No. 46382-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

KRISTEN HIGHSMITH,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION

An essential element of residential burglary is that the defendant entered or remained in a "dwelling." This means that, at the time of the offense, the building is used or ordinarily used for lodging. In this case, the building that the defendant entered was vacant and for sale. The owners and former residents had moved across the state. Because the evidence did not prove that the defendant entered a dwelling, this Court should reverse her conviction for residential burglary. Alternatively, this Court should reverse because the defendant was deprived of her right of effective assistance of counsel.

B. ASSIGNMENTS OF ERROR

1. In violation of due process under the Fourteenth Amendment, the defendant's conviction for residential burglary was not proved by sufficient evidence.

2. In violation of the Sixth Amendment, the defendant was deprived of her right of effective assistance of counsel.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Residential burglary requires that the State prove that the defendant entered or remained in a "dwelling." Dwelling means any building or structure that is used or ordinarily used by a person for lodging. The building that the defendant entered had been vacant for

about half a year. It was for sale. There was no evidence anyone used or ordinarily used the building for lodging at the time of the alleged offense. Did the State fail to prove beyond a reasonable doubt that the defendant entered or remained in a dwelling?

2. Effective assistance of counsel includes closing arguments to the jury. The evidence that the building was a dwelling was, if not insufficient, meager. Moreover, the State did not argue that the building was a dwelling. Still, defense counsel did not argue that the State had failed to prove that the building was a dwelling beyond a reasonable doubt. Instead, counsel focused exclusively on the intent element of burglary, contending that the defendant did not have any ill intent when she briefly entered the building. Was the defendant deprived of her right of effective assistance of counsel?

D. STATEMENT OF THE CASE

Natalie Foss and her family lived on property in Port Orchard. RP 154, 156. Ms. Foss and her husband had bought the property and house, a "fixer-upper," in December 2012. RP 155. In 2013, Ms. Foss's husband lost his job and the family decided to move back to Spokane. RP 155. The Fosses put the property up for sale in July 2013. RP 155. Before putting the property up for sale, they had already moved to Spokane. RP

155. Ms. Foss and her husband returned once or twice a month to work on the property. RP 156-57.

The listing agent for the Fosses, Sandra Nelson, began advertising the property in fall 2013. RP 95. The advertising emphasized the view from the property. RP 122-23; Ex. 49. The property was staged with furnishings to help it sell. RP 121. Ms. Nelson agreed that the property was one that "would require some work." RP 116. In December 2013, she and others were trying to get the furnace in the house to work. RP 109.

On December 15, 2013, Shawn Fletcher, the selling agent, visited the property. RP 305, 315. Entering through the front door, he noticed that the few pieces of furniture that had been in the living room before were gone. RP 315-16. Mr. Fletcher walked around outside to the back of the property and noticed that the sliding door was unlocked. RP 316. He did not lock up the building because he was unsure if the Fosses were around and moving items out. RP 316. He sent Ms. Nelson an e-mail telling her that the building was unlocked. RP 314. The Fosses had last been out to the property about three weeks earlier. RP 159.

The next day, December 16, Ms. Nelson visited the property around 4:30 p.m. RP 97-98. It was dusk and getting dark. RP 98. Ms. Nelson noticed a car parked in front of the building. RP 98. Ms. Nelson

did not think this car belonged to another real estate agent because agents usually drove nicer cars. RP 99. Ms. Nelson did not see anyone in the car. RP 100. She called 911. RP 101. She moved her car down the street and waited awhile for the police to arrive. RP 102-03.

Officer Nathan Lynch met Ms. Nelson about 200 to 300 yards from the property. RP 131. When he saw the car Ms. Nelson identified approaching them, he stopped the car. RP 132-33. Kristen Highsmith and Floyd Sibley were in the car. RP 133. Ms. Highsmith, who was in the process of moving, had many items, including boxes and clothing, in the backseat of the car. RP 136, 141, 248. After Ms. Nelson and another officer went to the property and reported back, Officer Lynch arrested Ms. Highsmith and Mr. Sibley. RP 133-37. Police took photos of the items and sent them to the Fosses. RP 144-45, 158. The Fosses identified some of the items as belonging to them. RP 150, 160-61.

Ms. Highsmith was initially charged with second degree burglary. CP 1. The State amended the charge to residential burglary. CP 11. She was tried together with Mr. Sibley, who was also charged with residential burglary.

Ms. Highsmith testified that on December 16, 2013, she had been in the process of moving and had many items in her car. RP 248-49. Ms. Highsmith, a former realtor, picked up Mr. Sibley, wanting to show him

the property that was for sale. RP 250. Mr. Sibley's mother was going to sell similar property on the market and viewing similar property is useful in determining a price range. RP 250-51. They arrived around 4:30 to 4:45 p.m. RP 251. They went to the back of the property to admire the advertised view. RP 252. She saw that the sliding glass door to the house was open and briefly stepped inside. RP 252-53. Afterward, she walked around outside to the front without Mr. Sibley and looked inside the front window. RP 255. She noticed boxes and other items outside. RP 252, 264, 287-88. While she did not see Mr. Sibley move anything, she believed it was possible for him to have moved items to her car without her noticing. RP 288. She was unware of how the items from the property got mixed in with her own items in the car. RP 293. Mr. Sibley did not testify.

Ms. Highsmith obtained a lesser included offense instruction for first degree criminal trespass. CP 55, 60. Ms. Highsmith's attorney asked the jury to convict his client of criminal trespass rather than residential burglary. RP 381. The jury convicted Ms. Highsmith as charged, but acquitted Mr. Sibley. CP 61; RP 417-18.

E. ARGUMENT

1. The evidence was insufficient to prove residential burglary.

a. The State bears the burden of proving all the elements of an offense beyond a reasonable doubt.

Due Process requires the State prove every element of the offense beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Const. art I, § 3. Evidence is sufficient to support a determination of guilt only if a rational trier of fact, viewing the evidence in the light most favorable to the State, could have found guilt beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 220–22, 616 P.2d 628 (1980). Reversal for insufficient evidence requires dismissal of the charge with prejudice. Burks v. United States, 437 U.S. 1, 11, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978).

b. Residential burglary requires proof that the defendant entered or remained in a "dwelling."

To be guilty of residential burglary, the person must enter or remain in a "dwelling":

> A person is guilty of residential burglary if, with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling other than a vehicle.

RCW 9A.52.025. "'Dwelling' means any building or structure, though movable or temporary, or a portion thereof, which is used or ordinarily

used by a person for lodging." RCW 9A.04.110(7).[1] Per the to-convict instruction, the jury had to find that "on or about the 16th day of December, 2013 the defendant, or an accomplice, entered or remained unlawfully in a dwelling." CP 54. Thus, the jury had to find that, at the time of the offense, the building Ms. Highsmith was accused of burglarizing was a "dwelling."

c. Under the "relevant factors" test, the evidence was insufficient to prove that the building was a "dwelling."

This Court has applied a "relevant factors" test to determine whether a building or structure is a "dwelling." State v. McDonald, 123 Wn. App. 85, 91, 96 P.3d 468 (2004). These factors include whether the building is usually used by a person for lodging at night, whether it was maintained as a dwelling, and how long it was vacant. McDonald, 123 Wn. App. at 91 n.18. This Court did not lay out an exclusive list of factors. McDonald, 123 Wn. App. at 91 n.18.

Applying this test, the McDonald Court held the evidence was sufficient for a jury to find the burglarized building to be a "dwelling." McDonald, 123 Wn. App. at 91. The building, a house in Gig Harbor, was

[1] The jury was instructed consistently with this definition. CP 50 ("Dwelling means any building or structure that is used or ordinarily used by a person for lodging.").

being remodeled. McDonald, 123 Wn. App. at 87. The owners had not lived at the house for about two or three months. McDonald, 123 Wn. App at 87. One of the owners, who lived in nearby Tacoma, worked on the house regularly on the evenings or on weekends. McDonald, 123 Wn. App at 87. The Court held that the jury could have rationally decided the issue either way and thus rejected the sufficiency challenge. McDonald, 123 Wn. App at 90-91.

Unlike in McDonald, the evidence here was insufficient to find that the building was a "dwelling." As in McDonald, it was undisputed that the property was unoccupied. RP 96. However, here the property had been unoccupied for a longer period, at least about five months. The residents had put the property up for sale in July 2013 and by this time had moved across the state to Spokane. RP 155-56. Moreover, in contrast to McDonald, the owners only returned about once to twice a month to work on the property. RP 156-57. There was no testimony that they still slept at the property. The house, a "fixer-upper," still needed work. RP 116, 155. For example, the furnace did not work. RP 109. Advertisements emphasized the view from the property, not the house itself. RP 122-23; Ex. 49. Though the house was staged for sale, it had very little furniture. RP 121, 316. Further, a day before the incident, a real estate agent noticed that the few pieces of furniture that had been in the living room were gone.

RP 316. Under all the "relevant factors," this evidence was inadequate for the jury to find that the building was a "dwelling" on December 16, 2013.

d. Alternatively, this Court should adopt a test premised on the statutory meaning of "dwelling."

If this Court disagrees that the evidence was insufficient under the "relevant factors" test, this Court should adopt a new test tied to the statutory language. The McDonald Court failed to explain why a building that has not been used for lodging for months qualifies as "a structure that is used or ordinarily used by a person for lodging." RCW 9A.04.110(7). Instead, the Court adopted a "relevant factors" test and conclusorily stated that the evidence presented a jury question. However, whether a particular building is a dwelling on a particular date turns on the statutorily defined meaning of dwelling, not on an amorphous "relevant factors" test.

In support of the "relevant factors" test, the McDonald Court cited to cases from Arizona, Illinois, Louisiana, New York, Ohio, Texas, and Virginia. McDonald, 123 Wn. App. at 91 n.18 & 19. An examination of these cases do not support some ad-hoc "relevant factors" inquiry. Rather, in each of these cases, the courts focused on the unique statutory language of their burglary statutes. Thus, the Louisiana case turned on applying the statutory language "inhabited dwelling" and "abode." State v. Black, 627 So. 2d 741, 744-45 (La. Ct. App. 1993). The Texas case on the statutory

meaning of "habitation." Hargett v. State, 534 S.W.2d 909, 910-11 (Tex. Crim. App. 1976). The Arizona case on the statutory meaning of "residential structure." State v. Engram, 171 Ariz. 363, 367, 831 P.2d 362 (Ct. App. 1991). The Illinois and New York cases on their statutory meanings of "dwelling." People v. Willard, 303 Ill. App. 3d 231, 233, 707 N.E.2d 1249 (1999); People v. Moore, 206 Ill. App. 3d 769, 773-74, 565 N.E.2d 154 (1990); People v. Sheirod, 124 A.D.2d 14, 16-17, 510 N.Y.S.2d 945 (App. Div. 1987). And the Ohio case on the statutory meaning of "occupied structure." State v. Green, 18 Ohio App. 3d 69, 70-71, 480 N.E.2d 1128 (1984).

Determination of the meaning of "dwelling" under Washington law is an issue of statutory interpretation. The meaning of a statute is a question of law reviewed de novo. State, Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 9, 43 P.3d 4 (2002). In interpreting a statute, the Court ascertains and carries out the Legislature's intent. Campbell & Gwinn, 146 Wn.2d at 9. If the statute's meaning is plain, the court applies the plain meaning. Campbell & Gwinn, 146 Wn.2d at 9-10. Plain meaning "is discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question." Campbell & Gwinn, 146 Wn.2d at 11. Courts "cannot add words or clauses to an unambiguous statute when the

legislature has chosen not to include that language." State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (quoting State v. Delgado, 148 Wn.2d 723, 727, 63 P.3d 792 (2003)).

"The law of burglary was designed to protect the dweller . . . ." State v. Schneider, 36 Wn. App. 237, 241, 673 P.2d 200 (1983). The legislature has divided burglary into three felonies: first degree burglary,[2] residential burglary,[3] and second degree burglary.[4] State v. Olson, 182 Wn. App. 362, 329 P.3d 121, 127 (2014). The offense of residential burglary was enacted to punish people who burglarize dwellings more harshly due to the inherent risk of personal injury to people in their homes. Olson, 329 P.3d at 128-29. Hence, residential burglary is a more serious offense than second degree burglary, which protects buildings that are not "dwellings." RCW 9A.52.025(2); 9A.52.030(1) ("A person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building other than a vehicle or a dwelling.")

The proper test of whether a building or structure is a "dwelling" should focus on the statutory language, which requires that the building or

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[2] RCW 9A.52.020.

[3] RCW 9A.52.025.

[4] RCW 9A.52.030.

structure be "used or ordinarily used by a person for lodging." RCW 9A.04.110(7). The focus of this language is on the use of the building or structure, not its type. That the legislature excluded "vehicles" from residential burglary even though they could qualify as a "dwelling" supports this conclusion. RCW 9A.52.025 (A person is guilty of residential burglary if . . . the person enters or remains unlawfully in a dwelling other than a vehicle."). Thus, in deciding whether a building or structure is a "dwelling," the proper inquiry is whether the evidence proved that (1) a person used the building or structure for lodging at the time of the offense or (2) a person, while not using the building or structure for lodging at the time of the offense, still ordinarily used the building or structure for lodging. This effectuates legislative intent and provides a workable test to distinguish residential burglary from second degree burglary.

Utah's interpretation of its analog burglary statute is similar. Under Utah law, burglary is elevated from third degree to second degree if the offense was committed in a "dwelling." State v. Francis, 284 P.3d 720, 2012 UT App 215 (Utah Ct. App. 2012); Utah Code § 76-6-202. "Dwelling" is defined as a "building which is usually occupied by a person lodging in the building at night, whether or not a person is actually present." Utah Code § 76-6-201(2); Francis, 284 P.3d at 721. Under this

language, "the key inquiry is 'the actual use of the particular structure that is burglarized, not the usual use of similar types of structures.'" Francis, 284 P.3d at 721 (quoting State v. McNearney, 246 P.3d 532, 534, 2011 UT App 4 (Utah Ct. App. 2011)). Under this test, evidence that a house was never occupied was insufficient to prove that it was a "dwelling." McNearney, 246 P.3d at 535. In contrast, evidence that a caretaker lived at a church at the time of the offense was sufficient to prove that the building was a "dwelling." Francis, 246 P.3d at 720-21.

e. Under the proposed statutory test, the evidence was insufficient for the jury to find that the defendant entered a "dwelling."

Applying the proposed test, it is undisputed that on December 16, 2013, the date of the alleged offense, the property was not being used by a person for lodging. It was unoccupied. RP 96. The owners had not resided there for about half a year. RP 155-56. While the owners returned once or twice a month to work on the property, there was no evidence they resided or slept there. RP 156-57. That the furnace was not working in December indicates they had not. RP 109. Thus, the owners also no longer ordinarily used the building for lodging. It follows that a jury could not rationally find that the building was a dwelling, i.e., used or ordinarily used for lodging.

f. The court may remand for conviction on criminal trespass, but not second degree burglary.

Because there was insufficient evidence to prove residential burglary, the conviction should be reversed and dismissed with prejudice. Burks, 437 U.S. at 17-18. The State may argue that remand for resentencing on second degree burglary is appropriate because second degree burglary is a lesser included offense of residential burglary[5] and the jury necessarily found all the elements of second degree burglary. However, remand for resentencing on a lesser included offense is appropriate only if the jury was explicitly instructed on the lesser offense. Green, 94 Wn.2d at 234. In re the Pers. Restraint of Heidari, 174 Wn.2d 288, 292–93, 274 P.3d 366 (2012). Because the jury was not instructed on second degree burglary, remand for entry of conviction for this offense would be inappropriate. This Court may, however, remand for entry of conviction for first degree criminal trespass because this is a lesser included offense of residential burglary and the jury was instructed on this offense. State v. Soto, 45 Wn. App. 839, 840-41, 727 P.2d 999 (1986); CP 56-57.

[5] McDonald, 123 Wn. App. at 89-90.

2. By failing to raise the strong defense that the building was not a dwelling, the defendant was deprived of her right to effective assistance of counsel.

Alternatively, this Court should reverse for ineffective assistance of counsel. To establish ineffective assistance of counsel, a party must show deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Deficient performance is performance falling below an objective standard of reasonableness. Strickland, 466 U.S. at 687. When counsel's conduct can be characterized as legitimate strategy, performance is not deficient. State v. Kyllo, 166 Wn. 2d 856, 863, 215 P.3d 177 (2009). "The right to effective assistance of counsel extends to closing arguments." Kyllo, 166 Wn.2d at 870. Closing arguments are critical for the defense and form part of the Sixth Amendment's guarantee of counsel. See Herring v. New York, 422 U.S. 853, 862, 95 S. Ct. 2550, 45 L. Ed. 2d 593 (1975) ("[F]or the defense, closing argument is the last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant's guilt.").

The evidence that the unoccupied building qualified as a "dwelling" was, if not insufficient, meager. Further, the State did not even argue that the building was a "dwelling" during closing. RP 361-73. Thus, the issue of whether the State had met its burden proving this requirement beyond a reasonable doubt was ripe for defense counsel to

expose. See McDonald, 123 Wn. App. at 90 (defendant entitled to lesser included offense instruction for second degree burglary because jury could have rationally found that house was not a dwelling as no one had lived in house for months). Despite this obvious and strong defense, Ms. Highsmith's counsel failed to make this argument to the jury. RP 373-82.

Instead, counsel focused exclusively on the intent element, arguing that Ms. Highsmith had innocent intentions in entering the building and that she should be convicted of the lesser offense of criminal trespass. RP 374, 382. In light of the meager evidence that the building was a dwelling, this was not legitimate trial strategy or tactics. See Kyllo, 166 Wn. 2d at 870-71 (counsel's misstatement of the law of self-defense during closing constituted ineffective assistance of counsel). An argument that the building was not a dwelling would not have detracted or been inconsistent with the defense that Ms. Highsmith's intentions were innocent. It would have only bolstered the odds of a not guilty verdict on the charge for residential burglary. By not making the argument, the jury likely did not even think there was an issue as to whether the building was a "dwelling." The constitutional guarantee of effective assistance of counsel demands more. See State v. Ermert, 94 Wn.2d 839, 850-51, 621 P.2d 121 (1980) (allowing defendant to be convicted of a crime she could

not have committed under the facts presented by the State deprived defendant of effective assistance).

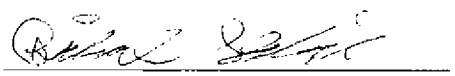
Once the defendant shows deficient performance, the defendant must prove there is a reasonable probability that, but for the deficient performance, the outcome would have been different. Kyllo, 166 Wn.2d at 862. Ms. Highsmith meets this burden. As argued, the evidence that the building was a dwelling was weak. Had counsel merely highlighted this for the jury, there is a reasonable probability that the jury would have acquitted Ms. Highsmith of residential burglary. See McDonald, 123 Wn. App. at 90 (jury could have found that house at issue was not a dwelling); Kyllo, 166 Wn.2d at 870 (prejudice shown where "considerable evidence" supported self-defense theory). This Court should reverse and remand for a new trial.

F. CONCLUSION

Because the State failed to prove that Ms. Highsmith entered or remained unlawfully in a "dwelling," this Court should reverse the conviction for residential burglary and order it dismissed with prejudice. Alternatively, this Court should reverse and remand for a new trial because counsel provided ineffective assistance by not arguing that the State had failed to prove that the building was a "dwelling."

DATED this 5th day of January, 2015.

Respectfully submitted,



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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 46382-2-II
v.	)	
	)	
KRISTEN HIGHSMITH,	)	
	)	
Appellant.	)	

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