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NO. 69369-7-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2013 JUL 19 PM 4:49

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH KELLY,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENT OF ERROR

The State presented insufficient evidence to convict Joseph Kelly of residential burglary, in that the prosecutor failed to prove that the building Mr. Kelly entered was a dwelling.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

To prove residential burglary, the State must prove beyond a reasonable doubt that the defendant unlawfully entered a residence with intent to commit a crime against a person or property therein. Must Mr. Kelly's conviction for residential burglary be reversed and dismissed where the State failed to prove beyond a reasonable doubt that the unoccupied and uninhabitable building which he entered was a dwelling?

C. STATEMENT OF THE CASE

Joseph Kelly was hired as a handyman by Errol Hanson and his wife, who owned a property in Conway, Washington. 9/10/12 RP 12. The property included a large farmhouse, a 10,000 square foot barn, a cabin, and several outbuildings, all of which had been built in the late 1800's or early 1900's. Id. at 9-10, 60-63.

Both Mr. Hanson and his wife testified at trial that their plan had been to gradually rehabilitate the old farmhouse, and to eventually move there from their then home, 16 or 17 miles away, in

Sedro-Woolley. Id. at 55, 60. At the time Mr. Kelly worked for the Hanson family, Mr. and Mrs. Hanson used the farmhouse to store antiques and other items; the record indicates they had never lived nor slept there. Id. at 10, 55, 60. Mr. Hanson stated that he stopped by the property "most every day," for about an hour or two to check on Mr. Kelly's work. Id. at 55.

As part of his employment, Mr. Kelly resided in a room located in Mr. Hanson's barn, doing carpentry and maintenance around the farm. Id. at 12-15, 60-63, 85-86, 129-32. In late September 2011, while the Hansons vacationed in Mexico, Mr. Kelly maintained the property in their absence. Id. at 22-24, 87, 137-41. Upon the family's return, Mr. Hanson accused Mr. Kelly of misappropriating for his own use several items belonging to the family, and asked him to leave. Id. at 24-26, 39-42, 91-92.

Mr. Kelly was charged with residential burglary, theft in the first degree, and four counts of trafficking in stolen property.

At trial, Mr. Kelly explained that he had taken certain tools and other property from the farm because Mr. Hanson had not been fair in paying his wages. Id. at 137-38, 142. He also testified that he had entered the farmhouse on a regular basis, because his

duties as Mr. Hanson's handyman included making the rounds of the entire property to do maintenance. Id. at 132, 145.

Following a jury trial before the Honorable Susan Cook, Mr. Kelly was convicted of residential burglary, as well as other related counts. CP 52-57. He timely appeals. CP 87.

D. ARGUMENT

THERE WAS INSUFFICIENT EVIDENCE PRESENTED THAT MR. KELLY ENTERED A "DWELLING" AS DEFINED BY RCW 9A.04.110(7).

a. The prosecution bears the burden of proving all essential elements of an offense beyond a reasonable doubt. The State has the burden of proving each element of the crime charged beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 471, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). This allocation of the burden of proof to the prosecutor derives from the guarantees of due process of law contained in article I, sections 3 and 22 of the Washington Constitution[1] and the 14th Amendment of the federal constitution. Sandstrom v. Montana, 442 U.S. 510,

[1] Art. I, section 3 provides, "No person shall be deprived of life, liberty, or property, without due process of law."

520, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); State v. Acosta, 101 Wn.2d 612, 615, 683 P.2d 1069 (1984).

On a challenge to the sufficiency of the evidence, this Court must reverse a conviction when, after viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). A challenge to the sufficiency of evidence admits the truth of the State's evidence and all reasonable inferences that can be drawn therefrom. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

In order to establish that Mr. Kelly committed residential burglary, the State had to prove that he: (1) entered or remained unlawfully in a dwelling, and (2) intended to commit a crime against a person or property therein. RCW 9A.52.025; State v. Stinton, 121 Wn. App. 569, 573, 89 P.3d 717 (2004).

b. The State must show that the building was a "dwelling," as defined by statute. Mr. Kelly was charged with a residential burglary under RCW 9A.52.025; therefore, the prosecution was required to prove each element of the statute

charged. CP 38 (Jury Instruction 12), CP 40 (Jury Instruction 14).

RCW 9A.52.025 reads:

> (1) 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.
>
> (2) Residential burglary is a class B felony.

A "dwelling" is further defined at RCW 9A.04.110(7) as "any building or structure, though movable or temporary, or a portion thereof, which is used or <u>ordinarily used</u> by a person for lodging." <u>State v. McDonald</u>, 123 Wn. App. 85, 90, 96 P.3d 468 (2004) (emphasis added). The <u>McDonald</u> Court, in determining whether a building is a "dwelling," considered several factors found important in other jurisdictions:

> <u>State v. Black</u>, 627 So.2d 741, 745 (La. App.1993) ("To determine whether the house was 'lived in' ... it is proper to consider whether the occupant deemed the house to be her place of abode and whether she treated it as such."); <u>Hargett v. State</u>, 534 S.W.2d 909, 911 (Tex. Crim. App.1976) (where building was furnished and rented out periodically, it was inhabited); <u>Rash v. Commonwealth</u>, 9 Va. App. 22, 383 S.E.2d 749, 751-52 (1989) (occupant's intent to return is a factor in determining if building is a dwelling); <u>see also</u> Occupant's Absence from Residential Structure as Affecting Nature of Offense as Burglary or Breaking and Entering, 20 A.L.R.4th 349, § 11 (1983); 13 Am.Jur. Burglary § 6.

<u>McDonald</u>, 123 Wn. App. at 91 n.18.

In People v. Willard, for example, the Illinois Appellate Court found an uninhabited building, which the owner intended to remodel into a residence, was not a dwelling. 303 Ill. App.3d 231, 235-36, 707 N.E.2d 1249 (1999). The Illinois Court specifically found that even where an unauthorized entry into a building occurred, if a building was uninhabited, the entry:

> did not implicate the concerns for privacy, sanctity of the home, and potential for serious harm that the residential burglary statute addresses. There is no home where no one can live, and no one's privacy can be violated where there is no habitation. With no one able to live in such a house, the probability of an intruder being confronted by the owner is nil. The dangers raised by residential burglary are not present to the same extent when a building is uninhabitable.

Willard, 303 Ill.App.3d at 235.

Other jurisdictions have also noted the distinction between places of "human abode" and buildings that have been perpetually unoccupied. See, e.g., Watson v. State, 254 Miss. 82, 85, 179 So.2d 826 (Miss. 1965) (uncompleted building designed and intended for occupancy as dwelling had never been so occupied before defendant took a saw from premises); State v. Celli, 263 N.W.2d 145 (S.D.1978) (cabin in which complainant had owned, but

in which he had never slept, was "unoccupied," and not "ready for occupancy" at time defendant entered it).[2]

In State v. Eaton, the Oregon Court of Appeals held that the building which the defendant entered was not a "dwelling" within the meaning of the statute, where the building was occupied only eight weeks out of the year, and the burglary occurred months after the last occupant had left. 43 Or. App. 469, 602 P.2d 1159 (Or. App. 1979). And in Smart v. State, the Supreme Court of Indiana found a couple's cabin not to be a dwelling or a place of human habitation, where the family only resided there two to three weeks per year, and where it was unoccupied at the time of the defendant's entry. 244 Ind. 69, 72, 190 N.E.2d 650 (1963).

c. The building was not a dwelling. Considering the factors relevant under the statute, the prosecution failed to prove the building was a dwelling. The farmhouse may have been "ordinarily used by a person for lodging" at one point in time; some unspecified

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[2] The Celli Court also notes that the basis for the protection from the invasion of the "dwelling house" originates in the common law:

> It is evident that the offense of burglary at common law was considered one aimed at the security of the habitation rather than against property. That is to say, it was the circumstance of midnight terror aimed toward a man or his family who were in rightful repose in the sanctuary of the home ... a man's home is his castle. (quoting Smart v. State, 244 Ind. 69, 72, 190 N.E.2d 650 (1963).

day in the future, after extensive renovations, it may be yet again. RCW 9A.04.110(7). However, at the time Mr. Kelly entered the farmhouse, it was merely a building, not a dwelling.

As the Illinois Court of Appeals held in People v. Willard, an entry into an unoccupied building – even if unauthorized – does not raise the same sort of privacy and "sanctity of the home" concerns as it would, were the entry into an occupied home. 303 Ill.App.3d at 235; see also State v. Smart, 244 Ind. at 72 (residential burglary based on security of habitation, not property crime).

Here, Mr. and Mrs. Hanson testified that the farmhouse was not a residence, and not a place they had ever lived. 9/1/12 RP 55, 60-66. The farmhouse was a place for storage, full of old "stuff" and antiques, kept under lock and key. Id. at 10, 18, 55, 60. There is nothing in the record concerning the presence of beds, other furniture, food, working utilities, or any indication that this farmhouse was operational as anything but an empty building undergoing a lengthy renovation. Mr. Hanson stated that he visited the farm to review Mr. Kelly's work for about an hour or two, per day, but did not testify to even entering the farmhouse during those visits. Id. at 55-56.

Celli, 263 N.W.2d at 147.

Accordingly, the State failed to prove the house was a "dwelling" for the purposes of residential burglary, thus failing to prove that Mr. Kelly was guilty of residential burglary.

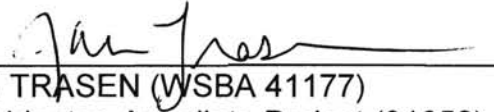
d. This Court must reverse and remand with instructions to dismiss the burglary conviction. Since there was insufficient evidence to support Mr. Kelly's residential burglary conviction, this Court must reverse the conviction with instructions to dismiss. To do otherwise would violate double jeopardy. State v. Crediford, 130 Wn.2d 747, 760-61, 927 P.2d 1129 (1996) (The Double Jeopardy Clause of the United States Constitution "forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding.") (quoting Burks v. United States, 437 U.S. 1, 9, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978)).

E. CONCLUSION

For the foregoing reasons, Mr. Kelly respectfully requests this Court reverse his conviction and remand the case for further proceedings.

DATED this 19th day of June, 2013.

Respectfully submitted,



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

STATE OF WASHINGTON, Respondent, v. JOSEPH KELLY, Appellant.	)	NO. 69369-7-I

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DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 19TH DAY OF JUNE, 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:

[X]	ERIK PEDERSEN, DPA SKAGIT COUNTY PROSECUTOR'S OFFICE COURTHOUSE ANNEX 605 S THIRD ST. MOUNT VERNON, WA 98273	(X) ( ) ( )	U.S. MAIL HAND DELIVERY __________
[X]	JOSEPH KELLY 420 FERRY ST SEDRO WOOLLEY, WA 98284-1103	(X) ( ) ( )	U.S. MAIL HAND DELIVERY __________

SIGNED IN SEATTLE, WASHINGTON THIS 19TH DAY OF JUNE, 2013.

X

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