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No. 43969-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

ANDREW J. BOYLAN,
NICHOLAS S. CHRISTIN,

Appellants.

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

The Honorable Judge William T. McPhee

Cause No. 12-1-00286-3

12-1-00290-1

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

Whether the evidence in this case was sufficient to show that the building entered by the defendants was a dwelling as defined by RCW 9A.04.110.

B. STATEMENT OF THE CASE.

The State accepts Christin's statement of the procedural facts of the case.

Substantive Facts of the Case

Ruth Longoria purchased a house in Thurston County with her mother more than 20 years ago. RP 153-156. After living at the property for 15 years she was unable to find employment in Washington and was forced to search for work out of state. RP 154. Despite her efforts to sell the property, Longoria was unable to do so and left the property in the hands of a realtor while she pursued work elsewhere. RP 154.

When she left, Longoria took her refrigerator, washer, and dryer with her but left the hook-ups for those appliances in a condition that could be used by a buyer. RP 156. She further left her sofa, some chairs, the stove, and the dishwasher at the property. RP 156. Finally, in order to ensure the protection of her home she posted "No Trespassing" signs on the fence around her property and made sure her "For Sale" sign was visible to the

public. RP 156, 159. The home was in great condition when Longoria left. RP 156.

While she was away, Longoria not only had friends checking on the property but also kept in contact with her realtor while he was taking potential buyers on tours of the home. RP 157-159, 170. 175. In fact, the realtor reported to Longoria as late as January of 2012 that the home was in fine condition. RP 175. However, the home was vandalized beyond recognition. RP 158. The dishwasher, stove, piping, copper wire, sinks, and other materials were stolen or destroyed. RP 156-159. Windows were broken out and the elements further ravaged the interior of her home. RP 166. Longoria was financially unable to return until April of 2012, at which point she planned to again prepare the home for sale. RP 161. Recently, a contractor agreed to buy her home, but he offered only a fraction of the original asking price due to the extensive damage and vandalism to the home. RP 153

Immediately before Longoria's return on March 5, 2012, Boylan and Christin entered her home around 9:00 p.m. and took a sink, wiring, pipes and other materials. RP 24, 82. The two men claimed to have had permission from Charles Stilson who was an old friend from school who occasionally conducted other scrapping

jobs.¹ RP 178, 180. Neighbors who were watching the property called the police, who stopped the two men and questioned them about their activity at the property. RP 14, 76. In the back of the truck were the stolen items that had obviously just been taken from the house. RP 21, 25, 48, 81, 88, 93.

The state charged both Christin and Boylan with Residential Burglary. CP 2-3. The jury convicted both men as charged. RP 342-346.

C. ARGUMENT.

1. The evidence was sufficient to prove that the building the defendants entered and removed valuable items from is considered a dwelling under RCW 9A.04.110.

A burglary in the second degree occurs when a person, with intent to commit a crime against a person or property therein, enters or remains unlawfully in a building other than a dwelling. RCW 9A.52.030. A residential burglary occurs when a person enters or remains unlawfully in a dwelling with the intent to commit a crime. RCW 9A.52.025. In determining if a residential burglary

¹ Both Boylan and Christin offered different stories about who gave them permission to scrap at the property; however Stilson was determined to be the source. RP 151. Stilson testified that he received permission from Rodriguez, however he failed to take any action to identify Ricardo Rodriguez as the owner of the property. RP 185. The "permission" (which Longoria neither authorized nor had any knowledge of) was written on a piece of lined paper torn out of a notebook minus any letterhead or contact information for Rodriguez. RP 185-187.

occurred, courts give weight to the testimony of “the person with possession...of the property over the alleged burglar to determine if the accused’s presence or entry [was] unlawful.” State v. J.P., 130 Wn. App. 887, 894, 125 P.3d 215 (2005). Finally, courts review *de novo* claims of insufficient evidence under the Fourteenth Amendment. McDevitt v. Harborview Med. Ctr., ___ Wn.2d ___, ___, 291 P.3d 310 (2012).

Longoria’s home is considered a dwelling because it was an inhabited building. A dwelling is defined as “Any building or structure... which is used or ordinarily used by a person for [habitation].” RCW 9A.04.110. No published decisions in Washington have clarified when a dwelling ceases to be inhabited. Other jurisdictions have discussed the issue, however, and looking to those opinions is instructive. For example, in California the distinction between inhabited and uninhabited turns on the character or use of the building rather than the immediate presence of the owner. People v. Lewis, 274 Cal.App.2d 912, 918, 79 Cal.Rptr. 650 (1969). Further, the character or use of the building can best be ascertained by looking to how it has been used in the

past. People v. Traylor, 100 Mich. App. 248, 250, 298 N.W.2d. 719 (1980).

In this case, Longoria purchased an 1,800 square foot home with three bedrooms and two bathrooms in which she lived with her mother for 15 years. RP 153-156. When Longoria left the state to find work, she contacted a real estate agent in an effort to sell the house to a new home owner. RP 154-155. Based upon the past use and character of the building, the house is considered a dwelling.

The abandonment defense is insufficient in this case because Longoria had not ceased to assert or exercise an interest or right to the property. J.P., 130 Wn. App. at 895; RCW 9A.52.090. Because the word “abandoned” is not defined by the statute, it must be given its usual and ordinary meaning. J.P., 130 Wn. App. at 892. When determining a word’s ordinary meaning, courts look to the dictionary definition:

“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.” Webster’s Third New International Dictionary 2 (1993).”

J.P., 130 Wn. App. at 896.

Abandonment, therefore, is based on the intent of the owner to return to the dwelling.² Id. In this case, Longoria decided to sell her home of 15 years, yet she retained and displayed her intent to return. RP 154. That intent to return to the property was demonstrated by her decision to leave several pieces of furniture inside the house, RP 157, as well as posting “No Trespassing” signs on her fence “all the way down the road” to ensure that others knew her property was still occupied and protected. RP 159. The dwelling in this case was not abandoned because Longoria showed every intention of returning to her home.

Moreover, a dwelling is not considered abandoned if the owner is readily ascertainable and has prepared the home for sale. J.P., 130 Wn. App. at 896. In J.P. for example, the court held that the absent owner’s preparation to sell the house was enough to show that the owner did not intend to surrender the property or its interest therein. Id. The court further held that because the police were able to readily identify and contact the owner of the home, the

² In many states courts have held that the determination of whether a house is a dwelling should be based on the resident’s intent to return. For example, in Illinois, a house that was left by the plaintiff who intended to return to sell the house at a later date was considered a dwelling. People v. Moore, 206 Ill. App. 3d 769, 774, 151 Ill. Dec. 883 (1990). Similarly, in Louisiana, the fact that a resident left furniture in a house that she was no longer living in was indicative of her intent to return, thereby showing her house was still a dwelling under the statute. State v. Black, 627 So.2d 741, 746 (1996).

property still had an ascertainable owner thereby showing the home was not abandoned Id. Christen incorrectly points to Sheffield v. State, to argue that an unoccupied home ceases to be a dwelling. Christen's Opening at 5. However, a closer reading of that case reveals that the court held because an unoccupied home was on the market to be sold as a dwelling, that "there was clearly an intent by the owner that the house continue to function as a dwelling;" therefore, the house was considered a dwelling under the statute. Sheffield v. State, 881 So. 2d 249, 253 (2003). In this case, Longoria attempted to sell the house once she moved out of state, as evidenced by the "for sale" sign posted at the front of her property.³ RP 153, 166. Finally, the police in this case were able to readily determine who the owner of the house was and contact her concerning the vandalism and burglary. RP 105. The evidence is sufficient to show Boylan and Christin committed a residential burglary by entering and/or remaining in Longoria's home with the intent to commit a crime.

A person commits a residential burglary when he lacks permission from the owner to be on the premises. J.P.,130 Wn.

³ Officer Hovda mentioned that he had in fact seen the "for sale" sign located on the corner of the property at the time of the burglary. RP 63. Stilson also told police that he had seen a "for sale" sign on the night in question. RP 190

App. at 896. Only the person who resides in or otherwise has authority over the property may grant permission to enter or remain on the premises. Id. In this case, Stilson gave contradictory testimony when he mentioned that he received permission to take items from the residence from Rodriguez on a lined piece of paper torn out of a notebook.⁴ RP 186. Later, however, Stilson admitted that he told the police that he actually had no permission by which he could authorize the defendants to enter the premises. RP 190-192. Both defendants further admitted that they had never met the owner of the home nor had they scrapped at that property before. RP 190-192. Moreover, Longoria had never met Rodriguez, Stilson or either of the defendants, nor had she given any of them permission to enter her home. RP 168. Because neither of the defendants had permission to enter the residence from the owner or any authority pertaining thereto, Boylan and Christin committed a residential burglary.

Finally, “The evidence concerning [a person’s] activity inside [the dwelling]...can support an inference that his entry and presence was [unlawful].” J.P., 130 Wn. App. at 894. In this case

⁴ Stilson has no business license to scrap. RP 187. He also mentioned that he had no contact information for Rodriguez and that he had done no checking to verify that Rodriguez had the authority to grant permission to enter the residence. RP 186-187.

Boylan and Christin were “scrapping” in the evening, around 9 p.m., at a property of someone they had never met, whereas in the past no home was scrapped without first meeting the owner. RP 179, 187-189. When Stilson was questioned about how scrapping is normally conducted he said that scrapping is usually done during the day to avoid dangerous working conditions; he further testified that the buyers of his material are only open during daylight hours which further shows that nighttime scrapping is both uncommon and unlikely to be legitimate. RP 189. The manner of both Boylan and Christin’s actions at the scene support an inference that their entry and presence at Longoria’s home was unlawful.

D. CONCLUSION.

Longoria’s property is considered a dwelling, therefore a residential burglary occurred in this case. The state respectfully submits that the trial court correctly determined the defendants were guilty of residential burglary.

Respectfully submitted this 7th day of June, 2013.



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