So at any point when you're open for business do you allow people to be back there? No, sir. Going to State's 10. Is this that cash box we've seen in a couple photos already? Yes, sir. Does it appear to be open or closed? It is closed, but it is broken in this picture. Okay. Was it broken before you let that guy out back? No, sir. Okay. But afterwards when you came back to the office was it broken? Yes, sir. And the box next to it was also straight before. So you testified that it wasn't broken open like this before. What else was out of place, did you notice? The box next to it, that is a battery box that we would keep our computers hooked up to. And that was also straight previously. And it is angled now. (3 RR at 28-43). Cross examination, on this day did you put a closed sign on the door when you left? No, sir. Okay. So when you left, the doors were still open. People could still walk in if they wanted to? Yes, sir. (3 RR at 43-46).

Leslie Bryson was called, and back in October of 2023, were you involved with Bryson Memorials? I was the owner. I got a text message from my secretary, Rachel

Whittington, that to, and I can almost quote it. Look at the cameras. Okay. So you got that text that said look at the cameras. What did you do next? I instantly got online. We have Nest cameras throughout the property. I believe seven cameras at the time. I could view all seven cameras simultaneously. When I pulled up the office, I saw two gentlemen in my office. Okay. So you said you pulled up the office camera. What I have right here is I have State's Exhibit No. 2. Is that familiar to you, Mr. Bryson? Yes, sir. That's the aerial shot of my property. Okay. And when you talked about looking at the camera in the office? Yes, sir. So you looked in there and you said you saw two people in there. Is that right? Yes, sir. What were those two people doing? They were rummaging through the drawers. They were going through the closets trying to find whatever they could find. They went through two desks. They tried to jimmy the lock on the cash box. They went through every drawer of every desk. And my biggest concern was I could not find my secretary in the cameras and I did not know about her safety. Okay. And so what did you do when you saw that on the videos? The minute I saw the gentlemen in areas of the office they shouldn't be, I immediately dialed 9-1-1. Mr. Bryson, what is right below this camera? The cash box. Okay. Were you able to make scene later that day? I'm sorry, sir? A little louder. Did you ever come back later that day? I was back on scene before the officers took them away. Okay. So you arrived shortly after there. Was there something different from

the cash box as there is normally? The cash box had been moved around a little bit. The lock had been jimmied open. In the video you can actually hear the drawer open with the ring of a bell. Mr. Bryson, did you give either one of those folks permission to go into your business that day? Absolutely not. Did you give them permission to go through your cash box? Absolutely not. Did you give them permission to go through any of those drawers? No, sir. Did they have any permission to be behind that desk? No, sir. Do you see the person that's on the screen right here in the blue cap in the courtroom today? I do, sir. And if you can point him out and identify him by an article of clothing? It's the gentleman in the blue shirt. MR. ROGERS: Let the record reflect that the witness has identified the Defendant. THE COURT: It does. Did you give anybody permission to be in your office on this particular day? Rachel Whittington is the only one who ever had permission to go in that office. Okay. So would that be a no, that you didn't give anybody else permission that day? Correct. Did you notice if anything was missing? I found nothing missing. You could tell that the cash drawer had been jimmied open. Okay. But you couldn't tell that there was anything missing? No, sir, I couldn't. (3 RR at 46-60). Cross examination, you told the dispatcher that you saw the Defendant go into the building? Yes, sir. Did you see them leave and go into well, I guess what you call your office? Yes, sir, I did. So did you see them go in or did you see them come out? Both. You saw both? You can see

both on the camera. And I was viewing the camera. Okay. So specifically to your building, that's the part that's not open to the public. Right? Your office? That's correct. And you saw them go in and come out of your office? Yes, sir. Do you know how long he was in there approximately? If you don't, that's fine. Under a minute. Under a minute? And nobody is ever allowed in there. Right. So I believe you testified on direct when it comes to the front business office that the front part of it is open to the public, but there are portions of that building that are not open to the public. Is that right? That is correct. And which portions are those? The closet that he looked in for sure. Anything that is a closed door or a closed drawer is not open to the public. What about the area behind Ms. Whittington's desk? Is that part open to the public? There is no reason for the public to be behind those desks. Absolutely no reason. Okay. So is that portion of the building open to the public or closed to the public? No, sir. Is your cash box open to the public? Absolutely not. Okay. Are the drawers in those desks open to the public? No, sir. Are the drawers in that desk behind there, the big rolling drawers, are those open to the public? No, sir. (3 RR at 60-65).

Joe Estrada was called, I'm Corporal Estrada with Angleton Police Department. I was the first officer responding to the incident. Okay. And where did you respond to? I responded to the memorial stones. I don't know exactly the address, but I know



that business. Did you write a report in this case? Yes, sir. When I got there I approached to a vehicle and the only vehicle that was outside. And what kind of vehicle was it? It was a Ford Explorer, Expedition. Okay. What color was it? Silver. Okay. And so when you approached it what did you do after you approached the vehicle? After I approached the vehicle I took the keys off the subject that was in the vehicle. Okay. I grabbed his ID. Then I heard an employee, a female employee, hollering from the back of the business saying he's running. So I approached. She pointed that he was going one direction. Okay. So I had to go around. So you heard the employee yelling and you went around the back? Yes. When you got around back what did you do next? I then saw this individual back there. It's another building next to the office. He was standing right behind that building walking towards the south. So after you detained him, what did you do next? Once he was detained I went and talked to the employee, the worker. Okay. And at that time she said she didn't know much. She just thought that it was very suspicious. Then I walked towards where the area I saw him -- Okay. -- when I first placed eyes on him, which was behind the building. Okay. So you walked over behind the building where you saw him. And what, if anything, did you see there? I saw a flat screwdriver I think with a red handle, and then a couple of feet further more it was a black flashlight I believe. Okay. At any point did you look inside the car that they arrived in? Yes. Did you find anything

interesting in there? It was another flat screwdriver that looked just like the one I had found behind the building. I think it had a red handle as well. (3 RR at 65- 79). Cross examination, at any point did you see Mr. Wade go into the building? What you mean go into the building? Did you see him inside any building? I just saw him behind that building walking away towards the bowling. So, no, you did not see him in any building? No. When I got there? At any point did you see him in the building? No, sir. Did you see him come out of a building? No, sir. I went back to the spot to where I first saw him and then I discovered the flat screwdriver and the flashlight. And that's the photos we just viewed. Correct? Yes, sir. That's why I called for evidence bags. And when you were there you found those? Yes, sir. And why did you believe they belong to the Defendant? The screwdriver looked just like the one in the vehicle. And then it was -- it didn't look no rusty. It looked fairly new. Both items looked fairly new. And then I believe, if I'm not mistaken, it had rained a couple of days. So they were dry for the most part. At this point had you seen the one in the vehicle yet? Yes. So, Mr. Estrada, based on where you found those items, you don't know whether or not Mr. Wade or the red cap guy dropped those, do you? No. Yes, I do. You do? You saw him? I didn't see him, but I know it wasn't the red cap because the red cap never went to that area. How do you know that? Because the lady told me. The employee told me he never walked to that area. So when you asked the charge on the report he

said Burglary of a Building? Yes, sir. And that's CID? What does CID mean? What was the question? What does CID mean? The criminal investigator division. When the sergeant told you that, what did you understand that to mean? I understood he went beyond that building. (3 RR at 79-84). The State rested. (3 RR at 84). Appellant rested. (3 RR at 85). Jury verdict of guilt. (3 RR at 116). At punishment the State called Leslie Bryson, so I noticed on your 9-1-1 call you seemed very worried. Was that fair to say? Terrified. Okay. And why was that? I've had a heart attack in my life and subject to a second or more. At the time of this crime I was recovering from stage four colon cancer, which they told me at the time they found that I had 60 days to live and they cured me. But I was going through recovery. Rachel Whittington, my secretary, is closer to a daughter than an employee. And I protect my family like nothing -- like a mama bear. I could see that my child was in danger. My heart was racing. I was near the HEB in Friendswood when I made that call. And the entire incident took less than 8 minutes. When they loaded this gentleman into the police car I was already on site. I was watching the cameras on my phone and driving in excess of 100 miles an hour trying to get to Rachel to protect her. They had her out of sight where I could not see her. I knew there was at least two very large gentlemen involved; and I did not know if she was being raped, murdered, kidnapped. I was in a total panic. And I did not calm down until the dispatcher told me they have him in

custody and I was watching them put him in custody. (4 RR at 8-10). State rested on punishment. (4 RR at 10). Appellant rested. (4 RR at 10).

## SUMMARY OF THE ARGUMENT

### Point of Error One:

The evidence adduced was insufficient to find that Appellant committed the offense of burglary of a building as alleged in the indictment . Thus, there was a reasonable doubt as to whether Appellant was guilty, and the evidence was insufficient to find Appellant guilty. Applying, *Brooks v. State*, 323 S.W.3d 893,894-95 (Tex. Crim. App. 2010) (plurality op.); *id.* at 926. *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781. *Burden v. State*, 55 S.W.3d 608, 612 (Tex. Crim. App. 2001).

The legal sufficiency standard of review is the only standard the Court will apply in determining whether the evidence is sufficient to support each element of a criminal offense that the State is required to prove beyond a reasonable doubt. *Temple v. State*, 390 S.W.3d 341, 360 (Tex. Crim. App. 2013) (“[T]his Court now applies only one standard ‘to evaluate whether the evidence is sufficient to support a criminal conviction beyond a reasonable doubt: legal sufficiency.’”); *Kolb v. State*, 523 S.W.3d 211, 214 (Tex. App.—Houston [14th Dist.] 2017, pet. ref’d). For this review, we consider the combined and cumulative force of all admitted evidence and any reasonable inferences therefrom in the light most favorable to the verdict to determine whether the jury was rationally justified in its decision. *Johnson v. State*, 509 S.W.3d 320, 322 (Tex. Crim. App. 2017); *Kolb*, 523 S.W.3d at 214.

## ARGUMENT

### APPELLANT'S POINT OF ERROR ONE:

**THE EVIDENCE ADDUCED AT TRIAL WAS LEGALLY INSUFFICIENT TO SUPPORT A FINDING OF GUILT AS TO THE INDICTMENT.**

#### **Sufficiency**

Appellant challenges the legal sufficiency of the evidence to support his conviction. The Court of Criminal Appeals has held that only one standard should be used in a criminal case to evaluate the sufficiency of the evidence to support findings that must be established beyond a reasonable doubt: legal sufficiency. *Brooks v. State*, 323 S.W.3d 893,894-95 (Tex. Crim. App. 2010) . Accordingly, the review of the sufficiency of the evidence in this case is under a rigorous and proper application of the legal sufficiency standard of *Jackson v. Virginia*, 443 U.S. 307 (1979). *Brooks*, 323 S.W.3d at 906. When reviewing the sufficiency of the evidence, it is proper to view all of the evidence in the light most favorable to the verdict to determine whether the fact finder was rationally justified in finding guilt beyond a reasonable doubt. *Brooks*, 323 S.W.3d at 899; *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). This Court will defer to the fact finder's resolution of conflicting evidence unless the resolution is not rational. *Brooks*, 323 S.W.3d at 902 n.19, 907. Appellant argues the evidence is legally insufficient to support his conviction. The

Court of Criminal Appeals has held that only one standard should be used to evaluate the sufficiency of the evidence in a criminal case: legal sufficiency. *Brooks v. State*, 323 S.W.3d 893, 894 (Tex. Crim. App.2010). Accordingly, the review of the sufficiency of the evidence in this case under a proper application of the *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), legal sufficiency standard. *Brooks*, 323 S.W.3d at 905.

### **Standard of Review**

When reviewing the sufficiency of the evidence, the view is to all of the evidence in the light most favorable to the verdict to determine whether the jury was rationally justified in finding guilt beyond a reasonable doubt. *Id.* at 898. *Dewberry v. State*, 4 S.W.3d 735,740 (Tex. Crim. App.1999); *see also Sharp v. State*, 707 S.W.2d 611,614 (Tex. Crim. App.1986) (stating the jury may choose to believe or disbelieve any portion of the testimony at trial). The duty as a reviewing court is to ensure that the evidence presented actually supports a conclusion that the defendant committed the crime. *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App.2007).

The legal sufficiency standard of review is the only standard the Court will apply in determining whether the evidence is sufficient to support each element of a criminal offense that the State is required to prove beyond a reasonable doubt. *Temple v. State*, 390 S.W.3d 341, 360 (Tex. Crim. App. 2013) (“[T]his Court now applies

only one standard ‘to evaluate whether the evidence is sufficient to support a criminal conviction beyond a reasonable doubt: legal sufficiency.’”); *Kolb v. State*, 523 S.W.3d 211, 214 (Tex. App.—Houston [14th Dist.] 2017, pet. ref’d). For this review, we consider the combined and cumulative force of all admitted evidence and any reasonable inferences therefrom in the light most favorable to the verdict to determine whether the jury was rationally justified in its decision. *Johnson v. State*, 509 S.W.3d 320, 322 (Tex. Crim. App. 2017); *Kolb*, 523 S.W.3d at 214. Direct evidence and circumstantial evidence are equally probative; circumstantial evidence alone may be sufficient to uphold a conviction so long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction. *Ramsey v. State*, 473 S.W.3d 805, 809 (Tex. Crim. App. 2015).

### ***Burglary Of A Building***

The indictment alleged that, on or about October 25, 2023, in Brazoria County, Appellant did:

did then and there intentionally or knowingly enter a building not then open to the public, owned by Leslie Bryson, Bryson Memorial, without the effective consent of said owner, with intent to commit theft.

(1 CR at 6).

Clearly, it was Appellant’s trial strategy that the appellant asserts that the record evidence is insufficient to prove he entered a building not then open to the



public, owned by Leslie Bryson, Bryson Memorial, when the business was open to the public, without the effective consent of said owner, with intent to commit theft, intended to commit theft because there is no evidence that appellant intended to commit burglary, by its definition. A person commits theft when the person "unlawfully appropriates property with the intent to deprive the owner of the property." Tex. Penal Code § 31.03(a) (West, Westlaw through 2017 1st C.S.); *Long v. State*, 525 S.W.3d 351, 359 (Tex. App.—Houston [14th Dist.] 2017, pet. ref'd). One appropriates property under section 31.03(a) of the Penal Code if one "acquire[s] or otherwise exercise[s] control over property other than real property." Tex. Penal Code § 31.01(4)(B) (West, Westlaw through 2017 1st C.S.); *Long*, 525 S.W.3d at 359. Appropriation of property is unlawful if it is "without the owner's effective consent." Tex. Penal Code § 31.03(b)(1); *Long*, 525 S.W.3d at 359. Consent is not effective if the consent is "induced by deception or coercion." Tex. Penal Code § 31.01(3)(A); *Long*, 525 S.W.3d at 359. "Deception" means "creating or confirming by words or conduct a false impression of law or fact that is likely to affect the judgment of another in the transaction, and that the actor does not believe to be true." Tex. Penal Code § 31.01(1)(A); *Long*, 525 S.W.3d at 359. One acts intentionally, or with intent, with respect to the nature of one's conduct or to a result of one's conduct when it is one's conscious objective or desire to engage in the conduct or

cause the result. Tex. Penal Code § 6.03(a) ; *Long* , 525 S.W.3d at 359. Intent is a question of fact for the jury, and the jury may infer intent from the circumstances. *See Reed v. State* , 158 S.W.3d 44, 48 (Tex. App.— Houston [14th Dist.] 2005, pet. ref'd). "Deprive" means "to withhold property from the owner permanently or for so extended a period of time that a major portion of the value or enjoyment of the property is lost to the owner." Tex. Penal Code § 31.01(2)(A) ; *Long* , 525 S.W.3d at 359. An "owner" "has title to the property, possession of the property, whether lawful or not, or a greater right to possession of the property than the actor." Tex. Penal Code § 1.07(a)(35)(A) (West, Westlaw through 2017 1st C.S.); *Long* , 525 S.W.3d at 359. Money is considered property. Tex. Penal Code § 31.01(5)(C) ; *Long* , 525 S.W.3d at 359.

Section 30.02 of the Penal Code lists three "distinct ways" a burglary may be committed. *DeVaughn v. State*, 749 S.W.2d 62, 64 (Tex. Crim. App.1988); see TEX. PEN.CODE ANN. § 30.02(a) (Vernon 1994 & Supp.1997). If a defendant is charged with burglary under subsections (a)(1) or (a)(2), the State is required to prove the defendant's intent to commit a felony or theft at the time the defendant entered or remained concealed in a habitation or building. See *DeVaughn*, 749 S.W.2d at 64-65; see also TEX. PEN. CODE ANN. § 30.02(a). However, when a defendant is charged under subsection (a)(3), the State is not required to prove that the defendant intended

to commit the felony or theft at the time of entry. The State must simply prove that the defendant intentionally or knowingly entered the building or habitation without the owner's consent and while inside committed or attempted to commit a felony or theft. *DeVaughn*, 749 S.W.2d at 65; see also *Rivera v. State*, 808 S.W.2d 80, 92 (Tex. Crim. App.1991); *Flores v. State*, 902 S.W.2d 618, 620 (Tex. App.-Austin 1995, pet. ref'd) ("Prosecution under section 30.02(a)(3) is appropriate when the accused enters without effective consent and, lacking intent to commit any crime upon his entry, subsequently forms that intent and commits or attempts to commit a felony or theft.") (citing SETH S. SEARCY III & JAMES R. PATTERSON, PRACTICE COMMENTARY, TEX. PENAL CODE ANN. § 30.02 (West 1989)). In determining whether a defendant may be convicted of burglary when the completed offense the defendant attempted to commit is classified as a felony, but the attempt to commit the felony is itself classified as a misdemeanor by the Penal Code, we begin our analysis by looking for the plain, unambiguous meaning of the phrase "attempts to commit a felony" contained in the burglary statute. TEX. PEN.CODE ANN. §30.02(a)(3); see *Brown v. State*, 943 S.W.2d 35, 36 (Tex. Crim. App.1997). When the language of a statute is clear and unambiguous, courts are bound to follow the plain meaning of the text "unless doing so would lead to absurd results." *Brown*, 943 S.W.2d at 36; see also *Ramos v. State*, 934 S.W.2d 358, 364 (Tex. Crim. App.1996); *Boykin v. State*,

818 S.W.2d 782, 785 (Tex. Crim. App.1991). The text of the burglary statute unambiguously states that an attempt to commit a felony is sufficient for the jury to convict a defendant of burglary. TEX. PEN. CODE ANN. § 30.02(a)(3). The statute does not require that the defendant have actually committed a felony, only that he attempted to commit one. *Id.* The fact that section 15.01(d) of the Penal Code classifies an attempt to commit a state jail felony as a class A misdemeanor does not change the plain meaning of the burglary statute which allows a conviction for burglary based on the defendant's attempt to commit a felony. See TEX. PEN. CODE ANN. § 15.01(d).

Appellant also challenges the evidence as to the element of intent. Intent to commit theft may be inferred from the circumstances. *Moreno v. State*, 702 S.W.2d 636, 641 (Tex. Crim. App.1986), disapproved on other grounds by *Hall v. State*, 225 S.W.3d 524 (Tex. Crim. App.2007); *Simmons v. State*, 590 S.W.2d 137, 138 (Tex. Crim. App.1979); *Coleman v. State*, 832 S.W.2d 409, 413 (Tex. App.-Houston [1st Dist.] 1992, pet. ref'd) (specific intent to burglarize motor vehicle can be inferred from circumstances).

The jury is exclusively empowered to determine the issue of intent, and the events of a burglary may imply the intent with which the burglar entered. *Moreno*, 702 S.W.2d at 641; *Joseph v. State*, 679 S.W.2d 728, 730 (Tex. App.-Houston [1st

Dist.] 1984, no pet.). Furthermore, property need not be taken for proof of intent to commit theft to be sufficient. *Ortega v. State*, 626 S.W.2d 746, 749 (Tex. Crim. App. 1981). The element required by Section 30.04 of the Texas Penal Code is intent; "the State is not required to prove any actual taking." *Jones v. State*, 482 S.W.2d 634, 636 (Tex. Crim. App. 1972); *Thomas v. State*, 919 S.W.2d 810, 814 (Tex. App.-Houston [14th Dist.] 1996, pet. ref'd). *Brown v. State*, 294 S.W.3d 203 (Tex. App. 2009). A person commits an offense if, without the effective consent of the owner, he enters a habitation with the intent to commit a felony, theft, or an assault. Tex. Penal Code Ann. § 30.02(a) (West 2003). Intent is generally proven by circumstantial evidence. *Dillon v. State*, 574 S.W.2d 92, 94 (Tex. Crim. App. 1978); accord *Kelley v. State*, 429 S.W.3d 865, 872 (Tex. App.-Houston [14th Dist.] 2014, no pet.). While proof of intent cannot rely simply on speculation and surmise, the fact finder may consider the defendant's conduct and surrounding circumstances and events in deciding the issue of intent. *McGee v. State*, 923 S.W.2d 605, 608 (Tex. App.-Houston [1st Dist.] 1995, no pet.). *Lee v. State*, 442 S.W.3d 569 (Tex. App. 2014).

Forced entry is not, however, an element of burglary; rather, burglary requires entry to be made without the effective consent of the owner. See Tex. Penal Code Ann. § 30.02(a) (West 2011). Although the door to this business was open. See *Evans*

*v. State*, 677 S.W.2d 814, 818 (Tex. App.-Fort Worth 1984, no pet.) (“A person can make an unlawful entry by walking through an open door when the entry is without the owner's consent.”); *Clark v. State*, 667 S.W.2d 906, 908 (Tex. App.-Dallas 1984, pet. ref'd) (“[A]n entry through an open door can constitute a burglary ... if the building is not open to the public.”). Importantly, lack of consent to entry in burglary prosecutions may be shown by circumstantial evidence. *Hathorn v. State*, 848 S.W.2d 101, 107 (Tex. Crim. App.1992). *Lee v. State*, 442 S.W.3d 569 (Tex. App. 2014).

Appellant argues, that Martus Stone also known as Bryson Memorials, was open to the public. Rachel Whittington claimed generally, when y'all are open do you allow customers to go behind your desk? Never. Is that area behind your desk, is that open to the public? No, sir. Okay. What all is contained back there that the public wouldn't or shouldn't have access to? That has files of our orders, that has our cash box, that's where we keep all of the confidential more stuff. Okay. So at any point when you're open for business do you allow people to be back there? No, sir. Going to State's 10. Is this that cash box we've seen in a couple photos already? Yes, sir. Does it appear to be open or closed? It is closed, but it is broken in this picture. Okay. Was it broken before you let that guy out back? No, sir. Okay. But afterwards when you came back to the office was it broken? Yes, sir. And the box next to it was also straight before. So you testified that it wasn't broken open like this before. What else

was out of place, did you notice? The box next to it, that is a battery box that we would keep our computers hooked up to. And that was also straight previously. And it is angled now. (3 RR at 28-43).

Leslie Bryson claimed when she pulled up the office, I saw two gentlemen in my office. Okay. So you said you pulled up the office camera. What I have right here is I have State's Exhibit No. 2. Is that familiar to you, Mr. Bryson? Yes, sir. That's the aerial shot of my property. Okay. And when you talked about looking at the camera in the office? Yes, sir. So you looked in there and you said you saw two people in there. Is that right? Yes, sir. What were those two people doing? They were rummaging through the drawers. They were going through the closets trying to find whatever they could find. They went through two desks. They tried to jimmy the lock on the cash box. They went through every drawer of every desk. Okay. So you arrived shortly after there. Was there something different from the cash box as there is normally? The cash box had been moved around a little bit. The lock had been jimmied open. In the video you can actually hear the drawer open with the ring of a bell. Mr. Bryson, did you give either one of those folks permission to go into your business that day? Absolutely not. Did you give them permission to go through your cash box? Absolutely not. Did you give them permission to go through any of those drawers? No, sir. Did they have any permission to be behind that desk? No, sir. Did

you give anybody permission to be in your office on this particular day? Rachel Whittington is the only one who ever had permission to go in that office. Okay. So would that be a no, that you didn't give anybody else permission that day? Correct. Did you notice if anything was missing? I found nothing missing. You could tell that the cash drawer had been jimmied open. Okay. But you couldn't tell that there was anything missing? No, sir, I couldn't. (3 RR at 46-60).

Texas penal Code, section 30.01, definitions states-“Building” means any enclosed structure intended for use or occupation as a habitation or for some purpose of trade, manufacture, ornament, or use. Martus Stone also known as Bryson Memorials, was open to the public. The indictment reads-Appellant did: did then and there intentionally or knowingly enter a building not then open to the public, owned by Leslie Bryson, Bryson Memorial, without the effective consent of said owner, with intent to commit theft. Well, as previously stated the building was open to the public, Appellant entered with the effective consent of the owner. Perhaps, only with the intent to commit theft. This case is akin to a retail theft such as a Walmart or other store front, open to the public, wherein an Appellant might go around a register area and attempt to commit theft. Texas Penal Code, section 30.01 defines theft as the unlawful appropriation of property with the intent to deprive the owner of it.

*Evans v. State*, 677 S.W.2d 814, 818 (Tex. App.-Fort Worth 1984, no pet.) (“A



person can make an unlawful entry by walking through an open door when the entry is without the owner's consent.”). Not the case in this instance. Rachel Whittington claimed generally, when y'all are open do you allow customers to go behind your deck? Never. Leslie Bryson claimed when she pulled up the office, I saw two gentlemen in my office. So you looked in there and you said you saw two people in there. Is that right? Yes, sir. What were those two people doing? They were rummaging through the drawers. They were going through the closets trying to find whatever they could find. They went through two desks. They tried to jimmy the lock on the cash box. They went through every drawer of every desk. Okay. So you arrived shortly after there. Was there something different from the cash box as there is normally? The cash box had been moved around a little bit. The lock had been jimmied open. This by definition is theft or attempted theft.

Texas Penal Code, section 15.01. CRIMINAL ATTEMPT. (a) A person commits an offense if, with specific intent to commit an offense, he does an act amounting to more than mere preparation that tends but fails to effect the commission of the offense intended. As Bryson testified to-They were rummaging through the drawers. They were going through the closets trying to find whatever they could find. They went through two desks. They tried to jimmy the lock on the cash box. They went through every drawer of every desk. Okay. So you arrived shortly after there.

Was there something different from the cash box as there is normally? The cash box had been moved around a little bit. The lock had been jimmied open. This by definition is theft or attempted theft. This by testimony and definition is attempted theft only, nothing was taken or stolen and the building was open to the public.

The testimony and evidence presented is insufficient to support a finding of guilt to said indictment-The indictment reads-Appellant did: did then and there intentionally or knowingly enter a building not then open to the public, owned by Leslie Bryson, Bryson Memorial, without the effective consent of said owner, with intent to commit theft.

The *Jackson v. Virginia* standard is the only standard a reviewing court should apply to determine whether the evidence is sufficient to support each element of a criminal offense the State is required to prove beyond a reasonable doubt. *Brooks v. State*, 323 S.W.3d 893, 894 (Tex. Crim. App. 2010). All of the evidence is viewed in the light most favorable to the verdict to determine whether the jury was rationally justified in finding guilt beyond a reasonable doubt, *Brooks*, 323 S.W.3d at 902. The Court will defer to the fact finder's resolution of conflicting evidence unless the resolution is not rational. *Brooks*, 323 S.W.3d at 907. Under the review of the evidence required by *Brooks*, even in the light most favorable to the verdict, a rational jury could not conclude that this evidence is such as to permit it to find beyond a

reasonable doubt that Appellant-according to the testimony and evidence presented is insufficient to support a finding of guilt to said indictment-The indictment reads-Appellant did: did then and there intentionally or knowingly enter a building not then open to the public, owned by Leslie Bryson, Bryson Memorial, without the effective consent of said owner, with intent to commit theft. The conviction should be reversed and this Court should render a judgment of acquittal as to burglary of a building or reform the sentence to attempted theft.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Appellant, Gerald Wade, prays that this Court would reverse Appellant's conviction, remand the matter to the trial court for a new trial. Further, Appellant prays for any and all other relief to which Appellant may be entitled in law and equity.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE, T.R.A.P., RULE 9.4(3)**

\_\_\_\_\_ In accordance with TEX. R. APP. P. 9.4(3), I Cary M. Faden, certify that this is a computer generated document and I state that the number of words in this document is 7,797 words. I am relying on the word count of the computer program used to prepare this document.

**/S/CARY M. FADEN**

**Cary M. Faden**

**CERTIFICATE OF SERVICE**

In accordance with TEX. R. APP. P. 9.5, I Cary M. Faden, certify that a true and correct copy of the foregoing brief for appellant has been served, by U.S. Mail, to Gerald Wade, and by electronic filing manager to the attorney for the State Of Texas, Tom Selleck, District Attorney, 111 E. Locust Street, Angleton, Texas 77515, on this 4th day of October, 2024.

**/S/CARY M. FADEN**

**Cary M. Faden**

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