

No. 43969-7-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Nicholas Christin,**

Appellant.

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Thurston County Superior Court Cause No. 12-1-00290-1

The Honorable Judge William T. McPhee

**Appellant's Opening Brief**

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### **ASSIGNMENTS OF ERROR**

1. Mr. Christin's conviction for residential burglary infringed his Fourteenth Amendment right to due process because the evidence was insufficient to establish the elements of the offense.
2. The prosecution failed to prove that Mr. Christin burglarized a "dwelling."
3. The prosecution failed to disprove the defense of abandonment.

### **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. To obtain a conviction for residential burglary, the prosecution was required to prove that Mr. Christin unlawfully entered a "dwelling" with intent to commit a crime. Here, the building Mr. Christin entered had been unoccupied for years, and was uninhabitable without substantial improvement. Did the residential burglary conviction violate Mr. Christin's Fourteenth Amendment right to due process because the evidence was insufficient?
2. Under the statutory defense of abandonment, a person is not guilty of burglary if she or he enters or remains unlawfully in a building that has been abandoned. In this case, the prosecution failed to disprove abandonment. Was the evidence insufficient for conviction of residential burglary?

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

Ruth Longoria owned a house in rural Thurston county. In 2007, after living in it for 15 years, she moved out of state. RP 17, 152-154. She took her washer and dryer and some other appliances out of the home and put it up for sale. RP 154-160. She did not return to the house and it remained vacant. RP 158.

By March of 2012, the house had been empty 5 years and wasn't inhabitable. RP 42, 53, 56-57, 108, 169-170. There were several broken windows, no power, an overgrown yard including vines trailing inside through the broken windows, and a flooded basement. RP 27, 42-47, 113, 114, 160-161, 165.

The inside of the house was damaged throughout, with rubbish everywhere as well as broken up walls. RP 45-47. Piping was cut out in various locations, and wiring had been pulled out and power boxes removed. RP 93-94, 113, 158. Most areas had only sub-flooring. RP 115. The stove and dishwasher had been removed, as had toilets and sinks. RP 156-157. The structure was easily entered and no padlocks were visible anywhere. RP 50, 116. The attached carport had a buckling roof. RP 45. The barn's metal roof had fallen off in a windstorm. RP 188.

On March 5, 2012, Nicholas Christin and Andrew Boylan went into the building to take items to scrap.<sup>1</sup> RP 24, 82. Neighbors called police, and police stopped their truck. RP 14, 76. In the back of the truck were items obviously just taken from the house. RP 21, 25, 48, 81, 88, 93.

The state charged both Mr. Christin and Boylan with Residential Burglary. CP 2-3. At trial, the defense argued that the state could not meet their burden of proving that the structure entered met the definition of dwelling. RP 289-315. The jury convicted both men as charged. RP 342-346.

After sentencing, Mr. Christin timely appealed. CP 4.

## **ARGUMENT**

### **I. MR. CHRISTIN’S CONVICTION FOR RESIDENTIAL BURGLARY VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE EVIDENCE WAS INSUFFICIENT.**

#### A. Standard of Review

Alleged constitutional violations are reviewed *de novo*. *McDevitt v. Harborview Med. Ctr.*, \_\_\_ Wn.2d \_\_\_, \_\_\_, 291 P.3d 876 (2012). The sufficiency of the evidence may always be raised for the first time on appeal. *State v. Kirwin*, 166 Wn. App. 659, 670 n. 3, 271 P.3d 310 (2012).

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<sup>1</sup> Both said they had permission to be in the building to scrap items, and a witness testified he had permission to scrap there and passed that on to Boylan. RP 130, 148, 180, 182.

B. The prosecution failed to prove beyond a reasonable doubt that Mr. Christin burglarized a “dwelling.”

The due process clause of the Fourteenth Amendment requires the state to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The remedy for a conviction based on insufficient evidence is reversal and dismissal with prejudice. *Smalis v. Pennsylvania*, 476 U.S. 140, 144, 106 S.Ct. 1745, 90 L.Ed.2d 116 (1986).

Conviction for residential burglary requires proof that the offender unlawfully entered or remained in a “dwelling” with intent to commit a crime against persons or property therein. RCW 9A.52.025. A “dwelling” is any building “which is used or ordinarily used by a person for lodging.” RCW 9A.04.110.

Whether or not a particular building qualifies as a dwelling “turns on all relevant factors and is generally a matter for the jury to decide.” *State v. McDonald*, 123 Wn. App. 85, 90-91, 96 P.3d 468 (2004) (footnotes omitted). In *McDonald*, the defendant was accused of burglarizing a house that had been unoccupied for two to three months while the owners remodeled. The trial judge refused to instruct jurors on the included offense of second-degree burglary. The Court of Appeals

reversed, holding that the jury should have had the opportunity to decide whether or not the building qualified as a “dwelling.” *Id.*, at 90-91.

No published decisions in Washington have clarified when an unoccupied house ceases to be a dwelling; however, other jurisdictions have addressed the issue. In most states, an unoccupied house remains a dwelling if the former occupant intends to return shortly, or a new tenant is expected within a reasonable time.<sup>2</sup> *See, e.g., State v. Evans*, 376 S.C. 421, 656 S.E.2d 782 (2008); *Sheffield v. State*, 881 So. 2d 249 (2003); *Washington v. State*, 753 So. 2d 475 (1999); *People v. Walker*, 212 Ill. App. 3d 410, 570 N.E.2d 1268 (1991); *People v. Smith*, 209 Ill. App. 3d 1091, 568 N.E.2d 417 (1991); *Rash v. Commonwealth*, 9 Va. App. 22, 383 S.E.2d 749 (1989); *State v. Kowski*, 423 N.W.2d 706 (1988).

Applying these cases to the building at issue here, it is clear that Mr. Christin was not guilty of burglarizing a dwelling. The house had been vacant for five years. RP 42, 53, 56-57, 108, 169-170. It was in a state of complete disrepair long before the incident date. Broken

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<sup>2</sup> There are some exceptions to this general rule; however, none are helpful to the prosecution. For example, in Illinois, a house that is for sale does not qualify as a dwelling because the prior occupants have no intention of returning. *People v. Roberts*, 983 N.E.2d 539 (2013). Similarly, in Utah, a house that has never been occupied does not qualify as a dwelling, even if it is ready for occupancy. *State v. McNearney*, 246 P.3d 532 (2011). Under Florida’s statute, the building’s intended purpose qualifies it as a dwelling, regardless of whether or not it has ever been occupied. *Jacobs v. State*, 41 So. 3d 1004 (2010); *Perkins v. State*, 682 So. 2d 1083 (1996). In Indiana, a house remains a dwelling while the occupants are in the process of moving out, even if they don’t intend to sleep in the house during the remainder of their lease. *Byers v. State*, 521 N.E.2d 318 (1988).

windows, broken doors, cut out pipes, missing and unconnected wiring were just some of the factors making the house uninhabitable. RP 27, 42-47, 53, 56-57, 93-94, 108, 113-114, 158, 160-161, 165, 169-170.

Under these circumstances, the evidence was insufficient to prove the house qualified as a dwelling. Accordingly, the conviction for residential burglary must be reversed and the charge dismissed with prejudice. *Smalis, at 144.*

C. The prosecution failed to disprove abandonment.

It is a defense to a prosecution for criminal trespass that a building has been abandoned. RCW 9A.52.090. Because criminal trespass is an included offense within burglary, the defense also applies to charges of burglary. *State v. J.P.*, 130 Wn. App. 887, 894-896, 125 P.3d 215 (2005). The burden is on the prosecution to disprove abandonment. *Id.*

Absent evidence of a contrary intent, words in a statute must be given their plain and ordinary meaning. *State v. Lilyblad*, 163 Wn.2d 1, 6, 177 P.3d 686 (2008). The meaning of an undefined word or phrase may be derived from a dictionary. *Lindeman v. Kelso Sch. Dist. No. 458*, 162 Wn.2d 196, 202, 172 P.3d 329 (2007).

The word “abandoned” is not defined by statute; accordingly, its ordinary meaning applies. In *J.P.*, the court quoted from Webster’s dictionary and defined “abandoned” as follows:

“Abandon” is defined as “to cease to assert or exercise an interest, right, or title to esp[ecially] with the intent of never again resuming or reasserting it” and “to give up ... by leaving, withdrawing, ceasing to inhabit, to keep, or to operate often because unable to withstand threatening dangers or encroachments.” ...  
“Abandoned” is [also] defined as “given up: DESERTED, FORSAKEN <an [abandoned] child> <an [abandoned] house>.”

*J.P.*, at 895-96 (most alterations in original) (quoting Webster's Third New International Dictionary (G & C Merriam, 1993)).

In this case, the prosecutor did not disprove abandonment beyond a reasonable doubt. The owner had not lived in the building for more than five years. RP 154. During that time it had fallen into complete disrepair, and no effort had been made towards its upkeep. RP 42-43, 50, 53, 108, 113, 158.

Accordingly, Mr. Christin’s burglary conviction must be reversed and the charge dismissed with prejudice. *Smalis*, at 144.

**CONCLUSION**

For the foregoing reasons, Mr. Christin's burglary conviction must be reversed and the charge dismissed with prejudice.

Respectfully submitted on March 21, 2013,

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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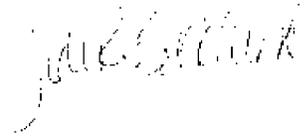
and to:

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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

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 21, 2013.



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**March 21, 2013 - 11:42 AM**

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