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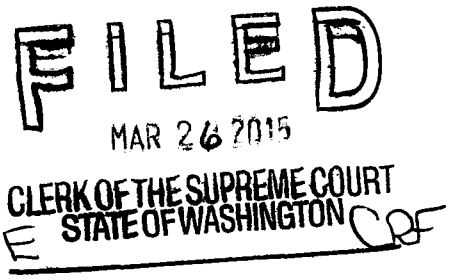

Supreme Court No. (to be set)
Court of Appeals No. 45056-9-II
IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
vs.
Justin McPherson
Appellant/Petitioner

Lewis County Superior Court Cause No. 13-1-00216-1
The Honorable Judge Nelson E. Hunt

PETITION FOR REVIEW

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TABLE OF AUTHORITIES

I. IDENTITY OF PETITIONER

Petitioner Justin McPherson, the appellant below, asks the Court to review the decision of Division II of the Court of Appeals referred to in Section II.

II. COURT OF APPEALS DECISION

Justin McPherson seeks review of the Court of Appeals opinion entered on February 24, 2015. A copy of the opinion is attached.

III. ISSUE PRESENTED FOR REVIEW

> Conviction for residential burglary requires proof that the accused entered or unlawfully remained in a building or portion of a building used for lodging. Here, the state presented evidence that Mr. McPherson burglarized a jewelry store. Was there insufficient evidence to convict Mr. McPherson of residential burglary?

IV. STATEMENT OF THE CASE

Justin McPherson was convicted of burglarizing a jewelry shop in Centralia. The jewelry shop is adjoined by an antique store on one side. On the other side is a vacant storefront. Each shop in the strip mall has its own entry. RP 47-50.

Above the jewelry shop is a small apartment. There is a door at the bottom of the stairs, and another at the top of the stairs. These doors are flimsy and don't lock. The only way into the apartment is through the

jewelry shop, through two doors and up the stairs. RP 20-23, 44, 67, 68. The building owner's son – Jeremy Sawlesky -- lived in the apartment. RP 20.

During the early morning hours of March 20, 2013, there was a break-in at the jewelry shop. A hole was made in the wall from the vacant shop next door. The hole made it possible for the perpetrator to grab the jewelry. RP 31-35. Sawlesky heard noise, went downstairs, and fired twice at the person he saw. RP 28, 29, 31. He did not see the burglars' faces. RP 28-30. He only saw a person going back through the hole in the wall. RP 30-31.

Police identified Mr. McPherson as a suspect and he was eventually charged with residential burglary, second-degree burglary, and malicious mischief.[1] CP 1-3.

At trial, the defense argued that the apartment above the shop did not convert the store into a residence, and that the state could not prove that Mr. McPherson was involved in the burglaries. RP 451-466.

The jury returned verdicts of guilty. RP 477-479.

After sentencing, Mr. McPherson timely appealed. CP 4-14, 15-25. He argued that no rational jury could have found beyond a reasonable

[1] One count of burglary was for the entry to the jewelry shop, and the other was for the entry into the vacant shop next door. RP 423-424.

doubt that the jewelry shop constituted a dwelling. Appellant's Opening Brief. The Court of Appeals affirmed Mr. McPherson's conviction in a published opinion. Opinion.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. The Supreme Court should accept review and hold that the presence of an apartment above the jewelry store does not convert the store into a dwelling. The Court of Appeals' published opinion conflicts with Division I's decision in *State v. Neal.*

Mr. McPherson was convicted of residential burglary for entering a jewelry store in a strip mall. RP 47-50. The jewelry store had an apartment above it. RP 20-23. There was no evidence that Mr. McPherson or any accomplice entered the apartment. *See* RP *generally.*

To find a person guilty of residential burglary, a jury must find that s/he "enter[ed] or unlawfully remain[ed] in a dwelling other than a vehicle." RCW 9A.52.025. "Dwelling" is defined as "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.

Under the statute, a dwelling "may be a building or structure used for lodging, or it may be any portion of a building *where the portion is used for lodging.*" *State v. Neal*, 161 Wn. App. 111, 114, 249 P.3d 211 (2011) (emphasis added).

Thus, for example, Quasimodo's home in the organ loft of Notre Dame does not convert the entire cathedral into a dwelling for purposes of Washington's residential burglary statute. *Id.* The *Neal* court reasoned that, because the entire building is not used for lodging, a person would not be guilty of residential burglary for entering the cathedral's nave or sacristy. *Id.* Rather, only the portion of the building used for lodging – the organ loft in this example – could be subject to residential burglary. *Id.* This is assuming that French burglary law is the same as Washington's. *Id.*

If Mr. McPherson had entered the apartment above the jewelry store, he would have been guilty of burglarizing "a portion of a building where the portion is used for lodging." *Neal*, 161 Wn. App. at 114. But Mr. McPherson allegedly burglarized only the jewelry store. RP 20-41. The store is not used for lodging, and thus is not a dwelling. RCW 9A.04.110.

The building as a whole is also not used for lodging, even though it does have an apartment. Just as Quasimodo's loft does not convert the entire cathedral into a dwelling, the fact that there was an apartment upstairs does not turn the commercial space into a dwelling. *Neal*, 161 Wn. App. at 114.

Still, the Court of Appeals refused to decide that the jewelry store was not a dwelling as a matter of law. Opinion, p. 4. The court compared the case to *McDonald*, in which it decided that the issue of whether an unoccupied house constituted a residence was a question for the jury. Opinion, p. 4 (*citing State v. McDonald*, 123 Wn. App. 85, 90-91, 96 P.3d 468 (2004)). In *McDonald*, the alleged victim and his wife occupied the house for eight years but had not lived in it for two to three months while it was being remodeled. *Id.* at 87. The house's owners still kept at least some belongings inside. *See Id.* at 88.

In *McDonald*, it was undisputed that the entire house constituted a building "used... for lodging" under the residential burglary statute. *Id.* The issue turned only on whether it remained a dwelling even when it was not being immediately used for that purpose. *Id. McDonald* is inapposite to Mr. McPherson's case.

Here, on the other hand, the jewelry store (as well as the adjoining antique store and vacant retail space) had never been used for lodging. RP 47-50. No rational jury could have found beyond a reasonable doubt that the jewelry store constituted "a portion of a building *where the portion is used for lodging.*" *Neal*, 161 Wn. App. at 114.

The Court of Appeals' decision turns on the evidence that the apartment and jewelry store were both part of a single structure and that the apartment does not appear to have been very secure. Opinion, pp. 4-5.

The court in Mr. McPherson's case finds that a rational jury could find a building to be a dwelling as long as any portion of the building is used for lodging. Opinion, p. 4-5. This holding is in direct conflict with *Neal*, which holds that only the areas used for lodging would be subject to the residential burglary statute. *Neal*, 161 Wn. App. at 114.

No rational jury could have found beyond a reasonable doubt that Mr. McPherson entered or unlawfully remained in a dwelling. *State v. Chouinard*, 169 Wn. App. 895, 899, 282 P.3d 117 (2012) *review denied*, 176 Wn.2d 1003, 297 P.3d 67 (2013). His residential burglary conviction must be reversed for insufficient evidence. *Id.*

The lower court's decision directly conflicts with Division I's decision in *Neal*. This case also presents an issue of substantial public interest that should be determined by the Supreme Court. This court should grant review. RAP 13.4(b)(2), (4).

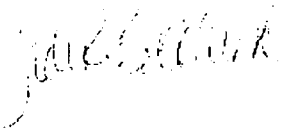
VI. CONCLUSION

The Court of Appeals decision conflicts with Division I's holding in *Neal*. This question is likely to arise in future burglary cases so it presents an issue of substantial public interest that should be determined

by this court. The Supreme Court should accept review pursuant to RAP 13.4(b)(2) and (4).

Respectfully submitted March 24, 2015.

BACKLUND AND MISTRY



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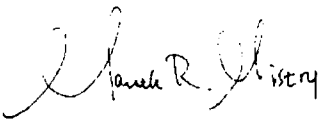

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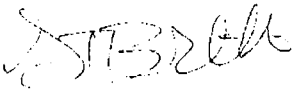


Skylar T. Brett, WSBA No. 45475
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that I mailed a copy of the Petition for Review, postage pre-paid, to:

Justin McPherson, DOC #325971
Olympic Corrections Center
11235 Hoh Mainline
Forks, WA 98331

and I sent an electronic copy to

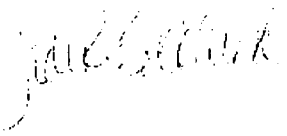
Lewis County Prosecuting Attorney
appeals@lewiscountywa.gov
sara.beigh@lewiscountywa.gov

through the Court's online filing system, with the permission of the recipient(s).

In addition, I electronically filed the original with the Court of Appeals.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on March 24, 2015.



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Attorney for the Appellant

APPENDIX:

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JUSTIN DEWAYNE MCPHERSON, Appellant.	No. 45056-9-II PUBLISHED OPINION

SUTTON, J. – Justin Dewayne McPherson appeals his jury trial convictions for second degree burglary, residential burglary, and second degree malicious mischief. He argues that (1) the evidence was insufficient to support the residential burglary conviction because there was no proof that the premises he entered, a jewelry store with an attached apartment, was a "dwelling," and (2) the accomplice liability statute is overbroad because it criminalizes constitutionally protected speech. We hold that under the facts of this case, the question of whether the jewelry store and attached apartment was a "dwelling" is a question of fact for the jury and the evidence supports the jury's verdict on this element. We also follow our previous rejection of McPherson's accomplice liability statute argument. Accordingly, we affirm.

FACTS

On the morning of March 20, 2013, someone broke into Frederick William Salewsky's jewelry store in Centralia by entering the unoccupied store next door and making a hole in the

adjoining wall.[1] Frederick's son Jeremy Salewsky,[2] who worked in the jewelry store and lived in an apartment above the store, was awoken by a noise, went downstairs to investigate, and interrupted the burglary. Jeremy fired a shot toward a person he saw in the store and then saw that person flee through the hole in the wall, but he was unsure if he had shot anyone. Jeremy did not see the intruder's face. The police later identified McPherson as a suspect after he checked into a Tacoma hospital with a gunshot wound.

The State charged McPherson with second degree burglary of the vacant store (count I), residential burglary of the jewelry store and attached apartment with a special allegation that the victim of the burglary was present at the time of the crime (count II), and second degree malicious mischief (count III). At trial, Jeremy testified that he lived in the apartment above the jewelry store, that the only way to access the apartment was by the stairs located inside the store, and that the apartment was separated from the store by a "swinging door" at the bottom of the stairway and a door at the top of the stairs that did not lock or shut securely.[3] 1 Report of Proceedings (RP) at 23-24.

Although the State did not specifically charge McPherson as an accomplice, the trial court instructed the jury on accomplice liability using an instruction identical to Washington pattern jury instruction 10.51. 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 10.51, at 217 (3d ed. 2008).

---

[1] Frederick Salewsky owned the entire building, including the vacant portion of the building. The vacant portion of the building and the jewelry store did not have a shared entrance.

[2] Because the Salewsky's share the same last name, we refer to them by their first names to avoid confusion. We intend no disrespect.

[3] There is nothing in the record about whether the "swinging door" was capable of being locked.

The jury found McPherson guilty as charged and found that he had committed the residential burglary while the victim was present in the building or residence. McPherson appeals his convictions.

ANALYSIS

McPherson argues that the evidence was insufficient to support the residential burglary conviction and that the accomplice liability statute is unconstitutionally overbroad. We reject both arguments.

I. SUFFICIENCY OF EVIDENCE

McPherson first argues that the evidence was insufficient to prove the residential burglary charge. Specifically, he contends that because the jewelry store was not used for lodging, the structure or building was not a "dwelling" as a matter of law. Br. of Appellant at 5-6. We disagree.

"Evidence is sufficient to support a finding of guilt if, after viewing the evidence in the light most favorable to the State, a rational trier of fact could find the essential elements of the crime beyond a reasonable doubt." *State v. Rose*, 175 Wn.2d 10, 14, 282 P.3d 1087 (2012). "A claim of insufficient evidence admits the truth of the State's evidence and all inferences that reasonably can be drawn from that evidence." *State v. Caton*, 174 Wn.2d 239, 241, 273 P.3d 980 (2012).

Under RCW 9A.52.025(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." "'Dwelling' means any building or structure . . . , or a portion thereof, which is used or ordinarily used by a person for lodging." RCW 9A.04.110(7).

Washington courts have consistently held as a matter of law that when a building clearly is used for lodging, an unoccupied portion of the building is included in the definition of dwelling.[4] However, this case involves the opposite situation. The jewelry store clearly is not used for lodging, but it includes a portion—the apartment above the store—that is used for lodging. And the burglary occurred only in the jewelry store portion. It is possible that if the portion of the building used for lodging is insignificant in relation to the rest of the building or is physically remote from the main portion of the building, it may not constitute residential burglary. For example, in *State v. Neal*, Division One of our court suggested that a person who burglarizes the nave of a cathedral would not be guilty of residential burglary simply because someone sleeps in the organ loft. 161 Wn. App. 111, 114, 249 P.3d 211 (2011).

But whether a building constitutes a "dwelling" under RCW 9A.52.025(1) cannot always be determined as a matter of law. In *State v. McDonald*, we held that the issue of whether an unoccupied residence was a dwelling was a question of fact for the jury to decide based on all the relevant evidence. 123 Wn. App. 85, 90-91, 96 P.3d 468 (2004). As in *McDonald*, here we decline to decide as a matter of law whether the jewelry store with an attached apartment was a dwelling, and instead hold that whether the jewelry store and attached apartment was a "dwelling" is a question of fact for the jury to decide.

Because the dwelling issue is a question of fact, we must determine whether there was sufficient evidence for the jury to conclude that the jewelry store was a dwelling. We hold that

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[4] *State v. Moran*, 181 Wn. App. 316, 321-23, 324 P.3d 808, *review denied*, 337 P.3d 327 (2014) (the area under the foundation of a house is a "dwelling" even though the area was not accessible from the inside living quarters); *State v. Neal*, 161 Wn. App. 111, 113-14, 249 P.3d 211 (2011) (a tool room in an apartment building is a "dwelling" because it was a portion of a building used as lodging); *State v. Murbach*, 68 Wn. App. 509, 513, 843 P.2d 551 (1993) (an unattached garage with a door leading to a residence was a "dwelling" because it was a portion of a building used as lodging).

there was. Jeremy's apartment was directly above the jewelry store, and the apartment and the jewelry store were within a single structure. The apartment was not secured as a separate unit; it was immediately adjacent to the store and was separated from the store only by a "swinging door" at the bottom of the stairway and a door at the top of the stairs that could not be locked or secured. RP at 24-25. The sole access to the apartment was through the jewelry store, and Jeremy had unlimited access to both the jewelry store and the apartment at any time of day.

This evidence was sufficient for the jury to find that the apartment was not separable from the jewelry store and, therefore, there was sufficient evidence to support the jury's finding that the jewelry store constituted a "dwelling." Accordingly, McPherson's sufficiency of the evidence argument fails.

II. ACCOMPLICE LIABILITY INSTRUCTION

McPherson next argues that the accomplice liability statute, RCW 9A.08.020, is unconstitutionally overbroad because it criminalizes constitutionally protected speech in violation of the First and Fourteenth Amendments.[5] McPherson's arguments have been rejected in *State v. Coleman*, 155 Wn. App. 951, 960-61, 231 P.3d 212 (2010), *State v. Ferguson*, 164 Wn. App. 370, 375-76, 264 P.3d 575 (2011), and *State v. Holcomb*, 180 Wn. App. 583, 589, 321 P.3d 1288, *review denied*, 180 Wn.2d 1029 (2014).

McPherson argues, however, that we should reject *Coleman* and *Ferguson* as wrongly decided because they erroneously rely on cases involving conduct, whereas the act of "aiding" can

[5] The First Amendment provides in part that "[c]ongress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I. The First Amendment applies to the states through the Fourteenth Amendment. *Kitsap County v. Mattress Outlet*, 153 Wn.2d 506, 511, 104 P.3d 1280 (2005).

involve "pure speech."[6] Br. of Appellant at 13-14; Reply Br. of Appellant at 3-4. This identical argument was rejected in *Holcomb*. As Division Three noted in rejecting this argument, "the required aid or agreement to aid the other person must be 'in planning or committing [the crime]."[7] *Holcomb*, 180 Wn. App. at 590. Thus, "aiding" was limited to acts that also involved conduct, so Ferguson's and Coleman's reliance on case law involving conduct was not misplaced. We adhere to the prior decisions and analysis in *Coleman*, *Ferguson*, and *Holcomb*, and McPherson's challenge to the accomplice liability statute fails.

---

[6] McPherson does not address *Holcomb*, which was filed after the briefing for this appeal was complete.

[7] We note that the accomplice liability instruction here included the limiting language that was discussed in *Holcomb*:

> A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime.
>
> A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:
>
> (1) solicits, commands, encourages, or requests another person to commit the crime; or
>
> (2) *aids or agrees to aid another person in planning or committing* the crime.
>
> The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.
>
> A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

Suppl. Clerk's Papers at 43 (Instruction 11) (emphasis added).

Finding no error, we affirm McPherson's convictions.

Sutton, J.
SUTTON, J.

We concur:

Johanson, C.J.
JOHANSON, C.J.

Maxa, J.
MAXA, J.

BACKLUND & MISTRY

March 24, 2015 - 2:46 PM

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