Supreme Court No. 90318-2

(Court of Appeals No. 69369-7-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,
Respondent

v.

JOSEPH ALLEN KELLY,
Petitioner.

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# PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Joseph Kelly, appellant below, seeks review of the Court of Appeals decision designated in Part B.

B. COURT OF APPEALS DECISION

Mr. Kelly appealed from his Skagit County Superior Court conviction for residential burglary. This motion is based upon RAP 13.3(e) and 13.5A.

C. ISSUE PRESENTED FOR REVIEW

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. Where the State failed to prove beyond a reasonable doubt that the unoccupied and uninhabitable building which he entered was a dwelling, was the Court of Appeals decision in conflict with other decisions of the Court of Appeals and with decisions of this Court, requiring review? RAP 13.4(b)(1), (2)?

D. 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 appealed, arguing that the evidence was insufficient to show the structure was, in fact, a dwelling.

On April 28, 2014, the Court of Appeals affirmed Mr. Kelly's conviction. Appendix.

Mr. Kelly seeks review in this Court. RAP 13.4(b)(2).

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

THIS COURT SHOULD GRANT REVIEW, AS THE COURT OF APPEALS DECISION IS IN CONFLICT WITH OTHER DECISIONS OF THE COURT OF APPEALS. RAP 13.4(b)(2).

a. 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 ordinarily used by a person for lodging." State v. McDonald, 123 Wn. App. 85, 90, 96 P.3d 468 (2004) (emphasis added). The McDonald Court, in determining whether a building is a "dwelling," considered several factors found important in other jurisdictions:

> State v. Black, 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."); Hargett v. State, 534 S.W.2d 909, 911 (Tex. Crim. App.1976) (where building was furnished and rented out periodically, it was inhabited); Rash v. Commonwealth, 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); see also 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.

McDonald, 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).[1]

b. The building was not a dwelling. Considering the factors relevant under the statute, the prosecution failed to prove the building was a

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[1] 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).

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

dwelling. The farmhouse may have been "ordinarily used by a person for lodging" at one point in time; some unspecified 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. 69, 72, 190 N.E.2d 650 (1963) (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 he visited the farm to review Mr. Kelly's work for about an hour or two, per day, but did not testify he even entered the farmhouse during those visits. Id. at 55-56.

Accordingly, the State failed to prove the house was a "dwelling" for the purposes of residential burglary, thus the State failed to prove Mr. Kelly was guilty of residential burglary, requiring review. RAP 13.4(b)(2).

c. Because the Court of Appeals decision is in conflict with other decisions of the Court of Appeals, this Court should grant review. Since there was insufficient evidence to support Mr. Kelly's residential burglary conviction, the Court of Appeals decision is in conflict with other decisions of the Court of Appeals, and this Court should grant review. RAP 13.4(b)(2).

Although the Court of Appeals cited State v. McDonald in its decision, the McDonald Court emphasized that in order for a building to be considered a dwelling, it must be "ordinarily used by a person for lodging." 123 Wn. App. at 90. In this case, it was undisputed that the farmhouse had never been used for lodging. 9/10/12 RP 10, 55, 60. The building was used exclusively for the storage of old "stuff" and antiques – and this fact was undisputed at trial. Id. at 10, 18, 55, 60.

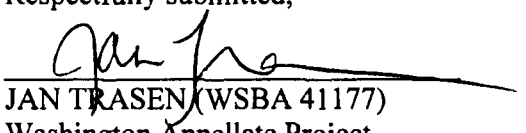
Accordingly, the Court of Appeals decision upholding the conviction was in conflict with decisions of other decisions of the Court of Appeals, and review should be granted. RAP 13.4(b)(2).

F. CONCLUSION

For the above reasons, the Court of Appeals decision requires review, as it is in conflict with other decisions of the Court of Appeals. RAP 13.4(b)(2).

DATED this 27th day of May, 2014.

Respectfully submitted,



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# APPENDIX

**IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON**

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| STATE OF WASHINGTON,<br><br>Respondent,<br>v.<br><br>JOSEPH ALLEN KELLY,<br><br>Appellant. | No. 69369-7-I<br><br>DIVISION ONE<br><br>UNPUBLISHED OPINION<br><br>FILED: April 28, 2014 |



LEACH, J. — Joseph Kelly appeals his conviction for residential burglary. He claims that insufficient evidence supports his conviction because the State failed to prove the house Kelly entered was a dwelling. In a statement of additional grounds, Kelly also contends the court erred by excluding "motive testimony for why [Errol Hanson] would lie." Because the record includes evidence sufficient to support the jury's finding that Kelly entered a dwelling and the exclusion of "motive testimony" was harmless error, we affirm.

Background

In October 2010, Errol and Laura Hanson[1] acquired a property in Conway, Washington, that included "an old house," a barn, and "some outbuildings." In

[1] For clarity, we refer to Errol, Laura, and their son Troy Hanson by their first names.

July 2011, Errol hired Kelly to work on the property and allowed him to stay in a room in the barn. Kelly does not dispute that Errol and his family were remodeling the house with the intention of living there. However, while Kelly worked for them, neither Errol nor Laura ever lived or slept in the house. They stored antiques inside the house and kept it locked. Errol visited the house and the large barn almost every day.

On October 18, 2011, Laura reported a theft of certain items from their barn. The Hansons found a slip in the barn showing Kelly had pawned their battery charger. Also, the Hansons reported 300 feet of "very old wood molding" missing from inside the house.

On September 10, 2012, the State charged Kelly with theft in the first degree, residential burglary, and four counts of trafficking in stolen property in the first degree.

At trial, Deputy Morgan testified about his investigation and determination that Kelly pawned a battery charger and a grease gun. Also, Deputy Morgan testified Kelly admitted to taking a flagpole and "several other items of metal from the Hanson property." Errol told Deputy Morgan approximately 300 feet of molding was stolen from the house. Deputy Morgan further testified Kelly denied "ever removing any of the molding off of the property itself, just from the residence into the barn." Deputy Morgan testified that there was "some discrepancy over the title [of a car], and a dispute between the parties" about a loan.

Also at trial, Errol testified that he hired Kelly to "work off the loan" Kelly owed him. He further testified that Kelly previously signed over the title of a car and annuity proceeds in a checking account to him as collateral for the loan. Errol testified that he learned Kelly closed the checking account, and Kelly put the car title in his daughter's name.

Errol, Laura, and their son Troy each testified that Kelly did not have a key to the house, and they "made it clear to [Kelly]" that they did not want him in the house. Troy and Deputy Morgan testified that Kelly admitted to entering the house and to taking "some of the molding from inside the house out to the barn."

Kelly maintained that Errol hired Kelly to do maintenance around the farm and that he had permission from Errol to clean up inside the house and dispose of the scrap metal in the barn. Kelly testified that Errol never told him he "could not go into the house." Kelly further testified that Errol instructed him to open and shut the windows each day and fix the plumbing leaks in the house.

Kelly testified he worked in order to earn money and not to pay off the loan. Defense counsel attempted to ask Kelly about his daughter's car that was collateral for the loan he owed Errol. The following exchange occurred at trial:

> [Defense]: Okay. Could you tell us about the car that Errol took from you that you signed over to him?
>
> [State]: Objection. Relevance.
>
> The Court: Sustained.
>
> [Defense]: Okay. Is the Court going to make the same ruling if I ask about the annuities?

[State]: I would make the same objection.

The Court: Same ruling.

[Defense]: Okay. Okay.

Defense counsel did not pursue this issue further.

The jury convicted Kelly of residential burglary and other counts. Kelly appeals.

Analysis

Sufficiency of the Evidence

Kelly first contends that insufficient evidence supports his residential burglary conviction because the State did not prove he entered a "dwelling." When reviewing a sufficiency challenge, we view the evidence in the light most favorable to the prosecution and ask whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[2] We draw all reasonable inferences from the evidence in favor of the State.[3] Circumstantial evidence is as reliable as direct evidence.[4] A defendant challenging the sufficiency of the evidence "admits the truth of the State's evidence."[5] We do not review credibility determinations, which are for the trier of fact.[6] Thus, we defer to the jury on issues of conflicting testimony, witness credibility, and persuasiveness of the evidence.[7]

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[2] State v. Hosier, 157 Wn.2d 1, 8, 133 P.3d 936 (2006).
[3] Hosier, 157 Wn.2d at 8.
[4] State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).
[5] State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).
[6] State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).
[7] State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

To convict Kelly of residential burglary, the State had to prove Kelly "enter[ed] or remain[ed] unlawfully in a dwelling other than a vehicle," as defined in RCW 9A.52.025(1). RCW 9A.04.110(7) defines a "dwelling" as "any building or structure . . . which is used or ordinarily used by a person for lodging." Kelly argues that the evidence at trial showed the Hansons kept the house as "a place for storage" and "never lived nor slept there," and thus the house was not a "dwelling."

The State presented evidence that the Hansons were remodeling the house in order to live there. They stored antiques inside, kept the house locked, did not allow Kelly inside the house, did not provide Kelly with a key to the house, and visited the house and the large barn almost every day.

The question whether a house is a dwelling "turns on all relevant factors and is generally a matter for the jury to decide."[8] The jury here could have found that the Hansons' house was not being "used or ordinarily used by a person for lodging" at the time of the burglary.[9] But the fact that the house was currently unoccupied did not preclude it from being considered a "dwelling" under RCW 9A.04.110(7).[10] Viewed in the light most favorable to the State, the evidence was sufficient to support the jury's finding that Kelly entered a dwelling when he entered the Hansons' house.

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[8] State v. McDonald, 123 Wn. App. 85, 91, 96 P.3d 468 (2004).
[9] See McDonald, 123 Wn. App. at 90.
[10] McDonald, 123 Wn. App. at 91.

Statement of Additional Grounds

Kelly was the only defense witness. During direct examination, defense counsel attempted to ask questions about "the car that Errol took from [Kelly]" and "the annuities." The trial court sustained the State's relevance objections to them. In a statement of additional grounds, Kelly contends that the court erred by denying him the "opportunity to present motive testimony for why Mr. Hanson would lie" about "improperly seizing [Kelly's] daughter's car in retaliation for an unpaid loan."

We need not decide whether the court abused its discretion by excluding this "motive testimony" because any alleged error was harmless. An evidentiary error is harmless if, within reasonable probabilities, it did not materially affect the outcome of the trial.[11] The jury received similar evidence through testimony from Errol Hanson and Deputy Morgan; therefore, the "motive testimony" offered by Kelly is "cumulative at best and, as such, any error in its exclusion may be deemed harmless."[12] Thus, there is no reasonable probability that the exclusion of this cumulative testimony affected the outcome of the trial.

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[11] State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986); see also State v. Wanrow, 88 Wn.2d 221, 237, 559 P.2d 548 (1977).

[12] Latham v. Hennessey, 13 Wn. App. 518, 526, 535 P.2d 838 (1975); see also ER 403; Havens v. C&D Plastics, Inc., 124 Wn.2d 158, 169-70, 876 P.2d 435 (1994) (the erroneous exclusion of cumulative evidence is harmless error).

## Conclusion

Because the State presented sufficient evidence to support a jury finding that the Hansons' house was a dwelling and the exclusion of the "motive testimony of why Mr. Hanson would lie" was harmless error, we affirm.

Leach, J.

WE CONCUR:

Ian, J.

Appelwick, J.