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NO. 50543-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

NATHANIEL HALL,

Appellant.

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

The Honorable Karena Kirkendoll, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

THE STATE'S SUFFICIENCY ARGUMENT RESTS ON A MISREADING OF THE RECORD.

The State's argument that the trial evidence proved beyond a reasonable doubt that Myrtle Fredson's former residence in Puyallup was a "dwelling" for purposes of Residential Burglary is premised on a mistaken reading of the record. Specifically, the State's dwelling argument rests on the notion that Myrtle Fredson intended to move back to the Puyallup house as soon as her son was able to restore utility services to the structure. This is simply not the case.

Evidence of this mistake is found throughout the State's brief. See BOR, at 1 ("dementia-related hardships forced her to temporarily move near a son who was helping her to return home"); BOR, at 2-3, 6-7 (describing situation as a "temporary displacement" and Myrtle as "temporarily displaced" and "temporarily relocated"); BOR, at 9 (indicating that Alzheimer's "temporarily diminished her ability to live without assistance"); BOR, at 9 ("All the accoutrements of [the structure's] residential purpose remained within it awaiting her return."); BOR, at 9 (referencing a "plan for her to resume occupancy as soon as finances permitted"); BOR, at 10 (referencing "Myrtle's planned return"); BOR, at 16 ("Lloyd planned to return his mother to

her home as soon as they could reestablish her utilities.”); BOR 16 (referring to Myrtle as among “temporarily displaced senior citizens”).

But Alzheimer’s does not “temporarily diminish” the ability to live without assistance and there is no evidence in this record of any plan to return Myrtle to her former Puyallup residence during the pertinent period. The genesis of the State’s mistake on this critical point is a faulty interpretation of Lloyd Fredson’s testimony.

Lloyd was asked why he had to move his mother out of her Puyallup house in 2014. RP 92. He explained that – because of her dementia – his mother thought neighbors were stealing her electricity. She did not pay her bills, which led to her water and electricity being shut off in Puyallup. RP 92. She also believed the utilities were “ripping her off” and that they would simply turn her water and electricity back on even though her accounts had been sent to collections. RP 93. Upon discovering his mother had no working utilities, Lloyd took his mother to Port Orchard (where Lloyd lives) and had the utilities turned on at a home across the street from his own, which Myrtle also owned. RP 92-93.

The sentence the State seems to focus on for its contention Myrtle will simply return to the Puyallup house once utilities are restored there is Lloyd’s statement, referring to Myrtle’s Port Orchard

home, “And there – there she remained until we could get her electricity and water turned back on.” RP 93; see also BOR, at 3-4, 16 (citing this testimony).

Myrtle was already suffering the serious and negative impacts of Alzheimer’s in 2014 (including paranoia, multiple hospitalizations, and an inability to live alone). RP 92-93. The State’s assertion that Myrtle would move away from Port Orchard and back to the Puyallup house once the utilities were restored seems impossible. Generously interpreted in favor of the State, perhaps that was the initial hope in 2014, since Lloyd was asked to describe the circumstances *in 2014*. But whatever Lloyd meant, there was no evidence presented of any ongoing plan to return Myrtle to the Puyallup house in 2016 (when the crime was committed) or by 2017 (when trial occurred).

Indeed, the Pierce County trial deputy did not contend there was such a plan, despite recognizing the importance of the “dwelling” element. See RP 146 (“The only issue that we really have is whether or not that house is a dwelling.”). Instead, consistent with the record, the trial deputy understood that it was not just the absence of utilities that made any return impossible:

Now, we know at this point that Mrs. Fredson hadn’t been living there and hadn’t lived there since October of 2014, that she moved out not only because of her

mental condition, which you heard her son talk about, but also because the electricity and the water had been cut off because she felt that she was being ripped off and she didn't want to pay those particular bills.

RP 147. Had there been any evidence that Myrtle intended to return to Puyallup in 2016 or was capable of returning in 2016, the trial deputy would have focused on it as proof of a dwelling. Instead, she argued the house was a dwelling because it had bedrooms, furnishings, and clothing inside and because it was still being used for lodging by someone (albeit a trespasser). RP 147.

In response, defense counsel argued it was not a dwelling because Myrtle had not lived there for a significant period and had no intention to live there again. RP 153-154. In her rebuttal argument, the prosecutor did not challenge this statement regarding Myrtle's intent. See RP 157-158. She did not do so because the evidence showed Myrtle was incapable of ever moving back to Puyallup after leaving in 2014.

Ultimately, the trial evidence established that no one had lawfully used the structure for lodging during the almost year and a half before Hall's arrest. RP 92, 104. There was no electricity and no evidence of other working utilities. RP 73, 149. Most points of entry had been boarded or otherwise secured. RP 94-96. Myrtle had been

a hoarder, and her things remained stored in the Puyallup house. RP 93-94, 107, 110-111. There is no evidence supporting the State's current contentions that "all the accoutrements of residential purpose remained within it awaiting her return," of a "plan for her to resume occupancy as soon as finances permitted," that "dementia-related hardships forced her to temporarily move near a son who was helping her to return home" or that Alzheimer's "temporarily diminished her ability to live without assistance." The foundation for the State's argument that the Puyallup house remained a dwelling in 2016 does not exist.

Three other subjects warrant some mention in reply.

First, the State devotes considerable space in its brief to the topic of burglars "targeting" the elderly and ascribes to Hall a desire to strip those suffering from age-related disabilities of the protections of the law. This discussion includes reliance on cases from other jurisdictions – applying different laws to different facts – and a statute relating to nursing assistants. See BOR, at 7-11. Intentionally targeting the elderly and seeking to take advantage of their disabilities is indeed despicable. However, that is not what happened in Hall's case. Myrtle Fredson moved away from Puyallup long before Hall showed up in 2016. Hall did not know to whom the property

belonged and believed it to be vacant. RP 68-69. There is no indication Hall sought to exploit Myrtle Fredson's age-related disabilities in 2016 or that he seeks to benefit from her disabilities now. Instead, he merely seeks removal of a conviction that does not satisfy the necessary proof for a "dwelling" under Washington law, as is his constitutional right. Myrtle had a dwelling in 2016, but it was not in Puyallup.

Second, citing State v. Jensen, 149 Wn. App. 393, 203 P.3d 393 (2009), the State argues that Hall is raising an improper "abandonment" defense to the burglary charge. BOR, at 15. In Jensen, the court rejected the defendant's claim that he was entitled to an instruction telling jurors he was not guilty of burglary in the second degree if the building in question had been abandoned. Id. at 398-401. Counsel for Hall did not seek a similar instruction at trial and no issue concerning the absence of an instruction has been raised on appeal. Jensen is irrelevant. That said, if a former residence has in fact been abandoned, that circumstance is certainly relevant to whether it still qualifies as a "dwelling." See State v. McDonald, 123 Wn. App. 85, 91, 96 P.3d 468 (2004) (status turns on "all relevant factors," including length of vacancy and whether former occupant intends to live there again).

Finally, the State correctly points out that Hall's jury also was instructed on Burglary in the Second Degree. Following vacation of the Residential Burglary conviction, the trial court would be authorized to enter conviction for that lesser offense. In re Heidari, 174 Wn.2d 288, 291-296, 274 P.3d 366 (2012).

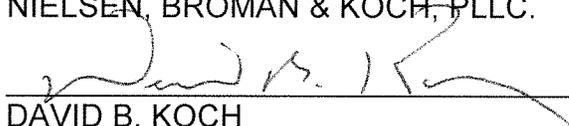
B. CONCLUSION

This Court should vacate Hall's Residential Burglary conviction and remand for resentencing.

DATED this 18th day of May, 2018.

Respectfully Submitted,

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